

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF  
CORTLAND

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VICTOR LAMOUREUX, on behalf of FRIENDS FOR  
RESPONSIBLE VESTAL ZONING, an unincorporated  
association,

Petitioner,

- against -

TOWN OF VESTAL TOWN BOARD;  
LCD ACQUISITIONS, LLC; and BHL VENTURES, LLC,

Respondents.

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**VERIFIED AMENDED  
SUPPLEMENTAL  
PETITION**

Index No.:  
RJI No.:

Petitioner Victor Lamoureux, on behalf of Friends for Responsible Vestal Zoning, an unincorporated association, by and through its counsel Tooher & Barone, LLP, hereby asserts the following for its Verified **Amended Supplemental** Petition:

1. This is a special proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) for a judgment to annul, vacate, and in all respects void the Town of Vestal Town Board Negative Declaration of Significance determination under the State Environmental Quality Review Act (“SEQRA”); and to annul, vacate, and in all respects void the Town of Vestal Town Board Local Law 1 of 2022 approving a zoning change from Rural Residential to Planned Development District in relation to the Retreat at Bunn Hill project rezoning application submitted by Respondent LCD Acquisitions, LLC.

## **Jurisdiction and Venue**

2. This Court has jurisdiction over this proceeding pursuant to CPLR § 7804.

3. Venue is proper in this Court pursuant to CPLR § 506(b) in a county within the judicial district where the Respondent Town of Vestal Town Board made the determinations challenged in this proceeding.

## **Parties**

4. Petitioner Victor Lamoureux is the President of Friends for Responsible Vestal Zoning (“RVZ”), an unincorporated association of Vestal residents, and brings this proceeding in his capacity as President and on behalf of RVZ pursuant to General Associations Law § 12. RVZ is an association of residents of the Town of Vestal established in or about April 2019. See Affidavit of Victor Lamoureux in Support of Verified Petition dated June 3, 2022 (“Lamoureux Aff.”), ¶¶ 2-3. Members of RVZ live in proximity to the proposed area of the zoning change and proposed project and are directly impacted thereby.

5. Respondent Town of Vestal Town Board (the “Town Board”) is the legislative governing body of the Town of Vestal. Under the Town of Vestal Code (“Town Code”), the Town Board is the entity authorized to approve a zoning change. Town Code §§ 24-36; 24-532.

6. The Town of Vestal is an incorporated Town in Broome County, New York.

7. Respondent LCD Acquisitions, LLC (“Applicant” or “LCD”), is a Delaware limited liability company. Upon information and belief, LCD Acquisitions, LLC is a subsidiary of Landmark Properties, Inc. (“Landmark”) with its principal place of business at 315 Oconee St., Athens, Georgia 30601. LCD is not currently licensed to do business in New York.

8. Upon information and belief, Landmark is in the business of acquiring, developing, and managing student housing developments across the country. Landmark advertises itself as “The nation’s top developer of student housing.”

9. LCD is the Applicant of record for the Town of Vestal rezoning application to rezone 6 parcels on Bunn Hill Road and Jensen Road in the Town of Vestal from a Rural Residence District (“RR”) to a Planned Development District (“PDD”) to build a multi-residential development (the “Student Housing Project”), a use not permitted in the RR District.

10. Respondent BHL Ventures, LLC (“BHL”), is a New York domestic limited liability company with a principal place of business at 84 Court Street, Suite 600, Binghamton, New York. BHL is the owner of the 6 parcels on Bunn Hill Road and Jensen Road that LCD seeks to rezone.

### **The Student Housing Project**

11. LCD proposes a multi-residential student housing development on 42 acres in the RR district. Specifically, LCD proposes to construct sixty-four (64) 2-5-bedroom cottages for a total of 161 units and 700 beds. Upon information and belief, the majority of the units are 4- and 5-bedroom units. The Student Housing Project will have a clubhouse, recreational amenities, and over 550 parking spaces. In total the project includes 350,000 square feet of new building area. At full build-out, the Student Housing Project will have a residential density four (4) times that permitted in the RR District.

12. The Student Housing Project will require disturbance of at least 24.5 of the 42 acres. This does not include the disturbance of land planned off-site to provide utilities to the property. The Student Housing Project will permanently destroy approximately 22 acres of forest. An additional 0.4-0.6 acres of wetland over ten (10) percent of the wetlands on-site will also be

permanently lost. In place of the natural lands, the Student Housing Project will result in over ten (10) acres of new impervious surfaces and over 12 acres of lawn.

13. The property contains shallow bedrock and a shallow water table. The majority of soils are classified as poorly drained and there are slopes between ten (10) and 15 percent over most of the site.

14. The Student Housing Project will require 77,000 gallons per day of water and produce 77,000 gallons per day of wastewater. The property currently lacks public water and sewer necessitating the expansion of utilities.

15. The project will require a Stormwater Management and Pollution Prevention Permit (“SWPPP”) from the New York State Department of Environmental Conservation (“DEC”). However, in order to meet DEC standards, the project will require unconventional infrastructure practices requiring special DEC approval.

16. The project will also require a Wetland Disturbance permit from the US Army Corps of Engineers.

17. The construction of the project is expected to take 12 months to complete. However, the Applicant’s wildlife expert proposed that the extensive tree removals be limited to November 1 through March 31 due to wildlife impacts, which would likely cause the overall construction to exceed the estimated 12 months.

### **Standing**

18. Petitioners have standing to bring this special proceeding pursuant to CPLR § 7801.

19. Petitioner Victor Lamoureux is a resident of the Town of Vestal, residing at 885 Bunn Hill Road, Vestal, New York. Lamoureux Aff. ¶ 1. He is the current President of RVZ and

is authorized to bring this proceeding on behalf of RVZ and its leadership members pursuant to General Associations Law § 12. Lamoureux Aff. ¶¶ 2, 7.

