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Via Facsimile and Fed Ex Mail

Hon. Peter M. Dolan
Town Supervisor
Town of Tuxedo Town Board
One Temple Drive
Tuxedo, New York 10987

Re: Tuxedo Reserve Supplemental Environmental Impact Statement

Dear Supervisor Dolan and Members of the Town Board:

This firm represents the Tuxedo Land Trust, a non-profit corporation established in 2006 for the purpose of conserving the natural resources and preserving the community character in and around Tuxedo Park. Our firm routinely assists similar groups, municipalities, and project applicants navigating the intricacies of the State Environmental Quality Review Act ("SEQRA") and local land use processes.

The Tuxedo Land Trust consists of local residents and property owners who will be directly and adversely affected by the size and magnitude of such a private project as the Tuxedo Reserve, one which effectively turns the SEQRA and local land use review and approval process on its head by delegating away all local control to the private developer for an unlimited future without full and adequate compliance with SEQRA's mandates.

The following comments are submitted in support of the Tuxedo Land Trust's contention that the SEQRA record for the Tuxedo Reserve project is woefully incomplete and misleading and that the project has been modified to such an extent over the last decade that it warrants an entirely new review pursuant to the strict mandates of SEQRA and the Town's local land use laws. New York courts require literal compliance with both the procedural and substantive requirements of SEQRA. "Substantial" compliance with the "spirit" of the act does not constitute adherence to its

policies "to the fullest extent possible." *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474 (2d Dep't 1981).

1. Incomplete Posting/Availability of Referenced Documents.

As an initial matter, the Town's website contains an incomplete posting of the project's SEQRA documents making it impossible for the public to fully understand and assess the potential adverse impacts of the project on the environment. Section 8-0109 of the Environmental Conservation Law ("ECL") requires that environmental impact statements be posted on a publicly-available internet website and remain posted until one year after all necessary permits have been issued by federal, state and local governments. While this obligation became effective only in 2006, the current Supplemental Draft Environmental Impact Statement ("SDEIS") expressly incorporates by reference the prior Generic EIS, Draft EIS and Final EIS for the project and as such the entire SEQRA record must be posted and otherwise made available. The SEQRA regulations require that all referenced documents, including EISs that contain information relevant to the SDEIS must be made available for inspection by the public within the time period for public comment. 6 NYCRR 617.9(b)(7). The failure to post or make available the entire SEQRA record not only violates the ECL but also makes it utterly impossible for the public, as well as other involved and interested agencies, to undertake an appropriate and thorough review of the project's impacts and the completeness and accuracy of the material in the SDEIS. In fact, SEQRA also requires that the SDEIS contain a list of the "underlying studies, reports, EISs and other information" considered in preparing the SDEIS. 6 NYCRR 617.9(b)(5)(viii). This has not been done. Accordingly, the Town Board should insist that the full SEQRA record be posted on the internet website and extend the public comment period to enable a legitimate review to be completed.

2. Inappropriate Use of the SDEIS.

As noted above, none of the former SEQRA documents is posted or readily available for the public to review. Indeed even the references to the former documents in the SDEIS are incomplete and make it difficult to fully understand the effects of the project changes in light of the former environmental review. At a minimum, the prior GEIS, DEIS and FEIS must be posted and made available. Better still would be to require the applicant to use the former documents as the framework for its submission including a review, update and new analysis that tracks each section in the former EIS. Only then can the current Board and the public be informed of the issues considered several years ago by others and how and whether such issues have changed since initially considered. A prime example of this need is the fact that the applicant now bases its primary reason for the project changes on an admission that certain areas previously identified for

development and presumably analyzed in the former DEIS/FEIS are now not appropriate for development because of their environmental sensitivity. The former DEIS/FEIS analysis of these areas is extremely relevant to the current contentions supporting the change in development plans. Accordingly, the Town Board should require the applicant to go back and correct noted deficiencies in the prior DEIS/FEIS and project plans as well as to update all other technical reports supporting these documents, as the technical reports are not only dated and stale, but potentially inaccurate.

