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Via: email (kovalchikk@togny.org)

Mr. Kenneth Kovalchik
Town of Guilderland Planning Board
5209 Western Turnpike
Guilderland, NY 12084

**Re: The Environmental Impact Statement for the Rapp Road
Residential/Western Avenue Mixed Use Redevelopment Projects**

Dear Mr. Kovalchik,

The Pace Environmental Litigation Clinic submits the following comments on behalf of our client, Save the Pine Bush in response to the proposed Draft Environmental Impact Statement (“EIS”) on the Rapp Road Residential/Western Avenue Mixed Use Redevelopment Projects (“The Project”) submitted to the Town of Guilderland’s Planning Board on February 19, 2020, by the project sponsor Rapp Road Development, LLC. Collectively, Commenters represent over 690 members and online activists in New York State.

The project sponsor has made it painfully clear they do not care about the protecting the unique Albany Pine Bush Environment. The EIS is woefully deficient in methodology, containing almost no substantive scientific proof to support their sweeping conclusions that support their baseless claims. The project proponent on March 26, blatantly violated the SEQRA process by clear-cutting almost the entirety of site 2. This was clearly an attempt to cut down the trees on the site before the April 1, moratorium on

tree cutting due to northern long-eared bat roosting. Thereby, the project proponent violated one environmental regulation to evade another environmental regulation. Lastly, it was discovered that the project sponsor did not include an important wetland report that the EIS relied on for its conclusions. The non-inclusion of the report is seemingly deceptive, especially when the report indicates the possibility of a wetland on site 2, the same site that was just clear-cut. The project sponsor is playing fast and loose with environmental regulations, trying to subvert the process at every opportunity, and it's up to the Planning Board to uphold and enforce these regulations, especially when Guilderland is steward of one of the last remaining inland pine barrens in the United States.

Summary of Evidence Submitted with These Comments

In support of these comments, we also submit several technical memorandums (Appendixes A-M) authored by experts in their respective fields. Appendix F is authored by Dr. Cynthia Lane of Ecological Strategies LLC, she is one of the foremost experts on the Karner Blue Butterflies. Her accreditations include writing papers, reports, books and best management practices for the conservation of the federally endangered Karner Blue Butterfly. Dr. Lane identified that the EIS's methodology was insufficient to support the EIS's findings, and that the mitigation efforts proposed either have no impact on the conservation of the Karner Blue Butterfly, or fail to state a valid connection in the conservation of the Karner Blue Butterfly. Appendix A is authored by Dr. J. Curt Stager, the endowed chair of Paleoecology Department of Natural Sciences at Paul Smith's College. Dr. Stager reviewed several soil and vegetation samples both directly on site and those identified in the EIS and they indicate that the project is indeed an Albany Pine Bush ecosystem. Appendix B, authored by Zamurs and Associates, LLC, experts in conducting environmental analysis for air quality, climate change and sustainability,

found that the EIS did not conduct adequate air quality analysis up to the standards set by the New York State Department of Environmental Conservation (“NYSDEC”). Furthermore, they confirmed that the EIS was woefully deficient in studying the potential impact the project will have on climate change. Appendix C, produced by Dr. Erik Kiviat of Hudsonia, an environmental research and conservation institute, not only identified the soils and vegetation of the project sites as Albany Pine Bush, but also found the methodology used by B. Laing Associates in producing the EIS to be scientifically flawed. Dr. Jeffrey Corbin, a professor of biological sciences at Union College, authored Appendix D, which states that the vegetation and soils located on the project sites denote the land as Albany Pine Bush. Moreover, Dr. Kiviat concludes that there is a high likelihood of success in converting the land into fully managed Albany Pine Bush. Lastly, Zachary Davis, a conservation biologist and contemporary master’s student pursuing a degree in Ecology, authored Appendix E, and Dr. Starkloff, an expert in ornithology, authored Appendix I, identifying the inexplicable absence of any discussion on how to mitigate the harms the project will pose to the fragile threatened bird populations of the Albany Pine Bush. Please see the other Appendixes for further research backing the individual claims. These expert reports prove that the prepared EIS is painfully inadequate and thus incapable of providing either the Guilderland Planning Board (“The Board”), or the public with an ability to make an informed decision on the project’s actual potential impacts to community of Guilderland.