20. RVZ is an unincorporated association of over 100 Town of Vestal residents. Lamoureux Aff. ¶ 3. RVZ was formed in 2019 for the purpose of ensuring that the Town of Vestal follows its approved zoning code (“Town Zoning Law”) and the proposed but un-adopted comprehensive plan. Specifically, in an effort to protect the interests of town residents, RVZ opposes development projects encroaching into residential districts requiring a change in the zoning laws. RVZ, and its predecessor unincorporated association of residents, has opposed the series of applications seeking to construct a Student Housing Project on Bunn Hill Road in the Town of Vestal. Lamoureux Aff. ¶¶ 4-5.

21. Thirteen (13) of RVZ’s members own and/or occupy eight (8) properties within 500 feet of the proposed Student Housing Project. Those RVZ members received notice of the public hearing by mail pursuant to Town Code § 24-36(d). Lamoureux Aff. ¶ 6.

22. Forty-nine (49) RVZ members own and/or occupy property located either directly on Bunn Hill Road or on side streets that open onto Bunn Hill Road north of the proposed Student Housing Project. Lamoureux Aff. ¶ 6. Per Applicant’s traffic impact analysis, the majority of traffic from the project will travel from the proposed Student Housing Project north to Binghamton University and/or the Vestal Parkway and past these residences. Moreover, the Applicant has suggested the use of a bus from the Student Housing Project to Binghamton University along Bunn Hill Road.

23. Ten (10) RVZ members live downstream of Bunn Hill Creek on Winding Lane, Lauderdale Drive, Avondale Court, and Annetta Street. Bunn Hill Creek crosses the property on which the Student Housing Project is built. These residents have been impacted by prior

development upstream causing increased runoff and erosion and are likely to be impacted by increased runoff and erosion from Bunn Hill Creek as a result of the Student Housing Project. Lamoureux Aff. ¶ 6.

24. The Applicant proposes extending sewer lines from where the municipal sewer lines currently terminate near the Vestal Parkway south along the west side of Bunn Hill Road right-of-way to the Student Housing Project. Nine (9) RVZ members, including President Lamoureux, own and/or occupy property adjoining the west side of the Bunn Hill Road right-of-way. Lamoureux Aff. ¶ 6. The installation of the proposed sewer line extension will require excavation and construction activities directly adjacent to these RVZ members.

25. RVZ's members, specifically including those located within 500 feet of the proposed Student Housing Project and along Bunn Hill Road, have authorized RVZ to initiate this special proceeding on their behalf. Lamoureux Aff. ¶ 7.

26. RVZ's members have standing based upon their proximity to the proposed Student Housing Project, potential erosion along Bunn Hill Creek, and the sewer line extension. Further, RVZ's members have standing due to the visual, noise, traffic, and community character impacts they will experience from the proposed Student Housing Project, which are different in kind and scope from the community at large. RVZ has standing through the standing of its members.

27. Eight (8) of the RVZ members own properties within 500 feet of the proposed Student Housing Project.

28. Catherine Maliwacki is an RVZ member whose residence is located directly across Bunn Hill Road from the BHL property. Upon information and belief, the project will alter her scenic view by replacing 24-25 acres of natural forest with a large residential complex with

attendant lighting impacts. The Maliwacki residence is located above Bunn Hill Road at an elevation of 1,424 feet, a height from which the development will be seen.

29. Linda Giammarino is an RVZ member whose property and residence at 841 and 851 Bunn Hill Road, adjoin and border the property on which the proposed Student Housing Project is to be built and are within 500 feet of the project. Upon information and belief, Construction of the project will create noise and disturbance directly outside the Giammarino residence. The addition of some 550 vehicles will greatly impact traffic in the adjoining community and upon the Giammarinos specifically.

30. Several RVZ members reside along the Bunn Hill Creek, downstream from the project. These property owners will be impacted by the erosion and increased drainage caused by construction and the increased impermeable surfaces the project will create adjoining Bunn Hill Creek.

## **Facts**

### **The 2021 Rezoning Law**

31. On or about January 15, 2020, LCD submitted a revised rezoning application to rezone properties from a Rural Residential district to a Planned Development District for “sixty-four 2-5-bedroom craftsman style cottages.” (Exhibit A, annexed hereto).

32. The rezoning application sought to first have the Town process the zoning change and to subsequently proceed to site specific review.

33. On January 23, 2020, the Town Engineer forwarded the rezoning application to the County Planning Department. (Exhibit B, annexed hereto).

34. On March 13, 2020, the County Planning Department recommended denial of the rezoning application, based in large part on the increased population density, which is not

consistent with the County Comprehensive Plan and the goals for development that is compatible with community character. The County Planning Department also provided comments from NYS Department of Transportation noting the traffic assessment provided by the applicant did not adequately reflect traffic from the university; comments from Binghamton Metropolitan Transportation Study that the project is inconsistent with BMTS's Greater Binghamton Transportation Plan to "promote compact, mixed uses development and infill/redevelopment of urban core communities;" comments from Broome County Transit that the Project was not compatible with public transportation routes or equipment, and that Bunn Hill Road has inadequate shoulders and lighting to allow for safe pedestrian travel; comments from Broome County Department of Public Works questioning the viability of utility placement and wastewater facilities and stormwater management facilities; and notes regarding the incompatibility of the Project with the 2013 Broome County Comprehensive Plan and the Broome County Housing Study. Additionally, the County noted that the "Town should ensure that the project complies with SEQR" noting the segmentation of the project and submittal of a Short EAF. (Exhibit C, annexed hereto).

35. On December 28, 2020, the Applicant submitted a Full EAF for the rezoning application after receiving County Planning Department and Town Planning Board recommendations. (Exhibit D, annexed hereto).

36. Upon information and belief, the Full EAF for the rezoning application was not sent to the County Planning Department and Town Planning Board for further comment.

37. In February 2021, the Applicant submitted an amended Full EAF for the rezoning application to the Town Board that included significant changes but was not accompanied by any explanation or supporting documentation regarding those changes. (Exhibit E, annexed hereto).



38. Upon information and belief, the amended Full EAF was not sent to the County Planning Department and Town Planning Board for further comment.

