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By Hand Delivery

Hon. Thomas Heaslip
Chairman of the Town-Village of Harrison
Planning Board
1 Heineman Place
Harrison, New York 10528

Re: Falcon Group, LLC - Proposed Sherman Avenue Subdivision

Dear Chairman Heaslip and Members of the Planning Board:

This Firm represents the Purchase Environmental Protective Association (“PEPA”) and Harrison Mamaroneck River Association (“HMRA”) in connection with the review of the above-referenced subdivision proposal (“Proposal”).

Respectfully, the analytic gaps in the Final Environmental Impact Statement (“FEIS”) prepared for the Proposal demonstrate that the Applicant: (i) has failed to conduct the analysis required by the New York State Environmental Quality Review Act (“SEQRA”), and, for this and other reasons; (ii) has not met its burden of establishing that its Proposal complies with the Town of Harrison’s (“Town”) Steep Slope Protection Law (“Steep Slopes Law” or “Law”).

The Steep Slopes Law unambiguously establishes that “the applicant has the burden of proof and has the burden of demonstrating that the proposed activity will be in accord with the findings and legislative intent [of the Law].” (Harrison Code § 199-8(B)(5).) In the FEIS, however, the Applicant seeks to shift the burden of proof to the Town, and also fails to carry out much of the analysis required by the Steep Slopes Law based on the assertion that it “purchased the Property prior to the enactment of the Steep Slopes Law and, in fact, filed its application before the law was adopted.” (See, e.g., FEIS at II-16.) In reality, whether the fact that the Applicant may have acquired the Property and/or filed its Proposal before the Town adopted the Steep Slopes Law is irrelevant to the Law’s applicability to the Proposal. The Applicant’s

insistence on adhering to a development objective formulated before the adoption of the Steep Slopes Law is unreasonable and untenable.

The Applicant also cannot insert qualifying language into the Law to rationalize its overambitious Proposal for this severely constrained Property. The Steep Slopes Law places severe and unequivocal restrictions on development on steep slopes. The Law contains a variance procedure, which specifically directs that an applicant who feels unduly constrained by the Steep Slopes Law must seek a variance from the Zoning Board of Appeals ("ZBA"). This variance procedure contrasts with other analogous environmental protection laws. Your Board should recognize that the Town Board inserted a variance procedure into the Steep Slopes Law for a reason. Respectfully, the Planning Board does not have authority to vary the application of the Steep Slopes Law.

If the Applicant wishes to proceed with the Proposal it must accept that it is subject to the Steep Slopes Law in its entirety. It must fill in the gaps left in its SEQRA analysis by virtue of its presumptuous and erroneous insinuation that it benefits from some form of "vesting" or "grandfathered" status. At this point, the FEIS contains multiple areas in which the Applicant has deferred or avoided critical analysis, in contravention of SEQRA.

**Respectfully, The Planning Board Must Reject
The Applicant's Steep Slopes Application**

The Town's Steep Slopes Law obligates the Planning Board to deny a Steep Slopes Permit where, as here, the Applicant, by its own admission, has not met its burden of showing that all reasonable alternatives have been explored. The Steep Slopes Law unequivocally establishes that the Planning Board "*must deny a permit if*" the "*applicant has not demonstrated that all reasonable alternatives have been explored,*" and reasonable alternatives exist or unavoidable losses have not been mitigated. (Harrison Code § 199-6(E)(1) (emphasis added).) This is consistent with other provisions of the Steep Slopes Law, which establish that "the applicant has the burden of proof and has the burden of demonstrating that the proposed activity will be in accord with the findings and legislative intent [of the Law]." (Harrison Code § 199-8(B)(5).)

Here, the Applicant forthrightly concedes that it has not explored all reasonable alternatives, apparently in a mistaken assumption that it should be entitled to some form of "vested rights" or "grandfathered" status:

The Applicant acknowledges that a reduction in the number of homes and building lots would result in a numerical reduction in the slopes disturbance figures but the Applicant purchased the Property prior to the enactment of the Steep Slopes Law and, in fact, filed its application before the law was adopted.

(FEIS at II-16 (emphasis added).) The Applicant, however, has no vested rights to any development proposal, cannot “grandfather” its Proposal from the Steep Slopes Law, or otherwise claim that the Steep Slopes Law should not apply to its Proposal with full force. The fact the Applicant acquired the Site and filed its Application prior to the enactment of the Town’s Steep Slopes Law is completely irrelevant to the applicability of that Law to this Proposal.

