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May 8, 2020

Town of Guilderland Planning Board
Guilderland Town Hall – 2nd Floor
5209 Western Turnpike, P.O. Box 339
Guilderland, N.Y. 12084

*Re: Comments on Draft Environmental Impact Statement for the
Rapp Road Residential Development and Costco*

Dear Chairman Feeney and Members of the Board,

I represent Red-Kap Sales, Inc., (Red-Kap), a third generation family-owned gasoline distributor that has served the Capitol District since 1933. Red-Kap is the operator of the Red-Kap Mobil Station at 1667 Western Avenue, Guilderland, New York in proximity to Site No. 2.

Pyramid Corporation, (Applicant), proposes a 3-site development consisting of 1) a 222-unit residential complex on Rapp Road, 2) “development of a ±160,000 square feet Costco retail facility and related fueling facility with a kiosk, and associated driveways, parking areas, and other infrastructure” on Site No. 2, and 3) a commercial/residential development on 11 acres which may include 115,000 sq. ft. of retail space, 50,000 sq. ft. of office space and 48 multi-family apartments (Site No. 3). See Draft Environmental Impact Statement, (DEIS), at page 30.

As you know, my clients are now plaintiffs in a matter filed in the Northern District of New York which seeks to require the re-establishment of lead agency due significant violations of SEQRA. The litigation also identifies that clear cutting on Site No. 2 violated the federal Clean Water Act and the Endangered Species Act.

As of this date, the Planning Board’s status as lead agency remains and therefore the following comments address the SEQRA process and deficiencies of the DEIS.

Attached herewith is a report by Ferrandino and Associates, (F&A), finding the DEIS utterly fails to meet the most basic requirements of SEQRA. The DEIS is replete with conclusory statements and lacks the supporting data necessary to allow the lead agency to identify, discuss and examine mitigation measures as required by SEQRA. Further, there is no examination of a reasonable range of alternatives that furthers the purposes of the WCS or the TOD overlay district.

Also attached is my letter to the Town dated December 23, 2019, which included traffic and market impact analyses detailing Costco’s environmental impacts in other jurisdictions. The purpose was to alert the lead agency as to the information that should be disclosed and reviewed under SEQRA for a Costco project.



New York Association of Convenience Stores
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JAMES CALVIN, being duly sworn, deposes and says:

1. I submit this affidavit regarding the economic impacts and conflict with Guilderland's zoning code that are presented by the proposed Costco warehouse as described in a Draft Environmental Impact Statement (DEIS) filed with the Town.
2. For the past 22 years, I have served as the chief executive officer of the New York Association of Convenience Stores, a private, not-for-profit trade organization representing thousands of neighborhood convenience stores and mini-marts statewide.
3. More than 85 percent of our member locations sell gasoline. Some are branded, some not. Some are chain-operated, others are independent. Some locations sell over 100,000 gallons a month, some only 30,000.
4. I am familiar with laws and regulations governing the retail sale of motor fuel in New York State, the various gasoline retailing business models that exist, and marketplace factors that influence retail gasoline volumes, branding, and pricing decisions.
5. I have reviewed the proposal by Costco to build a warehouse with 18 fueling positions in the Town of Guilderland and I have reviewed the Town's zoning code.
6. In my opinion, the Costco "members-only" fueling facility proposed as part of a Costco Warehouse Club is impermissible under the zoning code.
7. A big box retailer selling gasoline is not a permitted use.
8. Instead, Guilderland's Zoning Code, (§280-5), defines "Automobile Service Station" as:

A place where gasoline or other motor vehicle engine fuel (stored only in underground tanks), kerosene, motor oil, lubricants, grease (for operation of motor vehicles), or minor accessories are sold directly to the public on the premises and where the servicing or repair of automobiles, or installation of mufflers or other specialty items, may occur. An automobile service station shall not include sale or storage of automobiles or trailers, new or used, and shall be licensed by the NYS Department of Motor Vehicles. See § 280-40, Supplemental regulations.

9. Obviously a big box store selling gasoline does not fit this definition. By contrast, the Code does define “Convenience store, gas” as “[a] convenience food store including retail sale of motor vehicle fuel.”

