



COUNSELORS AT LAW

17 April 2009

HAND DELIVERED

A. Gregg Pulver, Supervisor  
and Members of the Town Board  
Town of Pine Plains  
PO Box 955  
Pine Plains NY 12567

Re: SEQRA Review of Proposed Local Law No. 1 of 2009  
(Proposed Pine Plains Zoning Law)  
Pine Plains United Comment on Draft Generic Environmental Impact Statement

Dear Supervisor Pulver and Members of the Town Board:

**I.  
Introduction**

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 24 years. Since its founding in 1994, my firm's practice has been limited solely to those fields of law. We represent Pine Plains United ("PPU") and I submit this comment on its behalf.

**II.  
Summary**

PPU is a group of citizens who care deeply about Pine Plains and how it will grow. They have closely followed the work of the Zoning Commission, and your work, as the Town's first-ever zoning law has been drafted. PPU is grateful to you and the Zoning Commission. All of you have volunteered many hours of your own time to help Pine Plains secure a better future. PPU applauds you for your work. And with the exception of the New Neighborhood District ("NND") zone, which I will discuss in this letter, PPU puts its full support behind this new law. PPU believes that a well-crafted zoning law that implements the goals of the Town's Comprehensive Plan will be critical in helping to assure that Pine Plains can grow without sacrificing the character and qualities which make it such an extraordinary place.

The NND zone is the one part of the new law that has PPU very concerned (Town of Pine Plains Third Draft Zoning Law, Section 100-28). PPU believes that this provision conflicts with the Town's Comprehensive Plan and Future Land Use map. PPU also believes that this "planned unit development" (or "PUD") provision holds the potential to cause significant adverse environmental impacts which are not adequately addressed in the Draft Generic Environmental Impact Statement ("DGEIS").

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For these reasons, and others which will be discussed later, we believe that Pine Plains is best served by adopting the new zoning law without the NND zone.

**III.  
NND Provision Conflicts with Zoning Law Purposes,  
Comprehensive Plan and Future Land Use Map**

A town's power to enact zoning regulations comes from State law. That law requires that local zoning regulations be enacted pursuant to a comprehensive plan. NYS Town Law, Section 7-704. The notion that zoning regulations should be imposed only in accordance with a comprehensive plan is based upon the premise that zoning laws are a means rather than an end. Salkin, *New York Zoning Law and Practice*, Section 4:03. The function of a zoning law is to implement a plan for the future development of the community. *Id.*

Pine Plains enacted its Comprehensive Plan ("Comp Plan") in April of 2004. Section 100-3(A) of your new zoning law states that one of its purposes is to implement the 2004 Comp Plan. Chapter 11 of the Comp Plan sets forth its goals and strategies.

Goal No. 1 is to protect the Town's natural beauty and rural character. When discussing zoning in relation to that goal, the Comp Plan states that Pine Plains should implement a land use program which has as its "primary goal" the protection of the environment and rural character. According to the testimony of Lisa Nagle of Elan Planning & Design, a professional planner and PPU's planning expert, reasonable scenarios exist for up to four NND projects. See, Letter of L. Nagle to Town Board dated 17 April 2009, at p. 3. Those projects could potentially bring up to 200 extra units each above and beyond the maximum density otherwise allowed. And as Ms. Nagle testifies further, the 750 acre minimum for an NND project creates a project scale that may actually encourage dense development since the cost of assembling that acreage and getting a project that size reviewed and approved would push developers hard to maximize density. These results are antithetical to the Goal No. 1 of the Comp Plan.

Comp Plan Goal No. 2 is to have future growth be consistent with the Town's rural character. The Comp Plan contains a Future Land Use Concept Map. That map depicts a compact hamlet district with the hamlet bounded to the west and northwest mostly by conservation and agriculture district lands. But as shown by the Elan Planning maps, the NND provision opens the possibility that those conservation and agriculture district lands could end up as the sites for several NND projects. This is clearly not consistent with either Goal No. 2 of the Comp Plan or the Future Land Use Map.

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Comp Plan Goal No. 3 is to preserve the hamlet of Pine Plains and to maintain it as the town center and principal location of commercial, cultural and residential uses. As explained by Elan Planning, the NND zone could have several adverse impacts on the hamlet. Because only a narrow hamlet connection is required, the NND Zone could end up creating several competing new hamlets only tenuously connected to the present hamlet by a bike trail or pedestrian walk. This would contradict Comp Plan Goal No. 3.

