

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

**PRESENT HON. \_\_\_\_\_ J.S.C.**

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GLENN K. DENTON and  
BRIDGET K. DENTON,  
1257 Round Swamp Road  
Old Bethpage, N.Y. 11804

KATHLEEN J. DUVAL,  
1251 Round Swamp Road  
Old Bethpage, N.Y. 11804

FRANCIS P. SCALLY and  
FAY E. SCALLY,  
1 Locust Road  
Old Bethpage, N.Y. 11804

Index Number

Verified Petition in  
Support of Order  
to Show Cause

*Petitioners pro se,*

For Judgements and an Order Pursuant to Article 78, Section 6313  
(Temporary Restraining Order), and Section 6311 (Preliminary Injunction)  
of the Civil Practice Law and Rules ("CPLR")

*-against-*

TOWN OF OYSTER BAY TOWN BOARD BY  
SUPERVISOR JOHN VENDITTO,  
Town Hall  
54 Audrey Avenue  
Oyster Bay, N.Y. 11771

BEECHWOOD POB LLC,  
200 Robbins Lane  
Jericho, N.Y. 11753

PLAINVIEW PROPERTIES SPE LLC,  
1600 Old Country Road, Suite 101  
Plainview, N.Y. 11803

*Respondents and Necessary Parties*

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### **Preliminary Remarks**

1. Petitioners are neighbors of the site of a heavily wooded, roughly 145-acre former sanitorium and government office campus currently approved to be converted into a "mini-city" of homes, apartments and commercial properties, called "Country Pointe at Plainview."
2. The property has for over fifteen years been the subject of contentious and even anguished concern by large portions of the surrounding community, which consists of relatively modest residential neighborhoods of single-family homes.
3. At the time the property became privatized, sold by Nassau County, the Town of Oyster Bay imposed various restrictions on the development of the property.
4. Since that time two different developers sought to change the restrictions to permit planned communities relatively more dense, containing apartments, attached townhouses, detached homes, and retailers -- and substantially levelling the natural woods dominating the site. .
5. The present developer, the Beechwood organization, apparently a Delaware company (see *infra*), in May, 2015, successfully obtained approval from the Town of Oyster Bay (hereinafter the "Town") to create a roughly 100-acre developed area.
6. The Town's action followed an environmental review process that Petitioners argue failed to comply with core requirements of state law governing such environmental review, Environmental Conservation Law "ECL" Article 8 as implemented by 6 NYCRR 617, the State Environmental Quality Review Act ("SEQRA").

7. As a result Petitioners argue their interests in protecting the enjoyment and value of their homes across the street from the project will be substantially damaged. They further argue that their interest in enjoying the natural environment -- woods and wildlife -- in the community around their homes will be substantially damaged.
8. They therefore bring this special proceeding under article 78 of the Civil Procedure Law and Rules ("CPLR") and asking the Court to nullify the approvals by the Town based on the faulty environmental review, and to enjoin the Respondents from undertaking any actions to damage or alter the property until a proper environmental review is performed.

### **Parties**

9. Petitioners Glenn K. Denton and Bridget K. Denton reside at 1257 Round Swamp Rd., Old Bethpage, NY, 11804. Their property is approximately 160 feet from the end of the buffer on Round Swamp Road (Exhibit 1). They take great pleasure in the forested area present and will be injured by the plans to remove substantial parts thereof, as detailed in their affidavits (Exhibit 2).
10. Petitioners Francis P. and Fay E. Scally reside at 1 Locust road, Old Bethpage, NY, 11804. Their property is approximately 160 feet from the end of the buffer on Round Swamp Road (Exhibit 1). They take great pleasure in the forested area present and will be injured by the plans to remove substantial parts thereof, as detailed in their affidavits (Exhibit 2).
11. Petitioner Kathleen J. DuVal resides at 1251 Round Swamp Rd., Old Bethpage, NY, 11804. Her property is approximately 185.745 feet from the end of the buffer on Round Swamp Road and the beginning of the area to be developed (Exhibit 1). (It

may be closer given the unclear location of the proposed fitness trail.) She takes great pleasure in the forested area present and will be injured by the plans to remove substantial parts thereof, as detailed in her affidavit (Exhibit 2).

12. Respondent Town of Oyster Bay is a political subdivision of the State of New York that is situated in western Long Island, in the County of Nassau.
13. Respondent Beechwood POB LLC, upon information and belief, is not registered with the New York Department of State corporation website as of June 7, 2015, although that name is listed on the rezoning petition in the Town of Oyster Bay file for the Project, and is also the name announced by the Town of Oyster Bay as the party seeking approval before the Town Board on May 12, 2015 approval (Exhibit 39, Town of Oyster Bay website).
14. An entity called by the same name was upon information and belief incorporated in the State of Delaware in 2010, according to the Delaware Department of State website.
15. Beechwood POB LLC is otherwise, upon information and belief, a partner in the Project.
16. Respondent Plainview Properties SPE LLC, upon information and belief, is a limited liability company registered in Delaware. It is upon information and belief a partner in the Project. Its name was announced by the Town of Oyster Bay as one of the parties to the development (Exhibit 39).

### **Jurisdiction**

17. The jurisdiction is in Nassau County because Petitioners and Respondents either reside or do business in Nassau County, the Project is in Nassau County, and the

Town of Oyster Bay is in Nassau County.

## **Facts**

### **Overview**

18. The proposed site of the Country Pointe at Plainview development is a 143.25 acre tract of largely wooded and open space in eastern Nassau County bordered by commercial developments on Old Country Road and single-family homes along both Round Swamp Road and part of Old Country Road.
19. The development plans of Country Pointe at Plainview (hereinafter the "Project") for the site (hereinafter the "Property") were approved by the Town of Oyster Bay in early 2015 after about fifteen years of controversy, and over the strong objections of a substantial part of the surrounding community.
20. Issues of overwhelming new vehicular traffic, substantial change in neighborhood character, and the destruction of ecological resources predominated the opposition to the project.
21. Economic arguments as well as the asserted need for senior citizen housing predominated the support for project.
22. Petitioners argue that flaws in the state mandated environmental review process should negate the approval of the Project rezoning, subdivision and site plan, among other actions on May 12, 2015.
23. Until about 1999, the Property was owned by the County of Nassau ("the County") and used as the "Nassau East Office Complex". On the site were a set of buildings and parking lots situated among trees, grass fields, forested lands, and

athletic fields (Exhibit 39).

24. The Property was privately acquired after a public process involving the the Town of Oyster Bay (the "Town") , which resulted in the imposition of covenants and restrictions on the future use of the Property as a condition of rezoning in preparation for sale in 1998.
25. In about 2003 the private owners sought changes in zoning to accommodate an extensive residential and commercial set of neighborhoods and stores. In the face of community opposition the plans were withdrawn in 2006, but similar plans were resubmitted by Respondents Beechwood POB and Plainview Properties (hereinafter "Beechwood/Plainview").
26. The Town undertook a review under the State Environmental Quality Review Act ("SEQRA") that resulted in the approval of a Findings Statement on February 3, 2015. The Town approved final rezoning, subdivision, and site plan on May 12, 2015.
27. Under the final plan, the project will include some 792 residential units and about 120,000 square feet for commercial/retail use.
28. Some 58.93 acres will be "dedicated" to the Town "for active and passive recreational activities" along with a one-acre plot for an "aesthetic gateway" (Exhibit 4, Findings Statement, p. 4).
29. According to the revised site plan (Exhibit 5, Final Environmental Impact Statement (hereafter "FEIS") p. 6) the main development is on 79.99 acres (Lot A); the commercial development on 16.07 acres (Lot C); and a senior development on 3.19 acres (Lot B). Thus roughly 96.07 acres was to be fully developed, adjusted

slightly in the final plans.

