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FARMINGTON TOWN

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STATE OF NEW YORK ONTARIO COUNTY
SUPREME COURT

JAMES FALANGA, NANCY FALANGA, DANIEL
GEER, and JAMES REDMOND,

Petitioners,

vs.

TOWN OF FARMINGTON, TOWN OF FARMINGTON
PLANNING BOARD, DELAWARE RIVER SOLAR,
LLC, ROGER SMITH A/K/A RODGER SMITH, CAROL
SMITH, ROCHESTER GAS AND ELECTRIC
CORPORATION, JOHN DOES, AND ABC
CORPORATIONS,

Respondents.

VERIFIED ANSWER
of Respondents Town of
Farmington and the Town of
Farmington Planning Board
to Petitioners'
Petition (Doc 376), with
Objections in Point of Law

Index No. 126079-2019

Respondents Town of Farmington and Town of Farmington Planning Board, for their verified Answer to the Verified Petition of Petitioners (NYSCEF Doc No. 376; hereafter "Petition"), e-filed November 6, 2020 with the Ontario County Court Clerk, respectfully respond to said Petition in three parts, as follows: Part I, addressing the numbered allegations asserted as such in the Petition; Part II, providing the basic grounds for the Planning Board's decisions challenged in this proceeding; and Part III, raising objections in point of law.

Because Petitioners' Petition is very long and raises many claims, and the Administrative Return is very large and covers over two years of Planning Board activities, the Town Answer is lengthy as well. A Table of Contents is provided for the Court's convenience on the following page.

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PART I

Town’s Answer to Petition’s Allegations

For its Answer to the Petition’s numbered allegations, the Town of Farmington and its Planning Board respond as follows:

1. Admit the allegations of the Petition’s paragraphs numbered 2, 3, 4, 7, 16, 20, 30, 34, 35, 42, 43, 45, 50, 51, 52, 54, 55, 56, 62, 64, 68, 73, 74, 75, 76, 78, 79, 80, 81 (with the understanding that the “GML 23 m review” is the GML 239-m review), 82, 83, 84, 85, 86 (with the understanding that the “Agricultural Enhancement Committee” is the Agricultural Advisory Committee), 88, 92, 93, 94, 95, 97, 98, 100, 101 (with the understanding there are no points “a.” or “b.” in the letter, and that there are two typos in the sentence (in for by; on for or) quoted as section “b.”), 102, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 118, 120, 121, 122, 123, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 150, 155, 163, 204, 229, 230, 233, 236, 242, 249, 254, 255, 257, 260, 263, 264, 265, 266, 268, 283 and 300 of the Petition; provided, however, that such admissions are limited to the allegations as stated using commonly understood meanings of the terms used, and any such admission does not extend to any implied concession that such allegation is complete on the issue as stated, nor extends to the construction, significance or consequence of such allegation; and, further, any admission made herein is made subject to the full context and additional relevant facts as may be appropriate to clarify context and meaning, or to provide a full exposition of the applicable law including exceptions and arguments therefore.

2. Deny the allegations of paragraphs 69, 71, 149, 151, 152, 156, 157, 158, 161, 162, 167, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 184, 185, 186, 187, 189, 190, 191, 194, 196, 197, 199, 202, 203, 207, 208, 211, 215, 216, 217, 218, 219, 220, 227, 228, 232, 235, 237, 239, 240, 241, 243, 244, 245, 246, 247, 248, 250, 251, 256, 259, 267, 273, 275, 276, 277, 279, 280, 281, 284, 285, 288, 289, 291, 292, 293, 295, 296, 297, 301, 302, 304 and 305 of the Petition.

3. Deny, upon information and belief, the allegations of paragraphs 160, 169, 221 and 223 of the Petition. The basis for the Town's information and belief is the information contained in the Administrative Return, filed with this Court.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 8, 9, 10, 11, 14, 15, 17, 18, 21, 22, 23, 27, 29, 31, 32, 36, 37, 38, 39, 40, 41, 44, 46, 47, 48, 49, 53, 57, 59, 60, 61, 67, 87 and 195 of the Petition.

5. Repeat and re-allege the Town's responses herein as if set forth at length to the corresponding paragraphs in the Petition when numbers of previous paragraphs are reasserted by Petitioners in their causes of action, such as contained in Petition paragraphs 271, 274, 278, 282, 286, 290, 294, 298 and 303; and in the event of any confusion regarding repeated allegations, deny them.

6. Admit the allegations in paragraph 1 of the Petition that Petitioners have brought this CPLR Article 78 proceeding to challenge some actions made by the Town of Farmington Planning Board with respect to Delaware River Solar, LLC's proposed 7.014 MW solar facility in the Town of Farmington to be located on part of the Smiths' property commonly known as 466 Yellow Mills Road, Town of Farming, New York; but deny the remaining allegations of the paragraph.

7. Admit the allegation in paragraph 5 of the Petition that current Town records show that the listed owners for 395 Ellsworth Road, Farmington, are James and Nancy Falanga; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

8. Admit the allegations in paragraph 6 of the Petition that the Falanga Property at 395 Ellsworth Road is divided into two parcels—one 5.4 acre parcel containing a cobblestone house, and a second parcel of 97.5 acres of farmland, some of which is located across Fox Road from the northern portion of the Proposed Facility; but deny the remaining allegations of the paragraph.

9. Admit the allegation in paragraph 12 of the Petition that current Town records show that the listed owner for 568 Yellow Mills Road, Farmington, is Daniel Geer; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegation of the paragraph.

10. Admit the allegation in paragraph 13 of the Petition that that the property indexed in the current Town records for 568 Yellow Mills Road consists of 98.6 acres; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

11. Admit the allegation in paragraph 19 of the Petition that current Town records show that the listed owner for 4500 Fox Road, Farmington, is James Redmond; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegation of the paragraph.

12. Admit the allegation in paragraph 24 of the Petition that current Town records show that the listed owners for 373 Ellsworth Road, Farmington, are James and Ann Foley; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

13. Admit the allegation in paragraph 25 of the Petition that the property indexed in the current Town records for 373 Ellsworth Road contains a single-family residence built long ago on a 4.5 acre parcel with 21.6 acres of farmland, wooded areas and wetlands; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

14. Admit the allegation in paragraph 26 of the Petition that the Foley Property is located directly north of the Falanga Property along Ellsworth Road; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

15. Admit the allegation in paragraph 28 of the Petition that current Town records show that the listed owner for 5191 Fox Road, Farmington, is Petrina Case; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

16. Admit the allegations in paragraph 33 of the Petition that current Town records show that the listed owners for 230 Ellsworth Road, Farmington, are Eric and Edith Chapman; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

17. Admit the allegations in paragraph 58 of the Petition that the Project Site portion of the property where the proposed solar farms project is to be situated is pastureland and contains prime agricultural soils classified as soil group 1 through 4 of the NYS Land Classification System; but deny that the Project Site contains only pastureland and only soils classified as soil group 1 through 4.

18. Admit the allegation in paragraph 63 of the Petition that the Revised Environmental Assessment Form filed at Doc # 316 states that "This wetland discharges across Fox Road, eventually to Ganargua Creek;" but deny knowledge or information sufficient to form a belief as to the truth of any remaining allegations of the paragraph.

19. Admit the allegations in paragraph 65 of the Petition that DRS's Project proposes construction on a 43.1 acre portion of the property at 466 Yellow Mills Road of three separate commercial solar facilities totaling approximately 7 megawatts (MW) in capacity through 21,000 solar photovoltaic panels in total; but deny the remaining allegations of the paragraph.

20. Admit the allegations in paragraph 66 of the Petition that a gravel access road and loop totaling some 3,000 square feet is proposed to be constructed with access off Fox Road to connect to the entrance of the Project, and 8' fencing is proposed to surround the Proposed Facility; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

21. Admit the allegations in paragraph 70 of the Petition that the Proposed Facility will be located a few hundred feet from the Geer lot line; but deny the remaining allegations of the paragraph.

22. Admit the allegations in paragraph 72 of the Petition that the proposed Project will disturb 2.6 acres of agricultural soils and will involve creation of an access road, burying of electric cables, installation of a support structure for about 21,000 solar panels, construction of a

small concrete pad for each solar system, and installation of inverter and transformer equipment; and admit the solar panels and inverter pad will cover about 9.4 acres within the proposed fenced area of 31.4 acres within the total 43.1 acres leased for the Project; but deny the remaining allegations of the paragraph.

