

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT HON. \_\_\_\_\_  
JUSTICE OF THE SUPREME COURT**

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RICHARD A. BRUMMEL,  
15 Laurel Lane  
East Hills, N.Y. 11577,

**Index Number**

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\_\_\_\_\_

Petitioner

For a Judgement Pursuant to Article 78, Section 6311  
and 6313 of the Civil Practice Law and Rules ("CPLR")

**Verified Petition in  
Support of Order to  
Show Cause**

-against-

THE VILLAGE OF NORTH HILLS, N.Y.,  
1 Shelter Rock Road  
North Hills, N.Y. 11576  
(516) 627-3451,

**Oral Argument  
Requested**

MIDTOWN NORTH HILLS LLC,  
C/O RXR CO REALTY LLC  
625 RXR PLAZA  
UNIONDALE, NEW YORK, 11556  
(516) 506-6000,

X-CELL REALTHY ASSOCIATES III LLC,  
a/k/a X-CELL III REALTY ASSOCIATES LLC,  
2110 NORTHERN BOULEVARD  
MANHASSET, NEW YORK, 11030  
(516) 627-8700

Respondents and Necessary Parties

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## **Exhibits**

Exhibit 1 New York State Natural Heritage Program Oak-Tulip Forest designation

Exhibit 2 Letter of NY State Department of Environmental Conservation (DEC)

Exhibit 3 Deed of X-Cell Property in Village File

Exhibit 4 Excerpts from X-Cell Full Environmental Assessment Form (FEAF)1996

Exhibit 5 Village Approval of X-Cell Incentives, Minutes, 1996

Exhibit 6 Planning Board Approval of X-Cell Site Plan, Minutes

Exhibit 7 Planning Board Approval of X-Cell Subdivision Plan, Minutes

Exhibit 8 Excerpts from X-Cell Full Environmental Assessment Form 1996

Exhibit 9 2008 Negative Declaration of X-Cell Zoning Incentives from Village File

Exhibit 9b Excerpts from Village Board hearing on X-Cell Zoning Incentives 2008

Exhibit 9c Negative Declaration of X-Cell Site Plan Village Board 2008

Exhibit 10 Hearing by Village Board on X-Cell Site Plan 2008

Exhibit 11 Foil request for hearings 2008

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Exhibit 13 Hearing by Planning Board on X-Cell Proposals

Exhibit 14 Village Findings Statement on RXR Project 2006

Exhibit 15 Excerpts of the Draft and Full Environmental Impact Statements (DEIS, FEIS) for RXR 2005-2006

Exhibit 16 Excerpts re Fauna in Final Environmental Impact Statement for RXR 2006

Exhibit 17 Excerpt from DEIS regarding the "Woodland Agrimony" plant 2005

Exhibit 18 Approval of RXR Project 2006

Exhibit 19 Excerpts from RXR 2013 Amendment and 2013 FEAF

Exhibit 19b Village of North Hills Board Agenda October 2013

Exhibit 19c Testimony of Sierra Club Long Island Group

Exhibit 19d Testimony of Green Party of Nassau County

Exhibit 19e Testimony of Richard Oberlander, certified arborist

Exhibit 20 Testimony of Petitioner Brummel before Village Board

Exhibit 21 Testimony of John DiLeonardo before the Village Board

Exhibit 22 Minutes of the Village Board November 20, 2013 RXR

Exhibit 23 Petitioner Brummel Letter December 3, 2013

Exhibit 23b Petitioner Brummel Letter December 16, 2013

Exhibit 24 Petitioner Brummel Affidavit

Exhibit 25 DEC: "Appendix D1: Species of Greatest Conservation Need and their status"

Exhibit 26 DEC: Rare Animal Status List 2013

Exhibit 27 Minutes of Village Board November 4, 2013 RXR

Exhibit 28 Decision statement of Village Board December 18, 2013 RXR

Exhibit 29 FOIL requests for GEIS and Statement of Significance (minutes, resolution)

Exhibit 30 Affidavit of Richard K. Oberlander, Certified Arborist.

Petitioner respectfully allege as follows:

### **I. Preliminary Statement**

1. This proceeding is brought pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) to compel the Respondent Village of North Hills ("the Village") and the other Respondents to comply with the New York State Environmental Quality Review Act (“SEQRA”), Environmental Conservation Law (“ECL”), Article 8, and the regulations promulgated pursuant thereto in connection with the proposed clearing and destruction of an approximately 26-acre tract of largely forested land for residential and commercial development.
2. During the preparation of this lawsuit, all the trees on approximately half of the forest were abruptly and with no notice pulled down over a period of one or two days from January 3 to 4, 2014. However upon information and belief the ground is still in a fertile and ecologically viable state. A professional arborist has provided a professional opinion that said portion of the forest, prior to mechanical grading, can be preserved and can re-grow, while much of the fauna therein remains viable as well. (Affidavit of Richard K. Oberlander, Exhibit 30).
3. Furthermore, the Respondent Village is sought to be compelled to comply with state Village Law with respect to its incentive zoning program under which said proposed developments and environmental impacts are to occur.

## II. The Parties

4. Petitioner Richard A. Brummel is a resident of East Hills, NY, a community located about five miles from parcels of land here at issue. Mr. Brummel is an environmental activist, journalist and professional cook. He is a member of the environmental groups the Sierra Club and Protect the Adirondacks. He is the author of a website called "Planet-in-Peril.org" which covers grass-roots environmental issues, particularly land-development issues. He has been closely involved with several environmental issues on the Town of North Hempstead over the past three years of his current residency therein. He grew up in East Hills and resided continuously from 1960 to 1978. He has appeared before public bodies in and around North Hempstead to testify and urge policy reforms on environmental issues.
5. During this time Mr. Brummel has periodically driven on the Long Island Expressway ("LIE") Service Road past the forest-land in North Hills at issue here. He has noted extensive destruction there -- announced by large signs by developers seeking to sell homes there, and he has been deeply displeased by it. In September, 2013, Mr. Brummel stopped his car at the western end of the Forest to inspect metal disks with numbers and plastic ribbons nailed to about thirty trees adjoining the Service Road, and photographed them. He later learned of plans to cut down the entire forest beyond the trees.
6. Mr. Brummel has since visited the Forest regularly, several times a month, since then. He has walked through the Forest to familiarize himself

with it, takes photos to document the natural environment there. He enjoys the unusual and peaceful setting there amid the development and cacophony of the area. He also appreciates the delicacy of the remaining part of a historic forest. setting. He takes further deep interest in the wildlife lives there.

7. He organized an environmentalist press conference at the Forest in October, and publicized its threatened status from development in various public forums and the media. Mr. Brummel has written on his website, spoken in various media, and addressed public officials and public meetings -- including those of the Village of North Hills -- to share his alarm at the plans to destroy more of the Forest. He typically has cited the devastating impacts on the wildlife and on the Forest itself, which has many beautiful old trees and rich ground-cover. (See Richard Brummel Affidavit Exhibit 24)

8. Respondent Village of North Hills (hereinafter "the Village") is an incorporated Village in the Town of North Hempstead, County of Nassau, State of New York. Its office is at 1 Shelter Rock Rd., North Hills, N.Y. 11576. It is located about three miles from the New York City line. It is a mostly residential community that has been heavily developed into gated or otherwise highly-planned, -dense and -homogenous residential development complexes in the past 10 to 15 years, upon information and belief.

9. Respondent X-Cell Realty Associates III LLC, upon information and belief also known as X-Cell III Realty Associates LLC (hereinafter "X-Cell") is a limited liability company with an office, upon information and belief, at Catagna Realty Co., 2110 Northern Blvd., Manhasset NY 11030, per the Secretary of State corporation information website. The entity listed in documents of the Village refer to "X-Cell Realty Associates III LLC" (note the placement of the "III" in the name) but such an entity is not listed on the NY Secretary of State corporate database website. But "X-Cell III Realty Associates LLC" is listed there, at the above address.
10. X-Cell is the builder, developer and/or owner of the site at the southeast corner the Long Island Expressway Service South Rd. at New Hyde Park Rd. and, sometimes designated 3400 New Hyde Park Rd., also known as Section 8, Block A, lots 880 and 881 on the Nassau County Land and Tax Map and on which an office complex is planned to be built. It is a necessary party because this Petition asks the Village of North Hills to annul its outstanding permits and require it to perform new environmental reviews. It is a Respondent because this proceeding asks the Court to enjoin it from destroying or otherwise disturbing the forest and appurtenant land at tat site.
11. Respondent Midtown North Hills LLC (hereinafter "RXR") is a domestic limited liability company registered in the state of New York with its principal office, upon information and belief, c/o RXR Co. Realty LLC, 625 RXR Plaza, Uniondale NY 11556. Scott Rechler is listed as its

"president" in a Village filing. It is the builder, developer and/or owner of tract of forest and appurtenant land known as 85 Long Island Expressway South Service Rd., a/k/a Powerhouse Rd., and bounded by that highway, the X-Cell project site, the Bristol facility, and Old I.U. Willets Rd. The tract is also known as Section 8, Block A, Lots 892, 893, 897B, 897C, and 889 on the Nassau County Land and Tax Map.

12. Upon that tract RXR has a nominally approved proposal to build a residential condominium campus. It is a necessary party because this Petition asks the Village of North Hills to annul its outstanding permits and require it to perform new environmental reviews. It is a Respondent because this proceeding asks the Court to enjoin it from destroying the forest

### **III. The Facts**

The following is a summary of the facts relevant to this petition:

13. The "Grace Forest" a/k/a the Nassau County, N.Y. state-mapped "Oak-Tulip Forest" ("the Forest") is an approximately 95-acre tract of land in Nassau County located in the Village of North Hills, in the Town of North Hempstead.
14. The tract is circumscribed on the north and south by the Long Island Expressway and Northern State Parkway, respectively, and on the west and east by New Hyde Park Rd. and Shelter Rock Rd., respectively.
15. The NY State ("state") Department of Environmental Conservation

("DEC"), Natural Heritage Program in 1973 added the Forest to its registry as an "Oak-Tulip Tree Forest" of state interest (Exhibit 1). According to the DEC, the Oak-Tulip-type forest is "a significant and rare vegetational community type." For that reason the DEC in writing urged the Village to preserve it to the maximum extent possible in the context of its response to the RXR proposal. (Exhibit 2).