3. Proposed Modifications Constitute a New Action Subject to Full SEQRA Review.

Moreover, there comes a point in time when the changes to a project become so significant and numerous that a project evolves into an entirely new project or action warranting a completely new consideration under SEQRA. Here, the project appears to have undergone several significant changes (both in number and magnitude) over the past several years, many of which appear to have slipped under the SEQRA radar screen, and when considered together depict an entirely different and new project that has not been fully assessed pursuant to SEQRA. Indeed, the SDEIS repeatedly describes the current Proposed Modifications as an enhancement, refinement and correction of the former project reviews. This, therefore, implies that the previous environmental review was incomplete and/or inaccurate. An applicant should not be granted an entitlement to prior improper SEQRA findings to support its changed project without a complete and full new review.

4. Rubber Stamp.

While SEQRA allows for the SDEIS to be prepared by either the applicant or lead agency, it is the obligation of the lead agency to make its own independent judgment of the scope, contents and adequacy of the EIS. ECL § 8-0109(3). Likewise, while the applicant may prepare the SDEIS, it is the lead agency that is ultimately responsible for the preparation of the SFEIS, which will include the SDEIS, any further Supplemental EISs, and responses to comments thereon. Therefore, it is the lead agency that is ultimately responsible for all of the material submitted and it is its obligation to assure the information is current, complete, accurate and not misleading. The lead agency cannot merely serve as a rubber stamp to the applicant's review of potentially significant adverse impacts from its project. However, there is nothing in the publicly available SEQRA record to indicate an independent review by the Town or its own consultants. Indeed, the Town has even posted on its website a draft decisional document prepared entirely by the applicant.

5. Supplemental Final Environmental Impact Statement Required.

SEQRA requires that where a supplemental EIS is required, it must be subject to the full procedures of SEQRA, including the requirement for the lead agency to prepare a final EIS. 6 NYCRR 617.9(a)(7)(iii). A review of the applicant's draft resolution granting the special use permit and preliminary plan approval to Tuxedo Reserve, which is posted on the Town's website, appears to forego the SFEIS requirement. By doing so, the Town Board would be neglecting its obligation to provide a reasoned response to the substantive comments on the SDEIS as well as any further revisions or supplements to the SDEIS.

6. Segmentation.

SEQRA defines impermissible "segmentation" as the "division of the environmental review of an action such that various activities or stages are addressed as though they are independent, unrelated activities" 6 NYCRR § 617.2(ag). There are several instances of segmentation identified on review of the SDEIS. For example, as noted above, there have been several changes or modifications to the project over the past several years. These have included, but are not limited to, changes made in 2007 and 2008, referenced as the First Amendment Application and Second Amendment Application, for which no SEQRA review was conducted whatsoever. It now appears that the current SEQRA review addresses only those portions of a purported Third Amendment Application that does not include a review of the prior changes but which treats them as independent and separate.

Further, it appears that the former DEIS/FEIS failed to provide timely and adequate detail of the residential subdivision components of the project sufficient enough to allow a proper and complete SEQRA review. This is evident by the various renditions of preliminary subdivision and site plan applications provided for Planning Board consideration subsequent to the FEIS. Such lack of detail obviously inhibits the lead agency from conducting an adequate analysis of projected environmental impacts. It is unacceptable to defer such an analysis until some later stage in the subdivision approval process. This is especially so, as here, where the current SDEIS is not being treated as a generic EIS, with no obligation for future SEQRA reviews by the Planning Board or any other agency. With the current opportunity under the SDEIS, the applicant should be required to provide the full detail and analysis of potential adverse impacts from its development plans.

Moreover, as discussed elsewhere in this comment letter, the Town further segments its SEQRA review obligations by deferring the need for further analysis or project detail until some

future time, as for example pursuant to the so-called “smart code,” archaeology MOU, wetlands delineations and blasting plans.

We also understand that the modified development plans for the project now identify commercial construction on lands in the Village of Sloatsburg. However, a complete analysis of this project component appears to be lacking in the SDEIS.

