STATE OF NEW YORK
SUPREME COURT COUNTY OF CORTLAND

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.

Index No.:EF22-260
RJI No.: 2022-0169-M

Hon. Mark G. Masler

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO REARGUE OR LEAVE TO RENEW AND AMEND AND SUPPLEMENT THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Preliminary Statement

This Memorandum of Law is submitted on behalf of Petitioner Victor Lamoureux, on behalf of Friends for Responsible Vestal Zoning, an unincorporated association, ("Petitioner") in support of Petitioner's Motion for Leave to Reargue or Leave to Renew and Amend and Supplement the Petition.

Petitioner commenced this special proceeding on June 23, 2022, by filing a Verified Petition ("Petition") setting forth multiple claims under CPLR Article 78 challenging the approval by Respondent Town Board of the Town of Vestal ("Town Board") of the resolution approving, and correspondingly filed Local Law A of 2022. Counts III and V of the Petition seek to nullify the resolution and Local Law A of 2022 and prohibit Respondent Town of Vestal Town Board ("Town Board") from illegally and arbitrarily usurping the site plan review authority of the Town Planning Board. The Petition further alleges that the Town Board failed to take the requisite "hard look" under the State Environmental Quality Review Act ("SEQRA") at the full environmental impacts of the Project (Count II); and finally, that Local Law A of 2022 constitutes illegal spot zoning (Count VII).

In the Decision, Order, and Judgment dated November 9, 2022 ("Decision"), with Notice of Entry filed November 10, 2022, the Court dismissed Counts III and V of the Petition based on statutory interpretation grounds, finding that the Town Board failed to provide standards in the Town of Vestal Zoning Code ("Zoning Code") "to guide actions of the Planning Board when it enacted the PDD ordinance," and that "the Town Board reserved itself the sole authority to approve or deny a PDD application." *See* Tooher Affirmation ("Tooher Aff."), Exhibit ("Ex.") 72, p. 8. With respect to the SEQRA claim contained in Count II of the Petition, the Decision found that the Town Board took the requisite "hard look" and provided a reasoned elaboration for the basis of its determination regarding potential impacts of the project. *Id.* at 5. The Decision also

concluded that Petitioner did not meet his heavy burden regarding the illegal spot zoning claim set forth in Count VII of the Petition. *Id.* at 10.

Petitioner respectfully requests leave to Reargue the Dismissal of Counts III, V and VII of the Petition and reinstate those claims because the Decision overlooked or misapprehended certain issues of law and fact related to the Planning Board's authority to conduct the site plan review process; and overlooked information from the 2013 Broome County Comprehensive Plan ("County Plan") that demonstrates the Student Housing Project's incompatibility with the County Plan.

Petitioner also requests leave to Renew, Amend and Supplement the Petition on Counts II, III, V, and VII based upon new evidence recently obtained, which confirms:

i. Petitioner's assertions that the Town Planning Board has mandatory authority in site plan approval, including in the Planned Development District (PDD) process;

ii. that the Respondent Town failed to adequately review under SEQRA the environmental impact of the Student Housing Project joining the water and sewer district; and

iii. that the recently submitted engineering report in support of the application for the joint sewer district clearly identifying the Project as student housing confirms that the Project is inconsistent with the 2013 Broome County Comprehensive Plan.

Based upon this new evidence, Petitioner respectfully requests the Court grant leave to renew on Counts II, III, V and VII, and reinstate those counts of the Petition and further allow Petitioner opportunity to amend and supplement the Petition to include these new factual allegations.

Argument

I. THE COURT SHOULD GRANT LEAVE TO REARGUE COUNTS III, V, AND VII

CPLR 2221 authorizes a party to seek leave to renew or reargue a prior motion. A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion . . . ." CPLR 2221(d)(2). Petitioner submits that the Decision misapprehended or overlooked law and facts related to the Planning Board's authority to conduct the site plan review process (Counts III and V), as well as facts related to the Broome County Comprehensive Plan in dismissing the illegal spot zoning claim (Count VII). For these reasons, Plaintiffs respectfully request that the Court grant leave to reargue and upon reargument, reinstate the Petition Counts III, V and VII..

