STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THOMAS HART, LISA HART, KEVIN MCDONALD,
SARAH MCDONALD, 1667 WESTERN AVENUE, LLC
And RED-KAP SALES, INC.,

Petitioners,

DECISION, ORDER
And JUDGMENT
Index No. 906179-20
RJI No. 01-20-136152
(Lynch, J.)

-against-

TOWN OF GUILDERLAND, PLANNING BOARD
AND ZONING BOARD OF APPEALS OF GUILDERLAND,
PYRAMID MANAGEMENT GROUP, LLC, RAPP ROAD
DEVELOPMENT, LLC and CROSSGATES RELEASCO,
LLC,

Respondents.

INTRODUCTION

This is a combined Article 78/Declaratory Judgment proceeding/action challenging the SEQRA review of a project by the Town of Guilderland Planning Board.

The Project includes the development of three (3) sites.[1] It is described in the FEIS as follows, to wit:

> **"**The project sponsor plans to develop 222 apartments in five buildings with underground and surface parking on a 19 acre site on Rapp Road, immediately west of Crossgates Mall ("Site 1). The analysis for Site 1 includes the potential future development of 90 additional apartment units strictly for the purpose of examining all potential future cumulative impacts. In addition, a ±160,000 square feet retail store (Costco) and fueling facility is proposed on ±16 acres of land ("Site 2) located at the intersection of Western Avenue and Crossgates Mall Road. Finally, lands immediately adjacent to Site 2 totaling ±11.34 acres of land ("Site

[1] See NYSEF Doc. No. 75, DEIS AR-861.

> 3") is considered for development of a mixed-use project, including ±115,000 SF of retail, 50,000 SF of office space, and 48 apartments. While there are no development plans for Site 3, a potential development scenario was required by the Planning Board to be analyzed as part of the cumulative impact review."[2]

The northerly boundary line of Site 1 is near the Pine Bush Preserve and the Rapp Road Historic District (hereinafter referred to as the "RRHD"), and each are within the direct impact area of the project.

The record evidences that development of Site 1 and Site 2 represents a maximum build scenario, i.e. residential development including two 5-story buildings on Site 1, and a mass retailer (Costco) on Site 2. The record, however, is barren of any reduced scale alternatives to enable a comparative analysis to mitigate impact (i.e. residential buildings less than 55' high and retail development that is not considered mass in nature).

Prior to the filing of the subject application, the Town of Guilderland enacted the Transit-Oriented Development District (hereinafter "TOD") on June 5, 2018. The project is located within and subject to TOD.[3] Prior to its enactment, on May 14, 2018, the Albany County Planning Board (hereinafter ACPB) commented on TOD's enactment, noting a representative of the project sponsor herein made the following statement, to wit: "Crossgates has bought property in the surrounding area, and is hoping to build something that is first floor commercial, upper floors residential apartments/condos; perhaps a **civic component** as well…"[4] (emphasis added) That representation is most troubling, because the Costco Site plan was prepared as early as November 1, 2017 but apparently not disclosed. It is evident that Costco is not a civic

[2] NYSEF Doc. 79 AR-3993. See also NYSEF Doc. No. 75 @ AR-861 where DEIS provides: "This DEIS has included a potential development scenario of 90 apartment units for this area strictly for the purposes of analysis of all potential future cumulative impacts. Actual density limitations on this area will be determined by the Town of Guilderland if, and when, an actual development proposal is made."
[3] NYSEF Doc. No. 23.
[4] NYSEF doc No. 22, p. 2; NYSEF doc. No. 24.

component. On scrutiny, the record herein is replete with conclusory self-serving and equally troubling representations made by the project sponsor, without the support of empirical data, which, unfortunately, the Planning Board relied on. That is not the stuff that the SEQRA hard look test is made of.

The issue distills to whether the Planning Board complied with its procedural and substantive SEQRA obligations? It did not, on both counts. Let's begin with a look at the land.

THE LAND

Applicant submitted the November 2018 Vegetation Wildlife and Soil Conditions Report by B. Laing Associates as part of its application. [5] With respect to the Karner Blue Butterfly, an endangered species, it was reported:

> "The Albany Pine Bush Preserve Commission 2017 Management Plan, Table 9 lists this site as #57 and recommends **"Partial Protection**." This partial protection designation is further described as, "Partial 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."** The proposed 200' undeveloped area on the north side of the site is consistent with the Management Plan's recommendation for partial protection.[6] (emphasis added)

Site conditions were described as follows:

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[5] NYSEF Doc. No. 74, AR- 34 to 70; See also, DEIS starting at § 3.3.1.1 to 3.3.1.6.5 @ NYSEF Doc. No. 75 AR 905-915. The report, re-dated October 2019, is incorporated into the DEIS – see NYSEF Doc. No. 75 AR-1288. See NYSEF Doc. No. 79 AR 3787 @ 3796- Report of Erik Kiviat, PHD dated 4/12/20, who noted, "The Vegetation, Wildlife, and Soil Conditions Reports (Laing 2019a, b) briefly mentioned the wildlife survey methods used but did not describe the amount of effort (e.g., person-days for a particular technique), the dates of particular surveys, the references used for identification, or the names and qualifications of the surveyors. These would have a major effect on survey findings, potentially resulting in misidentifications as well as species that are present but overlooked. Appendices F and G did not even list their authors. **These are serious omissions that compromise the credibility of the Appendices and the DEIS that cited them."**

[6] NYSEF Doc. No. 74, AR- 47. The location of the offsite Karner Blue Hill preserve east of the project site is depicted at AR-46.

> "The subject site does not provide adequate or suitable habitat for the Karner blue butterfly. The butterfly relies on blue lupine, its host plant, for its lifecycle. Karner blue eggs are laid on the stems of blue lupine and the leaves of the blue lupine are consumed by the caterpillar. No blue lupine species were identified or were expected to occur on site within either the closed canopy woodland or the small, isolated field located on the southwestern portion of same. Blue lupine requires open sandy areas with open space and low shrubby to herbaceous growth. Please see Appendix A for photographs outlining habitats on site; none of the above criteria occur on site. IN addition to the lack of on-site suitable habitat for this species, the secondary successional woodland area (south of Gipp Road) separating the site from Gipp Road acts as a buffer area from the northern site boundary. This area is consistent with a recommendation in the 2017 Management Plan for partial protection of the site. Per the plan, the buffer will further protect the linkage between Crossgates "Butterfly" Hill and preserve lands to the west (see Sections 1.2 and 4.0).
>
> The project site's proposed **200-foot buffer area is currently a densely wooded, secondary growth vegetative community** with a significant amount of fill having disturbed the original soils. Also, for many decades prior to its being allowed to go "fallow," **the site (and buffer area) was a pig farm. Thus, in the modern period (i.e., the last approximately 100 years or more), the site was/has been highly disturbed and was not a Pine Bush habitat."**[7] (emphasis added)

With respect to the Karner Blue Butterfly and the Pine Bush ecosystem, the report concluded:

> "No suitable habitat exists on-site for the Karner blue butterfly, and no Karner blue butterflies were located on the site. Thus, there are no potential adverse impacts to the Karner blue butterflies as a result of the Project. Further, as noted above, partial protection of the subject site was recommended in the 2017 Management Plan to protect the linkage between Crossgates Hill and preserve lands to the east. The project is consistent with the goal and objectives of the management plan and no impacts to the Karner Blue Hill Preserve area nor its intended functions and purposes will occur."[8]

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[7] NYSEF Doc. 74, AR-49.
[8] NYSEF Doc. 74, AR-50.

The report was not limited to impact on the Karner Blue Butterfly, for it also determined no adverse impact on Frosted Elfin (threatened species), Northern Long Eared Bat, Worm Snake (special concern species), Eastern Spadefoot Toad, Butterflies and Moths.[9]

The Vegetation, Wildlife and Soil Conditions Report dated October 2019 evaluated Sites 2 and 3.[10] In relevant part, the report indicates "there is no Albany Pine Bush habitat on the Site" and "no potential adverse impacts to the Karner blue butterflies"[11] The report also concluded that there will not be any potential adverse impact on the Frosted Elfin, and "no anticipated potential adverse impacts on the northern long-eared bat," each a threatened species.[12] The report also examined a number of other species, including the worm snake, Eastern Spadefoot Toad, Eastern Hognose Snake, Butterflies and moths, and concluded no significant adverse impacts would result from the project.

TREE CLEARING

The project sponsor submitted a Tree-Clearing Report dated March 2020 for Site 2.[13] The clearing commenced on March 26, 2020 and was stopped pursuant to a Cease and Desist Order dated March 27, 2020.[14]The tree clearing was the subject of litigation in the United States District Court for the Northern District of New York in an action entitled Hart v. Town of Guilderland. By Decision and Order dated August 5, 2020, the Court dismissed the action (see 2020 U.S. Dist. LEXIS 139496). The Court found that the due process claims based on alleged

[9] NYSEF Doc. 74, AR-50-55. The DEIS incorporated this report and expanded same to include the eastern whip-poor-will, Cooper's hawk, and sharp-shinned hawk @ AR-914.
mobile species.
[10] NYSEF Doc. No. 59. Note, the report references a separate report for Site 1 -see Fn.4, p. 4. This report was incorporated into the DEIS – see NYSEF Doc. No. 75 AR-1336.
[11] NYSEF Doc. No. 59, p. 7, 19.
[12] NYSEF Doc. No. 59, p. 20, 21.

[13] NYSEF Doc. No. 81 AR- 5289.
[14] NYSEF Doc. No. 81 AR- 5316.

SEQRA failures was not ripe for the SEQRA review was ongoing and dismissed the action. The Court did not make a merits determination on the procedural and substantive SEQRA compliance issues, now squarely raised herein.

STATEMENT OF FACTS

By application dated November 15, 2018, Respondent Rapp Road Development, LLC applied to the Town Planning Board (hereinafter Planning Board) for subdivision approval to consolidate five (5) existing lots into a single lot with a total of 19.68 acres and to construct 222 residential units in two five-story buildings and three two-story buildings, with surface and indoor parking spaces, as well as 4,300 SF of commercial space.[15] Respondent filed a corresponding site plan application dated November 19, 2018.[16] This component of the project is referred to as Site 1.

The corresponding EAF dated November 19, 2018 identified the necessary governmental approvals, to wit: site plan and subdivision approval from the Planning board, Town Board approval for a sewer extension, SPDES permit from DEC, and financial approval from the Guilderland IDA.[17] The EAF described the site as forested land, and that 10.5 acres of the site would be physically disturbed. Following construction, the site would have 6.57 acres covered by roads, buildings, and impervious surfaces. The EAF identified the site as substantially contiguous to the RRHD.[18]

[15] Applicant claims, “Consistent with TOD regulations, two five-story mixed use buildings are proposed on Site allowing density to increase vertically and not horizontally, thus preserving more green space.” (NYSEF Doc. No. 75 AR – 886)
[16] See NYSEF Doc. No. 28, 74 and represented the project complied with Zoning Law and bulk requirements of the Ordinance (Doc No. 74, p. 15: AR -9).
[17] NYSEF doc. No. 29.
[18] NYSEF Doc. 29 EAF Part 1, E.3 (e).

By letter dated March 8, 2019, DEC advised that it had no objection to the Planning Board acting as Lead Agency.[19]

On March 21, 2019, the ACPB considered the Site 1 development at a public meeting.[20] Significant comments were made relative to traffic impact, including impact on the Rapp Road Historic District.[21] The ACPB staff recommended the project be disapproved as incompatible with the intent of the TOD rezone, noting the excess parking spaces.

POSITIVE DECLARATION

On August 14, 2019, the Planning Board issued a Positive Declaration and identified itself as the Lead Agency; copies were sent to was sent to the Town Board, **the Zoning Board of Appeals**, DOT, DEC, NYSOPRHP, City of Albany, the Albany County Planning Board and the ENB.[22] In so doing, the Planning Board announced that it would conduct a cumulative impact review of Site 1, along with Site 2 for the development of a 160,000 SF retail and fueling facility, and Site 3, with no identified project at that time.[23] Once the project was expanded to include Sites 2 and 3, no steps were taken to re-establish Lead Agency.

ALBANY PINE BUSH PRESERVE COMMISSION

Considering its proximity to the Pine Bush Preserve, the project garnered significant input from the Pine Bush Preserve Commission (hereinafter the "Commission").

On January 25, 2019, the Commission commented:[24]

> "The APB supports the **world's best remaining example of an inland pitch pine-scrub oak barrens**, 76 wildlife Species of

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[19] NYSEF Doc. No. 30, 74, AR 600-610.
[20] NYSEF Doc No. 33.
[21] NYSEF doc. No. 33, p. 4.
[22] NYSEF Doc. No. 36 and 38. Notably, the August 14, 2019 notice in the ENB included a project description of Site 1 only -see NYSEF Doc. No. 37. See also NYSEF Doc. 74, AR 658-660. There is nothing in the record to evidence that the Zoning Board of Appeals ever participated in the review process.
[23] NYSEF Doc. No. 38.
[24] NYSEF Doc. No. 76 AR-1628.

> Greatest Conservation Need (SGCN), including the federal and state endangered Karner blue butterfly (Kbb) and state threated frosted elfin butterfly, the largest inland sand dune system in eastern North America and has been designated a National Natural Landmark, a National Heritage Area Site, **a NYS Bird Conservation Area and a National Audubon Society Important Bird Area.** Coordinating the review of development proposals within the Albany Pine Bush Preserve (APBP) Study Area is therefore an essential part of achieving the vision for the APBP consistent with Environmental Conservation Law (ECL) Article 46, the 2017 Management Plan Update for the APBP (APBPC 2017…).” (emphasis added)

The Commission also noted,

> “A coordinated SEQR review should also provide the necessary hard look **at how potential changes in traffic volume and timing on Rapp Road, may affect the ability of rare wildlife to disperse…** When combined with potential direct impacts to wildlife habitat, the impact of increased traffic on Rapp Road may be significant and further reduce the APBPC's and NYSDEC's ability to successfully manage these rare wildlife populations…[and] **“the conceptual proposal for this project is likely to result in significant direct and indirect short and long-term adverse effects on the environment and the APBPC's ability to create and manage a viable preserve as described in ECL Article 46 and the 2017 Management Plan Update for the APBP, and the long term potential viability of the species that exist within it.**”[25]

On April 18, 2019, the Commission commented to the Albany County Planning Board that the project sponsor is,

> “Voluntarily conveying three parcels in the City of Albany for addition to the Albany Pine Bush Preserve. These total 8.4 +/- acres (tax parcels 52.02-1-16, 52.6-2-35 and 52.6-2-29.1) and are within Full Protection Area 62, identified in the 2010 Albany Pine Bush Management Plan and FEIS. Area 62 is recommended for addition to the preserve and is documented as supporting highly restorable pitch pine-scrub oak barrens and several rare wildlife species including the endangered Karner blue butterfly, NYS threatened frosted elfin

[25] NYSEF Doc. No. 76 AR-1630.

> butterfly, eastern hognose snake and several rare birds. Protecting Area 62, north of the Karner Blue Butterfly Preserve will improve the long-term conservation of the both the globally rare inland pine barrens ecosystem and these rare wildlife species."[26]

With respect to the 8.4-acre mitigation offer, DEC stated, "It should be noted, however, that one of the parcels is already partially encumbered as part of the defined Kbb Management Area."[27]

On October 7, 2019, the Commission issued a comment letter relative to the scope of a DEIS.[28]In relevant part, the Commission emphasized:

> "A SEQR coordinated review should include an evaluation of development and associated potential environmental impacts and mitigation alternatives including **reduced footprint** and no-build alternatives."[29] (emphasis added)

By letter dated March 10, 2020, the Commission indicated they were satisfied with the DEIS, except with respect to Alternative Road layout under options 1,2, and 3.[30] At the May 13, 2020 public hearing on the DEIS, Conservation Director Neil Gifford stated,

> "The proposed mitigation for impacts to that site in particular adding land in The Preserve and various things that the applicant has outlined that they intend to complete will offset any potentially significant negative impact on the commission's work to create a manage a viable preserve."[31]

The Commission's comments are relevant, but not determinative of the issues before the Court.

