

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.

**AFFIRMATION OF  
MEAVE M. TOOHER IN  
SUPPORT OF MOTION  
FOR LEAVE TO  
REARGUE AND/OR  
RENEW AND TO  
AMEND AND  
SUPPLEMENT THE  
PETITION**

Index No.:EF22-260

RJI No.: 2022-0169-M

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I, Meave M. Tooher, an attorney duly admitted to practice law in the State of New York, hereby affirm under penalty of perjury that:

1. I am counsel for Petitioner Victor Lamoureux, on behalf of Friends For Responsible Vestal Zoning, an unincorporated association, and am fully familiar with the facts and circumstances alleged herein.

2. I make this Affirmation in support of Petitioner's Motion for Leave to Reargue, Renew, and to Amend and Supplement Counts II, III, V and VII of the Article 78 Petition filed with this Court on June 23, 2022, and dismissed in the Court's Decision, Order and Judgement dated November 9, 2022, and entered November 10, 2022.

3. In addition to this affirmation, the accompanying Memorandum of Law in Support of Petitioner's Motion for Leave to Reargue, Renew and Amend or Supplement ("Memorandum of Law"), and proposed amended and supplemental Petition, Petitioner relies on the prior papers filed on this Article 78 Petition in the NYSECF filing system (annexed as Exhibits 1 through 73).

4. Petitioner further submits the Affidavit of Ms. Madeleine Cotts (annexed as Exhibit 74) in addition to the following exhibits in support of the Motion for Leave to Renew:

- a. Town Board Minutes dated February 27, 2013 (annexed as Exhibit 75);
- b. The 2013 Broome County Comprehensive Plan (“County Plan”) (annexed as Exhibit 76);
- c. The New York State Department of Environmental Conservation (“DEC”) letter to Town of Vestal regarding inspection of the Town’s permitted sanitary sewer overflows, dated March 19, 2018 (annexed as Exhibit 77);
- d. DEC response letter to Town Engineering Report for proposed emergency relief manhole for the Town of Vestal’s sewer line, date September 21, 2018 (annexed as Exhibit 78);
- e. DEC 2020 SEQR Handbook, Fourth Edition (annexed as Exhibit 79);
- f. The Binghamton - Johnson City Joint Sewage Treatment Plant Board (“Sewage Treatment Plant”) Meeting Minutes, dated May 11, 2021 (annexed as Exhibit 80).
- g. Sewage Treatment Plant Board Meeting Minutes, August 10, 2021, annexed as Exhibit 81);
- h. Application of Respondent BHL Ventures, LLC (“BHL Ventures”) to extend and join the water and sewer district, filed with the Town on August 29, 2022 (“Water and Sewer District Application”) (annexed as Exhibit 82);
- i. Respondent BHL Ventures’ Engineering Report dated November 1, 2022 (“Engineering Report”), submitted to the Town Board as part of the Water and Sewer District Application (annexed as Exhibit 83);
- j. DEC Environmental Notice Bulletin dated November 23, 2022 (“ENB”), regarding Respondent BHL Ventures’ application for a permit pursuant to the Clean Water Act Quality Certification for the Retreat at Bunn Hill (annexed as Exhibit 84);

- k. The Town’s unapproved and unadopted meeting minutes from the Town Board Meeting held on December 7, 2022, which approved Respondent BHL Ventures’ Water and Sewer District Application (annexed as Exhibit 85);
- l. Petitioner’s comments in response to the DEC ENB dated December 8, 2022 (annexed as Exhibit 86); and
- m. Proposed Verified Amended Supplemental Petition (annexed as Exhibit 87).

Procedural History

5. 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 establishing a planned development district (“PDD”) exclusively for Respondents LCD Acquisitions, LLC; and BHL Ventures, LLC (“Applicant Respondents”). A copy of the Petition is attached hereto as Exhibits 1-39 (*See also* NYSCEF Doc. Nos. 1-39).

- a. Count II of the Petition 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.
- b. Counts III and V of the Petition allege that the Town Board improperly amended the Zoning Code to remove the Planning Board’s mandatory role in the site plan approval process.
- c. Count VII of the Petition further asserts that Local Law A of 2022 constitutes illegal spot zoning.

6. The Court’s November 9, 2022 Decision, Order and Judgment (“Decision”) dismissed all Counts of the Petition in favor of Respondents Town of Vestal Town Board; LCD Acquisitions, LLC; and BHL Ventures, LLC (“Respondents”). A copy of the Decision is attached hereto as Exhibit 72. (*See also* NYSCEF Doc. No. 72).

