

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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INCORPORATED VILLAGE OF HEAD OF THE
HARBOR; ST. JAMES - HEAD OF THE HARBOR
NEIGHBORHOOD PRESERVATION COALITION,
INC.; JUDITH OGDEN; GEORGE L. FITZPATRICK;
KAREN P. FITZPATRICK; MARA MATKOVIC;
NICHOLAS STARK; DAVID KELEMEN; ALYSON
HOPE SVATEK; THOMAS JAMES SVATEK; TRISTAN
COLE SVATEK; GERALD DUFF; LEONNA DUFF;
DAVE KASSAY; LAURINE KASSAY; HARRY
POOLE, SCOT VELLA; KATHY VELLA; MICHAEL
SASSONE; LOUISE SASSONE; ROSE NAPOLITANO;
CHARLES SHUTKA; MARGARET SHUTKA;
COLLETTE PORCIELLO; and BENJAMIN ROBINSON,

Index No.

PETITION

Petitioners,

- against -

TOWN OF SMITHTOWN; TOWN OF SMITHTOWN
PLANNING BOARD; BARBARA DESORBE, in her
official capacity as Chairperson of the Town of Smithtown
Planning Board; WILLIAM MARCHESI, in his official
capacity as a member of the Town of Smithtown Planning
Board; DESMOND RYAN, in his official capacity as a
member of the Town of Smithtown Planning Board;
THOMAS UNVERZAGT, in his official capacity as a
member of the Town of Smithtown Planning Board; RICK
LANESE, in his official capacity as a member of the Town
of Smithtown Planning Board; GYRODYNE, LLC; and
GYRODYNE COMPANY OF AMERICA, INC.,

Respondents.

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Petitioners, by their attorney, Ruskin Moscou Faltischek, P.C., as and for their Petition
pursuant to Article 4 and Article 78 of the C.P.L.R., allege as follows:

NATURE OF PROCEEDINGS

1. In the northeast portion of the Town of Smithtown, along historic Route 25A, there are approximately 48 acres of undeveloped land commonly known as the Flowerfield Fairgrounds. This undeveloped land is contained within a lot owned by respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc. (collectively “Gyrodyne”). The area is located within a mile of Stony Brook Harbor and on its northwest border is the Avalon Nature Preserve, 216 acres of fields, forests, and wetlands.
2. Toward the southwest of the property is Mills Pond and Mills Cemetery. A portion of the lot is located within the Mills Pond Historic District, which contains a number of historic structures and is listed in the National Register of Historic Places. The lot borders Route 25A, a designated historic corridor, and is serviced by two narrow roads. The overall character of the surrounding area is open space, intermixed with historical structures and residential homes. The area is a low density break from the more developed hamlet of St. James and the Three Village area located in the Town of Brookhaven.
3. Yet, based on an EIS which utterly fails to comply with the requirements of New York State Environmental Quality Review Act (“SEQRA”), a subdivision was approved by the respondent Town of Smithtown Planning Board (“Planning Board”), allowing the shoehorning of a massive commercial development consisting of a hotel, an assisted living facility, two office buildings, and a sewage treatment plant. The Planning Board gave its approval without debate, although numerous residents, as well as the Supervisor of the Town of Brookhaven and Mayor of the Village of the Head of the Harbor, expressed opposition to the project.
4. As fully explained below, among the most serious deficiencies in the SEQRA review is that the impact of the development on the character of the surrounding community is

not examined. Instead, the EIS baldly asserts that the development will be consistent with the existing land use in the area. However, there are no hotels, assisted living facilities, office building, sewage treatment plants -- or similar structures -- in the area. The failure to address this fundamental issue in and of itself means that the respondents failed to undertake the required hard look at the project's environmental impacts when approving the subdivision and requires the preparation of a Supplemental EIS.

5. Other deficiencies in the SEQRA review include: the use of outdated traffic data which contradicts prior representations by Gyrodyne as to the increase in traffic caused by development; the failure to examine the cumulative impact of the development in light of other potential projects in the immediate vicinity; the failure to consider the impact of the development, including the construction of a sewage treatment plant, on Stony Brook Harbor; not examining possible detrimental effects on historic structures, and other deficiencies set forth below.

