SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU
PRESENT THE HON. GEORGE R. PECK, J.S.C.
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GLENN K. DENTON and
BRIDGET K. DENTON,
1257 Round Swamp Road
Old Bethpage, N.Y. 11804

KATHLEEN J. DUVAL,
1251 Round Swamp Road
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FAY E. SCALLY,
1 Locust Road
Old Bethpage, N.Y. 11804

Petitioners pro se,

Index Number

5290/15

VERIFIED REPLY

For Judgements and an Order Pursuant to Article 78, Section 6313 (Temporary Restraining Order), and Section 6311 (Preliminary Injunction) of the Civil Practice Law and Rules ("CPLR")

-against-

TOWN OF OYSTER BAY TOWN BOARD BY
SUPERVISOR JOHN VENDITTO,
Town Hall
54 Audrey Avenue
Oyster Bay, N.Y. 11771

BEECHWOOD POB LLC,
200 Robbins Lane
Jericho, N.Y. 11753

PLAINVIEW PROPERTIES SPE LLC,
1600 Old Country Road, Suite 101
Plainview, N.Y. 11803

Respondents and Necessary Parties

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Introduction

1. Respondents deluge the Court with affidavits, arguments, and legal citations, the great mass of which fail to hold up under scrutiny as Petitioners will fully document.

2. Respondents' effort is understandable, because Petitioners have caught them in a series of blunders and misstatements, the most central of which is trying to 'sell' as environmentally-benign a project that will decimate rich forests, meadows and brushland, kill or render homeless an untold number of animals, and significantly alter the character of a community.

3. This disturbing result is to be achieved by something the State Environmental Quality Review Act ("SEQRA") forbids: the failure to perform a complete and reliable environmental review on which to base the zoning and other decisions taken in this matter.

4. Instead of preserving 70 percent or more of the relevant wildlife habitat, as Respondents repeatedly claimed[1], the Beechwood Project ('the Project") would instead, using Respondents' own data[2], destroy about 60 percent of the forests, meadows, and natural brushland on the site -- all interconnected wildlife habitat, thus preserving only about 40 percent of 'habitat' when properly classified.

5. Confining the discussion to the forested areas alone, which represent only part of the

[1] Findings Statement, p. 9. The claim that 70 percent of "woodlands" is preserved refers only to area designated as forest -- the original 53 acres so counted -- and implies that the 15 acres of meadows and shrubland is irrelevant to the environmental analysis. A later claim argues that 83.6 percent would be preserved (Respondent Beechwood affidavit of David Kennedy, ¶45.)

[2] As undeveloped, the site reportedly contains 70 acres of forest and meadows/brushland (Exhibit 2, FEIS Figure 3); according to the FEIS the final amount of forest and meadows/brushland is about 45.5 acres (Exhibit 2, FEIS Figure 3). But the expected removal of about 15.5 acres of habitat (Exhibit 3) for the planned new athletic fields, as substantiated in the Supplemental Petition and below, reduces the final preserved forest and meadows/ brushland to about 30 acres.

relevant wildlife 'habitat', an honest calculation, taking into account the indisputable plan to destroy about fifteen acres[3] for new athletic fields, shows that instead of preserving 70 percent of the forest, the current plans preserve about 55 percent of the forest (or 29 acres), a substantial misrepresentation, but one that still understates the real loss of overall habitat, as just discussed[4].

6. A simple visual analysis demonstrates the extreme implausibility of the amount of habitat preservation claimed by Respondents. Petitioners have created a summary graphic, Exhibit 1, based on Figure 16 and 27A, which illustrates the areas known to be slated for removal under the most uncontroversial assumptions of the Respondents. This visual image makes it abundantly clear, even without Petitioners' disparaged satellite acreage-measurements that far more than 30 percent of the forests on the site will be removed.

7. Even a visual comparison of Figures 16 and 27A from the Draft Environmental Impact Statement ("DEIS"), collected side-by-side in Exhibit J of the Respondent Beechwood affidavit of David Kennedy, shows the degree to which very large portion of habitat areas disappear -- notwithstanding the unverifiable claims regarding 'bulk' forest outcomes that Respondents rely on to justify their analysis[5].

8. The recent claims of Respondents that additional acreage has been dedicated to forests is not clearly documented anywhere in the SEQRA analysis or elsewhere, and also is not strictly relevant to the present legal evaluation of the sufficiency of the SEQRA Review

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[3] See Footnote 2, above

[4] Adjusting for the planned removal of about 15.5 acres for athletic fields, as described in the Supplemental Petition and below, only about 29 acres of forest will be preserved from the purported present total of 53.26 acres (Exhibit 2, FEIS Figure 3).

[5] For instance, "...contrary to the Petitioners' claims...the 'before' and 'after' extent of habitat communities were clearly delineated...." Affidavit of Kennedy, ¶45, for the Respondents arguments on habitat conservation.

alone.

9. Of one "forested" parcel, Respondents themselves quote a provision of the zoning resolution, as enacted by the Town of Oyster Bay Town Board in May, 2015:

> "...[N]o Certificates of Occupancy shall be issued unless and until the Declarants develop the athletic fields on the subject premises in accordance with the contemplated consensus plan, or, in the alternative, clear and grade for the athletic fields if plans for the athletic fields have not been completely formulated, or cannot be fully implemented in advance of the issuance of a Certificate of Occupancy for the shopping center."
>
> (Declaration of Restrictive Covenants, p. 6, Town Zoning Resolution 279-2015, Record Exhibit 52, Respondent Beechwood affidavit of Richard Rosenberg, ¶ 16.)

10. Given such 'inconvenient facts' -- which contradict the assurances given the Town Board and the public, and discredit the validity of the SEQRA environmental review -- it is unsurprising Respondents offer a succession of purported legal defects to escape scrutiny of their actions. But they are unavailing.

11. As fully explored in the accompanying memorandum of law, Respondents' repeated refrain that Petitioners lack 'standing' is without any basis in law. The other legal objections offered are similarly untrue.

12. Current case law from the Court of Appeals and from the Appellate Division, Second Department, firmly establishes that an argument presented by any other person before an agency gives any Petitioner the right to assert it[6].

13. Furthermore the Court of Appeals has held that 'exhaustion of administrative remedies' should not be applied as a bar to review environmental cases in any event[7].

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[6] Shepherd v. Maddaloni, 103 A.D.3d 901 (Second Dep't, 2013), at 905. See accompanying memorandum of law.
[7] Jackson v. UDC, 67 NY 2d 400 (1986), at 427. See accompanying memorandum of law.

14. Furthermore each 'issue' raised in this special proceeding was in fact raised before the Town Board; the statutory rule against 'segmentation' and the judicial standard of 'hard look' are not 'issues' that require notification in advance, thus the Town Board cannot claim 'ignorance' to 'immunize' itself in any event.

15. Thus are many pages of argument and a repeated coda throughout the pleadings and affidavits rendered fiction, a ridiculous waste of time and resources.

16. The fact that the injury to Petitioners' enjoyment of their homes or the nature they have visited occurs on property that is not theirs similarly has no basis in law[8]. The issue squarely and properly before the Court is the impact of the agency-approved changes on their own property and on their enjoyment of nature they currently experience, issues firmly established as proper for the Court to determine, as discussed in the accompanying memorandum of law.

17. Finally the language of the Article 78 provision establishes the right of an aggrieved party to appeal to the courts any final decision -- as the Town Board's zoning decision was[9].

18. In each instance, Respondents have raised these specious objections, and they '*should have known better'*.

19. With respect to the unlawful 'segmentation' of the SEQRA review, despite the Respondents' contorted claims that there is 'no plan' to build athletic fields in a roughly fifteen-acre area designated as preserved forest[10], the opposing papers themselves cite a clause (supra) that prevents the issuance of a Certificate of Occupancy for the development

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[8] Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) deals with private property; same with Shepherd, etc. Cite view cases.

[9] Civil Procedure Law and Rules ("CPLR") Article 7801.

[10] Exhibit 3, satellite images and Town figure of area planned for athletic fields.

unless the developer actually razes those forests itself beforehand[11].

20. Even the site plan adopted by the Town Board contains sketches of the planned athletic fields on the area designated elsewhere as forest[12] -- a fact the Respondents attempt to explain away, though its reality closely fits the narrative in both the Covenant accompanying the rezoning resolution[13] and the Town Supervisor's comments[14] explaining how new fields -- albeit in a mixture as yet undetermined -- will replace and augment fields lost to the development.

21. The quotations from documents and officials as cited in the Petition, Supplemental Petition, or the disingenuous denials in the Respondent's submissions thus reveal the undeniable fact that the Town plans to destroy 'preserved forest' for athletic fields and appurtenant facilities, whether

22. This 'segmentation' issue, which appears settled *prima facie*, could alternately by subject to a trial of fact under the CPLR rules governing the special proceeding[15].

23. With respect to Respondents' claim that there must have been prior testimony raising the issues 'segmentation' or the 'hard look', those arguments are themselves absurd, because following the law is the duty of the Town, a duty not absolved or immunized by the Town's supposed 'ignorance of the law' absent the public's testimony.

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[11] Record Exhibit 52., Declaration of Restrictive Covenants, p. 6, Town Zoning Resolution 279-15.

[12] Site plan, Record Exhibit 53, Supplemental Petition, Exhibits 2 and 3.

[13] Record Exhibit 52, Declaration of Restrictive Covenants, p. 6, Town Zoning Resolution 279-15.

[14] "What actually will go there -- soccer fields, all-purpose fields, baseball fields -- is something that I think, as I sit here, I would leave to the community to determine. (PARA) I don't want anybody saying why are there 16 soccer fields, no baseball, or 14 baseball and two soccer--" Statement of Town Supervisor Venditti, DEIS Hearing Transcript, Respondent Beechwood Affidavit of Rosenberg, Exhibit E, p. 16. Clearly the only question is the mix of athletic fields to be finally determined. Also, Petition, ¶¶ 40 *ff.*

[15] Trial of Fact, Article 78, CPLR Section 7804(h) "Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith."

24. SEQRA hearings are intended to gather relevant facts and public opinion, not to instruct an agency on its legal obligations or immunize it from them. To find otherwise would lead to chaos, implying every agency is free to violate the law unless put on notice otherwise. Urging such an argument on the Court is puzzling at best.

25. In reply to Petitioners' argument that the SEQRA review lacks basic information on the magnitude of the Project's impact on wildlife, the Respondents argue surprisingly that the information be unhelpful, and that collecting it would be "impossible"[16].

26. Yet a search online reveals dozens of scholarly articles on the techniques and practices of counting wildlife[17], and one of the Respondents experts whose affidavit is included has a single scholarly article listed in his resume which itself apparently involves counting animals to determine their "distribution"[18]. Petitioners have also compiled examples of the practice of counting wildlife for environmental analysis as referenced in reported judicial opinions[19] -- of which the Court may take 'judicial cognizance', as discussed in the accompanying memorandum of law.

27. To rebut Petitioners' challenge to the inadequacy of the SEQRA review of 'visual buffers' for the neighboring properties, Respondents dispatched an attorney 'into the field' (or forest). Thus were the first photos entered into the record on this subject, despite a 'scoping' requirement that such data be compiled[20].

28. But as the role of this Article 78 proceeding is not to correct a deficient record, but to

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[16] Respondent Beechwood supporting affidavits of Kennedy, ¶¶ 43, 44, and Elkowitz, ¶111
[17] Exhibit 4, Google search results -- scholarly articles on wildlife population analysis.
[18] Respondent Beechwood supporting affidavit of Kennedy, Exhibit A, p.9, curriculum. vitae.
[19] Exhibit 5, judicial opinions referencing wildlife counting.
[20] Scoping Record/return Exhibit 19, Aesthetics: "Site and area inspections and photographs", p. 13

gauge the adequacy of it, this effort to fill in 'gaps' in the record simply confirms that Petitioners' arguments were well grounded: that the record was not complete, and a 'hard look' was not performed. Otherwise such analysis -- and much more -- would have been part of the record before the Town Board, which it was not.

29. In reality the exercise of secreting a 5'8" colleague in the fully-leaved summer forest at the height of midday shadows hardly provides a real-world test if the visual buffer, which is required to function in leaf-less conditions, with night-time lighting from a sprawling development of multi-story dwellings.

30. Respondents use their answers and affidavits to attempt to re-write history regarding the 'walking/fitness trail' that will bisect and weaken the 'visual buffer' intended to protect Petitioners' homes.

31. Respondents improbably claim that normal and customary features of a such a walking/fitness trail, such as lighting and paving, will "upon information and belief" not be features of *this* fitness trail -- although such statements appear nowhere in the official plans and the SEQRA Review[21].

32. Respondents also attempt in their response, again improbably, to provide a backward argument to fill in another blank about the trail -- its width, another basic fact absent from the official record. To do so they undertake a mathematical calculation using the trail's planned length and its purported 'acreage'[22]. Such a calculation is a truly odd contortion, reflective of its glaring omission from the record and from the Town Board's deliberations.

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[21] Respondent Beechwood supporting affidavit of Kennedy, ¶ 61; Respondent Beechwood Answer, ¶ 51.

[22] Size of fitness trail, Ellsworth affidavit, ¶51: "the DEIS describes the trail for the proposed action as being 2.0 miles in length and occupying 1.2 acres, which translates into an average width of five feet...."

