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June 5, 2019

Planning Board
Town of Farmington
1000 County Road 8
Farmington, NY 14425

Re: Application of Delaware River Solar to construct a 7 MW solar facility at 466 Yellow Mills Road
SEQRA Determination of Significance
PB # 1003-18 Preliminary Four-Lot Subdivision Plat
PB # 1004-18 Preliminary Site Plan
PB # 1006-18 Special Use Permit

Dear Planning Board Members:

We represent a group of landowners and residents with respect to the following applications by Delaware River Solar, LLC ("Delaware") to construct a 7 MW solar facility at 466 Yellow Mills Road (the "Project"):

SEQRA Determination of Significance
PB # 1003-18 Preliminary Four-Lot Subdivision Plat
PB # 1004-18 Preliminary Site Plan
PB # 1006-18 Special Use Permit

For the reasons set forth in this letter, we ask you to issue a Positive Declaration of Environmental Significance ("Pos Dec") for the Project, or, in the alternative, deny Delaware's applications for subdivision approval, site plan approval, and a special use permit.



**THE PLANNING BOARD HAS AN OBLIGATION TO PERFORM
ENVIRONMENTAL REVIEW PURSUANT TO THE STATE ENVIRONMENTAL
QUALITY REVIEW ACT ("SEQRA")**

Compliance with SEQRA is mandatory. "No agency involved in any action shall carry out, fund or approve the action until it has complied with the provisions of SEQRA." 6 NYCRR 617.3(a)

SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making, which is effected, in part, through strict compliance with review procedures. *Mearson v. McNally*, 90 N.Y.2d 742, 750 (1997)(citations omitted).

SEQRA requires "literal compliance" with its procedural requirements because the Legislature directed that the policies of the State and its political subdivisions shall be administered "to the fullest extent possible" in accordance with SEQRA. ECL 8-103(6); *Matter of Rye Town/ King Civic Association v. Town of Rye*, 82 AD2d 474 (2d Dept. 1981), app. dismd. 55 NY2d 747 ("*Rye Town*").

**THE PLANNING BOARD MUST EXERCISE ITS OWN INDEPENDENT
JUDGMENT WHEN PERFORMING ENVIRONMENTAL REVIEW PURSUANT
TO SEQRA**

The Planning Board, as lead agency, has the primary responsibility for adhering to SEQRA's procedural requirements. The lead agency has two primary responsibilities: 1) determining the environmental significance of an action; and 2) overseeing preparation of an EIS.¹

In making a determination of significance, a lead agency must:

- (1) consider the action as defined in sections 6 NYCRR 617.2(b) and 617.3(g);
- (2) review the FEAF, the criteria contained in 6 NYCRR 617.7(c) and any other supporting information to identify the relevant areas of environmental concern;
- (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
- (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

¹ 6 NYCRR 617.7

6 NYCRR 617.7(b).

The lead agency's decision is the responsibility of the lead agency, regardless of the source of the advice it receives.² A lead agency "improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking."³ A lead agency must exercise its own judgment when determining whether circumstance may potentially impact the environment.⁴

The SEQRA review process and individual agency permitting processes are different reviews governed by different laws and standards.⁵ A lead agency may not delegate its decision-making authority under SEQRA to another agency involved in an environmental permitting or oversight process related to the Project.

"In making this initial environmental analysis, the lead agencies must study the same areas of environmental impacts as would be contained in an EIS, including both the short-term and long-term effects ... as well as the primary and secondary effects ... of an action on the environment. The threshold at which the requirement that an EIS be prepared is triggered is relatively low: it need only be demonstrated that the action may have a significant effect on the environment."⁶

In its responses to the Planning Board's questions regarding impacts to land/agricultural resources and surface water, the applicant suggests that Department of Agriculture and Markets (NYSDAM) and the Department of Environmental Conservation (NYSDEC) review of other applications is sufficient to show that there is no environmental impact. This is not the case. While the Department of Agriculture reviews projects to avoid or minimize impacts to agricultural land and the Department of Environmental Conservation reviews Stormwater Pollution Prevention Plans (SWPPP) and issues stormwater permits for construction activity, these activities are governed by laws and standards that are separate from the SEQRA review process.