6. Simply put, and as also explained below, because the development was favored by certain officials of the Town of Smithtown, the Planning Board did not fulfill the required environmental review but instead pushed through the approval of the subdivision without any discussion whatsoever. Accordingly, this Article 78 proceeding has been brought against the Town of Smithtown ("Town"), the Planning Board, the members of the Planning Board in their official capacities, and Gyrodyne because respondents' adoption of the SEQRA findings statement and approval of the subdivision was an abuse of discretion, arbitrary and capricious, violated lawful procedure and was affected by an error of law. For the reasons set forth below, and in the accompanying memorandum of law, the approval of the SEQRA findings statement

and the subdivision should be annulled, and the respondents directed to undertake a Supplemental EIS to address the deficiencies in the SEQRA review.

PARTIES

7. Petitioner Incorporated Village of Head of the Harbor is a New York municipal corporation located in Suffolk County, New York, whose boundaries are immediately north of the Gyrodyne property.

8. Petitioner St. James - Head of the Harbor Neighborhood Preservation Coalition, Inc. ("Coalition") is a duly formed not-for-profit corporation consisting of members of the community directly adjacent to or nearby the Gyrodyne property.

9. Petitioner Judith Ogden resides at 654 North Country Road, St. James, New York which is approximately 600' from the Gyrodyne property and she is the President of the Coalition.

10. Petitioners George L. Fitzpatrick and Karen P. Fitzpatrick reside at 15 Ashleigh Drive, St. James, New York, which is approximately 1250' from the Gyrodyne property and are members of the Coalition.

11. Petitioners Mara Matkovic and Nicholas Stark reside at 8 Victoria Court, Head of the Harbor, New York, which is approximately 1.5 miles from the Gyrodyne property.

12. Petitioner David Kelemen resides at 171 Mills Pond Road, St James, New York, which is immediately adjacent to the Gyrodyne property.

13. Petitioners Alyson Hope Svatek, Thomas James Svatek, and Tristan Cole Svatek reside at 9 Farm Road, Head of the Harbor, New York, 11780, which is approximately 1.1 miles from the Gyrodyne property.

14. Petitioners Gerald Duff and Leonna Duff reside at 1541 Stony Brook Road, Stony Brook, New York, which is approximately 0.25 miles from the north end of the Gyrodyne property, and whose house that was built in 1680 is on the National Register of Historic Places.

15. Petitioners Dave Kassay and Lauraine Kassay reside at 151 Mills Pond Road, St James, New York, 11780, which is immediately adjacent to the Gyrodyne property.

16. Petitioner Harry Poole resides at 2 Peter Court, St. James, New York, which is approximately 1400' feet from the Gyrodyne property.

17. Petitioners Scot and Kathy Vella reside at 5 Peter Court, St. James, New York, which is approximately 1400' from the Gyrodyne property.'

18. Petitioner Michael Sassone resides at 142 Mills Pond Road, St. James, New York, which is approximately 1100' from the Gyrodyne property.

19. Petitioner Louise Sassone resides at 122 Mills Pond Road, St. James, New York, which is approximately 0.36 of a mile from the Gyrodyne property.

20. Petitioner Rose Napolitano resides at 1280 North Country Road, Stony Brook, New York, 11790, which is adjacent to the Gyrodyne property.

21. Petitioner Charles Shutka and Margaret Shutka reside at 5 Hitherbrook Road, Head of the Harbor, New York, which is approximately 0.7 mile from the Gyrodyne property.

22. Petitioner Collette Porciello resides at 5 High Hedges Court, Head of the Harbor, New York, which is approximately 1250' from the Gyrodyne property.

23. Petitioner Benjamin Robinson resides at 64 Mills Pond Road, St. James, New York, which is approximately 0.64 of a mile from the Gyrodyne property.