16. Despite the DEC's expressed interest, a conservation easement on at least part of the Forest was dissolved over some public opposition in the early 2000's, and three real-estate developments were subsequently built with the approval of the Village on the eastern and central portions of the Forest, again over some public opposition. Those early and mid-2000's developments -- the Chatham I and II and the Bristol -- led to the destruction of approximately one-third to one-half of the original forest.
17. There are two classes of property on the portion of the Forest that remains: publicly held and privately-held:
18. (1) Public: The remaining portions of the Forest west and south of the developed tracts, and south of the tracts proposed for development presently, are for the most part narrow strips of land with a total of approximately 30 acres. And they are upon information and belief owned by the state as right-of-way for the Northern State Parkway, or by the Manhasset-Lakeville Water District, which has a building housing a pumping station south of the tracts currently proposed for building.
19. (2) Private: There is a generally rectilinear parcel of approximately 26

contiguous acres of forest-land or open space, and some paved roadway, owned privately and separately by two developers: Midtown North Hills LLC a/k/a RXR Realty ("RXR") and its related entities, and X-Cell Realty Associates III LLC ("X-Cell").

20. RXR and X-Cell have plans to build on their tracts and all but fully eliminate and destroy the Forest there and all its natural, living inhabitants.

21. It is those parcels that are at issue in the present action.

22. Despite numerous proceedings on the plans of the respective developers before the Village since at least 1996 and continuing to present, neither parcel has yet been developed by either builder or any other party. Pre-existing old construction that occurred prior to the current owners has been almost entirely removed, upon information and belief.

23. Only a small amount of black-topping, a small concrete drainage sump, and some small utility poles and wires constitutes, upon information and belief was the sole disturbance of natural terrain on the parcels until January 3 or 4, 2014, when all the trees on roughly half the 26 acres were pulled down with no prior notice. The land remains intact otherwise, upon information and belief, as it is as yet un-graded. A professional arborist familiar with the tract has stated that as such the land remains ecologically viable for the present flora and fauna. (Exhibit 30)

24. That area where the trees were removed is all or part of the RXR parcel. The X-Cell parcel remains intact, upon information and belief, and part of the RXR parcel may as well, upon information and belief.

## **1. The X-Cell project**

25. X-Cell owns an approximately nine acre parcel on the western-most part of the 26-acre contiguous western bloc of the Forest that remains.
26. X-Cell has since approximately 1996 indicated plans to build an office complex on the site.
27. The site has been called in X-Cell architectural diagrams "3400 New Hyde Park Rd".
28. The parcel directly borders on New Hyde Park Rd. We have not fully researched the full history of the parcel but a deed in the Village's X-Cell file indicates a transaction for the property April 16, 2002 signed between "X-Cell III Realty Associates" and the Greater New York Corporation of Seventh Day Adventists (Exhibit 3).
29. Given the various addresses and names used for the site in Village documents, it is designated hereinafter "the X-Cell site".

### **A. First X-Cell Approval 1996 and 1997**

30. In approximately 1996, X-Cell proposed to the Village a five-story office building to be surrounded by approximately parking lots containing about 750 parking spaces, to be built at the site after cutting down the forest there. (Exhibit 4).
31. The building plan would according to X-Cell's documents remove all the Forest on the site (Exhibit 4, page 4 of the PDF document [p.2 of original]).

32. Both the Village Board and the Planning Board declared themselves lead agency for the purposes of their own deliberations.
33. The Boards waived any environmental review under the State Environmental Quality Review Act ("SEQRA") beyond a Full Environmental Assessment Form ("FEAF") (see Exhibits 4, 5, 6 and 7).
34. The FEAF (Exhibit 4) is a cursory document that involves essentially "yes" or "no" questions.
35. Among those FEAF questions X-Cell answered that are here relevant:
36. "Is the site located in or substantially contiguous to a Critical Environmental Area...." "Yes";
37. "How many acres of vegetation (trees, shrubs, ground covers) will be removed from the site?" "8.6 acres" [entire site];
38. "Will any mature forest (over 100 years old) or other locally-important vegetation be removed by this project?" "No";
39. "Will Proposed Action substantially affect non-threatened or non-endangered species?" "No";
40. "Will Proposed Action affect aesthetic resources? ... Proposed land uses, or project components visible to users of aesthetic resources ... will eliminate or significantly reduce their enjoyment of the aesthetic qualities of that resource" "No";
41. "Will Proposed Action affect the quantity of quality of existing or future open spaces....?" "No"

42. "Will Proposed Action affect the exceptional or unique characteristics of a critical environmental area....?" "No" [the tract is in a state-declared "Special Groundwater Protection Area" a/k/a SGPA];
43. "Will Proposed Action affect the character of the existing community?" "No".
44. The Village Board and Planning Board both held hearings on the project -- the Village Board with respect to the zoning incentives, and the Planning Board with respect to various issues including the site plan.
45. At the Village Board hearing on the X-Cell project on June 26, 1996, (Exhibit 12) representatives of X-Cell stated (1) "the landscaping is going to be in the natural state" (p. 13); (2) "We are providing open space of twenty-eight percent, and of that...twenty-three percent is in the natural state" (p. 15); (3) "My opinion is that it would not have any significant adverse [environmental] impact" (p. 34)
46. It was noted that that hearing was "only for the incentive and bonuses approval" (p. 79) so the environmental discussion was limited to those issues.
47. The assertion regarding open space in a "natural state" was directly contradicted by the only FEAF on file -- that from 1996 -- which stated that all 8.6 acres of the site would be levelled, and all vegetation removed (Exhibit 4).
48. No question was raised on the record about that contradiction between testimony and the FEAF.

49. A hearing was held by the the Village Planning Board on May 14, 1997, after which, as stated above, a "negative declaration" of environmental significance was voted during the Planning Board's meeting at the same time. (Exhibit 13, excerpts relevant to the environment).
50. The hearing did not generate any substantive discussion of environmental issues of relevance to this action, according to the transcript.
51. The Village Board of Trustees ("the Village Board") approved zoning incentives for the site in 1996 (Exhibit 5), and the Village Planning Board approved a site plan on June 11, 1997 (Exhibits 6 and 7).
52. Under those filings, they found separately that the parts of the proposals they considered would have "no significant adverse environmental impacts" (Exhibit 7, page 2 of PDF).
53. Upon information and belief, no work was land-clearing or construction work was done on the site subsequent to the approvals.

### **B. Second X-Cell Approval 2008**

54. In approximately 2008, X-Cell submitted revised plans to the Village for the site.
55. The new plan would divide the total floor space of the original building between two smaller buildings.
56. On November 19, 2008 the Village Board determined that the new X-Cell project site plan "would not have a significant adverse environmental impact" and "no further environmental review is required."

57. The Board based its conclusions on "prior reviews and approvals [which] have included consideration and evaluation of environmental impacts" regarding "other properties adjacent to the subject property and/or in the immediate vicinity of the subject property," alluding to the RXR project, the Bristol, and the Chatham I and II projects.
58. The Board repeated "As part of its consideration of development of such properties the Village has in particular conducted an extensive review of the adjacent (RXR) property...[and] in the course of that review the Village considered the traffic and other environmental impacts from the project proposed at the subject site, in addition to the environmental impacts of the projects proposed at the adjacent or immediate vicinity sites." (Minutes of Nov 19, 2008, Exhibit 9a)
59. At some time prior to October 1, 2008, according to an email entitled "X-Cell incentive zoning decision" provided by the Village (Exhibit 9b), the Village Board approved "incentive zoning" for X-Cell's revised project. (The date was officially stamped by the Village on the email.)
60. That document is the sole record of a Village Board approval of incentive zoning for the revised X-Cell project provided upon open-records FOIL request to Petitioner Brummel by the Village, within the voluminous bulk files presented to him, upon information and belief, based on a systematic perusal of those files.
61. The Village Board concluded in that email that the project "would not result in substantial adverse impact" under SEQRA based upon the record

that consisted of "the information submitted by the applicant in its environmental assessment form, taken together with the applicant's presentation at the public hearing...."

62. With respect to "the public hearing", the Village provided Petitioner Brummel the transcript of a hearing before the Village Board November 19, 2008 (Exhibit 10).

63. Notably, there was discussion of what environmental information was not on the record.

64. Village Attorney A. Thomas Levin, Esq. stated that the "County Board" (sic) had asked the Village to re-do the environmental review of the X-Cell project "because it's remote in time and it was done on 1996 or 1997 and a lot of other things have happened in the area since then."

65. Mr. Levin stated he felt, by contrast, a new review was not necessary because other environmental and traffic reviews had been done for the RXR property, the Chatham and the Bristol properties in the interim, so the Village had a current record of the information needed. (Exhibit 9, pp. 6-8 on the original.)

66. The hearing was continued on December 17, 2008. No environmental information was provided at that hearing. X-Cell representatives said they could not provide landscaping information because a sub-contractor failed to appear for the hearing that night. (Such information was to be forthcoming at the next meeting.)

67. With respect to the environmental assessment referred to in the 2008

Village Board approval, it appears clear from the discussion on the record by the Mr. Levin that there was no further assessment performed by X-Cell since the FEAF from 1996 (Exhibit 4, supra).

68. Upon information and belief, the voluminous documents provided by the Village did not contain a record of a site-plan approval in 2008 or thereafter, despite the Village resolution approving the incentive zoning specifically stating that approval was required prior to "construction or improvement".

69. On December 3, 2013, Petitioner Brummel submitted a written request to the Village that X-Cell as well as RXR be required to create Supplemental Environmental Impact Statements (SEIS's) to evaluate new environmental information (Exhibit 23).

70. Such new data was in certain cases enumerated in the letter, and on some cases pointed to in general terms of reasonable likelihood.

71. The letter argued the SEIS was appropriate because significant environmental changes had arisen since the completion of the FEAF in 1996, and other environmental evaluations of the X-Cell project, and the RXR FEIS in 2007, and such a revised inquiry was mandated by SEQRA.