23. Admit the allegations in paragraph 77 of the Petition that DRS submitted revised subdivision and site plans to the Town of Farmington, and that the Project's site plans were further updated on October 31, 2019 and November 1, 2019, prior to the Planning Board's December 18, 2019 Negative Declaration; and admit that additional revisions to the Project's site plans were made on July 28, 2020, September 8, 2020, and October 14, 2020; but deny the remaining allegations of the paragraph.

24. Admit the allegations in paragraph 89 of the Petition that the Town Historian's letter dated October 29, 2018 characterizes the cobblestone structures at 4740 Fox Road and 595 Yellow Mills Road as having "historic value;" but deny the remaining allegations of the paragraph.

25. Admit the allegations in paragraph 90 of the Petition that the Planning Board held its first public hearing regarding SEQRA review for the Project on November 7, 2018, designated itself as lead agency for SEQRA review, and continued public hearings to December 5, 2018, while also directing Town Staff to prepare a draft of Parts 2 and 3 of the Full Environmental Assessment Form for review and acceptance at the December 5, 2018 meeting. However, the remaining allegations of paragraph 90 are denied, as the November 7, 2018 public meeting was properly noticed as indicated by the Affidavit of Publication sworn to October 31, 2018, submitted as a Supplement to the Administrative Record (Exhibit 266) at NYSCEF Doc No. 359.

26. Admit the allegations in paragraph 91 of the Petition that James Redmond submitted a letter dated November 20, 2018 addressed to Ronald Brand with copies to all committee members regarding traffic dangers of the Yellow Mills Road/Fox Road intersection; but deny the remaining allegations.

27. Admit the allegations in paragraph 96 of the Petition that on or about January 10, 2019, DRS submitted the review of the wetlands delineation report prepared by Diehlux, LLC, to the Planning Board, which verified a delineation finding made by North Country Ecological Services; but deny the remaining allegations.

28. Admit the allegation in paragraph 99 of the Petition that the Planning Board received correspondence from Ruth Ann Rowe dated March 20, 2019 stating, among other things, her opinion that the Project had the potential to decrease property values; but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph.

29. Admit the allegation in paragraph 103 of the Petition that on or about April 17, 2019, Petitioners' attorney submitted a letter to the Planning Board setting forth their reasons that a positive declaration of environmental significance should be issued and the site plan and subdivision approvals denied; but deny the remaining allegations of the paragraph.

30. Admit the allegation in paragraph 104 of the Petition that on or about April 24, 2019, Developer's counsel responded to the April 17, 2019 letter submitted by Petitioners' counsel; but deny the remaining allegations of the paragraph.

31. Admit the allegations in paragraph 113 of the Petition that SRF Associates provided the Town with a letter on or about May 31, 2019, that was not a Traffic Impact Study, but which concluded that a Traffic Impact Study was not needed due to the low volume of traffic that would be generated by the site, indicated that the Yellow Mills/Fox Roads intersection had a relatively high accident rate, and stated that the Project's landscaping needed to take the intersection sight lines into consideration; but deny the remaining allegations of the paragraph.

32. Admit the allegation in paragraph 117 of the Petition that the conclusions of the SRF Associates' traffic analysis letter were also discussed at the June 5, 2019 Planning Board meeting; but deny the remaining allegations of the paragraph.

33. Admit the allegation in paragraph 119 of the Petition that counsel for DRS submitted a letter to the Town on or about July 10, 2019, responding to a June 5, 2019 letter from Petitioners' counsel; but deny the remaining allegations of the paragraph.

34. Admit the allegations in paragraph 125 of the Petition that the Planning Board asked the Developer to briefly summarize the contents of its letter from Bergman Engineers dated August 7, 2019; that during the public hearing portion of the meeting, individual petitioners James Falanga and James Foley argued that the Project's potentially significant environmental impacts had not been fully investigated by the Planning Board; and that the Planning Board issued a negative declaration for the Project; but deny, upon information and belief, the remaining allegations of the paragraph.

35. Admit the allegation in paragraph 145 of the Petition that 6 NYCRR 617.7[a][1] provides that to require an Environmental Impact Statement for a proposed Type 1 action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact; but deny the remaining allegations of the paragraph.

36. Admit the allegations in paragraph 148 of the Petition that to determine whether a proposed Type I action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria found in 6 NYCRR 617.7[c]; but deny the remaining allegations of the paragraph inconsistent with the stated regulation.

37. Admit the allegation in paragraph 153 of the Petition that the Project will result in a change in some use of the land at issue from prime agricultural farmland to solar energy collection up to about 7MW; but deny the remaining allegations of the paragraph.

38. Admit the allegations in paragraph 154 of the Petition that the Developer's geotechnical report contains recommendations regarding parts of the Project; but deny the remaining allegations of the paragraph.

39. Admit the allegations in paragraph 159 of the Petition that the Developer's geotechnical report indicates that the Project site contains soil conditions with varying thermal resistivity values, and notes that hot spots may develop which could burn out wiring; but deny the remaining allegation of the paragraph.

40. Admit the allegations in paragraph 164 of the Petition regarding the Ontario County Agricultural Enhancement Board; but deny the remaining allegations of the paragraph.

41. Admit the allegation in paragraph 165 of the Petition that the geotechnical report indicates that the soil corrositivity is low; but deny the remaining allegations of the paragraph.

42. Admit the allegations in paragraph 166 of the Petition that zinc-coated steel posts are proposed to be driven into the ground to support solar panels, and admit that some information indicates in some conditions that rainwater and water condensation can corrode galvanized steel pilings, that it is possible that zinc can be dispersed into the environment from corroded galvanized steel pilings, and that high zinc concentrations that are bioavailable can have negative impacts; but deny the remaining allegations of the paragraph.

43. Admit the allegation in paragraph 168 of the Petition that the Project site currently consists of open pastureland; but deny the remaining allegations of the paragraph.

44. Admit the allegation in paragraph 170 of the Petition that the proposed Project will be a substantial change in some land use; but deny the remaining allegations of the paragraph.

45. Admit the allegation in paragraph 171 of the Petition that the Project site lies in the midst of a parcel that is identified in the Ontario County Agricultural Enhancement Plan—2018 as priority land for protection; but deny the remaining allegations of the paragraph.

46. Admit the allegation in paragraph 182 of the Petition that the Project will place approximately 21,000 solar panels over part of a principal, unconfined aquifer and near but separate from federal and state wetlands; but deny the remaining allegations of the paragraph.

47. Admit the allegation in paragraph 183 of the Petition that the Future Land Use Map (#10) of the Town of Farmington Comprehensive Plan identifies certain wetland areas along

the stream on the western side of the Smiths' property as an environmentally sensitive area; but deny the remaining allegations of the paragraph.

48. Admit the allegation in paragraph 188 of the Petition that the Project Site sits above part of a principal, unconfined aquifer, which recharges from water seeping down from the ground above the aquifer; but deny the remaining allegations of the paragraph.

49. Admit the allegations in paragraph 192 of the Petition that the Planning Board determined that the Project would not have any significant adverse impacts to vegetation and fauna, the Project site is pastureland, and not home to any known threatened or endangered species; but denies the remaining allegations of the paragraph.

50. Admits the allegations in paragraph 193 of the Petition that the Planning Board was informed that the Project will result in some land clearing activities and that the Project site is home to a several kinds of common animals which live and migrate through the Project site; but denies the remaining allegations of the paragraph.

51. Admits the allegation in paragraph 198 of the Petition that the Project is located several hundred feet from the intersection of Yellow Mills Road and Fox Road in the Town of Farmington; but denies, upon information and belief, the remaining allegations of the paragraph.

52. Admit the allegations in paragraph 200 of the Petition that Petitioners have cited to the Planning Board a number of safety concerns regarding the Yellow Mills Road/Fox Road intersection, including reference to one fatality and information that drivers regularly ignore the stop sign for the intersection; but deny the remaining allegations of the paragraph.

53. Admit the allegations in paragraph 201 of the Petition that Petitioners have stated to the Planning Board their opinion that the Yellow Mills Road/Fox Mills Road intersection will become more dangerous at morning and evening rush hour during the Project's construction period; but deny the remaining allegations of the paragraph.

54. Admit the allegation in paragraph 205 of the Petition that SRF Associates' letter dated May 31, 2019 states that the Yellow Mills Road/Fox Road intersection had an accident rate that is ten times higher than the statewide average; but deny the remaining allegations of the paragraph.

55. Admit the allegation in paragraph 206 of the Petition that SRF Associates' letter dated May 31, 2019 states that if the number and/or severity of collisions increases, OCDPW may consider additional warning measures; but deny the remaining allegations of the paragraph.

