SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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| In the Matter of<br><br>NATHAN HALE NATURE PRESERVE, INC., PAUL C. THOMSON III, and KIM E. THOMSON,<br><br>Petitioners,<br><br>- for a Judgment pursuant to Article 78 of the CPLR -<br><br>TOWN OF HUNTINGTON PLANNING BOARD and VINEYARD BAY LLC a/k/a VINEYARD BAY ESTATES LLC,<br><br>Respondents. | Index No. 630332/2024<br><br>and<br><br>Index No. 610622/2025 |

**PETITIONERS' REPLY MEMORANDUM OF LAW**

PERILLO HILL LLP

285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422

*Attorneys for Petitioners*

Petitioners, by their attorneys Perillo Hill LLP, respectfully submit this reply memorandum of law in further support of their Petition under Index No. 630332/2024 and their Petition under Index No. 610622/2025, and in reply to the Respondents' opposition to same.

## Point I

## The Planning Board's October 23, 2024 SEQRA Determination Must Be Annulled

### A. The Board's Negative Declaration is Contrary to Law and Violates SEQRA: An Unlisted Action with Identified Environmental Impacts Cannot be Given a Negative Declaration on the Basis of Promised Mitigation Efforts

i. Respondents Ignore Controlling Authority and Concede Dispositive Issue

As set forth in Point I(A) of Petitioners' opening memorandum, the disposition of this case is controlled by binding authority from the Second Department in *Matter of West Branch Conservation Assoc. v. Planning Board of Town of Clarkstown*, 616 N.Y.S.2d 550 (2d Dept 1994). The Respondents concede the dispositive issue by completely ignoring Petitioner's lead argument and the controlling authorities cited therein.

*Matter of West Branch Conservation Assoc.* provides that a lead agency fails to comply with and violates SEQRA as a matter of law when it issues a negative declaration for an unlisted action on the basis that mitigation elements included within the design of the proposed action will address otherwise acknowledged environmental impacts. *See id.*, 616 N.Y.S.2d 550 (2d Dept 1994); *see also Matter of Camardo v. City of Auburn*, 96 A.D.3d 1437, 1438 (4th Dept 2012) (accord); *Matter of Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Planning Bd.*, 235 A.D.3d 1124, 1128 (3d Dept 2025) (negative declaration relying on proffered mitigation in unlisted action was arbitrary and capricious). These authorities establish that if a planning board issues a negative declaration under these circumstances (an unlisted action with potential

impacts expected to be addressed by designed mitigation), it errs as a matter of law, and its determination must be annulled. This is exactly what happened in the matter at bar.

*Matter of West Branch Conservation Assoc.* is dispositive of this proceeding and compels that the Petition be granted and that the Board's determinations be annulled. Despite this blunt statement of the controlling law by Petitioners, Respondents' memoranda (both the Board and the developer) are tellingly silent. Respondents do not cite to, discuss, or even mention *Matter of West Branch Conservation Assoc.* at all (nor any of the many additional cited cases applying its holding). They do not say that it does not apply (it clearly does). They do not say that is distinguishable (it is directly on point). They simply avoid and ignore it altogether; they pretend it does not exist because they have no answer for its binding and controlling effect. This failure to address Petitioners' lead argument and failure even to cite, let alone discuss or address, the controlling authority is an admission and concession of the argument and the proceeding.

The Planning Board determination being challenged here states, on its face, that "potential environmental impacts which were identified during the course of review … are determined to not be significant, *as the impacts will be mitigated by plan design*" *See* Ex. 122 (the whereas clauses in the determination go on to repeat in multiple instances the Board's express reliance on the expectation that "environmental impacts to be mitigated by plan design"). In the case of an unlisted action, this reasoning—that identified impacts may be deemed not significant because they are addressed through mitigation measures made part of the design—violates SEQRA and cannot justify a negative declaration. This is precisely what *West Branch* and the establish case law expressly provides.

While completely bypassing Petitioners' dispositive argument and the controlling law, Respondents instead misguidedly cite to a number of cases that either do not apply or that, in

fact, support Petitioners' arguments herein. Respondents fail to disclose that, in almost every case they cite, the issue was a Type I action.[1] The matter at bar, however, does not involve a Type I action. Rather, the action, as designated by the Planning Board itself, is an unlisted action under SEQRA. Here again, the Respondents completely ignore the critical distinction between a Type I action and an unlisted action. Their memoranda contain no discussion addressing the difference between the two or dealing with the fact that the matter at bar concerns an unlisted action only. Not only is this a distinction that distinguishes the Type I cases from the matter at bar—but, as discussed below, once the distinction between the two types of SEQRA classifications is appreciated, the very same cases, in fact, undercut Respondents' position and support Petitioners.