39. On March 3, 2021, the Town Attorney sent a Notice of Intent to Establish Lead Agency letter to the US Army Corps of Engineers, DEC, and the Town Planning Board. Each agency responded indicating no objection to the Town of Vestal Town Board acting as lead agency.

40. On March 24, 2021, the Town Board's review of the Part 2 of the amended EAF identified six (6) moderate to large impacts with respect to the following: (1) reduction in population of threatened or endangered species, (2) reduction in habitat used by threatened or endangered species, (3) increased traffic, (4) inconsistencies with surrounding land use patterns, (5) inconsistent local land use plans or zoning regulations and (6) inconsistencies with community character. (Exhibit F, annexed hereto).

41. On April 14, 2021, the Town Board discussed its review of the Part 2 of the amended EAF a second time, but failed to address the items likely have a moderate to large impact mentioned in paragraph 40 above. (Exhibit G, annexed hereto).

42. Upon information and belief, The Town Board did not complete a review of the Part 3 of the amended EAF for any items mentioned in paragraph 40 above.

43. On April 28, 2021, the Town Board voted to approve "Local Law 3 of 2021" ("2021 Rezoning Law") and issued a Negative Declaration of Significance under SEQRA – without discussing the items in Parts 2 or Part 3 of the amended EAF, and without providing a reasoned elaboration for its determination. (Exhibit H, annexed hereto).

44. Upon information and belief, between April 28, 2021 and May 10, 2021, the Town Attorney prepared Parts 2 and 3 of the amended EAF. The Parts 2 and 3 were signed on May 10,

2021 by the Town Attorney as “Preparer” and by the Town Supervisor as “Responsible Officer in Lead Agency.” (Exhibit I, annexed hereto).

45. Upon information and belief, a Town Board meeting was not held to approve Parts 2 and 3 of the amended EAF.

46. On or about May 13, 2021, the amended Full EAF and Notice of Negative Declaration were filed with the Town Clerk and DEC. *Id.*

47. On July 6, 2021, the Town Planning Board failed to approve the site plan for the Student Housing Project in part because the project lacked a sidewalk plan on Bunn Hill Road and because there were too many units proposed for the site. (Exhibit J, annexed hereto).

48. On or about July 7, 2021 RVZ filed a special proceeding pursuant to Article 78 challenging the actions of the Town Board in issuing the Negative Declaration and adopting a resolution approving the 2021 Rezoning Law. *Lamoureux v. Town of Vestal Town Board*, Index No. EF21-358 (Supreme Court, Cortland County). (Exhibit K, annexed hereto).

49. On August 24, 2021, the Town Planning Board failed to approve the site plan for the Student Housing Project a second time due to concerns of pedestrian safety from increased traffic and population density, as well as concerns over future development that may result from the proposed rezoning. (Exhibit L, annexed hereto).

50. On February 9, 2022, the Town Engineer observed that the updated site plan for the Student Housing Project did not include sidewalks or paths along Bunn Hill Road, which failed to comply with the County Planning Department and Town Planning Board recommendations. (Exhibit M, annexed hereto).

51. On February 23, 2022, Supreme Court of Cortland County annulled the Town Board’s Negative Declaration of Significance and vacated the Town Board’s resolution approving

the 2021 Rezoning Law because the resolution did not contain a written reasoned elaboration as required by 6 NYCRR 617.7(b)(4), and because the subsequent documentation did not comply with the procedural requirements of SEQRA. (Exhibit N, annexed hereto).

### **The 2022 Rezoning Law**

52. On or about March 30, 2022, the Vestal Town Clerk posted legal notice of a public hearing and SEQRA review to be held on April 27, 2022 regarding Local Law A of 2022 (“2022 Rezoning Law”). (Exhibit O, annexed hereto).

53. On April 4, 2022, the undersigned sent a letter to the Town Board asking that a larger venue be considered for the public hearing due to the demonstrated public interest and Town notification that only ten (10) members of the public would be allowed to attend in person due to COVID-19 restrictions. (Exhibit P, annexed hereto). This request was denied by correspondence from the Town attorney on April 18, 2022, indicating “Inasmuch as the proposed local law is essentially the same as was previously before the Board, it appears to the Board to be unlikely that there will be any new or important comments that would benefit from an increased in person presence.” (Exhibit Q, annexed hereto).

54. On April 20, 2022, LCD submitted a revised GeoTechnical Engineering Evaluation, dated February 28, 2022. (Exhibit R, annexed hereto).

55. On April 27, 2022, the Town Board arbitrarily implemented COVID-19 precautions to limit public participating at the public hearing held to approve the 2022 Rezoning Law. Upon information and belief, these Covid-19 precautions were not implemented for the other Vestal board meetings in and around this same time period.

56. On April 27, 2022, the Town Engineer advised the Town Supervisor that the Applicant still needed to: (1) join the water and sewer district, (2) submit an application to the

BingJCSB to address exceedingly high flow rates, (3) submit a Notice of Intent for the SWPPP and a stormwater permit with NYSDEC, (4) submit an updated site plan that incorporates the Town Planning Board's recommendations and (5) obtain wetland disturbance and mitigation approval from the US Army Corps of Engineers. (Exhibit S, annexed hereto).

57. Upon information and belief, the deficiencies described in the above paragraph were not resolved in advance of the April 27, 2022 Town Board public hearing.

58. On April 27, 2022, the Town Board held a public hearing on the 2022 Rezoning Law pursuant to LCD's rezoning application. There were numerous members of the public and the press that were waiting at Town hall and were denied entry due to the limited spacing allowances for the meeting. At least one member of the press called in to address this concern during the public hearing and was summarily dismissed.

59. Prior to the April 27, 2022 public hearing, newly elected Councilman Donnelly recused himself from the Town Board as he had not been a member of the Town Board during review of the 2021 Rezoning Law. Upon information and belief, Councilman Donnelly campaigned on the position that "Though I'm pro-business, I also understand that residents deserve the sanctity of their residential neighborhoods, and that doesn't include business or college developments." (Exhibit T, annexed hereto). Councilman Donnelly's recusal from the discussion and consideration of the 2022 Rezoning Law was a dilution of the vote of the citizens of Vestal against this project.