Finally, yet another example of impermissible segmentation is evidenced by the description of the future use of Mountain Lake. Here, the applicant expressly states that any future use of Mountain Lake for recreational purposes would undergo a separate future environmental review process. This future consideration is promised notwithstanding the fact that the current proposed modifications incorporate development near and around the lake, including certain community amenities that appear directly associated with the lake, and the fact that the applicant’s consultant has identified that there is a potential significant adverse environmental impact.

The only way for these other project components to be adequately analyzed is through the preparation and review of a completely new DEIS. Otherwise, the separation and postponement of such review and consideration amounts to illegal segmentation.

7. The Town Board Cannot Satisfy its Substantive SEQRA Obligations in the Context of the Rezoning.

The developer has proposed to shift the location of designated R-1, R-2 and Open Space areas throughout the project site, as well as to change the allowable commercial uses and increase the total allowable square footage of those uses under the special permit for the project. The developer has also proposed that a hard look at the environmental consequences of these changes is unnecessary since there will be only a modest change in the overall density of the project. However, given the prior conclusions reached by the Town Board in its capacity as the SEQRA lead agency reviewing the project, and the fact that little change has occurred to the existing environment which the Town Board is required to consider in its SEQRA analysis, it is clear that the proposed changes to the project are significant and will require mitigation.

Given SEQRA’s mandate,¹ it can only be presumed that in 2004 and prior years when the

¹ SEQRA’s purpose is to “incorporate the consideration of environmental factors into the existing planning, review and decision making processes of state, regional and local government agencies at the earliest possible time.” 6 NYCRR § 617.1(c); *see Spitzer v Farrell*, 100 N.Y.2d 186, 190 (2003). In determining whether an action may have a significant effect on the environment, a lead agency must consider whether it would result in substantial adverse changes to “existing” environmental conditions (6 NYCRR §§ 617.7(c)(1)(i) and 617.2(1)), and when a lead agency

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Town Board reviewed the master plan for the project as the SEQRA lead agency, conscious decisions were made about the location of the R-1, R-2 and Open Space areas in order to avoid and minimize potentially adverse environmental impacts attributable to the project. In other words, allowable density and Open Space areas were designated as such based upon the existing environmental conditions of the overall project site, and the resultant conservation priorities assigned by the SEQRA lead and involved agencies to various portions of the project site. Under the new plan, however, all of the underlying analysis which led to the location of the R-1, R-2 and Open Space areas as a means of ensuring that environmental impacts were avoided and minimized is being ignored, and the environmental consequence of the change in location of the R-1, R-2 and Open Space areas overlooked. Simply put, the premise asserted in the SDEIS that as long as the total density of the project remains unchanged, no additional or different environmental impacts will result, is belied by the record previously established by the Town in analyzing the project.

The same is true of the allowable mix of single family and multi-family dwelling units, and the use limitations and size caps imposed on commercial uses under the special permit. Under the old plan, there would be 102 more single-family units and 102 less multi-family units than under the new plan. Similarly, concerning commercial uses, under the old plan, all of the uses were essentially ancillary only to the proposed residential uses, including a private community club, day-care, business center, active adult recreation, pool and welcome center, but under the new plan, the uses are intended to supply the broader community with retail services and an allowable total square footage that will accommodate a typical shopping center (small chain grocery store, bank, restaurant and other retail – maybe a nail salon for example). This will significantly change how the project integrates with the broader community, changing traffic patterns and density, and inducing growth which was not previously analyzed or considered by the Town and is not now being analyzed

In sum, between the shift of residential development to the edge of Mountain Lake and the addition of significant retail square footage to the project, it is apparent that the somewhat grandiose vision of Tuxedo Reserve has been abandoned to accommodate the developer's new, changed view of how best to market the project. While this new view may be more pragmatic from a market perspective, the fact that the overall density of the project will not change does not equate to the conclusion that there will be no additional or different environmental impacts associated with the change. There will be environmental consequences associated with these changes since areas of the project site previously targeted for conservation due to existing

does determine that existing environmental conditions will be adversely impacted, it is the lead agency's role to ensure that environmental impacts are avoided or minimized to the maximum extent practicable. 6 NYCRR § 617.11(d)(5).

environmental conditions will now be built out, and because the mix of housing has changed in a significant way as have the intended commercial uses. These changes require further environmental analysis.