Respondents do cite two cases that did involve unlisted actions—and in both such cases, the planning board's negative declaration was *annulled* along lines that follow *West Branch*. In *Matter of Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Planning Bd.*, 235 A.D.3d 1124 (3d Dept 2025), the Third Department concluded that the negative declaration issued by the planning board there *did not satisfy SEQRA* and was arbitrary and capricious. *See id*. at 1128-29. Of further important note, as it relates to the matter at bar, is that the court reached this conclusion, in part, by rejecting the rationale in the negative declaration that, as here, improperly relied on the efficacy of mitigation measures. *See id*. at 1125. Such analysis is of course fully consistent with the controlling holding from the Second Department in *West Branch, supra*. For good measure, it is noted that the Fourth Department is also right in line with this

[1] *Coalition for Cobbs Hill v. City of Rochester*, 149 N.Y.S.2d 400 (4th Dept 2021) (Type I action); *Friends of Fort Greene Park v. NYC Parks*, 239 N.Y.S.3d 457 (NY Cty Sup. 2025) (Type I action); *Hoffman v. Town Board of Town of Queensbury*, 680 N.Y.S.2d 735 (3d Dept 1998) (Type I action); *Falanga v. Town of Farmington*, 74 Misc 3d 1234[A], 2021 NY Slip Op 51303[U], *6 (Sup Ct, Ontario County 2021) (Type I action); *Wilkinson v. Planning Board of Town of Thompson*, 680 NYS2d 710 (3d Dept 1998) (Type I action).

broadly settled law in the state. *See Matter of Camardo v. City of Auburn*, 96 A.D.3d 1437 (4th Dept 2012).

Respondents also cite to *New Scotland Ave. Neighborhood Assn v. Planning Board of City of Albany*, 535 N.Y.S.2d 645 (3d Dept 1988). Here again, however, *New Scotland* is a case that completely supports the Petitioners' position in the matter at bar and illustrates the flaw in Respondents' analysis. The proposal in *New Scotland* was an unlisted action. However, what Respondents appear to have completely misunderstood is that the challenge there was to the board's determination issuing a conditional negative declaration (CND). The court's decision upholding the board's determination was thus approving the appropriateness of the conditioned negative declaration. *See id., see also Macchio v. Planning Bd. of E. Hampton*, 152 Misc 2d 622, 627 (Sup Ct, Suffolk County 1991) (planning board, considering an unlisted action (as here) that involved steep slopes (as here) with proposed mitigation measures to address potential impacts (as here), appropriately issued a *conditioned negative declaration*). Here, the Planning Board did not issue a conditioned negative declaration, which would have been wholly appropriate, but rather issued a negative declaration in violation of SEQRA.

Respondents attempt to argue that the negative declaration is not contradictory despite affirmative findings of potential impacts because they do not deem those impacts to be significant. But, again, the Board is relying on the mitigation measures brought into the design to conclude that the impact will be reduced, as a result of such mitigation, to a degree they believe to be small or not significant.[2] This reasoning has been rejected by the courts. *See Matter of*

[2] Clearly, the EAF is assessing significance in terms of conditions expected to exist post-implementation of mitigation. Alternatively, however, even if the Board were to assert that it was postulating that the potential impacts are not significant even before accounting for the mitigation measures, it would then be automatically subject to annulment as completely irrational since the project, objectively, involves a massive disturbance of an area the Town has specifically marked out as environmentally sensitive and requiring of heightened protection. As the Steep Slopes Ordinance expressly emphasizes and acknowledges: "The Board recognizes that development in hillside areas disrupts the aesthetic and scenic qualities of these sites and adversely impacts surrounding properties by disrupting

*S.P.A.C.E. v. Hurley*, 739 N.Y.S.2d 164 (2d Dept 2002) ("[i]n identifying various mitigation measures which would be undertaken to minimize the adverse effects to the environment posed by the project, the Town Board implicitly acknowledged the effects were significant.")

Respondents assert that Petitioners merely disagree with the Board's negative declaration or the EAF. But this is not Petitioners' argument at all. In fact, it is by taking the determination at face value for what it says that it is revealed and confirmed that the determination violates SEQRA. It is explicit in the determination that the Board has determined that mitigation measures would address the identified areas of environmental impact. And, indeed, the Respondents' memoranda double down and confirm their purported justification that there will be no adverse environmental impact *because* of such mitigation. This is precisely what *West Branch* and its progeny hold may not be done. Accordingly, far from merely disagreeing with the Board's conclusion, Petitioners have demonstrated, and Respondents have in fact confirmed, that their own stated rationale for the negative declaration violates SEQRA as a matter of law.