- a. The Court dismissed Count II finding 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 under SEQRA (Exhibit 72, pp. 4-6).
- b. The Court dismissed Counts III and V 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” *Id.* at 8.
- c. The Court dismissed Count VII by concluding that Petitioner did not meet his heavy burden regarding the illegal spot zoning, relying on the Town’s misinterpretation of the 2013 Broome County Comprehensive Plan (“County Plan”). *Id.* at 10-11.

7. Respondent Town of Vestal Town Board filed a Notice of Entry of the Decision on November 10, 2022. A copy of the Notice of Entry is attached hereto as Exhibit 73. (*See also* NYSCEF Doc. No. 73).

8. This motion for leave to reargue and renew pursuant to CPLR § 2221(d) is timely as filed within thirty (30) days of service of the Notice of Entry. CPLR 2103(b)(6).

9. A party may file a motion to amend or supplement a petition at any time by leave of court upon demonstrating additional or subsequent transactions or occurrences related to the claims set forth in the Petition. CPLR 3025(b).

Motion to Reargue Counts III, V and VII

10. With respect to Counts III, V and VII, Petitioner respectfully submits that the Decision overlooked or misapprehended certain issues of law and fact, and requests leave to reargue those Counts. As discussed in the Memorandum of Law, reargument is justified because:

- a. the Court misapprehended or overlooked law and facts related to the Planning Board's authority to conduct the site plan review process described in Zoning Code §§ 24-84 to 24-86; and
- b. the Court misapprehended or overlooked information from the County Plan as it relates to the spot zoning claim and the incompatibility of the Student Housing Project with the Broome County Comprehensive Plan.

11. Based upon the above facts and arguments contained in the Memorandum of Law, this Court should grant leave to reargue Counts III, V and VII and upon such reargument, reverse its Decision relating to the dismissal of those Counts.

Motion to Renew Counts II, III, V and VII

12. In the alternative, pursuant to CPLR sections 2221(e) and 3025(b), Petitioner further requests leave to Renew, Amend, and Supplement the Petition with respect to Counts II, III, V and VII based upon new evidence recently obtained. As discussed in the Memorandum of Law, a motion to renew, amend and supplement the Petition is justified as these new facts and events confirm that:

- a. the Planning Board has historically had mandatory authority in site plan approval under the Zoning Code, including in the Planned Development District (“PDD”) process;
- b. the Town Board failed to adequately take the required “hard look” under SEQRA at the environmental impacts related to extension of the water and sewer district for the Student Housing Project; and
- c. the Student Housing Project constitutes illegal spot zoning because it is inconsistent with the County Plan.

13. The Decision overlooked completely or misapprehended Zoning Code §§ 24-84 to 24-88, which unambiguously delegate mandatory site plan approval to the Planning Board in *all* instances, including in PDDs.

14. The Decision appears to focus on the approval of the PDD itself – which is separate and apart from approval of the Site Plan for the Project. The jurisdiction to review the site plan remains with the Planning Board as a matter of law.

15. 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.

16. As set forth in the Affidavit from the Planning Board Chair Madeleine Cotts dated December 6, 2022 (“Cotts Aff.”), submitted herewith, the Planning Board has historically played an integral role in site plan approval in the PDD process from at least 2013. Chairwoman Cotts’ Affidavit explains that removing the Planning Board from site plan consideration is inconsistent

with the Planning Board's powers under the Zoning Code and the past practices of the Planning Board, the Town Board, and the Town Attorney.

17. As pointed out by Chairwoman Cotts, the February 2013 Town Board minutes reflect the comments by the Town Supervisor and Town Attorney Vestal Park Rehabilitation and Nursing Center PDD on Route 26 are 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. Those minutes provide:

"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 Exhibit 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." *Cotts Aff.*, ¶ 3.

18. Chairwoman Cotts first brought this information to Petitioner's attention after becoming aware of the Decision. (*See Id.* ¶ 6).

#### New Facts Concerning the Sewer District Application

19. 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") for use by the Student Housing Project. (*See Exhibit 82*).

20. On December 7, 2022, The Town Board approved the Water and Sewer District Application. (*See Exhibit 85*).

21. The revised EAF (Exhibit 63) 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 Exhibits 77-78, 81).

22. DEC expressed concerns over sewer flow based upon an April 29, 2021 email to Sewage Board Members regarding the Bunn Hill housing project. (See Exhibit 80, p. 9).

23. The 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 Exhibit 81, p. 10).

24. 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.

25. 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 Exhibits 77-78).

