SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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In the Matter of

NATHAN HALE NATURE PRESERVE, INC.,
PAUL C. THOMSON III, and KIM E. THOMSON,

Petitioners,

For a judgment pursuant to Article 78 of the CPLR,

-against-

TOWN OF HUNTINGTON PLANNING BOARD and
VINEYARD BAY LLC a/k/a VINEYARD BAY ESTATES LLC,

Respondents.

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Proceeding No. 1

Index No.:
630332/2024

In the Matter of

NATHAN HALE NATURE PRESERVE, INC.,
PAUL C. THOMSON III, and KIM E. THOMSON,

Petitioners

For a judgment pursuant to Article 78 of the CPLR,

-against-

TOWN OF HUNTINGTON PLANNING BOARD and
VINEYARD BAY LLC a/k/a VINEYARD BAY ESTATES LLC,

Respondents

----------X

Proceeding No. 2

Index No.:
610622/2025
(Tinari, J.S.C.)

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' ARTICLE 78 PETITIONS

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PRELIMINARY STATEMENT[1]

Respondent, Town of Huntington Planning Board ("Planning Board" or "Board"), through its counsel, Berkman, Henoch, Peterson & Peddy., P.C., submits this memorandum of law in opposition of Petitioners' Nathan Hale Nature Preserve, Inc.,[2] Paul C. Thompson III and Kim E. Thompson ("Petitioners") Article 78 Petition seeking to, among other things, annul the Board's issuance of a negative SEQRA declaration and the related preliminary subdivision approval.

Respondent, Vineyard Bay LLC a/k/a Vineyard Bay Estates LLC ("Vineyard" or "Vineyard Bay" or "Applicant") submitted an application to the Planning Board seeking to subdivide almost ten (10) acres of land in the Town of Huntington's Halesite community. In sum, Vineyard's proposal sought to construct eight (8) single family homes. The proposal also included the dedication of 1.84 acres of land to the Town for passive open space. In addition, .812 acres would be designated as a conservation area and a separate 3.7 acres would be designated as a conservation easement restricting future disturbance or construction. Approximately 66% of the total land would not be disturbed. This ensured that construction was performed on the land's flattest areas thus, not disrupting the land's steep slopes.

The Planning Board, as the designated lead agency, conducted, over the course of several years, the environmental review required by New York's State Environmental Quality Review Act or SEQRA. As the record demonstrates, the Planning Board evaluated and took the requisite "hard look" at several areas that it initially identified could potentially have a "small impact" on the

[1] By "So Ordered" Stipulation dated July 9, 2025, two separate but related proceedings, Index No. 630332/2024 or "Proceeding No. 1" (in which Petitioners seek the annulment of the Respondent Planning Baord's SEQRA determination) and Index No. 610622/2025 or "Proceeding No. 2" (in which Petitioners seek similar relief as well as the annulment of the Planning Baord's decision granting preliminary subdivision approval), were consolidated.

[2] It should be noted that Nathan Hale Nature Preserve, Inc., is a nonprofit corporation solely organized to challenge Vineyard's effort to develop and subdivide the Property. *See R.100.* The Court should not infer from the name that the real property at issue in this matter has been designated or determined to be a nature preserve by any municipality.

environment. After reviewing several reports and environmental assessments provided by Vineyard's professional engineer/consultant and input from the public including several neighbors and Petitioners (which included comments made at public hearings), the Planning Board, predicated upon the information it gathered during the aforementioned review process, determined that the proposal would not have a significant adverse impact on the community and/or environment and thus issued a negative declaration under SEQRA.

As set forth in the record, the Planning Board confirmed that the proposed subdivision included various methods to address stormwater and erosion. The Planning Board further verified that the proposal avoids building on the land's steep slopes, provides slope stabilization structures where needed and preserves open space. The Planning also concluded that the proposed design minimizes clearing and will protect the community's character. It was also determined that the land does not contain any known threatened or endangered species.

As shown further herein, though Petitioners disagree with the Board's analysis and conclusions that the proposal does not pose a significant threat to the environment, the record clearly shows that the Board fully performed its obligations under SEQRA and did not abuse its discretion in issuing a negative declaration.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[3]

In or about April 2022, Vineyard Bay LLC submitted an application to the Town of Huntington Planning Board seeking to develop 9.77 acres of land ("Property") located in the community of Halesite, Town of Huntington ("Application"). *R.1, p.3; R.2, p.35.* Under the proposal, 7.93 acres of land would be subdivided into several single-family homes and 1.84 acres

[3] All references to the Return and Record of Proceedings (Index No. 63033/2024 - NYSCEF Doc Nos. 8-83 [Exhibit Nos. 1-136] and Index No. 610622/2025 - NYSCEF Doc Nos. 15-51 [Exhibit Nos. 137-173]) shall be denoted as "*R.__,*" which shall reflect the individual exhibit number assigned to each document in the Certified Return and Record of Proceedings.

of open space located next to the subdivision would be dedicated as open space ("Project"). *See R.1; R.104, p.6*. The 7.93 acres site is located at 78 Bay Avenue. *R.1.* Additionally, 4.6 acres of the subdivided land would be designated as a "conservation area" or a "conservation easement" thus restricting future disturbance. *R.104, p.2.* The proposed subdivision was classified as an Unlisted Action under SEQRA. *R.122, p.1.* Prior to Vineyard's purchase, several dilapidated homes, abandoned vehicles and an abandoned tennis court were located on the Property. *R.136, pp.21, 29; R.104, p.7; R.122, p.1.*

Under the Project, Vineyard seeks to construct eight (8) single-family homes. The size of each of the eight lots greatly exceeds the minimum zoning requirement and have an average of 22,139 square feet (.5082 acres). *R.36, p.11; R.104, pp.6, 7.* Despite the construction, 6.4 acres (of the 9.77 total) of the Property will be preserved in its current state. This amounts to approximately 66% of the Property. Most of the preserved area is comprised of steep or very steep slopes (as defined under the Town of Huntington's Steep Slope Law [Section 198-60 *et al.* of the Town Code]) that will not be impacted by the development of the surrounding land as construction will focus on the flattest portions of the Property. *R.136, pp. 9, 23.* While the number of lots under the Town Code's steep slope analysis (Section 198-63) allows for the creation of eleven (11) lots, Vineyard has only proposed to subdivide the property into eight (8) in order to preserve a greater portion of the land. *R.1, p.3; R.4, p.12 (Steep Slope Analysis); see also, R.152 ("the proposed Overall Steep Slope Analysis, prepared by R&M Engineering . . . complies with Chapter 198-63(B).).* The Town's steep slopes law does not prohibit constriction in a "Hillside Area" (as Petitioners seem to believe) but rather reduces the amount of development. *See Affirmation of Nicholas Tuffarelli, Esq. submitted in Opposition to the Petition ["Tuffarelli Aff."], Ex. 1 [Huntington Town Code § 198-60 et al.].*