For these reasons, the proposed NND provision is antithetical to the top three goals of the Comp Plan. And given the fact that the zoning law is legally required to be consistent with your Comp Plan, these inconsistencies may also create legal pitfalls.

#### **IV. The New Zoning Law and the Durst-Carvel Project**

I will turn next to the elephant in the room, the Durst-Carvel project.

First, while I am not sure whether it is true or not, I wish to address the rumor that the new zoning law contains the NND zone because the Town is concerned about potential litigation by the Dursts. Just in case that is a concern, let us look closer at the issue. Would the Town put itself in jeopardy, or even make itself vulnerable, if it were to pass the law without the NND zone? The answer is a resounding no. Might the Durst's sue? Sure, they have sued early and often in Milan. But the real issue is whether they would win. And again, the answer is no.

During most of the Durst-Carvel project environmental review, a moratorium has been in place. Nevertheless, the Dursts chose of their own free will to proceed with the SEQRA review of their project. They did this despite the moratorium, and despite knowing that the new zoning law could affect their project. They made this choice knowing the SEQRA review would be long and expensive. And remember, the Dursts are not babes in the woods, they are third generation developers who have earned their stripes in the Manhattan real estate market.

Further, every version of the Pine Plains moratorium which I have seen has contained a provision which requires any applicant choosing to proceed with a SEQRA review during the pendency of the moratorium to "declare its intent, in writing, to continue with the SEQRA review process at his or its own risk" (emphasis added). So, somewhere the Town has in its files a written declaration from the Dursts saying that they have voluntarily chosen to proceed at their own risk.

But even without the moratorium or a signed assumption of risk, there is no valid legal basis



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upon which the Dursts can claim that they have acquired a vested right to their project as presently proposed. The term "vested right" is used in the law to describe a right which has ripened to the point that it is protected. In New York there is a simple two prong test to determine whether one has a "vested right" to proceed with a project. First, the property owner must show that they have already been issued a legal permit. And second, they have to show they have also incurred substantial development costs in furtherance of the permit. *Town of Orangetown v. Magee*, 88 NY2d 41 (1996). The Dursts cannot meet either prong of this test.

In short, the Town has nothing to fear from the Dursts.

In fact, the potential of legal peril actually comes from the opposite direction. Where the courts have found that zoning amendments have been enacted, not for benefit of the community as a whole, but instead to benefit a particular property owner, they have been struck down as invalid for not being in accordance with a well-considered comprehensive plan. *Rogers v. Tarrytown*, 302 NY 115 (1951). Thus, if it were to be established that the Town did attempt to placate the Dursts by inserting the NND district into the zoning law just for the benefit of their project, the NND Section could be invalidated by the courts.

In sum, we urge you to act without fear. Enact the zoning law which you believe is in the best interests of the Town of Pine Plains.

## V.

### SEQRA Concerns About the NND Zone

#### A. Your Responsibilities as Lead Agency

You are in the midst of conducting your environmental review of the new zoning law as required by the State Environmental Quality Review Act ("SEQRA"). Your Lead Agency responsibilities are spelled out in the SEQRA regulations. You are required to take what is called a "hard look" at the potential adverse environmental impacts of this new law. At the end, you must issue a written Findings Statement which will be the record of your decision. Section 617.11(d)(5) of the SEQRA regulations states that your Findings must:

certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.(emphasis added)

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As Lead Agency, you must meet that standard in order to conduct a proper environmental review and also to ensure that the result of the SEQRA review is not vulnerable to legal challenge.

**B. Several NND Developments are Reasonably Possible**

As has been established in the letter from Elan Planning, the NND zone minimum standards create the potential for possibly four separate NND projects. Letter of L. Nagle to the Town Board dated 17 April 2009 at p. 3. Multiple NNDs raise the possibility of perhaps 800 extra residential units above the maximum otherwise allowed by the zoning law. These extra units would bring with them impacts related to increased density such as traffic impacts, fiscal impacts, visual impacts and impacts to community character, to name a few.

**C. The DGEIS Does Not Adequately Address the Potential Adverse Impacts of Multiple NND Projects**

The potential for multiple NND projects is important now because you are in the midst of your environmental review. According to Section 2.5.3, it appears as if the DGEIS assumes that the Durst-Carvel property will be the only NND project to be created by the new zoning law. This is an questionable assumption.