33. Additionally, Respondents assert improbably and for the first time, that the installation of fitness stations along the fitness trail will not require any 'significant' space[23]. But they offer no explanation of how the alleged five-foot-wide trail will also accommodate "benches", as required by the Restrictive Covenant attached to the zoning resolution[24].

34. All told, it appears there is no way the trail can be only five feet wide, and may in fact be closer to the width Petitioners alleged[25] if it is constructed to do all that is required. Respondents' answers appear to be inventions intended only to defend a record that is obviously legally flawed.

35. Material as they were to the character of the visual buffer, such specifics regarding the fitness trail, which will bisect the narrow buffer, were missing from the SEQRA record and impermissibly left for guesswork, until Respondents' attempt to fill in the blanks now, well after the Town Board decisions have been made. The very fact that Respondents feel impelled to supply such basic details to the Court confirms that the actual record of the SEQRA Review was deficient, practically and legally.

36. Respondents challenged as new and improper evidence Petitioners' effort to fill in gaps in the record with satellite views and measurements, and misrepresent this effort as an attempt to have the Court second-guess the Town Board of Oyster Bay (hereafter "the Town Board").

37. In actuality Petitioners used the satellite data from Google.com and the measuring tools of the website Daftlogic.com to create a visual and quantitative -- number based --

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[23] Respondent Beechwood Answer ¶ 51.

[24] "...[A] walking/fitness trail around the entire perimeter...(with exercise stations, benches, and way-findings [sic] signage)...." Record Exhibit 52, p. 3, Zoning Resolution, Restrictive Covenants.

[25] Petition ¶ 179.

context for their arguments where such data was inexcusably absent from the official record.

38. Petitioners' purpose was to create context, not an alternate record. Petitioners' intent was that the Court understand the type of information missing from the actual record -- what was actually at stake -- and what a 'hard look' would actually *look* like. Thus none of the figures or images need be taken 'as is' for the Court to agree that the required 'hard look' was not performed, based on the illustrative examples of the satellite images.

39. Only the concept of such a comprehensive analysis need be recognized by the Court as a valid model for how a 'hard look' should have been performed, and how such data would scientifically document the Project's impact on natural forest and woodland habitats.

40. It is telling that while they condemned Petitioners' lack of expertise and denigrated the satellite tools, in no case did Respondents refute or factually challenge any of data so presented. The pattern of Respondents' answers on this and other matters was not so much to contradict Petitioners' claims, as to argue that they were precluded from making them, or the factual issues raised were too demanding, too 'detailed', too difficult or 'impossible' to perform.

41. Respondents relied on their 'expertise' from thick curricula vitae and long track records selling and facilitating development projects across Long Island over the past several decades. They repeatedly argued, always implausibly, that whatever logic seemed to compel a full answer to a questions raised in the SEQRA process, such an answer was 'not customary' or 'not required'. They even cited 'loopholes' that excused the omissions.

42. For example, where Petitioners argued the visual buffer on Round Swamp Road could not adequately judged without data from different times of year, including when the

trees had no leaves, Respondents argued:

> "...[I]n my experience, analysis of visual impacts during 'off-leaf' vegetative conditions is not performed during SEQRA review...unless it is specifically required by the SEQRA lead agency...."[26]

43. There is no guidance in the Scoping that could be reasonably be interpreted as asking for only a *partial* analysis. A full analysis was demanded, not a resort to a 'loophole' for incomplete analysis that does not exist -- yet that is the Respondents' answer to that issue.

44. Ironically had a complete and adequate analysis been performed regarding this and the other issues Petitioners identified the discretion of the Town Board to decide how to act would have been almost plenary, subject of course to the public accountability for impacts so documented, and the law's demand that impacts be mitigated to the maximum extent practicable[27].

45. But without that rational basis upon which to exercise its discretion, the law requiring informed environmental analysis was violated.

46. As stated above, two of Respondents' experts claimed that it was "impossible" to provide any count of the wildlife on the site. Yet there is an entire scholarly discipline devoted to the practice[28], and the field of conservation biology, and laws related to threatened or endangered species demand such ability of the scientific community.

47. Further, against all logic, the Respondents asserted it was just not "necessary or appropriate"[29] to know the quantity of wildlife present, as if decisions affecting "the removal

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[26] Respondent Beechwood affidavit of David Kennedy ¶69 (emphasis added)
[27] As provided in SEQRA, 6 NYCRR 617.11(d).
[28] Respondent Beechwood affidavits of David Kennedy ¶ 44 and Theresa Elkowitz ¶ 111
[29] Kennedy ¶43 "...it is neither necessary nor appropriate --to assess potential impacts on wildlife from a proposed development action -- to 'quantify' (i.e., count) the individual members of each wildlife species present on the subject property."

or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area" (6 NYCRR 617.7(c)(1)(ii)).

48. Respondents claimed Petitioners simply wanted the status quo maintained, or that Petitioners sought to overturn the Town decisions based on the outcome rather than any legally defensible basis, or the quibbles over lack of "detail" or focus on "minutiae"[30].

49. But Petitioners know the applicable law, and addressed their challenge to the well-established requirements that the SEQRA review demonstrate procedural integrity to form a rational basis for the Town Board to act.

50. In many cases it was argued by Respondents that as long as a 'reply' was provided in the SEQRA review, the subject was adequately treated to pass judicial muster, as if the exercise was a check off matter and not a substantive test of the procedural adequacy of the review.

51. When Petitioners cited written testimony asking the Respondents to quantify wildlife and preserved contiguous habitat, Respondents' 'expert' claimed: "...[C]omments on these specific issues were raised during the public review of the DEIS, albeit not by Petitioners; and direct responses to all such comments were provided in the FEIS ['Final Environmental Impact Statement'][31]."

52. Respondents state in defense of other elements of analysis Petitioners identified as unlawfully absent: "...[C]omments regarding buffering were made during the DEIS review

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[30] Respondent Town of Oyster Bay affidavit of John M. Ellsworth ¶ 16, ¶ 18.

[31] Respondent Town of Oyster Bay affidavit of John M. Ellsworth ¶ 16.

period, and these were also addressed by direct responses in the FEIS[32]."

53. Thus was a pattern of minimal-analysis repeatedly but incorrectly defended as the basis for a 'hard look'. As discussed below, the 'hard look' standard, while not specifically defined in the law, is nevertheless a demand for robust, comprehensive, reliable and "forthright"[33] analysis and disclosure of environmental impacts.

54. Had this SEQRA review met such standards, possibly the Town Board would not have approved the project as planned, because of its unacceptable impacts on wildlife, habitat, and the neighbors.

55. As noted by a court defining what a 'hard look' *looks* like, as cited in Petitioners' memorandum of law:

56. "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms." National Audubon Society v. Dept. of the Navy, 422 F.3d 174 (US Court of Appeals, Fourth Cir., 2005) at 187

57. This SEQRA review should have disclosed very substantial loss of habitat, concomitant destruction of large quantities of wildlife, and an unknown character to the 'visual buffer' in terms of shielding the nearby Petitioners and the rest of the community along Round Swamp Road.

58. With that information, the public and their representatives might have forced changes. But given the flaws they did not have a "forthright acknowledgment of potential environmental harms" as outlined by the court, above. That is thus the ultimate question in

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[32] Respondent Town of Oyster Bay affidavit of John M. Ellsworth ¶ 16.

[33] National Audubon Society v. Dept. of the Navy, 422 F.3d 174 (US Court of Appeals, Fourth Cir., 2005) at 187, below.

this case: 'Did a flawed SEQRA Review lead impermissibly to the injury Petitioners now face?'

59. Respondents have simply failed in each of their efforts to refute Petitioners' case that it did.

60. Petitioners will below respond to each of the submissions the Respondents filed against the pleadings, then discuss the legal standard for the 'hard look' upon which their special proceeding is in past based, as well as the basis for the claim of 'segmentation' and the failures of Respondents to adequately review wildlife, habitat and the visual buffer.

61. The discussions are necessarily inter-related and build upon one another.

Reply to Answering Affidavits and Pleadings

62. Respondents each submitted answers to the Petition and Supplemental Petition, and two of them submitted affidavits in opposition and memoranda of law. The answers of two of the Respondents were identical or for all practical purposes indistinguishable.

63. Respondents also submitted extensive affidavits challenging Petitioners' arguments. But a close examination shows they fail to rebut and in places actually support Petitioners' claims now before this Court.

64. Petitioners will provide the Court a critique of each such pleading and affidavit for reference. Petitioners found no basis in the submissions for the Court to rule against Petitioners.

65. Affiant John M. Ellsworth stated he managed the SEQRA process for the Town as an

outside consultant. His affidavit presented repeated assertions that the issues raised by the Petitioners were either adequately addressed by the Town, or were invalid, or were not raised and hence unreviewable, or a combination of the three points.

66. Affiant David Kennedy stated he performed the scientific SEQRA analysis at issue in this matter. Overall Mr. Kennedy argues that the analysis was sufficient, and that the Petitioners' counter-analysis was invalid.

67. Affiant Theresa Elkowitz apparently oversaw the work of Mr. Kennedy. Her affidavit provides an extensive description of the SEQRA process and purports to buttress the defenses raised by Mr. Kennedy to the substance of the analysis.

68. Three other affidavits were submitted that sought to (a) substantiate the surveying work done on the forests and other natural lands at issue, and refute those raised by the Petitioners (Respondent Beechwood affidavit of Victor P. Bert); (b) refute the necessity to evaluate any environmental impacts from road-expansions connected with the project (Respondent Beechwood affidavit Patrick L. Lenihan); and (c) refute the deficiencies in the analysis of the visual buffer (Respondent Beechwood affidavit of Rachel S. Scopinich).

69. Respondent Plainview Properties stated it was relying on the submissions of the other Respondents rather than submitting opposing affidavits or memoranda of law.

Affidavit of John M. Ellsworth

70. John M. Ellsworth presented his qualifications and the nature of the SEQRA review, as well as the process the Town undertook procedurally.

71. The affiant mischaracterized the requirements of the 'hard look' in suggesting the

"procedural" requirements are simply formal and may be met by going through the motions of public input. (Ellsworth Affidavit ¶13).

72. As Petitioners explore at length in the accompanying memorandum of law and elsewhere in this submission, the 'hard look' standard requires a full and complete evaluation of all relevant and material environmental issues. Petitioners have demonstrated that in the areas of habitat preservation, wildlife computation, and analysis of the 'visual buffer' the data and analysis fell far short of the legal requirements.

73. Much is made of the purported lack of participation of Petitioners in the Ellsworth affidavit e.g. Ellsworth Affidavit ¶¶32-37.

74. But the record is replete with criticism of the project and other prior plans for the property going back ten years.

75. There was also substantial criticism on the record from numerous residents and others deeply concerned about the environmental impact of the project on the property itself -- the trees, wildlife, etc., as indicated by a sampling Petitioners have compiled from the extensive record, not all of which were reflected in the Responses in the FEIS (Exhibit 7).

76. Further criticism of the environmental effects was raised by the Nassau County Planning Commission as quoted in the Petition, ¶ 116:

> "The [Town of Oyster Bay Final Groundwater and Open Space Protection Plan (FGOSPP)] targets the subject property...as having open space, outdoor recreational, wildlife habitat and natural groundwater recharge protection potential. The proposed development, while implementing certain initiatives to mitigate environmental/ecological impacts of this development still will have a substantial impact concerning the objectives of the FGOSPP as it relates to the subject property."
>
> (Exhibit 44, FEIS Appendix A3, C1, Letter of Nassau County Planning

Commission, p. 4, Point 24, emphasis added)

77. In fact four of the Petitioners attended the single public hearing on the SEQRA review of the present proposal, and one managed to speak before the hours churned on too late to remain

78. Instead of breaking up its hearings and holding separate hearings on the various SEQRA submissions -- the DEIS and the FEIS, as other agencies have commonly done[34]. The arduous marathon hearing was not only apparently stacked with supporters of the Project (see Footnote 58), but the sequence of speakers may have been manipulated to force opponents to speak after midnight.[35]

79. But the legal test for raising issues in the Article 78 proceeding reviewing a SEQRA matter is whether the issues were raised by <u>any</u> person during the process, not whether the Petitioners themselves did so. (see footnote 4 above, <u>Shepherd v. Maddaloni,</u> and accompanying memorandum of law.)

80. And the affidavit confirms that the issues were raised:

81. "The primary argument in the Petition regarding <u>ecological resources and visual resources</u> can be simply stated as a complaint that the EIS did not provide sufficient

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[34] See Footnote 35 for a fuller reference to a far more extensive public hearing schedule held by another municipality -- on a far smaller project of 14 acres.

[35] Exhibit 8, an analysis of the testimony at the SEQRA hearing, shows that the breakdown of Pro and Anti speakers was heavily weighted -- by the dictat of the Town Supervisor -- to Pro speakers in the first parts of the arduously long, 3 AM-ending hearing, and Anti speakers in the final portion of the hearing. While not automatically a serious SEQRA issue, this fact does demonstrate that the Respondents' insistence that the process was exceptionally open and welcoming, and any deficits in the record were the sole fault of Petitioners, is not true. It may also be used to show the motives of the Respondents in the conduct of the SEQRA process. The breakdown per Petitioners' analysis: 1st Quarter (1-18): 78% For, 22% Against; 2nd Quarter (19-35): 88% For, 12% Against; 3rd Quarter (36-53): 67% For, 33% Against; 4th Quarter (54-71): 6% For, 94% Against (Exhibit 7) . The main leader of the opposition, Carol Meschkow, was not called upon to speak until after midnight, from the indication of the hearing transcript (Record Exhibit 40, Appendix B, p. 198)

detail....However, comments on these specific issues were raised during the public review...and direct responses to all such comments were provided...." (Ellsworth Affidavit ¶ 16, emphasis added).