During its review and evaluation of the Application, the Planning Board and Applicant regularly suggested, discussed and implemented revisions and adjustments to the Project intended to minimize and mitigate various minor environmental concerns raised by the Board and the public. For example, early in the Application process, R&M Engineering (Vineyard's environmental consultant) revised the Project to address concerns raised by the Board. *See R.2, p.26.* This give and take between the Board and Applicant continued until the Board granted preliminary subdivision approval in 2025. *See R.4, p.14 ["In furtherance of the public hearing that was held . . . on Wednesday, August 2, 2023, and in response to public comments that were received, please find transmitted herewith a revised Preliminary Plan . . . this revised plan contemplates the removal of a flag building . . ."]; R.8 [submission of revised map]; R.27; R.36; R.42 [Applicant's December 4, 2023 response to Board's comments].*

On August 2, 2023, the Planning Board held a public hearing in relation to the Project. *R.3, p.27; R.7.* By resolution dated February 21, 2024, the Board approved the preliminary subdivision plan and issued a negative declaration under SEQRA. *R.3, p.27; R.10; R.86.* Due to a procedural error, by Resolution dated May 29, 2024, the Board rescinded the negative declaration and preliminary subdivision approval. *R.87, 140.*

The Board then properly noticed a public hearing for July 24, 2024. *R.94; R.99.* After Petitioner's counsel and several other residents spoke and addressed the Board at the July 24th meeting, the Applicant requested to postpone and adjourn the public hearing. *R.98.*

In order to address community comments and the alleged and/or perceived environmental impact the Project would have, Applicant, through Nelson Pope Voorhis ("NPV"), prepared an Expanded Environmental Assessment ("EEA"), which was submitted to the Planning Board in August 2024. *R.103 ["This EEA supports the supposition that this subdivision will have no impact*

upon historic or culturally significant resources."]; R.104. The community's response to the EEA and its additional concerns were further addressed in NPV's September 12, 2024 "Response to Comments." *R.109.*

Following its October 23, 2024 meeting, the Planning Board passed a Resolution which reflected its determination that the "requirements of SEQRA have been met and there will be no significant environmental impacts, and hereby issues a Negative Declaration." *R.122, p.2.*

Attached to the October 23, 2024 Resolution was Parts 2 and 3 of the Full Environmental Assessment Form ("EAF") that were prepared by the Board. Though Part 2 of the EAF identifies six (6) arears where the Project *may have* a "small impact" on the environment, each area was specifically addressed and considered by the Planning Board. *R.122.* In sum, the Board examined the impact the Project would have on the land and its steep slopes, erosion, various species of plants and wildlife and on the character of the community. *R.122.* In issuing the Negative Declaration, the Planning Board noted that it has being reviewing the Project "since June 1, 2022 in order to preserve land from development, protect steep slopes and existing vegetation, and minimize the ability of future landowners to make changes to the property." *R.122 [EAF Parts 2 and 3, p.5].*

During the review process, the Board, pursuant to Town Law § 278 and Chapter 198-114 of the Town Code, amended the Application and advertised it as a cluster development application. As a result, the Planning Board was empowered to arrange the proposed subdivision's lots and slightly modify the applicable zoning requirements – primarily for the purpose of ensuring the preservation of hillside arears and the scenic qualities of undeveloped land. In other words, ensuring construction occurs on the least environmentally sensitive portions of the Property. To this end, the Planning Board noticed and held a public hearing pursuant to Sections 276 and 278

of the Town Law. *See R.122 ("The application is being processed as a cluster subdivision under Section 278 of New York State Town Law and Huntington Town Code Section 198-114"); R.126; R.136.*

In light of its amendment to the Application, the Planning Board, on December 18, 2024, held a hearing pursuant to Sections 276 and 278 of the Town Law to consider preliminary subdivision approval. *R.126; R.136.* Following the December hearing, on or about February 21, 2025, the Board, by Resolution, "granted preliminary approval" of the "Preliminary Map of Vineyard Estates." *R.137, p.3*. In granting preliminary approval, the Board, pursuant to its authority, slightly modified the lot frontage and lot width of Lot 3 (*R.4 [Plans] depicts the location of the eight proposed lots)* and the setback of the retaining walls which protect three (3) of the proposed lots from the preserved slope. *See R.136, p.13; R.155 [Resolution granting preliminary subdivision approval, p.2].* These modifications allow the homes to be built slightly closer to the front of the Property to increase the expanse of hillside being protected and preserved. *See R.2, p.30; R.136, p.24.* In other words, the cluster mechanism is allowing Vineyard and the Board to preserve a greater amount of the Property. *See R.136, p.25.*

As detailed herein, the Planning Board identified all relevant areas of environmental concern, took a "hard look" at those arears and made a reasoned elaboration of the basis for its findings of no significant environmental effect and resulting issuance of a negative declaration and preliminary subdivision approval.

POINT I

THE PLANNING BOARD TOOK THE REQUISITE "HARD LOOK" AT POTENTIAL ENVIRONMENTAL IMPACTS

A. The Court's Limited Review of the Planning Board's Issuance of a Negative Declaration under SEQRA

The Planning Board complied with the dictates of SEQRA and took a hard look at all of the components of the Project. Because the Board satisfied its obligations under SEQRA, the Petition's Second Cause of Action lacks merit and should be dismissed.

"In New York State, "SEQRA [State Environmental Quality Review Act] makes environmental protection a concern of every agency." *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 30 N.Y.3d 416, 424, 68 N.Y.S.3d 382, 385 (2017) (citations omitted). "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'" *Akpan v. Koch*, 75 N.Y.2d 561, 569, 555 N.Y.S.2d 16, 19 (1990) (citations omitted). "SEQRA dictates that a lead agency must review proposed actions "that might affect the environment." *Healy v. Town of Hempstead Bd. of Appeals*, 61 Misc. 3d 408, 412, 83 N.Y.S.3d 836, 840 (Sup.Ct. Nassau Cnty., 2018). "SEQRA ensures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices." *Jackson v. New York State Urb. Dev. Corp.*, 67 N.Y.2d 400, 414–15, 503 N.Y.S.2d 298, 303 (1986).

"The lead agency . . . designates the action as either Type I, Type II, or Unlisted." *Friends of Fort Greene Park v. New York City Parks & Recreation Dep't*, --- N.Y.S.3d ----, 2025 WL 1819847, *4 (Sup.Ct. N.Y. Cnty., July 1, 2025). "Unlisted actions must undergo an environmental

impact study to determine if the action may have a significant adverse impact on the environment." *475 Ninth Ave. Assocs. LLC v. Bloomberg*, 2 Misc. 3d 597, 601, 773 N.Y.S.2d 790, 796 (Sup.Ct. Nassau Cnty., 2003). In an unlisted action, the lead agency performs this study, in part, by preparing an Environmental Assessment form or EAF. *Friends of Fort Greene Park,* --- N.Y.S.3d ----, 2025 WL 1819847, at *4. "Then the agency must issue a declaration, either positive or negative, of environmental significance." *Id.*

A challenge to a lead agency's determination under SEQRA through an Article 78 proceeding is subject to a highly deferential standard of review. A court's review is limited to a determination of whether an agency's "determination was made in accordance of lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Friends of P.S. 163, Inc.* 30 N.Y.3d at 424, 68 N.Y.S.3d at 389; *see Matter of Brooklyn Bridge Park Legal Defense Fund Inc. v. New York State Urban Dev. Corp*. 50 A.D.3d 1029, 1030, 856 N.Y.S.2d 235, 236-37 (2d Dep't 2008); CPLR §7803(3). The New York Court of Appeals has explained that courts must determine if "the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Matter of Jackson*, 67 N.Y.2d at 417, 503 N.Y.S.2d at 305; *see New York City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348, 763 N.Y.S.2d 530, 535 (2003).