In New York, a landowner can only acquire vested rights to pre-existing zoning requirements where he has both: (i) a legally issued permit or approval, and (ii) a “demonstrated commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development.” Town of Orangetown v. Magee, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 24-25 (1996); see also Berman v. Warshavsky, 256 A.D.2d 334, 681 N.Y.S.2d 303 (2d Dept. 1998) (no vested right to approved subdivision where more restrictive zoning is enacted and developer had not “yet undertaken any construction, let alone substantial construction”). Clearly, the Applicant can satisfy neither criterion.

Accordingly, the Town Board had the absolute authority to adopt the Steep Slopes Law and to expect that it would apply to the Property. Khan v. Zoning Bd. of Appeals of Irvington, 87 N.Y.2d 344, 639 N.Y.S.2d 302, 305 (1996) (“A municipality may in the reasonable exercise of its police powers change its zoning to control land use and development. A municipality that chooses to make such changes may, but need not, exempt existing owners of substandard lots from the changes' more onerous effects.”). The Town Board could have created a grandfathering provision for individuals such as the Applicant, but it did not. As such, the Applicant must comply with the Steep Slopes Law in its entirety, which it has failed to do.¹

¹ Any suggestion by the Applicant that the regulation of the Property as required by the Town’s Steep Slopes Law could result in a Takings claim would be misplaced. It is axiomatic that “a mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” Noghrey v. Town of Brookhaven, 48 A.D.3d 529, 852 N.Y.S.2d 220, 221 (2d Dept. 2008), leave to appeal dismissed, 15 N.Y.3d 815, 908 N.Y.S.2d 148 (2010) (citation omitted). As the Appellate Court noted in that case, courts regularly reject Takings claims even “where the diminution in value caused by a regulation approached or exceeded 90% of the pre-regulation value.” Id. at 222. The Noghrey Court, for example, cited with favor a federal decision rejecting a taking claim where a regulation purportedly reduced a property’s value from \$2,000,000 to about \$100,000. Id., citing William C. Haas & Co., Inc. v. City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979), cert. denied, 100 S.Ct. 1315 (1980). It is PEPA and HMRA’s understanding that the Applicant acquired the Property in or about 2004 for \$1.6 Million. Even assuming the Property retained its value during the current Recession, Noghrey indicates that regulation that left 10-15% of that value would not result in a viable Takings claim.

Moreover, the Applicant would have to exhaust its administrative remedies by seeking a variance from the ZBA before it could even commence a Takings claim. See Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108 (1985).

The requirement that an Applicant demonstrate that “all reasonable alternatives have been explored” is intended to fulfill the express legislative intent of the Steep Slopes Law, which is “to ensure preservation *wherever possible*” of steep slopes. (See Harrison Code § 199-2 (emphasis added).) By failing to explore more reasonable, less intense development that would cause less steep slopes disturbance, the Applicant cannot meet the primary requirement for the issuance of a Steep Slopes Permit, which is to demonstrate that its Proposal “is consistent with the legislative findings of [the Steep Slopes Law].” (Harrison Code § 199-6(D)(1).) The express intent of the Steep Slopes law “to minimize disturbance on steep slopes and very steep slopes and to avoid disturbance on excessive slopes:”

[I]t is the intent of this chapter to minimize disturbance on steep slopes and very steep slopes and to avoid disturbance and construction activities on excessive slopes. Further, it is the intent of this chapter to minimize the development of hilltops and ridgelines wherever possible. It is the intent of this chapter to ensure preservation wherever possible and careful review and regulation, including stringent mitigation measures, of disturbance of soil and vegetation on steep slopes where they have been disturbed. The proponent of any activity proposed for hilltops, ridgelines, or steep slopes shall demonstrate that the impacts on the functions and essential characteristics of such areas can be effectively minimized.

