

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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REPLY AFFIRMATION  
OF MEAVE M. TOOHER  
IN SUPPORT OF  
VERIFIED PETITION

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

I, Meave M. Toohar, 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 (“Petitioner”), an unincorporated association, and am fully familiar with the facts and circumstances alleged herein.

2. I make this Affirmation in reply to the opposition of Respondents Town Of Vestal Town Board; LCD Acquisitions, LLC; and BHL Ventures, LLC (“Respondents”) and in further support of Petitioners’ Verified Amended Petition seeking 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 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;

- d) An Award to Petitioners of their costs, disbursements, and attorney's fees; and
- e) Such other and further relief as this Court determines to be just and equitable.

3. The underlying facts and proceedings are set forth in the previously filed Verified Petition ("Petition") and Affidavit of Victor Lameroux in Support of the Petition ("Lamoureux Aff.") filed with this Court on or about June 23, 2022.

4. Petitioners challenge Respondent Town of Vestal Town Board's ("Town Board") Negative Declaration of Significance under the State Environmental Quality Review Act ("SEQRA"); and seek to annul, vacate, and in all respects void the Town of Vestal Local Law A of 2022 ("2022 Rezoning Law") approving a zoning change from the Rural Residential ("RR") district to a Planned Development District ("PDD") in relation to the Retreat at Bunn Hill project rezoning application submitted by Respondent LCD Acquisitions, LLC and BHL Ventures, LLC ("Applicant" or "LCD"). Petitioners are also challenging the substantive impact of the 2022 Rezoning Law and the failure to take the requisite procedural steps to amend or modify the Zoning Law.

5. On or about April 28, 2021, the Town Board voted to approve "Local Law 3 of 2021" ("2021 Rezoning Law") to rezone the RR district to a PDD for the proposed Student Housing Project and issued a Negative Declaration of Significance under SEQRA, without providing a reasoned elaboration for its determination. (Petition, ¶ 43; Exhibit. H).

6. On August 24, 2021 the Town Planning Board continued to reject the site plan for the Student Housing Project in the PDD 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. (Petition, ¶ 49, Exhibit L).

7. On February 9, 2022, the Town Engineer noted that the site plan still failed to comply with the County Planning Department or Town Planning Board recommendations. (Petition, ¶ 50, Exhibit M).

8. As demonstrated in the Affidavit of Mark Parker (“Parker Aff.”), dated August 4, 2022, the plans for the project “evolved over time” and “revisions were periodically done as a direct result of public comments, comments from the Town Planning Board, comments from the Town Board and comments from the Town Engineer.” (Parker Aff., ¶ 8).

9. The Parker Affidavit also states that the August 9, 2021 site plan, date stamped January 21, 2022, was revised in response to comments from the Town Planning Board, the public, Town Board and Town Engineer. (Parker Aff., ¶¶ 9-12).

10. 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. (Petition, ¶ 51; Exhibit N).

11. 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 the 2022 Rezoning Law. (Petition, ¶ 52, Exhibit O).

12. Respondents do not dispute that on April 20, 2022, LCD submitted a revised engineer’s evaluation as part of its revised EAF for the 2022 Rezoning Law. (Petition, ¶ 54, Exhibit R).

13. Respondents admit that on April 27, 2022, just hours before the public hearing, the Town Engineer advised the Town Supervisor that an updated site plan incorporating the Town Planning Board's recommendations was still required. (Petition, ¶ 56, Exhibit S; Town Answer ¶1).

14. Respondents do not dispute that following the public hearing, 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 ("Determination"). (Petition, ¶ 63, Exhibit V; Town Answer ¶1).

15. There are significant substantive differences between the 2021 Rezoning Law and the 2022 Rezoning Law, which includes effectively amending the Town of Vestal Town Code ("Town Code") by removing the Town Planning Board from site plan review as required under §§ 24-84 to 24-88 of the Town Code. (Petition, ¶¶ 64-65).

16. During the April 27, 2022 public hearing, the Town Attorney stated that the Town Board is the only board authorized to accept the site plan on this project. (Exhibit U). This is contrary to the language of §§ 24-84 to 24-88 of the Town Code, which requires Town Planning Board review and approval of any site plan, and effectively amends the Town Zoning Law.