The Court of Appeals has also emphasized that "[a]n agency's responsibility under SEQRA must be viewed in light of the 'rule of reason;' not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility." *Matter of Neville v. Koch*, 79 N.Y.2d 416, 425, 583 N.Y.S.2d 802, 806 (1992). Accordingly, a court "may not substitute its judgment for that of an agency, for it is not their role to weigh the

desirability of a proposed action, or choose from among alternatives." *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 232, 851 N.Y.S.2d 76, 81 (2007). Nor is it the court's role to require an agency to "reach a particular result on any issue or . . . to second-guess the agency's choice." *Jackson,* 67 N.Y.2d at 417, 503 N.Y.S.2d. at 305. "The lead agency, after all, has the responsibility to comb through reports, documents and analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts." *Riverkeeper Inc.*, 9 N.Y.3d at 232, 851 N.Y.S.2d at 81; *see Aldrich v. Pattison*, 107 A.D.2d 258, 267, 486 N.Y.S.2d 23, 30 (2d Dep't 1985) (explaining that the "'hard look' standard does not authorize the court to conduct a detailed *de novo* analysis of every environmental impact of, or alternative to, a proposed project."); *see also Thorne v. Vill. of Millbrook Plan. Bd.*, 83 A.D.3d 723, 725, 920 N.Y.S.2d 369, 371 (2d Dep't 2011) ("The agency decision should be annulled only if it is arbitrary and capricious."); *Shop-Rite Supermarkets, Inc. v. Plan. Bd. of Town of Wawarsing*, 82 A.D.3d 1384, 1385, 918 N.Y.S.2d 647, 649 (3d Dep't 2011) ("It is not the province of the courts to second-guess thoughtful agency decision-making and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence.").

This approach is based on the premise that agencies should be granted "considerable latitude for the exercise of discretion" in the assessment of the environmental outcome of a project, "which frequently involves technical and scientific issues more properly entrusted to the expertise of an agency, rather than a court of general jurisdiction." *Aldrich*, 107 A.D.2d at 267, 486 N.Y.S.2d at 30. Thus, the general substantive policy of SEQRA is a "flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results." *Horn v. International Business Machines*, 110 A.D.2d 87, 93, 493 N.Y.S.2d 184, 189 (2d Dep't 1985).

Here, particularly in light of the applicable standard of judicial review, Petitioners' arguments – which in essence boil down to disagreements with the Planning Board's conclusions in the EAF, fail to demonstrate that the Board's review was arbitrary and capricious or unsupported by the record.

B. <u>The Planning Board Took the Necessary Hard Look</u>

Applying SEQRA's highly deferential standard of review, there is simply no basis for this Court to hold that the issuance of the Negative Declaration by the Planning Board (as lead agency) in this Unlisted Action was arbitrary and capricious or without a reasonable basis. By Resolution following the October 23, 2024 meeting, the Planning Board, after its evaluation of the Project based on the Full Environmental Assessment Form ("EAF"), issued and adopted a negative declaration. *See Cathedral Church of St. John the Divine v. Dormitory Auth. Of State of N.Y.*, 224 A.D.2d 95, 99, 645 N.Y.S.2d 637, 640 (3d Dep't 1996) ("The issuance of a negative declaration ends the review procedure."); *Vill. Of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 920, 953 N.Y.S.2d 75, 78 (2d Dep't 2012) ("A negative declaration is 'a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts.'").

Despite the issuance of the Negative Declaration, Petitioners point to several alleged areas of environmental concern. *See MOL, pp.24-27;*[4] *see also, R.122 [EAF, Part 2].* In doing, Petitioners attempt to place blame of the Project's alleged adverse environmental impact on the disturbance of the Property's steep slopes. *See MOL, pp. 24-27.* However, the record amply demonstrates that the Planning Board reviewed and considered the Project's potential environmental impact and that there would be no significant impact on the environment.

[4] References to "MOL" are to Petitioners' Memorandum of Law submitted in support of their Petition.

i. Impact on Geological Features and Impact on Critical Environmental Arears

Key to the Board's review and evaluation was ensuring that the Property's steep slopes were not harshly or significantly impacted by the Project. To this end, the Board and Applicant agreed to move and convert Lot 3 to a flag lot because its "former location is the portion of the property where steep slopes come closest to the road and where there is a significant understory of rhododendrons. Moving the lot allowed this area to be preserved with a Conversation Easement." *R.122 [EAF Part 2, p.2].* Indeed, the Board, to ensure maximum preservation of the Property's hillside, advised Vineyard Bay that it "preferred a subdivision lay-out that preserved a greater amount of the hillside area and [that it would be inclined to approve] zoning modifications" to accomplish this goal. *R.10, p.59; R.122 [EAF Parts 2 and 3, p.6] ("The proposal avoids much of the steep slopes on the property.").*

The Planning Board also recognized that much of the steep slopes and forested areas on the Property would not be disturbed. "While 3.51 acres of forested area will be removed as a result of the proposal, 4.07 acres of the forested area will remain undisturbed, and the majority of trees and shrubs on the property will be saved. *R.122 [EAF Parts 2 and 3, pp.3, 7].* For example, 3.79 acres will be protected in perpetuity in a conservation easement, .81 acres in a conservation area and 1.84 acres of adjacent forest will be preserved and dedicated to the Town of Huntington as parkland. *Id*; *see R.104, p.2 [EEA].*[5]

As noted above, in conducting its analysis, the Board revised and considered the EEA prepared by NPV, which explained that a "Steep Slopes Analysis . . . [was] conducted to further identify and confirm areas of steep slopes on site that will remain undisturbed and be protected by conservation easements, public dedications, non-disturbance conservation areas . . . nearly all steep

[5] The expanse of the preserved forested area is depicted on the Preliminary Map Alignment Plan. *R.141, p.4.*

and very steep slopes on site will remain undisturbed." *R.104, p.5 [EEA]; see Stewart Park & Rsrv. Coal. v. New York State Dep't of Transp.*, 157 A.D.2d 1, 7, 555 N.Y.S.2d 481, 484 (3d Dep't 1990) ("The negative declaration expressly incorporates by reference the [environmental assessment] and annexed traffic and automotive emissions study prepared by DOT's consultants. These documents, in our view, identify the areas of environmental concern . . . A lead agency such as DOT here may rely upon the advice it receives from others, including consultants . . ."). The Board's consideration of the EEA "demonstrate[s] the sufficiency of [the Planning Board's] examination, analysis and conclusion regarding the environmental effect of a proposed action." *Stewart Park & Rsrv. Coal.*, 157 A.D.2d at 7, 555 N.Y.S.2d at 484*; see R.109, p.5 ["areas of steep slope are centrally located."]; see also Riverkeeper, Inc.*, 9 N.Y.3d at 233–34, 851 N.Y.S.2d at 82 ("The Board relied on the material already in its file, including the DEIS, FEIS and initial SEIS, supplemental reports by the Town's wetlands consultant and the developer's engineering consultant, as well as its own environmental and planning consultant.")(emphasis added).