60. Upon information and belief, the site plan presented at the April 27, 2022 Town Board public hearing predated the Town Planning Board's site plan review in July and August 2021.

61. At the April 27, 2022 public hearing, the Town attorney indicated the purpose of the hearing was to address a procedural issue in the prior proceeding. He further indicated that there was a change in the wetland mitigation measures of the Student Housing Project. The Town attorney also stated that the Town Board is the only board authorized to accept the site plan on this project. (Exhibit U, annexed hereto).

62. During the April 27, 2022 meeting, the Town Board and the public were not advised of the Town Planning Board's decision to reject the prior site plan for the Student Housing Project, or the Town Planning Board comments that they would have voted to reject the 2021 Rezoning Law if they had reviewed the site plan prior to their recommendation of the 2021 Rezoning Law.

63. On April 27, 2022, the Town Board voted to approve the 2022 Rezoning Law and issued a Negative Declaration of Significance under SEQRA by adopting the record of the vacated 2021 Rezoning Law. The Town Board conducted a cursory review of certain items in Parts 2 or 3 of the EAF, and relied on the same "reasoned elaboration" for its previously annulled SEQRA determination. (Exhibit V, annexed hereto).

64. Section 13 of the 2022 Rezoning Law was changed to no longer require a site plan review by the Town Planning Board as required by the Town's Zoning Law §§ 24-84 through 24-88.

65. Section 13 of the 2022 Rezoning Law attempts to amend or repeal §§ 24-84 to 24-88 of the Town's Zoning Law by removing the Town Planning Board from the site plan approval process.

66. Public notice for the 2022 Rezoning Law makes no mention of any amendments to the Town Zoning Law.

67. The 2022 Rezoning Law was never referred to the Town Planning Board for recommendation as required under Town Zoning Law § 24-532(b).

### **The Revised EAF for the 2022 Rezoning Law**

68. The revised EAF for the 2022 Rezoning Law contained a number of significant changes from the EAF submitted for the 2021 Rezoning Law.

69. According to the new Part 1, the project will now require expansion of the water district and a new water supply district. (Exhibit V, p. 6)

70. According to the new Part 1, the project will now require a new wastewater sewage treatment district. *Id.* at p. 6.

71. According to the new Part 1, the project will now produce noise that will exceed existing noise levels during construction. *Id.* at p. 9.

72. According to the new Part 1, the project will now remove trees along the eastern side of the development adjacent to Bunn Hill Road. *Id.* at p. 9.

73. The new Part 1 has re-categorized the conversion of approximately 22 acres of Forested land as “Other: Woods”. *Id.* at p. 10.

74. According to the new Part 1, the project will now prohibit hunting on the property. *Id.* at p. 13.

75. Despite the significant changes to the new Part 1 referenced above, the new Part 1 was purportedly verified by the Applicant on November 20, 2020, which is the same date as the EAF submitted for the 2021 Rezoning Law. *Id.* at p. 14.

76. Despite the significant changes to the new Part 1 referenced above, the new Part 2 purports that the project will no longer have a moderate to large impact on any endangered species, or their habitat, located on or near the site. *Id.* at p. 20.

77. Despite the significant changes to the new Part 1 referenced above, the new Part 3 indicates that the project is no longer a Type 1 Action. *Id.* at p. 35.

78. Despite the significant changes to the new Part 1 referenced above, the new Part 3 incorporates the same “written reasoned elaboration” that was subsequently attached to the Negative Declaration of Significance for the 2021 Rezoning Law. *Id.* at pp. 27-34.

### **New Facts Concerning the Sewer District Application**

79. On August 29, 2022, Respondent BHL Ventures, LLC (“BHL Ventures”) submitted an application to extend and join the water and sewer district (“Water and Sewer District Application”) pursuant to the Student Housing Project. *See* Tooher Aff., Ex. 82<sup>1</sup>.

80. Respondent’s most recent Engineering Report regarding the sewer district extension, dated November 1, 2022, specifically identifies this off campus project as “a student housing development” and not multi-family housing. *See* Tooher Aff., Ex., p. 3.

81. On November 23, 2022, DEC issued an Environmental Notice Bulletin (“ENB”) regarding a permit under the Clean Water Act Quality Certification, which recognized the Student Housing Project as an *unlisted action* under SEQRA, based on the Town’s classification during their coordinated review. *See* Tooher Aff., Ex. 85, p.1.

82. Petitioner advised DEC that the Student Housing Project is Type I and raised concerns that additional water quality impacts were not mentioned in the EAF for the Student Housing Project. *See* Tooher Aff., Ex. 86. For example, the reserved wetland habitat credits proposed as mitigation for the Student Housing Project expired on October 31, 2022. *Id.* at 1.

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<sup>1</sup> References to the Tooher Affirmation are to the Affirmation in Support of the Motion to Reargue, Renew and Amend and Supplement the Petition. If the Motion is granted, the Exhibits will continue in seriatim with the prior exhibit letters.

Likewise, culverting the stream connecting two of the wetlands would allow it to flow under a parking area of the Student Housing Project. *Id.* at 2.

83. Upon information and belief, the revised EAF was never corrected with DEC or any other coordinated agencies to inform them that the Student Project is Type I and not unlisted.

84. On December 7, 2022, The Town Board approved the Water and Sewer District Application. *See* Tooher Aff., Ex. 85.

85. The revised EAF makes no mention of the fact that the DEC and the Binghamton-Johnson City Joint Sewage Treatment Plant Board (“Sewage Treatment Board”) previously raised concerns that residents and businesses with sewer service are at risk from potential sewer line back-up and damage to private property during a flood event if the Sewage Treatment Plant shuts off influent flow from the Town’s Bunn Hill trunk sewer. *See* Tooher Aff., Exs. 77-78, 81.

86. DEC expressed concerns over sewer flow in an April 29, 2021 email to Sewage Board Members regarding the Bunn Hill housing project. *See* Tooher Aff., Ex. 80, p. 9.