72. To date there has been no formal response from the Village to the request.

73. Mayor Marvin Natiss verbally told Petitioner Brummel he had read the request, was giving it to the Village Attorney, and that he felt since the developers of both the RXR and X-Cell properties could have proceeded

based on prior approvals of their projects, there would be no reason to stop them at this point. (Petitioner Brummel Affidavit).

## **2. The RXR project.**

### **A. Initial project design and proposal, 2006**

74. RXR proposed in approximately 2006 to build ten or eleven buildings, consisting of four-story condominium apartment blocks and a common "clubhouse".
75. The project was to be built on the approximately 17 acres of forest and woodlands above described, some small parts of which were by then, upon information and belief, paved over or cut down, or were occupied by structures that have since been demolished (Exhibit 14, Village "Findings Statement", excerpts. p. 15 of original, "Description of Proposed Action").
76. The Village issued a "positive declaration" under SEQRA and assigned the developer to investigate various likely environmental impacts of the project.
77. The developer produced a Draft Environmental Impact Statement ("DEIS") accepted by the Village Board on August 11, 2005, and a Final Environmental Impact Statement ("FEIS") that was accepted by the Village Board for filing on March 3, 2006.
78. The "Findings Statement" accepting the project as described in the EIS's was approved by the Village Board on April 19, 2006.
79. The Findings Statement said the Village Board "certifies" that "the

action ... is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable" (Exhibit 13, pp. 12-13).

80. Among the environmental issues considered in the SEQRA process for the RXR project were (a) the impact of the loss of some acres of an "Oak-Tulip" forest that was said to exist on part of the project site; and (b) the impact on flora and fauna on the site apart from the Oak-Tulip forest as a whole.

81. It is those elements that are especially significant to this proceeding, as follows:

#### **i. The Oak-Tulip Forest**

82. The 95-acre tract of forest on which the RXR and X-Cell projects are situated was designated by the DEC as "significant and rare vegetational community type," as discussed above, (Exhibit 2).

83. Exhibit 2 is a letter from the DEC to the Village stating, with respect to the proposed RXR project, "The Department strongly urges the Village of North Hills to undertake whatever measures are necessary to help ensure the protection and preservation of as much of this forest as possible....including protection of large contiguous blocks of forest."

84. Of the total 17 acre site, only 2 acres were planned to be left in the pre-development state, according to the DEIS.

85. The DEIS offered numerous arguments why the presence of the Oak-Tulip forest should not be a significant concern from an environmental

standpoint, among them: (1) only some 6.5 acres of the 17-acre tract were 'Oak-Tulip forest', the remainder being other hardwood, ground-cover, and some grassy areas; (2) the Forest in general in the 17-acre tract was degraded in various respects, including the effects of a temporary 20-month ponding-flood due to a broken drainage pipe on the tract; (3) there were at the time believed to be nine [9] other Oak-Tulip forest formations in Nassau County that would mitigate the loss of the remaining Oak-Tulip forest on the RXR site; (4) the project site is small, 7%, compared to the overall forest [notwithstanding the acknowledged past removal or planned removal of large other parts thereof]; (5) About 33 acres of the Forest remains on the Northern State Parkway right-of-way as a long narrow strip, (6) the overall forest is already ecologically compromised by separation from other woods ("fragmentation"), noise and other consequences of being bounded by roads and highways, (Exhibit 15).

86. The assertion that the site contains only a portion of the "mapped" Oak-Tulip forest is inconsistent with the fact that the project site and the Forest as defined ("stretching from New Hyde Park Road eastward for 0.8 miles between the Long Island Expressway and Northern State Parkway") are completely 'coterminous' -- that is, they lie in the identical area. Some of the mapped site may have been modified but the project site and mapped sites are otherwise identical.

## **ii. The impact on animals.**

87. The DEIS lists several dozen species of reptiles and amphibians, mammals, and birds that are "expected" to be found on the site given the nature of the environment there.
88. Among the narratives is this bird species: "The wood thrush is expected to utilize the site, as it prefers open woods with a well-developed understory of shrubs and small trees...The site and surrounding area is suitable for raptor and owl species, most of which roost or nest in forested areas....Woodpecker species...are common in the mature wooded portions of Long Island, and are likely to be found on site....A downy woodpecker was observed in the central portion of the project site." (DEIS pp. 2-39 to 2-41)
89. Despite the existence of state listings of insect-life that is endangered, threatened or otherwise, and may be protected by policy, the RXR DEIS does not list any insects on the site or make any evaluation of the impact of its plans on that type of living organism, or even acknowledge their presence.
90. Among the large lists of living creatures expected on the site, absent insects, the DEIS notes that three species were listed -- as of 2005 -- as in any way at-risk in the state of New York: the eastern hognose snake, the red-headed woodpecker, and the whip-poor-will birds.
91. In the case of those species, the state designated all to be, as of 2005, "species of special concern" (which is the lowest in the hierarchy of

living at-risk species, the others being "threatened" and "endangered").

92. After describing the nature of each of the various animal populations and their habitat, the DEIS states that the animals will "suffer direct loss" or the development will, in the case of birds, "cause a local impact".
93. Since almost all the natural land is destined to be being removed and flattened by "grading", every species listed can be expected to be largely eradicated, with the exception of birds which are mobile enough to flee. (Exhibit 16)
94. The overall judgment of the result of the project is that "the removal of habitat resulting from the proposed project will cause a direct impact on the abundance and diversity of wildlife using the site."
95. Even those animals that can 'flee' the development will encounter nearby habitats that can be expected to be already occupied to "equilibrium," the report says, and so the struggle for limited resources will lead to reduced populations (at best). (DEIS p. 2-49).
96. With respect to the "Special Concern Species" listed, the FEIS affords them special attention.
97. For instance the Eastern hognose Snake:  
"The eastern hognose snake is the only reptile species potentially found on site which is listed as a special concern species. The hognose snake is expected throughout the site in small numbers, and will suffer direct loss. It will not likely further utilize the site following construction. Although there is documented concern about its welfare in New York State, this special concern species receive no additional legal protection under Environmental Conservation Law...." (DEIS Section 2)

98. With respect to the Eastern Box Turtle -- which is a reptile listed as "special concern" upon information and belief subsequent to the completion of the DEIS, the DEIS states: "Like the snakes this species is likely to suffer direct losses during construction if present and significant impacts are expected," (DEIS p. 2-54).

### **iii. Impact on Flora**

99. The DEIS also discussed a long list of plants and trees expected on the site -- in addition to the Oak-Tulip eponymous trees.

100. Only one plant said to be potentially present on the site was listed by state at-risk lists, that being the Woodland Agrimony, a "species of special concern."

101. The DEIS stated that no instances of that plant were encountered during the various observations conducted on the site. (Exhibit 17)

102. Public comments were received on the DEIS, some of which dealt with the impact on wildlife and habitat, which were answered in the subsequent FEIS.

103. The entire SEQRA process was concluded, as stated, with the approval of the Findings Statement on April 19, 2006.

104. The project as a whole -- site plan, subdivision, and zoning variances ("incentives") -- was approved by the Village Board -- exercising plenary powers in place of the Planning Board -- on November 15, 2006. (Exhibit 18)

105. Upon information and belief, from that time until the present, no work has been done to cut down the Forest or to build the approved project. If anything was done, upon information and belief it involved demolition and removal of some structures present on the property, as illustrated in the DEIS.

### **B. Revisions to the RXR project in 2013**

106. On or about June, 26, 2013 the Village received from RXR an application to modify its building plans on the site because of what it said were negative new market conditions. (Exhibit 19)

107. The application, hereinafter designated as the Amendment (hereinafter "the RXR Amendment" or "the Amendment"), would affect the incentive zoning variances, and the site and subdivision plans.

108. The primary change would be to cancel the plan to build underground garages and instead fit five stories of space into the existing condominium plans without increasing the height of the buildings and to then use the first story for parking.

109. RXR proposed modest changes in roadways, parking spaces, and floor plans also.

110. To support the Amendment, RXR submitted a Full Environmental Assessment Form ("FEAF"). (Exhibit 19)

111. The Village Board held a series of hearings on the Amendment beginning at the Village Board meeting September 18, 2013, and concluding at the Village Board meeting of November 20, 2013.
112. The issues before the Village Board were "request to amend conditions of a prior incentive zoning permit, site plan, and subdivision approval" (Exhibit 19b)
113. Unlike in at least some prior approval processes in North Hills, the Planning Board did not act on the application, according to the background provided in the Village's "Decision" of December 18, 2013, and according to a review of the Planning Board minutes.
114. At the hearing on October 23., 2013, representatives of RXR appeared and discussed their plans and the environmental impacts, among other issues.
115. Environmental consultants speaking on behalf of RXR testified that the plan to cancel the underground parking garages would result in less soil being removed, which would change the water drainage needs, and would save some 20 trees on the periphery of the project because pipes would not need to be laid for drainage.
116. The witnesses also stated that the Forest area was not in any ameliorated condition from what had been reported in the FEIS in 2007.
117. Petitioner Brummel and three other environmental advocates testified in-person, opposing the project as a whole on environmental grounds.

## **The Request for an SEIS**

118. Among those three testifying in person in opposition to the project were Mark Kinnucan, chair of the Sierra Club Long Island Group and Jim Brown, chair of the Green Party of Nassau County.
119. Both the Sierra Club LI Group as an organization and Mr. Brown as chair of the Green Party of Nassau County submitted written testimony as well expressing concern and opposition to the project based on the issue of destroying the Forest land and the habitat there.
120. Both stated that they believed a new environmental review (a Supplemental EIS) was warranted to address new information. (Exhibits 19b and 19c)
121. Petitioner Brummel in verbal and written testimony requested that the Board require a new environmental review, a Supplemental EIS ("SEIS") under SEQRA, because material and significant ecological changes had occurred that affected the accuracy of the prior environmental review. (Exhibit 20)
122. Written testimony was submitted by John DiLeonardo, the president of Long Island Orchestrating for Nature (LION), an animal-rights group, who noted that additional species beyond those listed in the FEIS had since been added to NY state lists of species 'at-risk' in one way or another. (Exhibit 21)
123. "While the DEIS notes that 'the eastern hognose snake is the only reptile species potentially found at the site which is listed as a special

concern species,' this is no longer accurate as the Eastern box turtle is now listed both as a species of special concern in New York and listed as 'vulnerable' by the International Union for Conservation of Nature (IUCN), meaning their populations are already declining rapidly and are already isolated to patches like Grace Forest," Mr. DiLeonardo wrote.