Specifically, Delaware seeks to substitute NYSDAM's judgment concerning the continuing viability of farm enterprises for environmental review by the Planning Board.⁷ This is impermissible. The Planning Board must determine whether the project's impact on Class 1-4 soils may have the potential for

² *Apkan v. Koch*, 75 N.Y.2d 561, 575 (1990); *Coca-Cola Bottling Co. v. Bd. of Estimate of City of New York*, 72 N.Y.2d 674, 682-683 (1988).

³ *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 234 (2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359, 364, 365 (1986).

⁷ DRS response to FEAF Part 2 Supplemental Narrative to Applicant, page 3 (May 30, 2019).

significant environmental impacts independent of the Department of Agriculture and Market's mitigation review.

Further, Delaware suggests that the Planning Board does not need to analyze impacts to Class 1-4 soils or surface water because it must prepare a Stormwater Pollution Prevention Plan (SWPPP) in order to comply with NYSDEC's SPDES General Permit. When reviewing a SWPPP, NYSDEC does not evaluate whether there will be a potentially significant environmental impact. Rather, the necessity for a SWPPP is indicative of the potential for a moderate to large impact on soils and water resources. The purpose of the SWPPP is to establish mitigation measures to reduce erosion and sedimentation during the construction process. The SWPPP has no effect once construction activities have concluded.

Accordingly, the Planning Board, as lead agency, must exercise its own independent judgment when determining whether a circumstance may potentially impact the environment under SEQRA and may not defer to NYSDAM and NYSDEC.

**THE PLANNING BOARD MUST MAKE A
POSITIVE DECLARATION OF ENVIRONMENTAL SIGNIFICANCE**

The primary purpose of SEQRA is "to inject environmental considerations directly into governmental decision making."⁸ To this end, SEQRA requires the preparation of an Environmental Impact Statement ("EIS") when a proposed project "may have a significant effect on the environment."⁹ As the use of word "may" indicates, SEQRA requires that a positive declaration be issued where the potential for a significant environment effect exists.¹⁰ Because the operative word triggering the requirement of an EIS is "may," there is a relatively low threshold for issuance of a Pos Dec and preparation of an EIS.¹¹ Moreover, a Type I action (as is the one here) carries with it the presumption that it is likely to have a significant adverse effect on the environment and is more likely to require an EIS.¹² Accordingly, an EIS is required when the lead agency determines that the action as proposed **may** include the potential for at least one significant adverse impact to the environment.¹³

⁸ *Akpan*, 75 NY2d at 569; See *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dept. 1979).

⁹ 6 NYCRR 617.7(a)(1).

¹⁰ *Farrington Close Condominium Bd. Of Managers v. Incorporated Village of Southhampton*, 205 A.D.2d 623,624 (2d Dept. 1994).

¹¹ *Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 NY2d 382, 397 (1995); (*Omni Partners LP v. County of Nassau*, 237 AD2d 440 (2d Dept. 1997).

¹² *S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564 (2d Dept. 2002).

¹³ *Uprose v. Power Authority of State of New York*, 285 A.D.2d 603, 608 (2d Dept. 2001).

Further, “to determine that an EIS will not be required for an action, the lead agency must determine either that there *will be no environmental effect* or that the identified environmental effects *will not be significant*.”¹⁵

It is worth noting that that “the determination of significance is a threshold determination which should not balance benefits against harm, but rather should consider whether a proposal has any significant adverse impacts. Such balancing may only be done in Findings following an EIS.” SEQRA Handbook, P. 85.

THE PLANNING BOARD HAS IDENTIFIED SIX AREAS OF MODERATE TO LARGE POTENTIAL IMPACTS

The Town correctly identified six potentially significant environmental impacts at its May 15, 2019 meeting including: impacts to land; impacts to agricultural resources; impacts to aesthetic resources; impacts on open space; consistency with community plans; and consistency with community character.