(Harrison Code § 199-2 (emphasis added).) The legislative intent of the Steep Slopes Law effectuates the express legislative purposes of the Law, including, fundamentally “*minimizing the area of land disturbance related to site development.*” (*Id.* (emphasis added).)²

Even if the Law did not expressly command your Board to ensure that its Steep Slope decisions complied with the Law’s stated intent, your Board would still be required to give

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As the Findings and Legislative Intent Section states, the Law’s purposes include:

preventing erosion and sedimentation, including loss of topsoil, preventing habitat disturbance, water quality degradation, slope failure and flooding; minimizing stormwater runoff and flooding; providing stable and safe building sites; preventing landslides and soil instability; protecting the quantity and quality of the Town's surface and groundwater resources; protecting important scenic views and vistas; preserving prominent land forms of scenic and ecological value; preserving rock outcrops and trees, areas of vegetation and wildlife habitat; encouraging flexible design and minimizing the area of land disturbance related to site development and, when disturbance is necessary, ensuring environmentally sound disturbance; and ensuring and protecting the Town's character and property values.

(Harrison Code § 199-2.)

effect to that intent. See N.Y. Statutes § 92 (“The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature.”); see also Meegan v. Brown, 16 N.Y.3d 395, 924 N.Y.S.2d 1, 4 (2011) (“[I]n the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle.” (citation omitted).) Respectfully, your Board must require the Applicant to analyze the least dense feasible alternative in order to minimize and avoid disturbance.

The Applicant, however, makes clear in the FEIS that it has not studied the least dense possible alternative, under the mistaken assumption that it can pursue a development objective formulated prior to the Town’s adoption of the Steep Slopes Law. The Applicant claims that, prior to the Town’s adoption of the Steep Slopes Law, it “had a reasonable basis to believe that it could develop the Property for thirteen one-acre building lots.” (FEIS at II-16.) The Applicant acknowledges that “[a]s a practical matter a reduction of density would result in a reduction in the amount of disturbance but a subdivision of fewer lots is not an alternative that reasonably achieves the Applicant’s objectives explained above” – i.e., its objectives *before* the Town adopted the Steep Slopes Law. (FEIS at II-17.) Clearly, however, in light of the Town’s adoption of its Steep Slopes Law, the Applicant should have reformulated its objectives.

The Applicant’s failure to readjust its objectives in light of the Town’s adoption of the Steep Slopes Law means that its proposal conflicts with the Law, including disturbance of forty-four percent (44%) of the Excessively Steep Slopes on the Property and thirty-eight percent (38%) of the Very Steep Slopes. (See FEIS at III-75.) Even under the Applicant’s purportedly lesser dense alternative, 1.2 acres of Excessively Steep Slopes would be disturbed, as would nearly 1 acre of Very Steep Slopes. (FEIS at III-76.) This disturbance sharply contrasts with the Steep Slopes Law’s intent “to minimize disturbance on steep slopes and very steep slopes and to avoid disturbance on excessive slopes.” (Harrison Code § 199-2.) As such, the Applicant simply cannot meet its burden of showing that its Proposal “[i]s in accordance with the legislative findings” of the Law. (Harrison Code § 199-6(D)(1).)

It is simply not reasonable for the Applicant to pursue a development objective that is in denial of the Steep Slopes Law. By failing to study a reasonable, least dense alternative in its FEIS, the Applicant has effectively mandated that your Board reject its Steep Slopes application. (See Harrison Code § 199-6(E)(1).)

The Failure To Study The Least Dense Possible Alternative Also Violates SEQRA

The Applicant’s avoidance of analysis of the least dense alternative also violates SEQRA. Courts ruling under SEQRA’s federal analogue, the National Environmental Policy Act (“NEPA”) have repeatedly held that “[t]he ‘existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’” Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996) (emphasis added), quoting Resources Ltd., Inc. v. Robertson,

35 F.3d 1300, 1307 (9th Cir. 1993).³ The search for possible alternatives to a proposed action has “been characterized as the heart of the SEQRA process.” Shawangunk Mountain Env'tl. Ass'n v. Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 557 N.Y.S.2d 495, 497 (3d Dept. 1990) (citation omitted); see also 6 N.Y.C.R.R. § 617.9(b)(5)(v)(‘c’) (requiring an EIS to contain analysis of alternatives of substantially lesser “scale or magnitude”).

Again, the Applicant’s unwillingness to recalibrate its objectives in light of the applicable Law and development constraints cannot be allowed to repress your Board’s consideration of alternatives. The New York State Department of Environmental Conservation (“DEC”), the agency primarily responsible for SEQRA’s implementation, recognizes in its official guidance to SEQRA, the reviewing agency may be required to check an applicant’s unrealistic objectives. In response to the question “[w]hy must alternatives be considered when the project sponsor has already decided what is the best project?,” DEC states:

A project sponsor generally develops its project proposal based solely on its goals and objectives. These goals and objectives may not include maximum protection of environmental factors, and are not always shared by the reviewing agencies or the public.