Ultimately, following its hard look, the Town's Department of Planning and Environment, in conjunction with the Board, determined that the dedication of the designated conservation areas, "significantly mitigate disturbance of the steepest areas on the site." *R.12, p.3* The Project also avoids the removal of "much of the forested area" as it is primarily located on the preserved steep slope portions of the Property. *R.12, p.34.*

ii. Impacts on Surface Water and Impacts on Flooding

The Board noted that the "Grading and Drainage Plan will ensure that potential erosion and/or runoff resulting from the proposal will be mitigated." *R.122 [EAF Parts 2 and 3, p.6].* In addition, the EEA informed the Board that the proposed "[e]rosion and sedimentation control methods . . . are consistent with the 'New York State Standards and specifications for Erosion and

Sediment Control' guidance documents and standard engineering practices performed by a licensed engineer." *R.104, p.6 [EEA]; see Falanga v. Town of Farmington*, 2021 WL 8199904, *5 (Sup.Ct. Ontario Cnty., Oct. 18, 2021) ("[T]he Planning Board restated the obvious, that the Stormwater Pollution Prevention Plan must be complied with; so stating does not create a conditioned negative declaration out of a negative declaration.").

It was also observed that the Project would not result in significant flooding because "stormwater drainage systems have been designed by professional engineering consultants . . . and are consistent with applicable Town requirements and standard engineering and environmental principles and practices." *R.104, p.6 [EEA].* The drainage system, among other things, will include storm drains, leaching pools or drywells to accommodate stormwater runoff. *Id.; see R.109, p.2 [EEA Response to Comments] ("Flooding is not a significant concern."); see also Pres. Pine Plains v. Town of Pine Plains Plan. Bd.*, 2024 WL 2948678, *13 (Sup.Ct. Putnam Cnty., June 4, 2024) ("Planning Board observed that the site plan provided that all stormwater runoff management features would be designed to capture 100% of the runoff from the proposed impervious areas and found that minimal construction on steep slopes . . . The Planning Board's review process demonstrates that it identified and took a hard look at the stormwater issue and made a reasoned determination that the capacity of the existing system was adequate to handle the increase in stormwater runoff.").

iii. *Impacts on Aesthetic Resources*

As noted above, the Planning Board granted several zoning modifications which are intended to provide "greater protection of the hillside area and is preferred for the preservation of the nature and scenic qualities of open lands." *R.10, p.60.*

To protect the landscape and the Property's scenic qualities, the Board ensured that the Project included a "revegetation plan" for the area where the demolished previous existing residence was located. *R.12, ¶ 7.* To this point, the replanting will "include two white oaks . . . three chestnut oaks . . . and 30 Carolina rhododendrons . . . The applicant shall notify the Environmental Review Division [of the Planning Board] prior to and upon completion of the planting." *R.122 [EAF Parts 2 and 3, p.5].*

In reaching its conclusion that the Project would not have a significant impact on the Property's aesthetics, the Board was afforded with the EEA which further explained that the "geomorphology and natural landscape . . . will be kept largely intact through the non-disturbance and preservation of steep and very steeply sloping areas . . . The Map and Plans preserve steep sloped areas and will help to maintain the scenic qualities and environmental integrity of the site." *R.104, p.6 [EEA].*

iv. *Impact on Open Space and Recreation*

As detailed herein, the Board examined and determined that the Project would not have a negative impact on "open space and recreation." *See R.122 [EAF Parts 2 and 3, p.7].* The EEA indicates that the Project "includes 3.79 acres in Conservation Easements, 0.81 acres in on-lot Conservations areas and 1.84 acres of proposed passive open space/parkland to be dedicated to the Town for preservation and/or public passive open space. In total, 6.4 acres of the 9.77-acre parcel will remain as naturally vegetated . . . while 1.84-acre open space will be available for public enjoyment." *R.104, p.15 [EEA].* As noted by the Board, in total, 66% of the Property "will be retained in its natural condition." *R.109, pp.2, 5 [EEA Response to Comments].* Thus, the Planning Board rationally determined that the Project would not have significant impact on open space.

v. *Consistency with Community Character*

The Planning Board recognized that the Project is consistent with the character of the surrounding neighborhood and that the "proposal will not have a significant impact on existing community character." *R.122 [EAF Parts 2 and 3, p. 9].* Indeed, the Town's "Future Land Use Map . . . recommends that the Subject Property be used for future medium to high density residential uses." *R.104, p.4 [EEA].*

Additionally, the Board was advised by a local realtor that the "planned lots will fit within the existing pattern of development in the neighborhood . . . and will be improved with new homes that will be in keeping with and in scale with the eclectic nature of the residences along both Bay Avenue and Vineyard Road." *R.31, p.3.* The Board even noted that the creation of two (2) flag lots on the Property is consistent with other nearby properties. *R.10, p.13; see R.122 [EAF Parts 2 and 3, p.2] (The surrounding area is characterized by medium density and high-density residential development . . .").*

Based on the foregoing, the EAF explains that the "proposed development is similar to the development pattern of the neighborhood, as other houses are built close to the street to account for steep slopes . . . there are other flag lots on adjacent parcels to minimize road construction. No other development in this neighborhood has preserved land and natural features as proposed by this application." *R.122 [EAF Parts 2 and 3, p. 5]; see also R.104, p. 19 [EEA] ("The proposed subdivision is much more consistent with the surrounding single-family residential development in the area . . . These existing neighborhoods . . . are constructed on areas that currently or previously also contained moderate to steep slopes. The proposed project instead protects slopes and avoids development in arears of steep topography.").*

vi. *Other Impacts, including Archeological and those related to Endangered Species*

Because Costal oak-hickory trees are located on the Property, and because they are known to be a suitable habitat for Northern long-eared bats (which are listed as a "threatened species" by the U.S. Fish and Wildlife Service), the Board recommended that the removal of any oak trees be limited to between December 1st and February 28th. *R.12, ¶ 11; see also R.104, p. 14 [EEA] ("there are no threatened or endangered animal or plant species within the vicinity of the site.").* Additionally, the Board observed that "compliance with the NYSFEC Northern long-eared bat protections guidelines" will be required if the bats are "identified within 3 miles" of the Property during the development of the Project. *R.122 [EAF Parts 2 and 3, p.8]; R.109, p.2 [EEA Response to Comments].*

Further, a request was made to New York State Parks - Recreation and Historic Preservation, which determined that "[n]o archaeological sites were identified . . . Therefore it is the opinion of the OPRHP that no properties, including archaeological and/or historic resources, listed in or eligible for the New York State and National Registers of Historic Places will be impacted by the Project." *R.100.* Moreover, the New York State Department of Environmental Conservation Environmental Resource Mapper confirmed for the Board that the Property "is not in the vicinity of rare plants or animals." *R.122 [EAF Parts 2 and 3 pp.3, 7 and 8].* As such, the Board rationally concluded that there were no significant archeological impacts and/or impacts on endangered species.