30. Dozens of residents from the surrounding communities signed petitions, and testified in writing and in person challenging various aspects of the project during the SEQRA hearing process.
31. Petitioners have analyzed the documents used in the SEQRA Review, as well as external sources, to document extensive deficiencies in the process that are contrary to the provisions of SEQRA and therefore unlawful.
32. Petitioners have separated their analysis into three broad points:
33. (i) The Town unlawfully segmented the environmental review process by deferring questions of planned additional construction in its "dedicated" forest and field tract, as well as plans to construct additional highway lanes around the Property and nearby;
34. (ii) The Town failed to take a "hard look" at the impacts on wildlife and natural wildlife habitat, because its review of the issues resulted in documents that 'cooked' the numbers, obfuscated important ecological measurements, and contained contradictory data, among other issues; and
35. (iii) The Town failed to take a "hard look" at the visual impact on the neighboring residents because its analysis of the planned Round Swamp Road "buffer" lacked analytical rigor, ignored important practical questions, omitted important visual analysis, and left open key questions regarding plans to clear part of the central area of the buffer.

### **Segmentation**

36. It is black letter law in SEQRA that known related projects cannot be segmented

into separate SEQRA Reviews without a firm basis fully expressed and justified by the lead agency (6 NYCRR 617.3(g)).

37. But this project is a textbook example of unlawfully segmented review, in this case dealing with connected actions affecting the largest contiguous forest tract on the property, and the planned construction of new traffic lanes both adjacent to the property and elsewhere in the area.
38. The Town explicitly defers "appropriate environmental investigations" with respect to construction of additional athletic fields in area currently forest and which it counts as preserved habitat ("woodlands"). (Exhibit 6, FEIS p. 98; Exhibit 4, Findings Statement, p. 9)
39. A roughly eleven acre parcel of forest -- including a relatively rare "Coastal Oak-Heath Forest" tract -- to be "dedicated" to Town is planned to be substantially de-forested in short order to construct new athletic fields.
40. The Draft Environmental Impact Statement (hereafter "DEIS") explicitly states that the work is planned, and environmental review will be performed at such time as the plans are finalized. This is clearly a "smoking-gun" of segmentation.

"The developer of the project site has committed to a dedication of land within the property to the Town of Oyster Bay. The intention of this dedication is, in part, to allow the Town to replace the soccer fields that are currently utilized by area leagues that exist in the eastern portion of the property and that would be displaced by the development.  
...Once a consensus plan for park development at this location has been arrived at, appropriate environmental investigations, including traffic impact analysis, will be performed as needed."

(Exhibit 6, FEIS p. 98, emphasis added )

41. The FEIS is a central document that was formally adopted by the Town in its Findings Statement.

42. Graphic renderings reflect these plans, and it is clear to all concerned that the further construction is planned:

"The Town will cooperate with and assist [the Plainview-Old Bethpage Soccer Club] in securing temporary facilities... before the new fields in the 57.93-acre parcel have been constructed."

(Exhibit 4, Findings Statement, p. 20, ¶ 3, emphasis added)

43. This scheme is echoed in the testimony of a soccer league official:

"The Board of the soccer club has had extensive discussions with representatives of Beechwood and the Town of Oyster Bay to ensure that...the soccer club will have a permanent home once the land which we now play is developed (sic)."

(Exhibit 7, FEIS Appendix B, Testimony of Marc Breier, Treasurer of Plainview-Old Bethpage Soccer Club)

44. Contrary to the one exception allowed for segmentation, where it may be approved if the documents "clearly state" that such a process is occurring and incorporate "supporting reasons" for it, among other conditions (6 NYCRR 617.3(g) (1)), in this SEQRA Review there is no such statement included, nor was any vote on the segmentation per se undertaken.

45. Although the segmentation is effectively acknowledged in the FEIS, DEIS and Findings Statement, the act of segmentation is nowhere explicitly stated, justified, proposed, or approved anywhere in the SEQRA Review.

### **The Forest Area at Issue**

46. In the absence of a clear inventorying of forest habitats by the Respondents in the SEQRA Review, Petitioners have analyzed the Property (*infra*) and identified five existing contiguous forested areas. See below, discussion of "wildlife habitat".

47. The applicant supplied color-coded graphics labelling the forest and other land

"types" present before and after construction -- Exhibit 8, Figures 16 and and Exhibit 9, Figure 27A, Ecological Communities, pre- and post-construction, respectively.

48. There is also a clear graphic of the final development on the Beechwood website, Exhibit 35.
49. Unfortunately the figures supplied in the SEQRA Review do not seek to identify, or measure, contiguous areas of natural vegetation, although this type of natural feature of the land is recognized as the essential functional unit of wildlife habitat (Exhibit 10, Expert opinion, Point 1).
50. Petitioners designated the roughly 27.57 acre block of contiguous natural "forested" land and "meadow/brushland" on the central western portion of the property the "West Forest" (Exhibit 34). It is here that the new athletic fields are to be built.
51. About half the West Forest is to be dedicated to the Town, and half is to be levelled by the Applicant under the approved plan.
52. Sketches of new athletic fields illustrating the obliteration of most of the Town's "dedicated" portion of the Western Forest are depicted in the Final Site Plan as approved by the Town on May 12, 2015 (see Exhibit 12, Letter from Town Attorney transmitting Final Site Plan for Board approval; Exhibit 13, image from Town "dedicated" area; cf. Exhibit 14, Exhibit 15, images of forest portion of Town "dedicated" land)
53. The Final Site Plan contains marked-out baseball diamonds on the forested part of the Town's dedicated land.
54. The removal of all the vegetation in the West Forest -- including the Town lands

-- is also depicted in the Beechwood rendering of the site publicized on its website (Exhibit 35). This depiction corresponds almost exactly with the Final Site Plan as approved, Exhibit 13.

55. Evidently the Town will reconfigure athletic fields and build new baseball diamonds in the forest area to free space for soccer fields elsewhere in its "dedicated" land.

56. A soccer field is said to cover from one to two acres (Exhibit 16), and the new fields proposed would be replacing roughly five to six current fields.

57. The Town's plan to replace soccer fields by building new facilities in the "dedicated" land indicates not only segmented review, but also an intention to deforest area it is otherwise counting toward the preserved "woodlands" claimed to mitigate the environmental losses of habitat (Exhibit 4, Findings Statement, p. 9).

58. The plan to build the new fields thus undermines the SEQRA review in multiple ways, both impermissibly segmenting it and also negating the "hard look" at the preservation of habitat required (see discussion of wildlife habitat, *infra*.)

### **New Lanes to Be Constructed**

59. Further segmentation affects the plans to construct over one million dollars worth of new traffic lanes at or nearby the Property.

"The types of [traffic] mitigation consist of...construction to provide additional travel lanes and capacity are identified for three of the seven intersections.....

...The applicant has committed to fully fund the design and construction of these improvements...."

(Exhibit 17, FEIS pp. 17-18)

60. This plan is far from speculative. Rather it appears fully planned and needed,

waiting only "approval of NYSDOT, Nassau County and the Town of Huntington",  
*ibid.*

61. Also:

"While the evaluation of the site access drives in the DEIS did not include dedicated right turn lanes adjacent to the site, should the County request the construction of these lanes, the developer will do so."

(Exhibit 18, FEIS, p. 121)

62. The latter new construction is stated in the FEIS to be undesirable due to its impacts on the forested area adjacent to the roadway. Yet it is contemplated in the plan, with no further environmental review.