(N.Y.S. D.E.C., The SEQRA Handbook, at 121 (3d ed. 2010).) This guidance is particularly apt here, where the Applicant’s goals and objectives are in denial of the Steep Slopes Law. Moreover, also of special relevance to the instant Application, the DEC further states that “[t]he greater the [proposal’s] impacts, the greater the need to discuss alternatives.” (Id. at 122.)

The Applicant’s failure to study a reasonable least dense alternative not only violates the Town’s Steep Slopes Law, it also violates SEQRA.

**Respectfully, Only The ZBA Can Vary
The Application Of The Steep Slopes Law**

The Law’s intent to absolutely minimize development on steep slopes is further evidenced by the fact that it has a variance procedure, which the Applicant ignores. (See Harrison Code § 199-9.) Respectfully, your Board must recognize that the Town Board inserted a variance procedure into the Steep Slopes Law for a purpose. See Ocean Hill-Brownsville Governing Bd. v. Bd. of Ed. of N.Y.C., 30 A.D.2d 447, 294 N.Y.S.2d 134, 138 (2d Dept. 1968), affd, 23 N.Y.2d 483, 297 N.Y.S.2d 568 (1969) (“It is not to be supposed that the Legislature will

³ NEPA is SEQRA’s “counterpart and model,” with the primary difference being that SEQRA “imposes far more ‘action-forcing’ or ‘substantive’ requirements on state and local decisionmakers than NEPA imposes on their federal counterparts.” Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 303 (1986) (citation omitted). Thus, a failure to study viable alternatives under SEQRA is even more egregious than such a failure under NEPA.

deliberately place words in a statute which are intended to serve no purpose.”); see also N.Y. Statutes § 144 (“Statutes will not be construed so as to render them ineffective.”). Indeed, the fact that the Steep Slopes Law has a variance procedure contrasts with analogous environmental protection law, such as the Town’s Freshwater Wetlands Protection Law.

Section 199-9 of the Steep Slopes Law establishes that any person aggrieved by the application of the Law should apply to the ZBA for a variance from the Law, provided it can show either an “unnecessary hardship” or “a compelling public need for development of the parcel in question.” Notably, the Applicant has not claimed that its Proposal would fit within either of these two narrow exceptions to the Steep Slopes Law.⁴ Further establishing that the Steep Slopes Law is intended to allow the most minimal development, the ZBA, on a variance request, is required to consider whether “the variance is the *minimum relief necessary* to relieve the extraordinary hardship established by the applicant.” (Harrison Code § 199-9(C) (emphasis added).)

Respectfully, the Planning Board lacks the authority to vary the Application of the Steep Slopes Law. If the Applicant believes the lawful application of the Steep Slopes Law would cause unduly harsh results, it needs to exhaust its administrative remedies by applying to the ZBA for a variance.

The FEIS Violates SEQRA By Deferring Analysis Of Critical Issues

The Applicant has improperly deferred analysis of issues critical to your Board’s Steep Slopes permitting decision. If an agency does not resolve the critical environmental issues before the end of the SEQRA process, it will lack an objective factual basis for assessing a proposal’s impacts. Thus, it is axiomatic that by “deferring resolution” of potential environmental issues until after the conclusion of the SEQRA process, an agency “fail[s] to take the requisite hard look at [] area[s] of environmental concern.” Penfield Panorama Area Cmty., Inc. v. Town of Penfield Planning Bd., 253 A.D.2d 342, 688 N.Y.S.2d 848, 854 (4th Dept. 1999) (annulling Planning Board’s approval for, *inter alia*, deferring resolution of hazardous waste remediation issue). As the Second Department held in vacating an FEIS:

Where an agency fails or refuses to undertake necessary analyses, improperly defers or delays a full and complete consideration of relevant areas of environmental concern, or does not support its conclusions with rationally-based assumptions and studies, the SEQRA findings statement approving the FEIS must be vacated as arbitrary and irrational.

⁴ In the FEIS, the Applicant states that it “has not established any economic hardship through the SEQRA process and does not intend to.” (FEIS at III-114.)

