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Subj: Remarks to Town of Pine Plains Planning Board as Part of Public Hearing Session

By: John F. Lyons, Esq., Grant & Lyons, LLP, Counsel to Pine Plains United

Re: DEIS of Carvel Property Development

Good morning, ladies and gentlemen of the Planning Board.

My name is John Lyons. I am an environmental and land use lawyer. I am here today representing Pine Plains United. I thank you for the opportunity to speak this morning.

Let me begin with some brief remarks about my qualifications. I am a partner in the law firm of Grant & Lyons LLP located in Rhinebeck, New York. I have been practicing environmental, land use and real estate law for 23 years. Since my firm's founding in 1994, my practice, and my firm's practice, has been dedicated solely to those fields of law. In the course of my practice I have seen many draft environmental impact statements. My firm represents the planning boards of the City of Kingston, the Village of Rhinebeck, the Village of New Paltz, the Village of Tuxedo, the Town of Woodstock, Town of Shawangunk, the Town of Shandakan and, on occasion, the Town of Rhinebeck. I am also proud to say that in our 14 years of representing planning and zoning boards in litigation, Grant & Lyons has never lost a lawsuit. I sit on your side of the table in other communities every day. I know what a DEIS should contain and I know how the SEQRA¹ process should work.

I want to begin by talking, not about this project, but about you and about SEQRA. I want to impress you with the gravity of your responsibilities as a lead agency. I want to embolden you by explaining the extent of your authority and power. I want to inspire you about the tremendous positive difference you can make if fulfill your duties as lead agency.

With a project this big and complex, its easy to get lost in the details. I want you to take a step back with me this morning to reconnect with the big picture.

Let's start with SEQRA itself. The State Environmental Conservation Law (ECL) contains the State Legislature's "findings," its goals for enacting SEQRA. I want to read a couple of those findings to you. They will connect you the State Legislature's hopes for what you, as a lead agency under SEQRA, can accomplish. The Legislature said:

It is the intent of the legislature that all agencies which regulate activities ... which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.²

It is the intent of the legislature that all agencies conduct their affairs with the awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and future generations.³

Think about those goals. Those goals are your goals. As lead agency, you have been designated by the State to see that SEQRA is fulfilled in a way that will achieve those goals in your community. You are

¹ State Environmental Quality Review Act

² NYS ECL § 8-0103(9).

³ NYS ECL § 8-0103(8).

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the stewards of our air, our water, our land and our living resources. You have the obligation to protect the environment for the use and enjoyment of this and future generations. You have been designated by the State to be the firewall between our environment and the development pressure that is pushing down on this, and so many other communities, like a crushing gravitational force.

So how does SEQRA provide the means to achieve those goals? Langdon Marsh, a former DEC Commissioner once said:

[the] main effect of SEQRA [is] to screen out environmentally unsound proposals by modifying them to reduce environmental impacts or by deterring agencies and developers from proposing projects which would be environmentally unsound or controversial.⁴

In a case called *Schenectady Chemicals v. Flacke*,⁵ an appeals court said:

It is the stated purpose of SEQRA “to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources” (ECL § 8-0101). This policy is to be implemented to the fullest extent possible (ECL § 8-0103). By enacting SEQRA, the Legislature created a procedural frame work which was specifically designed to protect the environment by requiring parties to identify possible environmental changes “before they have reached ecological points of no return” (*Matter of Town of Henrietta v. Department of Environmental Conservation*, 76 Ad2d 215, 220). At the core of this framework is the EIS, which acts as an environmental “alarm bell” (*Id.* at 220).

Based on the comments put forward by the public, Pine Plains United, the Dutchess County Planning Department, Scenic Hudson, the Dutchess Land Conservancy, and even the Poughkeepsie Journal editorial page, the alarm bell that is the EIS for this project is ringing loud and long.

At PPU, we approached this DEIS with concern, but with open minds. Unfortunately, the quality of both the project and the DEIS rendered our worst fears a reality. You have heard from our team of experts. They examined the DEIS regarding visual, traffic, fiscal, planning, community character, and engineering impacts. The results of their reviews paint a disturbing picture. Together those experts have seen hundreds of DEISs. Every single expert on our team has told us that, in their professional opinion, the quality of this DEIS is very poor. The prospects of a mammoth project like this being built on that foundation is frightening.

In short, the DEIS has two major problems.

The first is a lack of completeness. The DEIS is incomplete regarding numerous important and relevant potential adverse impacts.