SEQRA’s Purpose and Impact on the Project

The New York State Legislature through the State Environmental Quality Review Act (“SEQRA”) has given the Town of Guilderland Planning Board the responsibility of “steward[] of the air, water, land and living resources, and... an obligation to protect the environment for

the use and enjoyment of this and all future generations.” N.Y. State Environmental Quality Review Law § 617.1(b) (McKinney 2020). Per the court in *Matter of Coca-Cola Bottling Co. v Bd. of Estimate*, 72 NY2d 674, 679 (N.Y. 1988) “SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making.” SEQRA requires a “strict compliance with [its] review procedures,” failing to meet SEQRA’s standards opens up the entire review process to legal review. *Merson v McNally*, 90 N.Y.2d 742, 750 (N.Y. 1997). And at “[t]he heart of SEQRA is the [environmental impact statement] process.” *Citizens Against Retail Sprawl v. Giza*, 280722 N.Y.S.2d 645, 649 (N.Y. App. Div. 4th 2001).

SEQRA does not provide a provision for judicial review, and so review is guided by the standard for inadequate agency actions, namely arbitrary and capricious review under a C.P.L.R. 7803(3) action. *See*, N.Y. C.P.L.R. 7803(3) (McKinney 2020); *Matter of Nash Metalware Co. v Council of N.Y.*, 836 N.Y.S.2d 487, 487 (N.Y. Sup. Ct. N.Y. Cty. 2006). Based on the below factual allegations it is apparent that “the procedure used to prepare the EIS [] violate[d] mandated procedures [and] rel[ied] on improper methodology of information collection.” *Id.* Nevertheless, even if the EIS was properly prepared the “Planning Board [is] required to take a hard look at all of the relevant and identified concerns” when making a decision on the adequacy of an EIS. *Matter of Cade v Stapf*, 937 N.Y.S.2d 673, 675 (N.Y. App. Div. 3d 2012). Based on the evidence in this public comment, detailing the issues and concerns not adequately addressed in the EIS, the Planning Board of Guilderland has failed to take an adequate hard look at the EIS. Therefore, to avoid potential arbitrary and capricious litigation challenges after the SEQRA process has finished, Save the Pine Bush strongly recommends that all inadequacies be resolved during this SEQRA review process. These inadequacies include insufficient surveying for the Karner Blue Butterfly, existence of an Albany Pine Bush ecosystem, the presence of other

threatened species, impacts of traffic and pesticides, the presence of wetlands, the impacts on climate change and air quality, and the use of improper methodologies, and implementation of inadequate mitigation measures to address these issues. The deficient preparation, development and implementation of the EIS, by the project proponent, leaves no other choice but for the Guilderland Planning Board to require the project proponent to remedy their EIS's deficiencies.

Project Sponsor's Clear Cutting

On March 26, the project sponsor, citing its own reports from the EIS for support, started to clear-cut the trees on site 2. Their report stated no harm would come from the clear-cutting and that no scrub oak nor pine bush would be affected, and therefore clear-cutting would have no negative effects on the environment. Even if this was true, which it is not, this was a clear violation of SEQRA. (See, N.Y. State Environmental Quality Review Law § 617.3(a) (McKinney 2020) "A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with."). Thankfully, the Board posted a cease and desist order, and the clear-cutting was halted, but not before the damage was already done to site 2. It was evident that the clear-cutting was done to evade another environmental regulation the New York State Department of Environmental Conservations' moratorium on tree cutting which starts on April 1, instituted to protect the Northern Long-Eared Bat, a bat which the EIS claims could never even live on site 2. These actions put the project proponents' motives in question, and demonstrate a clear willingness by the project sponsor to violate environmental laws and regulations.