24. Each of the individual petitioners reside directly adjacent to or are in close proximity to the Gyrodyne property and suffer special damages as a result. The petitioners will

be adversely impacted by heavy congestion of the roads where they live, and suffer harm from the lack of open space and the change in the character of their community. As a result of the close proximity to the Gyrodyne property these damages are different and more severe than the harm to the general population.

25. The Village of Head of the Harbor suffers special damages because of its close proximity to the Gyrodyne property including the change in character of the village because of the development.

26. Respondent the Town and Planning Board are municipal entities with a place of business located at 99 W. Main Street, Smithtown, New York.

27. Respondents Barbara DeSorbe, William Marchesi, Desmond Ryan, Thomas Unverzagt and Rick Lanese are members of the Planning Board.

28. Respondents Town, Planning Board, and the individual members of the Planning Board are bodies or officers as defined under C.P.L.R. §7802.

29. Respondent Gyrodyne is the owner of the lot of land on Route 25A in the Town of Smithtown, New York.

BACKGROUND AND FACTS

Gyrodyne Property

30. Gyrodyne is a former defense contractor and now describes itself as a publicly owned commercial property owner. *See* Website, Exhibit 1. Initially, Gyrodyne owned land that straddled the border between the Town of Brookhaven and the Town of Smithtown. That land consisted of approximately 308 acres.

31. In or about 2010, the State of New York took by eminent domain approximately 245 acres of the property to be included into the SUNY Stony Brook campus.

32. The remaining 63 acres in the Town of Smithtown consists of buildings and improvements, and approximately 48 undeveloped acres that are commonly referred to as the Flowerfield Fairgrounds.

33. The parcel is bordered on the north, east and west by New York Route 25A, Stony Brook Road and Mills Pond Road, all two-lane residential country roads with few houses in the area. The south of the property is bordered by the property now owned by Stony Brook University.

34. Across Route 25A to the north is the Avalon Nature Preserve, a 216 acre preserve that runs to Stony Brook Harbor. West of the property is Mill Pond and Mill Cemetery. A map of the area is attached as Exhibit 2.

35. As mentioned above, to the southeast of the property is SUNY Stony Brook campus, and south of the property is a residential development of single-family homes.

36. Across Route 25A to the north is the Village of Head of the Harbor, an all residential village. The lot is situated between the hamlet of St. James and the Three Village area in the Town of Brookhaven.

37. The lot is part of an area that is rural or undeveloped in nature. The lot provides a buffer between the more highly developed hamlet of St. James, and the Three Village area. *See* Photographs, Exhibit 3.

The Proposed Project

38. Gyrodyne has proposed to develop the property by subdividing it into nine lots to accommodate a hotel, assisted living facility, two office buildings and a sewage treatment plant. In 2020, Town of Smithtown Supervisor Edward Wehrheim stated that the project was a

concentration of his focus and the development was critical in his opinion. See Article, Exhibit 4.

The proposed subdivision map is attached as Exhibit 5.

39. With regards to the proposed lots, Lots 1 and 2 would continue with their existing light industrial use buildings.

40. For what is designated Lot 3, its intended use is for overflow parking for the developments on the other lots.

41. On Lot 4, a 150 room hotel with conference facilities is proposed.

42. On Lots 5 and 6, a 130,000 square feet of medical office, general office or technical office space is proposed.

43. On lots 7 and 8 a 220 unit assisted living facility is proposed.

44. In connection with the subdivision application, Gyrodyne submitted a Draft Environmental Statement (“DEIS”) dated November 2019 prepared by Cameron Engineering & Associates, LLP. Exhibit 6. A Final Environmental Impact Statement (“FEIS”) dated December 2020 and filed in March 2021 addresses comments made to the DEIS. Exhibit 7. The FEIS and DEIS are sometimes collectively referred to below as the EIS.

Procedural History

45. On March 30, 2022, the Planning Board met and adopted a findings statement under SEQRA (“Findings Statement”). Exhibit 8. The Findings Statement improperly states that the Gyrodyne project should be viewed with more “flexibility” than other projects in the Town. See Exhibit 8, Page 7.