124. Mr. DiLeonardo holds a BS degree in Anthrozoology, an interdisciplinary field recognized among established academic institutions and focusing on the study of human-animal interactions.

125. On December 3, 2013, Petitioner Brummel hand-delivered to the Village a formal written request on his own behalf that Supplemental EIS's be required for both the X-Cell and RXR projects based on SEQRA requirements. (Exhibit 23)

126. His requested the village "halt" "suspend" or "rescind" such approvals or permits or other village action as were related to both RXR and X-Cell projects.

127. He noted that both sites are contiguous and "in many of not all respects ecologically identical" so that the information available from the RXR full Environmental Impact Statement analyses could be logically applied to X-Cell , and hence that the changes in data would apply to both projects equally.

128. Among the reasons cited for a new SEIS were both the legal requirements under SERQA and new or likely and suspected new information:

129. (1) "four additional species of wildlife" beyond those listed in the RXR DEIS were found listed by the state as either "species of special concern" or "Species of Greatest Conservation Need" -- the Eastern box turtle, the Eastern spadefoot toad, Fowler's toad, and the hoary bat.
130. (2) "We suspect some of the bird and plant species on the site may also have become threatened and state classified since the completion [of the 2006 review]";
131. (3) "We suspect that among the 'alternative' [Oak-Tulip forest] properties in Nassau County...those alternate sites may have been degraded or destroyed in the interim....";
132. (4) Traffic and water resources and conditions may have changed "since 2006 and 1996/97".
133. The request added three more species, in two different phylogenetic classes (amphibians and mammals) to those that had been raised at the hearing of October 23, 2013.
134. Mayor Marvin Natiss told Mr. Brummel at the time of his delivering the letter to the Village office that he, Mr. Natiss, did not feel the Village should require an Supplemental EIS because both projects could have been built years prior, when they were first approved, with no further studies. (Exhibit 24 Brummel Affidavit)
135. Mayor Natiss said he would submit the request by Mr, Brummel to the Village Attorney for review. (Brummel Affidavit)

136. Petitioner Brummel has received no formal response to the letter from the Village to date.
137. On December 16, 2013 Petitioner Brummel submitted a revised SEIS request letter to the Village that described (a) an additional number of documented at-risk species of wildlife, (b) the results of a professional analysis of the current somewhat degraded condition of some cited 'comparable' woodlands and forests noted in the DEIS, and (c) other concerns that he argued should lead to an SEIS. (Exhibit 23b).
138. Petitioner Brummel's stated in the letter of December 16, 2013 that a review of database of DEC listings of "Species of Greatest Conservation Need" currently posted online indicated that that sixteen (16) species of birds, reptiles, amphibians and mammals that appear in the 2005 DEIS are on that DEC 'at-risk' species list (Exhibit 23b).
139. Similarly, five (5) species of birds, reptiles and amphibians are listed as "Species of Special Concern." *ibid.*
140. Also nine (9) species, all birds, are listed as "protected" in NY State *ibid.*
141. The letter reiterated the request for an SEIS and suspension of any action on the RXR and X-Cell projects.
142. The DEC wildlife lists were from the DEC publication "New York State Conservation Comprehensive Strategy Plan, 2005". (Exhibit 25)
143. The Plan states:
- The selection of Species of Greatest Conservation Need (SGCN) is required as part or the development of the Comprehensive

Wildlife Conservation Strategy(CWCS)....A list of about 350 species was generated by DEC staff... This list was later revised to include more than 600 species using the following criteria: Species on the current federal list of endangered or threatened species that occur in New York....Species that are currently state-designated as endangered, threatened or of special concern; Species ranked S1 or S1 by the New York Natural Heritage Program. Typically these are species with 20 or fewer populations....Estuarine and Marine SGCN as determined by the...Bureau of Marine Resources....Species identified as Wildlife Species of Regional Conservation Concern in the Northeastern United States....The list of species is not exhaustive but includes those species for which systematic assessments had been made by the staff of the DEC Division of Fish, Wildlife and Marine Resources and the New York Natural Heritage Program....The best available information was consulted to compile this list of species and their inclusion will possibly aid in achieving sustainable populations." "New York State Conservation Comprehensive Strategy Plan, 2005" p 31 (Exhibit 25)

144. The RXR DEIS was completed in July, 2005 while the "Final Submission Draft" of the "Conservation Comprehensive Strategy Plan" (CCSP) was, based on its front-page, completed or published in September 2005.
145. Petitioner Brummel does not know at this time when the CCSP was made public.
146. While the RXR FEIS was completed in 2006, after the publication date of the CCSP, by law it is designed to answer public comment on the DEIS.
147. The RXR FEIS compiled and addressed public input and responded to it. There was no evidence of an effort to update the environmental data contained in it.
148. A January 2013 publication of the DEC entitled "Rare Animal

Status" places two animal species not chronicled in the RXR DEIS/FEIS on an "Active" list as being "for the most part...the most rare or imperiled in the state" (those being: the eastern spadefoot toad and the Barn owl). (Exhibit 26)

149. Both species were cited in Petitioner Brummel's letter of December 16, 2013.

150. Neither of those species is cited as at-risk or state-listed in the DEIS/FEIS of 2005 and 2006.

151. The 2013 Rare Animal Status list also places three animal species noted in the RXR DEIS/FEIS but not identified as imperiled on a "Watch" list, which contains species "that could become imperiled enough to warrant being actively inventoried, or for which we do not have enough data" (the Eastern box turtle, the long-eared owl, and the brown thrasher bird).

152. All three species were cited in the letter of December 16, 2013.

153. Also on the 2013 list of "most rare or imperiled" are the red-headed woodpecker and whip-poor-will which were identified as at-risk ("species of special concern") in the DEIS.

154. The "Watch" list also contains the Eastern hognose snake.

155. The 2013 publication does not explicitly or implicitly remove any of the SGCN species previously listed in the 2005 publication. It is a document with a separate focus.

156. According to the DEC website the 2005 list is to be updated in 2015.

157. The data in the DEC list of Species of Greatest Conservation Need,

as newly presented to the Village, is 'new' in relation to the DEIS and the FEIS.

158. The SEQRA regulations state that an SEIS is appropriate where among other things there is "newly discovered information" (6 NYCRR 617.9 (a)(7)), without respect to the provenance or history of such information.

159. The data regarding the thirteen additional species in the SGCN list, not having been presented to the Village previously, is "new" in their deliberations on the RXR and X-Cell projects.

160. The DEIS does not, upon information and belief, list directly and clearly the sources for the three "Species of Special Concern" it reports. There are no footnotes for the information.

### **Denial of Supplemental EIS**

161. On November 4, 2013 the Village Board held a "special meeting" and approved a "Negative Declaration" of significance related to the new RXR proposals.

162. The vote also specifically addressed and rejected the requested SEIS, but it did so in the form of approving a written resolution, not through any discussion or deliberation upon the issue. (Exhibit 27, Minutes).

163. According to the Minutes, the Resolution stated: "The proposed action is an application to amend a previously issued incentive zoning permit in respect to relatively minor matter," (Exhibit 27.)

164. The approved Minutes of the minutes-long meeting, at which Petitioner Brummel was in attendance throughout, stated that the Resolution as passed contained a provision rejecting the need for an SEIS with respect to the revised RXR project. This Resolution was not previously publicized.

165. The resolution states in part:

"[T]he Board of Trustees has considered the potential environmental impacts of the application submitted ...including the comments received at the public hearing held with respect to this application on October 23, 2013....Despite the passage of time since the prior approval, there have been no changes in the material or relevant facts with respect to the prior environmental review which would warrant re-opening the review at this time with respect to the current application to amend the prior approval, nor which would require the applicant to prepare a supplemental EIS or other supplemental environmental documents".

166. There was no further discussion or specificity in the resolution regarding the issues raised with respect to an SEIS. There was no specification of the issues raised, nor the data upon which basis the issues were evaluated.

167. The reported Resolution also states: "The documentation submitted with the instant application is sufficiently complete to permit the Board of Trustees to make a determination as to the environmental impact of the proposed amendments to the incentive zoning permit." *ibid.*

168. The Resolution proceeded to list in general language closely following the language of the SEQRA statute and regulations (otherwise known as 'boiler-plate') the environmental factors it 'considered', and claiming simply there was no impact upon various similarly general 'boiler-

plate' environmental categories with respect to "the proposed action to amend the incentive zoning permit."

169. Absent from the Resolution was any "determination of significance" of environmental impact with respect to the "site plan and subdivision approvals" although those items were specifically enumerated in the subject matter of the hearings before the Village Board, and in the final resolution of "Decision" later, as separate and distinct elements from the "incentive zoning permit."

170. At the time of the Special Meeting November 4, 2013, Petitioner Brummel was not aware of the content of the Resolution with respect to the SEIS.

171. During the brief meeting, the vote was said to be upon a "negative declaration" under SEQRA.

172. A copy of the Resolution was not posted on the Village website prior to the meeting, nor was it provided to the public at the meeting.

173. On November 20, 2013, the Village Board continued its hearing, closed the hearing, and "reserved" decision on the Amendment. (Exhibit 22)

174. The Village Board on December 18, 2013 approved the RXR Amendment with respect to incentive zoning, site plan, and subdivision plan and outlined the background and its decisions in a "Decision" statement. (Exhibit 29)

175. The Decision states with respect to the Supplemental EIS:

"[S]ome objectants have asserted that the Board should reopen the SEQRA process with respect to this project (and also with respect to another, unrelated project...). The Board has evaluated those objections and suggestions, the applicant's responses to them, and the advice of the Village's Building Department and consultants, and previously concluded not to reopen the SEQRA process....Accordingly the Board previously has issued a Negative Declaration with respect to the pending application." (Exhibit 29)

176. The Decision also states: "Materials submitted and received after the close of the public hearing at the November 20, 2013 meeting...have not been considered, because other parties would not...have an opportunity to respond...."