63. This element is more speculative than the off-site highway changes, but appears to be under active consideration.

64. The various traffic mitigation strategies, especially the new construction, are connected to the project and yet lack environmental review. They thus segment the environmental review impermissibly.

### **Wildlife and Habitat**

65. A key issue in a SEQRA review is the outcome for wildlife from the destruction of natural habitat, which on this property consists of at least seventy-one of acres of roughly hundred-year-old forests, meadows and "brushland" or "shrubland".

66. In addition to the naturally-growing forests, meadows, and brushland -- most of which blend together as unified, synergistic, organic units -- there are large numbers of mature trees dotted throughout the parts of the property designated as paved or buildings.

67. The rich natural habitat is home to dozens of species of birds, mammals,

reptiles, amphibians, and Lepidoptera (butterflies and moths) that were catalogued in the SEQRA Review process (e.g. Exhibit 19, DEIS discussion).

68. Two issues are relevant to such a review: (A) What wildlife is present that will be harmed; and (B) What natural wildlife habitat is present that will be destroyed.
69. Citizens and a government agency sharply questioned the Town on one or both issues -- the quantity of wildlife, and the extent of habitat -- but neither was answered with a sufficient "hard look" in the SEQRA Review.
70. As a result significant habitat is planned to be destroyed and untold numbers of animals killed outright and/or displaced to dismal fates, yet the SEQRA Review would have the public and even voting members of the Town Board believe otherwise, because the SEQRA Review lacked a required "hard look".

### Wildlife

71. Testimony asked pointedly exactly what wildlife was present in the natural forest and meadow/brushland on the property:

"b. Quantities of Wildlife -- There are listings of some 55 species of birds, mammals and herpetofauna (pp 110-13). But there is no quantification of the animals present.

It is impossible to understand the impact of the project without knowing what the wildlife impact will be, and without quantities it is impossible to know this in any scientific or indeed public-policy aspect.  
It is essential to quantify the wildlife present to adequately understand it in this DEIS.

.....  
e. Displacement -- The assertion that animals would "migrate" and this would, result in some net loss due to "competition for available resources" (pp 224-5) is largely meaningless absent quantitative data on the wildlife present (see above).

It is also idle to assert that there would be a net loss without describing it in more quantitative terms, and also describing the nature of the wildlife

in neighboring areas that are supposed candidates for displacement."

(Exhibit 20, FEIS Appendix 3, C6, Letter of Brummel, 4/10/14, p. 3, emphasis added)

72. The SEQRA Review provided no answers to the questions raised as to the actual numbers of animals present among the documented roughly 55 species of birds, mammals, and herpetofauna (reptiles and amphibians) believed to inhabit the property.
73. Furthermore the presence meadows and brushland provide important habitat to Lepidoptera -- butterflies and moths -- of which 47 species were inferred to be present based on a nearby survey (Exhibit 21, DEIS Appendix L, p. 197).
74. Butterflies such as the Monarch are known to be under significant ecological stress at present (Exhibit 22, The New York Times, Nov. 17, 2014), yet the SEQRA Review completely ignored the issue of insects on the property.
75. Testimony specifically challenged the sufficiency of the DEIS for failing to account for any insects in its discussion of ecology, habitat, and wildlife (Exhibit 20, FEIS Appendix 3, C6, Letter of Brummel, 4/10/14, p. 3, Point 4(a))
76. The FEIS offers no response to the question raised regarding the amount of wildlife present in the roughly 71.03 acres of natural forest, meadows, and brushland present, along with the significant other acreage populated by large trees and other vegetation (Exhibit 23, FEIS Table 3, Land Coverage).
77. It states in defense of this omission:
78. "...[T]he wildlife impact assessment was conducted in a manner consistent with the customary procedures for a DEIS, including the procedures outlined in the Final

Scope promulgated by the Town Board...." (Exhibit 24, FEIS pp. 62-3)

79. Instead of discussing the fate of the roughly fifty-five species of animals identified as inhabiting the property (Exhibit 19, DEIS pp. 110-13), the Findings Statement changes the subject by stating the property contains no "endangered" or otherwise at-risk species:

"The field inspections and existing information sources did not identify the presence or likely presence of any federally listed or state listed, rare, special concern, threatened or endangered animals or plants, significant natural communities, or other significant habitats on or in the vicinity of the site."

(Exhibit 4, Findings Statement p. 9)

80. In further partial answer to the fate of the wildlife, the Findings Statement states that ornamental ponds to be constructed will provide some habitat for animal species "not presently found on the site".

81. It also argues that existing habitat is degraded because of the presence of "invasive plant species" and "disturbance in the relatively recent past" (Exhibit 4, Findings Statement p. 9)

82. The argument about "degraded" habitat is also carried in the DEIS:

"...[T]he overall habitat quality of these communities, and, therefore, the site as a whole has been degraded due to anthropogenic disturbance and colonization by non-native invasive plant species." (DEIS p. 106, emphasis added)

83. But the self-serving claim of irreversible "disturbance" is partially contradicted by the fact that one large tract of forest on the property was reclassified (upgraded) from a 2005 review to the current review of 2010-2012, a mere five to seven years later.

84. What was called a "degraded" tract of forest in a 2005 survey (Exhibit 21, DEIS

Appendix L, 2005 Ecological Assessment, p. 199, ¶ 2) was upgraded to a classic and uncommon forest type in the survey completed in 2012.

85. The re-classification applies to a roughly 20-acre portion of what Petitioners have designated the roughly 27.7 acre "West Forest" (*infra*), a large portion of which was upgraded from "Late Successional Mixed Oak Woods" to "Coastal Oak-Heath" (Exhibit 11, DEIS p. 100, ¶ 1).

86. The "Coastal Oak-Heath Forest" type is recognized by a state agency responsible for ecological preservation, the New York Natural Heritage Program ("NYNHP"), as a relatively rare "vegetation community type" (Exhibit 43, New York Natural Heritage Program (NYNHP), "Coastal Oak-Heath" Forest-type, pp.1-2).

87. Thus the SEQRA Review's strategy of denigrating all the habitat as "degraded" by invasive plants in order to minimize the impact on wildlife is substantially undermined even on its own terms, as the "degraded" habitat actually springs back to life.

88. The documented presence of large quantities of native wildlife -- birds, mammals, herpetofauna, and Lepidoptera, as catalogued by the DEIS -- contradicts the argument that less-than-pristine forests, meadows and brushland are materially less sufficient as habitat. While the inference is presented as such in the Findings Statement, nowhere does the SEQRA Review present an analysis that substantiates that inference.

89. Disturbances that might have affected the forests and meadows said to have occurred in the late 1800's or early 1900's:

"A substantial portion of the subject property has been disturbed by previous land-clearing and grading, including agricultural activities in the

late 19th century, site development associated with health facilities in the early 20th century, and subsequently Nassau County offices and soccer fields."