Concealed Wetland Report

Wetlands are one of the most highly protected types of ecosystems in not only New York, but also the United States having clear regulatory protections under the Clean Water Act and

NYSDEC regulations. So when, Dr. Kiviat made the alarming discovery that the project proponent relied on a wetland report when making its environmental findings, but failed to attach that wetland report to the EIS when the project proponent submitted it to the Board, it provides another incident of the project proponent trying to deceptively circumvent environmental regulations. If there is a wetland it may require a permit under Article 24 of the Environmental Conservation Law. (*See*, N.Y. Environmental Conservation Law Implementing Regulations § 663, 664, 665 (McKinney 2020)). Furthermore, the report was not provided to the public until April 15, after it was specifically asked for by Save the Pine Bush.

The report indicated a possible wetland on site 2, a “large south-north ditch... was delineated as a wetland []; the tributary ditch from Rapp Road to the western side of the south-north ditch may be part of this wetland but was not included in the delineation nor did the wetland report [] explain how the non-wetland status of the tributary was determined.” (Appendix C, 4). Moreover, the EIS “identified a histosol, which is a highly organic wetland soil that would have taken centuries or millennia to form.” *Id.* Dr. Kiviat does not “know the exact spot in the ditch where this soil boring was done or whether it’s representative of a larger area. [And he hypothesizes that] [t]here may be a buried histosol that remains from a formerly larger wetland, and it is possible that this wetland could be restored.” (Appendix C, 4-5). Moreover, the EIS’s Appendix F states “No wetlands or hydrologic features [presumably meaning surface waters] occur on-site or adjacent to the site,” however the EIS surveys list the bog deltoe and the black duckweed moths, common wetland moth species. (Appendix C, 8). Dr. Kiviat posits four possible explanations “1. There is indeed at least one wetland, vernal pool, or pond on or adjoining Site 1; 2. The two moths in questions were attracted to the collecting light or dispersed onto the site from wetland nearby; 3. These species can use non-wetland habitats; or 4. The two

species were misidentified.” *Id.* “Because these two moths are usually found in or near wetlands or ponds, there may be an unreported small wetland or temporary pool on Site 1, perhaps hidden by dumped logs and slash.” *Id.* The fact that the applicant hid the report, fails to provide methodology on how they concluded there were no wetlands, and fail to account for the contradiction between the wetland moths and there conclusion that there are no wetlands on the project sites raises serious questions as to the existence of an important wetland on the Project sites, that needs to be addressed by the applicant.

Existence of Albany Pine Bush Soil

One of the most important indicators that the project sites can be restored to a proper Albany Pine Bush ecosystem is the presence of unique soils that are naturally occurring in the Albany Pine Bush. The EIS, which contains the environmental study conducted by B. Laing, “describes well-drained sandy and sandy-loam soils that are typical of the Albany Pine Bush Preserve including Colonie and Enora soil types” (Appendix D, 1). The soil accounts in the EIS are corroborated by the “USDA Soil Conservation survey for Albany County (USDA 1922), the soils on sites 1-3 mostly belong to the Colonie (sandy loam) and Elnora (loamy fine sand) Series along with closely related types such as Granby and Stafford [soils].” (Appendix A, 1). Dr. Stager, Dr. Kiviat and Dr. Lane all agree that the soil on the sites are indeed Colonie and Enora, the typical soils found in the Albany Pine Bush. (*See*, Appendix A; C; F). “All of these soil types are widespread in the Albany Pine Bush and are capable of supporting...the classic community of pitch pine and scrub oak [] as well as the lupines necessary to support the Karner Blue Butterfly.” (Appendix A, 1).

The EIS claims “whatever qualities the original soils had, especially in comparison to the Albany Pine Bush, have been lost/disturbed since at least the 1960’s” due to extensive pig farming and human activity. (EIS, 7). However, “the reports [] did not show any actual soils data to support the statement that soils had been extensively modified by farming and that the Poorly Drained [] and Somewhat Poorly Drained [] soils no longer existed onsite.” (Appendix C, 6). Dr Stager and Dr. Kiviat both agree that the conclusions reached by the EIS are “incorrect,” the soils are still that of the Albany Pine Bush and rigorous testing of the soils is still needed. (See, Appendix A, 1; C, 13). Furthermore, the EIS suggests that the pig farm “disturbances disqualify [the project] from classification as potential pine bush habitat. In fact, such physical disturbances do not at all preclude development of [pine bush scrub oak] communities in these kinds of soils.” (Appendix A, 2). Alterations of soil by human activity does not make the land unsuitable habitat for organisms of conservation need. (See Appendix C, 5-6).