Respondents are likewise misguided where they emphasize that the negative declaration does not impose any formal conditions. That is precisely the point. The SEQRA determination is *not* a conditioned negative declaration, even though that was available to the Board given that this is an unlisted action. And yet despite foregoing the assurances and protection of the public and environment that a conditioned negative declaration would have yielded, the Board's pure negative declaration, dispensing with all such protections, arrives at its conclusion that there will be no adverse environmental impacts only by way of the legally erroneous rationale that mitigation measures will address the impacts that the project would otherwise cause. Here again,

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the surrounding natural vegetation and wildlife habitat, increasing the risk of stormwater runoff, flooding, surface erosion, sudden slope failure and soil movement." *See* Huntington Town Code §198-60.

this is precisely what a planning board reviewing *an unlisted action* may not do under *West Branch*.

Furthermore, the Court of Appeals decision in *Merson v. McNally* does not aid Respondents here. Once again, *Merson* was a Type I action. The holding in *Merson* that mitigation measures may be relied on to arrive at a negative declaration is constricted to Type I actions. And the reason for that limitation is emphasized by the Court of Appeals in *Merson* itself. Even in Type I actions, the crediting of mitigation measures that are brought into the design of the project are only viable "provided that" they are the product of "open and deliberative process" and not of a "bilateral negotiation" between the developer and Planning. The opportunity for such open and deliberative process is only available in a Type I setting. In the case of unlisted actions, these important concerns regarding transparency and public participation in the process are protected by the fact that upon issuance of a conditioned, a board is required to open the matter to the public. *See Matter of Camardo v. City of Auburn*, 96 A.D.3d 1437 (4th Dept 2012) (annulling a negative declaration and noting that "[t]here are additional procedural requirements when the lead agency issues a conditioned negative declaration in an unlisted action, none of which was satisfied here (*see* 6 NYCRR 617.7 [d]).").

It must be noted that Petitioners nowhere argue that the negative declaration was "impermissibly conditioned," a curious and misplaced area of focus by Respondents. Respondents mistakenly cite and waste several pages discussing cases involving claims by developers in Type I actions objecting to negative declarations as being impermissibly conditioned. These cases have nothing do with the arguments made by Petitioners herein. This is not a Type I action, and Petitioners here are quite obviously not developers. Nor do they lament that the determination was improperly conditioned. To the complete contrary, Petitioners argue

that the action either should have been formally deemed a conditioned negative declaration (with all of the procedural requirements for same being adhered to) or been given a positive declaration. The only point to be observed from such cases as having any relevance to the matter at bar is that the basis for the developers' arguments in those Type I cases is that a conditioned negative declaration is only permitted in unlisted actions.

ii. Respondents Overlook and Ignore that the Application Concerns an Unlisted Action

In the case of a Type I action, a negative determination may be justified by mitigation or modifications that are meant to address impacts.[3] The reason that works for a Type I action, but not for an unlisted action, is that Type I requires a public hearing, public input, and involves an open process where adjustments to a proposal to add mitigation to address areas of environmental concern are played out in a public process with public involvement.

The matter at bar, however, is an unlisted action. As such, the Board and the developer took advantage of not being required to submit to an open and transparent process with public participation. Instead, all of the back and forth happened, bilaterally, between only the Board and the developer. Even now, the Respondents admit as much and emphasize that the project had been under review for years. The EAF likewise boasts that the "Huntington Department of Planning and Environment has been reviewing Vineyard Bay Estates since June 1, 2022" *See* Ex. 122. In fact, however, the process started much earlier than that. At least as early as November 2020, Vineyard Bay was making submissions to the Planning Department, and its bilateral dialogue was underway. *See* Exhibit 1.

[3] *See Inc. Vil. of Poquott v. Cahill*, 11 A.D.3d 536, 541 (2d Dept 2004)("A determination to issue a negative declaration ***in the case of a Type I action*** may properly take into account measures included in a project's design specifically for the purpose of mitigating environmental impacts, provided that such mitigating measures are incorporated as part of an open and deliberative process (*see Matter of Merson v McNally*, *supra* at 753) and that the resulting negative declaration "is not the product of closed-door negotiations") (emphasis added).

As the record reflects, there was active and substantive dialogue and back-and-forth between the developer and Planning from 2020 through 2023, spanning years before the project became public. All of the mitigation measures that would ultimately form the basis of the Board's erroneous negative declaration were already worked out by the developer and Planning during this extended period of non-public, bilateral negotiations. *See* Exhibit 2; *see also* Exhibits through 45, and 48 through 71 (extensive email communications between the developer and Planning exchanged long prior to project becoming public). All of this activity is precisely what the Court of Appeals admonished in *Merson v. McNally*, 90 N.Y.2d 742 (1997) as impermissible under SEQRA. *See id*. ("The environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies *and the public*.").