56. Admit the allegation in paragraph 209 of the Petition that a letter dated August 29, 2018 from the NYS Office of Parks, Recreation, and Historic Preservation stated that the Project would not have impacts on archeological and/or historic resources listed in or eligible for listing

on the New York State and National Registers of Historic Places; but deny the remaining allegations of the paragraph.

57. Admit the allegations in paragraph 210 of the Petition that a cobblestone house is located to the northwest of the Project site at 4740 Fox Road and a second cobblestone house is located across the street and south from the Project site at 595 Yellow Mills Road; but deny the remaining allegations of the paragraph.

58. Admit the allegation in paragraph 212 of the Petition that a registered Public Historian opined that the two aforementioned cobblestone houses have historic value, suggested that the owners place them on the National Registry of Historic Places, and stated in a letter dated October 29, 2018 that “[t]he 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”; but deny the remaining allegations of the paragraph.

59. Admit the allegations in paragraph 213 of the Petition that the Project site is near a drumlin on the southern portion of the Smiths’ property, which the Town generally considers a unique natural resource and an environmentally sensitive natural feature; but deny the remaining allegations of the paragraph.

60. Admit the allegation in paragraph 214 of the Petition that a drumlin exists on the southern portion of the Smiths’ property; but deny the remaining allegations of the paragraph.

61. Admit the allegations in paragraph 222 of the Petition that solar photovoltaic panels can contain metals such as arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver which can be hazardous to human health if absorbed or ingested in sufficient quantity; but deny, upon information and belief, the remaining allegations of the paragraph.

62. Admit the allegations in paragraph 224 of the Petition that solar photovoltaic panels can be damaged during severe weather events, such as rain and windstorms, increasing the risk that toxic compounds contained in some photovoltaic panels may be released into the environment; but deny, upon information and belief, the remaining allegations of the paragraph.

63. Admit the allegations in paragraph 225 of the Petition that the Project is proposed to have at least a thirty-year life, and routine maintenance may only take place a few times per year; but deny the remaining allegations of the paragraph.

64. Admit the allegation in paragraph 226 of the Petition that landfilling some solar photovoltaic panels may result in toxic metals leaching out into the environment; but deny, upon information and belief, the remaining allegations of the paragraph.

65. Admits the allegations in paragraph 231 of the Petition that a conditioned negative declaration may not be issued for a Type I action, as is the Project; but denies the remaining allegations of the paragraph.

66. Admit the allegation in paragraph 234 of the Petition that the geotechnical study made many recommendations; but deny the remaining allegations of the paragraph.

67. Admit the allegation in paragraph 238 of the Petition that the wetlands delineation study verified the size and location of wetlands on the Project site, and indicated that some wetlands on the Project site are hydrologically connected to some neighboring properties; but deny, upon information and belief, the remaining allegations of the paragraph.

68. Admit the allegations in paragraph 252 of the Petition that SEQRA regulations (6 NYSRR § 617.7[f][1]) provide that a lead agency must rescind a negative declaration when: (i) substantive changes are proposed for the project; or (ii) substantive new information is discovered; or (iii) substantive changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result; but deny the remaining allegations of the paragraph.

69. Admit the allegations in paragraph 253 of the Petition that revisions to the site plan stemming from the Zoning Board of Appeals decision to deny the Developer's area variance applications resulted in changed circumstances, new project information and changes to the site plan; but deny the remaining allegations of the paragraph.

70. Admit the allegations in paragraph 258 of the Petition that notice of the Planning Board's December 18, 2019 Neg Dec in the DEC's Environmental Notice Bulletin for January 22, 2020 did not indicate that a Neg Dec had been previously issued on August 7, 2019, and did not discuss amendment to the Neg Dec of December 18, 2019; but deny the remaining allegations of the paragraph.

71. Admit the allegations in paragraph 261 of the Petition that the grant of the special use permit to the Smiths with conditions on October 7, 2020, was a culmination of the Planning Board process for that application; but deny the remaining allegations of the paragraph.

72. Admit the allegations in paragraph 262 of the Petition that the requirements for a special use permit for a large-scale ground-mounted solar facility in the Town of Farmington are set forth in Farmington Town Code Chapter 165 Zoning, particularly § 165-65.3 and § 165-99[C]; but deny the remaining allegations of the paragraph.

73. Admit the allegations in paragraph 269 of the Petition that this Court has jurisdiction over this special proceeding pursuant to CPLR Article 78; but deny the remaining allegations of the paragraph.

74. Admit the allegations in paragraph 270 of the Petition that venue is proper in Ontario County pursuant to CPLR § 7804[b] and CPLR §§ 504, 506[b], and 507; but deny the remaining allegations of the paragraph.

75. Admit the allegations in paragraph 272 of the Petition that the Planning Board determined that the Project would not significantly impact plants and animals, transportation, historic resources and geologic features adjacent to the Project site; but deny the remaining allegations of the paragraph.

76. Admit the allegations in paragraph 287 of the Petition that a lead agency may not generally delegate its responsibilities under SEQRA; but deny the remaining allegations of the paragraph.

77. Admit the allegations in paragraph 299 of the Petition that the requirements for a special use permit for a large-scale ground-mounted solar farm may be found in the Farmington Town Code at §§ 165-65.3 and 165-99 [C]; but deny the remaining allegations of the paragraph.

78. Finally, deny, upon information and belief, each and every other allegation in the Petition, whether numbered or not, not specifically admitted, denied or uncontroverted in this Answer, including admissions based on an expressed understanding or assumption that is not valid.

PART II

Grounds for Planning Board Decisions

As provided in CPLR § 7804[d], Part II of the Town’s Answer provides the pertinent and material facts showing the grounds of the Planning Board’s actions complained of.

The Petition complains of four actions taken by the Town of Farmington Planning Board with regard to Delaware River Solar, LLC’s proposed 7MW solar system to be located at 466 Yellow Mills Road in the Town of Farmington: (1) Planning Board’s August 7, 2019 Negative Declaration of Environmental Significance and accompanying Resolution; (2) Planning Board’s December 18, 2019 Negative Declaration of Environmental Significance and accompanying

Resolution; (3) Planning Board’s Special Use Permit granted October 7, 2020; and (4) Planning Board’s Preliminary Site Plan Approval granted November 4, 2020. Petition ¶ 4.

In each case, the Planning Board heard and considered the information presented to it by the Smiths, developer Delaware River Solar, LLC (DRS) and its engineers, consultants and counsel, by Petitioners and their counsel, by Town staff, and by other interested or involved agencies, residents of the Town of Farmington and members of the public, then sifted the information for significance and reliability, evaluated the significant information and weighed it against the issues to be addressed, and reached a considered, collective and rational decision as a matter of policy and discretion in compliance with law. That the Planning Board decided the issues differently than Petitioners wanted provides no basis to annul the Planning Board determinations reached after fair public process. As will become evident, there is no merit to Petitioners’ challenge to the Planning Board decisions and so their Petition should be dismissed, with prejudice, and without any relief to them.

Note that references to “Doc” in this Answer mean documents filed with NYSCEF in this proceeding at the designated document number.

Point 1**Planning Board's August 7, 2019 Negative Declaration
of Environmental Significance and accompanying Resolution**

- A. The Planning Board's August 7, 2019 Negative Declaration is moot, but the SEQRA review process resulting in that obsolete determination was beneficial in evaluating DRS's revised solar system proposal that resulted in another but new Negative Declaration on December 18, 2019.**

Although Petitioners directly challenge the Planning Board's August 7, 2019 Negative Declaration of Environmental Significance (Neg Dec) and accompanying Resolution, that result is not relevant to current issues, is moot, and need not be addressed on the merits.

The Planning Board's August 7, 2019, Negative Declaration of Environmental Significance was effectively rendered obsolete when DRS's proposed solar system for which the Neg Dec was declared was abandoned by DRS following the denial of required setback variances by the Town Zoning Board of Appeals shortly after the Planning Board's August 7, 2019 Neg Dec was issued. DRS subsequently revised its proposed solar system to comply with setback requirements, redesigned its Points of Interconnection to reduce the length of the access road, and rearranged some solar arrays that shifted the solar system footprint some 45' southeast. These changes were minor and would not require a new SEQRA review but out of an abundance of caution the Planning Board treated DRS's revised solar system proposal of November 1, 2019 (DRS's revised solar system proposal) as a new design proposal that warranted an additional SEQRA review and so a new SEQRA review process was undertaken. Consequently, the August 7, 2019 Neg Dec result of the original SEQRA review process for DRS's originally proposed

solar system was superseded by events, became practically obsolete with the change of design plans, and has no legal significance since the Planning Board renewed its SEQRA review for DRS's revised and current solar system proposal resulting in another but new Negative Declaration on December 18, 2019.