C. Petitioners' Disagreement with the EAF and the Issuance of the Negative Declaration does not Show that the Board Failed to take the Requisite "Hard Look"

Ultimately, Petitioners cannot credibly maintain that the EAF and/or the Planning Board failed to examine the Project's potential environmental impact. Petitioners' complaints amount to

nothing more than a mere disagreement with the Planning Board's conclusions. *See MOL, pp.15-16, 22-23.* However, a mere disagreement is not sufficient to demonstrate that the lead agency failed to take a "hard look" at those impacts. *See Morse v. Town of Gardiner Plan. Bd.,* 164 A.D.2d 336, 340, 563 N.Y.S.2d 922, 925 (3d Dep't 1990) ("The fact that petitioners disagree with the alternative chosen by the Board does not prove that the Board did not take the requisite 'hard look.'"); *see also Akpan v. Koch*, 152 A.D. 2d 113, 119, 547 N.Y.S.2d 852, 855 (1st Dep't 1989) ("mere disagreement with the plan promulgated does not make its action arbitrary, capricious, unsupported by substantial evidence or irrational.").

Moreover, as noted above, Petitioners' disagreements with the Planning Baord's conclusions center and focus on the construction, installation, placement and the alleged sufficiency and/or sustainability of the Project's retaining walls[6] and the alleged lack of protection that they allegedly offer and provide to the Property's hillside area. *See MOL, pp.7, 12, 24-27.* This emphasis on the retaining walls, however, is a red herring.

Petitioners' concerns raise questions relating to engineering issues and not environmental concerns. *See City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 515, 789 N.Y.S.2d 88, 90 (2004) ("SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making.'"). Nothing under SEQRA requires a lead agency to review and approve final design and construction plans. Any engineering issues, including but not limited to the design and installation of the proposed retaining walls, are not governed by the environmental review process but rather by the Town's building code, New York State's building code and sound engineering practices. *See Historic Hornell, Inc. v. City of Hornell Plan. Bd*., 2008 WL 786323, *5 (Sup.Ct. Steuben Cnty., March 21, 2008) ("The requirements of

[6] Among other places, the locations of the proposed retaining walls are reflected on R.95. p.2 (map entitled "Grading & Drainage Plan"). The retaining walls are depicted as alternating black and white rectangles.

SEQRA provide that an environmental impact statement is required any time an action which may have a significant effect on the environment is approved by a government agency . . . However, official acts which are ministerial in nature and involve no exercise of discretion are not considered actions under the mandates of SEQRA and, thus, do not require a SEQRA review."); *see also* 6 N.Y.C.R.R. 617.5(c)(25) ("The following actions are not subject to review under this Part . . . (25) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s).").

Thus, any concerns related to the sufficiency of the proposed retaining walls are irrelevant under SEQRA. *See Ziemba v. City of Troy*, 37 A.D.3d 68, 73, 827 N.Y.S.2d 322, 326 (3d Dep't 2006) ("Turning to the merits, we further agree with respondents that Supreme Court erred in determining that the issuance of a demolition permit under the Troy City Code is subject to SEQRA review . . . While the issuance of a permit may constitute an 'action' within the purview of the statute . . . SEQRA provides an express exemption from its application for 'official acts of a ministerial nature, involving no exercise of discretion.'").

Indeed, the Planning Board acknowledged the critical distinction between potential environmental impacts and engineering concerns as the EAF explains that the "actual walls will be designed by the developer [and its licensed civil engineer] and reviewed by the Town when building permits are submitted for each lot.[7] The grading of each lot and the construction of site improvements is reliant on the architectural design of each house." *R. 122 [EAF Parts 2 and 3, p. 2]; see R.104, p. 6 [EEA] ("Retaining walls, which are designed to meet professional engineering standards will be installed . . . to provide additional support and ensure slope and soil*

[7] Section 87-52(B)(1) of the Town Code states, "[n]o retaining wall . . . shall be constructed, installed or modified without a building permit having been issued by the Department of Engineering Services.

stabilization."); R.109, p. 6 [EEA Response to Comments] (explaining that the retaining walls will be designed by a certified professional engineer).

As detailed above, the record here establishes that the Planning Board took a hard look at the identified areas of environmental concern and gave a reasoned elaboration of the basis for its negative declaration. *See New Scotland Ave. Neighborhood Ass'n v. Plan. Bd. Of City of Albany*, 142 A.D.2d 257, 263, 535 N.Y.S.2d 645, 649 (3d Dep't 1988) ("Based upon a review of the record, which is replete with investigative reports and analyses, several of which were completed by engineers who were employed at the request of the Planning Board to satisfy its environmental concerns about the suitability of the site for cluster development, it is our view that the Planning Board, as lead agency, took the necessary 'hard look' at the relevant areas of environmental concern and made a 'reasoned elaboration' of the basis for its determination.").

POINT II

CONDITIONED NEGATIVE DECLARATION WAS NOT REQUIRED AS ALL MITIGATION MEASURES WERE INCORPORATED INTO THE PROJECT

Despite the Planning Board's "hard look," Petitioners contend that a positive declaration or at a minimum, a conditioned negative declaration was required "in light of the Board's own findings of multiple adverse environmental impacts." *See MOL, p.12.*[8] This contention that the Negative Declaration was issued in error or was impermissibly conditioned should be rejected.

"A 'negative declaration' is 'a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts' (6 NYCRR 617.2 [z]). In contrast, a 'conditional negative declaration' is 'a negative

[8] It should be noted that Petitioners' claim that the Board determined and/or concluded that the Project has "multiple adverse environmental impacts" is wrong. As discussed previously herein, the EAF identified six (6) arears that posed a potential "small impact" on the environment. Following its "hard look" at these areas, the Board rationally and reasonably concluded that the Project would not have a significant adverse environmental impact. *R.122.*

declaration in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency will modify the proposed action so that no significant adverse environmental impacts will result (6 NYCRR 617.2[h]; *see also* 6 NYCRR 617.3 [b]; 617.7 [d][1][iii])." *See Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Plan. Bd.*, 2023 WL 4383288, *11 at n.5 (Sup.Ct. Saratoga Cnty., July 6, 2023).

A. <u>A Positive Declaration was not Required</u>

Petitioners argue that due to the "multitude of acknowledged potential environmental impacts, a positive declaration (or a conditioned negative declaration) should have been issued. *MOL, p.16.* This argument is misguided.

SEQRA does not require the issuance of a positive declaration, simply because the Board identified several potential small impacts on the environment. *See Nicklin-McKay v. Town of Marlborough Plan. Bd.*, 14 A.D.3d 858, 861, 788 N.Y.S.2d 448, 452 (3d Dep't 2005) ("Potentially large impacts are not the equivalent of significant impacts. Identification of a potentially large impact simply requires the lead agency to conduct a further evaluation to determine whether the impact would be significant."). The identification of potential environmental impacts only requires the "lead agency to conduct a further evaluation." *Id.* When a lead agency, like the Planning Board here, conducts a further evaluation and "finds no significant adverse environmental impacts, it will issue a 'Negative Declaration.'" *Rimler v. City of New York*, 2016 WL 6682248, *6 (Sup.Ct. Kings Cnty., July 7, 2016) (citing 6 NYCRR Section 617.7(a)(2)); *see Buerger v. Town of Grafton*, 235 A.D.2d 984, 986, 652 N.Y.S.2d 880, 882 (3d Dep't 1997) ("While petitioner disagrees with the Board's analysis and conclusions supporting its determination, it is

clear to us that it fully performed its obligations under SEQRA and did not abuse its discretion in issuing a negative declaration for this project.").

As noted above, because the record reflects that the Planning Board undertook the requisite hard look, it complied with SEQRA and thus, correctly issued the Negative Declaration.