<u>RAPP ROAD HISTORIC DISTRICT ("RRHD")</u>

Apart from being contiguous to the Pine Bush Preserve, the north end of Site 1 is effectively contiguous to the RRHD, separated only by Gipp Road and a National Grid ROW.[32]

[26] NYSEF Doc No. 74 AR 592-593.
[27] NYSEF Doc. No. 74, AR 599.
[28] NYSEF Doc. No. 74, AR 586-591
[29] NYSEF Doc. No. 74 AR-589
[30] NYSEF Doc. No. 78 AR-3464-3467."
[31] NYSEF Doc. No. 78 AR-3368-3369.
[32] NYSEF Doc. No. 74 AR-46; NYSEF Doc No. 75 AR-1004.

The historical and cultural significance of RRHD cannot be overstated, and, in turn, cannot be ignored under the hard look test.

The closest home within the Rapp Road Historic District is 390 LF north of the northerly boundary of Site 1, and 985 LF from the northerly most 5-story building proposed for Site 1.[33] The site distances will be more fully discussed below, in context of the DEIS claim that, "a currently existing 200-foot wide perimeter buffer on the north side of the Project site will provide a **visual buffer** between the proposed development on Site 1 and these residences [i.e. 16 homes]."[34](emphasis added)

The Rapp Road Historical Association (hereinafter RRHA) objected to the project, citing traffic impact and impact on the character of the community, noting,

> "Many of the homes in the Historic District were built by hand as **southern style one-story bungalows** which resemble the rich history of the community in Shubuta, Mississippi."[35](emphasis added)

The RRHA also commented,

> "The **large-scale apartment** plan on Crossgate's property is within a commercially zoned area in Guilderland, however, it sits **directly next to and significantly affects existing small scale residentially** zoned areas in both Guilderland …and Albany."[36] (emphasis added)

[33] See DEIS Figure 13, NYSEF Doc. No. 75 AR-1004. The DEIS text claim that "the distance from the closest occupied house to the Site 1 is over 975 feet" (see NYSEF Doc. No. 75 AR-874) is belied by the 390LF distance depicted on Figure 13. The DEIS text claim that "the distance from the edge of the historic district to Site 1 is 820 feet" (see NYSEF Doc. No. 75 AR-874-875) is belied by the 390 LF distance of the closest within the district as depicted on Figure 13, i.e. the house within the district cannot be 390 LK from Site 1, if the district itself is 820 feet from Site 1. Considering the depiction of the historic district on Figure 12 @ AR-1005, it is manifest that the 820-foot site distance claim is error. The point made is that the DEIS text erroneously overstated the site distance between Site 1 and the historic district. The DEIS does not identify the distance between Site 1 and the remaining 15 homes within the district. The 200-foot buffer area is depicted in NYSEF Doc. No. 75 AR-1008.

[34] NYSEF Doc. No. 75 AR-874, 926.
[35] NYSEF doc. No. 74, AR 747.
[36] NYSEF Doc. No. 74 AR-745.

RRHA's objection to the project scale speaks directly to visual impact from the high-rise buildings that stand in sharp contrast to the historic character of the district.

By letter dated January 2, 2019, the Preservation League of NYS described the significance of the Rapp Road Historic District as follows:

> In 2016, the Preservation League listed the Rapp Road Community Historic District on our Seven to Save list. Seven to Save is an advocacy program that seeks to bring attention to endangered or threatened historic resources in New York State. **The Rapp Road Community Historic District is one of the most significant historic sites of the early 20th century for its association with the Great Migration movement. Rapp Road is imperative to New York State history and holds national significance.** The modest homes in the historic district are physical reminders of the story of 5 million African Americans who risked their lives to leave the Jim Crow laws of the South in search of a better life.
> Rapp Road represents freedom, equality and deeply significant family history that is still widely celebrated by people across the United States today. The district is constantly at risk because of its precarious position adjacent to major highways and commercial development. The once rural Pine Bush area that attracted the southern families to the north to build a new life for themselves continues to rapidly change day by day.
> Our concerns about the new development project just west and south of the historic district lie in its **exorbitant size** and proximity to the existing roadways and structures in the area…**The Rapp Road Historic District is a quiet, residential neighborhood that already feels the weight and impact of heavy area traffic**…The district is so close to Crossgates Mall and Crossgates Commons that there is very little indication left that this was once a rural, quiet area characterized by **modest shotgun-style homes** and open farmland. We feel that the proposed development plan of 222 new units, divided into five separate buildings that are two and **five stories each is simply too much for this historic area to support.**.."[37] (emphasis added)

[37] NYSEF Doc. no. 74, AR -655 to 666. See also, Preservation League Letter dated September 10, 2019 @ AR 702-704, where the League noted, "By **increasing large-scale urban development adjacent to this historic neighborhood, the quiet residential historic context of the area is further degraded."** (emphasis added)

By letter dated April 16, 2019, Habitat for Humanity Capital District also commented on the historical significance of the district, as follows:

> "In 1930, African American sharecroppers from Shubuta, Mississippi moved to Albany, NY in 1930 with their pastor Louis Parson in hopes of building a life free of debt and racial violence. They purchased a marshy 14-acre parcel for $400, started to farm, and used their earnings to build homes and expand their landholdings. As Sara DeWitt explained, "People would come with whatever little bit of money they had and little by little they built their houses and created this community." **Twelve of the original homes remain, the majority occupied by descendants of the original families**."[38] (emphasis added)

On May 13, 2019, the ACPB issued its recommendation to "Disapprove without prejudice" Site 1 development of 222 Residential Units, noting **"the proposed project does not adequately protect the character of historical and non-historical adjacent neighborhoods" (emphasis added)**.[39] The ACPB also stated, inter alia:

> "6. Two **5 story buildings**, with +/- 4,300 of ground floor commercial space are **antithetical to the community character that currently exist along Rapp Road now**. The degree of difference in height and density between the proposed development and existing residential development with frontage on Rapp Road is significant." (emphasis added)

By letter dated August 27, 2019, the NYS Museum issued a letter of historical significance as follows:

> "The **Promised Land** for an African American community residing in Albany, New York happens to be in the middle of the Pine Bush, on Rapp Road…In January 2003, the Rapp Road Community was **added to the National Register of Historic Districts, an honor that is rarely bestowed upon African American communities since so few remain in-tact for so many decades.** The Rapp Road Community's preservation is imperative

[38] NYSEF Doc. no. 74, AR -657.
[39] NYSEF Doc. No. 32. 74 AR- 606.

> since it serves as a testimony to the hard work, faith, and values of a group of Americans who looked for a new life — and found it in the Pine Bush of Albany, New York.[40]

Notwithstanding its uniqueness and clear historical and cultural significance of the RRHD, the Planning Board did not consider any alternative with reduced building height.

NEW YORK STATE PARKS, RECREATION AND HISTORIC PRESERVATION
(hereinafter "OPRHP")

Due to the historical and cultural significance of RRHD, OPRHP was heavily engaged is submitting input to the Planning Board.

By letter dated March 11, 2019, OPRHP initially determined "that the project, as submitted, will not impact cultural resources in or eligible for inclusion in the State and National Register of Historic Places."[41]

By letter dated April 3, 2019, OPRHP changed its view, and noted,

> "Per the regulations that guide the New York State Historic Preservation Law (NYPRHPL§14.09), an adverse impact on a listed historic property is found when a project is likely to cause the "introduction of **visual**, audible or atmospheric **elements which are out of character with the property or alter its setting."** (9 NYCRR Part 428.7(a)(3))" …[and]
>
> "**In speaking with community members, it has become clear that the relentless traffic associated with the steady commercial growth now surrounding the Rapp Road Historic District has reached a level of adverse impact.** The use of this intact and evocative section of Rapp Road by commuters and shoppers as a **short-cut is now having a profound, direct and negative impact on the serene rural qualities that the first settlers sought as their refuge from the city of Albany.** In **reevaluating** our comments to the Guilderland Planning Board, we now recommend that the potential cumulative traffic impacts from this newly proposed development be fully assessed. This evaluation should look at the expanded traffic counts anticipated with the proposed **high-density housing project**. We also strongly

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[40] NYSEF Doc No. 74, AR- 698.
[41] NYSEF Doc. 74, AR -597; NYSEF Doc. No. 78 AR-3493.

> recommend that the existing high volume of non-local residential traffic that floods this unique and historic neighborhood be addressed and dramatically reduced through all methods available."[42]

By letter dated April 15, 2019, OPRHP reiterated its concerns.[43]

By letter dated March 26, 2020, OPRHP commented,

> "In reviewing Section 6.0 of the DEIS we found that our letter of March 11, 2019 was referenced. The excerpted portion states that the Division found that the development at Site 1 "will not impact cultural resources in or eligible for inclusion in the State and National Registers of Historic places. "**Please be aware that this letter, which was included in the DEIS Appendix D, was superseded** by our letter dated April 11, 2019 to Mr. Feeney (attached)…"**Unfortunately, this significant update to our comments and potential impacts on historic resources associated with the Site 1 development were not referenced in the DEIS. The expansion of the original housing project to include development on Sites 2 and 3 adds to our previously identified concerns relating to traffic impacts on the Rapp Road Historic District.**[44] (emphasis added)

By letter dated August 12, 2020, OPRHP commented,

> "Each time we have determined that the proposed additional development and its associated traffic has the potential to have significant adverse effects upon the National Register Listed Rapp Road Historic District.
>
> The district was designated to the Nation's list of properties worthy of preservation in 2002…The homes and community buildings they erected, the seemingly random layout of the land and lots along the narrow and then rural Rapp Road remains evident today in the historic district. **This unchanged setting within the district remains a highly significant part of the historic integrity of this listed district."**[45] **(emphasis added)**

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[42] NYSEF Doc. No.76 AR-1640-1641.
[43] NYSEF Doc. No. 78 AR- 3491-3492.
[44] NYSEF Doc. No. 78 AR-3489
[45] NYSEF Doc. No. 80 AR 5219.

OPRHP clearly highlighted the importance of evaluating project impact on the RRHD, including but not limited to visual impact from the high-rise buildings.

SCOPING (6 NYCRR 617.8)

A draft project scope was prepared on August 14, 2019, and Final Scoping Document was completed October 23, 2019.[46] The Scope modified the Site 1 plan by identifying potential future development of an additional 90 units on the north end of the site.[47] The Scoping document also identified Site 3 as an 11.34-acre site with development potential of 115,000 SF of retail space, 50,000 SF office space and 48 multi-family apartments. The Scoping Document noted, "Considerations related to the Rapp Road Historic District, located north of the study area, will be addressed" and impact on "adjacent neighborhoods" would be considered.[48]

The Scoping Document contained the following provision:

> "The Guilderland Planning Board previously **circulated Part 1 of the Full EAF for the Project** to all identified involved/interested agencies and indicated its intent to act as lead agency. **No other involved agency objected to the Planning Board serving as lead agency and the Planning Board declared itself to be SEQRA lead agency for this Type I action on July 10, 2019** and indicated its intent to issue a positive declaration. The Planning Board is the appropriate entity to serve as lead agency for this action since it will be considering issuance of final site plan approval."[49]

Notably, as of July 10, 2019, EAF Part 1 identified the project as Site 1 development only and did not list the ZBA as an involved or interested agency since no approval was required from the ZBA at that time.

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[46] NYSEF Doc. No. 39; Final Scope. 75 AR- 825.
[47] NYSEF Doc. No. 39, p. 1. It is unclear what impact the 90-unit build-out would have on the claimed 2.5 acre buffer at the north end of the site.

[48] NYSEF Doc. No. 39, Section 3.4, p. 7. And 3.7, p. 9.
[49] NYSEF doc. No. 39, p. 2.; Doc No. 75 AR-826.

By letter dated September 15, 2019, Community Planning and Environmental Associates (CPEA) filed a comment letter relative to the Draft Scope.[50]With respect to the 5-story building height proposed for Site 1, CPEA made the following comment, to wit:

> "As the Proposed Action will allow for a higher building, a preliminary assessment of urban design and visual resources needs to be provided in the DEIS. Do **viewshed analysis** to identify locations where it will be visible from. **Use photo simulations to add to the description of community character.**
> Photo simulations should be done to show existing visual conditions and proposed conditions from a variety of locations. **Of especial importance to include in a photo simulation would be at least Gipp Road, Rapp Road**/Crossgates Mall Road, Paden Circle (Backyards), Route 20, and side streets off 20 (Westmere Terrace, Brooks Road, Carrp Terrace). As part of the scoping process the Planning Board should identify specific locations that should be included in a photo simulation and ask that a key map be developed to show where these locations are."[51]

Clearly, a viewshed analysis would have enabled the Planning Board to evaluate the visual impact from two (2) 5-story buildings on the RRHD. Incredibly, not only did the Planning Board fail to require a viewshed analysis, the viewshed analysis was not even mentioned in the DEIS, the FEIS, or the Findings Statement. Instead, the Board relied on the project sponsor's self-serving and conclusory claim that the residents of the RRHD would not even be able to see any of the project buildings due to the 200' wooded buffer at the north end of the site.

[50] NYSEF Doc. No. 74 AR-709 to 713.
[51] NYSEF Doc. No. 74 AR-711.

DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS)

On January 30, 2020, the applicant submitted a Draft Environmental Impact Statement dated February 2020 to the Town Planning Board.[52] By Resolution dated February 12, 2020, the Planning Board accepted the DEIS, and issued a Notice of Completion on February 20, 2020.[53]

The project impact on the RRHD is assessed in DEIS Section 3.4.1.2 to 3.4.1.3.2.[54] In wholly conclusory terms, the DEIS provides: "The **projects are not out of character with the area**, rather they are authorized pursuant to Town of Guilderland's TOD district." (emphasis added) Really? Since when do high-rise buildings comport with the character of historical one-story bungalows. The Court notes that compliance with the use and area requirements of an Ordinance is not the equivalent of taking a hard look at the project impact on the historical and cultural significance of the RRHD. The DEIS cites mitigation as follows: "the Project Sponsor proposes to convey five properties located in the Historic District to the District's not-for-profit entity, the Rapp Road Historical Association."[55]

DEIS §3.6.3.2 addresses Site 1 zoning character and visual impact as follows, to wit:

> "There are **no potential significant adverse environmental impacts relative to land use and zoning**, however the following measures have been incorporated into the proposed action. **To address potential visual** and noise **comments that were raised by residents to the south and west of the Site,** the project sponsor collaborated with residents residing to the south and west of Site 1,modified the site plan A new cul-de-sac will be constructed on tax map parcel number 52.09-4-43.2 (28 Westmere Terrace).
> • A **20-foot high berm along the southern boundary** of the Project site is proposed.
> • A double row of **12-15 foot high pine trees along the southern boundary of Site 1 across the top of the berm referenced above**.
> • The relocated cul-de-sac, berm and plantings shall be constructed

[52] NYSEF Doc. 75, AR 848.
[53] NYSEF Doc. No. 78 AR 3347-3350.
[54] NYSEF Doc No. 75 AR 925-928
[55] NYSEF Doc. No. 75 AR – 927, 1003. The Court notes that one cannot evaluate the integrity of the mitigation, without first determining the extent of the impact, which the DEIS fails to do.

> prior to construction taking place on the Site 1.
> • A double row of 8-10-feet tall pine trees along the northern boundary of tax map parcel number 52.09-4-43.1 (24-26 Westmere Terrace) owned by the applicant.
> • A **6-foot high solid panel vinyl fence in the following locations:**
> **a. along the top of the 20-foot berm** referenced in above at the southern boundary of Site 1…
> • The existing wood fence along the western boundary of tax map parcel number 52.10-1-25 will be replaced with a 6-feet high solid vinyl fence.
> • The Applicant will install parking lot light poles that are no higher than 12-feet in the southern most parking lot closest to Westmere Terrace. The exterior lighting will conform to Town Code section 280-28(C) (2), (3) and (4).
> • The Applicant will endeavor to not remove on-site mature trees near the southern property boundary unless necessary for building development and site improvements so that these existing mature trees may aid as a natural buffer to the Westmere Terrace neighborhood in addition to the substantial proposed landscaping shown on the Site Plan.
> • The berm along the western border will be planted with 12-15 foot tall double row of trees."[56]

In this section of the DEIS, visual impacts to the north of the site, i.e. to and from the Rapp Road Historical District, were not addressed.