177. The Decision further states: "The Board finds that the requested amendments are beneficial ...and are not likely to generate any significant impact changes [sic] in comparison to those projected to result from the project as previously approved."

178. Petitioner Brummel has found no record in prior Minutes that either the Village Board or the Planning Board voted on a "Negative Declaration". "Positive Declaration," or "Type II" designation under SEQRA with respect to the "site plan and subdivision approvals" with respect to the RXR Amendment.

179. Furthermore there is no "determination of significance" in said records with respect to that element of the RXR Amendment, although those issues were addressed in the original approvals in 2006.

180. The Village Board held no hearings on the requested SEIS, nor disclosed or reported the substance of any of the purported consultations that led to its decision not to require an SEIS.

## **The Village Decision Regarding the RXR EAF**

181. RXR submitted a Full Environmental Assessment Form (FEAF) dated June 25, 2013 with respect to its proposed Amendment (Exhibit 19).

182. The Environmental Assessment Form answered "No" to the following questions: Whether any plant or animal on the site is "threatened or endangered;" whether the project affects "scenic views" known to be important to the community; and whether any "mature forests over 100 years old or other locally important vegetation be removed."

183. Certified arborist Richard Oberlander submitted written testimony to the Village on October 23, 2013 at the Village Board meeting which stated in part:

I was asked to evaluate the Grace Forest in North Hills.

This is a very rich diverse forest that contains magnificent trees from what I observed.

This type of forest, while not unknown in parts of Nassau County, is quite unusual to find where it is located, near highly developed areas of Manhasset, Herricks, New Hyde Park, Garden City Park, Floral Park, North Hills and Mineola.

This forest is truly a pristine treasure that should be preserved for future generations to enjoy.

All the surrounding area was undoubtedly filled with similar forests that have been eliminated to allow for roads, houses, office complexes, stores and parking lots. It would seem foolish in the extreme to allow this precious last piece to be destroyed now as well -- both from aesthetic and ecological grounds. (Exhibit 19e)

184. In neither its Negative Declaration of November 4, 2013 nor in its "Decision" of December 18, 2013 did the Village Board specifically address any of the concerns raised by Mr. Oberlander.

185. Testimony and written statements at the Village Board meeting of October 23, 2013 also addressed the issues of wildlife habitat, aesthetics, and other such environmental concerns. (Exhibits 19c through 19e, 20, 21)

186. The Village Board did not address directly any of the concerns raised in testimony in its Negative Declaration of November 4, 2013 or in its "Decision" of December 18, 2013, except to recite boiler-plate language derived directly from the SEQRA statute, for example:

"The changes in the project...would not result in the 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 [sic], substantial adverse impacts on a threatened or endangered species...[etc.]" (Exhibit 27)

187. The Village Board did not in fact specifically discuss the EAF or issue a specific "Determination of Significance" addressed to it. Rather the Village Board simply passed conclusory and boiler-plate statements that rejected the potential of significant adverse environmental impacts.

**The North Hills Incentive Zoning Ordinance and the Absence of a Generic EIS (GEIS)**

188. The RXR and X-Cell developments were approved under the Village R-3 and C-1A incentive zoning programs, respectively (Village Code Sections 215-14, 174-13).

189. The modifications permitted by the Village to zoning and land-use restrictions otherwise applicable to the R-3 district that governs the Forest allowed development of a wholly different character, with wholly different environmental impacts than would otherwise obtain.
190. The modifications permitted by the C-1A incentive were perhaps less prone to significant impact on the natural environment, but their ability to facilitate a project that might not otherwise be proposed does thereby have the same potential significant import as the impact of the R-3 incentive.
191. Upon information and belief the Village did not create a GEIS pursuant to Village Law Section 7-703 prior to creating the incentive zoning policy of Village Code section 215.
192. Furthermore, upon information and belief, the Village did not approve a Determination of Significance ((617 NYCRR 617.7(b)) in compliance with the State Environmental Quality Review Act ("SEQRA"), to justify its failing to create the GEIS otherwise so required.
193. Village Code states with respect to the R-3 incentive program: "The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein...." (Section 215-12).
194. With respect to the C-1A incentive program, the Village Code states: "The Board of Trustees hereby further finds that there will be no significant

environmentally damaging consequences if incentives or bonuses are awarded as provided herein...." (Section 215-21).

195. The purpose of the GEIS is to inform public policy before the law implementing potentially 'for-profit' relaxation of zoning restrictions is approved.

196. Such a GEIS is stipulated in Village Law, but is defined by SEQRA.

197. In SEQRA the purpose of a GEIS is stated:

"They may identify the important elements of the natural resource base as well as the existing and projected cultural features, patterns and character. They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur. A generic EIS may be used to assess the environmental impacts of: (1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts..." (6 NYCRR Section 617.10)

198. Furthermore the decision whether to undertake a GEIS based on the finding of potential for significant adverse environmental impact must be in a written document that would "thoroughly analyze the identified relevant areas of environmental concern" and provide a "reasoned elaboration" regarding the determination. (617 NYCRR 617.7 (b)).

199. The Minutes of the Planning Board meeting of May 14, 1997 make reference to "the generic impact statement [sic] previously submitted and accepted by the Board of Trustees in connection with the adoption of certain zoning regulations pertaining to the [X-Cell site]".

200. On December 6, 2013 Petitioner submitted a FOIL request for a copy of the Generic Environmental Impact Statement prepared by the Village for the purpose of incentive zoning referred to in said minutes. (Exhibit 30)
201. On December 13, 2013 the Village provided a document which the Village Clerk said was responsive to said FOIL request.
202. Petitioner Brummel found within no such GEIS. Rather the document was the X-Cell Full Environmental Assessment Form and Traffic Study submitted in 1996 (Petition Exhibit 8).
203. Petitioner Brummel submitted a new FOIL request December 13, 2013 again requesting the GEIS associated with the Planning Board minutes. (Exhibit 30)
204. On December 18, 2013 the Village replied to the FOIL with a demand for additional time (Exhibit 30) .
205. On December 31, 2013 Petitioner Brummel filed a FOIL request with the Village to review any Findings Statement, minutes and resolutions related to the Village ordinance section 215 with respect to R-3 incentive zones. (Exhibit 30)
206. The Village Clerk indicated such documents were not available at the time of the request.
207. Upon information and belief, Petitioner's Brummel having examined said documents, nowhere in the Village's resolutions, "Decisions", and other documents relating to the X-Cell and RXR projects is there any

reference to a GEIS, or to a Findings Statement or a "determination of significance" with respect to the Village's incentive zoning program, with the exception of the Minutes noted.

208. To Petitioner's knowledge, there is no reference to a GEIS in the 2006 "Findings Statement" the Village produced pursuant to the SEQRA process with respect to the RXR proposal, nor in the resolution approving the X-Cell project again in 2008, as they were provided to the Petitioner by the Village.

209. Furthermore, there is no reference in any of the documents related to RXR and X-Cell as provided by the Village that tax any "proportionate share of the cost" for a Village-prepared GEIS, as provided for in the Village Code.

210. The Village of North Hills cited Village Code Sections 179-33 and 215-14 in their Decision to approve the RXR Amendment on December 18, 2013 (Petition Exhibit 29).

211. Those sections of the Village Code refer to changes to a "site development" once approved, and to the Village's procedure and authority to grant incentive zoning.

212. Pursuant to the provisions thereof the Village approved the RXR Amendments.

213. As a result of allowances the RXR development would consist of at least 10 buildings providing 244 condominium units over 17 acres. Each building is to be approximately 60 feet tall.

214. Absent the incentive zoning allowances, for which, upon information and belief, RXR paid or will pay cash compensation to the Village of \$21 million, the units per "cluster development" would have been limited to four units, not 20 or more; the height of the buildings to 2 1/2 stories or 35 feet, not 60 feet; and the the lot size per "cluster unit" at least eight acres, not an average of less than two per structure (Village Code Section 215-11).

215. The Village's incentive zoning was also the basis upon which X-Cell was granted approval in the C-1A district zone to build two office buildings of 92,500 square feet each and appurtenant parking and other facilities, providing various adjustments in parking configurations and "loading bays" among others.

#### **IV. STATUTORY AND REGULATORY FRAMEWORK**

##### **1. SEQRA**

216. The New York State Environmental Quality Review Act (SEQRA), NYS Environmental Conservation Law (ECL) Article 8, codified by the Department of Environmental Conservation (DEC) as 6 NYCRR Part 617, was enacted in 1975 in order to bring environmental issues, broadly defined, into the process of public policy-making at all levels of government in New York except the judiciary, the Legislature, and the Governor:

217. "It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should

be given appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities." (6 NYCRR 617.1 (d))

218. "SEQR [sic] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement." (6 NYCRR 617.1 ( c )

219. A "local agency" is defined as "any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state." (ECL Section 8-0105

220. "Environment means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." (617 NYCRR 617.2 (l))

221. In implementing the law, a lead agency's first step is to determine whether the action falls within one of three categories set out in SEQRA: Type 1, Type 2, or Unlisted.

222. Type I actions are "those actions and projects that are more likely to require the preparation of an EIS" (617 NYCRR 617.4 (a)).

223. SEQRA lists 11 actions or categories of actions that are by definition

Type I actions ((617 NYCRR 617.4 (b)) although agencies can create their own list as well provided they are consistent with the regulations and law otherwise. (617 NYCRR 617.4 (a)(2)).

224. Type 2 actions are defined as those “not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8.” (617 NYCRR 617.5 (a)).