County of Orange v. Village of Kiryas Joel, 44 A.D.3d 765, 844 N.Y.S.2d 57, 61 (2d Dept. 2007); see also AC I Shore Road, LLC v. Incorporated Village of Great Neck, 841 N.Y.S.2d 344, 347 (2d Dept. 2007), leave to appeal denied, 10 N.Y.3d 779, 857 N.Y.S.2d 14 (2008) (holding that “DGEIS, FGEIS, and SEQRA findings statement were insufficient in that they failed to take the requisite ‘hard look’” at two particular areas of environmental concern).

In Penfield, for example, the EIS stated that “‘primary areas of concern’ containing hazardous waste ha[d] been identified, that ‘additional characterization was required,’” and “that ‘some site clean-up may also be required.’” Id. at 853. Rather than requiring full characterization of the problem and the development of a remediation plan, the Planning Board “conditioned its approval of the project on [the Applicant’s] agreement to get approval of a site remediation plan from [the State Department of Environmental Conservation and the County Department of Health] before any construction beg[an].” Id. The Penfield Court rejected this approach, holding that “deferring resolution of the remediation was improper because it shields the remediation plan from public scrutiny,” and that by deferring resolution of the hazardous waste issue, the Planning Board failed to take the requisite hard look at an area of environmental concern.” Id. at 854. This principle applies with equal force to the case at hand.

One of the Steep Slopes Law’s most significant review criterion asks whether a proposal would “provide the maximum in structural safety [and] slope stability.” (Harrison Code § 199-6(C)(1).) The Applicant, in addressing this criterion, however, effectively concedes that it has not met its burden. The FEIS claims that “[s]tructural safety would be achieved by [*inter alia*] the testing of soil properties before construction” - i.e., no testing has taken place yet. (FEIS at II-11.) Similarly, elsewhere the FEIS states that “[s]oil bearing capacity and other relevant soil properties will be tested and certified prior to the start of construction to ensure that the building site is structurally sound and secure.” (FEIS at II-6.) Thus, in contravention of both the Town’s Steep Slopes Law and SEQRA, the Applicant has not yet demonstrated that any houses can be safely located there or that slope stability would be maintained. This analysis goes to the heart of your Board’s Steep Slopes decision. In the absence of this information, respectfully, your Board cannot make a rational finding in favor of the Proposal.⁵

Similarly, the Applicant improperly defers analysis of how it would meet the Steep Slopes Law’s criterion requiring that the “[t]ops and bottoms of cut and fill slopes [be] set back

⁵ Elsewhere in the FEIS, the Applicant indicates that it does not even know the load bearing capacity of the extension of Sherman Avenue it proposes. (See FEIS at III-68 (stating that “the Applicant *believes*” that “[t]he mapped section of Sherman Avenue” is “in an area where rock exists, not soft or wet subsoil” (emphasis added).)

The FEIS also appears to give conflicting statements with respect to the presence of rock on the Property. (Compare FEIS at III-101 (“[I]t is anticipated that there will not be a significant amount of rock excavation.”) with FEIS at III-107 (“[R]ock removal is anticipated.”).) Again, the FEIS lacks reliable information on critical issues.

from structures an adequate distance to ensure the safety of the structures in the event of the collapse of the cut or fill slopes.” (See Harrison Code § 199-6(C)(9).) All the Applicant claims is that it “recognizes that the cut and fill slopes will have to be constructed in accordance with the recommendations of a geotechnical engineer,” which it apparently has not even retained yet. (FEIS at II-13.) Again, this approach violates SEQRA, and certainly is not sufficient to satisfy the Applicant’s burden of proof under the Town’s Steep Slopes Law.

The FEIS also indicates that tree clearing limits still have not been established. (FEIS at II-8.) This issue also bears directly on the Proposal’s consistency with the purposes of the Steep Slopes Law, including “preventing erosion and sedimentation, including loss of topsoil,” “slope failure,” and “preventing landslides and soil instability.” (See Harrison Code § 199-2.) Again, without this information, your Board cannot rationally evaluate the Proposal.