DEIS §3.1.1.1 provides:

> "Soil investigations on-site determined that Site 1 is dominated by Colonie and Elnora, upland soils which have been heavily disturbed over time… Thus, it was determined that no Stafford or Granby soils were present on-site."[57]

DEIS §3.1.1.1 also provides:

> "Site 1 lacks pitch pines and blue lupine and contains few grassland, vegetative species. No suitable habitat exists on-site for the Karner blue butterfly and no Kamer blue butterflies were

[56] NYSEF Doc. No. 75 AR-957
[57] NYSEF Doc. No. 75 AR-895.

> located on the site. This result would be expected due to the closed, woodland canopy on the majority subject property."[58]

The DEIS does not address the comment of J. Curt Stager, Ph.D., Paul smith's College, that "Because the site in question lies on soils that are typical of the Albany Pine Bush, it currently has **potential for restoration** to classic pitch pine habitat that would be lost if the site is developed as proposed."[59] (emphasis added)

With respect to land use and zoning, DEIS §3.6.4 provides:

> "The proposed and potential developments analyzed for Sites 2 and 3 are **permitted uses in the TOD zone** subject to issuance of a **special use permit** by the Zoning Board of Appeals. Land uses in the immediate vicinity of the Sites are predominantly commercial in character. The adjacent area is dominated by commercial uses, including Crossgates Mall, and significant retail and office development along Washington Avenue Extension and U.S. Route 20. The Sites were part of a **former single-family residential area**. However, single family and two-family homes are no longer permitted in this location. See, Section 9, Figure 11 and Guilderland Zoning Law §280-18.1. **No additional mitigative measures are proposed since no adverse impacts are anticipated**."[60] (emphasis added)

Once again, the project sponsor's EIS assumes, incorrectly, that compliance with the use and area requirements of an Ordinance is the equivalent of finding no adverse impact, and no need for mitigation.

With respect to Site 1 Community Character (DEIS § 3.7.1), the DEIS does not even specifically identify the Rapp Road Historic District.[61] With respect to potential impacts, the DEIS § 3.7.1.2 provides:

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[58] NYSEF Doc. No. 75 AR-896.
[59] NYSEF Doc. No. 74 AR- 701. See also Report of Dr. Jeffrey Corbin who opined, The DEIS incorrectly writes off the woodlot as having no value, either in its present "green" state, or as a potential future site for restoration back to pine barren habitat" @ NYSEF Doc No. 79 AR-3785.
[60] NYSEF Doc. No. 75 AR- 958.
[61] NYSEF Doc no. 75, AR 958.

> "The five story buildings are situated in closer proximity to Rapp Road which is consistent with the TOD height design strategy for higher buildings to be situated farther away from residentially zoned properties."[62]

The DEIS fails to account for or evaluate its strategy to move the 5-story buildings closer to the Rapp Road Historic District will enhance visual impact on the RRHD.

With respect to Site 2 and 3 Community Character (DEIS § 3.7.2.1), the DEIS does not even mention the Westmere Terrace neighborhood.[63]The DEIS also fails to mention, let alone account, for the fact that Costco will not improve the environment for non-automobile-oriented modes of transportation, will not reduce the number of required parking spaces, and will not focus intense development away from existing residential neighborhoods, all in contravention of TOD. Moreover, the DEIS fails to account for the fact that the 13 houses proposed for demolition constituted an existing neighborhood when TOD was enacted, i.e. entitled to protection.

DEIS §4.0 identifies unavoidable adverse impacts.[64] The DEIS does not identify any adverse impacts attributable to the 5-story building height, nor any impact from the loss of 19.21 acres of land within the Primary Protection Acres of the Pine Bush Preserve. Moreover, the DEIS does not identify or address any adverse impact attributable to the mass retail nature of the Costco project.

DEIS §5.0 identifies "reasonable alternatives." With respect to Site 1, the DEIS provides "no alternate land uses may be feasibly examined."[65]This is a startling and false representation. Considering the public comment about the adverse impacts arising out of the high-rise buildings,

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[62] NYSEF Doc. No. 75 AR -958.
[63] NYSEF Doc. No. 75 AR 960-961
[64] NYSEF Doc. No. 75 AR—980.
[65] NYSEF Doc. No. 75 AR- 981.

the DEIS failure to consider reduced building height evidences a failure to take a hard look at the visual impact issue.

With respect to Site 2, the DEIS considered alternate buildout as office space but determined there was too much risk due to market conditions.[66] The DEIS provided a list of potential business operations but claimed they are not "within the area of expertise of the project sponsor" or "do not meet with the goals or objectives or ability of the project sponsor."

With respect to alternative scale, DEIS § 5.2 provided:

> "A retail center of a smaller or larger scale than the redevelopment at Site 2 is possible. However, this Project is **tenant driven** by a new use to this market area and specific demands for required space for their stores. Similarly, financing of a retail facility requires tenant commitments at a level anticipated for the proposed redevelopment Project at Site 2. **Therefore, the proposed Project is the minimum size that would meet the needs of the new use.**"[67] (emphasis added)

This is a blatant example of the project sponsor making an unsubstantiated claim that only a mass retailer may be economically developed on site. Absent empirical data, it is manifest that this is an entirely unreliable claim.

The DEIS indicated there were no suitable alternate locations for the residential component of the project, stating:

> "Moving the **five story buildings** and other buildings to this location would be immediately south of the established Kamer Blue Butterfly Hill located adjacent and immediately north of this parking area and **could have other unintentional adverse environmental consequences**."[68] (emphasis added)

[66] NYSEF Doc. No. 75 AR-983.
[67] NYSEF Doc. No. 75 AR-983.
[68] NYSEF Doc. No. 75 AR-985.

It is notable that the DEIS failed to address if there were any **unintentional adverse environmental consequences** of locating two 5-story buildings on Site 1, within the Partial Protection Area of the Pine Bush preserve. The DEIS did not identify or assess any alternate location for Costco.

DEIS 5.5 addressed the no action alternative as "contrary to the objective of the Project Sponsor" and would result in the loss of Costco.[69]The DEIS also provides:

> "The potential environmental and public benefits of the conveyance of 8.4 acres of land for the expansion of the Kamer Blue Hill Preserve and corridor area to the north would also not come to fruition."

Considering a significant part of the 8.4-acre site is already within the Kbb Management Area, and all of it is contiguous thereto, encumbering any development thereof, it begs the question of whether this is true mitigation for the loss of the 19 acre site for preserve lands.[70]

DEIS § 2.01 incorporated the Traffic Impact Study dated February 17, 2020 by Maser Consulting, as Appendix C.[71] The study concluded:

> "the proposed Rapp Road Residential (Site 1) and Costco (Site 2) developments will not

[69] NYSEF Doc. No. 75 AR-985.

[70] NYSEF Doc. No. 75 AR- 1008. See also Comment of Lynne Jackson, "The whole idea of mitigation. So the question is, setting aside, Pyramid Crossgates has land that is currently Pine Bush and **it's acting as Pine Bush habitat and they give it to the preserve whether they could actually develop that 8 acres of land in the City of Albany is a good question" –** NYSEF Doc. No. 78 AR-3396. See also Comment of Dr. Cynthia Lane, "The other thing is I think this is a really key point, **is the rational for justifying mitigating the loss of the 19.68 Acres in Site #1 with the protection of 8.4 acres to the north is lacking. There is really no stated reason why you could protect one area that's already habitat and then lose 19 acres"** (NYSEF Doc. No. 78 AR-3408). See also ornithological report of Naima Starkloff, Ph.D @NYSEF Doc. NO. 79 AR-3752 to 3753. See also, FEIS response: "The DEIS accurately reflects the amount of land that will be conveyed to the Pine Bush Commission. A small portion of the southern end of tax map no. 52.2-1-16 in the City of Albany was identified as being a portion of the Kamer Blue Hill Preserve corridor area as part of the 1994 Crossgates expansion. The property to be conveyed has frontage on and direct access to Rapp Road and Springsteen Road and is zoned R-1L (Single Family, Low Density)" (NYSEF Doc. No. 79 AR-4024).

[71] NYSDEF Doc No. 75 AR -1083-1112.

> result in a significant impact on the existing roadway network. Similar Levels of Service and delays will be experienced under Future 2022 No-Build and 2022 Future Build Conditions."

That study did not assess traffic impact on the character and historical significance of the Rapp Road Historic District. The traffic study also did not address the fact that the Costco project will draw customers from outside of Guilderland, as more fully discussed in the Economic and Fiscal Impact report by Camoin Associates, which noted the following, to wit:

> "There is not currently a Costco in the Town of Guilderland or in Albany County. The nearest Costco location is over an hour and a half east of Site 2 in West Springfield, MA. In the other directions, the nearest Costco locations are further away. To the north, there is a Costco located in Colchester, VT, which is 153 miles from Site 2. 108 miles to the South there is a Costco in Nanuet, NY and 147 miles to the west there is a Costco in Camillus, NY. The flags in the map to the right denote the location of these existing stores. Given the lack of Costco locations in the middle of this radius**, it is likely that the Costco to be developed at Site 2 will capture the market of Costco brand-loyal customers that exist between the site and halfway between these other locations, roughly a radius of a one-hour drive from Site 2.** This radius will capture existing Costco customers who drive to get to the other existing locations as well as customers who do not current shop at Costco but would choose to shop there if there was a store location located closer to their home."[72] (emphasis added)

Clearly, the record established that Costco is not a project which facilitates non-automobile-oriented modes of transportation. To the contrary, Costco facilitates automobile-oriented modes of transportation, in direct contravention of TOD.

[72] NYSEF Doc. No. 75 AR-1390, 1413.

The DEIS also included the Sound Level Measurements and Impact Review dated October 2019, prepared by B. Laing Associates.[73] With respect to noise impact from the 5-story buildings on Site, the focus was on Westmere Terrace, with no reference to the Rapp Road Historic District effectively contiguous to the north end of the site, to wit:

> "For the 5 story, eastern buildings, **the HVAC units will be on the northern side of the northern building** and on the southern side of the southern building. These will occur a minimum of 150 feet from the southern property line with residences on Westmere Terrace. The HVAC units will be grouped in banks of 4 (which adds some 9 dB(A) to the source level) and enclosed by a 6-foothigh fence which will have a decibel reduction effect of at least 9 dB(A). Further, a 2o-foot-high berm will be constructed between the buildings with their HVAC units and Westmere Terrace, which will add at least an additional 10 dB(A) attenuation. As a result of the project HVAC units, the **property line with Westmere Terrace properties will experience a 40 dB(A) sound level. This will be well below the Town's 50 dB(A)** sound level as specified in Section205-5."[74] (emphasis added)

The noise report makes no reference to the dB (A) at the north property line contiguous to the Rapp Road Historic District, i.e. the study failed to identify the sound impact on the Rapp Road Historic District.[75]

[73] NYSEF Doc No. 76 AR-1550.
[74] NYSEF Doc. No. 76 AR-1563.
[75] The noise study provided: The only two potentially sensitive receptors in the area are the McKownville Church and Westmere Elementary School. However, they are already subjected to higher sound levels due to their proximity to Western Avenue (as recorded above). There **are no other "sensitive" noise receptors** (e.g., hospitals, libraries, etc.) in the vicinity of the project sites. (AR-1557) Apparently, they did not consider the RRHD a sensitive noise receptor.

ADDITIONAL COMMENTS ON DEIS

A public hearing was held on the DEIS on May 13, 2020.[76]Many comments were in support of the project, with emphasis on job creation.[77] Here are a select few of the comments directed to project impacts, to wit:

1. Jonathan Kaplan's comment spoke to the impact on community character and business displacement as follows, to wit:

> "The town reinforces its position of this concept in 2018 by adopting its **Transit-Oriented Development District the TOD** which is **intended to protect nearby neighborhoods calm traffic and encourage nonautomobile modes of transportation along with reducing the number of parking spaces.** How could the same town that's been a year and half studying a problem area identifying and adopting measures to mitigate the problems in that area now permit a Costco to be placed right in the middle of that area. A **Costco will only aggravate the problem** identified in the Westmere Corridor Study and implies the intent of almost every aspect of the TOD..." [78](emphasis added)

2. Dr. Brewer also commented on business displacement.[79]

3. Petitioner, Lisa Hart, spoke at the May 13, 2020 meeting, including the following comments, to wit:

> "My husband and I have lived on Westmere Terrace for 20-plus years but being Guilderland residents for over 30. We raised our three children here. We've been happy to live on a **very quiet and tranquil street with wonderful neighbors** who look out for each other. With the proposed projects from Pyramid Corporation of apartments and townhouses and the Costco and gas station we will be **forever negatively impacted by these projects…The apartments will be approximately 55 feet in height with berms and trees that are planned on being put there. That's only thirty-three feet so the two upper floors will be able to see into**

[76] NYSEF Doc No. 78 AR-3351; NYSEF Doc. No. 82 AR-6414.
[77] Below I have only referenced a few comments but have reviewed all 90 comments made at the meeting.
[78] NYSEF Doc. No. 78 AR-3374.
[79] NYSEF Doc. No. 78 AR -3376

our neighbor's backyards and homes so they will be losing a major amount of privacy…Add on all these **thousands of cars where people are going to be coming in from other areas of our state and they'll be just glomming Costco.** So again, it's just going to make it **worse for us and our neighbors**…"[80]

4. Ginny Sussman made the following comment, to wit:

   "I live at 10 Westmere Terrace.I want the board to know that we oppose this project one hundred percent. When I moved to Westmere Terrace thirty-eight years ago it was a **quiet dead-end street** surrounded by the Pine Bush…From 1994 to the present, 26 years our street has remained a **quiet family-centered close-knit community**. **The TOD specifically requires any development to "protect viable residential neighborhoods from commercial and higher density residential development pressure". Every aspect of this proposal will directly impact this residential neighborhood**… **The quality of life on the street will never be the same**."[81] (emphasis added)

5. Christina Napierski commented:

   "I think these projects **will hurt** the neighborhoods in close proximity to Crossgates and the Costco **like Westmere Terrace and the historic Rapp Road neighborhood.** They will see their **home values decreased** and this will be negatively impacting on their daily lives including traffic, noise and pollution.[82] (emphasis added)

6. Iris Brody commented.

   I live at 9 Westmere Terrace…T**hen there is the undeniable invasion of privacy, which a five-story apartment building overlooking from the distance of a parking lot presents. There is nothing to screen the tenants on floor three, four and five from becoming observers on their terraces or the lighting from their apartments a permanent nighttime feature. In a short, there is no mitigation for the ruination to a way of life that this project will exact upon Westmere Terrace**…The Westmere Corridor Study encouraged
   establishment of **TOD zoning to promote development that would and I quote "help protect viable residential**

[80] NYSEF Doc. NO. 78 AR- 3392-3393.
[81] NYSEF Doc. NO. 78 AR- 3394.
[82] NYSEF Doc. No. 78 AR-3398.

> **neighborhoods from commercial and higher density residential developmental pressure". This project is the antithesis of that recommendation." (emphasis added)**

By letter dated May 13, 2020, the Commissioner of Planning and Development of the City of Albany made the following comment relative to traffic design alternatives, to wit:

> "ALTERNATIVE 9 I RAPP ROAD REALIGNMENT
> This option would be strongly opposed by the City of Albany for the following reasons:
> • **Greatly increases traffic through the Rapp Road Community Historic District from Costco and Crossgates Mall** , and potentially the proposed housing development, with no improvements to a section of roadway that cannot accommodate any increase."[83]

By letter dated May 26, 2020, NYS DOT wrote, "In summary, the Department is not satisfied with the Traffic Impact Study and mitigation measures provided."[84]

The ecological report of Dr. Cynthia Lane dated April 15, 2020 was filed to comment on the DEIS and raised serious questions as to the integrity of the DEIS.[85]Dr. Lane commented:

> "The reports prepared by B Laing Associates (2019a, 2019b, Appendix F and G in the DEIS), are incomplete and have numerous inaccuracies. This renders the DEIS incomplete and insufficient since the DEIS is built upon the findings of these reports. The key issues identified include:
> 1) The methods section is incomplete and/or incorrect methods may have been employed.
> 2) Incomplete vegetation survey.
> 3) **Traffic impacts on wildlife are insufficiently addressed and mitigated.**
> **4) Night lighting impacts on insects need to be examined.**
> 5) Heat island and cumulative effects need further study.
> 6) Climate change impacts not considered."(emphasis added)

[83] NYSEF Doc. No. 78 AR-3479.
[84] NYSEF Doc. No. 78 AR-3484
[85] NYSEF doc. No. 79 AR-3766-3776.