Impacts to Land

At its May 15, 2019 meeting, the Planning Board acknowledged that the Project site contained viable Class 1-4 agricultural soil, found potentially moderate to large impacts to land, and requested additional information regarding site preparation, inspections and abandonment. This is correct because the proposed action would result in the physical disturbance of at least 1.1 acres of agricultural soils and will require: creation of an access road; burying of electric cables; installation of a steel post support structure for 21,000 solar arrays; construction of a concrete pad for each solar system; and installation of inverter and transformer equipment. The physical disturbance of soils and vegetation on the project site may have a potentially significant adverse environmental impact on the environment, requiring issuance of a Pos Dec.

New York State Department of Agriculture and Markets approved mitigation measures for the Project. These measures include compliance with its Guidelines for Agricultural Mitigation for Solar Energy Projects; continued grazing of cattle on the designated grazing areas of the parcel, merging the parcels subdivided after decommissioning, back to their original state of pasture land; a 30 foot-wide path to accommodate farm equipment and cattle to traverse the parcel from the barn on the east side of the parcel to the pasture land on the west and south sides of the parcel; and the proposed area variances pending with the ZBA.

¹⁵ West Branch Conservation Ass’n v. Planning Bd of Town of Clarkstown, 207 A.D.2d 837, 839 (2d Dept 1994).

These mitigation measures indicate that the project may have significant adverse impacts on Class 1-4 soils. It must be emphasized that NYSDAM's determination is not dispositive for the purpose of the Planning Board's SEQRA review. NYSDAM reviews projects to avoid or minimize impacts to agricultural land. The Department of Agriculture is an interested agency for the purpose of SEQRA review; it does not have the authority to determine whether the project may result in potentially significant environmental impacts. The Planning Board must independently determine whether the project's impact on Class 1-4 soils may have the potential for significant environmental impacts independent of the Dept. of Agriculture and Market's determination. The Planning Board does not have adequate information in the administrative record to determine that there will be no potentially significant impacts to land.

The Developer's response to the Planning Board's request for more information was insufficient. The Planning Board requested a geotechnical study, which the Developer will not provide in advance of this meeting, offering mitigation instead. This is an insufficient response and requires a Pos Dec. The Planning Board needs a geotechnical study to properly evaluate the depth and location of the water table.

On Page 2 of its response to the Planning Board's request for more information, the Developer states that:

"If high groundwater is found to be present, the impact of construction can be mitigated by decompaction of soils and preventing any hypothetical spills from construction materials from leaching into soils. While there may be a small impact here, it is not outweighed by the benefits, and is similar to the current uses on the land, and therefore is insignificant."

The Developer's response does not address the Planning Board's request for additional information. It is also unclear as to what the Developer means by "benefits." A determination of significance should focus solely on environmental impacts and "should not balance benefits against harm, but rather should consider whether a proposal has any probable significant adverse impacts. Such balancing may only be done in Findings following an EIS."¹⁶

Additionally, while the Developer has provided a report indicating the results of its pile testing, the limited scope of this report fails to prove that the project site does not contain bedrock. Without a full geotechnical report, it is impossible to know if bedrock is present on the site. A geotechnical report prepared after the determination of environmental significance is made will not satisfy the Planning Board's burden. Therefore, Developer's response does not sufficiently address the Planning Board's request for additional information, and

¹⁶ DEC SEQRA handbook, page 85.

the Planning Board may not condition approval on receipt of future information regarding environmental impacts, as this violates the purpose of SEQRA.

Impacts to Agricultural Resources

At its May 15, 2019 meeting, the Planning Board found potentially moderate to large impacts to Agricultural Resources because the Project may impact soil classified with soil group 1 through 4 of the NYS Land Classification System. The Project will impact agricultural resources because it will convert 30 acres of prime agricultural land to a 7MW commercial scale industrial solar facility. It is likely that one or more moderate to large impacts could occur because the proposed action would result in the physical disturbance of at least 1.1 acres and that the project will fragment critical masses of farmland. The physical disturbance of soils and vegetation on the project site may have a potentially significant adverse environmental impact on the environment, requiring issuance of a Pos Dec.

As noted above, NYSDAM's determination is not dispositive for the purpose of the Planning Board's SEQRA review, and the Planning Board must perform its own independent review. In fact, the project will have a significant environmental impact as these soils will be taken out of use or production or 30+ years.