B. Planning Board was not Required to Issue a Conditioned Negative Declaration

Petitioners disingenuously argue that the Planning Board "identified and acknowledged impacts would be addressed through mitigation." *MOL, p.13.* Notably, Petitioners fail to point to any alleged conditions or modifications that were imposed or required by the Negative Declaration. Petitioners rather simply presume further mitigation measures will be required though the record is void of any such directive. *See MOL, p. 12.*

For example, Petitioners claim that the "integrity" and "aesthetic impact" of the proposed retaining wall system will need to be subsequently "evaluated" following its installation but provide no support for its claim. *See MOL, p. 12.* Petitioners also meekly contend that "mitigation measures are contained in the Planning Board's conclusion that the project will not result in adverse environmental impact. *See MOL, p. 21.* However, Petitioners fail to reference or identify any such conditions or any alleged unilateral modifications imposed by the Planning Board. *See Coal. for Cobbs Hill by Pastecki v. City of Rochester*, 194 A.D.3d 1428, 1434, 149 N.Y.S.3d 400, 407 (4th Dep't 2021) ("[I]t is equally plain that . . . the EAF . . . [did not] contain[] any mitigation measures *required* by the Zoning Manager as a *condition* of issuing the negative declaration . . . There is nothing in the record to demonstrate that the negative declaration was conditioned on any changes made to the Project.").

In addition, when determining if a conditional negative declaration ("CND") was impermissibly issued, courts conduct a two-step inquiry. First, "whether the project, as initially

proposed, might result in the identification of one or more significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration." *Friends of Fort Greene Park v. New York City Parks & Recreation Dep't*, --- N.Y.S.3d ----, 2025 WL 1819847, at *12 (citations omitted).

Here, the EAF did not find that the project as initially proposed could result in one or more significant adverse environmental impacts. *See Friends of Fort Greene Park,* --- N.Y.S.3d ----, 2025 WL 1819847, at *12 ("[T]he EAS [or Environmental Assessment Statement] did not find that the project as initially proposed might result in one or more significant adverse environmental effects, and thus under the *Merson* framework it could not be concluded that the negative declaration here was impermissibly conditioned."). Rather, the EAF simply identified the potential for several "small impacts."[9] *R.122; see Merson v. McNally*, 90 N.Y.2d 742, 751, 665 N.Y.S.2d 605, 609 (1997) ("Part 2 of the EAF allows the lead agency to identify 'the range of possible impacts' and "whether an impact can be mitigated or reduced."). "Identifying an impact . . . simply asks that it be looked at further." *Id.*[10]

After further examination, the Planning Board did not find that any of the potential environmental effects would be significant. As detailed above, the Planning Board addressed,

[9] *See Bervy v. New York State Dept. of Environmental Conservation*, 2001 WL 37130714, *3 (Sup.Ct. Columbia Cnty., June 8, 2001) ("Specifically, the instructions in Part 2 require that if the analyst answers "Yes" to any question which asks whether the proposed project will affect a particular aspect of the environment, thereby indicating that there will be an environmental impact in such category, the analyst must then indicate the size of the impact checking either "small to moderate impact" or "potential large impact.").

[10] It appears that Petitioners are confused. An EAF's identification of potential environmental impacts is not necessarily a determination that said impact is significant. It seems however, that Petitioners attempt to argue that that identification of the six (6) arears on the EAF is an admission that each has a significant environmental impact. *See MOL, p.15 ("[I]t is unimaginable that the Planning Board could possibly conclude that the action would involve no environmental impact.").* As noted by *Merson v. McNally, infra, p.23,* mitigation techniques can be utilized to resolve any minor concerns and the existence of such does not mandate the issuance of a CND.

considered and evaluated the impact the Project may have on (i) land; (ii) groundwater; (iii) plants and animals; (iv) noise, odor and light; and (v) community character. *See R.122.* In each instance, it was determined the environmental effect would not have a significant impact. *Id.; see Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Plan. Bd.*, 235 A.D.3d 1124, 1127, 228 N.Y.S.3d 334, 338 (3d Dep't 2025) ("That is, the lead agency must 'thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment.'") (citing 6 NYCRR 617.7[b][3]). Thus, the record supports the finding that the Planning Board took a "hard look" and "did not abuse its discretion in making specific findings of no significant adverse effects prior to issuing a negative declaration." *Hoffman v. Town Bd. of Town of Queensbury*, 255 A.D.2d 752, 754, 680 N.Y.S.2d 735, 737 (3d Dep't 1998); *see Merson*, 90 N.Y.2d at 753, 665 N.Y.S.2d at 610 ("[I]f all areas of concern involve a minimal risk to the environment, no further inquiry is necessary and modifications in these areas would not impermissibly condition or invalidate an otherwise proper negative declaration."). As such, the Planning Board did not issue a negative declaration that was impermissibly conditioned.

Further, the record shows that any purported mitigation measures were "part and parcel of the project plans being reviewed by respondent." *Cathedral Church of St. John the Divine*, 224 A.D.2d at 102–03, 645 N.Y.S.2d at 642. In other words, "where the applicant proceeds on the initial application . . . a negative declaration may be issued based on 'on adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies,' provided that such mitigation is incorporated as part of an 'open and deliberative process' and not as 'conditions unilaterally imposed by the lead agency.'" *Clean Air Action Network of Glens Falls, Inc.,* 2023 WL 4383288, *13.

Here, all revisions to the Project were part of the review process and included in Vineyard's revised plans that were submitted to the Planning Board and publicly evaluated prior to the issuance of the Negative Declaration. As a result, any revisions were mere "adjustments incorporated by the project's sponsor to mitigate concerns identified by the public and reviewing agencies." *Merson*, 90 N.Y.2d at 755, 665 N.Y.S.2d at 612 ("The revisions thus came about as part of the review process and were submitted and publicly evaluated prior to the issuance of the negative declaration."); *see Hoffman*, 255 A.D.2d at 754, 680 N.Y.S.2d at 737 ("It is clear that the mitigating measures referenced in the negative declaration were incorporated into the proposal in response to concerns of the Town Board, the community and other agencies raised during the "open and deliberative" application process.").

Ultimately, there is no evidence that any mitigating measures were unilaterally imposed or extracted by the Planning Board. Based on the foregoing, the Planning Board's issuance of the Negative Declaration was not procedurally defective. *See Inc. Vill. of Poquott v. Cahill*, 11 A.D.3d 536, 541–42, 782 N.Y.S.2d 823, 829 (2d Dep't 2004) ("those measures were incorporated as part of an open and deliberative process, were properly considered by LIPA in making its determination that the Project would have no significant adverse environmental impacts, and did not render the resulting negative declaration procedurally defective."); *see also Vill. of Tarrytown v. Plan. Bd. of Vill. of Sleepy Hollow,* 292 A.D.2d 617, 619, 741 N.Y.S.2d 44, 48 (2d Dep't 2002). The Planning Board's conclusion that there "was no significant adverse environmental impact was not conditioned upon [its] recommendations." *Falanga v. Town of Farmington*, 2021 WL 8199904, *6 (Sup.Ct. Ontario Cnty., Oct. 18, 2021).