10. Further, the Code’s definition of Automobile Service Station states “[a]n automobile service station shall not include sale or storage of automobiles or trailers, new or used.”

11. However, Costco offers the sale of automobiles and trailers for its members.¹ (See “How Much Can You Save by Purchasing Your RV From Costco?” at <https://www.crowsurvival.com/rv-from-costco/> and Costco’s “Costco Auto Program” stating “Costco members save on RVs... Low, prearranged Costco member pricing on many makes and models... Smooth, seamless buying experience.

at <https://www.costcoauto.com/rv/enterzipcode.aspx?gotourl=%2fRV%2f>)

12. Moreover, based on my familiarity with hundreds of gas stations in New York and familiarity with fuel facilities accompanying big box retailers such as Costco, Sam’s Club and BJ’s, a Costco fueling station without a supporting membership scheme is not economically viable.

13. Without the Costco store and its member-discount prices, all of Costco’s ancillary uses - its fueling facilities, pharmacy, optical and hearing aid centers, food court, and travel agency - would not perform as well as stand-alone businesses.

¹ “Executive members have access to additional savings and benefits on various business and consumer services (except in Mexico), such as auto and home insurance, the Costco auto purchase program and check printing services.” Costco Annual Report (2017) at pg. 8, see http://www.annualreports.com/HostedData/AnnualReportArchive/c/NASDAQ_COST_2017.pdf.

14. This is especially true for the no-frills Costco fueling facility which uses low² gasoline prices as a means to draw in members, e.g.:

We believe that our gasoline business draws members but it generally has a significantly lower gross margin percentage relative to our non-gasoline business. A higher penetration of gasoline sales will generally lower our gross margin percentage.

See page 21 of “Costco Wholesale Corporation Annual Report on Form 10-k for the fiscal year ended September 2, 2018” available at

<https://www.sec.gov/Archives/edgar/data/909832/000090983218000013/cost10k9218.htm#sB7C2BA5831435E409906549BACAA1ECF>

15. Based on my observation of the New York market, Costco’s business strategy with regard to fuel sales is to offer retail prices for Costco members that competing gasoline retailers perceive to be equivalent to the *wholesale* price they pay their supplier. That poses a Hobson’s choice for gasoline retailers in the surrounding market – match Costco on price and forfeit profitability, or maintain prices at a reasonable profit per gallon but lose volume to Costco. Since gas stations cannot operate on a zero profitability basis, most try to maintain their price per gallon, lose volume to Costco, and hope that in-store sales will keep them solvent.

16. Claiming that a fueling facility with a kiosk could survive independently of the Costco warehouse is like claiming that the earth could survive independently of the sun. Removing the nurturing radiance and magnetic pull of the Costco warehouse would fundamentally alter the underlying operating conditions of the orbiting fueling facility, exposing it to economic peril, to wit:

- The discount-driven high traffic count a Costco fueling facility relies upon for high sales volume would collapse without the big-box store affiliation.

² “Costco sets its gasoline prices for each day based on two price factors: our cost and the lowest priced competitor in the market. Within the geographic vicinity of our warehouses (generally a three to five-mile radius), you’ll find we consistently have the lowest priced gasoline.”

https://customerservice.costco.com/app/answers/detail/a_id/9230/~/-/costco-gas-station-faqs

- Without a Costco warehouse, a stand-alone Costco fueling facility’s business would be dependent on gross profit margin revenue from gasoline sales alone, forcing it to charge significantly more per gallon than the Costco business model allows. This inevitably would reduce its sales volume. The station would be saddled with the carrying charges of infrastructure designed to pump perhaps 300,000 gallons a month, yet it would struggle to achieve even a third of that volume.
 - The station would no longer enjoy the economic advantage of operating as part of a “membership club.” Revenue from annual membership sales enables Costco to price substantially lower for gasoline.
 - It would lack the financial stability to withstand wholesale gas price volatility. If you’re an independent operator, and you take delivery of 10,000 gallons of fuel at \$2 a gallon, but the market price subsequently drops to \$1.75, you’re not going to be able to sell that load at a sustainable level of profitability, meaning you may not be able to pay for the next load. Publicly traded Costco is big and diversified enough to absorb that delta until the market stabilizes; not so for a mom-and-pop business wholly dependent on wider gasoline margins.
 - In this particular case, nearby gas stations on Western Avenue that did not have any convenience store failed – proving that without associated retail, a fueling station alone is not economically viable.
17. Given all of the above factors, in my opinion, the fueling station could not be operated successfully independent of the Costco Warehouse Club at the Crossgates site.
18. Even if Costco’s use could be considered permissible under the Town Code, I note the Town’s definition of Accessory use is “[a] use that is incidental and subordinate to the principal use and located on the same lot with such principal use.”
19. As proof that Costco’s fueling facility is “incidental and subordinate to the principal use,” Costco defines its fueling facilities as “ancillary” businesses along with its pharmacies, optical and hearing aid centers, food courts, and travel:

We offer merchandise in the following categories: **Food and Sundries** (including dry foods, packaged foods, groceries, snack foods, candy, alcoholic and nonalcoholic beverages, and cleaning supplies) **Hardlines** (including major appliances, electronics, health and beauty aids, hardware, and garden and patio) **Fresh Foods** (including meat, produce, deli, and bakery) **Softlines** (including apparel and small appliances) **Ancillary** (including gasoline and pharmacy businesses)

Ancillary businesses within or next to our warehouses provide expanded products and services, encouraging members to shop more frequently. These businesses

include gas stations, pharmacies, optical dispensing centers, food courts, and hearing-aid centers.

Id. Costco Annual Report (10K) at pg. 4.

20. Even when gasoline is combined with all of the other ancillary sales, it comprises just 18% of Costco's net sales. *Id.* at page 59 reporting the following net sales: Food and Sundries 41%, Hardlines 16%, Fresh Foods 14%, Softlines 11% and Ancillary 18%.

21. Therefore, because fuel sales comprise just a fraction of the 18% of total ancillary sales, Costco's fueling facility is an accessory use as defined by the Town Code.

22. Further, during my tenure as the chief executive officer of the New York Association of Convenience Stores I have become familiar with and followed planning and zoning issues throughout the state. I am aware that the Town of Riverhead on Long Island has adopted zoning measures to allow discount clubs such as Costco to operate fueling facilities as an accessory use.³ Guilderland has not done that.

23. Finally, the DEIS fails to give any consideration to Costco's impacts upon other gas station businesses.

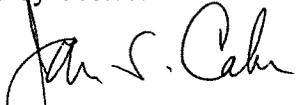
24. The fact that gasoline retailers have gone out of business on Western Avenue in the immediate vicinity of Costco's proposed site proves there are no additional local dollars to support a new fueling facility that will sell a projected 7-10 million gallons of gasoline a year.

25. The DEIS fails to include a market retail analysis identifying existing gas stations in the market area, quantifying their employment and tax revenue generated, and comparing how these stations will be impacted and whether economic impacts will result in blighted properties in the Town.

³ Riverhead established a "Destination Retail Center" zone allowing as a principal use "[w]arehouse clubs or wholesale clubs" and specifically identifies "[f]ueling facilities accessory to a warehouse club or a wholesale club" as a permitted accessory use. (See Section 301-106(A)(5) and (B)(2) at <http://www.ecode360.com/29712367>).

26. As evidenced by the long-deserted gas stations existing along Western Avenue, once gasoline businesses shut down, it is unlikely that the buildings can be retrofitted to a new productive use.

27. The DEIS fails to discuss whether surrounding gas stations will be able to survive the drop in sales volume due to artificially low fuel prices charged by Costco.



James Calvin

Sworn to me this 27th day
of February, 2020



ALISON RITCHIE
NOTARY PUBLIC-STATE OF NEW YORK
No. 01RI6392401
Qualified in Albany County
My Commission Expires 05-28-2023

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

) Case No.
THOMAS HART, LISA HART, KEVIN McDONALD,)	
SARAH McDONALD 1667 WESTERN AVENUE, LLC and)	
RED-KAP SALES, INC.)	
)	
Plaintiffs,)	
)	
-against-)	
)	
TOWN OF GUILDERLAND, GUILDERLAND PLANNING BOARD)	
AND ZONING BOARD OF APPEALS, PYRAMID MANAGEMENT)	
GROUP, LLC, RAPP ROAD DEVELOPMENT, LLC and)	
CROSSGATES RELEASECO, LLC,)	
)	
Defendants.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF DECLARATORY
JUDGMENT AND PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs submit this memorandum of law in support of their motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and declaratory judgment due to defendants' violation of plaintiffs' due process rights and privileges under the Fourteenth Amendment of the United States Constitution.