17. The public notice for the 2022 Rezoning Law makes no mention of any amendments to the Town Code. (Petition ¶ 66; Exhibit O). Respondents deny this allegation, but do not point to any amendments identified in the 2022 Rezoning Law. Town Answer ¶2.

18. Additionally, the 2022 Rezoning Law was never referred to the Town Planning Board for recommendation as required under Town Code § 24-532(b). (Petition, ¶ 67). Although Respondent Town denies this allegation, Town Answer ¶2, Respondent does not point to any place

in the Record that demonstrates the 2022 Rezoning Law was properly referred to the Town Planning Board.

19. In preparing the Rezoning Law of 2022, an Environmental Assessment Form (“EAF”) was prepared that differed significantly from the EAF for the 2021 Rezoning Law. (Petition, ¶¶ 66-74; Exhibit V).

20. Included in the changes to the EAF for the 2022 Rezoning Law is a determination that the project is no longer a Type 1 Action. (Petition, ¶ 77; Exhibit V, p. 35).

21. The Affidavit in Opposition and Return of Town Supervisor W. John Schaffer (“Schaffer Aff.”), states that the Town Supervisor “inadvertently checked ‘unlisted’ instead of ‘Type 1’ on the SEQR form”. *See* ¶ 8. However, a Type 1 action has a presumption of environmental impacts. There is nothing in the record that demonstrates the Town Board was ever advised of the erroneous nature of the classification of the action in the EAF.

22. Although there were significant changes to the EAF Part 1 for the 2022 Rezoning Law, the new EAF Part 3 incorporated the same “written reasoned elaboration” that was subsequently attached to the Negative Declaration of Significance for the 2021 Rezoning Law. (Petition Exhibit V, pp. 27-34).

23. Respondent Town’s failure to substantively review the EAF on the 2022 Rezoning Law violated the requirements under SEQRA to take a hard look at the environmental impacts of the project. Respondents point only to the review of the 2021 Rezoning Law to support the alleged hard look. A mere cursory mention of significant environmental impacts does not meet the Town’s obligations under SEQRA.

24. The EAF on the 2022 Rezoning Law has significant substantive differences from the EAF on the 2021 Rezoning Law. Thus the review conducted on the 2021 Rezoning Law is irrelevant to the 2022 Rezoning Law.

25. It is respectfully submitted that it is the responsibility of the Town Board to review the environmental impacts of a project and to determine the substantive effect of any changes to the EAF.

26. The classification of the 2022 Rezoning Law as an unlisted action without explanation is substantially and significantly different than its proper classification as a Type 1 action under SEQRA and is subject to a different level of review under SEQRA.

27. Adopting the Negative Declaration of Significance from the 2021 Rezoning Law without effectively reviewing the substantive differences in the 2022 Rezoning Law or properly classifying the action was arbitrary and capricious and contrary to law.

28. The 2022 Zoning Law removes the Town Planning Board from site plan review on the PDD.

29. Respondents concede that the “Town Board has reserved to itself site plan review powers in connection with the PDD process in the Town of Vestal.” Affirmation of Sarah Grace Campbell dated Aug. 3, 2022 (“Campbell Aff.”), ¶ 82. There is no authority cited establishing the legality of this action.

30. It is precisely this amendment of the site plan review process and usurping of the power of the Town Planning Board that is arbitrary and capricious and contrary to law in the Rezoning Law of 2022.

31. The Campbell Affirmation asserts that Town Code § 24-532 indicates the PDD application should include a site plan, but provides no authority that this provision somehow usurps Town Planning Board review and approval of such site plan. (Campbell Aff. ¶¶ 83-85).

32. The Campbell Affirmation mistakenly claims that § 24-532(b) merely provides the Town Planning Board with an opportunity to make a recommendation to the Town Board. (Campbell Aff., p. 19, ¶ 81).

33. Although the Affidavit in Opposition and Return (“Shaeffer Aff.”) states additional insight on the 2022 PDD Application “would not have been useful as the members of the members of the Planning Board had not changed” Shaeffer Aff. ¶2. However, the Town Planning Board had indicated in August 2021, that there would have been a different outcome for their recommendation if they had the latest detailed plan in advance of the recommendation. Petition ¶101, Exhibit L.

34. The Town Supervisor states that the “Town Board was fully aware and apprised of the activities of the Planning Board”. (Schaffer Aff., ¶ 7). This assertion does not address the obligation under Town Code to include the Town *Planning* Board in both the PDD application and site plan review processes.