The Court notes that the DEIS also did not address the high-rise building night lighting visual impacts on the RRHD.

The ornithological report of Naima Starkloff, Ph.D. dated May 15, 2020 was filed to comment on the DEIS, and also raised serious questions as to the integrity of the DEIS.[86] Of note, the report identified the impact that the high rise buildings could have on bird death due to collisions with building windows, and recommended "mitigation to limit avian mortality as a result of window collisions."[87]

FINAL ENVIRONMENTAL IMPACT STATEMENT

The Project Sponsor submitted the FEIS dated July 29, 2020.[88] A few technical changes were made to the DEIS, but the scope of the environmental analysis remained constant in the FEIS.[89]

With respect to the multiple comments on the project's impact on the Pine Bush ecosystem, and its multiple species, the response remained the same, to wit:

> "The only involvement of Albany Pine Bush habitat included with the project will be preservation in perpetuity of 8.4 acres within Full Protection Areas 62 and 79. At present, Areas 62 and 79 occur north of Crossgates Mall and the Karner Blue Butterfly habitat represented by the KBB hill and the east-west National Grid power line right-of-way. These areas are currently owned by the Applicant. They will be transferred to ownership by the Albany Pine Bush Commission for preservation and management as Albany Pine Bush in perpetuity."[90]

With respect to light pollution, the FEIS includes the following response:

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[86] NYSEF Doc. No. 78 AR-3447 to NYSEF Doc No. 79 AR-3753; NYSEF Doc. No. 82 AR-6044 to 6050.
[87] NYSEF Doc. No. 82 AR-6050.
[88] NYSEF Doc. No. 79 AR-3980.
[89] NYSEF Doc. No. 79 AR-3990.
[90] NYSEF Doc. No. 79 AR-3994.

> "Measures employed for Site 1, **to mitigate lighting and noise** include the construction of berms with landscaping and 6-foot-high fencing…In addition:
>
> …• The Albany Pine Bush located north of Gipp Road will be **protected from lighting** on Site 1 by the 200 foot wide buffer remaining on the Site's northern end, just south of Gipp Road. **Trees in this buffer were measured at 50 feet high. This is approximately the height of the proposed residential buildings**. The same woodland 200 foot buffer already casts some shade north of Gipp Road."[91]

This begs the question of how the light emanating from a 55' high building will be buffered from the RRHD by the 200'-wide wooded area at the north end of Site 1. As more fully appears below, the claimed effectiveness of the buffer lacks any empirical support.

In a remarkable statement relative to the impact of the carbon intensity of fuels, the Project Sponsor claimed,

> "the project will encourage sustainable public transportation by improving public transit" [and]… Similarly, with respect to the Costco, patrons presently travel approximately 87 miles to Springfield, MA, the location of the nearest Costco. The project may result in a net reduction of vehicle miles travelled (VMT) and therefore a net reduction in greenhouse gas emissions."[92]

Clearly, the record does not sustain any claim that Costco customers will utilize public transportation, nor is there any evidence to demonstrate the subject project will dilute traffic to Springfield.

With respect to a comment that the DEIS fails to adequately address project impact on "people's homes, neighborhoods", the response is that "the DEIS contains significant analysis of potential impacts on community character and historic resources".[93] It does not!

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[91] NYSEF Doc. No. 79 AR-4015.

[92] NYSEF Doc. No. 79 AR-4021.

[93] NYSEF doc. No. 79 AR-4024.

The FEIS is replete with comments and responses relative to traffic impact. Of note is the response to traffic impact on the Rapp Road Historic District, to wit:

> "The DEIS considered eight (8) alternatives that would change the travel pattern of vehicular traffic that would eliminate or reduce vehicle trips through the historic district on upper Rapp Road within Albany. Should Albany continue to object to severing through-traffic on Rapp Road, Alternative 9 is an option that would also work to effectively minimize to the extent practicable traffic through the historic district, thereby accomplishing a similar result and a potentially feasible alternative. Alternative 9 proposes to re-route a portion of Rapp Road south of Gipp Road to directly connect with the Crossgates Mall ring road. The re-routing of traffic to the Crossgates Mall ring road will encourage vehicles to use Crossgates Mall Road to access Western Avenue and Washington Avenue Extension." [94]

The Court notes that both the Rapp Road Historical Association and the City of Albany objected to Alternative 9.[95]

The project sponsor did concede it is subject to TOD restrictions.[96]The project sponsor then misrepresented TOD as follows:

> Comment 3: Albany County Planning Board Recommendation dated May 4, 2020. Large warehouse stores are typically found in auto-oriented commercial zones that rely on highway infrastructure and are not found in TOD zones that promote walkability.
>
> Response 3: The proposed use is a retail use which is authorized under the Town's Zoning Law General Business uses. A pedestrian and bicycle path plan was included in the DEIS which promotes walkability and use of the CDTA transit center. **Costco only represents a portion of the mixed-use development proposed."**.[97]

It is true that Costco is part of the project, not the whole project. It is equally true, however, that Costco is the largest traffic generator of the project and the project sponsor's attempt to downplay its significance is unpersuasive. Moreover, the FEIS fails to acknowledge, let alone

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[94] NYSEF Doc. No. 79 AR - 4083
[95] NYSEF Doc. No. 80 AR-5229.
[96] NYSEF Doc. No. 79 AR – 4096.
[97] NYSEF Doc. No. 79 AR- 4098.

account for the fact that Costco is simply not "**improving the environment for non-automobile-oriented modes of transportation"** as required by TOD. To the contrary, the record evidences that Costco is an automobile-oriented business, and its operations run afoul of TOD.

The FEIS provided:

> Comment 4: The Albany County Planning Board issued a recommendation pursuant to General Municipal Law 239-m regarding Costco. **Majority of customers visiting warehouse stores drive in. The closest Costco store is two hours away. Conceivable customers will be driving from many miles away to buy in bulk and leave. In this situation customers will typically not travel by bicycles or bus.**
>
> Response 4: **Commenter's opinion is not supported by the record**. It is not atypical for customers to travel by bicycle or public transportation, particularly with the CDTA improvements and additional new services that currently exist in the area to and from the proposed Costco. Those residents that live near the project site will continue to walk, bicycle and take public transportation. The new purple BRT line will expand and enhance the public transportation options opportunities to access the site. **The pedestrian and transit enhancements proposed will serve employees at the Costco facility in addition to nearby residents**.[98] (emphasis added)

This is a remarkably misleading response, considering the findings of the Economic and Fiscal Impact report by Camoin Associates that "**it is likely that the Costco to be developed at Site 2 will capture the market of Costco brand-loyal customers that exist between the site and halfway between these other locations, roughly a radius of a one-hour drive from Site 2."**

With respect to comments made by the Westmere Terrace neighborhood, the FEIS responded:

> "The proposed action including the uses, and area restrictions (building heights, setbacks and area and bulk requirements)

[98] NYSEF Doc. No. 79 AR-4098.

> comply with the Town's code… The proposed Site 2 and Site 3 developments are consistent with the character of the area and the TOD zoning. Area setbacks, greenspace and building height requirements have been met.[99]

Saying the project meets code, doesn't make it so. Costco requires a special use permit. It is misleading to affirmatively state it complies with the Town Code. Rather, Costco must first undergo scrutiny by the ZBA to make that determination. The FEIS continues to ignore the TOD provision "**that [development] adequately protects nearby residential neighborhoods…** encourages **more compact development**, traffic-calming measures, better access management, **improving the environment for non-automobile-oriented modes of transportation, reducing the number of required parking spaces**, supporting mixed-use buildings and pedestrian linkages, and **focusing intense development away from existing residential neighborhoods**…"

With respect to the comment "Elimination of a residential neighborhood [i.e. Gabriel Terrace, Lawton Terrace, Rielton Court, and Tiernan Court], is contrary to the TOD zone, the FEIS had the following response: "Single family dwellings are not a permitted use in the TOD"[100] To the contrary, the Gabriel Terrace neighborhood is permitted as a nonconforming use, and TOD is designed to protect it as an existing neighborhood.

The FEIS has the following comment and response relative to five-story building height:

> "Although density and even **high-rise buildings** make sense and are appropriate in an urban setting, five story buildings are out of place in the Pine Bush. **They will be a visual intrusion to the Preserve and for miles around.**
>
> Response11: The proposed development for Site 1 meets the building height, density, lot coverage and setback requirements outlined in the TOD. The proposed buildings are located a

[99] NYSEF Doc. No. 79 AR-4100.
[100] NYSEF Doc. No. 79 AR-4105.

> significant distance from any Pine Bush Preserve property **and will be visually buffered by greenspace**."[101] (emphasis added)

The FEIS also concludes,

> "The nearest occupied home in the historic district is approximately 700 feet away from the closest structure on site 1 [i.e. 5-story building] and separated be a 200 foot wide 2.5 +/- acre densely vegetated buffer, Gipp Road and Pine Lane. **No structure on Site 1 will be visible from any occupied home in the historic district.** The proposed Costco site is over 1/3 of a mile away from the nearest occupied home in the district and will have no visual impact on the district."[102] (emphasis added)

Citing the bulk regulations of the Ordinance and proffering an unsubstantiated claim that the buildings will not be visible, is not an effective substitute for a viewshed analysis.

The Planning Board voted to accept the FEIS on July 29, 2020.[103] On August 26, 2020, the Planning board voted to adopt the Findings Statement.[104]The Findings Statement was filed with the Town Clerk on August 28, 2020.[105]

In the Findings Statement, the Planning Board found:

> "that the **project, as proposed**, is approvable and minimizes potential environmental impacts to the maximum extent practicable and will provide the necessary balance between the protection of the environment and the need to accommodate social and economic considerations. Having considered the complete EIS record, including the DEIS and FEIS, and having considered the preceding written facts and conclusions relied upon to meet the requirements of 6 NYCRR Part 617.11, this Findings Statement certifies that: 1. The requirements of 6 NYCRR Part 617 have been met; and; 2. Consistent with social, economic and other essential

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[101] NYSEF Doc. No. 79 AR- 4099.

[102] NYSEF Doc. No. 79 AR- 4110. See AR-4115, where the project sponsor wrote, "The proposed action does not encroach upon or threaten a historic neighborhood or an ecologically sensitive ecosystem. **None of the proposed development will be visible from any occupied structure within the historic district."** (emphasis added) There is no viewshed analysis in the record to support this conclusion.

[103] NYSEF Doc. No. 80 AR-5217-5218; NYSEF Doc. No. 82 AR-6416.

[104] NYSEF Doc. No. 82 AR-6417. The court notes that the meeting lasted 8 minutes and 33 seconds, and there was no substantive discussion of the content of the Findings Statement, other than a reference that traffic alternatives were being left open.

[105] NYSEF Doc. No. 64; NYSEF Doc. No. 80 AR-5231 to NYSEF Doc. No. 81 AR-5288.

> considerations **from among the reasonable alternatives available**, the action is the one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable. Copies of the DEIS and FEIS."[106] (emphasis added)

The Findings Statement adopts the findings in the EIS's. There are, however, several factors which necessitate further comment.

The Planning Board found,

> "b. The **Rapp Road Historic District is located north of Site 1 by approximately 1,300 feet** and across the municipal boundary between the Town of Guilderland and the City of Albany. Rapp Road is classified as a Minor Arterial Highway connecting US Route 20/Western Avenue with Washington Avenue Extension.
>
> c. As described in the DEIS, in 2002, the Historic District was created as a result of the Great Migration (1927-1963) and has remained intact with descendants of the original homeowners for 90 years. The families who migrated predominately from Shubuta, Mississippi to Albany, New York built their Rapp Road homes, mostly by hand, and relied on scrap materials from deteriorating buildings throughout the City of Albany. The buildings were built as **small southern-style homes**, similar in style to the former Shubuta, Mississippi homes.
> d. The existing 200-foot wide perimeter buffer on the north side of the Site 1 is densely vegetated with mature trees. This buffer will be maintained and continue to provide a **visual buffer** between the proposed development on Site 1 and the residences in the Historic District."[107] (emphasis added)

[106] NYSEF Doc. No. 81 AR-5288.

[107] NYSEF Doc. No. 80 AR-5239.

The finding that the RRHD is 1,300 feet north of Site 1 is a stunning error, for it is wholly belied by the record demonstration that the closest home within the district is 390 feet north of Site 1.[108] This factual error undermines the claimed effectiveness of the 200-foot wide buffer.

The Findings statement addressed all the traffic alternatives that were presented, with a focus on Alternative 9 to mitigate traffic impact on the RRHD.[109]

The Findings Statement addressed the TOD zoning district, finding that all uses otherwise permitted in a General Business District (GB) or Multiple Residence District (MR) are either a permitted use subject to site plan approval or a special use.[110] The Planning Board determined:

> "The **Costco Project** on Site 2 is a **permitted** use within the TOD, **subject to issuance of a Special Use Permit** by the Town Zoning Board of Appeals. Permitted uses in this area include "regional shopping centers" and "General Retail" and "automobile service centers, including gas service stations.
> f. New York statutes define a **special use permit as the authorization of a particular land use that is permitted in a zoning law subject to specific requirements that are imposed to assure that the proposed use is in harmony with the immediate neighborhood and will not adversely affect the surrounding properties. It is well established law in New York that the inclusion of special use permit uses in a zoning code is tantamount to a legislative finding that the permitted use is in harmony with and compatible to existing adjacent land uses, and will not adversely affect those uses.**
> g. **The overall proposed action includes numerous features consistent with the Town's land use plans.**
> h. The **proposed action** includes all uses specifically listed as **permitted uses** in the TOD and meets all area and bulk requirements…
> n. The **proposed action consists of permitted uses** within the TOD and incorporates numerous access and circulation design features to facilitate the goals and objective of the TOD legislation,

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[108] See aerial photo with distance measurements on DEIS Figure 13 @ NYSEF doc. No. 75 AR-1004.
[109] NYSEF Doc. No. 80 AR-5241.
[110] NYSEF Doc. No. 80 AR-5250 – NYSEF Doc No. 81 AR-5253.

> particularly §280-18.1. G.1 of the Town of Guilderland Town Code."[111]

Subparagraphs (h) and (n) conflate the permitted use and special use.

Finding "The overall proposed action includes numerous features consistent with the Town's land use plans," the Board failed to account for the fact that the project flies directly in the face of the TOD requirement that existing neighborhoods be protected, that intense development be kept away from those neighborhoods, and that development which utilizes non-automobile modes of transportation be encouraged. (Zoning Ordinance §280-18.1).

The Findings addressed character of the community/neighborhood.[112]In this section, the RRHD is not even mentioned. This is a stunning flaw and evidences the Board's failure to take a hard look at the project impacts on the historical character of the RRHD. The Board also made this finding:

> g. Site 1 parking lot lighting will be located and screened without intruding upon the environment or adjacent residential properties. Based on the proximity of the Site 1 to the Albany Pine Bush Preserve, sodium vapor lighting is proposed so as to reduce the attraction of such lighting on insects. **The lighting will be at least 200 feet south of the established Albany Pine Bush corridor located north of Gipp Road and will conform to the 0.2 foot-candle limit set in the Town Code. The existing trees and vegetation on the 2.4 acre buffer area, just south of Gipp Road, will not be disturbed and will further serve to provide mitigation for Site 1 impacts to existing residential uses north of Gipp Road, in the City of Albany**.[113] (emphasis added)

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[111] NYSEF DOC. NO. 80 AR-5250-NYSEF Doc No. 81 AR-5251-5253.
[112] NYSEF Doc. 81 AR-5254-5258.
[113] NYSEF Doc. No. 81 AR-5256.