A. The Decision Ignores or Overlooks the Planning Board's Authority to Conduct Site Plan Review Pursuant to Zoning Code Sections 24-84 to 24-88 (Counts III and V)

The Decision finds the Zoning Code sections regarding Planned Development Districts ("PDDs") "facially ambiguous" as to the Planning Board's role. *See* Tooher Aff., Ex. 72, p. 7. Upon reviewing the PDD sections of the Zoning Code, the Court proposes two competing theories: either the Town Board delegated authority to the Planning Board to make mandatory findings in approving/disapproving an application as a condition precedent to the Town Board's authority to approve a PDD; or the Town Board merely assigned the Planning Board an advisory role to make recommendations on the PDD. *Id.* at 6-7. However, by focusing exclusively on the PDD sections of the Zoning Code, the Court overlooks or misapprehends Zoning Code §§ 24-84 to 24-88 which require site plan approval by the Planning Board. As a result the Decision create a false dichotomy with respect to the Planning Board's role in the PDD process and fails to directly address the Planning Board's authority in site plan approval.

Additionally, the Decision erroneously determines that the "Zoning Code provides no standards whatsoever to guide the Planning Board" and "that the general objectives of the Zoning Code…similarly fails to provide the Planning Board with intelligible standards." *Id.* at 8. The Court concludes that "by failing to provide standards to guide the actions of the Planning Board when it enacted the PDD ordinance, the Town Board reserved to itself the sole authority to approve or deny a PDD application." *Id.*

This conclusion appears to have overlooked completely or misapprehend Zoning Code §§ 24-84 to 24-86, which unambiguously delegate mandatory site plan approval to the Planning Board in *all* instances.24-87 to 24-88 According to Zoning Code §§ 24-84(a) the Planning Board must be involved in site plan approval prior to the issuance of any development or building permit. Any subsequent changes in approved site plans require additional Planning Board approval. *Id.* The only exclusions articulated in the Code are "single family detached houses in any district" or a "two-family houses in an RA-2 one-and two-family residential district." *Id.*

The Decision inaccurately focuses on the approval of the PDD itself – which is separate and apart from approval of the Site Plan for the Project. Zoning Code § 24-532(a)(5) requires that a site plan be included in the PDD application, and nothing excludes the Planning Board from review of this site plan. Even the "purpose clause" of the Zoning Code regarding PDDs (§ 24-531) clearly states that a PDD be established "for purpose of promoting *integrated site planning* of tracts of land ten (10) acres or more."

"[N]o rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal." *Bender v Jamaica Hosp.*, 40 NY2d 560, 562 (1976). "The courts are not free to legislate and if any unsought consequences result, the Legislature is best suited to evaluate and resolve them." *Id.*; *Bright Homes v Wright,* 8 NY2d 157, 162 (1960). Likewise,

courts often refer to a statute's purpose clause, or reference another provision of the same statutory enactment to find the meaning of a particular statutory provision. *See e.g.*, *Council of City of New York v Giuliani*, 5 A.D.3d 330, 773 N.Y.S.2d 557 (N.Y. App. Div. 2004); *see also*, *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 562-63 (1999).

Here, when interpreting Zoning Code §§ 24-531 and 24-532 concerning PDDs, the Court failed to consider the unambiguous language in Zoning Code §§ 24-84 to 24-88 regarding site plan approval. When read together, Zoning Code §§ 24-84 to 24-88 concerning site plan approval by the Planning Board are consistent with the underlying objective for establishing a PDD: to promote integrated site planning of tracts of land ten (10) acres or more with Planning Board site plan approval. *See* Zoning Code § 24-531. Following the public hearing when the Town Board approved Local Law A of 2022, the Town Attorney explained that "the PDD process, has been part of our code since at least 1966." *See* Tooher Aff., Ex. 62, pp. 60-61. The Zoning Code sections concerning site plan approval by the Planning Board were approved during the same 1966 statutory enactments. Therefore, the Zoning Code, based upon the PDD purpose clause and the language of the Zoning Code sections concerning site plan approval by the Planning Board, reflect that the Town Board maintained authority with the Planning Board for site plan approval and issuing building permits separate and apart from the Town Board's authority to approve a PDD.