PRELIMINARY STATEMENT

Municipal defendants have violated plaintiffs' substantive due process rights by failing to adhere to federal and state laws impacting plaintiffs' property interests. Most egregious, municipal defendants permitted the clear cutting of two acres of woodlands that is subject to an ongoing land use review in the Town of Guilderland, New York (Town).

The clear cutting of woodlands without a permit violated the federal Clean Water Act, (CWA), the Endangered Species Act, (ESA) as well as SEQRA.¹

Municipal defendant Planning Board, (lead agency), also violated SEQRA by establishing itself as lead agency prior to notifying involved agencies that the original residential project on Site No. 1 had expanded to two new development sites.

Corporate defendants,' (Pyramid), development of Sites 1-3, (project), depends upon the Town's alienation of more than three acres of Town roads and rights of way. The lead agency's failure to assess alienation as part of the action constitutes unlawful segmentation.

And, neither the lead agency or Zoning Board of Appeals has jurisdiction to assess the project due to invalid and non-existent land use applications. And, Pyramid failed to obtain authorization from the Town to proceed with land use permitting involving Town property.

¹ New York State Environmental Quality Review Act, (SEQRA). Environmental Conservation Law (ECL) Article 8; regulations at 6 New York Codes, Rules and Regulations (NYCRR) Part 617.

Defendants' violations of non-discretionary federal and state laws and regulations have caused an irretrievable commitment of resources and irreparable damage to the environment and evince an unalterably closed mind pre-determining critical aspects of the SEQRA process in which plaintiffs have a substantive due process property interest.

Therefore, plaintiffs commence this action pursuant to 42 USC §1983 to enjoin any further tree cutting or site excavation, enjoin the lead agency from further SEQRA review and require re-establishment of lead agency to remedy municipal defendants' "fundamental procedural irregularities," which have caused concrete, direct and irreparable harm to plaintiffs' due process rights and the woodlands in the Lawton Terrace neighborhood.

STATEMENT OF FACTS

The facts are set forth in detail by the complaint and exhibits² referenced therein and are summarized as follows.

Between the Westmere and Lawton neighborhoods in Guilderland is an area of woodlands which residents enjoyed as open space along with the wildlife therein, before the area was clear cut. See affidavits of Hart at ¶10, McDonald at ¶24 and Bacon Affirmation at ¶6.

The woodlands served as a refuge for wildlife in an area where such open spaces are becoming more rare with increasing development.

The woodlands included a variety of mature evergreen and hardwood trees, some up to three feet in diameter, including large eastern white pines, eastern cottonwoods, red maples and black oaks. See Affidavit of Erik Kiviat, PhD. included herewith at ¶10-13.

Large trees such as these used to form a forest canopy and provide very important potential habitat features for several bat species, many birds, insects and other invertebrates, mosses, liverworts, lichens, fungi, and other organisms.

² All exhibits are attached to the Affirmation in Support of James Bacon.

These forest patches, in an urban environment, are also important for carbon storage, stormwater absorption, microclimatic cooling (via shading and transpiration), maintenance of air quality, and noise buffering.

Affidavit of Dr. Kiviat at ¶¶14-15.

A number of species, including the Indiana bat, a federal and state-listed endangered species and the Northern Long-eared bat, (NLEB), a federal and state-listed threatened species, could occur in the woodlands on the west side of Lawton Terrace where there are dead and live trees with suitable bark voids.

Id. at ¶5. In order to protect this habitat, the New York State Department of Environmental Conservation, (NYSDEC), recommends all persons should “[l]eave uncut all snag and cavity trees unless their removal is necessary for protection of human life and property.” *Id.* at ¶6.