The EIS suggests that the vegetation on the site indicates that the soil is no longer capable of supporting Albany Pine Bush ecosystems. (EIS, pg 36-9) Notwithstanding, Dr. Stager states that “[t]he secondary growth woodland and open meadow vegetation that is currently on Site 1... is not there because of soil conditions... but rather because of the legacy of human activities on the site,” because “vegetation community composition [] is not solely a product of soil type, but more often due to the legacy of human activity on a given site.” (Appendix A, 1).

In other words, the current vegetation on Sites 1-3 is not primarily due to some quality of the soils that would be inappropriate for [pitch pine scrub oak] and other pine bush assemblages, but is instead due to how they have been managed, neglected, or otherwise affected by human activity. Restoration of heavily disturbed sand barren ecosystems is widespread and often successful despite former land use and soil disruptions of the sorts experiences on site 1-3.

(Appendix A, 2; See Appendix F, 8 “numerous successful restoration efforts of degraded and disturbed sites in both the Pine Bush and across North America are well documented.”; Appendix C, 6 These sites have potential for the restoration of pine barrens... [or] the study area in its current condition may be more valuable for ecosystem services (including habitats for biodiversity).”; Appendix D, 2 “the existence of the unique soils of the proposed development area mean is the key determinant of restoration potential, not present-day vegetation composition.”). The experts all agree that the soil is Albany Pine Bush soil and the fact that the land has had human activity on it does not preclude the project from being restored to a proper pine bush scrub oak ecosystem.

Inept Plant Survey

The EIS’s survey for plant species is substantially lacking. “[U]rban woodlands provide important ecosystem services by storing carbon, absorbing stormwater, shading and evapotranspiration (which cool[s] the local environment in summer), and providing healthful amenity value to human residents.” (Appendix C, 6). A comment letter provided by the Albany Pine Bush Commission (“the Commission”) on January 25, 2019 says that “the site likely contains a portion of Pitch Pine-Scrub Oak Barrens.” (Appendix G, 2). And it is unnerving that “the removal of substantial areas of woodland habitat as a result of the proposed development has not been adequately addressed in the [EIS], nor has the cumulative impact of these habitat changes in combination with the many other land use projects proposed or being undertaken in Guilderland and neighboring towns.” (Appendix C, 6).

The lack of a certain plant species, as well as the absence of the methodology used to conduct the surveys indicate that the surveys in the EIS are faulty. First, “Table 1 in Appendix F [of the EIS] is a list of plants identified on Site 1. The list is short, contains a single grass and no

sedge species, and is not a complete flora of the site.” (Appendix C, 8). Dr. Lane agrees that “it is unusual for so few grasses and no sedge species were seen and reported” (Appendix F, 5). Further proof that the survey is insufficient is the lack of plant survey methods. (See, Appendix C; F). “The use of transects is mentioned, but no information about the width of transects, the intensity of sample effort, etc. Therefore, it cannot be determined whether a rare plant survey was conducted, and what subset of the flora the tables providing species lists for the three sites represents.” (Appendix F, 5; Appendix C, 5). And “[u]nless a rare plant survey was done, and during the correct time of year, especially for species that are cryptic and/or ephemeral, it is not possible to state that no rare plants occur on site.” (Appendix F, 5). The fact that the EIS does not contain an accurate representation of the methodology used, and common species expected to be found on the site are absent from the report, the survey was either conducted fraudulently, and the methodology removed to hide their misconduct, or the survey was performed incompetently and would require being done correctly. Until a proper survey is completed, we cannot know the extent both rare, and Albany Pine Bush species live on the sites.