The Applicant Otherwise Fails To Sustain Its Burden To Establish That Its Proposal Meets The Criteria Of the Steep Slopes Law

The FEIS also indicates that the Applicant cannot meet the Steep Slopes criteria, and frequently seeks to reformulate the Law’s plain language to rationalize its Proposal. The Applicant, for example, does not seriously contend that the Proposal complies with the Steep Slopes Law’s criterion mandating that “[t]he terracing of building sites [be] kept to a minimum.” (See Harrison Code § 199-6(C)(2).) Instead, it states that “stone retaining walls are proposed on the lots to transition the grade around the homes that are stepped into the slopes” – *i.e.*, they are terraced – because “[t]he alternative would be to grade on and around the homes which would require more slopes disturbance.” (FEIS at II-11.)⁶ In fact, the alternative mandated by the Steep Slopes Law, which the Applicant did not study, is far less intense development.

Similarly, the Applicant cannot argue that its Proposal complies with the Steep Slopes Law’s criterion mandating that “[a]ny regrading blends in with the natural contours and undulations of the land.” (See Harrison Code § 199-6(C)(6).) Instead, the Applicant seeks to inject qualifying language into the Steep Slopes Law, asserting that its “[r]egrading blends in with the Property’s natural contours *to the extent possible*.” (FEIS at II-13 (emphasis added).) The Applicant cannot dilute the Law’s requirements by creating conditioning language to suit its purposes. Further, the Applicant acknowledges that “[t]he location of the houses close to the Sherman Avenue street line *does not follow the natural contours of the Property*.” (*Id.*) The Applicant’s effort to rationalize this failure does not overcome the fact that the Proposal does not meet this criterion, either.

⁶ To the extent the Applicant is suggesting here that it will not be grading sites, such contention is contradicted on the next page, where it states that “[h]ome sites will be graded to keep the driveways and homes at street grade.” (FEIS at II-12.) As will be discussed below, grading the sites as described conflicts with the Law’s criterion forbidding “altering the hillside to fit the structure.” (See Harrison Code § 199-6(C)(21).)

The Applicant also implicitly acknowledges that its Proposal does not meet the Steep Slopes criterion requiring that “[c]uts and fills [be] rounded off to eliminate sharp angles at the top, bottom, and sides of regraded slopes.” (See Harrison Code § 199-6(C)(6).) Instead, it states that “[c]uts and fills are rounded off to eliminate sharp angles *except where retaining walls are used.*” (FEIS at II-13.) Again, the Law does not have the qualifying language the Applicant seeks to inject.

The Proposal also violates the Steep Slopes Law’s criterion establishing that “[s]tructures [be] designed to fit into the hillside rather than altering the hillside to fit the structure.” (See Harrison Code § 199-6(C)(21).) In contravention of this requirement, the Applicant states that “[h]ome sites will be graded to keep the driveways and homes at street grade.” (FEIS at II-12.) While at one point the Applicant claims that “[b]uilding sites are not terraced to create building plateaus,” (FEIS at II-11), elsewhere it states that “retaining walls will be used to transition grading around the homes to keep it [sic] to the footprint.” (FEIS at II-15.) Clearly, the Proposal is inconsistent with the Law’s requirement that it be designed to fit into the Property.

Perhaps most fundamentally, the Proposal sharply contradicts the Steep Slopes Law’s criterion that “[d]evelopment [be] sited on that portion of the site least likely to impact the natural landforms, geological features, and vegetation.” (See Harrison Code § 199-6(C)(22).) This criterion goes to the heart of the Steep Slopes Law inquiry – will development avoid steep slopes? As the FEIS shows, even under the Applicant’s so-called lesser density alternative, substantial development would occur on Excessively Steep Slopes. (See FEIS Figure 4D (Slope Analysis for Cluster Alternative 6); see also Harrison Code § 199-3 (defining Excessively Steep Slopes to be slopes “with a topographical gradient equal or greater than 35%”).)

Indeed, the FEIS states that forty-four percent (44%) of the Excessively Steep Slopes on the Property will be disturbed, and that thirty-eight percent (38%) of the Very Steep Slopes on the Property will be disturbed. (FEIS at III-75.)⁷ Moreover, even under its so-called less dense alternative 1.2 acres of Excessively Steep Slopes would be disturbed, as would nearly an acre of Very Steep Slopes. (FEIS at III-76.) Clearly, little, if any, effort has been made to restrict development to “that portion of the site least likely to impact the natural landforms, geological features, and vegetation.” (See Harrison Code § 199-6(C)(22).)

