

**VILLAGE OF RED HOOK  
PLANNING BOARD SPECIAL MEETING  
November 16, 2011**

**Present:** Co-Chairman Rodney Morrison, Member Paul Fredricks, Member Stephen Zacharzuk & Member Mark Mirando

Chairman Everett Pearsall made a motion to open the Special Meeting of the Village of Red Hook Planning Board at 4:32pm.

Chairman Pearsall advised this meeting was for Anderson Commons.

<b>#1. Kearney Property, Inc.</b>	<b>Fisk Street</b>	<b>Subdivision</b>
<b>Tax Grid #: 6272-11-594590 &amp; 6272-11-619615</b>		<b>(Anderson Commons)</b>

**PRESENT:** Ken Kearney (applicant)  
Pete Setaro (Morris Associates)  
Victoria Polidoro (Village of Red Hook Planning Board Attorney)

Ken Kearney was present and spoke at this time and thanked the Board for holding this meeting. Mr. Kearney advised that he appeared in front of the Town Planning Board a week ago Monday night, and does not know what had transpired since receiving the letter from the Town's counsel dated November 15, 2011, but he wanted the Board to understand how he got here. Mr. Kearney stated that he has a history in Red Hook, with a very successful project, and that he knew the Loes and other principals involved. Mr. Kearney advised prior to purchasing he wanted to identify how the re-application/new-application process was going to be handled. Mr. Kearney advised that he reviewed minutes on-line with both Village and Town when this project was approved. Mr. Kearney wanted to advise that in the minutes of the Town Board (When Mr. Manza was considering taking over) – there were discussion on SEQR and how this approval process would be handled. At the time when Mr. Manza went to the meeting in late Spring, 2010, it seemed right then that the approvals with the Town were about to expire or had expired but that there were a couple of key notes that stuck out in regard to answers given to Mr. Manza. Ken read aloud the minutes from the April 19, 2010 meeting. .... "Mr. Setaro said that the project's attorney Scott Volkman had conferred with the planning board's land use attorney, Jennifer Reinke at Keane & Beane. Christine Kane summarized a memo from Ms. Reinke, saying that, according to Town regulations, there could be no further extensions and that the applicants must submit new applications for the revised site plan, special permit and subdivision approvals. She said that the memo also confirmed that the Village would continue serve as lead agency for the SEQR review".

Ken read aloud the minutes from the June 7, 2010 minutes. ...."The Board encouraged Mr. Manza to confirm with the Village Planning Board how a SEQR review would be handled if the

applicants were to submit new applications and how the Village Planning Board saw the modified project moving forward at the Village level. He was also encouraged to contact the Trails Committee and the Recreation Commission if he wished to discuss the recreation land option.

Ken advised that he gained control of the property in March, April, 2011 and had a meeting to discuss history of SEQR process. Ken said a memo was prepared (did not have memo present to recite exaction wording),... that the Village planning board could reaffirm SEQR and some reports would be looked at for certain impacts and that those impacts were identified. Mr. Kearney closed on this project in June, has engaged in several meetings to prepare updates With regard to traffic, water, endangered species and wetlands. Ken came in front of the Village planning board in August, SEQR was discussed and it was of the opinion of the Board that a courtesy circulation to involved agencies should be sent. Ken said they are continuing to upgrade studies. Ken said they came back in front of the Village planning board on October 13, 2011 and thought that night that SEQR would be reaffirmed. He was advised that on that day a letter was received form the Town planning board that they were requesting more time on our courtesy letter to review SEQR. Ken said it was agreed to give more time. Ken said in September a full application was submitted to the Town. Ken went in front of the Town planning board – felt the dialog was good and toward end of meeting the issue of SEQR came up and they did not have an attorney present, but rather a planner present, who recited some legal interpretations. Ken said that what he heard was “where do we go with SEQR – what do we do.... response was ..... “we can go as far as we want”. Ken did not understand what has transpired from Tuesday to tonight’s meeting. Ken stated that he has built 500 units in the Hudson Valley and is very familiar with the SEQR process – and understand that it is open to many interpretations, however, the role of lead agency has been identified. The facts as Ken sees them is a disagreement, as stated in letter from Keane & Beane (dated November 15, 2011) – some facts he agrees with and some he does not – but feels it is procedural – he does not see anything substantial. No negative comments were received after courtesy letter was circulated. Ken does not see anything that rises to the level of a significant issue that affects SEQR. Ken feels that if no substantial issues are present, and the planning board of the Town of Red Hook has an issue later on, he will address it. Ken passed out copies of the minutes from the Town board meeting that he recited above. Ken believes they have identified the critical issues.