87. Minutes from an August 2021 Sewage Treatment Plant Board meeting further explain that the Town requires an easement “to construct an emergency bypass/discharge/outfall for its Bunn Hill trunk sewer.” *See* Tooher Aff., Ex. 81, p. 10.

88. The Town has failed to provide information in the record that it has obtained the required easement to construct the emergency bypass/discharge/outfall for its Bunn Hill trunk sewer.

89. There is nothing in the Town’s administrative record to support the claim that elimination of individual septic systems along Bunn Hill Road is a benefit to the general welfare of the community, especially where it is known that residents and businesses with sewer service



are at risk of sewer line back-ups if the Sewage Treatment Plant shuts off influent flow from the Town's Bunn Hill trunk sewer. *See Tooher Aff., Exs. 77-78.*

90. Although the Zoning Code indicates that the Town Board should have reviewed the Water and Sewer District Application when it issued a Negative Declaration of Significance for the Student Housing Project and approved Local Law A of 2022, the application in this instance was only approved at the most recent Town Board meeting on December 7, 2022.

91. Town Board approval to extend and join the sewer district from the PDD rezoning is procedurally improper according to Zoning Code § 24-38(a), which states that no property can be rezoned from RR rural residence district to any classification unless a public sewer *has been extended*, or a performance bond *has been provided*, or unless the petition contains a covenant that the property will be developed *in compliance with the requirements of the Planning Board*. None of these requirements were met prior to the rezoning of the Bunn Hill property.

92. At the December 7, 2022 meeting, the Town Board minutes cite this Court's Decision as having determined that the requisite "hard look" under SEQRA was taken regarding the sewer and water district – even though the Water and Sewer District Application and supporting documents did not exist during SEQRA and was not before the Court. *See Tooher Aff., Ex. 85, p. 6.*

93. The Town Board clearly articulated the need for SEQRA review on this issue, as reflected in the December 7, 2022 minutes. *See Tooher Aff., Ex. 85, p. 6.*

#### **New Facts Concerning Site Plan Approval by the Planning Board**

94. According to the Planning Board Chair, removing the Planning Board from site plan consideration is inconsistent with the Planning Board's powers under the Zoning Code as explained previously by the Town Supervisor and the Town Attorney, as well as past practices of

the Planning Board. . *See* Affidavit of Ms. Madeleine Cotts dated December 6, 2022 (“Cotts Aff.”) ¶ 5.

95. The following comments by the Town Supervisor and Town Attorney from February, 27 2013 regarding the Vestal Park Rehabilitation and Nursing Center PDD on Route 26 are entirely inconsistent with the position taken in this Article 78 Petition negating the Planning Board’s authority to conduct site plan review for the Student Housing Project:

"Supervisor Schaffer stated that the Town Board only votes on the zoning change. Notifications about the rezoning were sent out as was required by law. A public hearing was held. The sanitary and storm sewers have been checked. The Board believes that it has adequately addressed all of the issues that it has control of. The remaining issues will be addressed by the Planning Board and the site plan review process." *See* Tooher Aff., Ex. 75, p. 2.

"Town Attorney David Berger explained that other development consistent with that zoning classification would be permissible. However, in a Planned Development District (PDD), any new use would need to be approved by the Town Board and be subject to a site plan review by the Planning Board." *Id* at 3.

96. The Planning Board Chair maintains that it has always been her understanding and practice that it is the Planning Board’s responsibility to conduct site plan review of PDD Projects. *See* Cotts Aff ¶ 9.

97. With respect to the instant PDD, the Planning Board fully expected to continue this practice and anticipated further review of the Student Housing Project. *Id.* at ¶¶ 6-7.

98. The Planning Board never received any notice of or explanation from the Town Supervisor or the Town Attorney for the change in the site plan approval practice. *Id.* at ¶ 7.

99. Chairwoman Cotts is unaware of any amendment to the Zoning Code requiring a change in the site plan approval process by the Planning Board and was never contacted by the Town Attorney on this topic. *Id.*

100. The Planning Board Chair and the Planning Board fully anticipated this Project being returned to the Planning Board for Site Plan review. *Id.* at ¶ 6.

### **New Facts Concerning the 2013 Broome County Comprehensive Plan**

101. The Town Attorney made the following statement when the Town Board approved the Local Law A of 2022:

[t]he county comprehensive plan notes at page 274 engaging our students and any professionals that we need to provide amenities and housing opportunities that appeals to student and recent graduates. They prefer places to gather, socialize, and network, which are not related to the bar scene downtown. The county plans to maintain the – the county plan seeks to maintain a rural character, but also recognizes the need for job in the area and the need to have modern varied housing types to attract stakeholders. The project will provide a modern attractive location for those stake holders looking to live and work in Vestal; that does not currently exist with the limited multi-family housing inventory. *See Toohar Aff., Ex. 62, pp. 60-61.*

102. According to the 2013 Broome County Comprehensive Plan the desired ‘amenities’ do not relate to housing, but relate to job fairs, public events and volunteer activities and leadership roles in the community to promote civic engagement of college students, recent graduates, and young professionals. *See Toohar Aff., Ex. 76, p. 274-75.*

103. The recently proposed water and sewer district extension further demonstrates the incompatibility of placing a high-density student housing project in a rural residential area. As articulated in the County Plan, “[n]early 90% of survey residents want to see infrastructure projects concentrated in the Triple Cities (Binghamton, Endicott and Johnson City) as a means of guiding where development takes place. . . . Only one quarter of respondents wanted to see this type of development take place countywide including the rural areas.” *Id. at 277.*

104. According to the Broome County Comprehensive Plan, “[t]he rural character of Broome County is eroded by the loss of agricultural land and the spread of development. *Id.* at 43.

105. The Broome County Comprehensive Plan further states that “[i]n addition to issues of community character, well-managed farmland provides groundwater recharge areas and helps control storm water runoff. Development of farmland increases impervious surfaces such as parking lots and this leads to increased runoff during storm events.” *Id.* at 49.