SEQRA requires the Lead Agency to thoroughly analyze the identified relevant areas of environmental concern. 6 NYCRR 617.7(b)(3). The courts have said that this means that the Lead Agency has to demonstrate that it took a "hard look" at the potential adverse impacts of the proposed action. [See, *H.O.M.E.S. v New York State Urban Development Corp.*, 69 AD2d 222, 232 (4<sup>th</sup> Dept 1979) and its progeny]. And so, while not every conceivable impact needs to be addressed, the law does require that an EIS address specific adverse impacts which can be reasonably anticipated. 6 NYCRR 617.9(b)(2).

As Lead Agency, you are also required to assess secondary and long-term impacts. NYSDEC, *SEQR Handbook*, Nov. 1992 Ed., Ch. 4, p. 40.

The *SEQR Handbook* describes a secondary impact as one which is reasonably foreseeable, but occurs at a later time or at a greater distance and is likely to be indirectly caused by the action. *Id.* Adopting of the zoning law with the NND provision may not cause an immediate direct impact. But it is reasonably foreseeable that once the zone is created, it will encourage developers to apply, especially with its density bonus incentives. Thus, adoption of the NND zone will have secondary impact.

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The *SEQR Handbook* describes a long-term impact as the continuing impacts from an action over time. *Id.* Again, once the NND zone is created, over the long-term it is reasonably foreseeable that the district will be utilized and that it could result in several NND projects.

As noted above, you are required to take a “hard look” and that hard look must include the secondary and long-term impacts of creating the NND zoning district.

**D. Multiple NNDs are a Reasonably Foreseeable Possibility**

At some point you may be told that the impacts I am describing are not a reasonable possibility because you would never act to approve four NND projects. But the fact of the matter is that you won't be the only ones making NND decisions. This law may be in place for many years. There may be Board members who are not yet born who in later years will be making decisions on NND applications. By including this provision in the law, you must assume that if the authority to approve NND projects exists, then it may be exercised to its fullest extent.

**E. A No-NND Alternative**

My final point on SEQRA regards alternatives. SEQRA requires that an EIS must evaluate all reasonable alternatives. 6 NYCRR 617.9(b)(1). That evaluation is considered necessary for lead agencies to fulfill their mandate of choosing an alternative that minimizes or avoids adverse environmental impacts. ECL Sections 8-0109(1) and 8-0109(8). It should also be noted that typically the range of alternatives to be considered in a generic EIS is generally broader than for a site-specific EIS. NYSDEC, *SEQR Handbook*, 1992 Ed., Ch. 5, p. 77.

It was not clear to me from reading the DGEIS Alternatives Section whether a No-NND version of your zoning law is being presented as an alternative. If not, it should be a distinct alternative. Without that choice available to you, you cannot properly fulfill your mandate as Lead Agency.

**VI.  
NND Provision Could Present Difficult Choices for Town Boards**

Finally, PPU is concerned about how, as a practical matter, the NND decision process might put Town Board members in a difficult position to make decisions in the best interests of the Town. Imagine that a developer goes through the entire process that the NND requires, one that could easily take years and involve significant costs. And after all that, the NND application lands on desks of the Town Board members for a vote of yes or no. I submit to you that a normal person's sense of fairness would make it very hard to say no to the applicant, even though the project was not the best for the town, knowing full well it will mean that all the



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applicant's time and money will have been lost.

As a practical matter, the process and decision sequence of NND approval can easily create a circumstance where the best interests of the Town could lose out to a sense of fairness about the applicant. This risk can be avoided by removing the NND from the zoning law.

### VIII. Conclusion

In closing, I reiterate again that PPU commends you for the work you have done thus far on the new zoning law. PPU's concerns are directed only at the NND zone, a small, albeit important, part of the zoning law.

The NND provision raises a multitude of potential difficulties. At the same time, as Lisa Nagle testified, your law does not even need this provision. In the vast majority of cases, PUD provisions are used by municipalities to build some planning flexibility into an older, less evolved law lacking flexibility. Your law doesn't need that kind of band-aid because it's fresh from the showroom and already incorporates both flexibility and the latest design and conservation tools. The Zoning Commission seriously considered whether a PUD provision was necessary. They decided against one. PPU urges you to do the same and to adopt the zoning law without the NND zone.

Thank you for your attention and consideration.

Very truly yours,

GRANT & LYONS, LLP

JOHN F. LYONS

cc: Pine Plains United  
Elan Planning & Design, Inc.  
Scenic Hudson, Inc.  
Dutchess County Planning Department  
Dutchess Land Conservancy