While the Board addressed parking lot lighting, it failed to address the lighting impact of two (2) high-rise apartment buildings. Once again the 2.4 acre buffer was referenced as an impact mitigation, yet no viewshed analysis was implemented to confirm that the visual impact of the high-rise apartment buildings will be mitigated to preserve the integrity of the RRHD, and/or the privacy of the Westmere Terrace residents.

The Findings addressed noise impact, as follows:

> "A Sound Level Measurements and Impact Review Report was prepared by B. Laing Associates to evaluate sound levels that may occur as a result of the Project. The report examined the data at four monitoring locations to establish an existing base line for sound in the area. Existing vehicular traffic was identified as the primary source of sound. The report examines the results of Maser Engineering Traffic Impact Study and the anticipated additional traffic that will result from the Project and its potential impact on noise. In addition, the mitigative measures employed for Site 1, including the 20 foot high berm and 6 foot high fencing at the north end of Westmere Terrace will mitigate noise impacts to the maximum extent practicable. The report concluded: "The analysis revealed that no significant noise impact will occur as a result of the proposed action."[114]

The Findings fail to account for the fact that the noise report did not evaluate noise impact at the north end of the site, i.e. noise impact on the RRHD.

The Findings Statement addressed alternatives as follows.[115]The Board made the following findings,

> 9. c. The applicant notes that land and associated development costs for the Project Sites are extremely high and require a use which generates significant revenue in order to make a reasonable return on the project sponsor's investment.
> d. Site 1 is located west of Rapp Road and, pursuant to the TOD, **no alternative residential or commercial land uses are permitted** west of Rapp Road…

[114] NYSEF Doc. No. 81 AR-5264.
[115] NYSEF Doc. No. 81 AR 5269 to 5271.

> j. With respect to Site 2, and assuming that a retail facility of a reasonable and appropriate use of the site**,** the record also includes an **analysis** exploring the development of larger as well as smaller facilities. A retail facility of a smaller scale than that proposed, while in theory possible, is not economically feasible and does not meet the goals or objectives of the project sponsor. Land costs and development costs preclude this option. Commitments to the potential tenant requires specific floor areas which do not allow the size of the facility to be reduced. **The Applicant advises that the high development costs, and existing site constraints make a smaller retail facility infeasible**."[116] (emphasis added)

Finding that there is no alternative (i.e. including reduced scale) use for Site 1 is patently false. With respect to reduced scale retail use, no "analysis" is in the record.

The Findings Statement addressed traffic.[117]The Board adopted alternative No. 9 to mitigate traffic impact on the RRHD, with a caveat that another alternative may be selected if an agreement can be reached with the City of Albany.[118]While the traffic studies are encyclopedic, the Findings Statement fails to address the record demonstration that Costco will draw customers from a 1-hour radius of the site (i.e. the antithesis of a project that will encourage non-automobile-oriented modes of transportation). The issuance and filing of the Findings Statement completed the SEQRA review.

On October 28, 2020, the Planning Board adopted a Site Plan Approval Findings Statement and issued Site Plan Application Approval for the Site 1 development.[119] The Site 1 Findings Statement effectively adopted the August 28, 2020 Findings Statement.

Petitioner MacDonald submitted the following comment on October 28, 2020, to wit:

> "Being one of the closest homes to this project (29 Westmere Terrace), **our major concern is the actual height of the 5 story buildings.** Even with the renderings provided by the applicant, we

[116] NYSEF Doc. No. 81 AR 5270 to 5271.
[117] NYSEF Doc. No. 81 AR- 5279-5287
[118] NYSEF Doc. No. 81 AR- 5283 – 5284.
[119] NYSEF Doc. No 114 AR-25; NYSEF Doc. No. 122 AR-6419-6448.

> still fear that the top levels of these apartments will have full view of our homes and yards. This will without question hamper our **rights to privacy and quality of life here along Westmere Terrace**. I'm not sure who thought that a 150 foot set back was enough space from an existing residential neighborhood to erect a 5-story building, but we highly suggest that it should be **revisited** before approval of this project…would you want this next to your home"[120](emphasis added)

Clearly, the Board did not revisit the issue of the 5-story height, for it approved the Findings Statement and Site Plan that night, October 28, 2020.

The following are excerpts relative to the 5-story buildings from the Site 1 Findings Statement, to wit:

> "The **five story buildings** are situated in closer proximity to Rapp Road and comply with the additional setback requirements from the Westmere Terrace and Paden Circle residential districts and is consistent with the TOD building height and setback requirements."[121]

> "c. The proposed project does not adequately protect the character of historical and non-historical adjacent neighborhoods.
> Town Response: All buildings proposed meet the required setbacks in the TOD District. The 5 story buildings are at least 150' away from the nearest residential district, and the two-story buildings are at the closest 124' away and at the farthest 236' from the property line. The nearest occupied home in the historic district is approximately 700 feet away from the closest proposed structure on the site and separated by a **200-foot wide 2.5+/- acre densely vegetated buffer,** Gipp Road and Pine Lane. **No structure on the site will be visible from any occupied home in the historic district.** Implementation of traffic Alternative 9 will reduce traffic travelling through the City of Albany's Rapp Road Historic District."[122] (emphasis added)

> "Town Response: Comment noted. As discussed previously, no structure on the site will be visible from any occupied home in the historic district."[123]

[120] NYSEF doc. No. 122 AR-6477.
[121] Site 1 Findings Statement p. 9; NYSEF Doc. No. 122 AR-6427.
[122] Site 1 Findings Statement p. 16; NYSEF Doc. No. 122 AR-6434
[123] Site 1 Findings Statement p. 17; NYSEF Doc. No. 122 AR-6435

> "ACPB Recommendation 6. Two 5 story buildings, with +/- 3,900 of ground floor commercial space are **antithetical** to the community character that currently exist along Rapp Road now. The degree of difference in height and density between the proposed development and existing residential development with frontage on Rapp Road is significant.
> Town Response: **The uses proposed as part of the Rapp Road project are permitted uses under the Town's TOD zoning district at this site and complies with all area and bulk requirements in the TOD district.**"[124](emphasis added)

Notably, the Planning Board, once again, failed to address the need for a viewshed analysis to assess the visual impact, instead relying upon its continuing theme that the use comports with the Ordinance. It's unsubstantiated conclusion that no project building will be visible from the RRHD lacks record support. Moreover, the Board utterly failed to require a reduced building scale alternative to conduct a comparative analysis to mitigate impact.

With respect to impact on the RRHD, the Board's response that the buildings are permitted uses and comply with the area and bulk requirements speaks volumes as a seismic failure to know and appreciate the historical and cultural significance of the RRHD. It also evidences the Board's fundamental failure to take a hard look at the visual impact of the 5-story buildings on the RRHD.

SPECIAL USE PERMIT APPLICATION[125]

On May 4, 2020, the ACPB issued its GML 239-M recommendation to the Zoning Board, relative to the pending special use permit application for the Costco development on Site 2.[126]In fine, the ACPB opined that the proposed use did not comport with the provision of TOD, it "ignores the community character" [i.e. Rapp Road Historic District] and "it does not protect

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[124] Site 1 Findings Statement p. 19; NYSEF Doc. No. 122 AR-6437.
[125] NYSEF Doc. No. 79 AR- 3987 – FEIS 2.4
[126] NYSEF Doc. 62: NYSEF Doc. No. 78 AR- 3453; NYSEF Doc. No. 81 AR-5293.

nearby neighborhoods, it does not create neighborhoods, it is not pedestrian friendly, it does not support bus transit services and does not emphasize alternate modes of non-automobile-oriented modes of transportation,"[127]

TOWN OF GUILDERLAND ZONING AND LAND USE LAW

The relevant provisions of the Town of Guilderland Zoning and Land Use Law (hereinafter "Zoning Ordinance**")** are set forth below. Whether the project comports with the TOD is at issue.

Zoning Ordinance §280-18.1 The TOD, provides, inter alia:

> A. Purpose. The Transit-Oriented Development (TOD) District is designed to implement the recommendations of the Westmere Corridor Study (study) by using an **overlay district** to support and incentivize development **that adequately protects nearby residential neighborhoods** and utilizes resources within and near the TOD's boundary, including regional shopping, entertainment, and employment centers, a robust transit service with high ridership and proposed enhancements, direct vehicle access to the interstate highway system, and a nearby local business community. The TOD District encourages **more compact development**, traffic-calming measures, better access management, **improving the environment for non-automobile-oriented modes of transportation, reducing the number of required parking spaces**, supporting mixed-use buildings and pedestrian linkages, and **focusing intense development away from existing residential neighborhoods**…

Here, residential buildings are subject to site plan approval by the Planning Board (Ordinance §280-18.1 (C), with a maximum density of 16 units/buildable land and a maximum height of 55 feet (Ordinance §280-18.1 (F) (3)). While single-family and two-family dwellings are prohibited (Ordinance §280-18.1 (E), existing residential neighborhoods are to be protected. Zoning

[127] NYSEF Doc. 62, p. 2-5.

Ordinance §280-18.1 and §280-21 effectively provide that general Retail and Automobile Service Stations are authorized by special use permit.

Zoning Ordinance § 280-47 Planning Board Membership and Powers, provides:

> "Pursuant to NYS Town Law § 271, the Planning Board shall consist of seven members appointed by the Town Board, which shall designate the Chairman and may appoint an alternate member thereof, in such manner and for such terms as provided in NYS Town Law. The Planning Board shall have authority established for it by statute and this chapter and may establish necessary rules and regulations.

Town Law § 271 is the underlying enabling authority to create a Planning Board in the first instance but does not give the Planning Board authority to grant special use permits or to interpret the Ordinance.

Town Law §274-a enables the Town Board to give site plan approval authority to the Planning board. Here. Zoning Ordinance § 280-53 provides, inter alia:

> "Purpose. The purpose of site plan approval review is to determine that a proposed development is in **compliance with the objectives of this chapter,** creates no unhealthful or unsafe conditions, and does not adversely impact adjacent land uses or the health, safety or general welfare of the community. (emphasis added)

The balance of § 280-53 speaks to physical site characteristics and dimensional requirements for site development, including a requirement that the sketch plan shall include "Existing zoning classification of the property and all adjacent properties, and restrictions on land use of the site, including deed restrictions or easements." Zoning Ordinance § 280-53 does not speak to the authority for the underlying use in the first instance, nor give the Planning Board any authority to interpret the use provisions of the Ordinance.

Zoning Ordinance § 280-48 Zoning Board of Appeals Membership and Powers, provides:

> "Pursuant to NYS Town Law § 267, the Zoning Board of Appeals shall consist of five members appointed by the Town Board, which shall designate the Chairman and may appoint an alternate member thereof, in such manner and for such terms as provided in NYS Town Law. The Zoning Board shall have authority established for it by statute and this chapter and may establish necessary rules and regulations."

Town Law §274-b (2) enables the Town Board to give special use permit approval authority to the Planning board or other administrative body. Here, such authority is vested in the Zoning Board of Appeals.

Zoning Ordinance § 280-52 Special Use Permit Review, provides:

> "Purpose. The purpose of special use permit review is to consider the proper placement of uses in the community and zoning district that are only suitable in such locations under appropriate conditions. Special uses require consideration of factors so that they are properly located **consistent with the objectives of this chapter and are not detrimental to neighboring properties**.
>
> B. Authorization. The special uses listed in this chapter may be permitted, enlarged or altered upon authorization by the Zoning Board. An application for a special use permit shall be made on the application form provided by the Town…" (emphasis added)

Pursuant to § 280-52 (C), the Planning Board is responsible to file a report relative to any proposed site plan with the Zoning Board. If the report is negative, "a special use permit shall not be granted by the Zoning Board except upon affirmative vote of at least four of its members." One of the factors that the Zoning Board must consider is whether "**the use shall conform in all other respects with the provisions of this chapter and be consistent with the Comprehensive Plan."(**see Ordinance § 280-52 (E) (1) (f)). (emphasis added)

Zoning Ordinance § 280-54 (A) Interpretation, provides:

> "The Zoning Board shall have the power to determine an interpretation of any provision of this chapter."

Pursuant to the Ordinance, the Zoning Board, not the Planning Board, is the administrative body with authority to interpret the Ordinance and to issue a special use permit.

STATEMENT OF LAW

The Court will first address the legal defenses interposed by Respondents. Next, the Court will determine the procedural SEQRA compliance issue. Last, the Court will determine the substantive SEQRA compliance issue.

STATUTE OF LIMITATIONS/JUSTICIABLE ISSUE/RIPENESS

Respondents argue the proceeding is not ripe for review but is also barred by the statute of limitations.

It is manifest that this Court does not have jurisdiction to issue an advisory opinion (see In Re Workmen's Compensation Fund, 224 N.Y. 13 [1918] [Cardozo, J.] where the Court held, "The function of the courts is to determine controversies between litigants…They do not give advisory opinions"). CPLR 3001 requires a justiciable issue.

Here, the Findings Statement, encompassed a cumulative review of three (3) sites, for which no specific project was identified for Site 3. The issue distills to whether the statute of limitations begins to run when the Findings Statement was filed, and thus ripe for review, or whether the limitations period begins to run when a specific project approval is granted, i.e. site plan approval for Site 1 and Special Use Permit for Site 2, and thus not ripe for review until a specific project approval is granted. The answer is; it depends.

In Matter of Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306 [2006], the SEQRA review underlying a challenged zone change was at issue. The Court held,

> "An article 78 proceeding brought to review a determination by a body or officer "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). We have held that this time period begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548, 847 NE2d 1166, 814 NYS2d 592 [2006]; *see also* *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, 832 NE2d 38, 799 NYS2d 182 [2005]). The issue to be decided here is whether petitioners suffered "concrete injury" from the alleged SEQRA violations on April 28, 2004, when the SEQRA process culminated in the issuing of a findings statement, as the Appellate Division held; or on May 13, 2004, when the Town Board enacted the rezoning, as Supreme Court held. We conclude that no concrete injury was inflicted until the rezoning was enacted, and that therefore petitioners' SEQRA claims were timely brought.
>
> In *Matter of Save the Pine Bush v City of Albany* (70 NY2d 193, 200, 512 NE2d 526, 518 NYS2d 943 [1987]), we held "that a **proceeding alleging SEQRA violations in the enactment of legislation must be commenced within four months of the date of enactment of the ordinance**." The Town Planning Board argues that *Save the Pine Bush* is "no longer good law," and that under *Stop-The-Barge v Cahill* (1 NY3d 218, 803 NE2d 361, 771 NYS2d 40 [2003]) the statute runs from the end of the SEQRA process. *Stop-The-Barge*, however, is distinguishable.
>
> In that case, the petitioners challenged a conditioned negative declaration (CND) issued under SEQRA by the Department of Environmental Protection (DEP), determining that a project for the installation of a power generator on a barge would have no significant adverse impact on the environment. After DEP's issuance of the CND completed the SEQRA process, the proponent of the project obtained an air permit from another agency. We held that a challenge to DEP's determination of no adverse impact must be brought within four months of the CND, not the later issuance of the air permit.

> Stop-The-Barge does not control this case because it did not involve "the enactment of legislation," as Save the Pine Bush did and this case does; **and also because in *Stop-The-Barge* the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged.** Any injury to the petitioner that DEP inflicted was concrete when the CND was issued. It did not depend on the future passage of legislation, and it was not subject to review or corrective action by DEP.
>
> Here, petitioners suffered no concrete injury until the Town Board approved the rezoning. Until that happened, their injury was only contingent; they would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition, or by persuading one more member of the Town Board to vote their way.
>
> We thus reaffirm the holding of *Save the Pine Bush*, and make clear that an article 78 proceeding brought to annul a zoning change may be commenced within four months of the time the change is adopted. **This does not mean that, in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains...** (emphasis added)

This case is distinguishable from Matter of Eadie v. Town Bd. of Town of N. Greenbush because it does not involve a zone change, i.e. a legislative act.