(Exhibit 4, Findings Statement, p. 9)

90. The term "substantial portions" used to characterize the man-made changes is not defined or quantified. In any event over one hundred years of growth has occurred even in "disturbed" sites that lie outside the hospital, county buildings and soccer facilities. It is a natural area acknowledged by the applicant to cover at least half of the 144-acre site.
91. The Town further claims that wildlife will be protected because "70 percent" of the current "woodland" will be preserved.
92. As discussed below, in the analysis of the impact on habitat *per se*, the "70 percent" figure is demonstrably false.
93. Among other issues: (i) At least about ten to eleven acres of forest on the western side, including a large portion of the "Coastal Oak-Heath Forest", is actively planned to be removed later by the Town to create replacement athletic fields after construction of the development begins (e.g., Exhibit 4, Findings Statement, p. 20; Exhibit 35, Rendering of post-construction site by Respondent Beechwood on its website). This issue was more fully discussed with respect to the unlawful "segmentation" of the SEQRA review, *supra*.
94. Further: (ii) Portions of the remaining "woodland" will be paved over for a walking/jogging path, *infra*; and (iii) The arithmetic can be challenged in any event, because among other issues, the analysis excludes "meadow/brushland" from its base figure of "woodland" but includes it in the end figure of "woodland", thus over-

stating the percentage of habitat preserved. See, e.g. Exhibit 8, DEIS Figure 16 pre-construction and Exhibit 9, DEIS Figure 27A post-construction, where the "meadow/shrubland" component clearly exceeds 1+/- acre claimed to remain outside "forest", also Exhibit 23, FEIS table of acreage), meaning it must be improperly and inconsistently counted in with "forest".

95. Whether or not the area contains invasive vegetation, preserves "70 percent" of the habitat, and whether or not the wildlife present is classified as "protected" or "endangered", the question of the direct impact on wildlife now present is both firmly within the concerns of SEQRA, and clearly not answered by this SEQRA Review due to its failure to measure the quantity of wildlife present, as requested in testimony.
96. Because of the omitted information, it is simply impossible for the Town to answer a fundamental question: Whether there exist on the property one "red-tailed hawk" or fifty, one "pheasant" or one hundred, one "red fox" or seventy-five, two "Bats" or two thousand, one "northern redback salamander" or one thousand, or one Monarch butterfly or five hundred -- drawing examples from the species known present (Exhibit 19, FEIS pp. 110-113, discussion of wildlife).
97. Thus neither it, nor the public, could determine as a matter of public policy how the project would affect such animals, as SEQRA requires.
98. As such it is impossible to argue that a "hard look" was taken at the wildlife, as legally required, or to answer the question: *"How will wildlife that is present be affected?"*
99. Without such information it is clearly impossible to understand how the project

could choose from the available options to best mitigate impacts on the environment, or to understand how the claimed mitigation would succeed.

### **Natural Habitat**

#### **Failure to Take "Hard Look"**

100. The Town and applicant also failed to take a "hard look" at the destruction of natural wildlife habitat.
101. The review of habitat loss is affected by the the following fatal flaws, at a minimum:
  102. (i) Habitat is never specifically defined, analyzed, or measured as such.
103. The several contiguous "forested" areas and "meadows/brushland" on the property that should be considered together as natural wildlife habitat (Exhibit 10, Expert Opinion on Ecology, Point 1) are not identified as such in the SEQRA Review, thus their fate is not tracked as is required for a "hard look" at natural wildlife habitat;
104. (ii) Part of the area claimed as "forested" after construction is clearly not. What are at best new plantings are identified with the same labels as decades-old forest in comparable figures. The Round Swamp Road "buffer" is purported to be populated post-construction by a thick buffer along its entire length of "Successional Southern Hardwoods" (Exhibit 9, DEIS Figure-27A, Post-Construction Ecological Communities; Exhibit 8, DEIS Figure 16 Ecological Communities). Yet a long stretch of the "buffer" -- roughly 1000 feet -- contains no significant vegetation currently, aside from single-depth trees (Exhibit 25, graphical analysis of planned

125-foot Round Swamp Road buffer).

105. Furthermore, an acre-wide area at the northern end of Round Swamp Road is counted as forest but is stipulated to be dedicated for "landscaping and civic signage" after construction. (Exhibit 4, Findings Statement p. 4, ¶ 1; cf. Exhibit 9, DEIS Figure 27A, post-construction graphic)
106. (iii) The Round Swamp Road buffer, as well as the southeast buffer, counted as "forest", are split by a paved, lighted paths of indeterminate width, and therefore cannot be fully considered "forest" for habitat purposes (see Exhibit 10, Expert opinion, Point 3).
107. States the documentation: "The [buffer] is now proposed to remain in its natural condition with the exception of the installation of the fitness/walking trail." (Exhibit 26, FEIS, p. 8). As such it should not be counted as preserved "woodland" for habitat preservation purposes but it is (Exhibit 10, Expert Opinion, point 3; Exhibit 4, Findings Statement, p. 9).
108. Beyond the path, there is also a plan for "fitness stations" that will require additional removal of forest for construction space.
109. (iv) About eleven acres of forest on the western portion of the property (designated by Petitioners part of the "Western Forest", below) that is to be "dedicated" to the Town is counted as preserved forest (Exhibit 9, Figure-27A, Post-Construction Ecological Communities), but it is explicitly planned for significant removal to create replacement athletic fields (Exhibit 4, Findings Statement, p. 20, ¶ 3; Exhibit 13, Final Site Plan design features).
110. Petitioners discussed this issue further in the discussion of illegal segmentation

of the SEQRA Review.

111. (v) Petitioners' systematic analysis of the natural habitat area -- undertaken to rectify the absence of any comparable analysis in the SEQRA Review -- using Internet tools based on Google satellite photos, shows that notwithstanding the flaws in the analysis already outlined, the official numbers appear to under-count existing forest and over-count remaining forest.
112. All the images and measurements from the Internet presented herein are upon information and belief.

### **Issues Related to Habitat Raised in Testimony**

113. SEQRA demands that the calculation of impacts on the "environment" include those related to fauna (animals) (6 NYCRR 617.2(l)).
114. "Environment means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." 6 NYCRR 617.2 (L), emphasis added)
115. At least several parties directly and emphatically addressed the issue of loss of wildlife habitat.
116. The Nassau County Planning Commission expressed concern about the "substantial impact" on "wildlife habitat":

"The [Town of Oyster Bay Final Groundwater and Open Space Protection Plan (FGOSPP)] targets the subject property...as having open space, outdoor recreational, wildlife habitat and natural groundwater recharge protection potential. The proposed development, while implementing certain initiatives to mitigate environmental/ecological impacts of this

development still will have a substantial impact concerning the objectives of the FGOSPP as it relates to the subject property."

(Exhibit 44, FEIS Appendix A3, C1, Letter of Nassau County Planning Commission, p. 4, Point 24, emphasis added)

117. Civic leader Carol Meschkow, president of Concerned Citizens of the Plainview-Old Bethpage Community, testified:

"With over 90 acres of woodlands, habitats undisturbed for decades, including an occasional red fox and trees and other specimens indigenous to the pine barrens, it behooves this Town to seek the maximum preservation of the last remaining tract of open space in Nassau County...."

(Exhibit 45, FEIS Appendix B, Hearing Transcript, p. 199)

An environmentalist testified:

"The DEIS notes that woodlands will decline from 53 acres to 37 acres (p. 214).

However there is no functional analysis that shows how contiguous forest would be affected -- how blocks will be destroyed and small edge-like formations left in their place.

That metric is needed to accurately gauge the impact on wildlife.

For example, to say that 100 trees will be removed but 50 trees left does not tell whether those trees are in one stand or apart, and whether they can support wildlife habitat or not."

(Exhibit 20, FEIS Appendix A3, C6, Letter of Richard Brummel of 4/10/14, p. 2, emphasis added)

Further:

"The DEIS states three brief mitigation points for the substantial ecological impact on trees, vegetation and wildlife: landscaping with native flora, the retention of perimeter buffers, and the creation of ponds (pp 357-8). They are far from adequate.

These points are not significant mitigation, and are incommensurate with the impact. They are token at best, and an afterthought.