The Developer's responses to this section do not sufficiently address the Planning Board's questions. The Developer fails to describe the short-term and long-term impacts associated with the loss of Class 1 through 4 Soils from farming operations or cumulative efforts associated with the conversion of farmland soils upon adjacent farming operations. Rather, the Developer punts on this issue by concluding that the Property is currently being used as a pasture. This is irrelevant to the analysis of a potentially significant environmental impact. The economic benefits to the landowners are also irrelevant for the purposes of the Planning Board's determination of significance. Accordingly, the Developer's responses do not sufficiently address the Planning Board's request for additional information, and the Planning Board may not condition approval on receipt of future information regarding environmental impacts, as this violates the purpose of SEQRA. The Planning Board must make a Pos Dec.

Therefore, the Developer's response does not sufficiently address the Planning Board's request for additional information, and the Planning Board must make a Pos Dec.

Impacts to Aesthetic Resources

At its May 15, 2019 meeting, the Planning Board correctly found potentially moderate to large impacts to aesthetic resources because the

proposed project may be visible from publicly accessible vantage points, seasonally and year 'round.

The proposed solar energy facility is entirely inconsistent with the existing natural landscape. Currently, the project site consists of open pastureland with views of adjacent fields and residential properties. The Project will place an industrial solar energy facility in the middle of agriculturally zoned prime agricultural land, which will clash with the existing viewshed.

This Project will cause a substantial change in land use, replace 30 acres of prime agricultural land with industrial solar arrays, and transform rural parcels into industrial uses. These factors indicate that the Project "may" have "the potential" for significant adverse impacts on aesthetic resources and requires further study.

Accordingly, the Planning Board must issue a Pos Dec.

Consistency with Community Plans

At its May 15, 2019 meeting, the Planning Board found potentially moderate to large impacts to consistency with community plans because the proposed action's land use components may be different, or in sharp contrast to, current surrounding land use pattern(s).

The placement of an industrial solar facility on agricultural land is inconsistent with the goals and recommendations of the Town's Comprehensive Plan, which seeks to balance future development goals and natural resource protection, and County's Agricultural Enhancement Plan, which specifically designates the Project's land as a priority for protection.¹⁸ The agricultural character of the Project site will be transformed by the addition of the densely packed, ground-mounted solar arrays, resulting in an industrial use sited in a pastoral agricultural neighborhood. While it the policy of the Town to encourage industrial growth and economic development, the Comprehensive Plan's Future Land Use Plan (#10) makes it clear that this parcel should remain an active agricultural site.

Moreover, the Town considers 4740 Fox Road and 595 Yellow Mills Road to be "notable historic properties." See the Town's Comprehensive Plan, Map No. 12 "Historic Buildings and Grounds". SEQRA review is not confined to historic resources which are listed or eligible for listing on the National or State Register. 6 NYCRR 617.7(c)(i)(v). Furthermore, a registered Public Historian identified these properties as important historic resources.²³ The Public

¹⁸ Farmington Comprehensive Plan. P. 3-1 and Agricultural Enhancement Board letters dated October 2, 2018 and April 9, 2019.

²³ Town of Farmington Historian letter, October 29, 2018.

Historian further states that “seven percent of all cobblestone structures in the state are located in Ontario County.” As these structures have unique historic value, “the proposed action should be required to provide supplemental information that identified what, if any visual or aesthetic impacts, it may have upon the environmental setting, including any impacts upon these historic structures.”

Therefore, the Project is inconsistent with existing community plans, requiring a positive declaration of environmental significance.

Consistency with Community Character

At its May 15, 2019, meeting, the Planning Board found potentially moderate to large impacts to consistency with community character because the proposed action is inconsistent with the predominant architectural scale and character of the community and natural landscape. The proposed solar energy facility is entirely inconsistent with the character of the existing natural landscape because: it will place an industrial solar energy facility in the middle of agriculturally zoned prime agricultural land; and siting arrays near a roadway will dominate and interfere with the development and use of neighboring property as the arrays will be perceived an eyesore, discouraging more desirable future residential and agricultural development near the Project parcels. These factors indicate that the Project “may” have “the potential” for significant adverse impacts to community character and requires further study.