Here, the proposed apartment building project for Site 1 is a principally permitted use, subject to site plan approval to assure compliance with bulk and area requirements, as well as engineering detail. Absent a significant project change necessitating a Supplemental EIS (6 NYCRR 617.9 (a) (7), SEQRA review was final. There is no specific project for Site 3 and the SEQRA review thereof was final. The Findings Statement effectively charted a final course of action for project approval, and the injury was both real and immediate (Stop the Barge v. Cahill, 1 N.Y. 3d 218, 223 [2003]; Matter of Cannon Point Preserv. Corp. v. City of N.Y., 183 A.D. 3d 416, 417 [1st Dept. 2020]; c.f. Matter of Guido v. Town of Ulster Bd., 74 A.D. 3d 1536 [3d Dept.

2010] which involved the SEQRA challenge to a single project requiring a discretionary special use permit and site plan approval, not, as here, a cumulative review of three (3) sites, for which one site did not identify any specific project.)

The filing of the Findings Statement on August 28, 2020 completed the SEQRA cumulative review, commencing the 4-month limitations period (see CPLR §217 (1) and 304 (a). This proceeding was timely commenced on September 25, 2020 and is ripe for review.

The Planning Board granted Site Plan approval on October 28, 2020, commencing a thirty-day limitations period pursuant to Town Law § 274-a (11). The amended Petition challenging the October 28, 2020 site plan approval was timely filed November 10, 2020.

Frankly, whether the SEQRA challenge to the Findings Statement was ripe for review upon the commencement of this proceeding or when the amended Petition was filed to include a challenge to the October 28, 2020 is now academic. The SEQRA challenge is ripe for review and timely.

STANDING

Petitioners Hart and MacDonald are residents of the Westmere Terrace neighborhood which is contiguous to Site 1. That neighborhood is to be protected under TOD, and their injury claim is within the zone of interest to be protected. The record establishes that the 5-story buildings on site 1 will have a visual impact affecting Petitioner's quality of life, including but not limited to loss of privacy. With respect to site 2, the record establishes visual and noise impacts which also directly affect Petitioners quality of life. Petitioners clearly have established that they will suffer direct injury, distinct from the public at large community, and have standing to bring this proceeding (see In the Matter of Town of Waterford et al v. NYSDEC, 2020 N.Y. Slip Op. 06180 [3d Dept. 2020] where the court found visual impact form the challenged landfill

presented distinct environmental harm; Matter of Cade v. Stapf, 91 A.D. 3d 1229, 1230-1231 [3d Dept. 2012], where Court held Petitioner had standing to assert SEQRA challenge based in part on the visual impact of an water tower 400 feet from his home; Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297 [2009]; Soc'y of Plastics Indus v. County of Suffolk, 77 N.Y. 2d 761, 774 [1991]; c.f. In the Matter of Kenneth Hohman v. Town of Poestenkill et al, 179 A.D.3d 1172 [3d Dept. 2020]).

Since Petitioners Hart and MacDonald clearly have standing, the Court need not address whether the remaining Petitioners have standing (see Matter of Wooster v. Queen City Landing, LLC, 150 A.D. 3d 1689, 1690 [4th Dept. 2017]).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

In Aldrich v. Pattison, 107 A.D. 2d 258, 267-268 [2d Dept. 1985], the Court addressed this defense in context of a SEQRA challenge, holding,

> "Applying the doctrine of exhaustion of administrative remedies, courts have refused to review a determination on environmental matters based upon evidence or arguments not presented during the proceeding before the lead agency." (emphasis added)

The foregoing notwithstanding, in Jackson v. New York State Urban Dev. Corp., 67 N.Y. 2d 400, 427 [1986], the Court held,

> "**No one raised the issue** during the lengthy hearing and comment periods before the FEIS was issued. Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS, yet failed to mention any impact on archaeology. **While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners' silence cannot be overlooked in determining whether the agency's failure to discuss an issue in the FEIS was reasonable**.

> The EIS process is designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing a FEIS and approving a project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has **the potential for turning cooperation into ambush**." (emphasis added)

The dispositive issues addressed in herein were, in fact, raised in the underlying administrative proceedings before the Planning Board, and are subject to judicial review.

MOOTNESS, WAIVER, LACHES, OR ESTOPPEL

To the extent that Respondents raised these defenses, they are frivolous and summarily rejected.

Clearly, this project is at its early approval stage and construction has not commenced, let alone completed; accordingly, the issues are not moot (c.f. Save the Pine Bush, Inc. v. Albany, 141 A.D. 2d 949, 951-952 [3d Dept. 1988] where the Court held,

> "Although the SEQRA compliance issue as to SEFCU and MAEOPI is **moot due to the completion of the SEFCU project and substantial completion of the MAEOPI complex during pendency of the present litigation** and the failure of petitioners to obtain the appropriate injunctive relief *(see,* *Matter of Serafin v Wallace*, 117 AD2d 926), we address the merits since "a question of general interest and substantial **public importance** is present and is likely to recur if not judicially resolved" *(* *Matter of Friends of Pine Bush v Planning Bd.*, 86 AD2d 246, 248, *affd on opn below* 59 NY2d 849; *see,* *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715) and, therefore, this controversy falls within an **exception to the mootness doctrine**." (emphasis added)

As to laches, Petitioners timely commenced this proceeding and sought a preliminary injunction; moreover, construction has not begun; accordingly, the claim is not barred by laches (c.f. Save the Pine Bush v. City Eng'r of Albany, 220 A.D. 2d 871, 872 [3d Dept. 1995]).

The waiver and estoppel defenses are fundamentally flawed. In Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 7 N.Y.3d 96, 104-107 [2006], the Court defined the elements of the defenses of waiver and estoppel as follows:

> "Contractual rights may be **waived** if they are knowingly, voluntarily and intentionally abandoned. Such abandonment "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage". However, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection. Generally, the existence of an intent to forgo such a right is a question of fact…
>
> "**estoppel** is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought".
>
> Thus, in the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, "an essential element of estoppel [i]s lacking".

Here, Petitioners have consistently objected to the project. There is nothing in the record to evidence justifiable reliance on any claimed fraud or misleading conduct. The Petitioners have not waived anything, nor are they estopped from pursuing the claims raised herein.

SEQRA

As a preliminary matter, the purpose of SEQRA is set forth in ECL § 8-0101, and 6 NYCRR 617.1 (b) (c) and (d) which provides:

> "**(b)** In adopting SEQR, it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they

> have an obligation to protect the environment for the use and enjoyment of this and all future generations.
>
> **(c)** The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies **at the earliest possible time.** To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.
>
> **(d)** It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should be given appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities. Accordingly, it is the intention of this Part that a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies. It is not the intention of SEQR that environmental factors be the sole consideration in decision-making." (emphasis added)

Here, the project involves physical construction activities that require municipal approvals including Town Board divesting street title, Planning Board site plan approval, and ZBA issuance of a special use permit for Costco. Accordingly, the project is an action necessitating SEQRA compliance (6 NYCRR § 617.2 (b) (1) (iii)), and the Town Board, Planning Board, and Zoning Board of Appeals (ZBA) are each an "involved agency" (6 NYCRR § 617.2 (t)).

Classification, as well as a determination if the action involves more than one agency, is a threshold determination in any SEQRA review (6 NYCRR 617.6 (a) (1) (iii) (iv)). Next, compliance with the SEQRA coordinated review process (6 NYCRR § 617.6 (b) (3)) is at issue. Last, the sufficiency of the EIS and Findings Statement (6 NYCRR § 617.9 and 617.11) is at issue.

SEQRA ACTION CLASSIFICATION

Here, there is no dispute that the action is Type I for it involves the construction of more than 200 residential units, involves the physical alteration of more than 10 acres of land, proposes more than 500 parking spaces for Costco, and proposes a commercial facility of more than 100,000 square feet of gross floor area (6 NYCRR § 617.4 (b) (5) (iii) and (6) (i), (iii), and (v)).

LEAD AGENCY COORDINATED REVIEW

In Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y. 2d 674, 680 [1988], the Court held,

> "Under SEQRA and its implementing regulations, a lead agency is defined as the governmental entity "**principally responsible** for carrying out, funding or approving" the proposed action (ECL 8-0111 [6]; 6 NYCRR 617.2 [v]). It is this agency that must initially determine whether a proposed action may have a significant effect on the environment (ECL 8-0109 [2], [4]; 6 NYCRR 617.2 [v])". (emphasis added)

Here, the Planning Board has authority to review the site plan for all three (3) sites. The Zoning Board is solely responsible for the issuance of a special use permit for Costco, albeit the Planning Board serves in an advisory capacity relative thereto. Moreover, the Zoning Board has authority to interpret the Ordinance (e.g. whether Costco comports with TOD). It is arguable that either entity is "principally responsible" to conduct the SEQRA review for the project. As such, the lead agency determination was required to undergo the coordinated review process.

Determination of Lead Agency status, in TYPE 1 actions involving more than one involved agency, must follow the coordinated review process under SEQRA regulation 617.6 (b) (3), which provides, inter alia:

"(3) Coordinated review.

(i) When an agency proposes to directly undertake, fund or approve a **Type I action** or an Unlisted action undergoing coordinated review with other involved agencies, it **must**, as soon as possible, **transmit** Part 1 of the EAF completed by the project sponsor, **or a draft EIS** and a copy of any application it has received **to all involved agencies and notify them that a lead agency must be agreed upon within 30 calendar days of the date the EAF or draft EIS was transmitted to them…**

(iii) If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then **no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action.** The determination of significance issued by the lead agency following coordinated review is **binding** on all other involved agencies.

Here, it is undisputed that the Planning Board failed to coordinate Lead Agency determination with the Zoning Board of Appeals.[128] Does that procedural failure vitiate the SEQRA review process, including the Findings Statement, as well as Site Plan approval for Site 1? Based on this record, it does.

It is well-settled that a lead agency may not delegate its SEQRA review responsibilities (see Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y. 2d 674 [1988]; Save Pine Bush v. Planning Bd of Albany, 96 A.D. 2d 986 [3d Dept. 1983] Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D. 2d 484 [2d Dept. 1982]). It necessarily follows that an involved agency may not usurp the coordinated lead agency review process, by foreclosing other involved agencies from lead agency consideration. In turn, coordinated review does not

[128] In the DEIS, Applicant wrote, "On July 10, 2019, following a coordinated review, the Planning Board made a determination to act as SEQRA Lead Agency" (See DEIS p. 34, NYSEF Doc. No. 75 AR-893). On the next page of the DEIS, the Applicant identified the ZBA and Town Board as involved agencies. The DEIS fails to mention that the ZBA was not included in the Lead Agency coordination process. In fine, the DEIS is misleading with respect to its claim that lead agency was determined on a coordinated basis.

contemplate that an involved agency seeking lead agency status may mislead other involved agencies as to the project scope.

In King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 347-348 [1996], the Court imposed a strict compliance standard on SEQRA procedures, holding,

> "More than 20 years ago the Legislature enacted SEQRA, and by so doing formally recognized that environmental concerns should take their proper place alongside economic interests in the land use decision-making processes of State and local agencies (*see,* ECL 8-0103 [7]; 6 NYCRR 617.1 [d]). To insure that this laudable goal would be accomplished, the Legislature created an elaborate **procedural framework** requiring parties to consider the environmental ramifications of their actions "[a]s early as possible" (ECL 8-0109 [4]) and to "the fullest extent possible" (ECL 8-0103 [6]). The mandate that agencies implement SEQRA's procedural mechanisms to the "fullest extent possible" reflects the Legislature's view that **the substance of SEQRA cannot be achieved without its procedure**, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that **strict, not substantial, compliance is required.**
>
> Nor is strict compliance with SEQRA a meaningless hurdle. Rather, the **requirement of strict compliance** and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment." (emphasis added)

; Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 185 A.D.3d 1306, 1313 [3d Dept. 2020] where the Court held, "SEQRA provides clear, if extensive, **procedures for compliance thereto, and strict compliance is mandatory**" ; see also, In Matter of Village of Ballston Spa v. City of Saratoga Springs, 163 A.D. 3d 1220, 1222 [3d Dept. 2018], the Court held, "A lead agency must **strictly** comply with SEQRA's mandates" (see N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 348 [2003]"; Rye Town/King Civic Asso.

v. Rye, 82 A.D.2d 474, 480-481 [2nd Dept. 1981] where the Court held "We read these provisions to mandate **literal compliance with SEQRA**; substantial compliance with the "spirit" of the act does not constitute adherence to its policies "to the fullest extent possible"; Schenectady Chemicals, Inc. v. Flacke, 83 A.D.2d 460, 463 [3d Dept. 1981]). (emphasis added)

Notwithstanding the strict procedural compliance standard, and the mandatory language of 6 NYCRR § 617.6 (b) (3) (i), the consequences of a procedural error in the lead agency designation process, necessitates a further determination of whether the failure was inconsequential or substantive.

In Mtr. of Cade v. Stapf, 91 A.D. 3d 1229, 1231-1232 [3d Dept. 2012])[129], as the project evolved, the Planning Board acted as Lead Agency to review a cluster subdivision application. The Planning Board completed a full EIS review, issued its findings statement, and granted approval, conditioned on the issuance of a height variance for a water tower to service the subdivision. Initially, the project utilized a ground level water system, which did not necessitate any variance. Once the elevated tower was proposed, however, a height variance from the Zoning Board was required. Rejecting the argument that failure to include the Zoning Board in the lead agency coordinated review process necessitated vacatur of the SEQRA review, the Court held,

> "When the need for a variance eventually became apparent, the Planning Board fully considered the impact of the height of the water tower and, in our view, **the failure to include the ZBA as an involved agency under these circumstances was inconsequential for purposes of the Planning Board's SEQRA review** (*see Matter of Scenic Hudson v Town of Fishkill Town Bd.*, 266 AD2d 462, 464, 699 NYS2d 70 [1999], *lv denied* 94 NY2d 761, 728 NE2d 338, 707 NYS2d 142 [2000]; *Matter of King v County of Monroe*, 255 AD2d 1003, 1004, 679 NYS2d 779 [1998], *lv denied* 93 NY2d 801, 710 NE2d 272, 687 NYS2d 625 [1999]). Furthermore, because the water tower was included in the Planning

[129] Respondent was the Planning Board Chair of the Town of New Scotland, which abuts the Town of Guilderland.

> Board's full SEQRA review, the review was not impermissibly segmented (*see* *Matter of Scenic Hudson v Town of Fishkill Town Bd.*, 266 AD2d at 464). Accordingly, **we find no procedural error requiring reversal.**" (emphasis added)

; see also Matter of Arthur M. v. Town of Germantown, 184 A.D. 3d 983,986 [3d Dept. 2020], where Court held "a planning board…will not be required to refer a matter to a zoning board for a **superfluous interpretation** of an unambiguous provision contained in the zoning code"; c.f. Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D. 3d 1767, 1768 [4th Dept. 2016] where the Court held, "We also reject petitioner's contention that the Town Board's failure to notify the Planning Board of the Town of Wellsville before assuming lead agency status requires nullification of the negative declaration. Under the circumstances of **this case**, any failure of the Town Board in that regard was **"inconsequential"** (emphasis added); King v. County of Monroe, 255 A.D. 2d 1003, 1004 [4th Dept. 1998], where the Court held, "the failure to designate the Town as an involved agency was **inconsequential** and does not require annulment of the negative declaration or subsequent action taken by the County with respect to the project." (emphasis added)).