Pyramid is seeking permits from municipal defendants to develop “almost 50 acres of wooded habitat,” (*Id.* at ¶4), planning to covert these woodlands and Town-owned properties in the Westmere and Lawton neighborhoods into commercial developments.

Since Pyramid’s construction of the Crossgates Mall in Guilderland, it has surreptitiously acquired properties to develop and support the mall. See Affidavit of Lisa Hart at ¶2 herewith.

The Town has facilitated Pyramid’s acquisition and development of property, abandoning a roadway, (Lehner Road), amending its zoning code and expediting land use approvals, *e.g.* the rezoning and approval of a 5-story hotel on Western Avenue. See Complaint at ¶¶41-42.

In 2018, the Town adopted a Transit Oriented Zone, (TOD), to reduce traffic by encouraging neighborhood-scaled mixed-use development.

However, Pyramid is using the TOD to justify multiple lot consolidations for its single use large scale developments on Sites 1 and 2.

The Albany County Planning Board objected that the residential-only proposal for Site No. 1 did not conform to the TOD’s purposes and goals. Complaint at ¶60 and Exhibit L.

However, not only did the Site 1 development conflict with the TOD, Pyramid had a second major development planned that would consolidate tax lots and convert the Lawton neighborhood into a large single retail store and fueling station.

The Guilderland Planning Board circulated notice of its intent to be lead agency under SEQRA to review Pyramid's 222-unit residential development on Site No. 1. Complaint at ¶61.

The Board established itself as lead agency on July 10, 2019, but did not disclose that the project would expand with a Costco at Site No. 2 and 115,000 sq. ft. of retail, 50,000 sq. ft. of office and 48 multi-family units on Site No. 3. Complaint at ¶¶66-69 referencing Exhibits O-R.

In fact, Pyramid had completed its site plan for a Costco in November 2017, while telling the public that it had no other plans. *Id.* at ¶43, Exhibit E, Hart Aff. ¶6 and McDonald Aff. ¶14.

Pyramid waited until four months after the establishment of lead agency, to disclose that Costco would be the occupant of Site No. 2. Complaint at ¶79 referencing Exhibit U.

On January 17, 2020, the Town refused to release the project's Draft Environmental Impact Statement, (DEIS), on grounds that the DEIS was an "intra-agency documentation," suggesting Pyramid was a branch of its government. The claim was a clear violation of New York's Freedom of Information Law. *Id.* at ¶90 referencing Exhibit Y.

Then, during the DEIS comment period, the Town allowed Pyramid to clear cut more than 2 acres of the Lawton woodlands. Kiviat Affidavit at ¶10.

This action was a fundamental betrayal of SEQRA's requirement that no physical alteration of a site occur until completion of the SEQRA review. 6 NYCRR §617.3(a).

In so doing, municipal defendants rejected their responsibility to act as "stewards of the... land, and living resources" with "an obligation to protect the environment for the use and enjoyment of this and all future generations" ECL §0103(8),

The clear cutting of the Lawton woodlands has had an immediate and negative impact upon the Harts and the McDonalds by removing an important sound buffer for traffic on Western Avenue. The tree felling also allows vehicle lights to shine into their homes at night. See Hart Aff. at ¶¶24-25 and McDonald Aff. at ¶18.

The clear cutting has also significantly reduced the quiet enjoyment that the Harts and McDonalds had experienced for years in walking next to the woodlands on the relatively quiet streets of the Lawton Terrace neighborhood. See Hart Aff. at ¶22 and McDonald Aff. at ¶23.

Most troubling, the Lawton woodlands were cut to prevent Indiana and Northern Long-eared bats from nesting and roosting there. Complaint at ¶¶27-33 referencing Exhibit C and ¶111, referencing Exhibit EE.

And, the trees were felled with no rare plant survey having been completed and no adequate assessment of the environmental impacts resulting from removal of woodland habitat. Complaint at ¶105 referencing Exhibit C and see Dr. Kiviat's Affidavit herewith at ¶¶7-8.

Further, Pyramid to cut the trees without submitting a subdivision or site plan application, as it did for the consolidation of lots and development of Site No. 1. Complaint at ¶¶79 and 55-56 referencing Exhibits H and I.