POINT III

DELIBERATIVE PROCESS WAS OPEN TO THE PUBLIC, WHICH WAS INVITED TO COMMENT AND RAISE ISSUES OF ENVIRONMENTAL CONCERN AT PROPERLY NOTICED PUBLIC HEARINGS

Petitioners argue that the Planning Board violated SEQRA by engaging in closed-door bilateral exchanges with the Applicant. *See MOL, 18-22; see also Merson*, 90 N.Y.2d at 753 ("[E]nvironmental 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."). A review of the record however, paints a completely different picture and shows that the Planning Board "engaged in an extensive, 'open and deliberative process' with developers, the public . . . thereby fulfilling the procedural requirements of SEQRA." *Creda, LLC v. City of Kingston Plan. Bd.*, 212 A.D.3d 1043, 1047, 183 N.Y.S.3d 591, 596 (3d Dep't 2023).

Petitioners' argument fails to appreciate the public hearings and/or meetings held by the Board including the lengthy hearing held in August 2023 (early in the SEQRA review process), at which the community, including Petitioners, had the opportunity and ability to voice their environmental concerns with respect to the Plan. *See* 6 NYCRR 6, § 617.3(d) ("Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing on the impacts and alternatives requiring in-depth analysis in an EIS."); *see also R.142*[11] *["the petitioning residents were given an opportunity to speak at this meeting regarding their concerns. Five (5) residents spoke after their attorney . . ."]; R.122; Clean Air Action Network of Glens Falls, Inc.*, 2023 WL 4286005, at *13 ("These adjustments were provided to the Planning Board in writing for public filing. They were openly

[11] Petitioners cite to R.142 in an attempt to show that the Planning Board's mitigation measures were fashioned in "prohibited closed private meetings." However, the referred to Planning Board minutes from the July 10, 2024 meeting make no such reference.

discussed during the public meetings, and the public was afforded ample opportunity to comment on them. As such, the mitigations were incorporated as part of an open and deliberative process and did not render the resulting negative declaration procedurally defective.").

Petitioners also had an opportunity to review and submit comments to the EEA. *R.147.* Indeed, because the Applicant believed Petitioners' comments to be significant, it (through NPV) provided the Board with a detailed response. *See R.109; see also Vill. of Tarrytown v. Plan. Bd. of Vill. of Sleepy Hollow*, 292 A.D.2d at 619–20, 741 N.Y.S.2d at, 48 ("[W]here a developer works with the lead agency . . . in public and . . . incorporates changes in the project . . . a negative declaration may be appropriate—provided that such declaration is not the product of closed-door negotiations or of the developer's compliance with conditions unilaterally imposed by the lead agency.").

The decision of the Appellate Division, Third Department in *Wilkinson v. Plan. Bd. of Town of Thompson*, 255 A.D.2d 738, 680 N.Y.S.2d 710 (3d Dep't 1998) is instructive. There, the owner of property adjacent to the site of a proposed retail development appealed from the trial court's decision dismissing the petition which alleged that the planning board's negative declaration "constituted an impermissible conditioned negative declaration." *Id.*, 255 A.D.2d at 738, 680 N.Y.S.2d at 712.

In affirming the trial court's dismissal of the petition, the Appellate Division observed:

> Further, following the filing of the EAF, Wal–Mart, the Planning Board (designated lead agency for environmental review), other interested agencies and members of the public engaged in a lengthy and meaningful consideration of various environmental concerns, including water supply, sewer capacity, traffic and access, environmental features, storm water runoff, Federal wetlands, historic and archaeological features and zoning. A number of open meetings were conducted between October 9, 1996 and July 9, 1997, providing the public with an opportunity to offer comments and address any potential adverse environmental impacts.

Id. 255 A.D.2d at 739-740, 680 N.Y.S.2d at 712-713 (explaining that the "lead agency did not unilaterally impose any conditions upon the issuance of the negative declaration.").

Here, because the Planning Board received input from members of the public, Petitioners' contention that the Negative Declaration was the result of closed-door negotiations should be rejected. *See Thorne v. Vill. of Millbrook Plan. Bd.*, 83 A.D.3d 723, 725, 920 N.Y.S.2d 369, 371 (2d Dep't 2011) ("Contrary to the petitioners' contention, the modifications to the project made by the developer were publicly evaluated prior to the issuance of the negative declaration."); *see also In re City of New York*, 2004 WL 2590582, *18 (Sup.Ct. Kings Cnty., Nov. 10, 2004) ('[T]he alleged modifications to the Project were made during the public review process, in open negotiations, and were before CPC when final approval was given.").

POINT IV

PLANNING BOARD POSSESSES AUTHORITY TO GRANT VARIANCES

Cluster development is a form of subdivision development that, among other things, places residences on certain locations in order to preserve other areas in their natural state. *See* Town Law § 278(1)(a) (a cluster development is a subdivision that provides "an alternative permitted method for layout . . . in order to preserve the natural and scenic qualities of open lands.").[12] It gives a planning board "greater flexibility in subdivision approval for the purpose of achieving more efficient use of land containing unusual features," such as "steep slopes." *Bayswater Realty & Cap. Corp. v. Plan. Bd. of Town of Lewisboro*, 76 N.Y.2d 460, 467, 560 560 N.Y.S.2d 623, 626 (1990); *see Kamhi v. Plan. Bd. of Town of Yorktown*, 59 N.Y.2d 385, 390, 465 N.Y.S.2d 865, 867 (1983)

[12] Section 198-2 of the Town Code similarity defines a "Cluster Development" as "[a] subdivision plat in which the zoning regulations are modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands." *See Tuffarelli Aff., Ex. 3.*

("Economy, flexibility and scenic beauty are all appropriate reasons for permitting cluster zoning."); *see* Town Law § 278(2)(b).

> The primary impetus and, indeed, the distinguishing feature of a cluster subdivision clearly is the preservation of open space. The conservation of open space accomplishes numerous laudatory purposes, including preservation of the natural and scenic qualities of open land and the preservation of environmentally sensitive lands, such as wetlands and steep slopes. Cluster development may also permit historic structures and sites and agricultural lands to be preserved. Lastly, the open space which results from clustering may be utilized for park or recreational use. Accordingly, one of the fundamental reasons for cluster subdivision authorization is the preservation of an array of various types and varieties of open space, the preservation of which has been deemed to be beneficial to the community.

Rice, Practice Commentary, Town Law § 278 (Westlaw, 2025).

To accomplish this goal, a town may authorize its planning board, as in the case of Huntington, to approve alternate development which deviates from many of the local zoning regulations. *See* Town Law § 278(2)(a). Section 198-114 of the Huntington Town Code states that the "Board may make any reasonable modification of the zoning regulations applicable to the land so platted as authorized by § 278 of the Town Law . . . Any such modification . . . shall be made to provide an alternative permitted method for the layout . . . [of] buildings and structures[13] . . . in order to preserve the natural and scenic qualities of open space . . . " *See Tuffarelli Aff., Ex. 2.* In other words, the Planning Board is permitted to modify the zoning regulations of a proposed cluster development, including those related to retaining walls and lot width. *See Penfield Panorama Area Cmty., Inc. v. Town of Penfield Plan. Bd.,* 253 A.D.2d 342, 346, 688 N.Y.S.2d 848, 851 (4th Dep't 1999).