To rule that the Planning Board can only make advisory recommendations in the PDD rezoning application review process and that no further site plan approval is required from the Planning Board would remove the Planning Board's mandatory role in site plan approval simply because of the PDD rezoning. While the Planning Board's authority in the PDD application review process is arguably limited to an advisory capacity, the language of §§ 24-84 to 24-88 unequivocally maintains a mandatory role in the site plan approval process. The Planning Board

has never approved any site plan related to Respondents' Student Housing Project, and indeed voted to disapprove the proposed site plan. See, Exhibit 39. Whether or not there have been substantial changes to the Student Housing Project, Respondents must still proceed with the site plan approval before the Planning Board in accordance with the Zoning Code.

The Town Board is required to properly amend the Zoning Code if it wishes to modify the Planning Board's mandatory site plan approval authority when approving a project in the PDD. By upholding Local Law A of 2022 in the current Decision, the Court has effectively allowed the Town Board to remove the Planning Board's mandatory authority in the site plan approval process without properly amending the Zoning Code. As such, the Decision overlooked the provisions of Zoning Code §§ 24-84 to 24-88, and misconstrued the language of the Zoning Code. Therefore, the Court should grant leave to Reargue Counts III and V of the Petition and upon reargument, reverse dismissal of those claims.

B. The Court Misapprehended or Overlooked Information in the 2013 Broome County Comprehensive Plan When Dismissing the Illegal Spot Zoning Claim (Count VII)

The Decision provides the following guidance with respect to the standard of review for an illegal spot zoning claim:

> "[s]pot zoning is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners. In evaluating a claim of spot zoning, courts may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff. However, the ultimate inquiry is whether the challenged zoning is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community" *61 Crown St., LLC v City of Kingston Common Council*, 206 AD3d 1316, 1320 (3d Dept 2022).

Courts consider rezoning laws to be a legislative act that enjoy a strong presumption of constitutionality, which a petitioner has the burden of overcoming beyond a reasonable doubt. *See Matter of Town of Bedford v Village Mount Kisco*, 33 NY2d 178, 186 (1973).

In this case, the Decision determined that Petitioner failed to meet its heavy burden by finding that "the Town Board considered the consistency of the project with community plans and the existing community character, and noted that the project's residential character was consistent with the predominantly residential use of the surrounding area and that the project would benefit the general welfare of the community by providing high-quality, multi-family housing and by extending public water and sewer service in the Town, thereby leading to an elimination of individual septic systems." *See* Tooher Aff., Ex. 72, p.10. The Court also found that "the Town Board rationally concluded that the rezoning law was consistent with the Town's plans and calculated to benefit the community as a whole" as "the project was consistent with the Broome County Comprehensive Plan because it will provide multi-family housing and amenities that appeal to university students and recent graduates, which are in high demand in the community." *Id.* at 10-11.

Based on this rationale, the Court's analysis appears to have misapprehended or overlooked the General Municipal Law ("GML") § 239 review conducted by the Broome County Department of Planning and Economics as well as the contents of the Broome County Comprehensive Plan. The GML § 239 review explained that 89 percent of residents who responded to a survey from the County Plan believed that infrastructure projects (such as sewer district extension) should be concentrated in the Triple Cities area (Binghamton, Johnson City, and Endicott). *See* Tooher Aff., Ex. 5, p. 5. Only eleven (11%) percent responded that water and sewer line extensions should expand development outside of the Triple Cities. *Id.* The GML § 239 review also noted that a