46. On that same date, a public hearing was held on the adoption of the subdivision, which is a final determination although site plan approval will be required for each lot before building can occur. Over thirty residents spoke in opposition to the subdivision, and numerous

written comments were submitted to the Planning Board. Among those speaking against the project were the Supervisor of the Town of Brookhaven and the Mayor of the Village of the Head of the Harbor.

47. Immediately at the end of the public comment period, and without any discussion whatsoever, the subdivision was approved. At the end of the meeting, without a motion, the Planning Board then ended the public participation, and upon information and belief, met privately.

48. This Petition is filed within thirty (30) days of the adoption of the Findings Statement and approval of the subdivision.

The Approval Of The Findings Statement And Subdivision Should Be Annulled

49. As set forth below and in the accompanying Affidavit of John W. Pavacic (Exhibit 9 hereto), the EIS and the resulting Findings Statement were deficient in numerous ways and the Planning Board did not undertake the required hard look before approving the subdivision.

a. *Impact on Neighborhood Characteristics*

50. Environmental Conservation Law Section 8-0109 sets forth what is required in a DEIS and includes the impacts of action which may have a significant effect on the environment. 6 N.Y.C.R.R. 617.7(c)(i) provides an illustrative list of criteria to be considered when determining whether an action may have a significant adverse impact on the environment, and subsection (v) specifically provides that the impairment of an existing community or neighborhood character is an indicator of significant adverse impact of a proposed action. In addition, as set forth in the accompanying memorandum of law, New York Courts have

consistently held that the impact on existing community character is a relevant and important concern in an environmental analysis.

51. The EIS submitted in support of the project is fatally flawed because it does not consider the project's impact on the character of the historic, undeveloped, and residential nature of the community. Nowhere in the EIS is there any discussion as to whether this substantial development will be detrimental to the overall character of the neighborhood, nor are there discussions on what efforts can be made to mitigate these impacts.

52. The EIS does recognize that there has been a visioning report prepared by the Town of Brookhaven regarding the Route 25A corridor, but then makes no effort to address the concerns raised in the report. The EIS then says that traffic and visual impacts will be "minor" and "the proposed subdivision is consistent with the surrounding land use." DEIS Section 12.2. This is absurd.

53. There is no hotel or assisted living facility in the neighborhood. There are no office buildings in the area. The area does not have a sewage treatment plant. The EIS does not reference any such structures or similar buildings. How could the proposed development be "consistent with the surrounding land use" which is undeveloped, open area with historical structures intermixed within residential communities?

54. The Findings Statement is similarly silent as to the impact of the development on the character of the surrounding neighborhood. The Findings Statement does not even mention the character of the surrounding community, which includes residential homes, open space and historic structures. In other words while the Findings Statement tries to address specific issues, it does not see the forest from the trees.

55. This failure to consider the impact on the character of the residential community is in and of itself fatal to the approval of the Findings Statement and subdivision. As explained in the accompanying memorandum of law, while SEQRA is not meant to require any particular decision on an application, it does require the decision making body to take a “hard look” at major environmental concerns. Here no hard look, nor any look at all, was given to the most basic environmental concern raised by this project, its impact on the overall character of the surrounding community.

b. *Traffic*

56. As fully set forth in detail in the report of Steven Schneider, PE attached as Exhibit 10 hereto (“Schneider Report”). The traffic study utilized for the EIS is seriously flawed. Critically, traffic study is based on outdated 2017 data. This fact alone should require a Supplemental EIS to use current traffic data.

57. In addition, while the traffic study references certain potential developments and acknowledges their potential impact on traffic, the study does not follow up as to whether these developments occurred.

58. Further, in only a few short paragraphs, the traffic study asserts that the massive increase in traffic caused by the development can be cured by the installation of traffic signals and turning lanes without any elaboration.

59. Worse yet, during the 2010 condemnation proceeding of 245 acres of the Gyrodyne property, Gyrodyne’s traffic expert testified that the highest and best use was not commercial development, but residential. Gyrodyne argued that if commercial development occurred, traffic would increase by 3,206%. See Decision, Exhibit 11.