....

The landscaping will not mature for decades to the point of providing

similar habitat, and even then the lack of density and the manicured undergrowth will not provide anything like habitat that exists now.

The perimeter buffers are minuscule with the exception of the retained soccer-field buffer such as it is. As such they will provide little mitigation for the loss of habitat.

If true mitigation is to be created -- as required by SEQRA -- then it should be in the retention of significant stands of habitat as they exist."

(Exhibit 20, FEIS Appendix A3, C6, Letter of Richard Brummel of 4/13/14, pp. 1-2, emphasis added)

118. There was also testimony from a local Audubon affiliate expressing deep concern (FEIS Appendix A3, Letter C21).

### **Town Response on Habitat**

119. The Findings Statement devotes a mere four paragraphs -- about half a page -- to addressing the removal of habitat and its impact on wildlife.

120. As discussed, *supra*, the Town asserts that the existing habitat is relatively unimportant because it is degraded. XXX The Town further claims new plantings and new ponds will provide habitat, the latter admittedly for wildlife not indigenous to the property. xxxx

"All ten of [the existing] ecological communities either characterize areas of current development...or are otherwise indicative of disturbance in the relatively recent past...The occurrence of invasive plant species is widespread on the site, which further degrades habitat quality. The field inspections and existing information sources did not identify the presence or likely presence of any federally-listed or state-listed, rare, special concern, threatened or endangered, animals or plants, significant natural communities, or other significant habitats on or in the vicinity of the site.

...

The proposed development plan will result in the clearing of existing vegetation on the subject property. However, to the extent practicable, land clearing will be concentrated in areas that are more disturbed and less ecologically valuable. In particular, the DEIS Plan entailed the retention of approximately 70 percent of the existing 53 acres of woodland on the site,

which was increased in the FEIS Plan and has been further increased in the Final Plan, in conjunction with a decrease in the development footprint and increase in buffers and other open space/recreational land. The proposed development plan includes extensive landscaping, which will provide some degree of compensation for habitat loss resulting from the removal of existing vegetation.

The ponds to be installed [will contain vegetation capable of] providing suitable habitat for animal species not presently found on the site."

(Exhibit 4, Findings Statement, p. 9)

121. The principal argument advanced in the Findings Statement is that the project will preserve 70 percent of existing "woodlands" so the issue of habitat is essentially satisfied.
122. This claim turns out to be based on blatantly deceptive math: the preserved "woodlands" include meadow and brushland, which if counted in the original (base number) woodlands would push them up to a total of 71 acres, meaning the "70 percent" becomes closer to 53 percent using the applicant's own numbers, which are in any event flawed. See *infra*. (Exhibit 46, Annotated graphic showing incorporated meadow/brushland).
123. As was discussed *supra*, the applicant's own numbers are flawed as they include land destined for further clearing for athletic fields, and for the paved and lighted fitness trail, and immature new plantings, among other issues.
124. Each of the arguments/justifications/analyses in the Findings Statement regarding habitat, wildlife, and current vegetation is seriously flawed and reflects an apparent effort to hide or obfuscate the destruction of habitat.
125. Without honest data, clearly presented, and rationally evaluated, there can be no substantiation of a "hard look" as required by the SEQRA Review.

126. As Petitioners will demonstrate, the present habitat area is significantly larger than that acknowledged in the Findings Statement, and the amount of habitat to be preserved is actually significantly smaller than stated in the Findings Statement.
127. The alleged "70 percent" preservation rate (Exhibit 4, Findings Statement, p. 9) is a material misstatement of the facts, and creates a materially-flawed premise to the Findings Statement's claim that it "weighed and balanced relevant environmental impacts" as required by SEQRA (Exhibit 4, Findings Statement, p.1).
128. The flaws in habitat-accounting fatally undermine the claim that a "hard look" was taken at the core, fundamental environmental question asked in this SEQRA process, to wit: *How will the project affect the existing natural environment?*

### **Petitioners' Habitat Measurements**

129. Petitioners used Internet mapping tools based on Google satellite images to quantify the "before" and "after" status of the contiguous areas of generally forested habitat in the project site, with exhibits attached, and offer the measurements upon information and belief (Exhibit 27, Affidavit)
130. Petitioners identify five existing areas of contiguous natural forest and brushland on the site. They are:
131. 1. "The West Forest": Contains approximately 27.57 acres, located along Old Country Road terminating at the Islanders' headquarters on the western edge (Exhibit 34, satellite depiction). Includes about twenty acres of the relatively-rare "Coastal Oak-Heath" forest type.
132. 2. "The NW Forest: Contains approximately 3.2 acres, located along Old Country Road north of the Islanders' headquarters (Exhibit 28, satellite depiction of

NW Forest).

133. 3. "The SW Forest": Contains approximately 6.52 acres, located next to the "Bethpage Bikeway" (Exhibit 29, satellite depiction)
134. 4 "The East Forest": Contains approximately 11.31 acre forest, located along Round Swamp Road (Exhibit 30, satellite depiction )
135. 5. "The SE Forest": Contains approximately 13.26 acre forest, located along Round Swamp Road south of the East Forest (Exhibit 31, satellite depiction)
136. All together, the areas identified by Petitioners sum to 61.86 acres, somewhat more than the 53 acres listed in the SEQRA Review as "forested".
137. Petitioners counted some acres of meadow and brushland located squarely within the forests (West Forest, NW Forest, SE Forest) which the SEQRA Review may have counted separately in its initial accounting.
138. But on a roughly equal compensatory basis, Petitioners omitted as "habitat" some narrow "spur-like" forest formations that likely were counted in the SEQRA Review (Exhibit 32, Spur-like forest area)
139. As noted it is impossible to determine how the SEQRA Review came up with its count of acres because there is no accounting for the various forest parcels in the documentation. Nor is there a specific numerical assignment to any forested area or meadow/brushland in the official documentation.

### **Respondents' Measures of Habitat**

140. Looking first at the terms and figures contained in the SEQRA Review documents:
141. The overall site under review comprises 143.25 acres (Exhibit 4, Findings

Statement, p. 2).

142. FEIS Table 3 (Exhibit 23) states that 53.26 acres of the site is currently "Forested" land, and 17.77 acres of the site is currently "Meadow or Brushland" .
143. The total of such natural lands -- forest and meadow brushland -- is 71.03 acres (cf. Exhibit 23, FEIS p. 9, Table 3 Land accounting). Important as it is as wildlife habitat (Exhibit 10, Expert Opinion) that number is not reported anywhere as the ecologically significant figure it is from the standpoint of habitat and wildlife preservation.
144. FEIS Figure 16 (Exhibit 8) illustrates the distribution of the various types of forest and "meadows and brushland" (therein called "successional old field" and "successional shrubland") currently on the site.
145. Nowhere in the SEQRA Review is there a numerical accounting of the size of each of the contiguous forest and meadow/brushland areas as they currently exist.
146. Nor is there a clear basis for how the applicant arrived at the numbers as presented, unless something is buried in some appendix not clearly referenced in any of the tables of numbers it presents in the main texts.
147. Furthermore there is no numerical accounting for how much of each of the contiguous forest and meadow/brushland areas will remain after the proposed construction.
148. The numbers regarding preserved habitat as presented by the Applicant themselves do not even agree:
149. FEIS p. 69 states 44.5 +/- acres woodland are preserved: "As currently proposed, a total of 44.50 +/- acres of wooded habitat would be preserved as a result

of the proposed action, representing an increase of approximately two acres over that which was originally proposed." (Exhibit 33, FEIS, p. 69, ¶ 2)

150. FEIS p. 70 states 35.41 +/- acres preserved: "As currently proposed, a total of 35.41 +/- acres of wooded habitat would be preserved as a result of the proposed action, representing an increase of two acres over that which was originally proposed." (Exhibit 33, FEIS, p. 70, ¶ 3)

151. The Findings Statement says: "...[T]he DEIS Plan entailed the retention of approximately 70 percent of the existing 53 acres of woodland on the site, which was increased in the FEIS Plan and has been further increased in the Final Plan...." (Findings Statement p. 9, Exhibit 4). That would come out to equal 37.1 acres.