Rather than address the inquiry directed by the Section 199-6(C)(22), the FEIS responds by referencing the Applicant’s classification of the Property into various “Zones.” (See FEIS at II-15.) This classification system is an artificial creation of the Applicant, clearly intended to divert the Board’s attention from the analysis mandated by the Steep Slopes Law. Moreover, even the FEIS recognizes that its alternative development scenario would “extend[] into the more valuable Zones.” (*Id.*) The Applicant seeks to rationalize this impermissible

⁷ The Law defines Very Steep Slopes as having “a topographical gradient equal or greater than 25%, [but] less than 35%.” (Harrison Code § 199-3.)

disturbance by claiming that it is for “improvements that are necessary to the welfare of the health safety and public welfare,” and they have been sited “where they are least likely to impact the natural land forms and ecological resources, *to the extent practicable.*” (*Id.* (emphasis added).) The Law, however, recognizes that the public health, safety and welfare are best preserved by limiting development to areas that will not result in steep slope disturbance.

Again, the qualifying language inserted by the Applicant is misplaced. And again, if the Applicant is dissatisfied with the lawful application of the Law by the Planning Board in the only manner it is capable of, it should apply for a variance to the ZBA.

The FEIS’s Failings Prevent Your Board from Issuing Findings That Would Allow a Steep Slopes Permit for the Proposal

The Applicant cannot meet the most fundamental requirement required for the issuance of a Steep Slopes Permit – that it show that its Proposal “[i]s in accordance with the legislative findings” of the Law. (Harrison Code § 199-6(D)(1).) Instead, the Applicant, at best, makes a generalized assertion that it meets this requirement based on its discussion of the Steep Slopes Law criteria. (See FEIS at II-16.) As discussed above, however, the FEIS discussion actually indicates that the Applicant has either improperly deferred analysis required by the Steep Slopes Law criteria, or has actually shown that it will violate many of the critical criteria.

Moreover, by virtue of the Applicant’s stated intention of pursuing a development objective formulated prior to the adoption of the Town’s Steep Slopes Law, the Proposal neither “minimize[s] disturbance on steep slopes and very steep slopes [nor] avoid[s] disturbance on excessive slopes.” (See Harrison Code § 199-2.) Nor is the Proposal consistent with the purposes of the Steep Slopes Law, which include “minimizing the area of land disturbance related to site development.” (*Id.*)

The Applicant also has not met its burden of demonstrating that it “[h]as no reasonable feasible on-site alternative.” (Harrison Code § 199-6(D)(4); see also Harrison Code §§ 199-6(D)(5) & (8).) Again, the Applicant improperly seeks to short-circuit this analysis by sticking to a development density it acknowledges it established prior to the adoption of the Town’s Steep Slopes Law. (See FEIS at II-16 to II-17.)

The Applicant’s Cluster Baseline Is Seriously In Error

The Applicant’s effort to evade the Steep Slopes Law continues with its description of a clustering baseline. The Applicant forthrightly concedes that the baseline it proposes for cluster analysis – *i.e.*, 14 lots – is only grounded in an analysis of R-1 bulk zoning requirements. (See FEIS at III-28 & III-40.) Thus, the Applicant’s baseline analysis fails to consider all other applicable legal requirements, including the Town’s Steep Slopes Law.

By law, however, “[i]n determining the allowable density for a given site, the applicant shall submit to the Planning Board a site plan illustrating the density of the property if developed as a conventional subdivision *conforming to all requirements of law.*” (Harrison Code § 235-10.2(C) (emphasis added).) Similarly, State law confirms that the cluster baseline is the number “in the planning board’s judgment” that could be subdivided based on the local zoning code “and conforming to all other applicable requirements:”

A cluster development shall result in a permitted number of building lots or dwelling units which shall in no case exceed the number which could be permitted, *in the planning board's judgment*, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance or local law applicable to the district or districts in which such land is situated *and conforming to all other applicable requirements.*

N.Y. Town Law § 278(3)(b) (emphasis added); see also McKinney’s N.Y. Town Law § 278, practice commentaries at 141-142 (“A planning board may only arrive at [a baseline] determination by subjecting a hypothetical conventional plat to the same rigorous review to which the plat would be exposed if it were intended to be constructed. [Caselaw] confirms that the density of a cluster development must be based upon *a realistic conventional plat which considers all development constraints of the local zoning law, engineering and planning considerations and common sense.*” (emphasis added).)