### **Count I**

#### **Article 78 to Nullify the Town of Vestal Town Board Negative Declaration of Significance for Failure to Comply with the Procedural Requirements of SEQRA Because the Revised EAF and 2022 Rezoning Law is Significantly Different From the 2021 Rezoning Law**

106. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 105.

107. On April 27, 2022, the Town Board voted to issue a Negative Declaration of Significance by adopting the prior record of the 2021 Rezoning Law even though the revised EAF and SEQRA determination pursuant to the 2022 Rezoning Law contained significant changes from the 2021 Rezoning Law.

108. The new Part 1 of the revised EAF for the 2022 Rezoning Law is significantly different from the Part 1 of the EAF for the 2021 Rezoning Law, as described in paragraphs 69 through 74 above, even though the new Part 1 was purportedly verified by the Applicant on the same date as the EAF for the 2021 Rezoning Law.

109. When issuing the Negative Declaration of Significance for the 2022 Rezoning Law, the Town Board failed to substantively address the additional impacts listed in the new Part 1.

110. The Town Board failed to perform an adequate review of Part 2 and/or Part 3 of the revised EAF for the 2022 Rezoning Law as the Board adopted the record of the 2021 Rezoning

Law prior to voting to issue a Negative Declaration of Significance for the 2022 Rezoning Law, despite significant changes to the EAF for the 2022 Rezoning Law.

111. As set forth below, the Town Board has neither properly reviewed nor completed a new Part 2 or Part 3 EAF review under SEQRA for the 2022 Rezoning Law. *See infra* Count II.

112. Accordingly, the Town Board’s SEQRA review and Negative Declaration of Significance for the 2022 Rezoning Law was procedurally defective, arbitrary and capricious and erroneous as a matter of law.

### **Count II**

#### **Article 78 to Nullify the Town of Vestal Town Board’s Negative Declaration of Significance as Arbitrary and Capricious and Failing to Take a Hard Look**

113. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 112.

114. When issuing the Negative Declaration of Significance for the 2022 Rezoning Law, the Town Board failed to take a “hard look” at the relevant areas of environmental concern, including, but not limited to:

- a. Expansion of the water district and a new water supply district;
- b. Creation of a new wastewater sewage treatment district;
- c. Tree removal along the eastern side of the development adjacent to Bunn Hill Road;
- d. Depth of water table less than 3 feet;
- e. Proposed action may involve construction on slopes 15% or greater;
- f. Construction on land where bedrock is exposed, or generally within 5 feet of existing ground surface;
- g. Construction that continues more than one year;

- h. Possible increased erosion;
- i. Decrease of over 10% in surface area of a body of water;
- j. Construction within or adjoining a water body;
- k. Create stormwater discharge that may lead to siltation or degradation of receiving water bodies;
- l. Impact on the nesting/breeding, foraging, or over-wintering habitat for the predominant species that occupy the project site;
- m. Conversion of more than 20 acres of forested land;
- n. Visibility from publically accessible vantage points;
- o. The lack of similar projects visible within 5+ miles of the project;
- p. Traffic increases exceeding capacity of existing road network;
- q. Construction of paved parking area for 500 or more vehicles;
- r. Degraded existing transit access;
- s. Degrading existing pedestrian or bicycle accommodations;
- t. Alteration of the present pattern of movement of people or goods;
- u. Creation or extension of an energy transmission or supply system to serve more than 50 single or two family residences;
- v. Project may utilize more than 2,500 MW hrs. per year of electricity
- w. Heating and/or cooling of more than 100,000 square feet of building area when completed;
- x. Project may produce sound above noise levels established by local regulation;
- y. Project may result in light shining onto adjoining properties;

- z. Project may result in lighting creating a sky-glow brighter than existing area conditions;
- aa. Project in sharp contrast to surrounding land use pattern;
- bb. Inconsistent with local land use plans or zoning regulations;
- cc. Inconsistent with County plans;
- dd. A change in the density of development that is not supported by existing infrastructure or is distant from existing infrastructure;
- ee. Located in an area characterized by low density development that will require new or expanded public infrastructure;
- ff. Create a demand for additional community services;
- gg. Inconsistent with the predominant architectural scale and character;
- hh. Inconsistent with the existing natural landscape.

115. When issuing the Negative Declaration of Significance for the 2022 Rezoning Law, the Town Board failed to effectively review Part 2 of the new EAF where the new Part 2 purports that the project will no longer have a moderate to large impacts on any endangered species, or their habitat, located on or near the site – despite the fact that the new Part 1 contains new significant impacts, as described in paragraphs 69 through 74 above, such as the expansion of a new water supply district and wastewater sewage treatment district, and tree removal along the eastern side of the development adjacent to Bunn Hill Road. *Compare* Exhibit V, pp. 6-9 *with* p. 20.

116. When issuing the Negative Declaration of Significance for the 2022 Rezoning Law, the Town Board failed to effectively review Part 3 of the EAF. The new Part 3 indicates that the project is an Unlisted action under SEQRA, despite the fact that the new Part 3 incorporates the same “written reasoned elaboration” that was subsequently attached to the Negative Declaration

of Significance for the 2021 Rezoning Law, a Type 1 action under SEQRA, and despite the fact that the new Part 1 contains new significant impacts.

117. When issuing the Negative Declaration of Significance for the 2022 Rezoning Law, the Town Board failed to substantively address the additional impacts in the new Part 1 as referenced in paragraphs 69 through 74 above.

118. The Town Board could not have taken the requisite “hard look” at environmental impacts of the sewer district extension before Respondent filed the Water and Sewer District Application.

119. To the extent that agencies such as DEC rely on the Town’s representation that this Student Housing Project is an unlisted action, the SEQRA review is inherently misleading and procedurally defective. The misclassification of the Student Housing Project as “unlisted” has meaningful consequences in the environmental review process and was not merely a clerical mistake.

120. Accordingly, for the reasons stated above, the Town Board’s Negative Declaration of Significance for the 2022 Rezoning Law is arbitrary and capricious and erroneous as a matter of law.