152. In contrast, Petitioners' calculations, fully documented herein with satellite photos, indicate that about 32.89 acres of forest and integral meadow/brushland would remain.

153. But whether or not the figure is at or near "70 percent of 53 acres", the mantra given by the Town for the project's ecological 'balancing', the numbers are wrong and unreliable from an ecological and reality standpoint, as discussed:

154. (i) The original measure of "woodland" acres omits important meadow/brushland wildlife habitat -- and deceptively so, given the later measure of "woodland" as including it; and,

155. (ii) The measure of "preserved" acreage includes land to be further developed either completely with athletic fields, or partially with fitness trails, or signage and landscaping.

## **Petitioners Measurements of Habitat Remaining**

156. Petitioners also made measurements of the forest area to remain after the construction.

1. The West Forest: The southern half of the forest is to be "dedicated" to the Town. It will contain about 11.73 acres (Exhibit 45, satellite image).

2. The NW Forest would be completely removed. It will thus contain 0 acres.

3. The SW Forest would "dedicated" to Town pending their own plans, as noted *supra*. It will contain about 6.52 acres (Exhibit 29).

4. The East Forest would be partially preserved only as a buffer "at least 125-feet" wide xxx. In calculating its remaining size there are two important caveats:

(i) The buffer would be cut through by a walking/jogging path of indeterminate width and with features such as pavement, lighting, and fitness stations, thus degrading its character as habitat (Findings p. 21, ¶ 7, Exhibit 4); and

(ii) Only part of the 125-foot buffer coincides with the forest (Exhibit 25, satellite image), so the calculation of the buffer "size" as 8.55 acres (Exhibit 5, FEIS Revised Site Plan) substantially overstates the "forest" the Round Swamp Road buffer preserves.

Thus for the East Forest -- including some meadow/brushland, it will contain at most about 4.71 acres.

5. The Southeast Forest: This is to be dedicated as covenant-buffer (Exhibit 5 FEIS Revised Site Plan). It will contain about 9.93 acres.

157. All together the sum of preserved "woodland" -- using the term to be both forest and meadow/shrubland integral to the forests -- is determined by Petitioners to be 32.89 acres.

158. This figure is short of the claimed "70 percent of 53 acres of woodland", or 37.1 acres.

159. But as noted *supra*, it is an error to fully count all the remaining forest areas as

such. The "West Forest" is clearly planned for partial or complete conversion to athletic fields. And the remaining East and SE Forest areas used as "buffers" are to be split by paved, lighted fitness paths, thus compromising their functional "forest" character.

### **Obfuscatory Language on "Open Space" Not Habitat**

160. The SEQRA Review further obfuscates the fate of natural wildlife habitat by referring to non-developed land as "open/recreational space" or "open space, buffers and recreational area" instead of using functionally useful terms like "preserved natural habitat" and "recreational facilities" (Exhibit 4, Findings Statement p. 2, ¶ 10; p. 3, ¶ 3).
161. The only systematic accounting of non-developed land in the Findings Statement -- an unlabelled numerical chart, p. 6 -- does not even identify preserved natural habitat -- either "forested" or "meadow/brushland". Instead, whatever habitat is preserved is lumped into a category called "Total Open Space, Buffers, and Outdoor Recreation" (Exhibit 4, Findings Statement p. 6, unlabelled chart).
162. The flaw in using such imprecise and obfuscatory language is clearly revealed by a significant apparent error in the Findings Statement.
163. In a table accounting for alternative development scenarios, as required the "Total Open Space, Buffers and Outdoor Recreation" is given as only forty ("40") acres; but the correct figure based on the FEIS itself is at least roughly 127.7 acres -- counting forest, meadow/brushland, and "turf grasses" (Exhibit 4, Findings Statement, unlabelled chart, p. 6; Exhibit 23, FEIS Table 3, p.9).
164. That error alone illustrates how inadequate and incommensurate with a genuine

"hard look" was the analysis of the impact of the project on land and natural habitat.

165. The imprecise language in the analysis of preserved wildlife habitat land leads to both overstating the implied quantity of preserved habitat and minimizing its significance.
166. Conflating recreational lands, new plantings, and "preserved natural habitat" lumps the latter into a category that suggests natural habitat and newly-planted or manicured recreational areas are indistinguishable, from a public policy and SEQRA standpoint.
167. But habitat and other "open space" is clearly not identical when determining the impact on wildlife, which is central in a SEQRA Review:
168. "Environment means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." (6 NYCRR 617.2 (L), emphasis added)
169. Further what is relevant as habitat for wildlife currently existing on the property is not newly-planted trees and shrubs -- which lack both size and a natural soil/flooring matrix -- but existing decades-old woods and shrubs that have the type of density, maturity, and cover to provide food and shelter -- "habitat" -- for wildlife. (Exhibit 10)
170. Additionally the aesthetics of the original nature is also measurably different from that of recently planted vegetation and will be for some years or decades. (Exhibit 10, Expert Opinion)

171. This is not semantics. It is a question of how the SEQRA Review took account of habitat -- and how it created a deceptive and inadequate basis for decision-making -- despite public criticism of its techniques, *supra*, (Exhibit 20).

172. Thus the language and categories used to account for habitat are deceptive and inadequate to conduct a "hard look" upon which to base rational decisions.

### **Screening Buffers**

173. The importance of "screening" the view of the development from neighboring property was recognized early in the process of converting the site to private ownership, and resulted in restrictive covenants as a condition of the Town's rezoning in 1998.

174. The goal was strong and comprehensive screening:

"The provision of adequate vegetative buffers to screen views of the developed site from adjacent roadways and neighboring properties is particularly important in this regard....This buffer must consist of retained sections of existing vegetation that provide a visual screen, augmented as necessary...."

(Exhibit 34, DEIS, p. vi, Point 4, emphasis added)

175. The Town now asserts a 125-foot buffer on Round Swamp Road will provide an adequate visual buffer for the residential community located, there of which Petitioners are members.

176. One hundred and twenty-five feet is the length of about three city buses (Exhibit 35, NY "MTA" Website). Presently the forest across from Petitioners' homes is from 200 to 390 feet deep (Exhibit 36, Buffer Widths).

"In order to provide visual screening, in accordance with the restrictive covenants governing the site, a minimum 125-foot wide buffer will be retained along Round Swamp Road and a minimum 350-foot wide buffer

will be retained in the southeast corner of the site adjacent to the residential community....Existing vegetation will be preserved in these buffer areas, except as necessary for the installation of the perimeter walking/fitness trail, augmented as appropriate by additional plantings. The nearest building will be located approximately 150 feet from the easterly property line and approximately 390 feet from the southerly property line."