⁴ Marsh, *Symposium on the New York State Environmental Quality Review Act: Introduction - SEQRA's Scope and Objectives*, 46 Alb. L. Rev. 1097, 1113 (1982). See also, Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA's Substantive Mandate*, 65 Alb. L. Rev. 393 (2001).

⁵ 83 Ad2d 460 (3rd Dept. 1981).

The second is that, substantively, in order to properly mitigate the identified impacts, it is clear that this project must be drastically reduced in scale and its design must undergo sweeping change.

First, lets talk about incompleteness. Incompleteness means that the DEIS either does not contain the content and detail required by the scope, or it does not contain sufficient detail so that its content can be properly analyzed and commented upon.

Virtually every expert on the PPU team identified significant impacts that were inadequately treated in the DEIS. Those inadequacies were so fundamental they prohibited any effective comment. These issues were summarized at the public hearings and will be identified in detail in our written submissions.

These issues are not trifling. I'll mention two examples.

At the February 29th public hearing session, visual impact expert George Janes said:

The photo-simulations presented in the DEIS do not accurately disclose the proposal's impact on visual resources. They have not been performed according to accepted standards in the environmental review process. They should NOT be used as evidence as of the project's impacts on visual resources as they do not accurately depict the action proposed.⁶

At the March 12th public hearing session, fiscal impact expert Michael N'dolo said:

There are a number of omissions and material errors in Chapter 14 that render it invalid. Camoin Associates finds Chapter 14 does not meet the requirements of the Carvel DEIS Final Scoping Document because it does not accurately reflect the fiscal impacts of the proposed project.⁷

Those are blunt statements. Additionally, our planning expert will identify in her written submission other incompleteness issues regarding compliance with the comprehensive plan, compliance with the Town's Future Land Use Map, population density impacts, and community character impacts. David Clouser our engineer, Robert Chamberlin, our traffic engineer, and Dr. Michael Klemens, Scenic Hudson's ecology expert, have also identified significant DEIS omissions and insufficiencies.

These are material defects that go to the heart of the validity of the DEIS. They must be corrected. Moreover, the public must be allowed to review the revised, completed chapters and be given an opportunity to comment on the completed version.

How do you achieve that correction? Don't be fooled by the argument that simply adding the missing information to the FEIS will be sufficient. That won't fix the problem. If you do that, you will have denied the public its right to comment on a completed DEIS. That denial will open the process up to

⁶ Remarks of George Janes to Town of Pine Plains Planning Board, on DEIS visual impact analysis, public hearing session of 29 February 2008.

⁷ Remarks of Michael N'dolo to Town of Pine Plains Planning Board, on DEIS fiscal impact analysis, public hearing session of 12 March 2008.

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annulment in court.

The SEQRA regulations say that a lead agency may require the preparation of a Supplemental Environmental Impact Statement, or SEIS. An SEIS is required for specific adverse environmental impacts not addressed, or inadequately addressed, in the EIS that arise from newly discovered information. DEIS omissions or inadequacies revealed through public comment are considered to be newly discovered information.⁸

In evaluating such newly discovered information, you are to consider: (1) the importance and relevance of the new information; and (2) the present state of the information in the DEIS.⁹

As for the issues we've raised, what could possibly be more relevant and important than issues of visual impact, fiscal impact, community character, and compliance with the comprehensive plan and proposed zoning. As for the present state of the information in the DEIS, the blunt quotes I just read to you say it all. If this DEIS does not accurately reflect the adverse impacts it is supposed to discuss, then the present state of the information in the DEIS is best called useless.

You must require an SEIS in this case. Send this applicant back to do the job right. And of course, this needs to be done before you move on to preparation of an FEIS.

Now lets turn to the substantive DEIS issues.

SEQRA requires that a DEIS must list the ways in which any adverse impacts of a proposed action might be minimized."¹⁰ Mitigation insures that the DEIS does not simply become a "mere disclosure statement."¹¹ And yet, our experts tell us this DEIS is just that. Mitigation has been paid lip service only.

Our experts will establish that, to properly mitigate the adverse impacts properly described in the DEIS, the DEIS will require sweeping and fundamental changes to:

- the project's massive scale,
- the project's sprawling suburban design,
- the project's questionable presumptions regarding its fiscal impact and marketing plan,
- the project's discordant visual impact to what is presently a pastoral setting,
- the project design's disregard for wildlife habitat and fragmentation,
- the project's disregard for the impacts of a sudden, dramatic increase in population and density
- the project design's disregard for wetlands and steep slopes, and
- the project's disregard for the Town Comprehensive Plan, Future Land Use Map and proposed new zoning law.