SEQRA, thus, prohibits the procedure followed by the Planning Board here. If there are potential impacts arising from an *unlisted* action, then a negative declaration may not issue on the basis of mitigation measures that were worked out between the Board and developer prior to any public notice or participation. *Matter of West Branch Conservation Assoc. v. Planning Board of Town of Clarkstown*, 616 N.Y.S.2d 550 (2d Dept 1994); *Matter of Camardo v. City of Auburn*, 96 A.D.3d 1437, 1438 (4th Dept 2012)

Another of Type I cases mistakenly relied upon by Petitioners is the lower court decision in *Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Planning Bd.*, 2023 WL 4383288 (Saratoga Cty July 6, 2023). Again, that was a Type I case. Respondents cite to language therein allowing, *in a Type I action*, a negative declaration to issue on the basis of mitigation adjustments made to and included in the project design. *See id*. But Respondents fail to note and call out the key fact that such reasoning *only applies to Type I actions*. *See id*. The

Second Department, reviewing the same principle and holding, explicitly clarifies the point. *See Inc. Vil. of Poquott v. Cahill*, 11 A.D.3d 536, 541 (2d Dept 2004) (explaining that a "determination to issue a negative declaration *in the case of a Type I action* may properly take into account measures included in a project's design specifically for the purpose of mitigating environmental impacts") (emphasis added). As the language Respondents quote (also seen in *Poquott*, *supra*, and all derived from *Merson*) goes on to specify, a negative declaration relying on such mitigation measures, even in a Type I action, is only permissible provided that such mitigating measures are incorporated as part of an open and deliberative process and that the resulting negative declaration is not the product of closed-door negotiations. This is another way of re-stating that such a negative declaration *is only available in Type I actions*, and that is because the open, deliberative and public process only occurs in Type I actions.[4]

By contrast, in an unlisted or Type II action, no public hearing is required. And, as was the case in the unlisted matter at bar, the Respondent Planning Board did not involve a public hearing or public participation, and the negotiation and inclusion of mitigation measures in the design was something that took place bilaterally between only the developer and the Planning department and was completed prior to the plan becoming public. Respondents now wish to suggest that the mitigation measures here were the product of such a public process. This is a post hoc justification and is belied by the record.

The June 26, 2024 "information meeting" was not a public hearing and no members of the public, other than Petitioners, were permitted to speak, and that was only because it was

[4] It is unclear why Respondents repeatedly miss the point on this or fail to disclose this important fact to the court—as the Type I cases they exclusively rely on all make the distinction rather explicit. Respondents, for example, cite *Falanga v. Town of Farmington*, 74 Misc.3d 1234[A], 2021 NY Slip Op 51303[U], *6 (Sup Ct, Ontario County 2021), where the court reminded that "a conditioned negative declaration can only be issued in an Unlisted Action, and is unavailable for Type I actions, such as the one [at issue in *Falanga*]".

required by the stipulation discontinuing the prior Article 78 proceeding. (Ex. 89).[5] And even that limited right was curtailed. At the June 26, 2024 Planning Board meeting (in mid-stream thereof), the developer asked the Board not to vote on SEQRA and requested to suspend the meeting. Then, when that tabled meeting was continued in October, Petitioners were not permitted to speak at all, in direct violation of the parties' stipulation. Clearly, then, the mitigation measures, which appeared in the EAF form long before the project became public, were not the product of this meager, partial allowance of a few comments from the litigants that took place years after the fact.[6]

The February 2024 resolution of the Planning Board recited the same language that persists and reappears in the October 2024 resolution that is the subject of this proceeding—namely, that "potential environmental impacts which were identified during the course of review will be mitigated by plan design." *See* Exhibit 3 at p.28 and p.46. The improper reliance on mitigation measures to issue a negative declaration in violation of SEQRA, as set forth in *West Branch* and other binding authorities, was a consistent feature of the Board's actions and pre-dated the June 2024 "information meeting" by many years. Accordingly, Respondents cannot plausibly contend that these mitigation measures were the product of or responsive to public

[5] Similarly, the August 2023 hearing was not a public hearing for SEQRA purposes. It was hearing for preliminary subdivision approval. Any alteration of the plans made with respect to the proposal following that hearing were not responsive to environmental or SEQRA issues but rather solely concerned layout issues for the subdivision approval.