(Exhibit 4, Findings Statement p. 21, emphasis added)

177. The claims of "screening" are called into question and even contradicted by other elements of the documentation and plans.
178. The paved, lighted walking/jogging path -- of indeterminate width -- to be built in the middle of the screening buffer along Round Swamp Road may substantially compromise the screening effect.
179. An apparent jogging/fitness trail at the Respondent Beechwood property at Meadow Brook Pointe is about thirty feet wide (Exhibit 39, satellite image).
180. Yet the issue of how the degraded screening will function raised is nowhere discussed or quantified in the SEQRA Review.
181. The Nassau County Planning Commission testified in writing that "visual simulations" should be provided to demonstrate the impact of the project and screening on nearby neighbors (Exhibit 41, FEIS pp. 154ff.).
182. The applicant responded in the FEIS that there were such simulations included. As regards Round Swamp Road the "simulation" Figure 31 (Exhibit 40) is more an abstract watercolor than a realistic image of the likely view from residences and the street.
183. As depicted in Figure 31 the "screening" along Round Swamp Road is so limited that from the perspective depicted a viewer can readily see houses in the

development, joggers on the walking/jogging path, and other jarring new visual elements that are supposedly "screened" by the "buffer".

184. In addition to providing no more than a fanciful depiction of the screening-functionality, Figure 31 provides no data as to distance, perspective, time of day, time of year, or other specific information to make it useful for understanding what is being depicted.

185. Yet this is the sole "visual simulation" cited by the FEIS in response to the written testimony of concern from the Nassau County Planning Commission. No other visual simulation from Round Swamp Road is provided.

186. FEIS Appendix I, "Visual Simulations," contains three other highly impressionistic water-color type images depicting views from Old Country Road, the corner of Old Country Road and Round Swamp Road, and one more realistic view from a backyard on Beatrice Lane south of the project.

187. In contrast to assurances in the Findings Statement about "screening" along Round Swamp Road, *supra*, the FEIS states in response to questions raised at the hearing that instead of screening the new development, the buffer would only assure that the residences are "partially obscured" (Exhibit 48, FEIS p. 158).

188. Petitioner Denton specifically challenged the visual impact of the project and the FEIS response was to his concern and similar concerns of others.

189. Said Petitioner Denton:

"The concern is the volume and size of this [new development]. If you were looking to strike the balance it would be a little more acceptable in the area. If you try...perhaps the buildings that are closer to the community...along Round Swamp Road...so essentially that community would be hidden."

(Exhibit 40, FEIS Appendix B, Hearing Transcript, p. 185, emphasis added)

190. While the FEIS claims increasing the buffer twenty-five feet from the earlier plan will improve the screening, no additional visual renderings are provided.
191. There is no discussion of how the buffer will function when the trees have no leaves in the winter, early spring and late fall, so called "off-leaf" conditions.
192. The Nassau Planning Commission (Exhibit 44, Letter, FEIS p. 154) sought far more functional documentation about the view from existing homes than is present. The failure to discuss off-leaf conditions, the impact of the walking/jogging path and its lighting, and the absence of clear visual sketches that correspond to the anticipated buffering along Round Swamp Road demonstrate flaws that make it impossible for an informed rational analysis to occur or to have occurred.
193. The deficiencies in the information, decision-making and analysis means that the Town did not take the required "hard look" at the question of buffers and screening as it affects the neighborhood east of the pending project.

## **Laws and Regulations**

### **SEQRA**

194. SEQRA was enacted in 1975, ECL Article 8, and regulations pursuant to it have been promulgated by the Department of Environmental Conservation (DEC), 6 NYCRR Part 617.
195. SEQRA was intended to make careful and thorough environmental planning , analysis and decision-making part of every official state activity:

“It was the intention of the Legislature that the protection and

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

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

196. SEQRA applies to every "local agency" (ECL Section 8-0105), including Towns.

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

197. An "action" for the purposes of SEQRA is defined as including:

Projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

- (i) are directly undertaken by an agency; or
- (ii) involve funding by an agency; or
- (iii) require one or more new or modified approvals from an agency or agencies;

Agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;

Adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and

Any combinations of the above."

(617 NYCRR 617.2 (b) (1) through (4))

198. The "action" is viewed as encompassing not merely the final step of approval or funding, but the entire sequence of steps leading there:

"Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency

decision-making relates to the action as a whole or to only a part of it. Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible."

(6 NYCRR 617.3 (g), emphasis added)

"Segmentation means the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance."

(6 NYCRR 617.2 (ag), emphasis added)

199. Actions that "may have a significant adverse impact on the environment" must be subject to a full environmental review including the analysis, public input, and factual documentation created in the preparation of a Draft and Final Environmental Impact Statement:

"Environmental impact statement (EIS) means a written "draft" or "final" document prepared in accordance with sections 617.9 and 617.10 of this Part. An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors early in the planning and decision-making process. A draft EIS is the initial statement prepared by either the project sponsor or the lead agency and circulated for review and comment. An EIS may also be a "generic" in accordance with section 617.10, of this Part, a "supplemental" in accordance with paragraph 617.9 (a)(7) of this Part or a "federal" document in accordance with section 617.15 of this Part."

(6 NYCRR 617.2(n))

200. Further:

"No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with."

(6 NYCRR 617.3(a))

201. The final step in the SEQRA process -- aside from the agency undertaking the action under review -- is the agency formulation of its conclusions of the environmental concerns in the creation and approval of a Findings Statement.
202. The “written findings statement” (6 NYCRR 617.11 (c)) provides a reasoned elaboration and demonstrates that the chosen action "avoids or minimizes adverse environmental impacts to the maximum extent practicable.” (6 NYCRR 617.11 (d))
203. With the Findings Statement in hand, the agency may then formally act on the action proposed.

### **Concluding Statement**

204. It should be clear from the preceding discussion the Town of Oyster Bay failed to frankly and fully address the inevitable drastic impact of the development on the wildlife present, the natural forests meadows and brushland present, and the possible substantial environmental impact on the character and enjoyment of the community closest to the Project, along Round Swamp Road.
205. Petitioners have submitted extensive documentation from the record itself, augmented by research they performed that should have been supplied in the review process, to demonstrate the flaws in the Respondents' arithmetic, their abuse of language and terminology to distort the before-and-after scenarios, and their erroneous and unlawful deferral of significant decision-making and environmental review, as revealed by their own words.
206. Petitioners thus respectfully request the Court impose the remedies required by

law to rectify these failures which otherwise will cause them severe injury and distress.

### **Basis for Preliminary Injunction**

207. Petitioners submit the following facts in support of their request for injunctive relief, as required:

208. Irreparable Harm: Dozens of acres of forest, meadow, brushland, and developed land dotted with mature massive hardwood trees which Petitioners enjoy and use from their properties and directly is planned to be levelled, and the wildlife therein killed outright or driven into neighboring roads, commercial properties, and residential neighborhoods as this massive Project commences.

209. The wildlife that is killed cannot be brought back to life. The natural habitat that has grown over a period of at least one hundred years cannot be replaced for many decades once destroyed. The woods, meadows, and brushland that Petitioners enjoy and treasure is irreplaceable.

210. For those reasons the Petitioners will suffer irreparable harm if this Project continues despite the unlawful flaws identified in the required review process.

211. Likelihood of Success: Petitioners have detailed numerous flaws in the SEQRA review process. Petitioners have thoroughly documented clear and convincing violations of well-established legal standards for SEQRA review: Segmentation of the review of land-use and future highway construction; Failure to take a required "hard look" at the impact on wildlife directly and wildlife habitat; and Failure to take a "hard look" at the visual impacts on across-the-street neighbors due to an inadequate evaluation of the planned visual screening.