82. The affidavit calls the requests for information on the quantity of wildlife present and the nature of the walking trail within the visual buffer unneeded "detail" (Ellsworth Affidavit ¶16) or "minutiae" (Ellsworth Affidavit ¶18). And it claims requests for information on the visual buffer by the Nassau County Planning Commission were rendered satisfied because they "received a direct response" (Ellsworth Affidavit ¶19).

83. The pattern of the affidavit is to trivialize concerns or claim they were satisfied merely by being addressed, even without providing the information requested.

84. But as Petitioners have explained at length in the Petition, there is no reasonable way the Town Board could make the informed 'hard look' analysis required under SEQRA with respect to the impact on wildlife and the effectiveness of the 'visual buffer' without the data missing from the review, and here dismissed as detail or minutiae.

85. The Ellsworth affidavit addresses the issue of segmentation in the same manner as the other Respondent submissions, claiming all the discussions of new athletic fields are essentially idle chatter (Ellsworth Affidavit ¶24).

86. Yet the facts are overwhelming that the athletic fields are an integral part of the Town's requirements for the project, and are inextricably bound up to the point that a certificate of occupancy is contingent on the levelling of the forests to build the fields (*supra*).

87. Indeed the affiant thoroughly mischaracterizes the law by arguing that provisions of

SEQRA allowing segmented review in certain cases should be applied here; yet the affiant omits the fact none of the conditions of that exception -- which require a specific acknowledgement and justification of the segmentation, and assurance the act would be no less protective of the environment -- were met in this case (Ellsworth Affidavit ¶29).

88. The affidavit challenges the introduction of "new information" in the Petition and Supplemental Petition (Ellsworth Affidavit ¶¶38*ff*.) It argues that the "new information" means that Petitioners are trying to "raise new issues or concerns which they had not previously identified," (Ellsworth Affidavit ¶43).

89. Petitioners purpose was precisely to focus attention on "issues or concerns" that were "previously identified". The issue of contiguous forests and other natural lands at risk of being destroyed without a full accounting was specifically raised as an issue of wildlife impact in the SEQRA review (e.g. FEIS p. 60, p. 61).The issue of the inadequate buffer was also raised (e.g. by Petitioner Denton, Ellsworth Affidavit ¶33).

90. The purpose of the satellite images was to demonstrate the type of information lacking in the official record, and how the deficiency illustrated the lack of a 'hard look'. The satellite images provided numerical acreages of the various <u>specific</u> forest and woodland areas, and attempted to quantify how the areas would be reduced by the proposed project -- information absent from the official record.

91. In instances where acreage figures were used in the Petition to challenge the calculations of the Town and the Respondent applicants, the purpose was to point to the procedural deficiencies in the SEQRA process, not to attempt to substitute new data. If the impression created was otherwise Petitioners ask the Court's understanding.

92. With respect to the citation of a newspaper article on the relevance of the impact on insects to the substance of the SEQRA review (Ellsworth Affidavit ¶41) this well-known matter of public record -- the decline on Monarch butterfly populations -- should present no challenge as an invasion of the record.

93. In sum, Petitioners purpose was to create a parallel narrative demonstrating what a 'hard look' would look like, what the land at issue looked like, and thus to illustrate the vast gap between such a 'hard look' analysis and what the Town's SEQRA analysis actually contained.

94. Finally the affiant recites a litany of small complaints largely about terminology and other minor issues.

95. The claim that the sprawling parcel of woods, meadows, shrubland, and heavily treed landscaping is not "an ecological jewel" because it is not old-growth forest and contains unspecified amounts of "invasive species" (Ellsworth Affidavit ¶ 25).

96. The Town itself recognized the value of the land in this parcel, stating:

> "The subject property is largely undeveloped, and contains extensive areas of natural habitat at the present time"
>
> (SEQRA Positive Declaration, 2012, Record Exhibit 7, p. 2).

97. Furthermore the Town had recognized the property in its open space preservation plan, "Town of Oyster Bay Final Groundwater and Open Space Protection Plan (FGOSPP)" as quoted by the Nassau County Planning Commission, *supra*.

98. Again the facts are skewed to defend the narrative that the property is not worthy of full environmental protection, and the serious gaps Petitioners have identified are thus

unimportant. But as Petitioners have documented, the facts are otherwise, and the law is otherwise.

Affidavit of David Kennedy

99. David Kennedy describes extensive experience in preparing environmental reviews. He states that "The customary procedures for assessing ecological conditions and impacts" include "[q]ualitative and quantitative impact analyses ... on existing ecological communities, observed/expected vegetation and wildlife...." found on the site (Kennedy Affidavit ¶13, 13(h)).

100. Notably there was no "quantitative" and minimal "qualitative" analysis of the "observed/expected...wildlife" (Kennedy Affidavit ¶13, 13(h)) in the entire SEQRA review in the present matter.

101. The affidavit contains details of the "field inspections" -- requested by the testimony of environmental advocate Richard Brummel -- cited in the affidavit (Kennedy Affidavit ¶¶17-19) but omits specifics that were contained in the FEIS that cast doubt on their thoroughness, to wit: of the eleven field inspections conducted in a prior environmental review, concluded in 2005, none were conducted in the summer, and the field inspections said to have been conducted in December 2010 and July 2012 by Mr. Kennedy are not quantified nor are their hours specified other than "5:00 AM and 7:00 PM" (FEIS, p. 64).

102. The affidavit claims that the SEQRA Review "comprehensively identified and analyzed" "the potentially-significant adverse impacts" of the Beechwood project (Kennedy Affidavit ¶ 24).

103. The affidavit takes issue with Petitioners argument that woodland and forest were variously characterized in the review, with the effect that the alleged 70% retention rate (Findings Statement, p. 9) overstated the amount of forest retained by counting "brushland" and "meadow" as part of it.

104. The affidavit for instance states that aerial photos can misstate the extent of forests when groups of single trees present a wide canopy together (Kennedy Affidavit ¶35).

105. Furthermore the affidavit challenges Petitioners qualifications to perform the measurements contained in the Petition (Kennedy Affidavit ¶36).

106. However, for all the errors imputed to Petitioners the affiant offers no specific challenge to Petitioners' counter-narrative, and ignores the purpose of the counter-narrative to demonstrate how a comprehensive review -- a 'hard look' -- would appear.

107. Mr. Kennedy repeats the Respondents' refrain that the habitat on the property is degraded by invasive species, but as is the case throughout the SEQRA Review, he fails to offer any quantitative analysis of the degree of degradation or its actual impact on wildlife (Kennedy Affidavit ¶38).

108. The claims are all vague statements containing unverifiable terms like "various non-native/invasive species are present and, in some cases, dominant throughout portions of ...all ten existing ecological communities...." (Kennedy Affidavit ¶38).

109. After listing the many flaws Petitioners identified in the SEQRA Review with respect to wildlife and habitat (Kennedy Affidavit ¶39) the affiant argues that it is "unreasonable" to expect the habitat to remain unchanged (Kennedy Affidavit ¶ 41) and "impossible" to perform a quantitative analysis of the wildlife on the site (Kennedy

Affidavit ¶44).

110. But Petitioners asserted no such expectation that the site will be unchanged, only that the SEQRA Review be complete and authoritative.

111. With respect to counting wildlife on the site, Petitioners note that as discussed elsewhere herein, wildlife population analysis (counting) is a well-established practice.

112. In fact Mr Kennedy's own lone scholarly paper, cited in this curriculum vitae, involves such a population counting.[36]

113. The affiant claims the data requested on habitat retention was indeed present in the review (Kennedy Affidavit ¶45) but the data cited, FEIS Table 7, in fact speaks of aggregate forest not specific contiguous units of habitat, as Petitioners argue is the relevant metric to determine environmental impact on wildlife[37].

114. In fact Mr. Kennedy appears to adopt Petitioners' understanding that such a measurement of intact habitat is a litmus test criterion for to the 'hard look' SEQRA demands, though there remains the disagreement over whether it actually was performed.

115. States Mr. Kennedy:

> "It is therefore apparent that the Town Board had before it precise quantifications of the 'before' and 'after' vegetated and habitat areas, and therefore took a 'hard look' at the impacts...."

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[36] "Distribution of living larval Chironomidae (Insecta: Diptera) along a depth transect at Kigoma Bay, Lake Tanganyika: implications for palaeoenvironmental reconstruction,"
H. Eggermont, D. Kennedy, S. T. Hasiotis, D. Verschuren and A. Cohen pg(s) 162–184. "We analysed the distribution of living larval Chironomidae (Insecta: Diptera) along a depth transect (0–80 m water depth) at Kigoma Bay in Lake Tanganyika (East Africa) to explore the ecological indicator value of Lake Tanganyika's midge fauna and to delineate the habitat preferences of resident larvae." (http://www.bioone.org/toc/afen/16/2, retrieved 10-24-15)

[37] Petitioners substantiate the importance of "contiguous" habitat by reference to court cases, a public record of which the Court may take legal cognizance.

(Kennedy affidavit, ¶ 46)(emphasis added)

116. Would it were so. In fact the Town Board was provided only aggregate data that had already been challenged in the DEIS review process as all but meaningless (DEIS p. 60).

117. The data in the chart cited by Mr. Kennedy, Table 3 of the FEIS, lumped together all instances of "meadow or brushland" or "forested" area, which could not properly show the fate of contiguous areas of natural habitat, as the Petitioners charged.

118. The affiant also cited Figure 27A of the DEIS, a rough colored drawing purporting to represent the various ecological communities post-construction (Kennedy Affidavit ¶47). He claims the figure shows it is "readily apparent" that even the FEIS plan would have preserved 70 percent of the habitat.

119. But that figure, also cited by Respondents in the FEIS (p. 60) was not only scientifically limited in that it contained only non-quantified sketches, but is now acknowledged by Respondents as an invalid basis for analysis:

> "...[T]he referenced DEIS 'Figure 27A' does not represent the final approved development plan for the Beechwood Project." (Answer, Respondent Beechwood, ¶84).

120. Mr. Kennedy offers a figure for preserved forest that is wholly at variance with the Respondents own statements.

121. The affidavit states "83.6% of the forested land would be preserved" (Kennedy Affidavit ¶ 45).

122. This figure ignores (a) the clearly established plan to "clear and grade for the athletic fields" about 15 acres[38] of forest in the Town's forested parcel (Rosenberg Affidavit, ¶16);

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[38] See Footnote 2, above, and Exhibit 3,

(b) the need to count meadows and brushland in the calculation of "habitat" to be lost or preserved; and (c) the acknowledgement by Respondents that the forested "buffer" along Round Swamp Road both is to be degraded by the fitness trail (Ellsworth Affidavit ¶51); and, the Respondents acknowledgement that part of that "buffer" lacks any trees at the present time (e.g. Kennedy Affidavit ¶59(c)).

123. In fact, the wildlife "habitat" -- forest, meadow and brushland -- remaining after the proposed construction will be reduced by about 60%, not preserved by 83.6% as claimed.

124. With respect to the buffer along Round Swamp Road, Mr. Kennedy points to the vague assurances contained in the DEIS that screening will be augmented with new plantings after the woods are reduced to 100 feet (or 125 feet, as the case may be) (Exhibit K, DEIS p. 371, Kennedy Affidavit ¶65).

125. The affiant claims the "visual impacts" of the project were "fully discussed": Exhibit K also contains the single water-color drawing, Figure 31 of the DEIS -- addressed in the Petition as wholly inadequate -- meant to represent the view of the project "along Round Swamp Road".

126. While this is meant substantiate the argument that a 'hard look' was performed, the pages excerpted in Exhibit K itself belie that assertion. While the various excerpts describe radically different views and characteristics of the buffer along Round Swamp Road, Figure 31 itself fails to locate itself in any one of the areas so described.

127. The excerpts describe part of Round Swamp Road where "the topography of the site rises, blocking views in to the site" (DEIS p. 344). Then "farther south...the topography flattens out , and there are existing views directly into the existing soccer fields. These fields

are directly located across form a single-family residential development...However there is no screening vegetation in this area." (DEIS pp. 344-45). Then, "There is a long stretch...that does not contain any residences.... the existing vegetation.. is relatively dense within this area" (DEIS p. 345).

128. Granted that the area across from Petitioners' residences the current screening is relatively denser, but that is not the point in evaluating the sufficiency of the 'hard look' supposedly made of the function of the buffer.

129. Rather the point is that despite the assurances of Mr. Kennedy, in fact as reflected in his own documentation, the drawings are simply unreliable and inadequate to provide a rational basis upon which to evaluate the visual impact.

130. Mr. Kennedy compounds the misrepresentation of the integrity of the visual buffer analysis by claiming that the lack of treatment of "off-leaf" conditions in a large part of the year is not significant because "The Final Scope for the Beechwood Project ... does not require such 'off-leaf' analysis" (Kennedy Affidavit ¶ 69).

131. One would need to truly parse the Scope cited to argue that the year-round evaluation of the buffer is somehow excused. The Scope states that the analysis "will provide depictions of the site from proximate residential areas and roadways and other public areas, under both existing conditions and post-construction. These will provide an evaluation of the potential changes to visual character from various vantage points."