Animal Surveys

The EIS’s surveys for animal life contain both improper methodologies and a complete lack methodologies at the same time making the conclusions reached by the surveys unsubstantiated. The Karner Blue Butterfly is a federally listed endangered species, and requires the utmost protection. The EIS claims that project site 1 does not have any Karner Blue Butterflies, or Frosted Elfin Butterflies another insect species of great conservation need. (EIS, pg 48-51). However, a comment letter prepared by the Commission contradicts this claim and states the site likely contains Karner blue butterfly and frosted elfin (a portion of the site is within the Karner Blue Butterfly Preserve and immediately adjacent to known occurrences of

both species)” (Appendix G, 2). As seen in the previous surveys, the survey for the Karner Blue Butterfly was severely lacking in methodology. Dr. Lane states “[f]or all insect surveys, it is critical to conduct site visits when suitable temperature, moisture, and wind conditions are conducive to detection.” (Appendix F, 4). And “Targeting nectar plant patches or other habitat features and/or sampling a minimum percentage of potential habitat is necessary to determine the presence or absence of a species with any confidence.” (Appendix F, 4). However, “[s]urvey conditions or methods were not stated or stated so generally in the report that it was not possible to determine whether methods were suitable to detect present or confirm the absence of insect species.” How can the EIS be so confident that Karner Blue Butterflies do not exist on the site, when experts can’t even be sure that a proper survey for them was conducted?

The EIS has implied that the human activity on the project sites has made it incapable of supporting animal and plant life of conservation need, however the project sites in their current state are capable of supporting organisms of conservation need including the Wood Thrush, (a species of greatest conservation need in NY) Eastern red bat, Silver-haired bat and Indiana bat. (See, Appendix C, 5). All three bats are of species of greatest conservation need in NY and the Indiana bat is listed as endangered in NY. (See, Appendix C, 5). In, “Appendices F and G [of the EIS], it was asserted that, following NYSDEC guidance, northern long-eared bat (*Myotis septentrionalis*) would not use the study area in summer because it is more than five miles from the nearest known hibernaculum.” (Appendix C, 7). Five miles is an inappropriate guideline, as it has been found that northern long-eared bat has seasonal migration distances up to 25 miles. (See, Appendix C, 7). Furthermore, the EIS does not state how any of the bat surveys were performed. (See, Appendix C, 7-8).

A local study was conducted by concerned citizens near the properties to observe and document bats living on or near the sites. (*See* Appendix J). The study identified several different species of bat and documented the methodologies used to observe and lure the bats out for observation. (*See* Appendix J). The study puts into question the legitimacy of the EIS's bat surveys, requiring further research into the presence of bats on the sites.

The EIS animal index for the project does not include sightings of common garter snake nor brown snakes, “[t]heir absence from the lists suggests herpetofaunal survey techniques and effort might have been inadequate.” (Appendix C, 6). If the surveyor's failed to find common snakes, then the EIS's non-reporting of the worm snake is questionable. (*See*, Appendix C, 6). Research suggests worm snakes can live in both dry soils and moist soils, and worm snakes were reported in the area in 2009. (*See*, Appendix C, 6). Furthermore, Dr. Kiviat has “found no information suggesting that cut-and-fill or pig disturbance of soils decades ago would make Site 1, unsuitable for [worm snakes] now.”

Another inaccuracy is the reporting of the southern house mosquito in Table 2 of the animal surveys in the EIS. (*See*, Appendix C, 8). The max Northern range of the Southern House Mosquito is Southern New Jersey, making its inclusion a likely misidentification. (*See*, Appendix C, 6).

Avian species were not only misidentified, but also woefully neglected when it comes to mitigation. First, “[i]t should be assumed that bird populations occurring on the [project] area[] are a part of the same populations that extend into the Albany Pine Bush Preserve... Thus, any impact on the avian communities which occur on the proposed sites should be considered detrimental to the Albany Pine Bush Preserve and its avian population. (Appendix E, 1). The EIS states that it conducted general wildlife searches, but “There is no elaboration on the