212. These flaws are fatal to the SEQRA Review process as a rational public policy action, and unlawful. Thus Petitioners case has merit and should prevail.
213. Furthermore it was timely brought, within 30 days of the Town zoning decision, the point at which injury was suffered due to the unlawful SEQRA process.
214. Balance of the Equities: SEQRA demands strict compliance according to a long line of legal precedent. It is the policy of the courts to impose an absolute bar on improper actions when clear violations of SEQRA procedures have been committed.
215. It is a matter of public policy enunciated by the courts that in order to deter bad behavior that SEQRA violations will lead directly to annulling actions taken in violation. In the present case, the violations could be called deliberate given the experience of the parties concerned. Using deceptive arithmetic and deceptive semantics would seem calculated. Other shortcomings were committed even when other government agencies pointed to issues of concern, for instance with regard to the absent or inadequate depictions of the proposed visual buffer.
216. But rather than asking for a true analysis of equities, the courts' have consistently stated that SEQRA requires a superseding emphasis on the deterrent effect of a clear halt to actions that have violated its strict provisions. Therefore the balance of equities -- calculating not only the interests of Petitioners but also the interest of the public at large in guaranteeing compliance with SEQRA by a deterrent effect -- justifies injunctive relief in this case.

## **As and For a First Cause of Action**

(CPLR Section 7803: Determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or evidenced an abuse of discretion)

### The Town Unlawfully Segmented The SEQRA Review And The Court Should Therefore Grant An Order Annulling The Findings Statement And Annulling The Town Approval Of The Site Plan And Rezoning And Other Related Actions

217. Petitioners repeat and incorporate paragraphs 1 through 216 above as if stated herein.
218. The Town review of the Project unlawfully deferred environmental consideration of the construction of an indeterminate number of athletic fields on the land "dedicated" to it, including about ten acres of forest.
219. Further the Town and other agencies deferred environmental consideration of the construction of new lanes of traffic on land surrounding or nearby the Project.
220. As such the environmental review was unlawful segmented in violation of the provisions of 6 NYCRR 617.3(g).
221. Thus the approval of the Findings Statement, rezoning, subdivision, and site plan, and other such related actions by the Town, including issuance of permits derived therefrom, was arbitrary, capricious, affected by an abuse of discretion, based on an error of law, and/or the result of unlawful procedure.
222. The degradation of the enjoyment of their homes and properties otherwise facing beautiful natural woods, the destruction or displacement of wildlife that Petitioners enjoy in the forests, meadows and brushlands of the Property, and the loss of enjoyment of the natural habitat across from their homes and properties that will

result from the flawed SEQRA process will cause material injury to Petitioners that could have been prevented by a proper SEQRA process.

223. Petitioners therefore respectfully request this Court issue an Order nullifying such actions by the Town and other public entities.
224. Petitioners have no adequate remedy at law.

### **As and For a Second Cause of Action**

(CPLR Section 7803: Determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or evidenced an abuse of discretion)

The Town Failed To Take A "Hard Look" At The Impact Of The Project On Wildlife And Natural Habitat And The Court Should Therefore Grant An Order Annuling The Findings Statement And Annuling The Town Approval Of The Site Plan And Rezoning And Other Related Actions

225. Petitioners repeat and incorporate paragraphs 1 through 216 above as if stated herein.
226. The Town failed to require an accurate accounting of the wildlife present on the Property. Furthermore the accounting of habitat was affected by multiple instances of material omission, error, and deceptive arithmetic.
227. Included among such issues is
228. (i) the counting as preserved forest habitat of land clearly planned to be destroyed for new athletic fields; and
229. (ii) the failure to count both forest and meadows/brushland in the base figure of existing natural wildlife habitat, while counting it -- along with new plantings and paved areas -- in the final area of preserved natural wildlife habitat, thus overstating

the percentage of habitat preserved;

230. (iii) the accounting for preserved natural habitat is vague and unverifiable, and actually contains multiple contradictory numbers in the documents themselves; and

231. (iv) the accounting for original natural habitat is not able to be verified by the documents as presented, and the figure given is in fact contradicted by an independent analysis using web--based tools and satellite images.

232. As such the Town failed to take a "hard look" at the environmental impacts on wildlife and wildlife habitat as required by SEQRA.

233. Thus the approval of the Findings Statement, rezoning, subdivision, and site plan, and other such related actions by the Town, including issuance of permits derived therefrom, was arbitrary, capricious, affected by an abuse of discretion, based on an error of law, and/or the result of unlawful procedure.

234. The degradation of the enjoyment of their homes and properties otherwise facing beautiful natural woods, the destruction or displacement of wildlife that Petitioners enjoy in the forests, meadows and brushlands of the Property, and the loss of enjoyment of the natural habitat across from their homes and properties that will result from the flawed SEQRA process will cause material injury to Petitioners that could have been prevented by a proper SEQRA process.

235. Petitioners therefore respectfully request this Court issue an Order nullifying such actions by the Town and other public entities.

236. Petitioners have no adequate remedy at law.

## **As and For a Third Cause of Action**

(CPLR Section 7803: Determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or evidenced an abuse of discretion)

The Town Failed To Take A "Hard Look" At Issues Regarding The Adequacy Of Visual Screening To Neighboring Residents On Round Swamp Road And The Court Should Therefore Grant An Order Annulling The Findings Statement And Annulling The Town Approval Of The Site Plan And Rezoning And Other Related Actions

237. Petitioners repeat and incorporate paragraphs 1 through 216 above as if stated herein.
238. The Town failed to clearly analyze the manner in which the proposed buffer along Round Swamp Road would function in reality to "screen" the neighboring properties.
239. Despite the urging of the Nassau County Planning Commission, only a functionally useless "visual simulation" of the buffer in action was incorporated into the record.
240. The Town failed to address in any way the degradation of the buffer due to the construction of a lighted fitness trail -- of indeterminate width -- in the confines of the buffer.
241. Further the SEQRA Review did not discuss the impact of the reduction of the current buffer at Petitioners properties of about 390 feet to 125 feet, particularly in off-leaf conditions during three seasons of the year.
242. As such the review of the visual impact of the Project on the neighboring properties on Round Swamp Road, although said to be "particularly important", lacked the detail and depth to be considered a "hard look".

243. Thus the approval of the Findings Statement, rezoning, subdivision, and site plan, and other such related actions by the Town, including issuance of permits derived therefrom, was arbitrary, capricious, affected by an abuse of discretion, based on an error of law, and/or the result of unlawful procedure.
244. The degradation of the enjoyment of their homes and properties otherwise facing beautiful natural woods, the destruction or displacement of wildlife that Petitioners enjoy in the forests, meadows and brushlands of the Property, and the loss of enjoyment of the natural habitat across from their homes and properties that will result from the flawed SEQRA process will cause material injury to Petitioners that could have been prevented by a proper SEQRA process.
245. Petitioners therefore respectfully request this Court issue an Order nullifying such actions by the Town and other public entities.
246. Petitioners have no adequate remedy at law.

### **Prayer for Relief**

Petitioners respectfully request this Court issue a judgement and order:

1. Nullifying the Findings Statement of the Town of Oyster Bay with respect to the Country Pointe at Plainview project;
2. Nullifying the rezoning, subdivision plan, and site plan approved by the Town of Oyster Bay for the Country Pointe at Plainview project;
3. Nullifying any permits or other official permissions affecting Country Pointe at Plainview issued by the Town of Oyster Bay;
4. Enjoining the Respondents from in any way damaging or altering the lands, woods, animals or other physical resources and properties on the project site of Country

Pointe at Plainview; and

5. Granting such other relief as to this Court seems just and proper.

The relief sought herein has not been sought previously before this or any other Court.

Nassau County, N.Y.  
June 9, 2015

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