Was the failure to include the ZBA in the lead agency coordination review process in this case inconsequential? Using Webster's dictionary as a guide, inconsequential means "irrelevant, unimportant" (see People v. Aragon, 28 N.Y. 3d 125, 128 [2016]; People v. Ocasio, 28 N.Y. 3d 178, 181 [2016]). This Court notes that in Cade v. Stampf, the Zoning Board's approval authority rested solely with the dimensional requirements of a permitted use, not jurisdiction to approve the use in the first instance. Here, as distinguished, the Zoning Board has sole jurisdiction to issue a special use permit to authorize the Costco use, including an interpretation of the Ordinance to determine if the use comports with its provisions. Thus, failure to include the

Zoning Board in the lead agency designation process was not inconsequential. To the contrary, considering the strained reasoning offered by the Planning Board that Costco is compatible with TOD, it is manifest that the Zoning Board's conduct of a SEQRA review would likely have been meaningful (see Ferraari v. Pennfield Planning, 181 A.D. 2d 149, 151-152 [4th Dept. 1992], where the Court held,

> "Respondent does not contest petitioners' claim that the DEC was an " 'involved agency' " within the meaning of 6 NYCRR 617.2 (t). Respondent failed to notify the DEC of the subject application during the lead agency designation process or before the negative declaration was issued. As a result, respondent was not properly designated the lead agency and its negative declaration is invalid *(see, Matter of City of Schenectady v Flacke,* 100 AD2d 349, *lv denied* 63 NY2d 603).
>
> This is not a case where the failure to notify an involved agency was inconsequential *(cf., Matter of Congdon v Washington County,* 130 AD2d 27, 31, *lv denied* 70 NY2d 610). A myriad of environmental concerns were raised at the outset, and the participation of the State agency having the greatest expertise regarding those issues clearly would have been **meaningful**." (emphasis added)

; see also, State of New York v. Town of Horicon, 46 A.D.3d 1287, 1289-1290 [3d Dept. 2007], where the Court held,

> "Here, there can be no serious dispute that DEC, as the land manager for the underlying forest preserve, plainly qualifies as an "involved agency" (6 NYCRR 617.2 [s]). Despite receiving letters in opposition to the various local laws proposed in 1999 and 2002, it is clear that respondents made **no effort whatsoever to either confer with DEC on this matter, designate a lead agency or otherwise undertake a coordinated review process.** To the extent that respondents argue that they were merely opening Town roads to ATV use and/or that DEC was free to more forcefully interject itself into the Town's legislative process, we agree with petitioners that such claims are both disingenuous and, ultimately, unavailing. Hence, **inasmuch as strict compliance with SEQRA's procedural requirements is mandated** (*see Matter of*

> King v Saratoga County Bd. of Supervisors, 89 NY2d 341, 347, 675 NE2d 1185, 653 NYS2d 233 [1996]), respondents' failures in this regard compel annulment of Local Law No. 2 in its entirety”

; Munash v. Town Bd. of E. Hampton, 297 A.D.2d 345, 347 [2d Dept. 2002]; Schenectady v. Flacke, 100 A.D.2d 349, 355 [3d Dept. 1984] where the Court held,

> “Since we have concluded that ECL 15-1501 (subd 1) is applicable to the facts herein, DEC should have been involved in the designation process. Accordingly, it follows that Schenectady and Niskayuna acted **improperly in designating the City of Schenectady Water Department as the lead agency**. **Since the improper agency was designated, we need not reach the issue of whether the Schenectady Water Department properly performed its function in making its negative declaration.”)** (emphasis added)

Here, the record evidences that the Zoning Board of Appeals was not engaged in the EIS review process; notably, the Findings Statement makes no reference to any comments made by the Zoning Board of Appeals.[130] The Zoning Board was simply left out of the process.

This Court recognizes that the special use permit application had not yet been filed as of the date that the Planning Board assumed Lead Agency status and issued a positive declaration to consider the cumulative impact of all three sites.[131] Identifying involved agencies does not, however, necessitate that an application be filed. An involved agency is defined as follows, to wit:

> “**Involved agency means an agency that has jurisdiction by law to** fund, **approve** or directly undertake an action. **If an agency will ultimately make a discretionary decision to** fund, approve or undertake an action, **then it is an involved agency notwithstanding that it has not received an application for**

[130] See NYSEF doc. No. 64, Findings Statement Part I ¶ 24.
[131] The Special Use Permit application was filed in advance of the acceptance of the DEIS.

> **funding or approval at the time the SEQR process is commenced.** The lead agency is also an involved agency."[132]

The Planning Board knew that Costco was the project for site 2, and that a special use permit was necessary to authorize the use in the first instance. The Planning Board certainly knew that it did not have jurisdiction to authorize the Costco use. The Planning Board had every opportunity to re-establish lead agency pursuant to 6 NYCRR 617.6 (b) (5) (6) (i) (b) and (ii) but failed to do so. This was a blatant, material procedural failure which undermined the integrity of the EIS review, necessitating vacatur of the EIS acceptance process and the issuance of the corresponding Findings Statements.

The Court notes that Respondent ZBA is unified with the remaining Respondents in opposition to the relief sought by Petitioners. The ZBA's after the fact acceptance of the Planning Board's actions does not excuse, nor render inconsequential, the SEQRA violation. Considering the ZBA's complete lack of involvement in the EIS review process, it's claimed ratification thereof, "would relegate SEQRA's mandates for environmental protection to an **afterthought** in contravention of the express legislative purposes" (emphasis added) (see Chinese Staff & Worker's Ass'n v. New York, 68 N.Y. 2d 359, 369 [1986]; Tri-County Taxpayers Asso. v. Town Bd. of Queensbury, 55 N.Y.2d 41 [1982]).

EIS REVIEW PROCESS

The Planning Board issued a positive declaration, completed a full EIS review, and issued a Findings Statement (6 NYCRR §617.7 (a) (1), 617.9 and 617.11). Implementing a full EIS review does not, however, end the inquiry. Rather, the process begs the question of whether the Lead Agency complied with the SEQRA hard look review standard.

[132] See 6 NYCRR § 617.2 (t).

In Matter of Keil v. Greenway Heritage Conservancy for the Hudson Riv. Val., Inc., 184 A.D. 3d 1048, 1049-1052, [3d Dept. 2020], the Court found the Lead Agency met its SEQRA obligations, holding,

> "In compliance with the substantive and procedural requirements of SEQRA and all applicable regulations (*see* ECL 8-0109 [2]; 6 NYCRR parts 617-618)**, a lead agency must prepare a DEIS and FEIS to analyze the environmental impact and any unavoidable adverse environmental effects of the project under review, as well as alternatives to the proposed action, including a no-action alternative, and mitigation measures** (*see* ECL 8-0109 [2] [a]-[d], [f]). Prior to approving the project, the agency must draft a **Findings** Statement that verifies that the agency complied with SEQRA and "provide[s] a **rationale** for the agency's decision (6 NYCRR 617.11 [c], [d]; *see* ECL 8-0109 [8]). This process is meant to insure that agency decision-makers — enlightened by public comment where appropriate — **will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices**.
>
> In reviewing an agency's SEQRA findings, courts accord a lead agency considerable **deference,** as it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively. Although [l]iteral compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice, [t]he court's role is not to second-guess the agency's determination. Importantly, a reviewing court must not substitute its judgment of the facts and alternatives for that of the agency, and an agency's obligation under SEQRA must be **viewed in light of a rule of reason,** realizing that not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before the substantive dictates of SEQRA are satisfied. **This Court is thus tasked with reviewing the record to determine whether the** . . . **lead agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination**. A determination should be annulled only if it is arbitrary, capricious or unsupported by the evidence."

(internal quotations and case citations are omitted) (emphasis added)

(see also, Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y. 3d 416 [2017; Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297, 306-307 [2009]; Chinese Staff & Worker's Assn v. New York, 68 N.Y. 2d 359, 363 [1986]; Jackson v. New York State Urban Dev. Corp., 67 N.Y. 2d 400, 416-417 [1986]).

In relevant part, identification and evaluation of reasonable alternatives is required content of an EIS pursuant to 6 NYCRR 617.9 (b), to wit:

(b) Environmental impact statement content.

(1) An **EIS must assemble relevant and material facts upon which an agency's decision is to be made**. It must analyze the significant adverse impacts **and evaluate all reasonable alternatives**. EISs must be **analytical and not encyclopedic..**.

(2) EISs must be clearly and concisely written in plain language that can be read and understood by the public. Within the framework presented in paragraph (5) of this subdivision, EISs should address only those **potential significant adverse environmental impacts that can be reasonably anticipated and that have been identified in the scoping process…**

(5) The format of the draft EIS may be flexible; however, all draft EISs must include the following elements:
(ii) a concise description of the environmental setting of the areas to be affected, sufficient to understand the impacts of the proposed action **and alternatives** …
(v) a **description and evaluation of the range of reasonable alternatives** to the action that are feasible, considering the objectives and capabilities of the project sponsor. **The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed.** The range of alternatives must include the no action alternative. The no action alternative discussion should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action. The range of alternatives may also include, as appropriate, alternative:
(a) sites…

> **(c) scale or magnitude…**
> **(f)** use; and
> **(g)** types of action.

In Matter of Keil v. Greenway Heritage Conservancy for the Hudson Riv. Val., Inc., 184 A.D. 3d 1048, 1053-1054 [3d Dept. 2020], the Court held,

> "… an agency's FEIS must provide [t]he description and **evaluation of each alternative . . . at a level of detail sufficient to permit a comparative assessment of the alternatives discussed**, including a no-action alternative (6 NYCRR 617.9 [b] [5] [v]). To be meaningful, any choice among alternatives must be based on an awareness of all reasonable options, but the degree of detail required in assessing those alternatives will vary with the circumstances and nature of each proposal. A rule of reason applies; the agency must consider a reasonable range of alternatives to the specific project. [A]gencies have considerable **latitude** evaluating environmental effects and choosing between alternative measures, and disagree[ment] with the alternative chosen by the [agency] does not prove that the [agency] did not take the requisite 'hard look'". "Where it appears . . . that there has been such **a reasonable consideration of alternatives, the judicial inquiry is at an end**." (emphasis added; internal quotations and citations omitted)

; see also In the Matter of Town of Waterford et al v. NYSDEC et al 2020 N.Y. Slip Op. 06180 [3d Dept. 10/29/20]).

This Court is mindful of its limited scope of review, especially with respect to an agency's identification and evaluation of alternative uses. The propriety of the Board's determination that there are no alternative uses for Site 1, and that a reduced scale retail project for Site 2 is not economically feasible, in the absence of any factual data, is certainly within the scope of judicial review. Here, it is manifest that the EIS's, and corresponding Findings Statements, arbitrarily failed to identify and evaluate reasoned alternatives to the project based on reduced project scale to mitigate identified impacts.

MAXIMUM BUILD

The driving force behind the project is the Costco retail facility, which the project sponsor characterized as "a **mass** merchandiser of goods and services," as well as high-rise residential buildings. (emphasis added)[133] The fundamental flaw in the EIS process, is the failure to consider reasoned reduced scale project alternatives. Of course, it is likely that maximum build-out would present the most profitable use of the sites, but achieving maximum profit for the project sponsor is not a relevant SEQRA factor (see Matter of Kirquel Dev., Ltd. V. Planning Board of Town of Cortlandt, 96 A.D. 3d 754, 755 [2d Dept. 2012], lv. Denied19 N.Y. 3d 813, where the Court held, "SEQRA does not require a lead agency to take a 'hard look' at the economic feasibility of a project").

The DEIS provides: "The 222 units across the 19+/- acres, generate a proposed density of 11.3 units/acre."[134] The project sponsor also projected that an additional 90 units could be built on site, i.e. a total of 312. Doing the math, 312 units on 19.21 acres equals 16.24 units per acre, exceeding the Ordinance density limit of 16 units/acre of buildable land.[135] The EIS and Findings statement failed to determine how much of the 19.21 acres constitutes "buildable land." Ordinance 280-5 defines "buildable land" as "Land excluding state-or federally regulated wetlands, water bodies, floodways, the area with the angle of repose, **including environmental setbacks and buffers of these features,** and preexisting developed areas of the lot". Applicant claims there is a 200' buffer on the north end of the site, i.e. 2.5 acres.[136] Considering that setback, buildable acres consist of 16.71 acres (i.e. 19.21 acres – 2.5 acres), with a maximum density of 267 units. In fine, while Applicant's current plan meets maximum density, its claimed

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[133] NYSEF doc. No. 79 AR-4107.
[134] NYSEF Doc. No. 75 AR-886. 222 acres divided by 19.21 acres equals 11.55 units/acre, not 11.3.
[135] Ordinance §280-18.1 (F) (3) (a).
[136] NYSEF Doc. No. 79 AR-3994.

ability to add 90 units does not. In any event, the plan seeks a maximum building height of five-stories (55') pursuant to Ordinance §280-18.1 (F) (4) (c).

In context of the proposed density, the project sponsor did not identify any alternative to the Site 1 use/design. To the contrary, the project sponsor affirmatively represented that there were no alternatives. This claim is false. Clearly, where, as here, the site is substantially contiguous to the Pine Bush preserve, the Rapp Road Historic District, and the Westmere Terrace neighborhood protected by the TOD, and the visual impact of the high-rise buildings is squarely at issue, it is manifest that a reduced building scale, and corresponding reduced density, is a reasonable alternative which by necessity should have been evaluated under the hard look test. Significantly, the Board utterly failed to even address, let alone require, a viewshed analysis of the high-rise buildings in its Findings Statement; and this failure speaks directly to the failure to identify and evaluate a reduced project scale alternative (see Matter of Falcon Group Ltd. Liab. Co. v. Town/Village of Harrison Planning Board, 131 A.D. 3d 1237, 1240 [2d Dept. 2015] where the Court held the Findings Statement were invalid, in part, due to the failure to address reduced-density alternatives).

With respect to Site 2, the project sponsor simply listed possible uses but exclaimed "no additional attention will be given to these."[137]The sponsor then listed a number of other uses and exclaimed, "these uses are not within the area of expertise of the project sponsor… and "are incompatible with the ability of the project sponsor to successfully manage on the project site."[138]No detail was presented with respect to any of the cited uses to permit a comparative assessment. Next, the project sponsor made the following statement, "Single family dwellings

[137] NYSEF Doc. No. 75 AR-981.
[138] NYSEF Doc. No. 75 AR-982.

are prohibited uses in the TOD."[139]This statement is false; the existing homes along the Lawton Avenue neighborhood are permitted as legal nonconforming uses. What consideration did the project sponsor give to maintaining these homes (i.e. protecting the neighborhood in accord with the TOD mandate) on part of Site 2 and redeveloping the balance of the site? None. The project sponsor then presented a detailed analysis of an alternative office use for which there is admittedly no market.

What is missing? Clearly, there is a market for high-rise residential units, and such use is permitted in the TOD. Considering the public objections to mass retail development of Site 2, the objections to high-rise buildings on Site 3, and the existence of a high-rise hotel along Western Avenue, what consideration did the project sponsor give to an alternative use for high-rise units on site 2? None.

With respect to the Site 2 development of Costco, the record does not support the Board's finding that the record included an "**analysis exploring the development of larger as well as smaller facilities."** To the contrary, the Board simply took the self-serving statements of the project sponsor that a reduced project scale is not feasible. Frankly, the assertion that only a mass retailer is economically viable is absurd on its face. The Board's reliance on the project sponsor's self-serving, absurd claim, does not rise to the level of a hard look at a reasonable reduced scale alternative to mitigate impact. As a result, the record is barren of any alternative with a reduced retail scale, that would enable the Board to make a comparative evaluation.

The point made is that the project sponsor took an all or nothing approach for the Costco plan, without a reasoned identification and evaluation of a viable alternative reduced retail project scale, and the Planning Board went along with it. This fails the hard look test.

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[139] NYSEF Doc. No. 75 AR-982.

IMPACT, INCLUDING VISUAL IMPACT, ON RRHD

The record clearly established the historical significance of the RRHD, necessitating a hard look at the visual impact of the high-rise buildings on Site 1 (6 NYCRR 617.7 (c) (1) (v) – i.e. impairment of “aesthetic resources” and/or “Historical” factors). While the buildings are 5 stories in height (subject to a 55’ height limit), the record does not contain any building elevations, depicting its architectural features, including the number and types of windows facing the RRHD.

The RRHD has been described a unique, quiet, serene, rural setting characterized by modest one-story bungalow or shotgun-style homes and presenting an intact agrarian lifestyle. The RRHD’s significance is that it stands as a reminder of freedom and equality for African Americans who came here in the Great Migration. This is no small matter. Project impact on the RRHD merits real attention.

As set forth above, the accepted EIS’s assert that the existing 200-foot wooded buffer at the north end of Site 1 will buffer visual impact on the RRHD. In fact, the EIS represents that the Site 1 buildings will not even be visible from the RRHD. Incredibly, the Planning Board accepted these representations. The record does not sustain the effectiveness of the claimed buffer.