Additionally, the Project is out of character with the surrounding agricultural residential neighborhood and will become an external obsolescence, driving down property values.²⁴

Additionally, the Developer did not provide any studies regarding impacts to property values in Ontario County or the Finger Lakes. Rather, it attempted to refute these facts by offering self-serving statements of alleged communications with officials from other counties. The previous assessment data cited by the Developer is irrelevant because the Developer fails to cite to projects that similar in size and scope. Furthermore, the Developer’s response to the Planning Board’s questions cites to a State of Massachusetts’s Clean Energy Results study, which discusses property values in the context of residential PV systems, not industrial scale systems.²⁵

Further, the Developer’s reliance on *N. Shore Steak House, Inc. v. Bd. of Appeals of Inc. Vil. Of Thomaston* is misplaced. The North Shore Steak House case involved an application for a special exception permit, and the cited language was used by the Court to explain the legal difference between a special

²⁴ Rowe Realty letter dated March 20, 2019.

²⁵ State of Massachusetts, Clean Energy Results, P. 13.

exception permit and a use variance. It simply is irrelevant to any SEQRA analysis as to whether the proposed solar energy facility is visually consistent with the surrounding agricultural farmland and whether its placement in the middle of an agricultural community may significantly affect community character.

The Developer grossly mischaracterizes the project as semi-permanent, while the project will have a long-term impact on the Project site and surrounding landscape. For the purposes of SEQRA review, a project whose duration lasts several decades may be considered environmentally significant, and the long term impacts of this Project and its impact on the natural landscape must be considered by the Planning Board's SEQRA review.

OTHER AREAS OF POTENTIAL IMPACT

In addition to the areas of moderate to large potential impacts identified by the Planning Board in Part 2 of the EAF, we believe that there is sufficient evidence in the record to show that there are moderate to large potential impacts to: surface water, groundwater, drainage, open space and recreation and traffic.

Impacts on Surface Water

It is likely that the one or more moderate to large impacts to surface water could occur because the Project site contains two federally regulated and two state regulated wetlands, which are hydrologically connected to off-site wetlands and streams. Additionally, the fact that Project contains 100 foot buffers around the two NYSDEC wetlands on the site does not necessarily mean that these buffers are adequate to protect these wetlands from project runoff.

The wetlands study performed by North Country Ecological Services delineated the wetlands on the project site, but did not address specific impacts caused by site plan and layout of the solar arrays. This warrants further investigation as Project may affect the water quality of wetlands on and near the site. No data has been provided to this Board about the impact of the addition of 21,000 impermeable solar arrays to the Property. This is a significant addition of impermeable surfaces to a property that is currently undeveloped.

Because the project site disturbs more than one acre it requires a SWPPP approved by NYSDEC. However, the fact that the Project requires a SWPPP does not obviate the need for additional study regarding potential impacts to surface and groundwater. Rather, it should be indicative of the potential for a moderate to large impact on surface water during construction. A SWPPP does not address potential stormwater pollution post-construction.

The Planning Board must determine that an EIS is required if one potentially significant environmental impact may be found. The fact that concentrated stormwater flows resulting from the project's densely massed solar array surfaces may impact waterbodies in and around the site is a potentially significant environmental impact requiring further study by the Planning Board.

Impacts on Groundwater

Potential leaching of chemicals from broken solar panels should be investigated further by the Planning Board. While the project will not use water, most of the Project site contains moderate to high permeability soils.²⁶

These soils lay on top of a principal unconfined aquifer, which recharges from surface water that percolates through the soils when water seeps in from pores in the ground's surface directly above the aquifer. Therefore, the Project may result in potentially significant adverse impacts to the aquifer because it will place 20,000 impervious solar arrays directly on top of the highly permeable soils and impact the underlying aquifer's groundwater recharge rate. This indicates that the Project may have potentially significant adverse impacts to groundwater. Therefore, Project may have significant adverse impacts to surface water.