8. The SDEIS Fails to Take a Sufficiently Hard Look at a Number of Areas of Environmental Concern.

SEQRA requires that the SDEIS identify the relevant areas of environmental concern and take a hard look at them. Where a lead agency fails to undertake necessary analyses, improperly defers or delays a full and complete consideration of relevant areas of environmental concern, its subsequent decisions on the action will be annulled. The SDEIS presented to the Town Board is woefully inadequate in its consideration of a number of areas of environmental concern. Many of these issues have been identified in more detail in comments of others. Here, we simply point out certain obvious shortcomings in the SDEIS that we believe will make it difficult for the Town Board to complete its necessary hard look at the potential environmental impacts of the project and therefore warrant further supplemental analysis.

a. Natural Resources. The NYSDEC has recently issued new guidelines for the study of potential impacts on threatened and endangered species. These guidelines set forth appropriate considerations and study parameters regarding a number of species with potential ranges/habitats in or around the project site. These guidelines have largely been developed subsequent to the original DEIS/FEIS and, therefore, should be considered in the SDEIS. Of particular note are the guidelines for potential impacts to the Timber Rattlesnake, Northern Cricket Frog, Indiana Bat and Bog Turtle. The current SDEIS lacks any reference to these NYSDEC guidelines. Copies of these guidelines are attached for the Board's use.

Similarly, as a result of recent court decisions, wildlife assessments required by the courts now include field surveys for threatened and endangered species, as well as species of special concern, and the absence of any of these species in the Natural Heritage Service database is not dispositive of whether such species may exist within the project site. Again, this issue should be addressed in the SDEIS as a new requirement since the original DEIS/FEIS for demonstrating a hard look.

As explained more fully by others, the analysis of the impacts on the Timber Rattlesnake from the development is seriously inaccurate, and needs to be supplemented. The Town Board, as lead agency, must remember that a "prohibited taking" of a protected species may occur upon modification of its

habitat. This includes, among others, impairment to migratory corridors, denning and basking sites. *NYS v. Sour Mtn. Realty, Inc.*, 128 AD2d 28 (2d Dep't 2000).

b. Archaeology. As noted elsewhere, the SDEIS does not contain a full review of potential cultural resource impacts; instead, deferring a more detailed analysis of these issues to the future in reliance on the OPRHP protocol. Moreover, it appears that the SDEIS contains an inadequate recognition of the presence of the historic Continental Road on the project site and an analysis of potential impacts on this resource.

c. Stormwater. In 2008, NYSDEC issued a new SPDES general permit for stormwater discharges from construction activity (GP-0-08-001). This new general permit was issued well after the original DEIS/FEIS. Since the project has never been built, this new permit and its stormwater control requirements may apply and must be considered with updated information for the entire project in the current SDEIS. In addition, the new general permit contained a major change that affects construction activities that are tributary to waters of the state classified as AA and AA-s and will disturb land areas where the soil slope phase is identified as E or F (generally those exceeding 25% slopes) on the USDA Soil Survey for Orange County. Such projects are no longer eligible to come under the stormwater general permit and, therefore, must obtain an individual permit from NYSDEC. NYSDEC made this change because of the increased potential for these construction activities to be a significant contributor of silt and sediment to drinking water supplies. Accordingly, the NYSDEC believes it appropriate that a higher level of oversight is warranted for such projects. Given the project's proximity to Tuxedo Lake (classified as AA(T)), it would appear relevant that the concerns expressed by the NYSDEC and the requirements of an individual SPDES permit must be considered in the SDEIS.

d. Wetlands. As expressly acknowledged in the SDEIS, the delineation of all on-site wetlands and thus any legitimate analysis of potential adverse impacts to these resources is not complete. Likewise, any previous analysis contained in the earlier DEIS/FEIS is now out of date. Any conclusions in the SDEIS with respect to wetlands not falling within the jurisdiction of federal or state agencies has not been supported in the SDEIS.