132. There is nothing in the Scope that offers a 'loophole' to ignore how the issues raised will be varied throughout the year. In fact to absence of that information is clearly a gap that suggests a 'hard look' was absent.

133. The affiant does not refute Petitioners' assertions that the SEQRA Review was fatally wanting in key areas.

134. While the arguments over acreage and habitat tend to be complex, the fact that there is no categorical answer provided by the SEQRA Review demonstrates the essential weakness of it.

135. Without clearly accounting for habitat as such, in contiguous parcels, and similarly accounting for the populations of the wildlife living there, it is impossible to maintain that the Town Board could make the informed and rational "balancing" or "weighing" of ecological, social, and economic issues that SEQRA demands.

136. Since that determination is the intent and purpose of the SEQRA process, if the data presented could not support it, then the data itself fails to satisfy the 'hard look' standard, as well as the statutory requirement.

Affidavit of Theresa Elkowitz

137. Theresa Elkowitz presents a long resume to her opposition to Petitioners' action. But her credentials also reflect a career working 'both sides of the street'. She has apparently earned a living advocating for developers and private firms -- at the same time she reports consulted with government entities and even held public office[39] (Elkowitz affidavit ¶¶1-14).

138. It also be noted that her tenure of 29 years in planning and consulting on Long Island

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[39] At the time Ms. Elkowitz was chairperson (1992 - 2006) of an environmental body in Suffolk County (affidavit, ¶12) she also provided testimony on behalf of private firms like Waldbaum Inc. in its opposition to a local waterfront redevelopment and sewer relocation plan, Waldbaum v. Village of Great Neck, 10 Misc. 3d 1078(A), 2006 N.Y. Misc. LEXIS 160 (Supreme Court, Nassau County, Bucaria, J., 2006). Petitioners did not specifically search for this information, but instead happened on it in researching legal issues explored in the accompanying in the memorandum of law

(Elkowitz affidavit, Exhibit A) coincides with a period when overdevelopment has become a noose strangling the Island -- removing natural open space and creating traffic congestion on almost every main artery unheard of thirty years ago.

139. Ms. Elkowitz's expertise is used in a self-serving manner here. In describing the SEQRA process, Ms. Elkowitz is poetic in quoting the lofty goals of the Environmental Assessment Form (EAF) (Elkowitz affidavit ¶27). Yet the affidavit makes no mention of the goals and intent -- described by Petitioners below -- of the 'Environmental Impact Statement' and 'Findings' part of the process, which is so crucial to the present matter (Elkowitz affidavit ¶ 30, ¶ 35, ¶¶ 41-42).

140. Repeating a refrain heard throughout the Respondents arguments, Ms. Elkowitz argues "the Subject Property is not pristine forest or wildlife habitat" (Elkowitz affidavit ¶ 46).

141. As previously noted, the Town had determined that whatever the property was not, it was indeed a rich site valuable to the local environment: "The subject property is largely undeveloped, and contains extensive areas of natural habitat at the present time" (Record Exhibit 7, SEQRA Positive Declaration, 2012, p. 2).

142. Ms. Elkowitz calls the site "one of the most intensively-studied properties on Long Island" (Elkowitz affidavit ¶19). But that statement is belied by the fact that nothing has been determined of the numbers of any species of wildlife living there.

143. Furthermore according to the Respondents testimony, this richly vegetated 143-acre site has apparently been visited by biology professionals only thirteen times in the past twenty-four years (1991-2015) (FEIS p. 64; Kennedy Affidavit ¶17, ¶19). One could hardly

call this among the most intensively studied sites on Long Island, given state parks and preserves that are visited on a weekly basis by professionals.

144. The affiant provides an encyclopedic recitation of the various plans that have been made for the site since Nassau County sold it, including the present plans of Respondents Beechwood (Elkowitz affidavit ¶¶ 46*ff*.).

145. The affiant asserts there have been notable efforts to mitigate impacts of the Project (Elkowitz affidavit ¶ 64), and the evident plans to replace the athletic fields lost is a clear indication.

146. But missing from the analysis she provides is specific mitigation of the issues raised by Petitioners as relate to wildlife and habitat, and with respect to the buffer facing their homes.

147. As has been frequently noted herein, the dedication of land to the Town is destined to result in additional athletic fields, not preserved habitat.

148. The various buffers are to be cut through with paths whose character appears strangely unknown, even to the Respondents[40]. These diluted buffers and cut-through forests are thus degraded as both habitat and buffer.

149. Ms. Elkowitz provides a full history of the steps her client took to comply with SEQRA, and claims that the process "significantly exceed the requirements of SEQRA" (Elkowitz affidavit ¶ 92).

150. Petitioners do not dispute that extended period for comment may indeed have

[40] Numerous assertions regarding how wide the fitness path will be and whether or not it will be lighted or paved are carried in the various affidavits here (e.g. Ellsworth affidavit ¶51, Kennedy affidavit ¶ 61) but in fact the plans are absent from any of the approved resolutions and documentation, so Petitioners are constrained to assume the 'worst case', as is the Court.

exceeded statutory requirements.

151. But there was only a single hearing on the full SEQRA analysis, which dragged on to 3 AM and which many residents left far earlier as it was a school/work night.

152. By contrast, in another matter dealing with a far smaller property, the public record reveals that multiple SEQRA hearings were held by public agencies on both the DEIS and FEIS prior to a planning board vote[41]. Thus the affiants' claims of meeting or exceeding the requirements benefits from some context.

153. However, insofar as SEQRA is intended to protect the environment, not merely create a bureaucratic exercise, Petitioners strongly dispute that the SEQRA Review met any of the substantive requirements of the law, for the reasons repeatedly stated.

154. The fact that "ample opportunity...for public participation" was provided (Elkowitz affidavit ¶92) does not repair the defects that occurred when objections raised in that participation were not addressed.

155. In fact very considerable opposition to the Project was raised throughout the process by local residents and outside environmental activists, Mr. Brummel included but also by the Audubon Society.

156. Ms. Elkowitz makes what appears to be a legal argument that during the public comment opportunities, no one had objected to SEQRA procedural-issues or to

[41] In Falcon Group v. Town/Village of Harrison Planning Board, 2015 NY Slip Op 07025 (Second Dep't, 2015), the record states, with emphasis added: "The Board accepted the DEIS as complete on March 25, 2008. Public hearings were held on the DEIS, which was then revised to incorporate a further alternative plan. Additional public hearings were held, and a final environmental impact statement (hereinafter FEIS) was prepared. The Board accepted the FEIS as complete on September 27, 2011. The FEIS included two new alternatives which would reduce the density of the project and many of the environmental impacts. After a public hearing on the FEIS, the Board adopted a findings statement pursuant to SEQRA on February 28, 2012." The land at issue was under 20 acres, in contrast to the 143 acres in the present matter.

segmentation (Elkowitz affidavit ¶93). However, as previously stated, Respondents are not absolved of their legal responsibilities to comply with statute by the failure of testimony to warn them of such violations.

157. Again, the purpose of public comment is not to recite the law, but to gather facts and opinions not otherwise available to the SEQRA actors. As stated, to allow the absence of legal objection to immunize an agency from violation of statute would lead to chaos if sustained.

158. Ms. Elkowitz provides a robust recitation of Petitioners challenges to the SEQRA process (Elkowitz affidavit ¶95) although she is incorrect to claim that the allegations do not concern "procedural" issues. In fact all concern procedural issues of compliance with SEQRA in the zoning process.

159. The affiant's claim that "Petitioners did not bring the foregoing...to the attention of the Town Board" (Elkowitz affidavit ¶96) again misstates the legal requirement, which is that the issues needed to be raised by a person before the agency, not the Petitioners necessarily[42].

160. As a blanket purported refutation of Petitioners objections to the failure to account for habitat clearly and accurately, Ms. Elkowitz cites the affidavit of David Kennedy, discussed above, and the short affidavit of Victor P. Bert, who says he performed the measurements of the forests (Elkowitz affidavit ¶97).

161. The affiant defines the judicial standard for approval of the SEQRA process in that an agency identify the areas of concern, take a 'hard look' at them, and provide a reasoned

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[42] Again, see Shepherd v. Maddaloni. *supra*. and in the accompanying memorandum of law.

elaboration (Elkowitz affidavit ¶ 98).

162. The affiant does not define the 'hard look', but merely asserts that the Town Board did take a 'hard look' because it "discussed and evaluated" (Elkowitz affidavit ¶104, ¶104,¶105, ¶106, ¶107) various general issues e.g. "potential ecological and aesthetic impacts" (Elkowitz affidavit ¶ 106).

163. Further Ms. Elkowitz states, as had Mr. Kennedy and Mr. Ellsworth, the Town Board completed its 'hard look' because in the FEIS it "responded, in great detail, to all the comments and questions made, with respect to the ecological and aesthetic impacts of the proposed Beechwood Project...." (Elkowitz affidavit ¶ 108).

164. Unfortunately for the reader, the affidavit then simply points to a collection of pages representing the relevant pages from the DEIS and the FEIS. No effort is made to demonstrate how the information in the DEIS and FEIS contradicts the allegations of the Petitioners with respect to each of the particular deficiencies Petitioners alleged in detail in the Petition and Supplemental Petition.

165. As such, Ms. Elkowitz's affidavit is of little practical use in judging the merits of issues with respect to the 'hard look' missing from the EIS and the DEIS.

166. Ms. Elkowitz took a similar approach with respect to the Findings Statement, underlining what in her judgement was dispositive of Petitioners arguments.

167. For instance, the Findings Statement is underlined in portions that state:

168. "The site is comprised of nine ecological communities....All ten...either characterize areas of current development....or otherwise indicative of disturbance....The occurrence of invasive species is widespread on the site...The proposed development will result in the

clearing of existing vegetation....However to the extent practicable, land clearing will be concentrated in areas that are more disturbed and less ecologically valuable. In particular the DEIS Plan entailed the retention od approximately 70 percent of the existing 53 acres of woodland...which was increased in the FEIS plan and has been further increased...."

169. This supposed 'hard look' does not even mention the impact of the project on the dozens of species of existing wildlife that inhabits the site.

170. It continues to reflect the flaws of counting as habitat disparate tracts not measured as contiguous units, as well as counting forests that will be converted to athletic fields, and omitting the impact on habitat that comprises meadows and shrublands.

171. Thus Ms. Elkowitz's affidavit, in these sections, by relying verbatim quotation from the record, neither engages nor rebuts Petitioners allegations. Simply larding Respondents' submission with pages and pages of record may tend to overwhelm with verbiage, but it does not respond to the questions at hand.

172. In much the same way Respondents conducted their overall SEQRA Review, artfully sidestepping key environmental issues that would have proved most challenging to the project -- that being the life and death impact on wildlife and habitat, and the visual impact on neighbors along Round Swamp Road. It is for the courts to address those failings, as the political process did not.

173. Ms. Elkowitz asserts that it is "impossible" to count or quantify the wildlife on the property (Elkowitz affidavit ¶111), despite the fact, as Petitioners have demonstrated, that an entire discipline exists in wildlife biology devoted to population dynamics and counting, and the fact that one of the very experts involved in this study, Mr. Kennedy, claims partial

authorship of an article that addresses counting organisms, *supra*.

174. Ms. Elkowitz then turns to the segmentation issue and the athletic fields that Respondents must "clear and grade" prior to the issuance of a Certificate of Occupancy (e.g. Respondent Beechwood affidavit of Rosenberg, ¶16).

175. As stated previously, in addition to all the other statements clearly indicating the Town's plans to create athletic fields on the forest it is being given, the Covenant attached to the approved zoning resolution is a clear proof of the fact stating "...no Certificate of Occupancy shall be issued unless and until the Declarants develop the athletic fields on the subject premises in accordance with the contemplated consensus plan, or, in the alternative, clear and grade for the athletic fields if plans for the athletic fields have not been completely formulated....." (e.g. Rosenberg affidavit, ¶16;)

176. Using Ms. Elkowitz preferred 'tests' of segmentation from the state's SEQRA Handbook (Elkowitz affidavit ¶115) even the most sympathetic reading still denominates the omission of the athletic fields as improper segmentation:

177. As quoted by Ms. Elkowitz, the SEQRA Handbook asks "Is there a common purpose or goal for each segment?"

Answer: In this case, the purpose is to allow the developer to proceed with the project by compensating the local sport club(s) for the destruction of their fields.

178. Further, "Is there a common reason for each segment being completed at or about the same time?"

Answer: Yes, in this case the point is as stated: to compensate the local sport club(s) and avoid any inconvenience to them.

179. Further, "Is there a common geographic location involved?"

Answer: The answer is again yes, the common location is the 143 acre property at issue here.

180. Further, "Do any of the activities...share a common impact that may...result in a potentially significant adverse impact....?"

Answer: Again the answer is yes, because the destruction of the roughly twenty acres of forest and woodland in the Town parcel for athletic fields will substantially reduce the forest and habitat left on the overall site.

181. Further: "Are the different segments under the same or common ownership or control?"

Answer: Again, 'yes' the entire site is at the present owned and controlled by the Respondent developers/owners.

182. Further: "Is a given segment a component of an identifiable overall plan?"

Answer: Again, 'yes' the destruction of natural habitat for the soccer fields is part of the overall compensation mechanism meant to allow the project to go forward while removed in existing athletic fields.

183. Further: "Can any of the interrelated phases of the various projects be considered functionally dependent on each other?"

Answer: Again, 'yes' the Town has made very clear it considers the compensatory athletic fields essential and required for the overall project to proceed.