Moreover, contrary to SEQRA's segmentation prohibition, the lead agency failed to identify the alienation of Town property as part of the project. Complaint at ¶¶145-151.

Finally, the Town has allowed Pyramid to assume control over Town property in its land use applications without formal conveyance of the properties pursuant to Town Law §64(2). Complaint at ¶¶160-161, 164 and 165.

Taken together, and most egregiously demonstrated by the clear cutting, the lead agency's violations of SEQRA's non-discretionary provisions demonstrate an unalterably closed

mind and predetermination of the project's environmental review negatively impacting plaintiffs' property interests and due process rights.

As a result, plaintiffs respectfully request an injunction preventing further clear cutting and enjoining the Town's further SEQRA review and respectfully request an order requiring re-establishment of lead agency status to another involved agency.

STANDARD OF REVIEW

Under § 1983, a private cause of action can be brought against 'persons who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 USC §1983. *Sherwin-Williams Co. v Crotty*, 334 F Supp 2d 187, 193 (NDNY 2004).

There are two alternative tests used in determining violations of substantive due process:

The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first test, the plaintiff must prove that the governmental body's conduct "shocks the conscience." *Pittsley*, 927 F.2d at 6 (citing *Rochin*, 342 US at 172-173). Under the second test, the plaintiff must demonstrate a violation of an identified liberty or property interest protected by the Due Process Clause. *Id.* (citing *Meyer v. Nebraska*, 262 US 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)).

DeLeon v Little, 981 F Supp 728, 734 (D Conn 1997).

POINT I

MUNICIPAL DEFENDANTS' VIOLATIONS OF FEDERAL AND STATE LAWS SATISFY THE FIRST *DELEON* DUE PROCESS TEST

In *Natale v Town of Ridgefield*, 170 F3d 258 (2d Cir 1999), the Court of Appeals recognized an agency's "fundamental procedural irregularity" would violate a plaintiff's substantive due process rights. 170 F3d at 262.

The Court also addressed procedural irregularities in *Cine SK8, Inc. v Town of Henrietta*, 507 F3d 778, 789 (2d Cir 2007), regarding a Town Board’s questionable jurisdiction involving a special use permit. The Court found the irrational amendment of the special use permit was sufficiently egregious to warrant review, *i.e.* “there is at least a genuine issue as to whether such irregularity tainted the process by which plaintiffs’ special use permit was amended.”

Illegal actions also qualify as substantive due process violations. *Silverman v Barry*, 845 F2d 1072, 1080 (DC Cir 1988); “a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.”)

Here, municipal defendants’ “procedural irregularities” were fundamental, non-discretionary, violations of the law.

First, the clear cutting of the Lawton Terrace woodlands violated Sections 402 and 404 of the Clean Water Act, (CWA), and its delegated state counter-part in the ECL, which expressly prohibits construction activity without a permit. See complaint ¶¶119-125.

Second, where the action “may” affect protected species, the Endangered Species Act, (ESA), prohibits any federal action, such as issuance of a CWA §404 permit to fill wetlands on Site No. 2, until consultation with the USFWS. See complaint at ¶¶127-132. Indeed;

To comply with the ESA, federal agencies faced with permit applications for construction projects must ensure, in consultation with the US Fish and Wildlife Service (“FWS”), that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of” a listed species or “result in the destruction or adverse modification” of designated critical habitat. 16 USC § 1536(a)(2). Formal consultation with FWS is required when an agency proposing to act (“action agency”) determines that its action “may affect” a listed species or critical habitat. 50 CFR §402.14(a).

Def. of Wildlife v United States DOI, 931 F3d 339, 343 (4th Cir 2019).

The CWA and ESA require assessing potential environmental impacts before taking an action such as cutting down woodlands which include federal wetlands and which may harbor endangered or threatened rare species.

Third, New York agencies must strictly adhere to SEQRA's procedures:

SEQRA's policy of injecting environmental considerations into governmental decisionmaking is "effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations."

N.Y.C. Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 348 (2003).

Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

Id. at 348, quoting *Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 348 (1996); and see *Bauer v County of Tompkins*, 57 AD3d 1152 (3d Dept 2008); "Strict compliance with SEQRA's procedural mechanisms is mandated and anything less will result in annulment of the determination."