Moreover, the New York State Legislature is poised to enact new legislation extending NYSDEC jurisdiction over wetlands down to one acre in size. As this

legislation may become effective prior to Town approval and likely before the commencement of any construction, the Town Board would be well-served by an analysis of the effect such legislation will have on the project. At minimum, this scenario should be assessed in the alternatives section of the SDEIS.

e. Community Character. The project modifications contain a significantly different mix of residential and commercial uses, with the commercial uses expanding greatly. The SDEIS contains no analysis of the effect of these changes on the character of the local community. Moreover, the analysis of “growth inducement” in the SDEIS fails to acknowledge or assess the effect such a change in the project uses will have on the potential for growth resulting from the project.

f. Steep Slopes. The SEQRA environmental assessment form identifies a potential significant impact from development on slopes greater than 15%. The affected slopes on the project site are identified as generally greater than 33%. No further analysis on the impacts to steep slopes is contained in the SDEIS.

Acceptance of the SDEIS by the lead agency as complete for SEQRA purposes (i.e., for public review and comment) does not preclude the agency from later demanding/requiring revisions where needed. 6NYCRR § 617.3(c)(2); *In re Raymond Naftali* (DEC Comm’r Interim Decision, Sept. 24, 1993). You have been provided with a number of issues identifying potentially significant environmental impacts that have not been fully explored or mitigated. A further supplemental EIS or completely new DEIS should be required to address specific issues that were omitted or not adequately addressed in the current SDEIS and former DEIS/FEIS.

9. Alternatives.

SEQRA requires more than careful consideration of the environmental impacts of a proposed project. “It requires consideration of such alternatives to various aspects of the project as might result in amelioration of environmental problems caused thereby.” *Rye Town/King Civic Ass’n*, 82 A.D.2d at 481. More specifically, SEQRA requires that the SDEIS contain a “description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor.” 6 NYCRR 617.9(b)(5)(v).

Here, the SDEIS contains a limited analysis of a mere two alternatives: (i) a no further action alternative that is based on the previously approved project which has yet to be developed; and (ii) an alternative that involves an unsanctioned land swap with the Palisades Interstate Park

Commission (“PIPC”). Since both of these alternatives are not feasible, the entire alternatives analysis is flawed and violates both the letter and spirit of SEQRA.

The no-action alternative is misleading and disingenuous because it relies on the premise of the project site’s existing conditions being those under the prior approval which it has acknowledged is impractical and potentially injurious to the environment. Indeed the fundamental basis supporting the proposed modifications is that the prior approved plan is no longer viable for financial, market and environmental reasons. Therefore, it is clearly apparent that the prior approval cannot be developed as planned. As such, it cannot be presented as the existing condition of the site or represented as the no-action alternative. A more legitimate no-action alternative should consider the existing conditions of the project site as they are presently without any project development for the foreseeable future.

If at all, the previously approved project itself should also be considered as another alternative to the proposed modified project. However, in doing so, the analysis of this alternative should include the current market for the assumed level and type of development on each parcel, the likelihood of restrictive and mitigative measures to be imposed and the reality that cumulative impact analysis will limit the full development. This is especially true here, given the shifting conservation priorities assigned to various portions of the project site.

Given the applicant’s acknowledgement of the environmentally sensitive areas slated for development under the prior approval, a truly legitimate alternative worthy of consideration and review is one that totally eliminates these sensitive areas from development without transferring the development plans to areas previously designated for open space preservation. Notwithstanding the prior approval, the applicant has yet to vest its development rights in that approval and, therefore, is not entitled to simply trade off the development approval to other lands dedicated to open space preservation merely because its original development plan is impracticable. An alternative that eliminates all environmentally sensitive lands from the development plans is a legitimate alternative that the Board should require be analyzed.