Impacts on Drainage Patterns

Question 5 of the Full Environmental Assessment Form (FEAF Part 2) asks the reviewing agency to evaluate whether the proposed action may result in development on lands subject to flooding. Lands subject to flooding can include: lands in wetlands or lands where development will change drainage patterns so as to create potential for flooding. This section is not limited to projects located in existing floodplains.

Question 5d asks if "[t]he proposed action may result in, or require modification of existing drainage patterns." Altered flow patterns are all actions that can modify drainage patterns of surface water flow." It is likely that one or more moderate to large impacts could occur "[w]hen land uses with high percentages of the lot are covered in impervious surfaces" and "[w]here stormwater generated on-site will impact water bodies off-site on other properties."²⁷

Here, the proposed action may result in or require modification of existing drainage patterns because it will cover 30 acres of land with impervious surfaces. The Project will create industrial facility containing 21,000 impervious solar arrays on 30 acres of farmland. Concentrated stormwater runoff resulting from

²⁶ Ontario County Planning Board Draft Meeting Minutes, September 12, 2018, P. 16.

²⁷ DEC, SEQRA FEAF Workbook, Question 5. <https://www.dec.ny.gov/permits/91414.html>

densely massed impervious solar array surfaces will impact stormwater flow in and around the Project site. These impacts may be exacerbated by differences in soil and slope characteristics on the Project site. This indicates that the Project may have potentially significant adverse impacts to onsite and offsite surface water and drainage. For these reasons, the Planning Board as lead agency must issue a Pos Dec for this Project.

Impacts on Plants and Animals

At its May 15, 2019, meeting, the Planning Board found that the proposed action may result in impairment of natural functions, or “ecosystem services,” provided by an undeveloped area, including but not limited to stormwater storage, nutrient cycling, and wildlife habitat. These factors indicate that the Project “may” have “the potential” for significant adverse impacts to community character and requires further study.

The Developer failed to comply with the Planning Board’s request to provide documentation as to how the proposed solar arrays will adversely impact existing wildlife habitats on site. The fact that the project site is primarily used as pastureland is irrelevant; the Developer’s response fails to account for the plants and animals that live and migrate through the Project site. Impacts to plants and animals are a potentially significant environmental impact requiring further study by the Planning Board.

Impacts on Traffic

The Project may cause a substantial adverse change in existing traffic or noise levels pursuant to 6 NYCRR 617.7 (c) (1) (i). The Project is located several hundred feet from the well-traversed intersection of Yellow Mills Road and Fox Road. The location of the proposed Project raises serious safety concerns as the it is located in close proximity to a well-traversed intersection. Inadequate landscape buffers and glare from the Project’s densely massed solar panels will distract drivers and create safety issues for drivers and pedestrians. These factors indicate that the Project “may” have “the potential” for significant adverse traffic impacts and requires preparation of an EIS.

In fact, the SFR Associates Trip Generation/Crash Analysis Letter dated May 31, 2019 confirms that the Project is located in close proximity to a dangerous intersection.²⁸ The letter noted that if the number and/or severity of collisions increases, additional warning measures may be needed. In fact, SFR identified that the project intersection has a crash rate of ten times the state average. Additionally, the letter indicated that the “the solar farm sight should

²⁸ SRF Associates Trip Generation/Crash Analysis Letter, dated May 31, 2019.

not have any equipment or plantings within the sight lines of Fox/Yellow Mills Road intersection.”

This letter affirms that the further study of the project’s traffic impacts are needed.

PROPOSED MITIGATION MEASURES CANNOT BE USED AS A SUBSTITUTE FOR A THOROUGH ASSESSMENT OF THE PROJECT’S IMPACTS.

The environmental review process was not meant to be a bilateral negotiation between an applicant and lead agency but, rather, an open process that also involves other interested agencies and the public. Merson v McNally, 90 N.Y.2d 742, 753 (1997); Shawangunk Mountain Environmental Ass’n v. Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 275-76 (3d Dep’t 1990) (Where a lead agency and applicant agree to mitigation measures to safeguard against adverse environmental risks, the procedure employed to achieve the negative declaration violates both the letter and the spirit of SEQRA). A SEQRA review process conducted through closed bilateral negotiations between an agency and an applicant would bypass, if not eliminate, the comprehensive, open weighing of environmentally compatible alternatives both to the proposed action and to any suggested mitigation measures. Mearson, 90 N.Y. 2d at 750.