35. The claim that the Town Board can usurp authority from the Town Planning Board for site plan review is not supported by the provisions of the Town Code and is belied by the repeated review and denial of the site plan submitted following adoption of the Rezoning Law of 2021. (Petition, ¶¶ 47, 49 and 61; Exhibits J, L and V).

36. At a minimum, the change in procedure evidences that the action of the Town Board in intentionally evading County and Town Planning Board review of the 2022 PDD application

and site plan in both the PDD process and the site plan review process were arbitrary and capricious and contrary to law.

37. Section 13 of the 2021 Rezoning Law originally stated that the Applicant must “complete site plan review in accordance with the Town Zoning Law.” (Petition, Exhibit H). This clause is noticeably absent from the 2022 Rezoning Law. (Resp. Exhibit I). Section 14 of the 2022 Rezoning Law also states that “[a]ny other local law, ordinance or resolution inconsistent herewith is hereby removed.” *Id.*

38. When Sections 13 and 14 are read together, the Applicant is no longer required to complete site plan review in accordance with Zoning Code §§ 24-84 to 24-88, which govern site plan review.

39. Thus the 2022 Rezoning Law effectively amends or repeals §§ 24-84 through 24-88 of the Town Code. (Petition, ¶ 93).

40. Vestal Town Code §§ 1-6(b) and (e) require specific reference to any section of the Town Code that is being amended or repealed. (Petition, ¶¶ 94-95). In failing to specifically identify the sections, articles, chapters or provisions of the Town Code desired to be repealed, the 2022 Rezoning Law is arbitrary and capricious and contrary to law.

41. Respondents concede that Town Code § 24-532(b) requires that a proposed PDD be referred to the Town Planning Board for review and recommendation. (Campbell Aff., ¶ 14). Respondents further concede that the Rezoning Law of 2021 followed the mandatory referral process. *Id.* at ¶ 15. Given the changes in the 2022 Rezoning Law, it was subject to again being referred to the Planning Board pursuant to the Town Zoning Code.

42. The Town Planning Board has been designated by the Vestal Town Board to review and approve all site plans in accordance with NY Town Law § 274-a. (Petition, ¶ 107).

43. In adopting the 2022 Rezoning Law, the Town Board failed to refer this new proposed PDD and zoning change to the Town Planning Board for review and recommendation in violation of Town Code § 24-532(b) and NY Town Law § 274-a. (Petition, ¶ 118; Campbell Aff., ¶ 73). Adoption of the 2022 Rezoning Law without referring the proposed PDD to the Town Planning Board was inconsistent with prior practice, arbitrary and capricious and contrary to law.

44. The 2022 Rezoning Law is significantly different than the 2021 Rezoning Law referred to the County Planning Department in that it amends the Town Zoning Law and the PDD process. (Petition, ¶ 118). The Town Board is not authorized to act on a new zoning law without referral to the County Planning Department for review in accordance with General Municipal Law (“GML”) 239(l) and 239(m).

45. 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 GML 239(l) and 239(m). (Petition, ¶115).

46. The Town Board issued its Determination by adopting the prior record of the 2021 Rezoning Law and without referring the matter back to the County Planning Department for review in violation of NY Town Law § 264(3) and GML 239. (Campbell Aff., ¶ 73).

47. The Town Board’s approval of the 2022 Rezoning Law without review by the County Planning Department was inconsistent with its prior practice, arbitrary and capricious and contrary to law.

48. The 2022 Rezoning Law is not part of a Comprehensive Plan for development in the Town of Vestal. (Petition, ¶ 125). It is inconsistent with the prior draft Comprehensive Plan and the Town’s prior use of the PDD zoning change procedure. *Id.*

49. The Applicant's revised EAF Part 1 submitted with the 2022 Rezoning Law creating a PDD is significantly different from the EAF Part 1 submitted by the Applicant in connection with the 2021 Rezoning Law creating a PDD. (Schaffer Aff. ¶ 2; Campbell Aff., ¶ 73; Park Aff. ¶ 9).

50. The Town Board's review of section 7a. and 7b. of the EAF Part 2 failed to adequately address items likely to have moderate to large impacts, such as the presence of threatened or endangered species on the project site and loss of habitat for those threatened or endangered species. *Compare* Petition, Exhibit I with Petition, Exhibit V.