184. Finally, "Does the approval of one phase or segment commit the agency to approve other phases?"

Answer: The answer is again 'yes', as demonstrated by the very explicit provision in the

resolution; cited by Mr. Rosenberg that explicitly requires the clearing of the athletic fields as a condition for the issuance of a Certificate of Occupancy for the massive Project itself.

185. The affiant attempts to deny the reality of any of the above facts. For instance she claims "There is no reason for the Beechwood Project and any construction of the ballfields on the portion of the Subject Property ...to be completed at or about the same time" (Elkowitz affidavit ¶118(g)).

186. Yet the Town Supervisor himself expressed anguish that the fields might not be constructed when by the time the land-clearing for the Beechwood development was performed:

187. "The Town will cooperate with and assist POBSC in securing temporary facilities to accommodate their needs if there is a hiatus in field availability after development commences in the existing fields and before the new fields in the 57.93-acre parcel have been constructed." (Findings Statement, p. 20)

188. There seems to be very little doubt what the Town plans to do. In the event the facts of the Town's plans are tested by an Article 78 trial of fact, perhaps the testimony will change.

189. Ms. Elkowitz also denies the segmentation connected with construction of new turning lanes both along the Project property in addition to elsewhere, at some distance, along the Long Island Expressway Service Road and at Route 135 (Record Exhibit 52, Restrictive Covenant, p. 4).

190. Ms. Elkowitz asserts this is not segmentation because her colleague "does not recall any agency having required that traffic mitigation measures ...be themselves subject to

environmental review" (Elkowitz affidavit ¶ 119).

191. Further, she asserts that a part of the new traffic construction "will entail, at worst, the removal of a few street trees" (Elkowitz affidavit ¶120).

192. Such a cavalier and incredulous attitude is not what is required by the "strict compliance" standard demanded of SEQRA[43]. The law provides no exemption when an environmental disturbance is to be undertaken in service of mitigating another environmental disturbance and the Respondents cite no such exemption.

193. In fact the plans as stated (Record Exhibit 52, Restrictive Covenant, p. 4) contemplate at least three separate construction projects, in three separate areas, not 'merely' the removal of what have been called large mature trees along the site periphery.

194. Insofar as it is directly connected to, and the result of, the Beechwood Project, the deferral of the environmental review, whatever the nature of the new construction, is in violation of the SEQRA prohibition against segmentation.

195. The Elkowitz affidavit demonstrates the type of 'trust me' and 'nothing to see here' attitude that Respondents have asserted throughout both the legal review and the environmental review itself, leading to the flaws that Petitioners have catalogued.

196. Ms. Elkowitz's final argument challenges the acreage calculations Petitioners presented to illustrate the type of analysis missing from the Town's SEQRA review.

197. She argues that the figures were not compiled by "any qualified surveying, engineering, or ecological expert" and are presented for the first time in the special

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[43] NYC Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 (2003): "Strict compliance with SEQRA is not 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." (at 348)

proceeding (Elkowitz affidavit ¶122).

198. Ms. Elkowitz does not point to any instance where the figures are incorrect or misleading, she only questions their lack of expert provenance.

199. As Petitioners have stated elsewhere, their purpose was to create a parallel review to illustrate what was missing from the Town's review -- not primarily to contradict the Town's review, although discrepancies were noted where appropriate.

200. The satellite images, and acreage calculated on the website "Daftlogic.com", graphically illustrated the several distinct 'habitat' areas present on the property and attempted to assign some acreage measurements to them that were entirely absent from the record (Petition, ¶¶ 129-135, e.g.), .

201. The Town was well aware that testimony had requested that it specifically address and quantify contiguous habitat area as part of the SEQRA Review (FEIS p. 60; Petition Exhibit 20).

202. Thus this issue was not newly raised in this special proceeding. Petitioners only created such a parallel record to demonstrate how the SEQRA Review was deficient and failed to answer key questions that had in fact been raised during the review process.

203. Nowhere in the entire mass of papers presented to the Town Board or to the Court is there a graphic that shows how the ecological communities currently on the Beechwood property finally fare.

204. The only measure of contiguous habitats "post construction" is one compiled early in the SEQRA process, DEIS Figure 27A. While Figure 27A is repeatedly referenced in the affidavits as a valid answer to Petitioners' challenges over contiguous habitat, e.g. Kennedy

Affidavit ¶46, Respondents elsewhere acknowledge that "...the referenced DEIS 'Figure 27A' does not represent the final approved development plan for the Beechwood Project" (Answer, Respondent Beechwood, ¶84).

205. Without the effort of Petitioners to create some clear and complete record of what is proposed, the Court would have had only the deficient and self-serving record created by the Respondents.

206. The record thus created by Petitioners is meant for guidance and analytical purposes in judging the completeness and sufficiency of the Town's record -- which the Town was emphatically urged to improve.

207. Thus Ms. Elkowitz is in error to dismiss the Petitioners' analysis on technical grounds or due process grounds, though its presence proves 'inconvenient' to the official narrative.

Affidavit of Rachel S. Scopinich

208. Rachel Scopinich purports to refute Petitioners' challenge to the sufficiency of the analysis of the visual buffer in front of their homes along Round Swamp Road. She asserts that based on her post facto photographic and site analysis, the proposed buffer "will provide substantial, if not complete screening of the Beechwood Project...." (Scopinich affidavit, ¶14).

209. Petitioners find it quite telling that the Respondents believe it necessary and helpful to supplement the record relied on by the SEQRA Review with photographs and analysis that could not to be found anywhere in the review itself.

210. Indeed the whole thrust of Petitioners' challenge to the SEQRA Review of the "visual buffer" is the absence of rigorous analysis and evidence of the ability of the buffer to achieve its aims of screening the homes.

211. As Petitioners noted, the goal of the Town was stated as follows:

212. "The provision of adequate vegetative buffers to screen views of the developed site from adjacent roadways and neighboring properties is particularly important in this regard....This buffer must consist of retained sections of existing vegetation that provide a visual screen, augmented as necessary...." (Verified Petition, ¶174, Exhibit 34, DEIS, p. vi, Point 4, emphasis added)

213. Yet the lack of adequate analysis was blatant to Petitioners:

> "The deficiencies in the information, decision-making and analysis means that the Town did not take the required 'hard look' at the question of buffers and screening as it affects the neighborhood east of the pending project"
>
> (Verified Petition, ¶193).

214. Ms. Scopinich offers no credentials to perform visual environmental analyses.

215. Ms. Scopinich's efforts as reported may have a reasonable "common sense" credibility as Petitioners' own efforts to use internet tools and common knowledge may have such credibility.

216. But without engaging in Ms. Scopinich's specific alleged findings, Petitioners emphasize that such analysis was entirely missing from the record, and was thus not available for challenge or testing prior to the Town's decision-making.

217. Furthermore the 'analysis' was undertaken with full foliage present, in the shadows of the daytime, with an object -- a person -- far smaller than a two-story house, or other

multi-story buildings to be constructed, and in no way reflected the reality of say a fall or winter evening with lights from various sources in the proposed development.

218. The new analysis has no place now in the process, but it illustrates the validity of Petitioners' challenge to the failure of the Town to take a 'hard look' at the visual buffers.

Affidavit of Victor P. Bert:

219. Victor Bert describes the procedures for the acreage calculations performed by the Respondents (Bert affidavit ¶6) and dismisses those performed by the Petitioners (Bert affidavit ¶7).

220. The affiant does not offer any contradiction to any of the Petitioners' findings, he only argues that the techniques they use are unreliable, to wit the internet mapping of Google (Bert affidavit ¶7).

221. As Petitioners have stated elsewhere, the primary purpose of their satellite presentations was to illustrate for the Court what was missing from the Town's record, and what would reasonably constitute a complete good-faith analysis -- as legally required -- of the habitat-areas on the property and their specific fates after construction.

222. Mr. Bert does not challenge the purpose of the Petitioners' analysis, or its utility, nor does he defend the absence of such data and analysis from the Respondents' official record.

223. Mr. Bert only asserts the superiority of Respondents' technical tools, which Petitioners do not dispute, while wishing they had been utilized in the interest of providing a full and honest accounting of the devastation to be created by the full implementation of Respondents' plans.

Affidavit of Patrick L. Lenihan

224. Mr. Lenihan's affidavit serves, it appears, simply to assert that the additional construction resulting from and directly connected with the Beechwood Project on various roads in the area nearby should not be reviewed in the same environmental review as the Beechwood Project -- despite their having been specifically included in the Covenant attached to the zoning resolution (Declaration of Restrictive Covenants, p. 4, Town Zoning Resolution 279-15, Record Exhibit 52).

225. The affiant cites no provision of SEQRA that exempts such connected activities from review, but only asserts that "in my experience...the potential environmental impacts of traffic mitigation measures ...for a proposed action are not separately evaluated, during SEQRA review, beyond or in addition to review of the environmental impacts of the proposed action itself...." (Lenihan affidavit, ¶13).

226. The affiant also argues that the issues "were expressly discussed" in the DEIS (Lenihan affidavit, ¶15), and that the impacts were said to be "actually discussed and evaluated" (Lenihan affidavit, ¶16).

227. However, only one element of the additional road construction was so reported to be discussed, not the three instances. The only discussion involved a turn off lane at the site, not the additional work at the Long Island Expressway and Route 135 (see Restrictive Covenant, *supra*)(Lenihan affidavit, ¶15).

228. Further, the discussion cited offered no specifics of what was involved, aside from general terms, "a number of large mature trees" (Lenihan affidavit, ¶15).

229. Finally Mr. Lenihan offers no indication that having addressed one of the connected

projects, which would affect the Beechwood site and its ecology directly, the Town Board followed the SEQRA rules in explicitly acknowledging the segmentation, offering reasons for it, assuring it would be no less protective of the environment, and approving it as such (6 NYCRR 617.3 (g)(1)).

230. Needless to say, the lack of "discussion" of the other two elements of road construction meant there was no deliberation whatsoever regarding the environmental impact of those actions.

231. Thus Mr. Lehinhan's affidavit fails to refute Petitioners' identification of segmentation with regard to the new external road construction occasioned by and connected with the Beechwood Project.

Affidavit of Richard Rosenberg

232. Mr. Rosenberg includes massive detail on the issue of segmentation regarding the athletic fields (Rosenberg affidavit, ¶¶ 4 *ff.*).

233. The bulk of the discussions and resolutions reported overwhelmingly supports Petitioners contentions that the plan for the athletic fields are firm and absolute, not a vague proposal.

234. As quoted elsewhere, the affidavit carries the text of the Town's resolution of May 12, 2015 stating in part:

> "....[N]o Certificates of Occupancy shall be issued unless and until the declarants develop the athletic fields on the subject premises in accordance with the contemplated consensus plan, or in the alternative, clear and grade for the athletic fields if plans for the athletic field have not been completely formulated, or cannot be fully implemented in advance of the issuance of a Certificate of Occupancy for the shopping center...."

(Rosenberg affidavit, ¶16)

235. Nothing could be clearer. The alleged contingency on some "consensus plan" refers only to the type of athletic fields to be constructed, not the fact that they will be athletic fields. The Supervisor states as much:

> "What actually will go there -- soccer fields, all-purpose fields, baseball fields -- is something that I think, as I sit here, I would leave to the community to determine. (PARA) I don't want anybody saying why are there 16 soccer fields, no baseball, or 14 baseball and two soccer--"

(Rosenberg affidavit, ¶9)

236. The assertion is also made that the issue was adequately discussed because the Town said in its Findings Statement that future environmental review would be performed when appropriate (Rosenberg affidavit, ¶18).

237. However the approval of an action, while deferring the environmental review fully-formed plans without a clear set of reasons, is not permitted (6 NYCRR 617.3 (g)(1)).

238. And indeed in this case there could be no real 'reason' for the deferral.

239. Mr. Rosenberg's asserts that "Such investigations cannot be undertaken at this time because there is currently no agreed 'consensus plan' for what if anything will be constructed...." (Rosenberg affidavit, ¶18)

240. But whatever will be constructed there, the entire purpose of the dedicated lands is for 'construction', whether of fields or clubhouses. There is consistent language in the record that 'construction' is the aim, culminating the commitment of the applicant to "clear and grade for the athletic fields" (Rosenberg affidavit, ¶16, *supra*).

241. The Findings Statement does not offer a word regarding preservation in the Town's

58-acre parcel, but only "development":

> "The facilities to be developed on the land to be conveyed to the Twn have not yet been decided." (Findings Statement, p. 4)
>
> "...[D]evelopment of the 57.93 acre contiguous parcel...(including determination of the specific facilities to be provided and groups to be accommodated) will be decided...." (Findings Statement, p. 20).

242. Despite its likelihood to destroy a large portion of the remaining forest on the site -- possibly 1/3 of the thirty-some acres of forest alleged to be preserved[44] -- there is no evaluation of the impact of clearing the forests for the athletic fields, nor a valid argument for a deferral of he analysis as required by SEQRA.

243. On segmentation, SEQRA states:

> "Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible."
>
> 6 NYCRR 617.3(g)(1)(emphasis added)

244. The deferral of the environmental analysis is clearly "less protective" of the environment for that reason, because it hides the environmental impact, as it obfuscates the total impact of the planned project.