methods employed to accrue the list of reported avian species, and thus [it is] uncertain if these protected species were considered “general” wildlife, despite their protected statuses, and were therefore not given proper consideration. (Appendix E, 2; *see also*, Appendix I). The EIS does “not mention the methods employed for conducting surveys for the two hawk species of special concern—Cooper’s hawk and sharp-shinned hawk” nor what methods were employed to search for these nesting birds. (Appendix E, 2). The EIS only states that as a closed canopy/successional woodland, the site has the potential to be hunting habitat for Cooper’s Hawk and Sharp-shinned Hawk, but that B. Laing personnel searched for these raptors on Site on many occasions, and never spotted them. (*See*, EIS, pg 55-6). Mr. Davis concludes that “Without further elaboration on the techniques employed for these searches, and whether searches were conducted to locate nests, it is ill advised to accept any conclusions regarding the status of [the hawks] on the proposed sites, and the degree to which impacts will be incurred on them via this assessment.” (Appendix E, 2; *see also*, Appendix I). Especially when the sites contain preferred habitat for both species of hawk. (See, Appendix E). Not surprisingly, “many species [are] absent from the report which are commonly occurring throughout the area, and [] would be expected to be [on] the sites based on reported observations from areas adjacent to the proposed sites.” (Appendix E, 2). “These reported results may [] indicate that the sites were not sufficiently sampled [], or that surveys were carried out by unskilled observers.” (Appendix E, 2; *see also*, Appendix I).

Because the EIS does not acknowledge the existence of avians of conservation need on the project sites, despite the populations of avians in the Pine Bush Preserve being the same found on the sites, the EIS does not provide any mitigative efforts to protect the avian species that it will impact. Two of the biggest risks to bird mortality are light pollution and building

glass panes. (See, Appendix E, 3; *see also* Appendix I). “Birds do not perceive window installments as physical barriers; they instead see contiguous space to fly through because windows reflect the environment. It has been estimated that upwards of 1 billion birds succumb to window strike mortality annually in the U.S. alone.” (Appendix E, 3; *see also*, Appendix I). Furthermore, “human disturbance is associated with [an increase] in invasive species populations.” (Appendix E, 3). And an increase in the invasive species surrounding the Albany Pine Bush Preserve, combined with habitat fragmentation surrounding the site increases the invasability of the preserve itself. (See, Appendix E, 3). Invasive species pose a real threat to all species not just to avians, because “Invasive species cause reduced fecundity [], increase competition, and harbor disease causing parasites such as *Trichomonas* sp. which are thought to reduce predatory bird populations and are important to consider as per the New York State DEC.” (Appendix E, 3). Putting in bird-safe glass, limiting light pollution and causing minimum impact to the sites will not only help save avian lives, but also those of bats and insects as well. (See, Appendix E, 3-4)

It is abundantly clear that all of the surveys conducted in the EIS to detect the critically endangered species, and species of conservation concern were conducted to such an improper degree that no one can be certain whether the species do or do not exist on the project sites. And until we know for sure, the town of Guilderland should err on the side of caution to protect these endangered and important species.

Air Quality

The “Operati[on] [of] motor vehicles (cars, trucks, busses, motorcycles) emit[s] a myriad number of different substances... most have serious negative implications for human health and wildlife health.” (Appendix B, 3). The “pollutants of concern for this project [are]... carbon

monoxide [], Particulate Matter 10 microns in diameter or less [], Particulate Matter 2.5 microns in diameter or less [], and Nitrogen dioxide.” (Appendix B, 3). These are localized pollutants “in that their concentrations can vary substantially over short distances.” (Appendix B, 3). Because the pollutants are localized in nature “[t]heir concentrations will be highest near the source of emission and decrease fairly rapidly as the distance from the source increases.” (Appendix B, 4). The pollutants should be analyzed for their effects on humans as well as “endangered and threatened species and species of special concern in the project area (Karner blue butterfly, frosted elfin, northern long-eared bat, worm snake, eastern spadefoot toad, eastern hog-nosed snake, eastern whip-poor-will).” (Appendix B, 3). Appendix P of the EIS “lists [that] the NYSDEC monitors [air quality] in Loudonville, downtown Albany and the Bronx, miles away. The NYSDEC monitors do not reflect the air quality in the project area and their measurements do not reflect the air quality in the project area that will occur with the completion of the project.” (Appendix B, 4). Appendix P in the EIS doesn’t even list where the nearest NYSDEC monitors are located. (*See*, Appendix B, 3).