[13] The definition of "Structure" under Section 198-2 of the Town Code includes retaining walls more than four (4) feet in height. *See Tuffarelli Aff., Ex. 3.*

Here, the Planning Board, pursuant to the authority provided to it by the Town Law and the Town Code, made minor modifications to Lot 3 by creating a flag lot (*see R.95 [Revised Plans]*) and modified the retaining wall setback for Lots 6, 7, 8. *See R. 158, p. 2 [Resolution dated March 19, 2025, granting preliminary subdivision approval].* Petitioners concede that the Planning Board possessed such authority [*see MOL, pp.28-29*] but nonetheless contend that the exercise of this authority was improper as the "subject subdivision is not a cluster development." *MOL, p. 28.* This argument is solely based on Vinyard Bay's initial application which did not indicate that it was proposing a cluster development. This view is shortsighted and fails to appreciate one of the several benefits of cluster development.

Under Town Law § 278(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." *See Maor v. Town of Ramapo Plan. Bd.*, 44 A.D.3d 665, 666, 843 N.Y.S.2d 163, 164 (2d Dep't 2007) (explaining that following the submission of a subdivision application, the planning board referred the matter to the town board for "authorization to consider . . . application as [one] for a 'cluster development.'"). This is precisely what transpired here. As noted above, the cluster mechanism enables structures (such as retaining walls) to be built on certain portions of real property in order to preserve the natural and scenic qualities of open land. As proven by the record, the Planning did just that, *i.e.,* first determined that subdividing the Property into eight (8) lots (though more were permitted based on the Steep Slope Analysis) was in compliance with the Town's Steep Slopes law and then determined that classifying the Project as a cluster development, would provide it with the ability to arrange/move the proposed lots and slightly modify zoning restrictions, particularly those related to the retaining walls and the width of Lot 3, in order to preserve several acres of land, in approving the Project. *See Bayswater Realty*

& Cap. Corp., 76 N.Y.2d at 467, 560 N.Y.S.2d at 626 (observing that cluster developments provide planning boards with flexibility in approving subdivisions which contain steep slopes.); *see also R.122 ("The application is being processed as a cluster subdivision under Section 278 of New York State Town Law and Huntington Town Code Section 198-114").*

In light of the Planning Board's determination, it provided notice of this change to the classification of the Project and its intent to utilize the authority provided to it under Section 278 of the Town Law. *See R.126 [Legal Notice of Hearing].* Contrary to Petitioners' argument, there is no rule that prevents the Planning Board from treating a subdivision, though not initially marked as such, as a cluster development. *See* Town Law § 278 and Section 198-114. Additionally, the fact that the proposed development was not a so-called traditional cluster development is of no moment. *See* Town Law § 278(3)(d) ("In the case of a residential plat or plats, the dwelling units permitted may be, at the discretion of the planning board, in detached, semi-detached, or multi-story structures.").

Based on the foregoing, the Planning Board possessed authority to grant the minimum modifications to the Town's zoning restrictions.

Petitioners nonetheless contend that a variance from the Town's Zoning Board of Appeals was/is required with respect to the retaining walls and "relaxation of the lot width." *See MOL, pp. 29-31.* However, Petitioners misread, confuse and misconstrue the provisions of Town Code § 198-60 *et al.* (Steep Slope law). *See MOL, p. 31.*

The section of the Town's Steep Slope law pertinent to the Project is Section 198-63 ("Subdivision of Land") and its calculations, which determined the "number of lots permitted in

[the] "Hillside Area"[14] of the proposed subdivision. Nothing in Section 198-63 references retaining walls or lot width, or the need for variance relief if a subdivision's proposed retaining wall(s) or width is violative of the Town's zoning requirements. Section 198-63(G) simply explains that an applicant *may* seek a variance from the Town's Zoning Board of Appeals when a "lot(s) on a proposed map does not comply with the area requirements of this article" or in other words, the required minimum lot area set forth in Section 198-63 - and not a lot's width. Here, each of the proposed lots complies with the relevant size or area requirements. *See R.104, p.3 [EEA]; R.122 [EAF Parts 2 and 3, p.1.]*[15] Moreover, the Applicant did not need to seek a variance from the Zoning Board of Appeals because the Planning Board granted the slight modifications under its cluster development authority.

Petitioners also fail to appreciate that Section 198-63(G) is inapplicable if a site plan is approved by the Planning Board. *See* Town Code § 198-61(E)(1) ("Exemptions. (1) Hillside Arears included in a residential site plan approved by the Planning Board shall not be referred for further review under § 198-64 when an application for a permit is filed [with the department of buildings] . . .").

While Petitioners also refer to Sections 198-64 and 198-65, which each reference the Town's Zoning Board of Appeals' ability to grant variances in relation to the location of proposed

[14] Section 198-2 of the Town Code defines "Hillside Area (Steep Slope)" as a "geographical area, whether natural or manmade and whether on one (1) or more lots, having an average slope of ten (10%) percent or greater, extending over a horizontal length of at least 25 feet and a horizontal width of at least 25 feet. For the purpose of this Article, a slope of ten (10%) percent shall be equivalent to a vertical rise of two (2) feet in a horizontal distance of twenty (20) feet." *See Tuffarelli Aff., Ex. 3.*

[15] While Resolution (*R.158*) granting preliminary subdivision approval references a modification to the area of Lot 3, the size of Lot 3 (1.4993 acres) is clearly greater that the size permitted in the R-10 zoning district. *See Tuffarelli Aff., Ex. 4.* The minimum lot area in a R-10 district is 10,000 feet. *See Tuffarelli Aff., Ex. 4.* The reference to Lot 3's Lot Area reflects a change in relation to the initial proposal which indicated a larger initial lot size. The only zoning modifications granted with respect to Lot 3 are the lot width and lot frontage, which are permitted by the cluster development mechanism. *See R.152; see also Tuffarelli Aff., Ex. 4.*

retaining walls and lot width, neither of those Code Sections are relevant and/or applicable to the Project. Because Section 198-64 ("Building permits for individual residential building lots") pertains to the construction of "individual residential" lots in a Hillside Area and Section 198-65 (Multi-family site development in C-1, R-3M, R-HS and R-RM zoning districts) pertains to several zoning districts not relevant here,[16] each of the aforementioned Code Sections are inapplicable.

Based on the foregoing, Petitioners' contention that only the Town's Zoning Board of Appeals could grant a variance with respect to the Project's retaining walls and lot width (and not the Planning Board under its cluster development authority), should be rejected.

CONCLUSION

As detailed herein, the Planning Board's decision is rationally supported by substantial evidence in the record. The Board undoubtedly complied with SEQRA by taking the necessary "hard look" at potential adverse environmental impacts. As a result, the Planning Board properly and lawfully issued a Negative Declaration. Accordingly, the Petition seeking to annul the Negative Declaration and subsequent preliminary subdivision approval should be dismissed.

[16] "The proposed action is for the subdivision of a 7.93-acre property into eight (8) lots zoned R-10 Residence Zoning District (Minimum Lot Area 10,000 s.f.) and R-7 Residence Zoning District (Minimum Lot Area 7,500 s.f.)." *R. 122 [EAF Parts 2 and 3, p.1.]*

WHEREFORE, the Planning Board requests judgment dismissing the Petition, together with such other and further relief as may be just and proper.

Dated: Garden City, New York
September 12, 2025

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September 12, 2025

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