2017 Broome County Housing Study documented an *oversupply* of student housing. Indeed, the Housing Study specifically observed that "on-campus housing provided by Binghamton's University, combined with the existing stock of off campus student housing, has reached a maximum level of supply. Any new beds added to this inventory will exceed demand, and there continues to be the pending issue of whether this existing inventory can be sustained." *Id.*[1] Therefore, based upon the GML 239 review and the Broome County Comprehensive Plan, the Court misapprehended or overlooked relevant factual information demonstrating that the Town Board failed to properly consider the County Plan or whether the zoning changes benefit the community as a whole. Accordingly, it is respectfully submitted that the Court should grant leave to reargue Count VII, and upon reargument, reverse dismissal of Petitioner's spot zoning claim.

II. THE COURT SHOULD GRANT LEAVE TO RENEW COUNTS II, III, V AND VII BASED UPON NEW FACTS AND UPON RENEWAL UPHOLD THESE COUNTS OF THE PETITION AND ALLOW PETITIONER TO AMEND AND SUPPLEMENT THE PETITION TO INCLUDE THESE ALLEGATIONS

CPLR 2221(e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." Petitioner submits the following justifying renewal on Counts II, III, V and VII:

i. New facts related to the Planning Board's authority to conduct the site plan review process (Counts III and V);

[1] As discussed *infra* the Student Housing Project is unequivocally for student housing, as identified by Respondent's own engineering report dated November 1, 2022. The layout of the 5-bedroom apartments and touted location in proximity to the University do not reflect "high quality multi-family housing."

ii. New facts concerning potential environmental impacts related to Respondents' recent efforts to join the water and sewer district to demonstrate that these impacts were not adequately reviewed under SEQRA (Count II);

iii. New facts obtained from Respondents' recent efforts to join the water and sewer district to show that the Student Housing Project constitutes illegal spot zoning (Count VII).

Based upon this new information, Petitioner requests this Court grant leave to renew Counts II, III, V and VII, and to further allow Petitioner to amend and supplement the Petition.

A. New Facts Regarding the Planning Board's Mandatory Authority in Site Plan Approval for Prior PDDs (Counts III and V)

In seeking leave to renew Counts III and V regarding the Planning Board's authority in site plan approval, Petitioner seeks to offer new facts to the Court regarding the Town Board's practices on prior PDDs, which was only recently brought to our attention by the Planning Board Chair. Submitted herewith as Exhibit 74 to the Tooher Affirmation is an Affidavit from the Planning Board Chair Madeleine Cotts, dated December 6, 2022 ("Cotts Aff."), which discusses the Planning Board's integral role in site plan approval in the PDD process from at least 2013 to the present. 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* Cotts Aff. ¶ 5. Specifically, 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 litigation negating the Planning Board's authority to conduct site plan review for the Student Housing Project on Bunn Hill. Specifically:

> "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.*

The Planning Board Chair states 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. With respect to the Bunn Hill Road PDD, the Planning Board fully expected to continue this practice and anticipated further review of the Student Housing Project. *Id.* at ¶¶ 6-7. The Planning Board Chair 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. Additionally, 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.* 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.

These facts were brought to Petitioner's attention only after the Planning Board Chair became aware of the Decision and was advised that the Student Housing Project would not be coming back to the Planning Board for site plan review. *Id.* at ¶ 3. Therefore, Petitioner requests this Court grant leave to renew Counts III and V, and upon renewal reinstate those claims and allow Petitioner to Amend the Petition to include these additional facts.

> <u>B. New Facts Discovered Regarding the Proceedings to Join the Sewer District Demonstrate the Town Board Improperly Segmented the SEQRA Review and Failed to Take the Requisite Hard look at the Environmental Impacts of the Project (Count II)</u>

The Decision found that with respect to the SEQRA determination, the Town Board took the requisite hard look at the environmental impacts of the Project based on prior review of potential impacts and its review of the revised EAF. *See* Tooher Aff., Ex. 72, p. 5. In support of this conclusion, the Court offered the following explanation: "[a]n Agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant." *Id.* at 6 citing, *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 307 (2009). Notably, however, the Court of Appeals decision in *Matter of Save the Pine Bush, Inc*, was based on a finding that the City had investigated "such subjects as traffic and storm water drainage" as well as other ecological concerns. 13 NY3d at 307.