As for the PIPC alternative, the SDEIS lacks any acknowledgement whatsoever from PIPC that it has even been approached with this idea, let alone that such is under serious consideration or is otherwise viable. Accordingly, there is nothing to indicate that this alternative is feasible or within the capabilities of the project sponsor.

Accordingly, the alternatives analysis is inherently flawed and must be redone.

10. Lead Agency Cannot Defer its SEQRA Obligations to Other Agencies or Future Reviews and Approvals.

While a lead agency is encouraged to consider opinions of other experts and other agencies, it must exercise its own judgment in determining whether a project or project component adversely impacts the environment. The lead agency is required to sufficiently consider environmental concerns even when addressed by other permits. A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency. This is exactly what the Town Board is doing here through the SDEIS when it defers complete review on issues like archaeological resources to some point in the future pursuant to a 2001 OPRHP MOU or protocol. Likewise for the deferral of site specific environmental impacts related to future subdivision reviews by the Planning Board and deferring full consideration of federal wetland delineations to later USACE review. Courts have repeatedly annulled SEQRA reviews based on such deferrals to future consideration by other agencies. *See, Purchase Env'tl. Protective Ass'n v Strati*, 163 A.D.2d 596 (2d Dep't 1990).

11. Spot Zoning.

Impermissible spot zoning occurs when an area of land is rezoned in a way which deviates from the planning goals and objectives of a community in order to accommodate an applicant's goals. As demonstrated by the Town's comprehensive plan and current zoning map, as well as the Town's prior approvals for this project, the Town Board has previously determined the appropriate locations for the R-2 and R-1 zoning districts in the Town and with relation to the project. This is extremely relevant because the R-1 district provides for the preservation of important open space areas, which is now inconsistent with the proposed modifications. The SDEIS offers no planning rationale for changing the current zoning districts other than the applicant's own pecuniary gain. For example, there is no attempt in the SDEIS to explain how the zone change would advance - - or impact or undermine - - the purposes, goals and rationale of the Town's overall community-wide planning which located the districts at their current locations.

Moreover, further lack of comprehensive planning rationale is evident in the fact that the Town is not being asked to change the zone Town-wide or at least at any other area of the Town. The present application and SDEIS does not seek a revision or update of the Town's comprehensive planning based on demographic or other changes in the Town or region. Rather, what the applicant seeks is effectively "spot zoning" of its property and no other solely for its own economic benefit and completely contrary to previous conclusions and findings relevant to the appropriate zoning and planning for the area of the proposed modifications. If the rationale for the zone change is protection of the environmentally sensitive character of the area, then that

rationale should be fully analyzed in the SDEIS and incorporated into any approval. Clearly, permitting the development of previously restricted open space areas is inconsistent with current planning or the best interests of the community.

12. Contract Zoning.

Contract zoning, or the bargaining away of the Town Board's local zoning power, is unconstitutional, and that is precisely what is occurring here. Various offers have been made to provide open space, land for a library and a sewage treatment plant and other amenities, all contingent on approvals or the applicant reaching a minimum level of development or return on the project. Moreover, the use of the smart code appears intended to unlawfully vest or guarantee rights to future development notwithstanding any subsequent changes to the zoning law that may occur.

13. Grandfathering.

The concept of "grandfathering" generally applies to uses that existed or were approved at time of a change in zoning law and therefore are considered existing legal non-conforming uses exempt from subsequent changes in the law that would affect those uses, and only in limited circumstances. However, such exemptions are generally discouraged because they are inconsistent with current zoning and comprehensive planning. Here, the Town Board appears to have expressly exempted the project from new or amended local laws related to planned development districts which turns the legislative process and the notion of equal application of the law on its head by grandfathering a use that did not exist at the time of the new legislation and still does not exist even now when the prior grandfathered use is being changed yet again and seeking continued special grandfathered protection.