[6] One salutary byproduct of the litigants' negotiated albeit not fully honored ability to speak at the June 2024 meeting (not a public hearing) was that certain completely overlooked aspects of the project, namely relating to the archaeological significance of the parcel and its role as a habit for endangered species, were thereafter given some limited attention. However, it must be recognized that the same Planning Board had already once before rubber stamped a negative declaration that gave no consideration to these important areas of concern. The Planning Board, rather than the neighbors, should have been the ones to identify such deficiencies. Ultimately, the Board's review of even these area remains deficient. More importantly, however, the superficial and still deficient hole-plugging that the developer and its consultant engaged in following the litigants' exposure of its substantive shortcomings in addressing areas of environmental concern did not alter or address in any way the mitigation measures that were already in the design as agreed upon bilaterally between the developer and Planning long before the project became public.

comment. There never was a public hearing for SEQRA purposes, the highly restricted June 2024 "information meeting" was not open to the public, and, in any case, the record demonstrates that the mitigation measures negotiated bilaterally between the developer and Planning had been worked out in private between the two of them years prior.

What happened here is that the developer enjoyed the nonpublic aspect of their project being classified as an unlisted action rather than a Type I action, but what neither Respondent Board or developer were willing to deal with was the corollary principle under SEQRA law that they could not then rely on the mitigation measures the two of them had worked out in private to justify a negative declaration.[7]

Respondents, thus, cannot have it both ways, as the court in *Matter of Healy v Town of Hempstead Bd. of Appeals*, 83 N.Y.S.3d 836 (Sup Ct, Nassau Cty 2018), which is directly on point, held. There, as here, the court instructed that, regardless of the fact that the board called its determination a negative declaration, the Board's conclusion that there would be no significant environmental impact because of mitigation measures means that it needed to have followed the procedures in 6 NYCRR 617.7 for a conditioned negative declaration (or issued a positive declaration). *See id*. In *Healy*, the court recognized that the respondents there, like here, by arguing that the mitigation would address the potential impacts, conceded that the determination was in effect a conditioned negative declaration and was therefore subject to the requirements of 6 NYCRR 617.7. See id. ("The Board was required to comply strictly with SEQRA's prescribed

[7] *Wilkinson v. Planning Board of Town of Thompson*, 680 N.Y.S.2d 710 (3d Dept 1998), contrary to Respondents' contention is *not* instructive. It, like every case relied upon by Respondents, involved a Type I action. Thus, because the Type I process mandates public participation from the outset, it is no surprise that there was public participation in that case. Indeed, it is precisely for that reason that it bears no resemblance to the matter at bar—an unlisted action where the modifications and mitigations were worked out bilaterally between the developer and Planning long before it became public.

procedures and it did not. As a result, its purported unconditional negative declaration is improper.").

**B. The Negative Declaration is Arbitrary and Capricious: It is Contradicted by Evidence in the Record, Including the Board's Own Findings**

Respondents offer little in the way of a response to Petitioners' straightforward argument that acknowledged impacts cannot be rationally reconciled with a negative declaration. *See Matter of Peterson v. Planning Bd. of the City of Poughkeepsie*, 163 A.D.3d 577, 579-580 (2d Dept 2018); see also *Matter of Coalition for Future of Stony Brook Vil. v. Reilly*, 299 A.D.2d 481, 484 (2d Dept 2002).

Respondents answer to this contention is a now familiar one—they cite inapposite Type I cases that say it is permissible to account for mitigation measures in order to arrive at a negative declaration. The defect in this argument (ignoring that such reliance is impermissible in unlisted actions) is discussed thoroughly above and need not be repeated here.

The other rejoinder offered by Respondents is that any concern with adverse impacts is erased by planned preservation. But Respondents' reliance on the partial conservation involved is both misplaced and overstated. Respondents seek to place great emphasis on the notion that part of the project design involves preservation of certain portions of the property at issue.[8] While the balancing of policy interests that might recognize the benefit of a development proposal that contemplates leaving a certain portion of a parcel as open space may very well be an appropriate consideration for a planning board deciding to approve or deny a subdivision or other development project (that is, to make the substantive land use decision), it is not material to the SEQRA analysis. In determining the environmental impact of a project or action, SEQRA must,

[8] Respondents irrationally include within this discussion land that is not even located within the Town of Huntington, but rather in an adjacent incorporated village, and over which the Town's Planning Board obviously has no jurisdiction.

in the first instance, address the impact of what the project is, in fact, doing to land (not what it is not doing).

Here, while Respondents want to champion the Vineyard Bay project for its conservation, what remains essential for SEQRA purposes is recognition of the objectively significant impacts the project, as proposed on its face, will have. As the record here reflects, the project will have, at a minimum, the following significant realities:

- The proposed action would "disturb" and remove 3.51 forested acres;
- The action will result in the removal of 202 trees;
- The action will result in the loss of other flora or fauna;
- The property contains steep slopes;
- The average slope of the hillside area is 32.34%;
- The proposed action will involve construction on slopes greater than 15%;
- The hazard for erosion of certain soils existing on the property is "moderate to severe" and is "moderate to slight" for other soils;
- The project will create and increase the amount of paved and impervious surfaces;
- The proposal creates the potential for erosion and runoff; and
- The proposal involves the creation of flag lots.