51. For example, while the new EAF Part 1 identifies environmental concerns such as tree removal along the eastern side of the development and the presence of endangered species inhabiting the site, EAF Part 2 no longer lists any moderate to large impact on any endangered species, or their habitat, located on or near the site. (Petition, Exhibit V).

52. The Applicants' environmental consultant recommends additional consultation with DEC and US Fish and Wildlife Service if tree removal cannot not take place between November 1 and March 31 to avoid impacts to endangered species habitat. (Resp. Exhibit 16; Petition, Exhibit V). The Record does not indicate when tree removal will take place.

53. On April 14, 2021, Councilman Willis stated that "although there would be temporary displacement of animals during construction, that there's plenty of habitat that still remains on undeveloped portions of the property and offsite the project that would allow free movement of any species that might be disturbed." (Petition, Exhibit G; Campbell Aff., ¶ 50).

54. On April 14, 2021, the Town Attorney stated that "if [the project] moves forward, it would go back to the Town Planning Board and there would be an additional review of the plan and specifics of the tree removal process." (Petition, Exhibit G).

55. On April 14, 2021, the Town Supervisor stated that “he has a lot of faith in our Planning Board to make recommendations to the Town Board.” *Id.*

56. According to the Town Supervisor, the Town Board did not consider any other new environmental impacts from the revised EAF and Rezoning Law 2022 to be “significant enough to merit further discussion”. (Schaffer Aff., ¶ 8). It is unclear if this determination was impacted by the erroneous Unlisted classification.

57. The minutes from the April 27th public hearing where the Town Board issued its Determination confirms that new environmental impacts were not even raised. (Petition, Exhibit U). Instead, the Town Board declared the prior record of the 2021 Rezoning Law “as still accurate and all prior proceedings and hearings should be considered as part of this record and tonight’s meeting as well.” *Id.*

58. The only change to the EAF mentioned at the April 27th public hearing related to wetland mitigation that would be addressed at a later time through the purchase of a “wetland credit”. (Petition, Exhibit U).

59. The Town Board failed to take the requisite “hard look” by relying on the record of the 2021 Rezoning Law where the revised EAF and the 2022 Rezoning Law differ significantly from the 2021 Rezoning Law. The updates and significant changes to the EAF requires deliberation by the Town Board.

60. The Town Supervisor inadvertently checked “unlisted” instead of “Type 1” on Part 3 of the SEQR form. Schaffer Aff. ¶ 8; Petition, ¶ 76, Exhibit V, p. 35). Accordingly, the Town Board’s SEQRA review contains a material defect that requires a new SEQRA review to correctly identifying the action.

61. The alleged benefits to the Town of Vestal are speculative and/or illusory. The 2022 Rezoning Law stands to benefit a single landowner and is inconsistent with the surrounding land uses and existing RR District in which it is proposed to be located. (Petition, ¶¶ 127-28).

62. Respondents readily acknowledge this project is an expansion of a nearby college into the rural community. (Resp. Exhibit 6, p. 130; Resp. Exhibit 27, p. 33; Petition, Exhibit V, pp. 31-32).

63. The rezoning at issue accommodates a single developer, is inconsistent with the land use plans for the Vestal community and is not in harmony with the rural character of the neighborhood. (Lamoureux Aff., pp. 5-6, ¶¶ 17-25).

64. 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.

65. Despite widespread opposition to the 2022 proposed Rezoning Law in this rural community, the Town Board adopted the 2022 Rezoning Law without consideration of a single alternative location. (Petition, ¶ 131).

66. The 2022 Rezoning Law is a classic example of illegal spot zoning and the Town Board's action in adopting the 2022 Rezoning Law should be determined to be arbitrary and capricious and contrary to law.

### **CONCLUSION**

67. The Court should enter an order vacating and nullifying the Negative Declaration of Significance under SEQRA pursuant to the Local Law A of 2022; vacating and nullifying the Town Board's resolution approving the Local Law A of 2022 and the correspondingly filed Local Law A of 2022; 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; grant an award to Petitioner of their costs, disbursements, and attorney's fees; and such other and further relief as this Court determines to be just and equitable.

Date: August 10, 2022  
Albany, New York



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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 3,348 words.

Dated: August 10, 2022  
Albany, NY



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