It is impermissible for the Planning Board to issue a Neg Dec based on the mitigation conditions contained in the declaration itself. This makes the Neg Dec an impermissible Conditioned Negative Declaration (CND) for a Type I action.²⁹ Citizens Against Retail Sprawl ex rel. Ciancio v Giza, 280 A.D.2d 234, 239 (4th Dep’t 2001); Ferrari v. Town of Penfield, 181 A.D.2d 149, 151 (4th Dep’t 1992). It also violates both the letter and the spirit of SEQRA. Shawangunk Mountain Environmental Ass’n v. Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 275-76 (3d Dep’t 1990).

Additionally, using a conditioned negative declaration in a situation where the reviewing agency requires additional information to be submitted prior to approval is not an acceptable use of the CND procedure.³⁰

An important limiting principle in an involved agency's authority to impose mitigating measures is that SEQRA does "not change the jurisdiction between or

²⁹ A conditioned negative declaration (CND) is a form of negative declaration which may be used for Unlistd actions only, and only in limited circumstances. Use of a CND can be appropriate when a lead agency concludes that a proposed action may have a potentially significant adverse impact on the environment, but the impact can be eliminated or adequately mitigated by conditions imposed by the lead agency, without the need for additional environmental studies. DEC, SEQRA handbook, pg 98.

³⁰ <http://www.dec.ny.gov/permits/91836.html>.

among state agencies and public corporations." ECL § 8-0103(6); 6 N.Y.C.R.R. § 617.3(b). As noted above, The SEQRA review process and individual agency permitting processes are different reviews governed by different laws and standards.³¹ A lead agency may not delegate its decision-making authority under SEQRA to another agency involved in an environmental permitting or oversight process related to the Project.

Consequently, the Planning Board, as lead agency, must issue a positive declaration and prepare an EIS. Mearson, 90 N.Y.2d at 754. Mitigating measures proposed by DRS cannot be incorporated into the FEAF and required by the lead agency as a condition precedent to issuing the negative declaration. *Id.*

For example, the fact that the Project requires a SWPPP does not obviate the need for additional study regarding potential impacts to surface and groundwater. Rather, it should be indicative of the potential for a moderate to large impact on surface water. The purpose of a SWPPP is to mitigate impacts during construction, not to evaluate whether and to what extent an impact will occur as required under SEQRA. A lead agency may not delegate its decision-making authority under SEQRA to another agency involved in an environmental permitting, such as the DEC.

Additionally, the Planning Board cannot consider future, speculative proposals for sheep grazing at the site as potential mitigation for the purposes of SEQRA review.

Furthermore, any future proposed Traffic Mitigation Plan should not be considered by the Planning Board as mitigation for potential environmental impacts as the Planning Board's determination of environmental significance should only be premised upon the information it currently has regarding potentially significant environmental impacts.

Finally, a negative declaration cannot be based on results of future studies about potential impacts.³² It must be based on the facts available to the lead agency at the time of the determination.³³ Issuing a negative declaration and then requiring the project sponsor to conduct studies to determine the magnitude of an impact is improper.³⁴ At the time the lead agency makes its negative declaration, the lead agency must have sufficient information to show that no impacts will be significant.³⁵

³¹ *Id.*

³² SEQRA handbook, p. 95.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 96

CONCLUSION

A review of the Developer's responses to the Planning Board's Part 2 FEAF questions demonstrates that the Project may have the potential for significant adverse impacts to land, prime agricultural farmland and aesthetic resources, consistency with community plans, and impacts on community character. The project may have potentially significant impacts on surface water, groundwater, drainage, plants and animals, and traffic conditions. Consequently, the proposed action may have a significant adverse impact requiring a positive declaration of environmental significance and preparation of an EIS.

For the foregoing reasons, we request that the Planning Board a positive declaration of environmental significance and require preparation of an Environmental Impact Statement.

Thank you for reviewing this letter. If you have any questions please do not hesitate to contact me.

Sincerely,



Frances Kabat