26. Should the Town Board look to examine these issues under SEQRA now, it would constitute illegal segmentation.

27. Segmenting 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.* (Emphasis added.) None of these requirements from the Zoning Code were met prior to the rezoning of the Bunn Hill property

28. Although the Zoning Code indicates that the Town Board should have reviewed the Water and Sewer District Application prior to issuing a Negative Declaration of Significance under SEQRA for the Student Housing Project and approving Local Law A of 2022, the application was only approved at the most recent Town Board meeting on December 7, 2022.

29. 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 could not have been before the Court. (*See* Exhibit 85, p. 6)

30. 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* Exhibit 79, p. 32).

31. "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.

32. 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.

33. In this case, the Town Board has effectively sidestepped SEQRA review of the Water and Sewer District Application by relying on the prior EAF for the Student Housing Project, even though the Town Board held multiple public hearings on the sewer district extension and Respondent submitted new material for review, such as the Engineering Report date November 1, 2022. (*See Exhibit 83*).

34. The Town Board articulated the need for SEQRA review on this issue, as reflected in the December 7, 2022 minutes, and relied on the SEQRA review and EAF that could not have included the later information. (*See Exhibit 85, p. 6*).

35. 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 Exhibit 84, p.1*).

36. 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, the misclassification of the Student Housing Project as “unlisted” has meaningful consequences in the environmental review process and was not merely a clerical mistake.

37. 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 Exhibit 86*). For example, 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.

38. 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 Exhibit 83, p. 3*).

39. Furthermore, the Town Board only approved the petition to extend and join the water and sewer district on December 7, 2022, after holding multiple public hearings on the matter where the Respondents continued to supplement their petition to extend and join the water and sewer district with critical new information. (*See Exhibit 85*). This most recent conduct by the Town Board raises the following new facts:

- a. Upon information and belief, the Town Board approved Respondents' Sewer District Petition without submitting a report from the Town Engineer into the record.
- b. Upon information and belief, the Town Engineer has not provided a report to the Town Board in an open meeting to the Town Board voting to approve Respondents' Sewer District Petition.
- c. Upon information and belief, the Town Attorney relied on the Decision from this Article 78 Petition as sufficient SEQRA review prior to the Town Board voting to approve Respondents' Sewer District Petition.
- d. Respondents' Sewer District Petition contains new information, such as an Engineering Report, that did not exist and was not reviewed when the Town Board issued a Negative Declaration for the Student Housing Project.
- e. The Court did not review this new information at the time of making the Decision.

40. The evidence concerning the sewer district could not have been provided to the Court previously because Petitioner only became aware of this information after Respondents filed

an application with the Town on August 29, 2022 to extend and join the water and sewer district for the Student Housing Project and the subsequent hearings on said application. (*See* Exhibit 82).

41. Based upon this new evidence, Petitioner respectfully requests the Court to grant leave to Renew, Amend, and Supplement the Petition with respect to Counts II, III, V and VII; to reinstate those Counts of the Petition and further allow Petitioner an opportunity to amend and supplement the Petition to include these new facts and events.

42. Petitioner is filing the proposed Amended, Supplemental Petition with this motion as Exhibit 87. The Exhibits are not attached to the Complaint but are all provided as part of the original Petition and this motion. If the Motion is granted, Petitioner will file the Amended, Supplemented Petition, together with all exhibits, with the Court within 20 days.

43. Therefore, the Court should grant leave to renew, and to amend and supplement the Petition and allow Petitioners 20 days to file the Amended, Supplemented Petition with the Court, together with all exhibits.

Dated: December 12, 2022  
Albany, New York



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behalf of Friends for Responsible Vestal Zoning*  
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CERTIFICATE OF WORD COUNT LIMIT

The undersigned attorney hereby certifies:

The Affirmation 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 sections excluded by Rule 202.8-b(b) contains 3,138 words.

Dated: December 12, 2022  
Albany, NY



Meave M. Tooher, Esq.  
Tooher & Barone, LLP  
*Attorneys for Petitioners Victor Lamoureux  
and Friends for Responsible Vestal Zoning*  
313 Hamilton Street  
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**VERIFICATION**

**STATE OF NEW YORK**    }  
  } **ss.:**  
**COUNTY OF ALBANY**    }

I, Meave M. Tooher, Esq. under penalty of perjury, state:

1. I am the attorney for the Petitioner in this action.

2. The foregoing Affirmation is true to my own knowledge, except as to matters therein stated on information and belief and as to those matters I believe it to be true. The grounds of my belief as to all matters not stated upon my knowledge are my review of files associated with this proceeding and discussions with other persons with direct knowledge of these matters.

3. This Verification is being made by the attorney for the Petitioner because the Petitioner is not located in the county in which I maintain an office.

Dated: December 12, 2022



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Meave M. Tooher, Esq.