Even so, the original SEQRA review process for DRS's original solar system proposal (that is substantially similar to DRS's revised solar system proposal) was relevant to identification of associated environmental issues, education of the Planning Board on potential risks involved, communication of viewpoints of interested agencies and observers, and evaluation of the significance of the relative environmental risks, all of which informed the Planning Board's analysis of DRS's revised solar system in the renewed SEQRA review. The information and comments considered in the original SEQRA review process for DRS's original solar system proposal were again relevant and considered in the Planning Board's new SEQRA review process for DRS's revised solar system proposal (which was substantially similar to its original solar system proposal). In sum, the Planning Board's August 7, 2019 Neg Dec *result* is not relevant to this proceeding and has become moot since it was superseded by the December 18, 2019 Negative Declaration applicable to DRS's revised and current solar system proposal finally approved by the Planning Board on December 16, 2020, but the Planning Board's original SEQRA *public process review* regarding DRS's original solar system proposal was beneficial and contributed substantial information about the proposed solar system and issues to the Planning Board's renewed SEQRA review process of DRS's revised solar system proposal which resulted in another but new Negative Declaration related thereto dated December 18, 2019.

The Planning Board's original SEQRA process is summarized here to demonstrate the thoroughness of the Planning Board's first environmental risk assessment undertaken in this matter and which information and analysis was carried forward into a renewed SEQRA review process for DRS's slightly revised solar system proposal which again resulted in another but new Negative Declaration of Environmental Significance dated December 18, 2019, and accompanying Resolution, discussed in the following section.

B. Summary of Planning Board's initial SEQRA review process resulting in the August 7, 2019 Negative Declaration

The Town of Farmington enacted new Local Law No. 6 of 2017, amending its Town Code to permit large-scale ground-mounted solar systems in the A-80 Agricultural District with a special use permit. DRS subsequently applied for permissions to construct and operate a large-scale ground-mounted 7MW solar system consisting of three independent but adjoining 2.388MW solar systems, each comprised of 7,000 solar arrays plus some associated equipment, each on their own subdivided lot, which solar system would connect to RG&E facilities in the area and supply substantial solar-generated electricity to Town residents who desired the available discount and others connected to RG&E's energy grid. The Smiths agreed to lease part of their large farm property to DRS to host the proposed solar system to be located on part of 466 Yellow Mills Road in the Town of Farmington, which is situated in the A-80 Agricultural District. Docs 4, 89-94.

The Town's Planning Board then became obligated to consider DRS's proposed solar system under the new Town law and Town Code as written and under existing New York land law, which latter provisions included a requirement that the Planning Board consider DRS's proposed project under the State Environmental Quality Review Act (SEQRA). Environmental Conservation Law § 8-0109. The paramount purpose of SEQRA is to inject environmental considerations into land use planning from the outset—and that state goal was realized in this case.

From the beginning of DRS's applications for approval of its solar system plans in summer of 2018, the Planning Board has proceeded in accordance with SEQRA's legal requirements, both procedurally and substantively, and conducted its SEQRA review of the proposed solar system in a public and well-attended process over an extended period of time to give all the environmental issues and interested voices full consideration as is evidenced in the Administrative Return.

Town staff began work on DRS's proposed solar system through the Farmington Project Review Committee, which work attended to details of DRS's proposal and supported Planning Board consideration of the novel proposal—the largest large-scale solar system sought to be approved in Farmington under new Local Law No. 6 of 2017. *E.g.*, Doc 95, 109, 118.

The Planning Board began preparing to address DRS's proposed solar system with consideration of the proposal at its September 9, 2018 meeting; and, after the Zoning Board of

Appeals declined to serve as lead agency for SEQRA review, the Planning Board designated itself the lead agency for SEQRA review at its October 3, 2018 meeting. Docs 114, 121.

The Town sought input about DRS's proposed solar system from various involved and interested state, county and local organizations. *See* Doc 118.

In response, the Planning Board received comments from state, county and town organizations: New York State Department of Agriculture and Markets (Doc 244); New York State Energy Research and Development Authority (Doc 244); New York State Office of Parks, Recreation and Historic Preservation (Doc 107); New York State Department of Environmental Conservation (Doc 234); Ontario County Planning Board (Doc 111 at 18-20); Ontario County Agricultural Enhancement Board (Doc 122, 241); Town of Farmington Conservation Advisory Board (Doc 134); and Town of Farmington Historian (Doc 152).

From the outset, DRS provided the Planning Board with numerous plans, maps, consultants reports, and technical data about the solar system equipment and solar panels to be used. *E.g.*, Docs 89, 91-93, 100, 196, 200. *See also, e.g.*, Doc 174 at 9 (“MRB Group has received the full package of materials for the three solar systems including the applicant’s drainage reports, environmental records associated with the project and information which supports the Town’s solar law regarding the decommissioning plan, surety bond estimate and operations plan which details the day-to-day, month-to-month and year-to-year operations.”)

Over the course of a year's investigation into the environmental issues involved with DRS's proposed solar farms project, the Planning Board conducted eight public hearings where interested residents such as Petitioners could hear from DRS, and Town residents could ask questions and voice their opinions. *See* Docs 157 (November 11, 2018), 174 (December 5, 2018), 218 (January 16, 2019), 248 (April 17, 2019), 268 (May 15, 2019), 281 (June 5, 2019), 290 (July 17, 2019), and 299 (August 7, 2019).

The Planning Board also provided a dedicated website within the Town's official website where anyone could follow the information presented to the Planning Board and the Planning Board's actions—which website and information is still being maintained and updated as the proposed solar farms project proceeds. https://www.townoffarmingtonny.com/solar_committee. As a result of that dedicated website, Town residents and interested persons have had prompt and full access to the information before the Planning Board, and Town residents could be as well informed about the SEQRA process in this matter as they wanted to be. Hard copies of each item were also available for review in the Town's Building Department. Docs 268 at 6, 299 at 5.

The public actively participated in the public hearings regarding the proposed solar farm Project, which attracted unusual interest from Town citizens and required moves to a larger meeting venue. *See, e.g.*, Doc 157, 174, 218, 268.

The Planning Board received many comments from Town citizens about the proposed solar system—some in favor, and some against. *E.g.*, Docs 123-33, 135-51. For example, the

Planning Board heard comments that the Smiths should be able to use their property to host a solar farm if they want, that solar is the future and the Town should get aboard, and that solar energy provides benefits and is a better means to maintain the agricultural nature of the area than developing it with residential homes. Docs 173 at 16, 18; 174 at 11, 16, 18; 207; 218 at 12; 268 at 11. Other commentators feared industrial development, hazardous chemicals that might be released into the environment, and questioned why the Smiths would take the land out of cultivation for thirty-five years. Docs 257 at 16, 18; 163 at 1; Doc 268 at 13. The Smiths agreed to host DRS's solar farms to strengthen their traditional farming operation and keep it going for another thirty years since their actual farming operation would not be affected, and help the Town transition to solar energy and provide its benefits to the community. Docs 188, 174 at 8.

Some of the Smiths' neighbors did not want the proposed change in their neighborhood even though the solar farms project would be completely situated within the Smiths' private property and screened hundreds of feet from their lot lines. Petitioners actively participated in the public hearings to oppose DRS's proposed solar system, and during the lengthy public hearing process Petitioners and their counsel submitted numerous statements, letters and documents to the Planning Board regarding their concerns about potential adverse environmental impacts. *E.g.* Docs 126, 127, 129, 132, 137, 142, 145, 162, 180, 190, 204, 220, 225, 228, 232, 242, 257, 258, 259, and 261; *see also* Petitioners' counsel correspondence: Docs 245, 265, 267, 272, 280, 288, and 295. Petitioners' active involvement ensured that the Planning Board was presented and considered every conceivable environmental risk as part of its lengthy and extensive SEQRA review. *See id.*

The Planning Board was not passive nor derelict in its investigative duty but pushed DRS to produce information and answer questions to address various environmental issues. *E.g.*, Docs 161, 172, 205, 229, 268 at 30.

DRS responded as requested and provided written responses to questions from the Planning Board and Town residents. *E.g.*, Docs 167, 168, 203, 206, 210, 253, 274, 275, 286.

The Town also pushed its own engineers MRB Group to hire a certified wetland biologist to review DRS's Wetlands Delineation Report, which was done. Doc 174 at 9; Docs 201, 202.