**Count II. A**



**Article 78 to Nullify the Town of Vestal Town Board’s Negative Declaration of Significance as Arbitrary and Capricious and Improper Segmentation of SEQRA for the Water and Sewer District Application**

121. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 120.

122. The Town improperly relies on the previously issued Negative Declaration of Significance for the 2022 Rezoning Law as the SEQRA review for the Respondent’s Water and Sewer District Application.

123. Reliance on the prior SEQRA determination by the Town Board in support of its the Water and Sewer District Application months after the Town Board issued a Negative Declaration for the Student Housing Project, is improper under SEQRA as Respondent has submitted significant new material in the interim that could not have been part of the initial review.

124. To conduct a separate SEQRA review on the environmental impacts at this juncture would constitute improper segmentation under SQERA.

125. According to the SEQRA Handbook, water and sewer extensions to larger projects should include the “whole action”, and “[s]eparating the utility extension from the review for the rest of the project would constitute segmentation. *See Toohar Aff.*, Ex. 84, p. 32.

126. “Cumulative impacts must be assessed when actions are proposed, or can be foreseen as likely, to take place simultaneously or sequentially in a way that the combined impacts may be significant.” *Id.* at 80.

127. The SEQRA Handbook identifies the following examples where cumulative impacts should be considered: “[a] single action inducing one or more secondary actions, e.g., the expansion of a public water system inducing residential subdivision of an area previously constrained from growth due to the unavailability of potable water” or “[t]wo or more different

types of actions carried out in a planned sequence, e.g., the expansion of a sewage treatment facility in preparation for and followed by the development of, a new residential area.” *Id.* at 80.

128. The Town Board has effectively sidestepped SEQRA review of the Water and Sewer District Application by relying on the EAF for the Student Housing Project, even though the Town Board held multiple public hearings on sewer district extension after Respondent submitted new material for review, such as the Engineering Report date November 1, 2022. *See* Tooher Aff., Ex. 83.

129. To the extent that agencies such as DEC rely on the Town’s representation that this Student Housing Project is an unlisted action, the SEQRA review is inherently misleading and procedurally defective. The misclassification of the Student Housing Project as “unlisted” has had meaningful consequences in the environmental review process and was not merely a clerical mistake.

### **Count III**

#### **Article 78 to Nullify the Town Board’s Resolution Approving the 2022 Rezoning Law for Improperly Amending §§ 24-84 Through 24-88 of the Town Zoning Law Without Identifying Said Sections in Violation Town Code §§ 1-6(b) and (e)**

130. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 129.

131. Section 13 of the 2022 Rezoning Law amends or repeals §§ 24-84 through 24-88 of the Town’s Zoning Law by removing the requirement for site plan approval by the Town Planning Board.

132. Vestal Town Code Section 1-6(b) requires identifying by specific reference the section of the Town Code to be amended.

133. Section 1-6(e) of the Town Code requires specifically identifying the sections, articles, chapters or provisions of the Town Code desired to be repealed.

134. The 2022 Rezoning Law failed to identify any sections, articles, chapters or provisions of the Town Code sought to be amended or desired to be repealed.

135. Therefore, the Town Board's approval of the 2022 Rezoning Law was arbitrary and capricious and contrary to law for violating § 1-6(b) and (e) of the Town Code.

#### **Count IV**

#### **Article 78 to Nullify the Town of Vestal Town Board's Resolution Approving 2022 Rezoning Law for Failing to Refer the 2022 Rezoning Law to the Town Planning Board for Review in Violation of § 24-532(b) of the Town Zoning Law**

136. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 135.

137. The Applicant amended the EAF on the 2021 Zoning Law change with a more detailed site plan after the Town Planning Board initially recommended the Town Board approve the 2021 Rezoning Law with certain caveats.

138. On July, 6, 2021 and August 24, 2021, the Town Planning Board denied the Project's site plan on two occasions after the Town Board passed the 2021 Rezoning Law. Planning Board Minutes. (Exhibits J and L, annexed hereto).

139. At the August 24, 2021 meeting, the Town Planning Board noted that there would have been a different outcome for their recommendation if they had the latest detailed plan in advance of the recommendation. Planning Board Minutes. (Exhibit L, annexed hereto).

140. Section 24-532(b) of the Town Zoning Law requires Town Planning Board approval of any rezoning amendment.

141. The Town Board failed to refer the 2022 Rezoning Law to the Town Planning Board for recommendation in violation of § 24-532(b) of the Town Zoning Law.

142. The 2022 Rezoning Law is significantly different from the 2021 Rezoning Law and should have been referred to the Town Planning Board in accordance with § 24-532(b) of the Town Zoning Law.

143. By failing to refer the 2022 Rezoning Law to the Town Planning Board for recommendation in violation of § 24-532(b) the Town Board's approval of the 2022 Rezoning Law was arbitrary and capricious and contrary to law.

#### **Count V**

#### **Article 78 to Nullify the Town Board's Resolution approving the 2022 Rezoning Law as Improperly Amending the Town's Zoning Law and Removing the Planning Board From the Site Plan Review Process.**

144. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 143.

145. The Town Planning Board has been designated by the Vestal Town Board per section 274-a of NY Town Law to review and approve all site plans.

146. Pursuant to the 2021 Rezoning Law, the Town Board originally referred the site plan on the Project for review by the Town Planning Board, which the Planning Board denied.

147. The Town Board failed to perform the substantive review required under SEQRA for the 2022 Rezoning Law, which contained significant changes from the 2021 Rezoning Law by amending Town Zoning Law Town Zoning Law §§ 24-84 through 24-88 to remove the Planning Board from the site plan review process.

148. The Town Board failed to properly notice a public hearing on the substantive changes to Town Zoning Law §§ 24-84 through 24-88 effectuated by the 2022 Rezoning Law.

149. Following the public hearing on the 2022 Rezoning Law, and after approving the resolution adopting Local Law A of 2022, the Town attorney stated that the Town Board is the only Board qualified to accept the site plan on this project.” See Draft Minutes April 27, 2022. (Exhibit U, annexed hereto).