Due to the effect the project will have on the local environment proper air quality measures need to be taken, and the EIS failed to take those measures. The EIS “does not properly apply the New York State Department of Transportation [] air quality analysis procedures as described in Section 4.4.16 (Chapter 1 Air Quality) of The Environmental Manual.” (Appendix B, 1). There are three intersections which will operate at a level of service of “D” upon completion of the project and they were not screened using the proper methodology required by The Environmental Manual (*See*, Appendix B, 1-2). The traffic study conducted in

the EIS did not properly account for criteria three and five in The Environmental Manual.¹ (*See*, Appendix B, 1-2). Before the Town of Guilderland approves the project, the EIS must use the proper NYSDEC guidelines and apply the tests in the Environmental Manual. (*See*, Appendix B). Moreover, the report failed to analyze the impact the 1700 new parking spots will create on air quality. (*See*, Appendix B, 6). Failing to use the proper tests given by the NYSDEC, as well as failing to take into consideration something as monumental as 1700 new parking spots is a critical oversight, and before the project is approved these revisions need to be implemented into the air quality studies.

Climate Change

The EIS fails to address one of the biggest issues facing the planet, climate change. None of the experts found any “meaningful consideration of GHG emissions [or] climate change implications in the [EIS] as is strongly encouraged under SEQRA.” (Appendix C; *See also*, Appendix B, C, F). The project site will increase greenhouse gases, by attracting new vehicle trips to the project area, by increasing congestion on nearby and upstream roadways, by using diesel powered construction equipment during project staging and construction, and by using building materials, fixtures, interior materials etc... that were not sustainably sourced. (*See*, Appendix B, 10). Moreover, the vegetation on the sites currently act like carbon sinks, and without meaningful vegetative offset, carbon sequestration loss will occur. (*See*, Appendix C, 10).

¹ Screening capture criteria 3: “a 10% or more increase in vehicle emissions for ETC, ETC +10 or ETC+20; increase in vehicle emissions can be due to speed changes, changes in operating conditions (hot/cold starts), changes in vehicle mix etc..

Criteria 5: a 20% reduction in speed, when build estimate average speed is 30 mph or less (AB)

Furthermore, local climate change in the form of heat islands was also overlooked by the EIS. Appendix F in the EIS states, “the residential buildings will not add materially to any “heat island” effects of the current commercial development which flanks Western Avenue (including the Crossgates Mall).” (EIS Appendix F, 19). However, “No evidence for making this statement is offered. Further, the importance of examining cumulative effects, which is considering the combined addition to the heat island from other planned developments, is a commonly accepted requirement and/or practice in assessing environmental impacts.” (Appendix F, 6). So again, the EIS makes a baseless conclusion without providing the methodology of how it came to that conclusion. And when it comes to an issue like climate change, shortcuts cannot be taken, and the issues must be considered seriously.

New York State recently enacted the New York State Climate Leadership and Community Protection Act, which amends the environmental conservation law and sets greenhouse gas emission reduction targets to 60% of 1990 emissions by 2030 and 15% of 1990 emissions by 2050 (See, Appendix B, 9; S. 6599, 2019-202 Leg. Sess. (N.Y. 2019)).

Furthermore section 7(2) states,

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law.

(S. 6599 § 7). Without a proper climate and Greenhouse gas analysis, it is not possible for the Board to have considered whether approval of the project will be inconsistent with the state emission reduction targets.

Nevertheless, the Planning Board should, at bare minimum, consider the implementing the following mitigative efforts to reduce the effect that the project will have on climate change. Require sufficient electric vehicle charging stations and ensure sufficient charging capacity for all in-use stations, enhance transit service to the project area, facilitate ride-sharing and taxi service drop-off and pick-up areas, require electric powered construction and staging equipment, require renewable fuels in construction and staging equipment, require leadership and environmental design certification for building design, and require building fixtures, furnishings, merchandise etc... to be sustainably sourced. (*See*, Appendix B, 10).