Chairman Pearsall asked the Board if they had any questions. No comment.

Chairman Pearsall asked Attorney Polidoro for the board’s legal footing. Attorney said the purpose of tonight’s meeting is to decide whether or not to recirculate. Attorney advised that she has no objections to what Mr. Kearney has said and that this board has been proceeding as lead

agency as it continues to be lead agency under the logical assumption that it has been a continued application and had we not received any written objections she feels they would still be proceeding in that manner.

Attorney stated that the problem is now we have received an objection from an involved agency to the process, so this Board will need to decide on how they wish to handle it. Attorney agrees that they have not raised any substantiate issues on issue of process. Attorney advised that they are an involved agency and should the Board proceed without resolving their objection, and reaffirm SEQR, it raises a few issues – 1) it opens the action up for litigation and litigation is always costly, and while the board thinks it will prevail, it is never 100%. 2) If we do not recirculate and start the process over, they will start the process. The Town has taken the position that they will not be bound by a SEQR reaffirmation until such time as they consent to us being lead agency. Member Fredricks asked who was lead agency? Attorney stated that the Village planning board was, but they put something in writing stating that they are not agreeing to us being lead agency unless we recirculate. Attorney advised that if this Board reaffirms SEQR tonight the Town would not be bound by it. Chairman Pearsall asked would they not be bound by it or would they claim they would not be bound by it? Member Morrison said should The Board reaffirm SEQR tonight then they will need to make their choice – they can go along or object to it. Attorney stated by the letter received she feels they already decided. Chairman Pearsall indicated his issue was that the Board has already been through the process and declared themselves as lead agency, already recirculated and involved agencies did not have a problem with that, as we already subsequent to that have gone through this process, so you cannot now say the decisions we made all that time ago don't exist anymore and not want to have a changing of the minds. Chairman Pearsall asked legally can the Village planning board say we are moving forward and reaffirm. Attorney said we have taken a logical position and there is not case law in point, so their attorney can support their decision by saying there is not case law in point, as well as she can, and until there is case law in point she cannot give a 100% answer. Attorney is recommending that we recirculate to take this procedural aspect out of the process and focus on substance. Member Fredricks asked if it would be a problem either way. Member Morrison asked if we recirculated for lead agency why wouldn't they like wise feel so strongly of what their next move is going to be. Member Morrison said what we do have in court is history on issues concerning the SEQR process and the fact that nothing has changed as far as environmental since then. Attorney agreed, but feels the court would question that if we received something in writing then why would we not have just recirculated. Ken Kearney asked that if the Town were to recirculate don't they have to declare themselves with intent as lead agency. Attorney said yes. Ken said then les say at the next meeting they declare themselves as lead agency – how long would that take. Attorney advised that they would have to declare their intent that night, but they could say that because the Village has not reinitiated SEQR that they are obligated to do that because in Type 1 Action you have to coordinate with all involved