In this case, renewal of the SEQRA claim is appropriate because new facts have come to light that could change the Decision. The revised EAF makes no mention of the fact that the New York State Department of Environmental Conservation ("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. Likewise, it appears there are sewer flow management concerns set out in an April 29, 2021 email to Sewage Board Members from the DEC regarding the Bunn Hill housing project. *See* Tooher Aff., Ex. 80, p. 9.

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. The Town should have been aware of this information previously, but there is no evidence that this information was considered in the Town's

administrative record. Furthermore, 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. Likewise, 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.

The Town Board should have been in possession and aware of this information when conducting its SEQRA review for the Student Housing Project, but nevertheless failed to take a "hard look" at these critical facts, which relate to the environmental consequences of extending the sewer district, such as the potential for damage to private property as a result of sewage backflow during wet weather, a flood, or storm water events. Should the Town Board look to examine these issues now, it would constitute illegal segmentation under SEQRA. Petitioner only became aware of these new facts upon filing a Freedom of Information request with DEC after Respondent BHL Ventures, LLC applied to join the water and sewer district on August 29, 2022 ("Water and Sewer District Application") five (5) months after the Town Board conducted its SEQRA review of the Student Housing Project. *See* Tooher Aff., Ex. 82.

Segmenting Town Board approval to extend and join the sewer district from the PDD rezoning is procedurally improper according to SEQRA and 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.[2] 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. Curiously, 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.

Potential impacts must be evaluated before allowing an action to take place. *See Miller v. City of Lockport,* 210 AD2d 955, 957 (4th Dept 1994) (annulling negative declaration because instead of studying the environmental impacts, "conditions were being imposed" on the facility); *Corrini v Village Of Scarsdale*, 1 Misc 3d 907 781 N.Y.S. 2d 623 (NY Sup. Ct. 2003) (annulling negative declaration because lead agency failed to study the relevant impacts and left it for future review and analysis).

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* Tooher Aff., Ex. 84, p. 32. Likewise, "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. Moreover, the SEQRA Handbook identifies the following examples where cumulative impacts

[2] The Town Board apparently "waived" the performance bond requirement at a meeting on December 7, 2022. The Board cites the fact that the Student Housing Project could not go forward without the sewer and water extension as the basis for not requiring the bond. It is respectfully submitted that this is exactly the reason for a performance bond – that if the Project does not go forward, the Town is not left financially responsible for either completing the sewer extension or remediating environmental damage from incomplete construction of the extension. It is respectfully submitted that this reasoning is arbitrary and capricious on its face.

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.

In this case, 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 dated November 1, 2022. *See* Tooher Aff., Ex. 83. DEC previously raised concerns with respect to sewage backflow during wet weather or storm water events, which may cause damage to private property. *See* Tooher Aff., Exs. 77-78. 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. The Town Board could not have taken the requisite "hard look" at the sewer district extension before Respondent filed the Water and Sewer District Application, and relying on the prior SEQRA determination constitutes an improperly segmented review as Respondent has submitted significant new material to 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.

The misclassification of the Project as an unlisted action exacerbates the inadequacy of the SEQRA review. According to the Decision, "the Town Supervisor avers that he inadvertently checked "unlisted" instead of "Type I" on the EAF without intending to recharacterize the project. *See* Tooher Aff., Ex. 72, Decision, p. 4 citing NYSCEF Doc No. 45, Schaffer Aff ¶ 8. A Type I action under SEQRA carries with it the presumption of environmental impact. Although the

Decision appears to negate the importance of this misclassification, on November 23, 2022, DEC issued an Environmental Notice Bulletin ("ENB") regarding a permit under the Clean Water Act Quality Certification, identifying 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. As such, to the extent that other agencies rely on the Town's representation that this Student Housing Project is an unlisted action, the SEQRA review is inherently misleading and procedurally defective. Accordingly, this additional evidence supports a determination that the misclassification of the Student Housing Project as "unlisted" has meaningful consequences in the environmental review process and was not merely a clerical mistake.