60. In addition, Gyrodyne's own appraisal and planning experts testified that the property is not suitable for commercial development and that "getting traffic on and off the property is a problem for the site". While this testimony related to the 245 acres taken in 2010, they are no less applicable to the subject property that is serviced by two extremely narrow roads. Additionally, these opinions were based on traffic conditions existing in 2005. If the roads could not handle the increase in traffic caused by commercial development then, how could they handle it now?

61. Gyrodyne now contends that the development will "only" generate an increase of 61% in traffic. This discrepancy is not explained and as stated in the Schneider Report even this increase will have a tremendous impact on the local road system that is geared for residential traffic.

62. Respondents also assert that the number of trips on 25A will be limited. How additional traffic on Route 25A can be limited is not explained.

63. Accordingly, a Supplemental EIS should be prepared utilizing current data, otherwise the true traffic impact cannot be considered in deciding to approve the subdivision.

c. *Impact on Water Resources*

64. The proposed project includes a sewage treatment plant for the wastewater generated by the development. However, the Town has made clear, and as referenced in the Findings Statement, there is the intention to connect piping to transfer waste from the St. James business district to the sewage treatment plant at the Gyrodyne property. Findings Statement pp. 8-9.

65. Initially, the EIS does not consider the *2020 Suffolk County Subwatersheds Wastewater Plan* (SWP). Exhibit 12. According to the SWP, Stony Brook Harbor is an

impacted embayment with high levels of nitrogen and is identified as a high priority area for nitrogen reduction. Yet, the EIS admits that the volume of sanitary flow will increase due to the proposed development and that the resultant nitrogen will only slightly decrease when the sewage treatment plant is completed.

66. Accordingly, the development does not comply with the SWP recommendations to reduce the current amount of nitrogen in Stony Brook Harbor by 37% which would require the sanitary flow from Gyrodyne to decrease by 37%, otherwise nitrogen traveling to Stony Brook Harbor will remain at levels that will endanger the viability of the harbor. This impact is not addressed by the EIS or Findings Statement.

67. Further, this impact is compounded by the fact that the proposed location of the sewage treatment plant is in a rapid transit watershed near Stony Brook Harbor and will be magnified by the fact that Stony Brook Harbor is poorly flushed due to the gyre in Smithtown Bay that prevents dispersal of the nitrogen load for an additional four (4) days as determined by SUNY Stony Brook. This retention results in the largest hypoxic dead zone east of New York City and requires further study. *See* Letter from Town of Brookhaven Supervisor Edward Romaine dated April 13, 2021, Exhibit 13.

68. In addition, the EIS does not address how to mitigate the significant amounts of pharmaceuticals that will be contained in the sanitary effluent from patients and residents in the proposed medical offices and assisted living facility. It is generally accepted that current sewage treatment technologies are not effective at removing pharmaceuticals in the wastewater stream. More significantly, the EIS ignores the potential for doubling the projected sanitary flow due to the real possibility of the St. James business district connecting and sending the sanitary effluent to the proposed sewage treatment plant.

69. Further, potential mitigating steps were not considered, including:
- i. How and who will monitor and enforce the requirement that the maximum daily wastewater flow/hydraulic load for the entire site will be limited to 87,591 gallons per day.
 - ii. Remedies to be employed if exceedances of the daily discharge levels occur.
 - iii. Specific measures to be implemented to ensure that on-site nitrogen-loading levels do not increase above the existing levels currently generated at the Gyrodyne property along with a specific numerical nitrogen-loading threshold that is not to be exceeded, how these activities will be monitored and enforced and remedies to be employed if exceedances of the nitrogen loading levels occur.
 - iv. Specific measures to ensure that all existing uses on the Gyrodyne property will connect to the new sewage treatment plant within 6 months of commencement of its operation and will abandon all on-site individual septic systems.