As aforementioned, the closest home within the Rapp Road Historic District is 390 LF north of the Site 1 northerly boundary line, and 985 LF from the northerly most 5-story building. The record is replete with comments objecting to the adverse visual impact from the two (2) modern 5-story buildings on the RRHD. The Albany County Planning Board aptly described the high-rise buildings as “**antithetical to the community character that currently exist along**

Rapp Road now". In response to this comment, the Planning Board cited compliance with the Ordinance. Does that rise to the level of a hard look? I think not.

The closest one-story home is 985' north of the closest high-rise building. The claimed 200' wide wooded area is situated between the high-rise and the one-story home. Doing the math, the wooded area is 390' south of the closest home and 395' north of the high-rise building. What is the relative topography and corresponding line of sight trajectory from that home to the top of the high-rise building? The record is silent. Absent a determination of the topography and line of sight, how does one determine if the 200'-wooded area serves as a visual buffer? You don't and are left to speculate. What is the line of sight from the remaining 15 homes in the RRHD to the top of the high-rise building? The record is silent. In turn, does the 200-foot buffer obstruct the view from the high-rise buildings into the RRHD? The issue was not addressed. What is the privacy invasion impact on the RRHD? The issue was not addressed.

Assuming arguendo the trees in the 200-foot wooded area will serve as a visual buffer, what is the effectiveness of the buffer during leaves-off winter months? The DEIS does not address this issue. What is the effectiveness of the buffer when the high-rise building lights are on at night? The DEIS does not address this issue.

The Court has posed the foregoing questions, for they are simply not addressed in either the DEIS, the FEIS, or the Findings Statement. Why not? As set forth above, the means to assess visual impact was raised during the scoping process, to wit:

> "As the Proposed Action will allow for a higher building, a preliminary assessment of urban design and visual resources needs to be provided in the DEIS. Do **viewshed analysis** to identify locations where it will be visible from. **Use photo simulations to add to the description of community character. Photo simulations should be done to show existing visual conditions and proposed conditions from a variety of locations**."[140]

[140] NYSEF Doc. No. 74 AR-711.

Considering the historical significance of the RRHD, and its proximity to Site 1, it is inconceivable that the Planning Board did not require a viewshed analysis through photo simulations to show what the project would look like from the RRHD in order to assess and mitigate impact. It is disturbing that the viewshed analysis comment was not even addressed in the DEIS, the FEIS, or the Findings Statement, let alone acted on, for it evinces a complete indifference, or avoidance, of the project impact on the RRHD (c.f. Matter of Arthur M. v. Town of Germantown Planning Board, 184 A.D. 3d 983, 987 [3d Dept. 2020], where the Court determined the hard look test was satisfied, finding,

> "Although the façade did exceed the Town zoning code's 50-foot guideline, the Planning Board **took various actions to ensure that** Primax **minimized the façade's visual and environmental disruption**, including, in preparation for the second draft EIS, **requiring** Primax to **alter the façade to include a chamfered front to reduce the visual impact.") (emphasis added)**

; Shapiro v. Town of Ramapo, 185 A.D. 3d 747, 749 [2d Dept. 2020], where the Court held the agency failed the hard look test, stating, inter alia: "the Town **failed to require** Scenic to provide a wetlands delineation" (emphasis added); Matter of Catskill Heritage Alliance, Inc. v New York State Dept. of Envtl. Conservation, 161 A.D.3d 11, 22-23 [3d Dept. 2018], where the Court held,

> "We reach a similar conclusion with regard to the claimed issue of visual impacts of the modified project upon the nearby Galli-Curci Mansion, which is listed on the National and State Registers of Historic Places. Contrary to petitioners' contention, the Commissioner did not improperly defer to the finding of the Office of Parks, Recreation and Historic Preservation (hereinafter OPRHP) that no adverse impacts would result to the historic property as a consequence of the modified project. Instead, the Commissioner recognized that DEC complied with its statutory obligation to consult with OPRHP concerning any adverse impacts that the project may have upon property within its jurisdiction (*see* PRHPL 14.09 [1]; 6 NYCRR 621.3 [a] [8]) and considered

> OPRHP's findings as they related to the Galli-Curci Mansion, as he was entitled. In addition to OPRHP's findings, the Commissioner also considered the statements of petitioners' expert, **the results of a visual impact assessment contained in the supplemental EIS that revealed no visual impact issues and an additional visual impact analysis specifically addressing the Galli-Curci Mansion, which demonstrated that intervening topography and vegetation would visually screen the modified project**. These materials furnished a rational basis for the Commissioner's determination that petitioners failed to raise any substantive and significant visual impact issue requiring adjudication" (internal citations omitted; emphasis added).

; Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1769 [4th Dept. 2016], where the Court held,

> "An ecological evaluation of the project site provided to the Town Board in August 2014, shortly before the negative declaration was issued, further noted that the area surrounding the project site is a habitat for "a myriad of songbirds and some raptors." **Despite that knowledge**, the Town Board, in making its determination that the project would have no significant impact on wildlife, merely relied on letters from NHP and the U.S. Fish and Wildlife Service indicating that those agencies did not have any records of any endangered or threatened species on the project site. The letter from NHP specifically warned, however, that the information therein "**should not be substituted for on-site surveys that may be required for environmental impact assessment." The Town Board never undertook or demanded any such on-site surveys.** Given the **information received from the public** that state-listed threatened species might be present on the project site and the **failure of the Town Board to investigate the veracity of that information**, we conclude that the Town Board failed to take a hard look at the impact of the project on wildlife, and the negative declaration with respect thereto was therefore arbitrary and capricious." (emphasis added)

The Planning Board's failure to require a viewshed analysis to investigate the project sponsor's claim that no sit buildings would be visible from RRHD is exacerbated by its erroneous finding

that the RRHD was 1,300 feet north of Site. The Board simply failed to take a hard look at visual impact of the high-rise buildings on the RRHD.

The failure to require a viewshed analysis is not insignificant. Had the Planning Board been able to see a photo simulation of what the 5-story buildings would look like from the perspective of the RRHD homeowners, it would have been in an informed position to assess the impact. Moreover, considering the historical significance of the RRHD, requiring an alternative project design with reduced building height would necessarily be a reasonable alternative to mitigate impact, once the extent of the impact is truly assessed. Instead of doing so, the Planning Board simply accepted the project sponsor's claim that "site 1 is located west of Rapp Road and, pursuant to the TOD, no alternative land uses are permitted west of Rapp Road. **Therefore, no alternate land uses may be feasibly examined**."[141] Clearly, the project sponsor's statement is misleading at best, and false at worst. The board should have required a reduced project scale as an alternative to evaluate and mitigate impact under the hard look test.

The record established the review of traffic alternatives was encyclopedic in scope. The record also evidenced that the RRHD has effectively reached a saturation point of adverse traffic impact. In context, the Planning Board chose traffic alternative No. 9, but that selection was qualified by potential further interaction with the City of Albany. Based on the failure of the project sponsor to present a reasoned alternative of a reduced scale project, the Planning Board was effectively left with choosing from 9 maximum build alternatives, i.e. choosing the least bad alternative. The failure to require the project sponsor to present a reduced project alternative evidences that the Planning Board's finding that the project "is the one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse impacts will be avoided or minimized to the maximum extent practicable" was arbitrary and capricious.

[141] NYSEF Doc. No. 75 AR-981.

SPECIAL USE PERMIT

The underlying theme of the EIS review process, and corresponding Findings Statements, is that permitted uses, including special uses, are assumed to be in harmony with the community character and will not cause an adverse impact. This notion is predicated on the Board's statement of the law, to wit: "It is well established law in New York that the inclusion of special use permit uses in a zoning code is tantamount to a legislative finding that the permitted use is in harmony with and compatible to existing adjacent land uses, and will not adversely affect those uses." This is legal error.

In Mobil Oil Corp. v. Oaks, 55 A.D.2d 809 [4th Dept. 1976], the Court held,

> **"Mobil contends that the inclusion of a permitted use in an ordinance, subject only to a special permit, indicates that the use is in harmony with the neighborhood.** Petitioner's reliance upon *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston* (30 NY2d 238) and *Matter of Highland Brooks Apts. v White* (40 AD2d 178) is **misplaced**. In those cases the use sought by the applicant was a permitted use in the zoning district provided there existed compliance with certain enumerated conditions. In those cases there was a pre-established legislative finding that the requested use was in harmony with the general zoning plan, and the issue was, therefore, limited to whether the applicant had sufficient proof of compliance with the enumerated conditions. Such is not the case here. As enacted, the Henrietta Zoning Ordinance does not contain a legislative finding that since a gasoline filling station is a permitted use in an "A" commercial district, provided a special permit be obtained, it is per se in harmony with the general zoning plan. Rather, as can be seen from section 39-35(c) of the ordinance, **the Legislature left for the body which was to determine whether a special permit should issue to consider whether "the proposed use will be in harmony with the existing and proposed future development of the neighborhood in which the premises is situated." (emphasis added)**

Here, as in Mobil Oil Corp. v. Oaks, supra., Zoning Ordinance § 280-52 requires the Zoning Board of Appeals to decide whether the project is "consistent with the objectives of this chapter and are not detrimental to neighboring properties," i.e. there is no per se determination the use is in harmony with the district (see also Wegmans Enterprises, Inc. v. Lansing, 72 N.Y.2d 1000, 1001 [1988], where the Court held, "Failure to meet any one of the conditions set forth in the ordinance is, however, a sufficient basis upon which the zoning authority may deny the permit application"; PDH Props., LLC v. Planning Bd., 298 A.D.2d 684, 685 [3d Dept. 2002], where the Court held, "The applicant must establish compliance with the conditions legislatively imposed upon the permitted use). Moreover, finding that a use comports with the use and area requirements of an Ordinance is not a substitute for a hard look at the relevant issues under SEQRA.

ZONING/COMMUNITY CHARACTER

In Matter of Vil. Of Chestnut Ridge v. Town of Ramapo, 45 A.D. 3d 74 [2d Dept. 2007], lv dismissed 12 N.Y. 3d 793 [2010], the Court addressed the confluence of an existing community and its attendant zoning regulations as follows:

> "…a municipality is more than the collection of pavement, pipes, and other improvements that make up its infrastructure. Rather, a village is a local governmental unit with broad powers, conferred not just by legislative grant, but as a matter of constitutional entitlement. It "is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions." In the furtherance of this authority, municipal officials exercise a broad array of powers with respect to the nature of the community, including the powers to protect and enhance the "physical and visual environment**", and to enact zoning regulations**. **It is through the exercise of these powers that they**

> **define the character of the community for the benefit of its residents.**
>
> **Community character is specifically protected by SEQRA**. SEQRA requires the preparation of an environmental impact statement with respect to any action that "may have a significant effect on the environment" (ECL 8-0109 [2]). "Environment," for this purpose, includes, significantly, "existing patterns of population concentration, distribution, or growth, **and existing community or neighborhood character"** (ECL 8-0105 [6]). The criteria by which the significance of a project is determined include "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" **and "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character"** (6 NYCRR 617.7 [c] [1] [iv], [v]). "The impact that a project may have on … existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis."
>
> **The power to define the community character is a unique prerogative of a municipality acting in its governmental capacity…**" (internal case citations omitted; emphasis added) (id. at 93-95)

Here, community character was established, in part, by the enactment of TOD, with the intent to protect existing neighborhoods. One means to accomplish that goal was to promote non-automobile-oriented modes of transportation.

In stark contrast with that legislative intent, the Site 2 project calls for the physical destruction and removal of all homes within the Lawton Terrrace neighborhood. The record also evidences Costco is an automobile-oriented business and will have a devastating impact on the quality of life and potential displacement of the Westmere Terrace residents, as well as potential displacement of the residents of the RRHD (see Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1770 [4th Dept. 2016], where the court held, "With respect to the "community character" of the Village, we note that SEQRA defines

"environment" as "the physical conditions which will be affected by a proposed action, including . . . existing community or neighborhood character" (ECL 8-0105 [6]), and "require[s] a lead agency to consider more than impacts upon the physical environment," including "the potential **displacement of local residents** and businesses" (emphasis added)).

In its Findings Statement, the Board failed to address, let alone implement, TOD's express provision that it is an **"overlay district to support and incentivize development that adequately protects nearby residential neighborhoods"…[and]** TOD District encourages **more compact development**, traffic-calming measures, better access management, **improving the environment for non-automobile-oriented modes of transportation, reducing the number of required parking spaces**, supporting mixed-use buildings and pedestrian linkages, and **focusing intense development away from existing residential neighborhoods**…" (Zoning Ordinance §280-18.1). The omission speaks volumes. The Planning Board effectively ignored the intent of the Ordinance and turned a blind eye to the destruction of the relevant neighborhoods, all to authorize a mass retailer that will promote automobile modes of transportation (see H.O.M.E.S. v. State Urban Dev. Corp., 69 A.D. 2d 222, 234 [4th Dept. 1979], where the court held,

> "The **plan** submitted by the university and approved by the planning commission **in no way complied with the above-recited provisions for traffic and parking for the protection of the neighborhood**, and was in absolute disregard of the substantial evidence before the commission that the project posed tremendous traffic problems, endangering the safety of the neighborhood, without a planned solution. Thus, **the intent of the ordinance was frustrated,** and the action of the commission in approving the application was not supported by substantial evidence and was arbitrary, capricious and an abuse of discretion." (emphasis added)

In fine, the Planning Board's finding that the project comported with the provisions of TOD was

predicated on its failure to distinguish a special use from a principally permitted use, violated the Ordinance intent, and was clearly arbitrary and capricious, all underscoring its failure to take a hard look at the project impact on community character.

PINE BUSH ECOSYSTEM

Without question, the Pine Bush ecosystem is unique and judicial review of project impacts have evolved over the last 40 years (see Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297 [2009]; Save the Pine Bush, Inc. v. Albany, 70 N.Y. 2d 193 [1987]; Save the Pine Bush, Inc. v. Common Council, 188 A. D. 2d 969 [3d Dept. 1992]; Save the Pine Bush, Inc. v. Albany, 141 A. D. 2d 949 [3d Dept. 1988]; Save Pine Bush, Inc. v. Planning Bd. of Albany, 130 A. D. 2d 1 [3d Dept. 1987]; Save Pine Bush, Inc. v. Planning Bd. of Albany, 96 A. D. 2d 986 [3d Dept. 1983]; Friends of Pine Bush v. Planning Board, 86 A.D. 2d 246 [3d Dept. 1982], aff'd 59 N.Y. 2d 849).

As aforementioned, the Planning Board acknowledged the ecological significance (primarily of Site 1) of the project but determined that impact would be mitigated by a title transfer of 8.4 acres of Pine Bush lands to the Commission. Recognizing that the Board was not required to analyze every conceivable impact (Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297, 307 [2009]) and the record supports a determination that the lands are not necessary to establish the Pine Bush Preserve proper (c.f. Save the Pine Bush, Inc. v. Common Council, 188 A. D. 2d 969, 971 [3d Dept. 1992]), at first blush it appears the Board satisfied the hard look test relative to impact on the Pine Bush ecosystem, and its species. In context of this record, however, a closer look is merited.

Clearly, the two (2) high-rise buildings are near the preserve. The record established that preserve is a NYS Bird Conservation Area and a National Audubon Society Important Bird

Area. The record also established that the building height and light emanating therefrom presents an adverse impact on avian populations. No consideration was given to reducing the building height to mitigate impact (c.f. Matter of Wooster v. Queen City Landing, LLC, 150 A.D. 3d 1689, 1692 [4th Dept. 2017]).

CONCLUSION

For the reasons more fully stated above,

1. The Petition is granted to the extent that the Planning Board's acceptance of the DEIS and FEIS, the issuance of the Findings Statement filed August 28, 2020, the issuance of the Site 1 Findings Statement on October 28, 2020, and the grant of Site 1 Site Plan Approval on October 28, 2020, violated SEQRA procedure and the "hard look" test, rendering the challenged approvals arbitrary and capricious, null and void.[142]
2. This memorandum constitutes both the decision and order of the Court.[143]

Dated: Albany, New York
November 20, 2020

PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:
All e-filed pleadings, with exhibits.

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[142] Based on the vacatur of the SEQRA Findings Statements and Site Plan approval, the preliminary injunction request is academic.
[143] Notice of Entry by e-filing and service in accord with CPLR R 2220 is required.

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