Clearly clustering provisions are not intended to enable an applicant to accomplish more intense development than would be allowed for a conventional subdivision on the same property. The Applicant must propose a lot count that conforms to all applicable legal requirements, including the Town’s Steep Slopes Law.

The Applicant’s Proposal To Cross The Mamaroneck River Appears Illegal and Would, At a Minimum, Require Town Board Approval

Initially, the Applicant’s proposal to cross the Mamaroneck River appears to violate Section 235-31(A) of the Town Code. That Section establishes that “all buildings and structures [in this Zoning District] shall be set back at least 50 feet from the seasonal high water level water's edge or established channel lines of streams and other water bodies.” (Harrison Code § 235-31(A).)⁸ The Code broadly defines a “structure” to be “[a]nything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground.” (Harrison Code § 234-4 (emphasis added).) Clearly, the proposed

⁸ The 50 foot buffer is either as established by the Town Board or by reference to other governmental bodies such as the state, the county, the Soil Conservation Service or the United States Department of Housing and Urban Development, Federal Insurance Administration. Id.

“bridge” is a structure within the definition of the Code. The Applicant appears to contemplate locating the bridge far closer to the River than the Code would allow.

In any event, if the Applicant is serious about crossing the Mamaroneck River, then, at long last, it needs to engage the Town Board in this process. Initially, and respectfully, the Planning Board does not have authority to alter streets outside of the property proposed for subdivision. Valmont Homes, Inc., v. Town of Huntington, 89 Misc.2d 702, 392 N.Y.S.2d 806, 808 (Sup. Ct. Suffolk Co. 1977). The Applicant here implicitly acknowledges that crossing the River would involve the alteration of streets outside of its Property. It states that “[t]his crossing is entirely within the boundaries of the Applicant’s property *or the existing public right of way.*” (FEIS at III-11 (emphasis added).)

Finally, crossing the River would also appear to require an amendment to the Town’s official map. Section 273 of the New York Town Law, however, confers exclusive jurisdiction with respect to “change[s] or add[itions] to the official map of the town so as to lay out new streets . . . or to widen or close existing streets” to the Town Board.

To the extent the Applicant is serious about crossing the Mamaroneck River, it needs to develop, if it can, a plan that conforms to the Town Code, and process it as required by law, including seeking Town Board approval.

Your Board Clearly Should Not Exercise Its Discretion To Allow The Applicant To Exceed Maximum Cul-de-Sac Length

For all of the reasons outlined above, the Applicant’s proposal to extend Sherman Avenue to Dorado Drive strains credulity. As even the Applicant appears to recognize, the decision to extend the road is solely in your Board’s discretion. (See Harrison Code § 204-33(C)(5) (“The Planning Board, at its discretion, may allow this length to be increased, provided that adequate provisions are made for a secondary access for emergency vehicles to the site.”); see also FEIS at III-41 (Applicant recognizing that the decision to allow a cul-de-sac to surpass the legal limitation is in the Board’s discretion).) The Proposal’s manifest unstudied and unmitigated adverse impacts clearly counsel against the Board’s exercise of discretion, which would simply enable the Applicant to effectuate excessive steep slope disturbance, in contravention of the Law.

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**The Board Should Keep The Hearing Open
To Enable All Affected Parties To Speak**

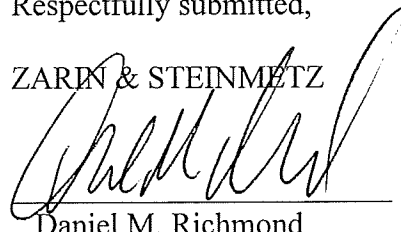
Finally, PEPA and HMRA have been advised that some of their constituents could not attend the Hearing this evening because it conflicts with an election debate. In light of the significant public interest in the Proposal, which could affect both public and private interests, the Board should keep the Public Hearing on the FEIS open.

As always, if your Board has any questions or comments, please let us know.

Respectfully submitted,

ZARIN & STEINMETZ

By:



Daniel M. Richmond

DMR/mth

cc: Purchase Environmental Protective Association
Harrison Mamaroneck River Association
Supervisor Walsh and the Honorable Town Board
Nat Parish, AICP
Frank Allegretti, Esq.
Pat Cleary
Geraldine Tortorella, Esq.