70. Finally, Gyrodyne has been duplicitous in offering to connect the St. James commercial district and process its sanitary effluent of approximately another 79,000 gallons per day, but not addressing the impact of the connection in the EIS. It is obvious that the groundwater and surface water issues associated with realization of the Gyrodyne project are more complicated than analyzed in the EIS. The protection of Stony Brook Harbor requires a “hard look” and honest analysis of impacts from the proposed sewage treatment plant, and a Supplemental EIS should be required.

d. *Cumulative Impact*

71. The EIS lacks a truly adequate, sufficient and detailed comprehensive cumulative impact analysis. This deficiency was first apparent in the DEIS but was continued through the FEIS and the Findings Statement as well.

72. The EIS and Findings Statement are improperly dismissive of comments made regarding the need for an adequate cumulative impact analysis, instead of ensuring that the requisite “hard look” has been undertaken as required by SEQRA. During the SEQRA process it was implied that in order to conduct a cumulative impact review, formal development applications must first have been publicly proposed for adjacent and nearby parcels. This is inaccurate.

73. A cumulative impact analysis should consider the development potential of all adjacent undeveloped and underdeveloped parcels, as well as those non-adjacent parcels that have a meaningful proximity to the subject site, whether or not actual development applications have been submitted. During the SEQRA process, the zoning, size and other characteristics of adjacent and proximate parcels could have been utilized to determine potential future cumulative impacts, especially synergistic and incremental impacts, within a specific radius of the Gyrodyne project site, but there was a failure to do so. See Exhibit 9, ¶ 6.

74. During the public comment period, there were numerous comments of potential cumulative impacts and the lack of analysis in the EIS. Projects were identified including: to the immediate east the build out of the Stony Brook Research and Development Park; to the immediate west the potential for an assisted living facility; to the immediate northeast, a planned senior living “resort”; and the pending site of the BB-GG Farmland.

75. These concerns were dismissed as too speculative, but Benchmark, a developer, has already approached the Town Planning Department about building a senior living facility on the parcel to the immediate west. Further, the cumulative impact methodology described above has been successfully utilized and applied in other towns on Long Island, so the respondents are capable of ensuring these steps are taken.

76. And, the analysis of cumulative impacts is all the more important here because the EIS appears to be intended to serve as a generic EIS. The DEIS states that the proposed action “is not a formal plan” but a “comprehensive guide for future development potential”. DEIS 1-2. Accordingly, some consideration should have been given to the future development potential.

e. *Displacement of Existing Businesses*

77. As explained in the accompanying memorandum of law, in assessing the environmental impacts of a proposed action, the deciding body should examine any impacts or displacement of local businesses. Neither the Planning Board, nor the EIS examined the impact of the predicted displacement of office tenants as a result of the Gyrodyne project.

78. Although the DEIS recognizing one of the adverse impacts associated with the proposed office space, the EIS does not examine this impact other than to admit 130,000 square feet of medical office space will displace from relocating tenants from Stony Brook Medical Center and downtown business district.

79. Accordingly, the approval of the Findings Statement and subdivision should be annulled and a Supplemental EIS should be prepared to address this issue.

f. *Historic and Cultural Resources*

80. A portion of the Gyrodyne Property is located in the Mills Pond Historic District, which is listed in the National Register of Historic Places. In addition, Rout 25A has been

designated as an Historic Corridor. See DEIS 16.1; see also March 29, 2021 Letter from The Ward Melville Heritage Organization, Exhibit 14.

81. A number of historical structures are adjacent to the property including the Jackson/Rogers House at 155 Mills Pond Road, O'Donnell/Newton House 159 Mills Pond Road, L'Hommedieu House 161 B Mills Pond Road, Powell House 163 Mills Pond Road, Baily/Baily/Papdakos House, Corner of Mills Pond Road. See Photographs, Exhibit 15.

82. There are also two archeological sites on the property: Mills Pond prehistoric site and the Mills-Smith House historic site, and a stairway to intact cellar deposits has been discovered on the property.