225. “Unlisted” actions are “all actions not identified as a Type I or Type II action in this Part, or, in the case of a particular agency action, not identified as a Type I or Type II action in the agency's own SEQR procedures.” (617 NYCRR 617.2 (ak) (sic))

226. "Unlisted actions" is a category designed to provide the flexibility needed by a law designed to apply to every single action that could be undertaken by an executive agency, authority, governmental subdivision, or other such public entity in the entire state, for the foreseeable future.

227. If an action is determined to be Type I or Unlisted, the agency will itself undertake or cause an applicant to produce a “long” or “short” Environmental Assessment Form (EAF) which will document the potential environmental effects of the action; a draft Environmental Impact Statement (DEIS) may be substituted for the EAF (617 NYCRR 617.6 (a)).

228. The next step is critical: determining “significance” of the proposed action, based on the information in either the EAF or the DEIS.

229. This determination will establish whether the costly and time-

consuming effort to create an EIS (or Generic EIS (6 NYCRR 617.10)) -- and to formulate a clearly articulated, legally reviewable decision based thereon -- shall be required. (617 NYCRR 617.7 (a)).

230. The formulation of such a "determination of significance", which affects both the EIS and Generic EIS process (6 NYCRR 617.10) requires a reasoned, written elaboration:

[The agency must] identify the relevant areas of environmental concern; thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation. (617 NYCRR 617.7 (b )) (internal numbering removed)

231. Thereby the lead agency must "determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment" (617 NYCRR 617.7 ( c ) (1))

232. Among the criteria used to determine the significance:

233. "(ii) the 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;

234. (viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses," (6 NYCRR 617.7 (c)(1)(i))

235. The lead agency will require an EIS when it concludes the action "may include the potential for at least one significant adverse environmental impact" (6 NYCRR 617.7 (a) (1)).

236. The final EIS will contain the substance of the DEIS as enriched by the public comment period:

237. "A final EIS must consist of: the draft EIS, including any revisions or supplements to it; copies or a summary of the substantive comments received and their source (whether or not the comments were received in the context of a hearing); and the lead agency's responses to all substantive comments. The draft EIS may be directly incorporated into the final EIS or may be incorporated by reference. The lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it."(6 NYCRR 617.9 (b)(8))

238. A Supplemental Environmental Impact Statement ("SEIS") can be performed after the FEIS is done, in circumstances where there exist:

"specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; or (b) newly discovered information; or (c) a change in circumstances related to the project. (ii) The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon the following criteria: (a) the importance and relevance of the information; and (b) the present state of the information in the EIS. (iii) If a supplement is required, it will be subject to the full procedures of this Part." (6 NYCRR 617.9 (a)(7))

239. While the regulations suggest the SEIS "may" be required, the overall statute requires that the lead agency pro-actively evaluate significant adverse environmental impacts, without exception.
240. "SEQR[A] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment," 6 NYCRR 617.2 (b) (3) ). Thus if an SEIS is needed to make that informed determination, the agency cannot dispense with it and also fulfill its statutory duty to do so.
241. Neither the rules nor the statute offer any limitation on the obligation of the lead agency to require an SEIS when the circumstances dictate. Nor is there a specific procedure set out for initiating or considering such an undertaking.
242. Finally, the agency is required to come to a decision and issue a "written findings statement" (6 NYCRR 617.11 (c)) that is extensively considered based on the information it has caused to be prepared.
243. "Findings must: (1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS; (2) weigh and balance relevant environmental impacts with social, economic and other considerations; (3) provide a rationale for the agency's decision; (4) certify that the requirements of this Part have been met;(5) 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."(6

NYCRR 617.11 (d))

244. Changes in circumstances that necessitate changes in reviews can cause a revision of a decision.

245. "If a project modification or change of circumstance related to the project requires a lead or involved agency to substantively modify its decision, findings may be amended and filed in accordance with subdivision 617.12(b) of this Part." (6 NYCRR 617.11 (a))

246. An important provision of SEQRA is the policy against "segmentation" of environmental review, whereby either the initiation of the SEQRA process is delayed or an "action" is effectively broken down and reviewed in smaller pieces to effectively dilute the environmental impact being detected and evaluated at each stage.

247. "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)).

## **2. State and Local Law Pertaining to "Incentive Zoning"**

248. The Village code of the Village of North Hills Section 179-33 establishes the procedures for the proposed amending of an already-approved site development plan per the North Hills Village Code.
249. It states: "At any time after the adoption of a Board resolution of approval, the applicant may apply to amend the terms or conditions of the approval..." upon the compliance with various procedures as described.
250. Village Code Section 215-12 and 214-14 describe aspects of the Village's incentive zoning procedures.
251. Section 215-12, describes the creation of the program for "Incentives and Bonuses in the R-3 District", apparently pursuant to state requirements.
252. Section 215-12 states: "The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein and that such incentives or bonuses are compatible with the development otherwise permitted in the R-3 District."
253. Village Code Section 215-12 does not state whether or not a Generic Environmental Impact Statement ("GEIS") was prepared. It states " In the event that the lead agency has prepared or caused to be prepared a generic environmental impact statement (GEIS) in connection with the adoption of this section, the lead agency may require that the applicant pay a proportionate share of the cost..."

254. Village Code Section 215-14 states: "In the R-3 District, the Board of Trustees may, in its sole discretion, and after a public hearing held as provided in this section, allow one or more buildings to be erected, altered or used and a lot or premises to be developed and used for enhanced development, as an incentive use...."

255. Village Code Section 215-21 states:

"the Board of Trustees of the Village of North Hills hereby finds that the C-1A District contains adequate resources, environmental quality and public facilities (including adequate transportation, water supply, waste disposal and fire protection) to permit the authorization of the incentives or bonuses hereinafter specified for property located in said zoning district. The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein...." (emphasis added)

256. Further the Code states (Section 215-21):

After a public hearing as required by law, the Board of Trustees, in a proper case, may grant one or more of the following incentives or bonuses, notwithstanding any other provision of this chapter to the contrary:

- (1) An increase (not to exceed 25%) in the permitted maximum number of stories and permitted building height.
- (2) A reduction (not to exceed 60%) in the required number of loading docks (bays).
- (3) A reduction (not to exceed 25%) in the required setback of parking areas from property lines.
- (4) A reduction (not to exceed 10%) in the required size of parking spaces.
- (5) A reduction (not to exceed 10%) in the required number of off-street parking spaces.
- (6) An increase (not to exceed 200%) in the number of permitted ground signs per building.
- (7) An increase (not to exceed 100%) in the permitted size of any ground sign.
- (8) An increase (not to exceed 50%) in the maximum permitted floor area ratio.

257. Such relaxed zoning restrictions are based on the owner or builder providing "community benefits or amenities".

258. Absent incentive zoning allowances, the R-3 district in North Hills has the following building limits: maximum building height of 2 1/2 stories or 35 feet; minimum lot size 20,000 square feet (approximately 0.46 acres); cluster development maximum dwelling units four per structure; maximum height 2 1/2 stories or 30 feet. (Village Code Section 215-11)

259. New York Village Law section 7-703 provides for the establishment by villages of the incentive zoning programs.

260. It provides further for the creation of a generic environmental impact statement ("GEIS") when the impact of the incentives and bonuses for development may create "significant impact":

"A generic environmental impact statement pursuant to article eight of the environmental conservation law and regulations adopted by the department of environmental conservation shall be prepared by the village board of trustees for any zoning district in which the granting of incentives or bonuses may have significant effect on the environment before any such district is designated, and such statement shall be supplemented from time to time by the village board of trustees if there are material changes in circumstances that may result in significant adverse impacts."

261. Further the GEIS must be updated by supplementation when needed:

"[S]uch statement shall be supplemented from time to time by the village board of trustees if there are material changes in circumstances that may result in significant adverse impacts." (NY Village Law Section 7-703)

262. Such a GEIS is a component of state environmental law under State Environmental Quality Review Act ("SEQRA").

263. Its purpose is to inform broad-based policy that may not be susceptible to granular analysis afforded by the normal Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) process that is tailored to specific more concrete projects and decisions, stating:

"Generic EISs may be broader, and more general than site or project specific EISs and should discuss the logic and rationale for the choices advanced. They may also include an assessment of specific impacts if such details are available. They may be based on conceptual information in some cases. They may identify the important elements of the natural resource base as well as the existing and projected cultural features, patterns and character. They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur. A generic EIS may be used to assess the environmental impacts of: (1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts..." (6 NYCRR 617.10)

264. The decision whether or not to create a GEIS is however governed by the same strict decision-making process that requires a robust rational and written decision by the agency:

"[The agency must] thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation. (617 NYCRR 617.7 (b ))

265. In the Village code section creating the incentive zoning program, there is merely this statement with respect to any environmental impacts:

266. "The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein." (Village code Section 215-12)

#### **V. AS AND FOR A FIRST CAUSE OF ACTION**

#### **The Village Board of Trustees Violated SEQRA When It Failed To Properly Consider The Necessity For A Supplemental EIS for the RXR Project**

267. Petitioner Brummel repeats and re-alleges the prior paragraphs as if fully set forth here.

268. The Village on December 18, 2013 approved an "amendment" to the RXR application, after re-considering and re-approving necessary elements of the RXR project -- incentive zoning, site plan, and subdivision plan.

269. Prior to that action the Board approved a Negative Declaration with respect to "incentive zoning".

270. Petitioner Brummel and others gave the Village information that substantial changes have occurred with respect to the at-risk status of wildlife believed to inhabit the project site for the RXR development.

271. The Village has also been alerted to the possible change in circumstances of other environmental issues raised in the RXR draft and final Environmental Impact Statements.

272. The Nassau County Planning Commission has raised the issue of

out-of-date environmental reviews with the Village in urging it to require fresh analysis for its decision-making under SEQRA (with respect to the X-Cell re-application in 2008).

273. The Village has been formally requested by Petitioner Brummel to halt its action on the RXR projects pending an SEIS to address the issues raised, but it has not responded and its Mayor has stated he is opposed to the SEIS.

274. Other parties testified that they believed an SEIS was warranted.

275. The SEIS would provide an up-to-date environmental analysis of the public policy issues raised by destroying habitat of animals designated by the state as at-risk, and other new environmental issues.