Petitioner only became aware of the multiple agency misrepresentation on the Type of action after receiving a DEC Environmental Notice Bulletin on November 23, 2022, accepting comments through December 8, 2022. *Id.* Petitioner advised DEC that the Student Housing Project is Type I and raised several concerns that additional water quality impacts were not mentioned in the EAF for the Student Housing Project. *See* Tooher Aff., Ex. 86. The reserved wetland habitat credits proposed as mitigation for the Student Housing Project expired on October 31, 2022. *Id.* at 1. 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. The Town Board's SEQRA review of the Student Housing Project was facially inadequate without a comprehensive "hard look" at the proposed sewer and water extension. Therefore, Petitioner requests this Court grant leave to renew Count II with respect to SEQRA, and upon renewal reinstate these counts and allow Petitioner to amend and supplement the Petition to include these additional facts.

C. New Facts Regarding Illegal Spot Zoning Contrary to the Brome County Comprehensive Plan (Count VII)

In addition, Petitioner seeks to renew the illegal spot zoning claim based upon recently received information. 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* Tooher Aff., Ex. 62, pp. 60-61.

According to the County 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* Tooher Aff., Ex. 76 p. 274-75. The Court appears to rely on the Town's erroneous finding that the PDD is consistent with the County Plan "because it will provide multi-family housing and amenities that appeal to university students and recent graduates, which are in high demand in the community." *See* Tooher Aff., Ex. 72, p. 10. However, 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. 83, p. 3. Petitioner only recently became aware of the Engineering Report after Respondents filed a petition for the Student Housing Project with the Town on August 29, 2022 to extend and join the sewer district. *See* Tooher Aff., Ex. 82.

In addition, 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." *See* Tooher Aff., Ex. 76, p. 277. The tremendous outpouring by Vestal residents in opposition to this Project supports a finding that this Project only benefits a single landowner at this location. "The rural character of Broome County is eroded by the loss of agricultural land and the spread of development. *Id.* at 43. "In 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.

Based upon reconsideration of 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:

1. 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,
2. The project is unequivocally student housing and not multi-family housing,
3. The Student Housing Project does not provide the desired articulated amenities designed to promote civic engagement of students, recent graduates and young professionals, and
4. Rural residential areas are not desired for development according to the County's Plan.

Therefore, Petitioner requests this Court grant leave to renew Counts VII with respect to the illegal spot zoning claim, and upon renewal, to reinstate this claim and allow amendment and supplementation of the Petition.

Conclusion

Petitioner Victor Lamoureux, on behalf of Friends For Responsible Vestal Zoning, an unincorporated association, respectfully request that this Court grant leave to reargue the Counts III, V and VII of the Petition as the Decision misapprehends or overlooks the relevant facts and law previously presented before the Court. In the alternative, Petitioner request the Court grant leave to renew, amend and supplement Counts II, III, V and VII based upon the recently obtained new information confirming the Planning Board's mandatory authority in site plan approval, identifying procedural defects in the Town's SEQRA review, and establishing that this project constitutes illegal spot zoning.

Dated: Albany, New York
December 12, 2022

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CERTIFICATE OF WORD COUNT LIMIT

The undersigned attorney hereby certifies:

This Memorandum of Law filed herein complies with the word count limitations pursuant to rule 202.8-b(c) of the Uniform Civil Rules for the Supreme Court and County Court as amended by the Administrative Order 141-22 effective July 1, 2022. According to the word processing system used in this office this document, exclusive of the §s excluded by Rule 202.8-b(b) contains 5,711 words.

Dated: Albany, New York
December 12, 2022

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