83. Although the presence and existence of these historic elements is acknowledged in the EIS, no plan has been put forth to ensure the continued maintenance and repair of the historic structures nor the perpetual protection of the integrity of the historic district.

84. No plan has been formulated to:

- i. Require the preparation and submittal to the Town of annual architectural and engineering reports on the status of the structures.
- ii. Describe the measures the applicant will undertake to stabilize, repair, maintain and ultimately restore the historic structures while ensuring their historic integrity and monitoring by the Town to ensure these measures are implemented.
- iii. Describe specific design features, including height limits, building architecture, signs, lighting, etc., that will be required of the project to minimize potential impacts of the development on the Historic District.

85. Instead, the EIS simply relies on a buffer along the property's boundaries as if that solves all problems. No real effort is made to address how the project and the inevitable

traffic will affect the historic buildings and the historic area. Accordingly, the EIS is clearly inadequate for the Planning Board to take a hard look at the potential damage of this historic area.

86. As for the Findings Statement, it relies on an existing “vegetation-covered chain link fence’ on the property that will be retained “except for approximately 106 linear feet . . . which may be disturbed”. Findings Statement, P. 6. The Findings Statement also acknowledges that a new access road with two five feet high ground monument-style signs will be constructed within the historical area. The Findings Statement goes on to argue that the historic designations do not include any specific development restrictions.

87. This is simply inadequate when considering a massive development in an area with numerous historical structures. To say that a chain link fence – even if covered with vegetation – is sufficient mitigation to protect these structures hardly complies with the respondents’ obligation to examine and consider if this type of development is appropriate given the areas substantial historic character, or even if sufficient mitigation steps can be taken.

g. *Open Space*

88. In regards to Open Space, there continues to be a misapplication of that term to include the 13.5 acres of “Managed Landscape” to be established on the project site. As set forth in the Pavacic Affidavit, actively maintained areas, such as lawn and landscaped areas, are not generally included in a formal “open space” definition. Areas that are not formally dedicated to or covenanted as open space are suspect, especially if the applicant is proposing to count land-banked parking as open space.

89. Although statements have been made that public access will be provided to open space areas on the project site, including walking and nature trails, no mechanism for formally ensuring public access is provided, especially if the interior roads are private.

90. Further, the project does not comply with the provisions of the Town of Smithtown's Draft Comprehensive Plan (Exhibit 16). That Plan recommends that developments should be concentrated in the Town's business districts, and that open space should be maximized in the areas between these areas. The proposed development is exactly the opposite, it eliminates open space between the hamlet of St. James and the Town's border.

91. Until these open space issues are adequately addressed, the Planning Board should not have adopted the Findings Statement but should have required the preparation of a Supplemental EIS to address these deficiencies.

h. *Native Plants*

92. During the SEQRA process, reference continued to be made to the fact that "*additional supplemental plantings, consisting solely of native plant species, will be provided in the existing buffer*". However, in the Findings Statement the specific parameters for native plantings that should be applied are not outlined. The Town should include a requirement that a sufficient minimum number of woody native trees and shrubs be utilized as herbaceous plants do not provide significant visual buffering.

93. Furthermore, the Findings Statement does not provide a listing of the specific native species to be used, minimum plant sizes (for woody species in gallons or caliper), spacing requirements and planting seasons (e.g. specific fall or spring planting periods) and replacement requirements (e.g. applicant to guarantee survival of at least 85% of all supplemental plantings for a three-year period commencing on the date of installation of last plant).

94. Until these Native Plant issues are adequately addressed, the Findings Statement and subdivision should not have been approved.

Conclusion and Request for Relief

95. Respondents are attempting to proceed with a massive project with serious environmental impacts without undertaking the required environmental hard look. Such basic steps as considering the impact on the character of the neighborhood and utilizing current traffic data was not done.

96. Accordingly, the approval of the Findings Statement and subdivision should be annulled, and respondents directed to undertake a Supplemental EIS to correct the deficiencies set forth above.

Dated: Uniondale, New York
April 25, 2022

RUSKIN MOSCOU FALTISCHEK, P.C.

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