*See* Ex. 137

Accordingly, it is acknowledged and admitted that the project will result in the following adverse impacts:

- Impact on Land. Proposed action may involve construction on, or physical alteration of, the land surface of the proposed site. **Yes**
- Impact on Groundwater. The proposed action may result in new or additional use of groundwater, or may have the potential to introduce contaminates to groundwater or an aquifer. **Yes**
- Impact on Plants and Animals. The proposed action may result in a loss of flora or fauna. **Yes**
- Impact on Historical and Archaeological Resources. The proposed action may occur in or adjacent to a historical or archaeological resource. **Yes**
- Impact on Energy. The proposed action may cause the increase in the use of any form of energy. **Yes**
- Impact on Noise, Odor, and Light. The proposed action may result in an increase in noise, odors, or outdoor lighting. **Yes**

*See* Ex. 137.

It is these impacts that SEQRA is concerned with. Respondents' reliance on conservation is both misleading and immaterial. It is immaterial because the impact from such massive transformation of this environmentally sensitive land occurs regardless of any partial conservation. *See Matter of Peterson v. Planning Bd. of the City of Poughkeepsie*, 163 A.D.3d 577, 579-580 (2d Dept 2018) (noting that although the EAF contemplates the reduction of the parcel's forestation, the Board's negative declaration inexplicably stated that "[t]he proposed action will not result in the removal or destruction of large quantities of vegetation or fauna" and concluding that "it is clear that the proposed action may have significant adverse environmental impacts upon one or more areas of environmental concern (*see* 6 NYCRR 617.7 [a]). Thus, the Planning Board's issuance of a negative declaration was arbitrary and capricious.")

It is also misleading and disingenuous. The exceedingly steep slopes render certain portions of the property unbuildable anyway; so, the developers are not really restraining themselves from any development they actually could pragmatically perform. And it is misleading because the euphemistic phraseology that is peppered throughout Respondents' memorandum should be recognized for what is actually admitting. Thus, when it is suggested that much of the land is being conserved, it is simultaneously admitted, albeit tacitly, that much of the land is being stripped, deforested and completely deformed. And when it is stated the much of the development is not occurring on the steepest slopes, what is acknowledged is that some of the development is occurring on very steep slopes, and all of the development is occurring on some slopes.

The bottom line is that partial conservation of certain areas does not immunize or render without effect the very significant impact that the project will undeniably have in the areas that

are being developed. The conclusion that there will be no adverse environmental impact is, thus, irrational and arbitrary and capricious. And a defense that other areas are being preserved only confirms such irrationality since it fails to deal with the significant effects of the substantial area that is proposed to be disfigured.

Recall that the Town's Steep Slopes Ordinance expressly acknowledges "that development in hillside areas disrupts the aesthetic and scenic qualities of these sites and adversely impacts surrounding properties by disrupting the surrounding natural vegetation and wildlife habitat, increasing the risk of stormwater runoff, flooding, surface erosion, sudden slope failure and soil movement." *See* Huntington Town Code §198-60.

Even aside from the *West Branch* defect in the Board's reliance on mitigation measures, the Board's cursory discussion of such mitigation is separately defective for failing to provide a "reasoned elaboration" as required by SEQRA. The determination merely states in conclusory fashion the mitigation in the plan design will address the identified areas of concern without providing any specifics as how or why such mitigation, across multiple areas of identified concern, "would successfully avoid any adverse impacts." *See Matter of Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, 102 N.Y.S.2d 349 (4th Dept 2019).

## POINT II

### Because the Board's Negative Declaration Violates SEQRA, the Board's Preliminary Subdivision Approval Predicated on Such SEQRA Error Must Be Annulled

Respondents do not contest the Petitioners' premise, uncontroversial in the law, that a determination that the Board violated or failed to comply with SEQRA mandates that its subdivision approval must also be annulled for that reason alone. *See Matter of Andes v. Planning Bd. of the Town of Riverhead*, 2019 NY Slip Op 32455[U], *9 (Sup Ct, Suffolk County

2019) (finding that Riverhead Town Planning Board violated SEQRA in misclassifying the subdivision application and ordering therefore that the subdivision approval be vacated and annulled); *see also Matter of Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Bd.*, 153 A.D.3d 823; 60 N.Y.S.3d 381, 387 (2d Dept. 2017)("Since the Planning Board failed to comply with the requirements of SEQRA, the Supreme Court properly annulled both the SEQRA determination and the site plan approval"). The failure to fulfill the obligations under SEQRA, requires annulment of a board's negative declaration "and its ensuing application approvals." *See Yellow Lantern Kampground v. Town of Cortlandville*, 279 A.D.2d 6 (3d Dept 2000). Accordingly, because the Planning Board's negative declaration must be annulled for failing to comply with SEQRA, the Planning Board's preliminary subdivision approval must likewise be annulled on this basis alone.