245. In fact it allows the Town to falsely claim that "70 percent" of the original forest is retained -- until the developer will "clear and grade"the lands to obtain his Certificate of Occupancy for the development (Rosenberg affidavit, ¶16)

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[44] It is difficult to estimate the plans using the limited data, but using the maps and the Final Site Plan, which sketches out the proposed athletic fields, it is clear that what portion of the Town parcel is forested and will be destroyed amounts to about 15 acres. See Footnote 2, and Exhibit 3.

246. Nowhere in Mr. Rosenberg's affidavit or the other submissions opposing the Petition is there an indication that the Town Board met the specific requirements of the law regarding a decision to segment the review and defer considerations of clearly intended actions.

247. Thus this affidavit fails to rebut Petitioners allegations regarding the illegal segmentation of the environmental review of the athletic fields to be built on forest claimed to be preserved point he Town parcel.

248. The affiant also attempts to rebut the segmentation issues regarding the construction of new traffic lanes to accommodate new traffic caused by the development.

249. He relies on the arguments of Patrick L. Lenihan, discussed herein elsewhere, that somehow the fact that the new construction is intended to mitigate some other environmental impact renders it exempt from review, and that the vague passing references to the possible outlines of one element of the three elements of new construction somehow constitutes adequate environmental review (Rosenberg affidavit, ¶23).

250. But Mr. Rosenberg also fails to cite any basis in SEQRA for claiming that connected actions are exempt if they have a 'mitigation purpose'.

251. Furthermore as discussed elsewhere the statement in the FEIS that the new traffic lane next to the Beechwood site might affect "a number of large mature trees" and that replacement trees would "compensate for tree removal" (Lenihan affidavit, ¶15) does not provide the type of comprehensive analysis required by SEQRA.

252. It also obviously omits the impacts on two sides of the Long Island Expressway service road and along Route 135 and Old Country Road. (See for example Record Exhibit 50, Town zoning resolution May 12, 2015, Restrictive Covenants, p. 4.)

253. As such Mr. Rosenberg's dismissal of the 'segmentation' issue is unavailing.

254. The affiant's final volley against the Petitioners for their failure to raise the issue of 'segmentation' is similarly baseless: as stated elsewhere herein, an agency is not immunized for non-compliance with state law by the failure of citizens opposing a project to warn it of its legal obligations.

255. Unlike testimony regarding facts and opinion, there is no requirement that 'issues' be raised that describe statutory obligations of an agency, because those are supposed to be known to an agency independently. But beyond that as stated elsewhere and substantiated in the accompanying memorandum of law, there is no bar to raising environmental issues by the doctrine of exhaustion of administrative remedies or otherwise.

256. In the present case SEQRA is clear regarding the rules surrounding segmented review.

257. The issues of the fate of the forests, habitat and wildlife in them was clearly and emphatically raised in the SEQRA Review (e.g. Petition Exhibit 20, Letters of Richard Brummel,, FEIS Appendix A-3 C9).

258. Thus the plans to destroy the forest in the Town's parcel should have been fully analyzed were the SEQRA review to be complete and comprehensive as required by law.

259. Mr. Rosenberg's final sections address the preliminary injunction sought by Petitioners. This matter will be more fully addressed elsewhere.

260. Suffice it to say that Petitioners are indeed affected by the actions taken on private property -- as is often the case in environmental actions -- and despite Mr. Rosenberg's claims this reality has no impact on Petitioners standing in this case (Rosenberg affidavit,

¶28).

261. Furthermore, it is not guaranteed that the Respondents would defer their work until the outcome of this special proceeding is fully settled, thus the deferral of issuing injunctive relief is only warranted on that basis u[stipulation by the parties (Rosenberg affidavit, ¶29).

262. Otherwise Petitioners have thoroughly discussed the nature of the irreparable harm, the equities, and the likelihood; of success in the Petition (pp. 44 *ff.*) and Supplemental Petition (pp. 10 *ff.*).

Affidavit of Matthew M. Rozea

263. Mr. Rozea, writing on behalf of the Town of Oyster Bay, refers primarily to the affidavit of John M. Ellsworth appended to the Rozea affidavit. Mr. Ellsworth's affidavit is discussed elsewhere herein.

264. Mr. Rozea argues that the Town undertook "a lengthy public hearing" and produced "voluminous environmental impact studies" (Rozea affidavit, ¶5).

265. He further states that Petitioners primarily assert "displeasure with the results" of the review, but argues that the Petitioners' arguments are belied by the studies conducted (Rozea affidavit, ¶6).

266. Mr. Rozea's generalized opposition offers no specific basis which Petitioners need address. The detailed analysis of the affidavit of Mr. Ellsworth and others in support of Respondents' position(s) disposes equally of Mr. Rozea's critique.

The Answers of the Parties

Answer of Beechwood

267. The most significant objections are Respondent Beechwood's objections in points of law.

268. Respondent Beechwood asserts that Petitioners lack standing because they allegedly "trespass" on the property whose environmental impact they assert will affect them, and it is further asserted the type of injury is not different from that of the general public, as required by environmental standing rules in New York (Answer Beechwood, ¶98, ¶99).

269. The baseless allegation of illegality is refuted by several obvious facts reflecting the impacts on the Petitioners homes directly, and the public nature of the property at present, to wit:

270. (1) Petitioners homes will be directly affected by the Project in that the woods nearby will be largely destroyed, while new homes will be built and a potentially lighted fitness trial will pass close by; (2) the various forested areas that Petitioners have been acquainted with are accessible from open public roads that are used to access the athletic fields presently on the site and fully open to the public with no restriction; (3) any change in the natural habitats on the site will affect surrounding properties such as those of Petitioners. In fact, the "mitigation" strategy that calls for the "emigration" of wildlife specifically contemplates the wildlife transiting the area where Petitioners reside to reach undeveloped lands past their homes[45].

[45] "It is further anticipated that emigration of displaced wildlife would also occur....in particular...undeveloped woodlands located beyond Round Swamp Road, to the east of the subject property" (DEIS p. 224).

271. As for the manner in which Petitioners suffer an injury different from the public at large: Petitioners' homes' proximity to the subject property alone gives them presumptive standing, along with their wholly substantiated claim that the type of injury they suffer is environmental in nature and the law, SEQRA, is designed to address environmental impacts. The issue is further substantiated in the accompanying memorandum of law.

272. Furthermore their use of the subject property, in its publicly accessible areas, also distinguishes them from the public at large -- defined in a case like this as those who do not typically utilize the natural resource at issue.

273. The next issue raised by Respondent Beechwood, whether the issue of 'segmentation' was raised before the Town of Oyster Bay (Answer of Beechwood, ¶ 101)), has been discussed elsewhere herein.

274. Suffice it to say here that an agency is not immunized from violations of statute simply because it was not 'informed' of the law prior to violating it.

275. Unlike matters of fact and opinion to be gathered in the public process of the environmental review, matter of state law are supposed to be known to the agency independently. Again, to assert that the agency is immune from the law if not so informed by the public invites chaos, were such a bizarre proposition sustained.

276. The Respondents further misconstrue the applicability of "exhaustion of administrative remedies", which doctrine they consistently misapply in any case by claiming, contrary to established case law[46], that only issues raised before the agency by Petitioners

[46] e.g. Shepherd v. Maddaloni, Footnote 4 above.

themselves may be asserted in a legal challenge, a theory which is patently untrue.

277. The same rebuttal applies to Respondent Beechwood's third issue of law, arguing that only the two Denton Petitioners appeared before the Town during the process (Answer Beechwood, ¶103) .

278. In fact there was considerably greater participation by the Petitioners in the process leading up to the Town Board's decision, but as a matter of law it is not relevant. What is relevant is that the Town Board and the Respondents were challenged specifically and emphatically to analyze numerous environmental impacts this Project would create.

279. Furthermore they heard from a large portion of the local population opposing the changes the project would cause.

280. But the Respondents ultimately failed to perform the environmental review called for, and they soft-pedalled the impact on the natural environment while bending over backwards to placate local sports clubs to the extent any of their facilities would be affected.

281. The 55 species of birds, mammals, and herpetofauna (reptiles and amphibians) believed to inhabit the property, and roughly 47 species of Lepidoptera -- butterflies and moths -- found on the land to be largely levelled (Petition, ¶¶72-73) unfortunately had no such powerful advocates on the Town Board, and were not even mentioned in the entire Findings Statement[47].

[47] The Findings Statement only mentions wildlife twice, once to indicate there are no endangered or otherwise at-risk species present, and second to argue that the installation of ornamental ponds may attract animals not currently native to the site (p. 9). The word "wildlife" does not even appear in the Findings Statement, according to a computer search.

282. The fourth, fifth and eighth arguments on the law (Answer Beechwood, ¶106, ¶107, ¶114) have already been addressed herein: Petitioners need not themselves have raised issues before an agency to argue the issues before the Court, and matters of statute need not have been raised before the agency at all.

283. In fact the 'hard look' concept is a legal standard established by the judiciary, not a statutory one, and it would be quite bizarre to assert that the court lack power to enforce their own doctrine when reviewing administrative decisions.

284. With respect to the sixth objection in point of law by Respondent Beechwood, essentially that new evidence is being introduced (Answer Beechwood ¶111),

285. Petitioners have stated elsewhere herein that the purpose of their satellite images and acreage measurements was not to create a new record, but to illustrate what a thorough environmental review -- one that heeded critiques submitted regarding the DEIS -- would have yielded.

286. The purpose of the "evidence" was to illustrate the deficiencies in the official record with respect to identifying and analyzing habitat, not to supplant that record.

287. Petitioners' graphical illustrations provided the only such systematically organized and quantitatively-based data on the property that is before the Court.

288. That reality is despite all the claims by 'experts' for the Respondents that they had superior skills and programs (Affidavit of Bert, above), that massive volumes of records were generated in the environmental review (Affidavit of Rozea, above), that the site was among the the most-studied on Long Island (Affidavit of Ms. Elkowitz), the gaps in the analysis they performed were fatal to the 'hard look' required.

289. By creating the counter-narrative with such illustrative evidence, Petitioners have demonstrated the weakness and insufficiency of the actual record, and its failure to meet the 'hard look' threshold.

290. The Court need not accept the specific figures or illustrations Petitioners have compiled to arrive at the simple conclusion that lacking such a systematic analysis -- despite having been urged to provide one[48] -- the official analysis was fatally flawed.

291. Insofar as the Petitioners calculations were used to challenge the data of the Town Board, again the purpose was not to create separate record but to illustrate how a transparent and systematic analysis of the natural habitat areas would function, and allow the public and the Town Board to fully understand the impact the project would actually have, piece by piece, in a manner that could be checked, verified, and understood.

292. Respondent Beechwood's seventh objection labels the concerns of Petitioners "general or speculative fears" (Answer Beechwood, ¶113).

293. This is a peculiar and unfounded objection when Respondents' own DEIS clearly describes the various impacts that may be expected to occur as a result of the Beechwood Project, on wildlife, on habitat, and on neighboring properties. A similar inventory of negative impacts is likewise catalogued in the Town's SEQRA Positive Declaration, p. 2, Exhibit 7 of the Record.

294. Respondent Beechwood's ninth objection is a legal question, whether the correct

[48] See letters of Brummel, Petition, Exhibit 20; FEIS p. 60.

vehicle for this special proceeding and the requests for relief it contains are more properly maintained in an action for declaratory judgment.

295. The courts have held the error where found to be harmless and treated the applications as Article 78 writs or actions for declaratory judgement with no penalty imposed. However it has also been held that zoning matters, where challenged for procedural violations such as SEQRA compliance, should be adjudicated in the Article 78 process[49].

296. Thus Respondent Beechwood's objection is ultimately irrelevant to the adjudication of this matter.

297. With respect to Respondent Beechwood's tenth objection in point of law, the Respondent asserts that an injunction is beyond the jurisdiction of the Court.

298. Petitioners leave it to the discretion of the Court whether it has such jurisdiction, which they assert it has.

299. The Town of Oyster Bay maintains a tree preservation code[50] whose working has effectively been supplanted by the SEQRA process and the zoning process in this matter.

300. Petitioners would seek to have the findings of the present SEQRA process -- and its connected judicial review -- be applied to any operation of the Town tree regulations that

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[49] Save the Pine Bush v. City of Albany, 70 N.Y.2d 193 (1987), (where a zoning enactment was held reviewable by an Article 78 proceeding); Amerada Hess Corp. v. Lefkowitz, 82 A.D.2d 882 (Second Dep't, 1981)(where an Article 78 special proceeding was "deemed converted" to an action for declaratory judgment as needed).

[50] "§225-3. Regulated activities; permit required. Except as specifically permitted elsewhere in this chapter, it shall be unlawful to remove a tree, as defined herein, unless a tree removal permit is granted pursuant to the requirements of this chapter." Town of Oyster Bay Town Code, http://ecode360.com/print/OY1221?guid=26878370,26878376 (retrieved 10/28/15).

would seek to effectuate by other means any of the actions of an environmental nature contemplated in the current development process.

301. In other words it appears Respondent Beechwood is asserting that it has the power to do with its land as it pleases, re-zoning or no re-zoning.

302. As such a posture would violate the intent of SEQRA and undermine the authority of this Court Petitioners argue that Respondent Beechwood's assertion is invalid and contumacious, and should be rejected by the Court.

303. Respondent Beechwood's eleventh objection was that Petitioners did not need an injunction because they did not lack "an adequate remedy at law" (Answer Beechwood, ¶124).

304. Their rather academic argument, which points to this special proceeding as such a remedy at law, ignores the fact that inasmuch as the injunctive relief is part and parcel of this proceeding, their argument actually makes no sense.