⁸ Gerrard, Ruzow, Weinberg, *Environmental Impact Review in New York*, 2007 Release, § 3.13 [2][b].

⁹ 6 NYCRR 617.9 (a)(7)(ii)(a) & (b).

¹⁰ ECL § 8-0109(2).

¹¹ *Lucas v. Planning Board of the Town of LaGrange*, 7 F Supp2d 310, 322 (SDNY 1998).

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Believe it or not, these are but a few of the major adverse impacts we've identified which must be properly mitigated before any plan for this property can properly go forward.

Fortunately, SEQRA gives you the power and authority to address this problem. As lead agency, you are empowered to require any mitigating condition or requirement designed to minimize significant adverse impacts to the environment.¹² As long as there is a reasonable nexus between the mitigating condition and the alleviation of an adverse impact, you have wide latitude and discretion to determine which, and to what extent, mitigation measures are required. I want to impress upon you that your hands are not tied. You are not mere administrators wielding a rubber stamp. With the proper nexus, you have tremendous discretion and authority to require mitigation. We urge you to avail yourselves of the full extent of that authority.

Finally, regarding DEIS substance, a few other points to remember. Under the law, whether the developer can, or will, make any profit after proper mitigation is not your concern. At the end of this process, you will have to prove that you took a "hard look" at the adverse environmental impacts of this project and required proper mitigation. SEQRA requires that an FEIS address in good faith every single substantive public comment received. Public comments cannot be paid lip service or swept under the rug. That response is part of the FEIS. Regarding your every decision, you will have to explain your justification in writing in a separate Findings Statement which you will issue along with the FEIS. Also remember, while in practice the applicant writes the FEIS, in the end it becomes your document. Each of you will be signing your name to the finished FEIS.

Before concluding, I want to briefly address lawsuits. Sometimes lead agencies I represent are afraid of being sued by unhappy applicants. My advice is to forget about being sued and to concentrate instead on fulfilling your duties under SEQRA. Your job as a lead agency is to see that the environment is protected, not to make an applicant happy.

Indeed, if you do your job well here, its very likely the applicant will be unhappy. In a recent Millerton News article entitled "*Durst rep says no change to DEIS*", the Durst's Director of External Affairs, said that, despite the criticisms of the DEIS from the public, the organization would not change or alter the DEIS. Amazingly, that statement was made with the public comment period far from conclusion. At a minimum that is bad faith. It's a slap in the face to the public and the process. How can you credibly claim to be "green" with that attitude about the environmental review process? The answer is you can't.

Here you have a poor quality plan and DEIS, and an applicant that disdains the environmental review process. You aren't going to make an applicant like that happy.

Yes, you'll probably get sued. The Town of Milan hasn't even made a decision on this project and the Dursts have already sued them. Don't allow yourselves to be bullied and intimidated. Stand tall. Fulfill your obligations as lead agency to the best of your ability, and let the legal chips fall where they may.

Soon the comment period will be over. As the critical next leg of this process begins, we need your help.

We need you to be serious about your commitment to making this environmental review fulfill the letter

¹² *Nichols Yacht Yard v. Board of Trustees of Mamaroneck*, Slip Op. No. 19599/84 (Sup. Ct. Westchester Co. Oct 28, 1987).

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and the spirit of SEQRA. We need you to take to heart all of the public comment and concern about this project that has poured out over the course of these public hearings. We need you to respect the quality of the comments and concerns brought forward by your fellow citizens, and by the experts. We need you to appreciate how much your fellow citizens care about the potential damage this ill-conceived project can do to your community and the environment. They have cared enough to dig into four boxes worth of DEIS. They've come out to meeting after meeting. They've spoken to you and written to you. They've reached into their pockets and gotten help from a group of experts in an attempt to understand this project and the environmental damage it threatens, and to comment intelligently to you. Finally, we need you to understand that our comments are meant to help you help us. To empower you do your job as lead agency as best as you possibly can.

But in the end, our efforts won't amount to much unless you accept our help and put it to good use. We need you to take the information you've been given and use it to fulfill SEQRA's goals. We need you to stand tall before this applicant and to do what is right. We need you to not be intimidated by the applicant's money, its publicity machine, its lawyers or, if it comes to that, threats of legal action.

We simply need you to understand your responsibilities, and to exercise the full extent of your power and authority. Remember, the State Legislature made you the stewards for this community and its environmental resources. It's a huge responsibility. And yes, it won't be easy. But everyone in this community is counting on you to step up to the plate and to do what is right.

Thank you for your time and attention.