## POINT III

## The Preliminary Subdivision Approval Must Be Annulled

The Vineyard Bay subdivision application did not propose or seek approval as a cluster development. The application was not for a cluster under Town Law §268. As detailed in the opening memorandum, that is the unequivocal sworn statement of Vineyard Bay's principal on the face of the application. Further, the public notice for the August 2023 meeting expressly stated the subdivision application was being made pursuant to Town Law §276. No reference is made to Town Law §278 or to a cluster development, which is of course fully consistent with the developer's sworn denial that it was making any such application. *See* Exhibit 6 at p.4. The

application was never amended to change this explicit representation.[9] Nor would there have been any basis to amend the application in any case since this is not, in fact, a cluster development but rather was one made specifically pursuant to and under the Town of Huntington's Steep Slope Ordinance.

Accordingly, Respondents' recitation of Town Law §278 for the proposition that it provides the Planning Board with authority to make modifications to zoning regulations in the case of cluster developments is of no moment whatsoever. Because this is not a cluster development, those provisions do not apply, and the Planning Board, in the context of the Vineyard Bay application made specifically pursuant to the Steep Slopes Ordinance possesses no such modification authority whatsoever.

In order to attempt to rescue the subdivision approval from this patent legal error, Respondents advance a clear misstatement of the law. Respondent's memorandum at p.29 offers as follows: " Under Town Law 268(3)(a), a planning board is free to classify and treat a proposed subdivision as a cluster development at its own "discretion … if, in said board's judgment, its application would benefit the town." " The memorandum then cites *Maor v. Town of Ramapo Plan. Bd.*, 44 A.D.3d 665, 666 (2d Dept 2007). This is a completely false statement of the law. While the language within the internal quotes appears in the text of Town Law §268(3)(a), the introductory clause (purporting to confer the Board to freely re-classify an application) is Respondent's pure invention both in content and its relation to what Town Law §268 actually says and does. Neither Town Law §268, nor *Maor v. Town of Ramapo*, nor any other authority provides that a planning board may on its own classify or re-classify an application as one for a

[9] The clandestine inclusion of a reference to §278 in a subsequent public notice does not constitute an amendment of the application, nor is it an act by the applicant developer at all. Rather, it is merely further evidence of an act of advocacy by the Board for the benefit of the private developer.

cluster development—let alone do so when the application explicitly and under oath disavows such classification.

The misappropriated language from Town Law §268(3)(a), in fact states: "*This procedure* may be followed at the discretion of the planning board if, in said board's judgment, its application would benefit the town" (emphasis added). The reference to "This procedure" in subsection (3)(a) is the procedure set forth in the immediately preceding subsection, Town Law §268(2)(a), which provides that a Town Board may authorize a planning board to approve a cluster development.[10] Clearly, nothing in any portion of Town Law §268 gives a planning board authority or "discretion" to treat an application that is *not* for a cluster development as a cluster development, nor the ability to, on its own, amend or alter the application of a private developer (here, the developer was represented by experienced private counsel), nor, of course, to do so in contravention of the private developer's own sworn statement to the explicit contrary.

The Planning Board had no authority to make an unsolicited amendment to the application as an act of advocacy for the benefit of the private developer. As the sworn statements of the applicant expressly aver, the subject application was not made for a cluster subdivision and was not made pursuant to Town Law §268.

The unlawful purported change of the statutory basis for the application, made not by the applicant but now admittedly by the Planning Board itself, i) is solely for the purpose of attaching powers to the Planning Board that the Planning Board does not have, ii) is fully

[10] Thus, in *Maor v. Town of Ramapo*, cited by Respondent, the "procedure" was followed in that the planning board there specifically referred the matter to the Town Board in order to obtain authorization to treat that particular application as one for a cluster development. Here, no application was made by the Planning Board to the Town Board for such authorization specifically for the Vineyard Bay application. And the general authorization conferred by Town Code cannot have been, and was not, invoked given that the application plainly and explicitly was not made pursuant to such Code provision. Rather, the application was explicitly made under the Steep Slopes Ordinance—a separate chapter of the Town Code that is hyper-specific to the relief sought by this application (and thus controlling over any more general provision) and that expressly directs all requests for modifications from its requirements to be made to the Zoning Board of Appeals. *See* Town Code §198-60 *et seq*.

incongruous with the application, iii) was only done in reaction to this unauthorized act being called out by the Petitioners during the proceedings. The Planning Board's role is not to act as a "fixer" for a private applicant. It is not disputed that, but for the unlawful invoking of Town Law §268, the Planning Board does not have the authority to grant variances or modifications from zoning code requirements and regulations.