agencies. Attorney said they will recirculate for lead agency and have 30 days. Member Fredricks asked what happens if we recirculate. Attorney advised then we would have 30 days for everyone else to object. Ken said it was recirculated. Attorney advised we sent a courtesy letter because we did not feel that anyone would treat this as a new application. Ken said that in the letter he agrees with them that TKB's special permits, subdivision approvals and site plan in the Town have expired, and Ken submitted the exact plans as a new application with SEQR aside. Attorney said that even though this is a new application with a new owner the impacts of the project that were studied and you updated studies to show that, but that is how we see it, and Attorney feels Ken did not convince the Town planning board of this. Ken disagreed. Ken felt that the Town did not have a big discussion on this. Ken asked if Town declares themselves as lead agency and recirculates and their Board takes this position what happens? Attorney said the Village would then have to decide whether to consent and start SEQR over, or dispute, at which time it would go to DEC for resolution. DEC will resolve on the merits, and based on what she can tell will go to the Village, but they could also say when you received this letter, why did you not recirculate. Member Morrison said the letter was clear that the Town was going to object regardless. Attorney felt the letter does not say object. Chairman Pearsall said that since they took the time to say that they want us to recirculate that means they will object. Attorney does not feel they will object to Village being lead agency. Pete Setaro said we cannot sit here and answer that, but because there is not case law and it is a gray area, but if the Town planning board wanted to go this route that the Village planning board was heading down to reaffirm SEQR, and knowing it is a new application, and from his years of experience, and from what Ken has said that if the Town planning board wanted to accept the Village's reaffirmation of SEQR that it would fly, even though there will be new applications in the Town because it is the same project and we did look at certain studies. Attorney felt they were looking at procedure. Ken feels differently. Chairman Pearsall advised that he wanted comments addressed to the Chairman. Attorney said that if this Board wants to be lead agency that we should recirculate and if they dispute it, we are in a better position to gain lead agency. Attorney advised that if we wait for Town planning board to recirculate and we dispute it, she feels it won't change it too much but puts us on shakier ground on question of why we did not just recirculate first. Ken said that with all due respect, and he cannot speak on legal issues, but believes that looking at this from the SEQR standpoint that nothing has rose to the level of substance.

Ken said that he filed a new application with Village with new subdivision fees, so they don't disagree. In letter it says that ...."the Village has taken the position that they are reaffirming"...., no the Village has taken the position, he believes, that the site plan for Anderson Commons has not expired and the subdivision has expired, and a new application is not in and the Village planning board is lead agency is taking over that. Ken spoke when both Mr. Manza and Pete were in front of the Town in late 2010 (April, May & June), New York State Senate passed a bill giving municipalities the ability to pass extensions of previously approved projects, (for unlimited 90-day periods), and unfortunately Governor Patterson did not sign into law until

September, and these approvals had expired and this did not apply to that, and the reason he brings this up is because he looks at the laws and the spirits of the law, and that NYS passed a law that due to the economic climate we are in, and what is going on out there, no work, nothing going on, they are giving the ability to grant unlimited 90-day extensions (to be flexible) due to economic climate. Mr. Kearney said he brings this up in all his applications because it's indicative that the law makers have acknowledged where we are at. Attorney said that what Mr. Kearney is getting at is that this could be treated as an extension because it is the same exact project, and if this were an extension, we would not be going through SEQR again, and that had been out rational from the beginning, but we cannot change the way the Town Board interprets its process. Member Fredricks said that since the site plan has not expired, Ken interrupted and spoke to advise that variances were granted at Town level that run with the land, those variances have not expired, Member Fredricks continued stating that the Village's portion is really not a problem and is a Town portion, Attorney interrupted saying that the subdivision has expired, Member Fredricks continued saying he understands, but feels there is no why we should not go ahead since the Village portion is really an extension. Pete said he feels we are going to end up in the same anyway – Chairman Pearsall agreed. Member Morrison feels, in his opinion, they would not have issued this letter if they were going to go that route. Member Morrison asked if the Village was to recirculate he hears that as we are acknowledging that we are restarting the SEQR project and in essence we are saying that we almost agreeing with them and that there are thing that have not been considered before, and it if that is correct, and we walk through the full SEQR time frame that is required, but we open that time frame up and open everything up again, that he is absolutely against it because this Board has done their work, Ken has done additional work and the we have a valid site plan. Member Morrison sees no reason to do anything than reaffirm our previous decision. Attorney answered saying no you can recirculate without admitting or agreeing that we are starting the process over, and that the only applicable time frame is the 30-day time frame for circulation – there is no EAF requirement so we are not locked into any other time frame. Member Morrison asked then what is the point in recirculating if it is not re-opening SEQR. Attorney said it is to make this binding on the Town Board. Attorney said, but she does not know why and cannot speak for them, but they are of the opinion that they will not be bound by a reaffirmation unless we recirculate. Attorney advised she did draft 2 Resolutions at the Board's request – one to recirculate and one to reaffirm. Attorney briefly read through the resolutions. Attorney said she understands that both the Village Board and applicant have put a lot of time into this the first time around, but her concern is that if we go ahead and adopt this that the Town Board will not be bound by it. Chairman Pearsall said there is a difference between not being bound by it and saying they are not bound by it. Chairman Pearsall said it is his opinion that we already did the circulation and had been declared lead agency, we already did SEQR and dealt with the Town comments the first time, so he sees no compelling reason to now go through it again, even it part. Attorney agrees up to compelling reason, she cautions it and now that there is something in writing, she feels that we should resolve it before moving forward. Chairman Pearsall sees it as an objection, but not an objection