8.4 Acre Mitigation

Unfortunately, “is not clear why the protection of 8.4 acres of pine barrens habitat is sufficient to mitigate the almost complete and permanent loss of 19.68 acres at Site 1, plus acres that would be lost at Sites 2 and 3.” (Appendix F, 8). The commission’s 2017 Management Plan states, “[p]artial development of Area 57 may be appropriate provided proper set-asides are protected and native pine barren plantings are used for landscaping to ensure that the area can widen and protect the existing Karner Blue butterfly linkage between Crossgates Hill and Preserve lands to the east.” (Appendix H). Dr. Lane concludes that “[t]he proposed development would eliminate any chance of restoring pine barrens habitat to this site, as well as Sites 2 and 3 if developed.” (Appendix F, 7). Moreover, if the goal of mitigation is to prevent the loss of potential pine barrens ecosystems then for area 57 “a 1:1 mitigation ratio would seem a more reasonable ratio than the less than half an acre protected (not added) to an acre lost.” (Appendix F, 8). Under the current plan, no new habitat is created, only lost. (Appendix F, 7-8). If instead the Board approved “[p]rotecting [] 8.4 acres in Areas 62 and 79 [then the mitigation] would

widen habitat near the Karner Blue Butterfly Preserve.” (Appendix F, 8). The board needs to seriously reconsider the current mitigation plan and how it will affect the ability to not only preserve the Karner Blue Butterfly Preserve, but also help expand it.

Other Issues

Still some unique issues remain that were not adequately addressed in the EIS. Dumps are widespread on site 2 and likely occur on sites 1 and 3 as well. (*See*, Appendix C, 9). The dumps need to be mapped throughout the study area and analyzed for hazardous wastes before development planning. (*See*, Appendix C, 9). And if the sites do contain dumps then the project sponsor will need to conduct a hazardous wastes site assessment. (*See*, Appendix C, 9). How plant life on the site will be managed after construction is also a concern. The construction will allow for many invasive species to take root, especially weeds. (*See*, Appendix C, 9). Certain invasive weeds can cause severe building damage and the EIS should address the non-chemical management of such weeds prior to and following construction, to avoid creating a nuisance for landscaping and a possible hazard to building footings. (*See*, Appendix C, 9). Furthermore, the EIS mentioned the sites would emphasize “native species, but [the EIS failed to] say if the “native” species would be species of the Albany Pine Bush region and [if the plants would be] propagated from locally sourced material.” (Appendix C, 10). The “[p]lantings should be limited to species native to the region (e.g. Albany County).” (Appendix C, 10; *See also*, Appendix F, 9). Also, no purpose is given for the 200-foot buffer, or what threat it is protecting against. (Appendix F, 7). Until the threats the buffer is intended to protect against or benefits it will provide are clearly stated, it is not possible to judge whether the proposed composition and structure of vegetation or the width of the buffer are sufficient. (Appendix F, 7). Finally, “[t]he sandy Colonie soils are very permeable and groundwater is easily polluted, especially when there

is a gas station which is a risk for spills of gasoline and other motor vehicle fluids that could move through the permeable soils into the unconsolidated aquifer.” (Appendix C, 9). Until these issues are discussed and addressed in the EIS, the EIS will remain incomplete and in need of revision.

Conclusion

After the tree cutting incident by the project sponsor on March 26, which was a clear violation of SEQRA, and the missing wetland reports in the EIS, it becomes clear that the project sponsor is not concerned with protecting the unique Albany Pine Bush habitat. (See, N.Y. State Environmental Quality Review Law § 617.3(a) (McKinney 2020)). It is up to the Guilderland Planning Board to oversee that the oversights in the EIS do not go unchecked, and the public gets the protection it deserves. Save the Pine Bush asks that the Guilderland Planning Board thoughtfully considers the points made in this comment and asks for the project sponsor to remedy the oversights.

Respectfully submitted,

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(appearing pursuant to the Practice Order of Pace Environmental Litigation Clinic, Inc.)

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