14. Growth Inducement.

Rather than analyze the project modifications in terms of growth inducement, as required by SEQRA, the applicant maintains that an analysis completed for the 1999 DSEIS remains somehow current and applicable to a project and community that has changed significantly over the past decade. The applicant would have the Board believe that simply because the number of bedrooms remains the same any current changes to the development plans will have little, if any, growth inducement. Clearly, the question presented is whether the newly proposed changes in the mix and phasing of the development will have an effect on the growth of the community in or beyond 2010, not in 1999. Unfortunately, this is not a question that is possible to answer based on the SDEIS.

15. The SmartCode Impermissibly Delegates Authority to the Planning Board.

Incorporation of a “SmartCode” into the conditions of the special permit for Tuxedo Reserve would turn the planning and zoning process on its head -- giving the developer a special permit to seek project related approvals incrementally from the Planning Board rather than a right to build in compliance with the permit and within a rational timeframe. While such an approach may ostensibly appease some by adding layers of administrative review to the project, the SmartCode is neither permissible under Town Law nor desirable from the perspective of the Town’s need to retain authority to plan for its future growth and development.

First, the “SmartCode” delegates quasi-judicial powers to interpret and vary the Code to the Planning Board rather than the Zoning Board of Appeals (“ZBA”). *See*, SmartCode §§ 1.3 and 1.3.3 (delegating authority to the Planning Board to administer, interpret and grant waivers from the provisions of the Code). Such is not permissible under Town Law. Indeed, Town Law §§ 267, 267-a, 267-b and 267-c provide the sole enabling authority for the provisions of a zoning law to be interpreted or varied. This authority may only be exercised by a properly constituted ZBA, and town boards are not given authority to entrust these powers to any other administrative body, such as a planning board, under Town Law. *See*, Town Law § 267. Nor may a Town Board utilize its Municipal Home Rule Law authority to supersede Town Law §§ 267, 267-a, 267-b and 267-c. *See, Cohen v. Bd. of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 402 (2003) (holding that the State Legislature has preempted the field with respect to zoning boards of appeal, and invalidating a local law which delegated authority at variance with the requirements of Town Law § 267-b).

Second, the Planning Board’s role in the PID legislative process should be advisory only, and to the extent special permit review jurisdiction is delegated to the Planning Board, the purpose of the delegation should only be to detect “[d]eviations from the overall plan... before construction is begun...” Salkin, Patricia E., *New York Zoning Law and Practice* §§ 24:07 and 24:08 (4th Ed. 2009) (stating that “...the planning board’s function in the legislative process is advisory in character, the power of decision being in the legislative body...”). Here, however, the SmartCode would enable the Planning Board to waive and vary any and all provisions of this Code – essentially giving the Planning Board authority to override the Town Board’s legislative decisions.

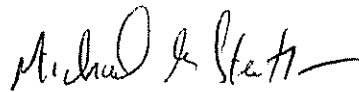
Finally, the SmartCode has the potential to curtail the Town’s right and ability to plan for its future growth and development. This is because the Town Board and Planning Board will lack discretionary authority to amend the SmartCode. *See e.g., E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988) (holding that Planning Board’s attempt during the second phase of a project to address environmental problems which were associated with the first phase of the project was

arbitrary and capricious). Accordingly, if the need to change the regulatory provisions set forth under the SmartCode, such as the lot, setback and area dimensional regulations, arises as a result of future growth and development in the Town, the Town Board will be in the awkward position of attempting to amend its Comprehensive Plan, Zoning Law and PID in a way which curtails the developer's rights under the permit and SmartCode. The zoning provisions contained in the SmartCode, while in need of substantive revision, should be incorporated into the PID to preserve the Town's rights in the future.

Conclusion

We, therefore, respectfully request that the Town Board view the proposed modifications as a completely new project for purposes of SEQRA and local land use laws and demand an entirely new or updated DEIS that accounts for the changed circumstances with the evolution of the project and the rest of the community. At minimum, the Board must extend the public comment period and insist that the applicant post all of the environmental review record for the project so that the public may have a fair opportunity to understand the proper context of the latest in a long line of project modifications. The Town Board has a duty to its residents to ensure maximum transparency for a project that will affect the community for the generations to come.

Respectfully submitted,



Michael G. Sterthous