to anything of real substance. Member Morrison asked where is the substance. Chairman Pearsall feels the only 2 reason he sees we are going through this is a) Town planning board wants to be lead agency and is going to dispute it, or b) it is just what is going to be step in dragging feet to slow the process down. In either case, Chairman Pearsall sees no reason to entertain it. Chairman Pearsall would like to hear the Board's comments at this time. Member Mirando sees no grounds and feel the Board should reaffirm. Member Mirando feels this will fall back on ENCON who will ultimately decide lead agency. Member Fredricks said it will be a problem either way, but would be upset if the Town took over control. Member Fredricks asked if they could take complete control. Attorney advised that the Town has no control over the approvals (site plan or subdivision), but what they would have control over is the environmental review. If we do not recirculate and they feel they are obligated to start SEQR all over again, they could open up other issues – we would still be approving land use, but they would be mitigating environmental impact. Member Morrison said if they became lead agency, hypothetically, they could absolutely manipulate the entire design. Member Morrison said in the past he has watched this occur using SEQR as a tool to be in control of the design of a project. Attorney said this project had been approved in the past, so it would arbitrary and capricious for them to not reapprove it absent some very good affirmation. Member Morrison does not see any substantial statements. Attorney feels the letter is for concern on following exact process – again her recommendation is to recirculate. Ken said the other scenario is once the Board passes a resolution that dialog is opened up and making people soften their position, he want to make it very, very clear that his position is that he sees no substance issues and if an issue comes up that has not been addressed he will address it. Member Stephen Zacharzuk agrees with Board in that there is no substance, but believes that their alternative motive is to apply the recently passed zoning. Attorney said the zoning on this parcel was not changed, but part of their rational, as far as they told her after conversation with the planner, is that it is new and the context has changed because some of the zoning around the area has changed. Member Morrison said that is a misuse by Michelle of the SEQR process. Member Mirando agrees with Member Morrison. Member Morrison said he does not agree with use of SEQR in that manner and the change in their zoning code, if they want to look at both lot configurations is separate from an environmental quality review. Chairman Pearsall and Attorney agreed with Member Morrison. Pete said this was talked about with the Town Board on the 7<sup>th</sup> because of some of the changes with variances. Pete said the Town advised them to look at the density count, and Michelle said that a couple of things changed, but did not feel that the project will change, so Pete went back and redid one wherein it was the same density. Member Morrison asked how many houses – Ken said 28. Member Morrison said ok – 28 homes – 28 driveways – even if the driveways got shorter, some longer, there is no critical environmental area or identified resource through your studies that would be protected all of a sudden – he does not see that it had substance. Attorney again stated the issue is not substance but whether this objection means the Board should recirculate. Member Mirando asked what would happen if we asked the Town Board what they are objecting to and why they are saying

this is new? Attorney said the Town is taking position that any kind of new application, even if it is a re-application they have to start the SEQR process again. Pete answered Member Miranda with stating that this is new because the approvals with the Town lapsed, but the only question is is the SEQR determination made in 2006, even with new approvals, still valid. Ken wanted to make a point that Vicotoria said they feel SEQR process should be done again –Ken agrees with this being a new application but never read new SEQR. Attorney read the letter .....”although information from the prior review may be used in the Village and Town where you have the current application, the application must none the less be treated as new”.... Ken said let’s take that one step further, and in April, the same planning board, same attorney said .....”according to Town regulations there could be no further extensions and that the applicants must submit new applications for the revised site plan, special permit and subdivisions approvals. Ken is in agreement, but she said that the memo also confirms the memo also confirmed that the Village would continue to serve as lead Agency for the SEQR review – 2 months later in June, the same Board encourages the applicant, Mr. Manza, to confirm with the Village planning board how a SEQR review would be handled. That was done and this Board determined how a SEQR review would be handled. Attorney said there are 2 issues, and she agrees with Ken 100%, but again, those are minutes and minutes are how someone interprets, so we cannot rely on that 100%, and second if challenged, those will be helpful to show that the Village is the appropriate lead agency, always has been and should continue to be. Attorney stated that her role is to make sure that the Board’s decision are rock solid and because it is a little gray and we have this written objection she is not confident that is would be rock solid if we did not recirculate.