DRS addressed issues of concern raised by public commentators, demonstrating, for example, that the solar panels to be chosen for installation would be approved as nonhazardous by the United States Environmental Protection Agency, UL (Underwriter's Laboratories), and the International Electrotechnical Commission against hazardous chemicals leaching from broken or damaged panels. *E.g.*, Doc 100 at 14, citing IEC 61215 (terrestrial solar PV panels suitable for long-term operation in general open-air climates, including passing tests for humidity-freezing, thermal cycling, outdoor exposure and hail), IEC 61730 (solar PV panels safety against electrical shock, fire hazard, and mechanical and structural safety (wind and snow)); UL 1703 (solar PV panels must pass tests for fire, temperature cycling, accelerated aging, corrosive atmosphere, arcing, handle wind and snow loads, *et al.*). Similarly, the solar panels would not be an eyesore because of the low-key nature of fixed solar panel arrays less than ten feet high tilted south away from most vantage points, with hundreds of feet of buffer space, behind landscape screening, and

using anti-glare technology reducing reflection to that of a forest. *See, e.g.*, Docs 318, 100 at 35, 35-37.

The Planning Board had the benefit of multiple expert opinions.

The Town had its own engineering experts in MRB Group, who provided input on the various environmental issues to be addressed. *E.g.*, Docs 292, 334; *see also, e.g.*, Docs 95 at 15, 157 at 10, 281 at 5-6. At the Planning Board's request, MRB Group retained a wetland biologist firm Diehlux, LLC to review the Wetland Delineation Report by North Country Ecological Services, Inc. Docs 201, 202.

The Planning Board retained its own traffic expert SRF Associates to analyze traffic issues in connection with the proposed solar system. Doc 276.

DRS submitted various expert reports to the Planning Board to address environmental issues of concern. *See* Toxicity Test Report of solar panels from TestAmerica, Inc. (Doc 110); Wetlands Delineation Report by North Country Ecological Services, Inc. (Docs 8, 201); Soils Report from Schulz Associates, Engineers & Land Surveyors, P.C. (Doc 178, 181, 182); Photo simulations from Saratoga Associates, Landscape Architects, Architects, Engineers and Planners, P.C. (Doc 191, 192, 195, 196, 284); Geotechnical Evaluation by Foundation Design, P.C. (Doc 287); Bergmann Associates letter of August 7, 2019 (Doc 33/34, 97); Naval Facilities Engineering Command Engineering and Expeditionary Warfare Center re Electromagnetic

Interference near airfields (Doc 256); Clean Energy Results report regarding ground-mounted solar photovoltaic systems prepared by Massachusetts' Department of Environmental Conservation (Doc 274, Appx C); and a Proposed Decommissioning Plan (Doc 90).

Petitioners submitted their own expert engineer's opinion to challenge DRS's experts. *E.g.*, Doc 296 (Lakeside Engineering PC). *Cf.* Doc 97.

And during this process the Planning Board received legal opinions on various issues before the Board from Town counsel, DRS's counsel and Petitioners' counsel. *E.g.*, Docs 164, 194, 213, 255, 285, 294, 245, 265, 267, 272, 280, 288, and 295.

As a result of this vigorously-disputed SEQRA process, the Planning Board had the benefit of multiple expert opinions on various environmental issues, as well as the benefit of its own Town engineers and traffic consultant, public comment, Petitioners' viewpoints, the Town of Farmington Comprehensive Plan, Town of Farmington Future Land Use Map, Town Code and New York land law. *See, e.g.*, Docs 298, 36, 37. *See also* Town Code §§ 165-65.3, 165-99. The Administrative Record relevant to the Planning Board's August 7, 2019 Neg Dec shows the Planning Board received over two hundred documents regarding DRS's proposed solar system leading up to that determination—many of which contained multiple and lengthy appendices so that the printed record would fill almost two banker's boxes. *See* Doc 89-299.

This extensive and extended investigative process with the active involvement of Petitioners ensured that the Planning Board identified every relevant environmental issue, and took the requisite “hard look” at environmental issues of DRS’s proposed solar system as required by state policy established in SEQRA.

After considering and evaluating all the information provided in the Administrative Record in compliance with applicable law, the Planning Board prepared, as required, Parts 2 and 3 of the DEC’s Full Environmental Assessment Form (FEAF). Docs 268, 298, 299. *See also* Doc 519 ¶ 18.

The Planning Board then concluded its SEQRA review with a Negative Declaration of Environmental Significance on August 7, 2019, by Resolution of such date, in which the Planning Board provided a reasoned elaboration of the basis for its Neg Dec determination that took five single-spaced pages. Docs 298, 299 (p 17-21).

In this matter of great public interest, the Town of Farmington’s Planning Board fulfilled the state’s environmental policy in SEQRA to consider environmental risks at the outset of the agency’s deliberations, and over the course of a year discharged its duty to investigate, consider and reach a collective Planning Board conclusion regarding whether DRS’s proposed solar system may have a significant adverse impact on the environment. In the end, and reasonably so, the Planning Board determined that the proposed solar system would not have a significant adverse impact on the environment and therefore an environmental impact statement need not be

prepared—and so issued a Negative Declaration as provided by SEQRA. Docs 298, 299. Notice of the August 7, 2019 Neg Dec was published as required in the NYS Department of Conservation Environmental Notice Bulletin on August 21, 2019. Doc 300.

As evidenced by this summary and as detailed extensively in the Administrative Return, the Planning Board provided more than the procedural process DRS's proposed solar system required in an extensive, extended, public and fair manner, and reached a justifiable conclusion regarding the environmental impact of DRS's proposed solar system that the Planning Board alone, as lead agency under SEQRA, was charged with assessing. 6 NYCRR § 617.7[a].

Although Petitioners apparently would have made a different determination based on their self-interests, it was not their call—nor anybody else's—to make. *See Coca-Cola Bottling Co. of New York, Inc. v Board of Estimate of City of New York*, 72 NY2d 674 [1988]. The Planning Board had good grounds to reach the reasonable Negative Declaration conclusion it did—that even ten acres of solar panels certified by multiple agencies not to be hazardous even if broken installed impermanently above ground on posts set back from area wetlands, a small flood zone along a stream and neighbors (and with drip edges around each solar panel so that precipitation would reach the same vegetated ground within a couple feet of the natural fall zone) would not have a significant adverse impact on the environment of the Smiths' pastureland or any neighboring property. Docs 298, 299.

The extensive and lengthy process the Planning Board engaged in as its SEQRA review of DRS's original proposed solar system provided a firm foundation for the Board's result—a

Negative Declaration issued on August 7, 2019. The Planning Board’s SEQRA review conclusion was effectively negated when the Zoning Board of Appeals subsequently denied DRS and the Smiths the setback variances necessary for DRS’s original solar system design. Doc 301 at 17-28.

DRS abandoned its original solar system design needing setback variances and in September 2019 and November 1, 2019, proposed a new, altered design for its proposed solar system that was slightly different but had no need for setback variances. Docs 303-08, 317-21. The Planning Board renewed its SEQRA review process for DRS’s revised solar system proposal that did not require setback variances as is discussed in the next section.

Point 2

Planning Board’s December 18, 2019 Negative Declaration of Environmental Significance and accompanying Resolution

As discussed, the Planning Board’s August 7, 2019 Negative Declaration based on DRS’s original proposed solar system with setback variances was effectively negated by the Zoning Board of Appeals’ denial of required setback variances needed to implement DRS’s original solar system design. Also, as discussed, DRS abandoned its proposed solar system design needing setback variances and proposed a new revised solar system design that did not require setback variances. Docs 303-08, 317-21. DRS’s revised solar system was substantially similar to its original solar system because the perceived setback requirements changed from 160 feet of setback for each system for the original solar system design to only 40 feet under a different

interpretation of the Town Code—not much difference from the 20 foot setback variances DRS had sought from the Zoning Board of Appeals for its original solar system design. Doc 314.

The Planning Board continued its public hearings on DRS's solar system proposal at a public hearing on September 4, 2019, where DRS and the Planning Board addressed the consequences of the Zoning Board of Appeals' denial of the requested setback variances. Doc 302. DRS indicated its was redesigning its solar system proposal to comply with Town Code setback requirements and avoid any need for variances. *Id.* at 5. The Planning Board acknowledged that the new review process would begin with revised designs submitted to the Town's Project Review Committee, and deferred further consideration and the public hearing to its next meeting scheduled for October 16, 2019. *Id.* at 5-6.

DRS submitted revised design changes to its proposed solar system to the Town, which changes were taken up by the Town's Project Review Committee on September 6, 2019. Doc 303.