150. The 2022 Rezoning Law, as confirmed by the understanding of Town attorney at the public hearing, improperly amended the Town’s Zoning Law by removing the Town Planning Board from the site plan review process in contravention of Town Law and the requirements of SEQRA.

151. By improperly removing the Town Planning Board from the site plan approval process, the Town Board’s approval of the 2022 Rezoning Law failed to comply with the requirements of SEQRA, was arbitrary and capricious and contrary to law.

#### **Count VI**

#### **Article 78 to Nullify the Town Board’s Resolution Approving the 2022 Rezoning Law as Improperly Amending the Town Zoning Law in Violation of the Requirements of NY Town Law § 264(3) for Failing to Refer Local Law 1 of 2022 to the County Planning Department for Review Under General Municipal Law §§ 239(l) and 239(m)**

152. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 151.

153. When previously reviewing the 2021 Rezoning Law and prior to issuing the Negative Declaration of Significance, the Town Board referred the 2021 Rezoning Law to the County Planning Department for recommendation in accordance with NY Town Law § 264(3) and General Municipal Law §§ 239(l) and 239(m).

154. As set forth in paragraph 34, above, the County Planning Department previously recommended denial of the project and noted the impact of the proposed Student Housing Project on traffic, public transportation, inadequate safety measures for pedestrians, viability of utility

placement and wastewater facilities and stormwater management facilities; and incompatibility of the Project with the 2013 Broome County Comprehensive Plan and the Broome County Housing Study.

155. The 2022 Rezoning Law is significantly different from the 2021 Rezoning Law and should have been referred to the County Planning Department in accordance with General Municipal Law §§ 239(l) and 239(m).

156. Prior to taking any action on the for 2022 Rezoning Law, the Town Board failed to refer the 2022 Rezoning Law to the County Planning Department for review in violation of GML § 239(l) and 239(m).

157. The Town Board is not authorized to act on a rezoning law without referral to the County Planning Board for review in accordance with GML §§ 239(l) and 239(m).

158. Therefore, the Town Board's approval of the 2022 Rezoning Law without review by the County Planning Department was arbitrary and capricious and contrary to law.

### **Count VII**

#### **Article 78 to Nullify the Town of Vestal Town Board's Resolution Approving the 2022 Rezoning Law as Constituting Illegal Spot Zoning and is Arbitrary and Capricious and Contrary to Law**

159. Petitioner hereby affirms and incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 158.

160. Section 24-531 of the Town Zoning Law requires guidance regarding the purpose and standards for approval of a PDD.

161. The Town of Vestal lacks a Comprehensive Plan as the Town prepared a draft Comprehensive Plan but failed to pass it.

162. While recognizing the need for a Comprehensive Plan, the Town Board approved the 2022 Rezoning Law while concurrently planning to develop a Comprehensive Plan in the future.

163. The 2022 Rezoning Law is not part of a Comprehensive Plan for development in the Town of Vestal. It is inconsistent with the prior draft Comprehensive Plan and the Town's prior use of the PDD zoning change procedure.

164. Upon information and belief, the 2022 Rezoning Law is distinct and different from prior PDD approvals in the Town of Vestal, which established several uses under different property owners and were beneficial to the general community.

165. By contrast, the 2022 Rezoning Law involves a collection of parcels under single ownership and a project to be constructed and managed by a single entity.

166. The alleged benefits to the Town of Vestal are speculative and/or illusory. Instead, the 2022 Rezoning Law stands to benefit a single landowner.

167. The 2022 Rezoning Law is inconsistent with the surrounding land uses and existing RR District in which it is proposed to be located.

168. Although the Town Board did not refer the 2022 Rezoning Law to the Broome County Planning Board, the Broome County Planning Board previously recommended disapproval of the project, as set forth in paragraph 34, above, and noted the impact of the proposed Student Housing Project on traffic, public transportation, inadequate safety measures for pedestrians, viability of utility placement and wastewater facilities and stormwater management facilities; and incompatibility of the Project with the 2013 Broome County Comprehensive Plan and the Broome County Housing Study.

169. There is no indication in the record of consideration of any alternative sites for the proposed project that would be less impactful to the RR district.

170. A large number of local residents opposed the 2022 Rezoning Law because the proposed development would be detrimental to the community.

171. Based upon the GML § 239 review and the new information referenced above, the Town Board could not have rationally concluded that Local Law A of 2022 would benefit the general welfare of the community for the following reasons:

- a. The GML § 239 review found an oversupply of student housing and stated that infrastructure projects (such as sewer district extension) should be concentrated in the Triple Cities area,
- b. The project is unequivocally student housing and not multi-family housing,
- c. The Student Housing Project does not provide the desired articulated amenities designed to promote civic engagement of students, recent graduates and young professionals, and
- d. Rural residential areas are not desired for development according to the 2013 Broome County Comprehensive Plan.

172. Accordingly, the Town Board's approval of the 2022 Rezoning Law constitutes impermissible spot zoning and is therefore arbitrary and capricious and contrary to law.

### **Requested Relief**

**WHEREFORE**, Petitioner Friends for Responsible Vestal Zoning, by and through Victor Lamoureux, respectfully requests the following relief:

- a) An Order vacating and nullifying the Negative Declaration of Significance under SEQRA pursuant to the Local Law A of 2022;



- b) An Order vacating and nullifying the Town Board’s resolution approving the Local Law A of 2022 and the correspondingly filed Local Law A of 2022;
- c) An Order vacating and nullifying the Town Board’s resolution approving the Water and Sewer District Application of Respondent BHL Ventures, LLC;
- d) An Order remanding this matter to the Town Board and directing the Town Board to comply with the substantive and procedural requirements of SEQRA, the Town of Vestal Code, NY Town Law and the General Municipal Law in considering the application of Respondent LCD Acquisition, LLC for a Planned Development District zoning change;
- e) An Award to Petitioners of their costs, disbursements, and attorney’s fees; and
- f) Such other and further relief as this Court determines to be just and equitable.

Date: December 12, 2022  
Albany, New York



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