Chairman Pearsall asked Attorney, with all considerations taken, does this Board have the authority to reaffirm and move forward. Attorney said she can make the argument both ways.

Pete asked for a break so he can speak with Mr. Kearney. (5:30pm).

5:35pm meeting back in session.

Chairman Pearsall polled the Board.

Member Mark Miranda – Reaffirm

Member Paul Fredricks asked the difference between reaffirm and recirculate.

Attorney said under SEQR in a type I action it has to be coordinated so there has to be a lead agency among everyone who has to approve the project – in this case the Town Planning Board,

the Village Planning Board and Village Board. Recirculating is sending out a notice advising that we intend to be lead agency and you have 30 days to object. Once there is a lead agency we go through the SEQR process which is looking at studies, etc. In this case a lot of the studies have been done and updated, so when it gets to that time, whether now or later, instead of re-doing SEQR entirely, we would reaffirm the one we adopted in 2005 and that nothing has changed.

Member Fredricks – Reaffirm

Member Stephen Zacharzuk – Recirculate

Member Morrison – Reaffirm.

Member Morrison believes that work has been done and also feels that if we recirculate that the Town will object – based on this and previous conversations. Member Morrison would rather reaffirm – from the point of view it seems that this establishes for the record in the future that the DEC, or whomever, that we believe we did the work and it is current and it is accurate. It establishes our position that we are the lead agency.

Chairman Pearsall feels that a dispute with the Town over this is inevitable no matter which direction is taken.

Member Zacharzuk said he is a firm believer that he stands with the majority, but still has issues.

Attorney said that the third option is to not do anything. If the Board does not recirculate it won't start that process, but if we don't reaffirm it puts it in a holding pattern until the Town Board meets.

Member Morrison read the last paragraph in the letter dated November 15, 2011 from the Town ...” alternatively until the Village Board circulates the notice of intent, the Town plan board may circulate the notice of intent...”. Attorney said that they are saying until you do it, the Town can.

Chairman Pearsall feels this should be moved forward with no delay. Chairman Pearsall feels that we should reaffirm and that this Board's position should be that we have been lead agency an no-one contested prior when we were lead agency, we have been through this entire process, and we are still in that position. He has not seen anything of substance that changes his mind in that facet.

Member Miranda asked if it would be proper procedure to ask the applicant for his opinion.

Chairman Pearsall asked Mr. Kearney for his thoughts on reaffirming or recirculating,

Mr. Kearney felt disappointed that we were at this point. Ken said conflicts are bad and he would like to avoid any conflict, and feels it was the right decision in October to grant more time to the Town Board to review, after we sent the courtesy letter. Now we are here, and he feels indications are he feels differently.

Chairman Pearsall thanked Attorney Polidoro for all her hard work. Chairman Pearsall asked for certain changes to be made to the Reaffirmation Resolution. Changes were discussed, approved and made.

Chairman Pearsall read aloud the “Now Therefore” paragraph of the Resolution:  
***NOW, THERFORE BE IT RESOLVED***, that the Planning Board hereby affirms its prior SEQR determination of non-significance issued on September 19, 2005, and directs the Secretary to the Planning Board to file the attached Notice of Determination of Non-Significance in accordance with 6 NYCRR 617.12.

***Chairman Pearsall made a motion to adopt Reaffirmation Resolution as written. Seconded by Member Rodney Morrison. All in favor. Reaffirmation Resolution Adopted.***

***Chairman Pearsall made a motion to adjourn the planning board meeting at 5:45pm. Seconded by Member Fredricks. All in favor.***

Submitted,

Lara Hart Secretary