As presented to the Town:

The new design is a relocation of panels from areas of the site to within the minimum 40-foot setbacks from all property lines. The original footprint largely stays the same. We increased the 20-foot setbacks between the three systems to 40 feet, which creates two 80-foot corridors, dividing the three systems east to west. We moved the panels in these two 80-foot-wide corridors to the eastern side of the system by adding one rack of panels to the eastern side of the project area (see the Layout V2 comparison map). This extends the system 45 feet toward Yellow Mills

Road. Landscaped screening was realigned around the perimeter of the eastern side of the project area, and enhanced.

The majority of panel relocation took place in the interior of the original footprint, within the 160-foot setback behind the Smith’s barn, which was reduced to 80 feet. Most panels that were moved were relocated to this space (see the Layout V2 comparison map). We retained the southern cattle pass-through corridor from the barn to the western pasture fields, which is now five feet wider than originally proposed.

Doc 303 at 22-23. *See also* Doc 314.

As indicated, the overall design of DRS’s proposed solar system had not changed significantly in the new revision that did not utilize setback variances. The proposed use for DRS’s revised solar system remains the same—to generate about 7 MW of electricity from solar energy under the state’s Community Solar Program on three subdivided lots of the Smiths’ farm at 466 Yellow Mills Roads in Farmington. The proposed solar systems were still large-scale ground-mounted energy systems, the same as before and again totaling 21,000 solar panels on racked supports suspended in a fixed-tilt position above the ground between some 3’ and 9.2’ tall, and with the same inverter and transformer electrical equipment. The revised design primarily relocates some of the solar panels to the southeast portion of the property and shifts the total project design 45’ southeast towards Yellow Mills Road, reducing the distance of the closest solar farm facility point to that road from 412’ to 367’. Docs 319-21. The new design footprint was no closer to any wetland or the stream flood zone, nor any closer to Fox Road, and solar system equipment actually only occupies 9.426 acres out of the 43.056 acres allocated to the three subdivided lots hosting the solar systems—still providing less than 25% of lot coverage by the solar systems and again leaving the large majority of the subdivided lots as green space.

Docs 303 at 22-24; 308.

The new slight design changes to DRS's revised solar system proposal were not material and did not appear to affect the environmental risks evaluated by the Planning Board for the previous design. *See* Docs 304, 310. It would be reasonable to conclude that the limited and non-significant environmental impact remained the same under both proposed project designs. *See Residents Against Wal-Mart v. Planning Board of the Town of Greece*, 60 AD3d 1343, 1344-45 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009] (planning board complied with the requirements of GML §§ 239-m and 239-n without having to resubmit revised plans to county planning when there was no substantial difference between the materials).

Thus, while there is a significant question about whether a new SEQRA review was required for DRS's revised solar system proposal that was so close to its original proposal, the Planning Board determined to treat the new revised solar system proposal with a renewed SEQRA review, obviating the issue and rendering its August 7, 2019 Neg Dec conclusion moot.

At the Planning Board's October 16, 2019, meeting, the Planning Board formally determined that there was new information about DRS's proposed solar system that had resulted in a new design that may be substantive and warranted renewed SEQRA consideration so as to determine whether there may now be a significant adverse environmental impact based upon said changes. Doc 312 at 8.

Accordingly, the Planning Board directed DRS to prepare a revised Part 1 of the Full Environmental Assessment Form, along with any other supporting documentation for the Board's

consideration. Doc 312 at 8. The Planning Board expressed its intent to revisit its SEQRA review upon receipt of a revised Part 1 EAF by DRS by then completing an appropriately revised Parts 2 and 3 of the Full Environmental Assessment Form prior to making any amendment of the Negative Declaration that has been previously issued. Doc 312 at 9.

DRS prepared a revised Part 1 EAF on October 31, 2019, and submitted it to the Planning Board. Doc 316. The changes were so few and minimal they are not worth mentioning. Doc 314 at 4-5. DRS submitted a set of revised project plans to the Planning Board (Docs 314, 315), but then DRS was able to reach agreement with RG&E to relocate the Points of Interconnection for its three solar systems into a more central location so that the access road length could be reduced, and this second and final revision was incorporated into DRS's second revised solar system proposal of preliminary site plan and subdivision plat drawings submitted to the Planning Board on November 1, 2019. Docs 317, 319-21.

The Planning Board promptly sent a copy of DRS's November 1, 2019 revised solar system plans to involved agencies seeking comment. Doc 519 Ex G. *See also* Doc 323 at 16.

At its November 6, 2019 meeting, the Planning Board accepted DRS's revised Part 1 EAF and continued the public hearing to November 20, 2019, to "enable the public and the involved agencies time to review the new applications referenced above herein; to enable the Ontario County Planning Board time to complete its review of the new information, as provided for under the provisions of Sections 239-l, -m & -n of the New York State General Municipal

Law; to review the November 1, 2019, Town Project Review Committee (PRC) meeting with Town Staff; and to allow the Planning Board, in turn, time to determine what, if any changes may be necessary to complete Parts 2 and 3 of a Full Environmental Assessment Form.” Doc 323 at 16. The Planning Board also directed “the Town Director of Planning and Development to send a complete set of the above described new information to the involved agencies....” Edward Hemming, Chairperson of the Planning Board, said that the Town staff and the Planning Board are being cautious in view of the pending litigation and taking what may be viewed by some as excessive steps to be sure that each Involved Agency, the Ontario County Planning Board and the public are aware of the revisions to the application and have the opportunity for review and comment. Doc 323 at 14-15.

New photo simulations were provided that do not appear much different from the prior ones. *Cf.* Doc 325, 326; 191, 195.

Petitioners’ counsel weighed in on the new design, rehashing old arguments and citing to submissions made in the initial SEQRA review such as the geotechnical report, historian opinion, and traffic analysis. Doc 328.

At the Planning Board’s November 19, 2019, meeting, the Planning Board determined that additional time was needed by the involved agencies, the public and the Planning Board to consider the issues in light of the recently submitted information and so continued the public hearing to December 4, 2019. Doc 330 at 11.

The Planning Board did not receive much feedback from agencies on DRS's revised solar system design. The Ontario County Planning Board reviewed the design changes, but merely re-issued its prior comments. Docs 324 at 11-12, 311 at 8-10. NYSERDA responded to the new design revision only to say it had no new comments. Doc 327. No other agency responded.

On November 27, 2019, DRS updated its response to a prior submission back on May 30, 2019 to account for changes necessitated by the revised site plan design. Doc 331. *Cf.* Doc 275. That submission included correspondence from Foundation Design, P. C. again indicating its initial Geotechnical Evaluation from the original SEQRA review still applied even though the footprint of the proposed solar system had been moved slightly southeast towards Yellow Mills Road. Doc 331 at 1, 16.

DRS provided the opinion of Bergmann Associates disputing the concerns and conclusions of the Petitioners' engineer. Doc 97. The Town's engineer also weighed in on December 4, 2019, and countered criticisms of the Petitioners' engineer. Doc 334. Petitioners also submitted another statement of their concerns on December 4, 2019, incorporating the criticisms of their engineer. Doc 335.

At its December 4, 2019, meeting, the Planning Board determined to adjourn the public hearing on DRS's proposed solar system to December 18, 2019, to ensure sufficient time to review the provided information and determine whether any changes to the August 7, 2019 Neg

Dec were warranted by the new design change and information submitted in relation thereto.
Doc 336 at 10.

On December 10, 2019, DRS responded to the Petitioners' December 4, 2019, statement, which was followed by additional correspondence to the Planning Board from Petitioners' counsel. Docs 337, 338.

Thus, the Planning Board again had the benefit of multiple viewpoints on DRS's revised solar system proposal: DRS, its counsel, its engineers Bergmann Associates and Foundation Design, P.C., and photographers Sarasota Associates; Petitioners and their counsel and engineer Lakeside Engineering PC; and the Town's engineer; plus the information and comments of participants in the original SEQRA review still found relevant by Petitioners as well. An updated preliminary Stormwater Pollution Prevention Plan was also part of the information before the Planning Board. Doc 313.

On December 18, 2019, the Planning Board held its final public hearing on the environmental aspects of DRS's November 1, 2019 revised design for its proposed solar system. Doc 342. After hearing from Petitioners' counsel and Mr. Falanga and Ms. Herberle, and hearing no further comments or questions about the revised design, the Planning Board moved on to address the Full Environmental Assessment Forms Part 2 and Part 3 for the revised design. Doc 342 at 8-9. The Planning Board found no differences that would change the findings of the Full Environmental Assessment Form Part 2 of May 15, 2019. *Id.* See Docs 339, 519 ¶¶ 39, 40. The

Planning Board completed Part 2 of the Full Environmental Assessment Form for DRS's revised solar system proposal as the Board had previously. Doc 519 ¶ 18, Ex E.