305. Either Petitioners have an adequate remedy at law, meaning this special proceeding and the preliminary injunction which this proceeding has authority to grant (see NY Civil Procedure Law and Rules ("CPLR") Section 6301), or in the event this proceeding cannot grant them such relief, they lack an adequate remedy at law and also need to avail themselves of a preliminary injunction.

306. Respondents are incorrect in asserting that Petitioners lack a basis for a preliminary injunction, but Petitioners have been and will continue to be agreeable to achieving the same aims through stipulation on consent.

307. Respondent Beechwood's twelfth objection is that Petitioners have "no relevant

qualifications or expertise" to make unspecified assertions in unspecified affidavits. (Answer Beechwood, ¶127).

308. Without greater specificity it is impossible for Petitioners or the Court to make sense of or respond to the assertion. Should the Court choose to entertain the objection nevertheless, Petitioners assert that the SEQRA statute is meant to be intelligible to the general public, the facts and details outlined in the SEQRA process are meant to be intelligible to the general public. The Legislature enshrined such a principle in the enactment of SEQRA, establishing:

> "Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment."
>
> (Environmental Conservation Law ("ECL") Chapter 8, Environmental Review ("SEQRA"), § 8-0103. Legislative findings and declaration, Section (2)).

309. The law notably did not denominate that environmental protection was the sole province of 'experts' -- to the contrary.

310. As such the contribution of the citizens to the enforcement of SEQRA in this matter is not invalidated because they allegedly lack credentials comparable to those who designed and executed the flawed SEQRA process in this matter.

Answer of Respondent Plainview Properties

311. The answer submitted by Respondent Plainview Properties is identical or otherwise indistinguishable from that of Respondent Beechwood, and therefore the treatment of the Beechwood answer, above serves to fully address the issues raised in the Plainview Properties answer.

Answer of Respondent Town of Oyster Bay

312. The answer of the Town of Oyster Bay is essentially a pro forma denial of the Petition and Supplemental Petition and thus does not warrant specific rebuttal here.

Hard Look -- The Standard Defined

313. Petitioners have in the accompanying memorandum of law described how the term 'hard look' came into being as a standard for the courts to use in evaluating SEQRA reviews, and established what it requires: "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms."[51]

314. What has been in fact glaringly absent from the SEQRA Review in this matter was any type of "forthright acknowledgment" that large quantities of wildlife will be killed or rendered homeless and that large swaths of natural habitat will be removed.

315. The statute itself provides clear guidance as well, as discussed below, and it is not so easily satisfied by the deficient analysis that Petitioners have identified.

316. Respondents assert that because deadlines were met, issues were raised and addressed in some form, therefore the established standard of rational decision-making was satisfied (e.g. Elkowitz affidavit ¶ 92, Ellsworth affidavit ¶13).

317. The Respondents also assert that a 'hard look' does not require the kind of 'detail' or 'minutiae' that Petitioners have demanded, or that omissions in the record were 'acceptable' because the Scope did not make certain specific demands (e.g. Ellsworth affidavit ¶ 18 ,

[51] Accompanying memorandum of law citing National Audubon Society et. al. v. Dept. of the Navy, 422 F.3d 174 (US Court of Appeals, Fourth Cir., 2005 at 187.

Kennedy affidavit ¶ 69).

318. Yet the law itself describes the substantial duty on the agency to provide meaningful and comprehensive answers to relevant questions. Under those standards expressed in the statute, the SEQRA review in this matter is clearly insufficient as Petitioners have documented.

319. SEQRA states:

> "An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors...."
>
> (6 NYCRR 617.2(n), emphasis added))
>
> "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."
>
> (6 NYCRR 617.9b emphasis added)

320. The statute is clear: the SEQRA review must be thorough -- assembling "relevant and material facts"; it must be systematic and "systematically consider" the facts; it must be "analytical". And it must be comprehensive if it can reasonably perform the "weighing of social, economic and environmental factors".

321. The 'hard look' judicial test is an indication of satisfying this statutory requirement; it but it is not a gimmick to conceal the failure to do so. In the present case the issues raised by the Petitioners -- and not successfully refuted by the Respondents -- demonstrate a failure to meet the statutory or judicial test.

322. Petitioners identified several fatal deficiencies in the SEQRA review that injure

them by damaging their use and enjoyment of their homes and the natural environment around their homes:

323. (1) the failure by Respondents to properly account for the impact of the Beechwood project on wildlife presently on the land at issue, and the 'habitat' for that wildlife; and

324. (2) the failure by Respondents to properly evaluate the visual buffer designed to insulate their homes from the proposed Beechwood development.

Hard Look: Wildlife

325. Respondents refused to undertake any quantitative analysis of wildlife on the land they planned to substantially denude of natural forests, meadows and shrubland. And they have defended this argument in their opposing submissions.

326. In two items of written testimony on the DEIS, an experienced environmental advocate, Richard Brummel, argued a quantitative analysis of wildlife -- not merely a listing of any species that might be present[52] -- was required if the Town would accurately understand the impacts of the Project, in term of how large a group of animals would be affected, and how practical it would be for the animals to undertake an "emigration" elsewhere as the Respondents claimed they would[53].

327. In their answers, Respondents dismissed the idea of evaluating the numbers of wildlife affected. They claimed it was "impossible" and unheard of, in all their 'experience'. They also surprisingly argued that such information would be unhelpful (e.g. Affidavits of Kennedy, ¶ 44, Elkowitz ¶ 111)

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[52] DEIS pp. 110 - 113.

[53] DEIS p. 224 "It is further anticipated that emigration of displaced wildlife would also occur to undeveloped habitats...."

328. Then they claimed that such a response meant that they had adequately satisfied the 'hard look' standard. Yet the law cannot be so easily satisfied if it is to be understood on its face. The law says the SEQRA review "must be analytical and not encyclopedic" (*supra*).

329. Yet the Respondents tell the Court that the bare listing of the names of the various species alleged to dwell on the land at issue is being "analytical and not encyclopedic."

330. According to Merriam-Webster, 'encyclopedic' means: "of, relating to, or suggestive of an encyclopedia or its methods of treating or covering a subject : comprehensive <an encyclopedic mind> <an encyclopedic collection of armor>"[54].

331. By contrast, the primary definition of analytic is: "of or relating to analysis or analytics; especially : separating something into component parts or constituent elements"[55].

332. Clearly the mere listing of the species is encyclopedic -- i.e. essentially meaningless overview -- while the actual counting of the animals present, in some manner at least, would correspond to "separating something into its component parts or constituent elements," as analysis requires.

333. Oddly the Respondents actually try to make the denigration of "encyclopedic" analysis more sympathetic to their approach[56], but it simply is not so, based on if nothing else the standard dictionary definition.

334. Without the numbers, the "analytical" review of the wildlife impact which should allow the Town Board "to systematically consider significant adverse environmental impacts " (statute, above) is reduced to empty unverifiable phrases, for example:

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[54] http://www.merriam-webster.com/dictionary/encyclopedic
[55] http://www.merriam-webster.com/dictionary/analytical
[56] Affidavit of Ellsworth ¶17

> "...due to the overall decrease in available undeveloped habitat, the proposed action would lead to a decrease in population densities for the wildlife species adapted to woodland and successional habitats,"
>
> (DEIS p. 225)

335. SEQRA requires the agency to determine the impact of the action on flora and fauna and make its findings and decisions based on specific facts. The law is clear. Among the environmental impacts to be subjected to "analytical" treatment is:

> "[T]he removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;"
>
> (617.7 (c)(1)(ii))

336. Without an accounting of some type of the animals present, no such an analysis can be achieved. How can the Town Board know if the action will remove or destroy "large quantities of ... fauna " without such information?

337. The statute itself provides a substantive meaning of 'hard look', however weakly the Respondents would wish this Court to view it.

338. The purpose of the 'hard look' is not to merely pass an abstract legal test, but to accomplish the purposes of SEQRA: to assure a clear, rational and scientific balancing of the issues at hand, based on the facts. The absence of any type of accounting for wildlife cannot achieve that purpose.

339. Furthermore, Respondents' repeated assertion[57] that such an accounting is not only unhelpful but actually "impossible" is belied by the facts, as a sampling of the results from a

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[57] Respondent Beechwood supporting affidavits of Kennedy, ¶ 44, and Elkowitz, ¶ 111.

Google search of the term "wildlife population analysis" indicate[58].

340. The titles of scholarly articles on the subject of population analysis include:

> "Geographical population analysis: Tools for the analysis of biodiversity", "Sampling techniques for Forest resource inventory....estimating wildlife population size", "Population viability analysis and risk assessment...models to estimate extinction risks and recovery probabilities...in population modelling...."
>
> (Exhibit 4).

341. The judicial record, of which this Court may take 'judicial notice'[59], is also full of references to the counting of wildlife for environmental purposes (Exhibit 5).

342. Some excerpts of such decision:

> "...[T]he District Court issued an order remanding the case back to the Fish and Wildlife Service with instructions to count the goshawk population."
>
> Southwest Ctr. for Biological Diversity v. Babbitt, 215 F. 3d 58 (USCA, Dist. of Columbia, 2000) at 59
>
> "The Yellowstone grizzly bear population increased at a rate between 4.2% and 7.6% per year from 1983 until 2002. AR 11280. By 2007, the population in the Greater Yellowstone Area measured approximately 500. "
>
> Greater Yellowstone Coalition, Inc. v. Servheen, 672 F. Supp. 2d 1105 (USDC, . Montana, 2009) at 1110
>
> "The Fish and Wildlife Service estimates that of the 15 bears occupying the Cabinet Mountains, five are females of reproductive age. 05-107 AR 126-1 at A24 to A-25. Of those five females, two or perhaps three "may have home ranges within the action area."
>
> Rock Creek Alliance v. US Forest Service, 703 F. Supp. 2d 1152 (USDC, Montana, 2010) at 1206
>
> "Moreover, although it was not required to, the Forest Service conducted an on-the-ground analysis of flammulated owls in the Bonners Ferry Ranger district

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[58] Google search, Exhibit 4.
[59] See discussion in accompanying memorandum of law.

within the IPNF. Dawson Ridge Flammulated Owl Habitat Monitoring (June 30, 2006). The Dawson Ridge study monitored five 1/5 acre plots of flammulated owl habitat ..."
Lands Council v. McNair, 537 F. 3d 981 (USCA, 9th Circuit, 2008) at 995

"...[T]he NFMA ['National Forest Management Act'] requires the Forest Service to ensure continued diversity...According to these regulations, population trends of MIS ["Management Indicator Species"] were to be monitored because changes in MIS were considered as evidence of the effects of management activities on various species."

Cascadia Wildlands Project v. US Forest Service, 386 F. Supp. 2d 1149 (USDC, Oregon 2005) at 1161

343. The assertions of the Respondents that it is "impossible" or unhelpful to count wildlife is belied by formal records of such activities.

344. Should there be any further question, the matter may be subjected to a 'trial of fact' under the provisions of CPLR Section 7804(h).

345. The fact that the wildlife maybe counted and may yield important information means its omission reflects the Town's failure to take a 'hard look' at the issue of wildlife impact.

Hard Look -- Habitat

346. Respondents challenge as "new evidence" Petitioners' expert opinion (Petition, Exhibit 10) which affirms that it is contiguous parcels of natural habitat -- not raw numbers of cumulative areas of forest -- that are the proper functional measure of wildlife habitat, as was attested to during the SEQRA process (FEIS p. 60).

347. The same information is however present in public records of which the Court may take judicial cognizance, as discussed in the accompanying memorandum of law.

348. Some excerpts of such cases:

"Habitat fragmentation occurs when a contiguous block of a species' habitat is divided into smaller parts. Fragmentation may decrease connectivity -- the continuity that enables members of a species to move between habitat areas and is important to maintaining genetic diversity. Habitat fragmentation has been recognized as a factor in the decline of sage-grouse populations."

Oregon Natural Desert Assoc. v. Sally Jewell, No. 3:12-cv-00596-MO, (USDC, Portland Oregon, 2013)(from Justitia.com, 11/2/15)

"Efforts will also be made to avoid separating or isolating unbroken tracts of forest and to keep the trail corridor as narrow as possible through contiguous forest areas to reduce fragmentation effects."

White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. Court of Appeals, 1997)

"...[T]he Legislature recognized that the Highlands is an essential source of drinking water for half the population of New Jersey and 'contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for flora and fauna,'" as well as sites of historic significance and recreational opportunities. *N.J.S.A. 13:20-2*."

Heritage at Independence v. NJ Dept. Envir. Prot., Docket No. A-4645-08T3, 2010 N.J. Super. Unpub. LEXIS 2025 (Superior Ct. of N.J., Appellate Div., 2010)

"The AMS found that 'current habitat [for the sage-grouse] is highly fragmented throughout the northern two-thirds of the [JRA],' and noted a study that found sage grouse had lower nesting success in fragmented habitats when compared with contiguous habitats."

Western Watersheds Project v. Bennett, 2008 U.S. Dist. LEXIS 38031 (USDC, Idaho, 2008)

349. Despite the importance of tracking contiguous lands -- as urged on the Town during its SEQRA Review (DEIS p. 60), the DEIS and FEIS resorted to bulk counting to report the 'fate' of the natural lands at issue.

350. Respondents inexplicably continue to defend the practice of such bulk counting of what may be highly fragmented parcels, or even claim that the information presented to the

Town Board was reliable because it separated forests from other natural lands, as stated in the Kennedy Affidavit (Respondent Beechwood affidavit of Kennedy, ¶ 45).