276. Respondent Village has constructively and actually denied the request for an SEIS with respect to the RXR projects made by Petitioner Brummel and others.

277. The failure of the Village to properly inquire into the need for an SEIS, and to consequently deny the requests therefor, is affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure

278. Respondent Village 's failure to properly inquire deprives Petitioner and the public of the required protection and stewardship the Village owes a Forest they use and value.

279. Petitioner has a reasonable expectation that such an inquiry would sustain the need for an SEIS, and said SEIS with respect to wildlife issues

raised, at a minimum, would lead to a reconsideration of mitigation measure required by law to protect more of the Forest and more fully to mitigate the environmental impacts of the proposed development.

280. Therefore the absence of that current analysis deprives Petitioner of the expected protection and stewardship required for the Forest that he uses, enjoys and values.

281. Therefore Petitioner requests that the Court annul action taken by the Village on the proposed RXR amendments, require Respondent Village to suspend any permitting or other actions or decision-making except a stop-work order if needed on the RXR site, and any other such remedy to prevent any damage to the Forest, unless and until the inquiry on the SEIS requested is properly undertaken.

282. Respondent Village shall also be required to suspend its Findings Statement of November 19, 2006 pending its inquiry regarding the SEIS.

283. The Village shall also suspend any permits or authorizations, and not issue any new ones, with regard to the X-Cell project, inasmuch as the Village's decisions that project as of 2008 were was also based in significant part on the findings of the RXR DEIS and FEIS that are the subject of the Village's SEIS inquiry.

284. Having no valid permits due to the SEQRA inquiries, the developers RXR and X-Cell should be enjoined from damaging or otherwise altering the Forest in any way.

285. And Respondent Village Village shall be required to rescind its

Negative Declaration of November 4, 2013.

286. The SEIS inquiry shall take into account all issues of environmental impact that have or are reasonably believed possible to have changed since the completion of the Environmental Impact Statement in 2006, with respect to both the RXR and X-Cell parcels.

287. Petitioner has no other remedy at law.

## **VI. AS AND FOR A SECOND CAUSE OF ACTION**

### **The Village Failed to Create the Necessary Generic EIS or Proper Declaration of Significance for its Incentive Zoning**

288. The Village adopted the incentive zoning program for R-3 and C-1A districts without creating a Generic EIS to evaluate and manage the adverse environmental impacts the incentives could create.

289. Furthermore the decision not to create a GEIS for the zoning incentive plan in either district was based upon an overly general and conclusory statement of non-significance that failed to comply with SEQRA requirements for a process that would "thoroughly analyze" the impacts, providing a "reasoned elaboration" in written form.

290. As such the Village failed to obtain jurisdiction to promulgate either zoning incentive plan. The zoning incentive plans are thus nullities.

291. The Village lacks jurisdiction to grant incentive zoning approval for projects in its putative incentive zoning districts because the Village never completed a GEIS, a condition precedent to obtaining jurisdiction over any

incentive zoning projects in that district, or a reasoned elaboration in compliance with SEQRA as to why such a GEIS was not needed.

292. Lacking a legal basis to grant zoning incentives, the Village's approval of the zoning incentives for RXR and X-Cell are affected by an error of law or were arbitrary and capricious, an abuse of discretion, or the product of a violation of lawful procedure.

293. Insofar as the zoning incentives formed the basis for the approved development plans, which would substantially destroy the remaining contiguous 26 acres of the Forest, said grants injure Petitioner by depriving him of the Forest that he uses, enjoys and values.

294. Petitioner therefore requests the Court annul the approvals of incentive zoning grants to X-Cell and RXR, and to annul the overall approvals of which the incentive zoning grants were a central part, and thence to vacate any permits or other authorizations arising therefrom.

295. Having no valid permits due to the SEQRA inquiries, the developers RXR and X-Cell should be enjoined from damaging or otherwise altering the Forest in any way.

296. Petitioner has no other remedy at law.

## **VII. AS AND FOR A THIRD CAUSE OF ACTION**

### **The Village Board of Trustees Improperly "Segmented" its consideration of RXR Amendment**

297. Petitioner repeats and re-alleges the prior paragraphs as if fully set

forth here.

298. The Village Board voted November 20, 2013 to find that the "incentive zoning" pursuant to the RXR Amendment would not have a significant adverse environmental impact.
299. By its approval on December 18, 2013, of the entire RXR Amendment, with respect to "Incentive Zoning Permit, Site Plan and Subdivision Approvals", absent further environmental review, the Village constructively adopts a Negative Declaration for the remaining elements of the plan without actually having adopted such a decision directly and explicitly.
300. SEQRA requires that no element of a project should be considered in isolation for SEQRA purposes when it is integral to the overall project, because such conduct would constitute impermissible "segmentation" of the review.
301. The approval of the changes to the project proposed by RXR in 2013 would have the effect of permitting the entire project to go forward. Absent such changes, the developer's stated in its application, the project would most likely not go forward.
302. "Under the present economic environment it is virtually impossible to obtain funding for new condominiums. Consequently, Applicant has been exploring ways to reduce the construction cost [resulting in the changes in the Amendment]...." (Exhibit 19, RXR Amendment application of about June 26, 2013 )

303. To avoid improper segmentation of its review, the proper question before the Village Board, was not the effect on the environment of the changes proposed but of the project in its entirety.
304. Whether it already answered that question 7 years before is a matter for the Village Board to determine, by law in light of all the current information including that which has changed.
305. Instead the "Decision" says the Village Board only evaluates the Amendment "in comparison to those [impacts] projected to result from the project as previously approved." with respect to the prior approved application.
306. Clearly that posture conflicts with the provisions of SEQRA that require an action by an agency to be evaluated for its overall consequence with respect to the environment. In this case that result would be the whole mass of the RXR project.
307. If the Village Board wished to pursue a segmented review the law required it to explain its reasoning and to ultimately take account of the entire project in its decision.
308. While the Decision suggested without actually saying that there were supposedly sensible reasons for considering the Amendment separately, with regard only to its marginal environmental consequences, it failed in any event to take account in its reasoning of the overall impacts of the project in its entirety, as SEQRA requires.
309. "Considering only a part or segment of an action is contrary to the

intent of SEQRA. 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. (617.3 (g) (1)) (emphasis added)

310. Since the whole project had already been subject to a full SEQRA review that had already concluded it would have significant adverse environmental impact, the proper process for re-evaluating the environmental impact of the current proposals and Village actions was a full reference to that prior process.

311. Such a course of action would have of necessity revisited the original DEIS and FEIS, and also should have uncovered in the process the necessity due to the passage of time and the changes in circumstance the necessity of an SEIS.

312. As such the failure of the Village to consider the entirety of the consequences of its actions with respect to the RXR project amendments was in violation of the law, and resulted in impermissible segmentation of review by considering only the changes apart from the overall project.

313. As such the Village's Negative Declaration with respect to incentive zoning was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure

314. That unlawful action short-circuited the review and deliberations required by SEQRA and this deprived Petitioner and the public of the mandated protection and stewardship the Village owes the Forest that he uses, enjoys and values.

315. Were those procedures followed, a more robust protection for the Forest could have been required by the Village -- either by policy choice or by obligation under SEQRA to balance the various concerns related to land-development -- based upon the newly-determined precarious condition of the wildlife currently living in the Village's midst.

316. Therefore Petitioner requests the Court to require Respondent Village to annul the Village's Negative Declaration of November 4, 2013 with respect to the incentive zoning, to vacate its Decision on Amendments to the RXR project of December 18, 2013, and to suspend any permitting or other actions or decision-making except a stop-work order if needed, and any other such remedy to prevent any damage to the Forest on the RXR site.

317. Having no valid permits pursuant to SEQRA violations, RXR should be enjoined from damaging or otherwise altering the Forest in any way.

318. Petitioner has no other remedy at law.

#### **VIII. AS AND FOR A FOURTH CAUSE OF ACTION**

##### **The Village Board of Trustees Violated SEQRA When It Failed To Fully Inquire Into the Necessity For A Supplemental EIS for the X-Cell Project**

319. Petitioner repeats and re-alleges the prior paragraphs as if fully set

forth here.

320. The Village has been provided with information that substantial changes have occurred with respect to the at-risk status of wildlife believed to inhabit the project site for the X-Cell development.
321. The Nassau County Planning Commission has raised the issue of out-of-date environmental reviews with the Village in urging it to require fresh analysis for its decision-making under SEQRA with respect to the X-Cell re-application in 2008.
322. Petitioner Brummel has formally asked the Village to halt its action on the X-Cell project pending an SEIS to address the issues raised.
323. The Village has not responded directly to date to the requests of Petitioner Brummel.
324. The Village's Mayor has stated he is opposed to the SEIS for either project.
325. In its Decision on the RXR Amendment, the Village stated that it had considered and rejected the requests for SEIS's for the RXR projects and "another, unrelated, project" -- taken to mean the X-Cell project absent any other response to the request made in respect to that project.
326. Respondent Village has constructively and/or by implication actually denied the request for an SEIS made by Petitioner Brummel and others.
327. No EIS was created for the X-Cell project, the Village having required only a cursory FEAF throughout its twice-repeated approval process in 1997 and 2008 for 185,000 square feet of office space and

hundreds of parking spaces to be constructed on natural woodlands.

328. The lack of a specific X-Cell EIS notwithstanding, the Village by its own statements in 2008 relied substantially on the EIS produced for the RXR project -- and other such environmental reviews not specified -- in evaluating the adverse impacts of the X-Cell project.

329. Insofar as the EIS relied on is subject to revision by SEIS, so the decisions made thereon are subject to that SEIS review process, and are otherwise deficient and defective once the SEIS is determined to be needed.

330. The failure of the Village to make a diligent inquiry into the need for an SEIS despite its receiving information and testimony tending to validate the necessity thereof was affected by an error of law, or was arbitrary and capricious, or an abuse of discretion, and or was the product of a violation of lawful procedure

331. Respondent Village 's failure to properly inquire into the need for an SEIS as an up-to-date environmental analysis of the public policy issues raised by destroying habitat of animals designated by the state as at-risk, and other new environmental issues, deprives Petitioner of the mandated protection and stewardship the Village owes the Forest that he uses, enjoys and values.