The Planning Board then addressed Part 3 of the Full Environmental Assessment Form. Doc 342 at 9-12. *See* Doc 340. In sum, the Planning Board found that there was new information about DRS's revised proposed solar system that warranted consideration under SEQRA, and the Planning Board had reopened public hearings on the matter and considered the new information. The Planning Board found that DRS's revised proposed solar system still involved the construction of three 2.388 mega-watt alternating-current solar facilities, for a total of 7 megawatts AC of electricity generation from a total of 21,000 solar panels to be located upon 43 acres of land involving three proposed subdivided lots from the original tax map parcel number 010.00-01-037.110 [the Smiths' property at 466 Yellow Mills Road, Farmington]; the total project acreage has decreased in size from 63 acres to 43 acres of land, thus resulting in less agricultural land being used for the proposed solar arrays and electric transfer system; the anticipated disturbed area has increased from 1.1 acres to 2.6 acres due to design changes that now included more vegetative screening, and tree planting, as well as increased access road area to accommodate RG&E requirements, and a larger construction staging area and erosion and sediment controls such as silt fence; and the slightly shifted location (45' southeast) would not involve drastic changes in subsurface conditions that would impact the prior Geotechnical Evaluation. Doc 342 at 10-11. The Planning Board's findings were based on the new information provided regarding DRS's revised solar system proposal dated November 1, 2019, as supplemented with the Board's previous extensive environmental review of DRS's similar

original solar system proposal. Doc 519 ¶¶ 19-27, 29. The Planning Board members concluded that the revised DRS proposal is basically the same application as originally proposed without any significant changes. Doc 342 at 13.

The Planning Board also found that stormwater issues could not be settled without an approved final site plan as is usual for construction projects, but further found that no construction would occur without full compliance with the applicable SWPPP requirements of the NYS Department of Conservation and the Town Code, and NYSDEC had recently audited the Town's Stormwater Management Program and found it acceptable. Doc 342 at 11-12.

Finally, the Planning Board "considered the criteria set forth in Part 617 of the State's Environmental Quality Review Regulations and has again made a reasoned elaboration of the impacts likely to result from the amended Preliminary Subdivision Plat and amended Preliminary Site Plan drawings associated with the above referenced applications, finding that based upon the additional information received in the environmental record now on file in the Town's Development Office and posted upon the Town's website, that the proposed Action will not have any significant adverse impact(s) upon the environmental setting in the Town of Farmington." Doc 342 at 12. The Planning Board's reasoned elaboration spans four pages of its Resolution and Part 3 of the Full Environmental Assessment Form with two supplemental pages. Docs 342 at 19-22, 340, 341. *See also* Doc 519 ¶¶ 19-27.

The Planning Board then adopted an extended resolution addressing the environmental impacts of DRS's revised solar system proposal and again concluded that DRS's large-scale solar system proposal, even as revised, will not result in any significant adverse environmental impacts that were not identified in the original Determination of Non-Significance issued August 7, 2019. Doc 342 at 22. Consequently, "the Planning Board does hereby affirm its previous Determination of Non-Significance upon said Action and directs the Planning Board Chairperson to sign and date the revised Part 3 of the Full Environmental Assessment Form and the Negative Declaration Form." *Id.*

Chairperson Edward Hemminger then executed Part 3 of the Full Environmental Assessment Form as directed by the Planning Board, concluding again for DRS's revised solar system proposal that it will result in no significant adverse impacts on the environment, and therefore, an environmental impact statement need not be prepared. Docs 340, 341.

Thus, based on its review of—and renewed hard look at—DRS's revised proposed solar system, the prior environmental record and the supplemental record developed in public for DRS's revised design plans proposed November 1, 2019, the Planning Board again considered the information presented to it, identified and evaluated the environmental risks with the benefit of Petitioners' active participation, and reached a considered, collective and independent determination that another Negative Declaration under SEQRA for DRS's revised proposed solar system was warranted. Accordingly, the Planning Board issued another but new Negative Declaration for DRS's revised solar system proposal on December 18, 2019, and made a

reasoned elaboration therefore. Docs 340, 341, 519 ¶¶ 19-27. *See also* Doc 342. Notice of the new Negative Declaration for DRS’s revised solar system proposal was published in the NYS Department of Environmental Conservation Environmental Notice Bulletin on January 22, 2020. Doc 357 at 1-2.

As this summary demonstrates, the Planning Board complied with all procedural and substantive requirements of SEQRA in reaching its second conclusion that another but new Negative Declaration under SEQRA was warranted for DRS’s revised solar system proposal. There is no legitimate basis for a legal challenge to the Planning Board’s SEQRA determination for DRS’s proposed solar system, whether as originally proposed or revised, reached after a fair and public process that was clearly not abrupt, unfounded, arbitrary, capricious or irrational, nor affected by an error of law.

Point 3

**Planning Board’s Special Use Permit
granted with conditions on October 7, 2020**

Along with its request for site plan and subdivision plat approvals, DRS, on behalf of the Smiths, requested a special use permit for its proposed solar system back in the summer of 2018. Doc 4. The Planning Board opened a public hearing on DRS’s special use permit application on November 7, 2018, which was continued through the Planning Board’s SEQRA review processes already discussed. Doc 157 at 6.

Following its December 18, 2019 Negative Declaration for DRS's revised solar system proposal, the Planning Board undertook consideration of the Smiths' request for a special use permit for their property at 466 Yellow Mills Road to host DRS's proposed solar system.

Large-scale ground-mounted solar farms such as the ones DRS proposed for the Smiths' farm are specifically permitted as a special use in the A-80 Agricultural District where the Smiths' property is located. TC § 165-65.3.

As the Court is aware, under New York land law, a proper application for a permitted special use must be approved subject to appropriate conditions unless there is good and lawful cause to deny the application. *E.g., Carrol's Development Corp. v. Gibson*, 73 AD2d 1050 [4th Dept 1980], *aff'd* 53 NY2d 813 [1981] (a special use permit confers authority to use property in a manner that is permitted by a zoning ordinance under stated conditions, and such a permit is required to be granted unless reasonable grounds exist for its denial). General objections from neighbors and residents are not a valid lawful basis for refusing to issue a requested special use permit for a property zoned to allow such special use permit. *E.g., Matter of Royal Management, Inc. v. Town of West Seneca*, 93 AD3d 1338, 1339-40 [4th Dept 2012] (board could not deny special use permit on ground that aesthetics of project were out of character with neighborhood when requested action was a permitted special use).

In this case, after the December 18, 2019 Negative Declaration and despite pandemic restrictions, the Town conducted six additional public hearings over ten months on the issue of a

special use permit for the Smiths to host solar systems on their Yellow Mills Road property as proposed. Docs 414 (January 15, 2020); 430 (February 19, 2020); 458 (August 5, 2020); 478 (September 16, 2020); 499 (October 7, 2020).

The knowledge and expertise the Town developed in addressing the SEQRA issues for the large-scale solar systems proposed by DRS was applied to the special use permit consideration. The Town's Project Review Committee met six times in public sessions following the December 18, 2019 Negative Declaration to address issues involved with consideration of a special use permit for DRS's proposed solar system, some of which meetings were attended by James Falanga. Docs 424 (February 7, 2020); 433 (March 6, 2020); 453 (July 2, 2020); 459 (August 7, 2020); 467 (September 4, 2020); 492 (October 2, 2020). At the August 7, 2020 Project Review Committee meeting (open to the public), DRS exhibited a solar panel to demonstrate its lack of glare to the Committee members. Doc 459 at 36.

Again, the Planning Board heard from DRS, town residents including some Petitioners, Petitioners' counsel, and the Town's own engineers MRB Group. *E.g.*, Docs 456, 471, 475, 476-77, 480-84, 486-88, 491, and 498. In addition, the Planning Board itself had questions for DRS about details of decommissioning the solar systems at the end of their useful lives. *E.g.*, Docs 347, 430, 478, 499. And again DRS provided responses the Planning Board found reasonable. *E.g.*, Docs 452, 460, 491, 493-97.

The Planning Board received additional revised plan designs, proposed decommissioning plans, an operations and maintenance plan, and revised Stormwater Pollution Prevention Plans (SWPPP). *E.g.*, Docs 423, 462, 469, 470, 473, 474. The Town's engineers responded. *E.g.*, Docs 446, 485.