351. But this is not a functional analysis of contiguous lands, as demanded by a 'hard look' at the environmental impacts here.

352. The SEQRA Review failed to systematically analyze contiguous lands either in terms of acreage preserved or lost, or in terms of which wildlife species lived in which areas of the natural lands.

353. Notably while the SEQRA Review sought to delineate about ten separate types of natural ecological communities present -- including different types of forests, as well as meadows and shrubland, DEIS Figure 16 -- it made no attempt to assign any of the multiple species of birds, mammals, herpetofauna, or lepidoptera to any of the specific areas, or thereby to track their fates based on the fates of the habitat.

354. The DEIS contained only vague and non-quantified claims about how the various stands of forest would treated, with no consideration for the effect on wildlife connected with those forests. Yet SEQRA is concerned with both flora and fauna (6 NYCRR 617.2 (L)).

355. The only treatment of the forests was vague and conclusory:

> "Portions of the existing areas of Successional Old Field and Successional Shrubland located at the southern site area are proposed to be cleared. However some portions...would be preserved"
>
> (DEIS p. 215)
>
> "Although much of the existing Successional Southern Hardwoods at the eastern portion of the site would be cleared, significant examples of this community would continue to exist within the 100-foot buffer...and at the northern and

western portions of the 43+/- acre parcel...."

(DEIS p. 215)

"As detailed in the Tree Preservation Plan and Commercial Landscape Plan (see Appendix C [see below]), successional communities, wooded communities and associated trees would be preserved in mostly contiguous blocks at the northwestern, west-central, extreme southern, and eastern perimeter site areas, thus accomplishing the goal of preserving representative areas of nearly all existing ecological communities...."

(DEIS p. 216)

356. Despite the reference to Appendix C in the last quotation, there appears to be no such information present in that Appendix that supplies the promised information.

357. These vague statements do not provide anything like a clear basis in understanding quantitatively how habitat as contiguous blocks would be destroyed or retained, or the impact on the wildlife dependent on them.

358. The assertion that 70 percent or even 80 percent of the forests would be preserved[60] is central to the Respondents mitigation claim[61], but without the satellite images which Petitioners created, neither they nor the Court -- or the Town Board -- would have or did have a solid basis for evaluating those claims.

359. In fact, it appears impossible that such a large portion of habitat is preserved[62] and it appears the Project will destroy at least 40 percent of the habitat on the site, counting forest, meadows and shrublands[63].

360. Though the DEIS section is entitled "4.3.1 Habitats/Vegetation", the discussion

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[60] Findings Statement, p. 9; Affidavit of Kennedy, ¶ 45.
[61] Findings Statement, p. 9
[62] Exhibit 1, graphic overlay of Figure 27A with areas to be removed.
[63] Calculation of forest, meadow, and shrubland pre and post, including athletic fields.

centers entirely around "preserving representative areas of nearly all existing ecological communities" (DEIS p. 216), and not preserving habitat, which is repeatedly claimed to be "degraded" (DEIS p. 211).

361. The statements were challenged as to their sufficiency, but the effort to clarify them was unsuccessful. The reply in the FEIS points to a chart and a graphic that both fail to account for contiguous blocks numerically (FEIS p. 60).

362. For illustrative purposes Petitioners compiled their own versions of what a forest-by-forest analysis would look like -- to demonstrate the lands at risk and the paucity of data in the actual SEQRA review.

363. The purpose of the satellite images was not to add data to the record, but to create a parallel record that discredited the alleged 'hard look' contained in the official record.

364. In answer to the charge that the vague and incomplete accounting for forest and other habitat indicated a failure in the SEQRA review, the Respondents said that Petitioners were unqualified to perform any analysis, and that in any event they had answered all the questions raised by having confronted each one with a "reply". But that is not the standard in SEQRA.

365. With respect to Petitioners data presentations, Respondents in no instance rebutted the data presented or directly challenged its veracity. They simply said the satellite images were unreliable, and Petitioners were not professionals in the field of surveying etc.

366. In any case as stated above the issue was not to challenge the record but to create a contrast and a framework within which to evaluate the SEQRA review.

367. In those instances Petitioners did challenge numbers of acres using the data from the

satellite measurements, Petitioners affirm that their measurements were performed in good faith.

368. But in the end, the numbers presented by the Respondents fall on their own account, given the plans to destroy the western "Town" parcel of forest for athletic fields, the plan to cut through the eastern Round Swamp Road buffer with a walking/fitness trail, and the misrepresented portions of "forest" along Round Swamp Road that Respondents grudgingly acknowledge has validity.

Segmentation

369. Petitioners have extensively quoted from the record to demonstrate the plans are fully formed to "clear and grade" the forest area dedicated to the Town to create replacement athletic fields, supra.

370. Petitioners in the accompanying memorandum of law also indicate how the clear evidence should be used based on legal precedent to (1) demonstrate the reality of the 'plans' as done in similar cases; and (2) to show how SEQRA requires the plans to be treated by law.

371. Respondents repeatedly have denied the facts -- whether the sketches in the final site plan that are held to be only "illustrative" (Respondent Town affidavit of Ellsworth, ¶ 26) or the plain meaning of the Covenant is held to constitute "no current plan" (Respondent Beechwood affidavit of Kennedy, ¶ 48).

372. The law is clear, and an honest answer to <u>any</u> of the guidance questions posed in the states "SEQRA Handbook" clearly supports the conclusion that the athletic fields are a

closely connected project subject to review at the same time as the rest of the Project -- see discussion with analysis of Elkowitz affidavit, supra.

373. Petitioners would urge the Court to engage in a 'trial of fact (CPLR Section 7804(h) in the event there exists any question of fact regarding the plain meaning of the 'plans' of the Town to construct athletic fields -- or to in the alternative 'clear and grade' the forest on their dedicated parcel for that purpose, that being a distinction without a difference from the standpoint of environmental impact.

Hard Look Visual Buffer

374. Petitioners' arguments regarding the Town's failure to subject the 'visual buffer' to a 'hard look' revolves around two issues: (1) the impact of the fitness trail in diminishing the functioning of the buffer, and (2) the lack of any useful (scientific) drawings, photos or other such analytical tools to evaluate how the buffer would work in practice, at various seasons of the year when trees are with or without leaves.

375. Respondents in one case attempted to fill in the glaring gaps in the SEQRA record by conducting after-the-fact such visual 'studies' on-site (Respondent Beechwood affidavit of Scopinich).

376. One 'expert' argued that the environmental analysis did not 'have to' perform year-round analysis of the 'visual buffer' -- not because it was not needed, but because no one wrote it in the Scope plans.

377. And almost every submission contained some argument that the fitness trail would not contain either typical features of fitness trails -- like pavement and lighting (Respondent

Beechwood affidavit of Kennedy, ¶61) -- or that the exercise stations would not require any space to construct (Respondent Beechwood Answer, ¶51), or that the trail would be a certain very modest width based on a whimsical mathematical calculation of 'acreage' (Respondent Town affidavit of Ellsworth, ¶51).

378. No submission appeared to take note of the provision in the Town's Covenants that the trail would also contain benches (Footnote 20, above, quoting from the Restrictive Covenants, p. 3). That a feature would appear to be difficult to reconcile with the purported five-foot width of the trail (Ellsworth, above).

379. Levity aside, the issue of the character of the fitness trail goes to the question of the nature and adequacy of the 'visual buffer' -- and the question before this Court, "Did the SEQRA review perform the required 'hard look' analyses, in this case with regard to the 'visual buffer'?"

380. Petitioners' homes will face the new development from across Round Swamp Road, each less than 200 feet from the far side (the interior boundary) of the buffer. They have each, in affidavits supporting the Petition, described their enjoyment of the natural forest they face and the concern they have for the fate of this prized view, which influenced several to buy their homes.

381. Petitioners have argued in the Petition that the character of the 'visual buffer' cannot be properly known because of the uncertainty around the design of the fitness trail, and the lack of any systematic analysis of the requirements of an effective visual buffer given the types of development being planned.

382. Respondents effectively acknowledged the record was deficient by their attempt to

create new evidence with photographs of the Petitioners homes and the buffer in leafy daytime conditions. The points they wished to 'prove' were incorrect, and inappropriate given that the SEQRA analysis was long finished and the votes taken buy the Town Board.

383. But they did illustrate with the 'new evidence' what Petitioners endeavored to illustrate with Petitioners' 'new evidence: the SEQRA record was flawed, and consequently it cannot be said that a 'hard look' was taken, as required by law.

Conclusions

384. As stated at the outset, it appears that in addition to mobilizing their considerable resources to overwhelm the Petitioners and the Court, it appears the Respondents believe they can win simply by the bulk of their paper -- much as they appear to have attempted to do in the SEQRA Review itself.

385. But at each point Petitioners have rebutted and disproved Respondents' most aggressive and extensively argued challenges.

386. The entire edifice of Respondents' arguments that the Petitioners and the Court are unable to hear almost every matter raised because of 'standing' or 'exhaustion of administrative remedies' issues has been shown to be without legal substance.

387. Petitioners have clearly demonstrated, in this Reply and the accompanying memorandum of law, that not only equity but the case-law provides them every right they have asserted to maintain this case: Petitioners have legal standing based on 'proximity' to the property and their 'use and enjoyment' of the natural resources; The Courts do not foreclose review of any issues in Article 78 actions regarding the environment based on the

doctrine of 'exhaustion of administrative remedies'; Arguments raised by any party in the administrative process are fair-game for any litigant in the judicial review of the matter, etc.

388. Furthermore the standards for a 'hard look' are robust and unflinching, articulated in both judicial opinions and in the SEQRA statute. They demand far more than the pro forma type 'exercises' of review -- the 'going through the motions' -- that Respondents assert is adequate to pass judicial muster.

389. Petitioners demonstrate that the areas and subjects they point to as fundamental deficiencies are not trivial and pettifogging, but go to the core of the purpose of the SEQRA Review, answering the question: How will 'flora and fauna' fare in the face of a massive development of currently that is by the telling of the Town itself: "...largely undeveloped, and contains extensive areas of natural habitat at the present time" (SEQRA Positive Declaration, 2012, Record Exhibit 7, p. 2).

390. And further answering the question: 'How will the neighboring properties be affected or protected?'

391. Petitioners established that in failing to make the robust inquiries both necessary and eminently possible, like: 'What quantities of wildlife exist on the property?' and 'How will the visual buffer work in practice?' and 'How will the fitness trail affect the utility of the narrow visual buffer?' and 'What is to become of contiguous natural habitat on the property?' the Respondents could not answer the questions they needed to by law.

392. Petitioners were dismayed and surprised by many of Respondents assertions in the opposition submissions, such as the claim it was 'impossible' to count wildlife -- and not even helpful to do so; and that such effort was spent trying to deny Petitioners this judicial

forum by the erroneous characterization of various laws of standing.

393. This special proceeding provides an opportunity to perform the type of environmental review that was expected by the now 46 year history of federal and state laws mandating environmental review to protect the environment.

394. It provides an opportunity to afford the type of protection so desperately needed by the dwindling natural resources that remain in this area of New York State, and to give a voice to the living creatures in the forests, meadows and brushland of the property as well as the neighbors who tried to address the Town Board in a single, frustratingly long week-night hearing that left many opponents of the present project beaten down by the process that overwhelmed them[64].

395. This Court has many options before it. In some instances, as Petitioners noted, a trial of fact may be warranted to establish 'facts', particularly with respect to the 'segmented' review of the Town's plan to 'level and grade' for athletic fields a large parcel of the property otherwise unreviewed by the SEQRA environmental review process.

396. Petitioners request the Court assure the property is protected while the Court considers the matter, and request that the Court assure that SEQRA cannot in this case or others be manipulated by deep-pocketed developers and their municipal allies to reach what appear to be foregone conclusions that mock the intent of the law itself by turning it into a

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[64] One resident left the one hearing held after the hour became too late, and wrote to the Town: "I attended the hearing regarding Country Pointe at Plainview on February 4, 2014 but could not stay much beyond midnight and had not been selected to speak by that time...." (Email of Gail Kaden C58, FEIS Appendix, Record Exhibit 40, Appendix A C58). Another resident wrote: "I am a Plainview resident who attended the Town Meeting [the hearing]....I sat in the meeting for two hours and heard nothing but rhetoric from the developers who bussed in hundreds of people to fill the room....When I got there there was not a seat inn the house and I did not recognize one person!...I know the meeting went on until 2 AM -- but I work in NYC and have children in the schools and could not stay....." (Email of Ivy Chasan, FEIS Appendix, Record Exhibit 40, Appendix A C55).

massive but empty exercise.

397. The solutions to the challenges of balancing environmental concerns with economic and social ones appear to be readily available to the parties in this matter: to avoid replicating suburban sprawl and instead to build a smarter type of development that respects its natural and man-made surroundings, and promotes an environmentally sustainable future.

398. Petitioners have no power to push for such an outcome. But the function of the law is to push agencies and those who appear before them to use a comprehensive and reliable environmental review to inform their choices and best mitigate the environmental impacts[65].

399. Because such a complete review was not performed in this matter, such a salutory outcome was that much less assured. Fortunately the contrary may be true, if the law is truly applied here.

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[65] SEQRA is intended to mitigate adverse environmental impacts from agency actions: "Findings must.....certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental 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." (6 NYCRR 617.11(d))

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