332. Petitioner has a reasonable expectation that a current analysis of the wildlife issues related to the X-Cell project would result in a modification of the X-Cell project plans to protect more of the Forest, and to more fully

mitigate the environmental impacts of the proposed development, and therefore that the absence of that current analysis deprives them of the expected protection to the Forest that he uses, enjoys and values.

333. Therefore Petitioner requests that the Court require Respondent Village to suspend any permitting or other actions or decision-making except a stop-work order if needed on the X-Cell site, and any other such remedy to prevent any damage to the Forest, unless and until a proper inquiry into the need for an SEIS is completed.

334. And Respondent Village shall be required to rescind its Negative Declaration of November 19, 2008 with respect to the X-Cell project pending completion of that inquiry.

335. Having no valid permits pursuant to SEQRA violations, X-Cell should be enjoined from damaging or altering the Forest in any way.

336. The SEIS inquiry shall take into account all issues of environmental impact that have or are reasonably believed possible to have changed since the completion of the RXR Environmental Impact Statement in 2006, with respect to both the RXR and X-Cell tracts. .

337. Petitioner has no other remedy at law.

## **IX. AS AND FOR A FIFTH CAUSE OF ACTION**

### **The Village Board Violated SEQRA When It Failed to Make An Inquiry Regarding A Supplemental EIS That Would Look At Both The X-Cell And RXR Tracts Together (i.e. "segmentation")**

338. Petitioner repeats and re-alleges the prior paragraphs as if fully set

forth here.

339. The Village Board in conducting deliberations in 2013 on the RXR revised project has full knowledge of the tandem development in the adjacent X-Cell tract.
340. To ignore the related developments results in a segmented review, which absent an openly expressed rationale therefor violates the requirements of SEQRA.
341. Given its statements and record, the Village Board has used the RXR EIS's to consider the X-Cell project, and relied on EIS data from RXR and other developments in the Forest in its decision-making process on environmental issues with respect to the X-Cell project.
342. The Village's use of the EIS's mutually is an acknowledgement that the Forest and its environment is a unified whole, and impacts to one area of it are comparable to, and intertwined with, those of the others.
343. Furthermore, the RXR EIS specifically refers to neighboring tracts of the Forest as places to which wildlife will shift for new habitat when the RXR tract is cleared of vegetation (DEIS p. 2-49)
344. Because the tracts are mutually-related, environmental damage to one tract necessarily impacts the environmental health other tracts, either as potential refuges for displaced wildlife or simply due to the dynamics of natural systems that are interdependent.
345. SEQRA requires that the consideration of the environmental impact of agency actions reasonably anticipate and consider the larger effects of

the action, and not "segment" consideration of the action into discrete units that fail to reveal the reasonably expected overall impact of the action(s).

346. In its 2013 re-consideration of the RXR project, the Village failed to require that the review incorporate the known impacts of the pending development at the neighboring X-Cell tract.

347. That informational and analytical failure was manifest in the FEA the developer RXR did compile, as well as in the SEIS that was absent from the deliberations, due to the failure of the parties to properly inquire into, or disclose the facts supporting the need for one.

348. That failure to properly require comprehensive, non-segmented review was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure

349. By failing to conduct the required complete SEQRA review the Village deprives Petitioner of the mandated protection and stewardship the Village owes the Forest that he uses, enjoys and values.

350. Petitioner has a reasonable expectation that a complete analysis of the wildlife and other environmental issues related to the RXR project and the X-Cell project together would result in a modification of the project plans to protect more of the Forest, and to more fully mitigate the environmental impacts of the proposed development.

351. The absence of that current analysis therefore deprives Petitioner of the expected protection and stewardship required for the Forest that he uses, enjoys and values.

352. Therefore Petitioner requests the Court order the Village to require that the mandated inquiry into whether or not to require an SEIS for the X-Cell and RXR projects evaluate the mutual effects and impacts of the two proposed projects in order more fully to describe to policy-makers the overall impact of the clearing and destruction of the Forest as proposed.

353. Having failed properly so to inquire, and therefor the subsequent administrative processes being defective with respect to the RXR and X-Cell projects, the Village shall suspend any permits or authorizations issued thereupon for any damage or other modification to the Forest by X-Cell, RXR, their agents or assigns, or any other parties.

354. Having no valid permits therefor, the developers RXR and X-Cell should be enjoined from damaging or altering the Forest in any way.

355. Petitioner has no other remedy at law.

## **X. AS AND FOR A SIXTH CAUSE OF ACTION**

### **The Village Violated SEQRA By Failing To Consider The Environmental Impacts Of The RXR Amendment "Site Plan and Subdivision Approvals"**

356. The Village Board voted on November 4, 2013 that the Amendment with respect to the "Zoning Incentive Permit" would have no significant adverse environmental impact and voted a Negative Declaration under SEQRA as provided by law.

357. On December 18, 2013 the Village Board voted to approve a "Decision" that covered the entire RXR Amendment, including the aforementioned Incentive Zoning Permit, and also including changes to the

Site Plan and Subdivision approval of the project.

358. Upon information and belief neither the Village Board nor the Planning Board, according to the Decision and Minutes of recent Village Board meetings, voted upon or proposed any SEQRA determination with respect to the "site plan and subdivision approvals" as that element of the Amendment was described in the Village minutes and other records.
359. SEQRA requires that actions which have an impact on the physical environment must be classified under its provisions and a determination by the lead agency be taken as to whether or not the action contemplated may have a significant adverse environmental impact.
360. Failing to make such a determination prior to taking such an action violates SEQRA.
361. As such the Village Board's omission, and the Decision contingent thereupon, was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure.
362. If the Village Board or Planning Board had undertaken the necessary review Petitioner and the public would have had a further opportunity to address the environmental issues raised by the project as a whole, possibly before another set of Village officials, with the effect of further analysis and deliberation.
363. Failing to do so therefore deprived Petitioner and the public of the proper level of review and stewardship of the Forest that he uses, enjoys and values.

364. Therefore Petitioner requests the Court annul the Village Board "Decision" of December 18, 2013 approving the RXR Amendment, and require the Village to rescind any permits or actions arising therefrom until such time as the Village subjects the Site Plan and the Subdivision Approval to the mandated SEQRA procedures of review.

365. And furthermore that such inquiry should be properly connected with an inquiry into the necessity of performing an SEIS with respect to the X-Cell and RXR projects.

366. Having no valid permits pursuant to SEQRA violations, the developers RXR and X-Cell should be enjoined from damaging or altering the Forest in any way.

367. Petitioner has no other remedy at law.

## **XI. AS AND FOR A SEVENTH CAUSE OF ACTION**

### **The Village violated SEQRA when it approved a Negative Declaration with respect to the RXR Amendments but failed to compose an adequate "Determination of Significance"**

368. The Village was presented evidence through personal and written testimony that there were numerous subject areas of environmental significance upon which the project to be approved in the RXR Amendments of 2013 would have significant adverse impacts.

369. The Village issued a "negative declaration" on November 4, 2013 that did not address the issues with any specificity, or contain a "reasoned elaboration," or provide "reference to any supporting documents", as

required by law.

370. As such the negative declaration was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure.

371. Had the Village Board engaged in such an inquiry and reflection Petitioner and the public would have been afforded the protection and stewardship the Forest was required to enjoy under law, and the members of the Board of Trustees may have arrived at a different decision.

372. Thus the failure directly impacted the Petitioner's enjoyment and use of the Forest and injured him.

373. Therefore Petitioner requests the Court annul the Village Board negative declaration of November 4, 2014, and annul the "Decision" of December 18, 2013 as a result, and require the Village to rescind any permits or actions arising therefrom until such time as the Village subjects the incentive zoning approval at issue thereupon to the requisite review of environmental significance required by SEQRA.

374. Having no such valid permits or permission to work, RXR should be enjoined from from damaging or altering the Forest in any way.

375. Petitioner has no other remedy at law.

**WHEREFORE**, Petitioner respectfully requests the Court enter an Order in this proceeding:

(1) Revoking any permits issued by the Respondent Village of North Hills to clear

or otherwise alter in any way the Forest or other land, and wildlife therein, on the respective project sites at issue, by the Village, RXR and X-Cell, or their agents, employees, contractors, successors or any other entities;

(2) Requiring the Village to undertake a thorough inquiry into the need for an Supplemental EIS for the RXR and X-Cell projects, taking into account among other things changed circumstances of the wildlife and flora at the RXR and X-Cell sites in the time period since the 2005-2006 EIS process was undertaken, and the new information that has been presented or shall be presented on those and other topics relevant to SEQRA, and to rescind its prior actual or constructive denials of the request submitted therefor;

(3) Annuling the Negative Declaration the Village issued November 4, 2013 with respect to the RXR project and requiring the Village to undertake further consideration of the RXR project by proper SEQRA procedure, including a proper Determination of Significance not affected by segmentation of review;

(5) Annuling the approval of the X-Cell project incentive zoning of 2008, and if such exists, site plan and subdivision approval as well, pending completion of proper inquiry into the necessity for an Supplemental EIS, Generic EIS, and any and all other appropriate SEQRA mandated steps;

(6) Annuling the approval of the RXR project incentive zoning, as well as site plan and subdivision approval if they exist, pending completion of Supplemental EIS, Generic EIS, and all other SEQRA mandated steps;

(7) Enjoining the Respondents Midtown North Hills LLC herein known as RXR,

and X-Cell, as well as their agents, assigns, successors or other such parties, from damaging or altering the Forest, or the wildlife therein, in any way pending the satisfactory completion of the requisite Village actions;

(8) Awarding Petitioner reasonable costs and expenses.

(9) And ordering such other and further relief as the Court may deem just and proper.

The relief requested herein has not been previously requested from this or any other court.

Dated: January 4, 2014  
Nassau County, N.Y.

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RICHARD A. BRUMMEL  
15 Laurel Lane  
East Hills, N.Y. 11577  
Tel. (516) 669-1741  
Email rbrummel@att.net (not for legal  
process)