Simply put, in any case, this is not a cluster development. This is not a subdivision where the proposed parcels are deficient in lot area for the existing and applicable zoning. As the developers' counsel emphasized during the administrative proceedings, all of the lots are wholly conforming in that regard. Accordingly, the hallmark of a cluster development, that substandard parcels (smaller in lot area than what the zoning district requires) be permitted, is absent. Meanwhile, because this application is so specifically made pursuant to the Steep Slopes Ordinance, and indeed a very particular subsection thereof, that ordinance is undeniably the governing provision of the Town Code for the purposes of this application. Under principles of statutory construction, whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 238). *See Matter of Gershow Recycling of Riverhead, Inc. v. Town of Riverhead*, 193 A.D.3d 731, 733 (2d Dept 2021).

The Respondents' memorandum admits and confirms that the Vineyard Bay project was made specifically pursuant to §198-63 of the Town Code (the subsection of the Steep Slopes Ordinance addressing subdivision applications). And, §198-63(G) of said ordinance states in as plain language as there could be: "In the event a lot(s) on a proposed map does not comply with

the area requirements of this article, an applicant may seek a variance from *the Zoning Board of Appeals*." *See id*. (emphasis added).[11]

The introduction of the term "cluster" in the subdivision approval is without any purpose except as an improper *post hoc* attempt to cure a blatant defect and violation known to the developer and the Planning Board. Here, as in *C&S Bldrs., Inc. v Benz*, 2024 N.Y. Misc. LEXIS 51331, at *1-2 (Sup Ct, Suffolk County Apr. 3, 2024), the "Planning Board does not have the authority to grant variances to environmentally sensitive lands. The Smithtown Town Zoning Board of Appeals (hereinafter, the ZBA) is the only body with the authority to grant such variance relief." Accordingly, the approval must be annulled.

The "modifications" improperly contained within the Planning Board's Preliminary Subdivision Plan Approval constitute area variances for which the Town of Huntington Zoning Board of Appeals (ZBA) has exclusive jurisdiction and authority to grant. No variances from the ZBA have been sought or granted. Nothing in the publicly available record indicates that the Planning Board has ever referred or coordinated these matters to or with the ZBA. This is violative of SEQRA's requirement for such coordination and additionally constitutes impermissible segmentation of SEQRA review.

## POINT IV

## The Preliminary Subdivision Fails to Comply with the Steep Slopes Law

Respondents fail to respond to or address this argument as set forth in Petitioners' opening memoranda and in the Petition itself. Accordingly, they are deemed to have conceded the point.

[11] Vineyard Bay was aware from the outset and expressly acknowledged, as early as April 2022, that it would need to obtain variance relief from the Zoning Board of Appeals for area variances or relief from the dimensional requirements of the Steep Slopes Ordinance. *See* Exhibit 2 at p.11.

Pursuant to the Steep Slopes Ordinance, Town Code §198-61(A), no "subdivision shall be approved…if any portion of the property is Hillside Area until the provisions of this Article have been applied." Applying the yield analysis under the Steep Slopes Law, as set forth in Section 198-61(B), this parcel is limited to a two-parcel subdivision. While an alternative method for yield analysis and calculation exists under Section 198-61(D), even under the alternate yield method, the Applicant and the Board failed to apply the applicable Code provisions and miscalculated the yield. First, the Applicant suggests that its plan qualifies under the alternate yield method by restricting the areas of development to "flat areas." The term "flat area" is not defined in the Town Code generally nor in the Steep Slopes Law. The Board and the Applicant appear to have worked off of an unwritten rule of thumb that the "flat area" is something less than a 10% slope. Even if this were true, the plan proposes to develop and build on lots that are greater than 10% and in some cases greater than 15% slope. Accordingly, the design does not restrict itself to "flat areas" and does not comport with the alternate yield method.

**Conclusion**

For the reasons stated above, and in the Petitioners' opening memoranda and its two Petitions, it is respectfully submitted that the Court should grant the Petitions in their entirety, together with such other and further relief as it deems just and proper.

Respectfully submitted,

PERILLO HILL LLP

By: *Timothy Hill*
Timothy Hill, Esq.
*Attorneys for Petitioners*
285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422