As part of its special use permit review process, the Planning Board issued a detailed and lengthy draft special use permit resolution on May 6, 2020. Doc 441. The proposed resolution contained proposed findings as required by the Town Code and numerous conditions to maintain Planning Board oversight over the proposed solar system to the extent permitted by law to protect against foreseeable problems with the construction and operation of the proposed solar farms. *Id.* In response, DRS suggested some revisions based on its better familiarity with the technology involved, and objected to some provisions. Doc 452. Differences over provisions and conditions contained in the draft special use permit resolution such as a soil sampling protocol were addressed and resolved in a public process. *See, e.g.*, Docs 441, 452, 466, 487, 488, 490, 499, 500.

In the end, after an additional ten month process dedicated to special use permit consideration, the Town developed an extensive and sophisticated final set of fifty-five detailed conditions to ensure compliance with the Town Code, safe operation of the solar systems, and financially-responsible decommissioning of the proposed solar systems in the foreseeable future. Doc 500. The conditions imposed by the Planning Board included, for example, detailed and regular reporting of solar system operations, periodic soil sampling at the solar system sites,

updating of the decommissioning surety every three years, use of an environmental monitor during construction and decommissioning, requirement of an acceptable Decommissioning Plan, and post-decommissioning monitoring of the site. Doc 500.

After a final public hearing on the matter on October 7, 2020, the Planning Board made required findings under the Town Code that complied with both the specific Town Code provisions for large-scale ground-mounted solar systems (TC § 165-65.3 [F, H]) and the general provisions for special use permits. TC § 165-99 [C][5]. Docs 499, 519 ¶ 65.

At that same public meeting of October 7, 2020, the Planning Board finally approved a Special Use Permit for the Smiths to use a certain part of their land at 466 Yellow Mills Road for the proposed large-scale ground-mounted solar systems subject to fifty-five conditions. Doc 500.

Again, the Planning Board properly discharged its duties with respect to the Special Use Permit granted to the Smiths for part of their property at 466 Yellow Mills Road, Farmington. As with the Negative Declarations, the Planning Board engaged in an extended, extensive, public and fair process considering the requested Special Use Permit and only granted it in accordance with the requirements of the Town Code and New York land law, with appropriate and extensive conditions. Thus, again, there is no basis for invalidating a collectively-considered and rational determination rendered by a political agency charged with the Town's responsibility to address

the special use permit issue after a fair and public process that was clearly not abrupt, unfounded, arbitrary, capricious or irrational, nor affected by an error of law.

The Town notes that the approved Special Use Permit in this matter is not yet effective as the Smiths, DRS and its affiliates, and the Town have not yet agreed to a Decommissioning Plan satisfactory to the Town, and DRS has not yet provided the requisite financial security to ensure the Town does not incur any costs in decommissioning any of the solar systems at the end of their operational life.

Point 4

Planning Board's Preliminary Site Plan Approval granted with conditions November 4, 2020

Along with its request for a special use permit, DRS, on behalf of the Smiths, proposed a preliminary site plan for its proposed solar system back in the summer of 2018. Doc 4. The Planning Board opened a public hearing on DRS's site plan application on November 7, 2018, which was continued through the Planning Board's Negative Declaration and Special Use Permit processes already discussed. Doc 506 at 8. The Planning Board determined to resolve the SEQRA and special use permit issues before major consideration of DRS's preliminary site plan application, though work was done on the Preliminary Site Plan application in conjunction with the other issues being addressed by the Planning Board in this matter. *See, e.g.*, Doc 458 at 17.

Following the December 18, 2019 Negative Declaration, the Planning Board conducted six public hearings on DRS's site plan application in 2020: January 15, 2020 (Doc 414); February 19, 2020 (Doc 430); August 5, 2020 (Doc 458); September 16, 2020 (Doc 478); October 7, 2020 (Doc 499); and November 4, 2020. Doc 506. In total, the Planning Board conducted seventeen public meeting on DRS's preliminary site plans. *See* Doc 506 at 8.

As various issues arose over the course of Planning Board consideration, DRS's proposed preliminary site plans went through multiple revisions to address issues raised by the Planning Board, which included various site plan issues such as fencing, signage, landscape screening, topsoil stockpiling, storage locations, sheep grazing to control vegetative growth, and erosion control. Each revision was the subject of a public hearing as well as the Town's Project Review Committee, where much of the detailed work on DRS's proposed preliminary site plans was done, and which meetings were open to the public and frequently attended. *E.g.*, Docs 453, 459, 492, 499. The Planning Board ensured that DRS's preliminary site plans complied with Town Code requirements. *See* TC § 165-100.

On November 4, 2020, after final requests for comments, the Planning Board closed the public hearing on DRS's Preliminary Site Plan application. Doc 506 at 8-9. The Planning Board then granted approval of DRS's latest preliminary site plan subject to various conditions. Doc 506 at 11-16.

Consistent with the Planning Board’s handling of the Negative Declarations and Special Use Permit, DRS’s latest Preliminary Site Plan was approved November 4, 2020 in an extended, extensive, public and fair process in accordance with the requirements of the Town Code and New York land law, with appropriate conditions.

Thus, as before, there is no basis for invalidating a rational determination rendered by a political agency charged with the Town’s responsibility to address the issue after a fair and public process that was clearly not abrupt, unfounded, arbitrary, capricious or irrational, nor affected by an error of law.

Finally, it should be noted that the Planning Board subsequently approved a Final Site Plan and Final Subdivision Plat for DRS’s revised solar system proposal on December 16, 2020. Doc 518 at 38-42.

PART III

**OBJECTIONS IN POINT OF LAW
CPLR § 7804[f]**

1. Petitioners lack standing to bring their Article 78 Petition, which should be dismissed. The Town incorporates by this reference its prior Motion to Dismiss for Lack of Standing and accompanying Memorandum of Law and Reply Memorandum of Law filed with this Court, and raises those standing issues here against the individual Petitioners the same as if fully set forth. NYSCEF Docs 391, 392, 393 and 396. In addition, the Town’s renewed challenge to Petitioners’ standing in this Answer imposes on Petitioners an evidentiary burden to establish their standing with sufficient sworn and probative facts, not merely to state a claim, which burden is not met with Petitioners’ Petition, particularly as it lacks a verification by a person with personal knowledge of the Petition’s facts and claims.

2. There is no legal basis for an award of attorney fees to Petitioners in this matter and so such claim must be dismissed as improper in law.

3. The Administrative Record filed in conjunction with this Answer demonstrates that the Planning Board properly identified the relevant environmental risks, took the requisite hard look at the environmental risks, and reached a considered, collective and independent determination that DRS’s solar system proposals, both as originally submitted and as revised, would not have a significant adverse environmental impact, and so validly issued Negative Declarations on August 7, 2019, and December 18, 2019, with a reasoned elaboration for its

determinations, and had those Negative Declarations published in the NYS Department of Environmental Conservation's Environmental Notice Bulletin. Furthermore, the Administrative Record establishes that the Planning Board found that the special use permit and site plans for DRS's revised solar system complied with Town Code requirements and so properly approved them with appropriate conditions, and such determinations were rational, and not arbitrary, capricious or affected with an error of law. Consequently, Petitioners' challenges to these determinations must be denied, and the Planning Board's determinations upheld as a valid discharge of its authority and responsibility under the Farmington Town Code.

Conclusion

WHEREFORE, Petitioners' claims to the Planning Board determinations challenged in this Article 78 proceeding must be denied on the law and on the merits, and their Petition dismissed, with prejudice, and costs, together with such other, further and different relief as to the Court seems just and proper.

Dated: May 7, 2021
Rochester, New York

BRENNA BOYCE, PLLC

By: ___s/Sheldon W. Boyce, Jr. ___

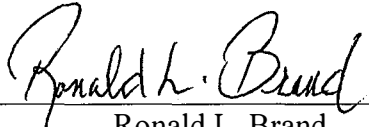
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Town of Farmington and Town of
Farmington Planning Board*

Verification

STATE OF NEW YORK)
COUNTY OF ONTARIO) ss.:

Ronald L. Brand, being duly sworn, deposes and says that he is Director of Planning and Development for the Town of Farmington and is authorized to attest to the foregoing facts on behalf of the Town of Farmington and its Planning Board, that he has read the foregoing Answer with Objections in Point of Law of the Town in this proceeding, and knows the contents thereof, and that the same is true to deponent's knowledge except as to matters therein stated to be alleged upon information and belief, and that as to such matters deponent believes them to be true based on his position with the Town, attendance at Town, Planning Board and Project Review Committee meetings and familiarity with the Administrative Record in this matter.



Ronald L. Brand

Sworn to before me this 11 day of May, 2021.



Notary Public

MARCY L DANIELS
Notary Public, State of New York
Qualified in Wayne County
Reg. #01DA6408248
Commission Expires 8/17/ 2024