Again, "[a] project sponsor may not commence any physical alteration³ related to an action until the provisions of SEQR have been complied with." 6 NYCRR §617.3(a).

Pyramid was well aware that the Lawton woodlands could support roosting areas for federally and state-listed endangered bat species.⁴ And, NYSDEC had advised the lead agency of its concerns regarding potential impacts to endangered and special concern species.

³ "Physical alteration" is defined as "vegetation removal... grading and other forms of earthwork... filling or depositing, discharges to air or water, excavation or trenching..." 6 NYCRR 617.2(ac).

⁴ "Vegetation, Wildlife and Soil Conditions Report Western Avenue Mixed Use Redevelopment Projects" B. Laing and Associates, (October 2019) included as Exhibit EE.

Nonetheless, the Town allowed Pyramid to cut the Lawton woodlands to prevent the those species from using the trees for roosting and nesting during the coming months.

Defendants were also keenly aware of the public's interest in Pyramid's projects. Both Pyramid and the Town had met with Westmere residents who expressed their concerns over the relocation of the Westmere cul-de-sac and demolishing a home to accommodate Pyramid's development plans for Site No. 1. Hart Aff. at ¶¶6 and McDonald Aff. at ¶¶9, 10 and 14.

And, the lead agency received numerous letters expressing overdevelopment concerns from the County Planning Board, during the scoping process and on the project's DEIS.

The tree cutting pre-determined the lead agency's decision-making regarding alternatives and is precisely the type of "fundamental procedural irregularity" as defined by *Natale*, (170 F3d at 262), demonstrating a violation plaintiffs' substantive due process rights.

However, there is more. In addition to the clear cutting, the lead agency committed a number of non-discretionary procedural violations.

First, the lead agency failed to circulate environmental data on Sites 2 and 3 to involved agencies before establishing lead agency. Yet:

When an agency proposes to directly undertake, fund or approve a Type I action or an Unlisted action undergoing coordinated review with other involved agencies, it must, as soon as possible, transmit Part 1 of the EAF⁵ completed by the project sponsor, or a draft EIS and a copy of any application it has received to all involved agencies and notify them that *a lead agency must be agreed upon within 30 calendar days of the date the EAF or draft EIS was transmitted to them.*

6 NYCRR 617.6(b)(3)(i); emphasis added.

⁵ NYSDEC's model EAFs are set out in Appendices A and B of 6 NYCRR §617.20.

By September 2019, the project had more than doubled in size and expanded to two new sites. However, the Board did not rescind its lead agency status nor re-circulate a revised EAF.⁶

Second, the lead agency violated SEQRA's segmentation prohibition since "[a]ctions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action (6 NYCRR 617.3[g])." *Town of Coeymans v City of Albany*, 284 AD2d 830, 834 (3d Dept 2001). This Court has also addressed segmentation:

Segmentation is to be avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.

Stewart Park & Reserve Coalition, Inc. (SPARC) v Slater, 225 F Supp 2d 219, 233 (NDNY 2002), *affd in part revd in part* 352 F3d 545, 559 (2d Cir 2003).

Here, the EAF did not identify that the Town's Board's approval to alienate portions of Westmere Terrace and the Lawton neighborhood roads was a pre-requisite for the development of Sites 1, 2 and 3.

Because the conveyance of Town property is part of the action under review, environmental impacts, such as whether the conveyance conflicts with the Town's land use plans, must be identified and considered as part of the project's SEQRA review.

Third, Guilderland's subdivision, site plan and special use permit applications require certification that the applicant is authorized to proceed on the property owner's behalf.

However, Pyramid did not submit site plan or subdivision applications for the development of Site No. 2 and the consolidation of tax lots therein.

And, Pyramid does not own or control the Town's roads or rights of way in the Westmere and Lawton neighborhoods.

⁶ Also, Pyramid's November 2019 special use permit application for the Costco added an involved agency – the Zoning Board of Appeals – a fact that was not identified by in the EAF.

Because Pyramid was unauthorized to sign site plan, subdivision and special use applications to develop Town property, municipal defendants do not have jurisdiction to review those applications.

In sum, the lead agency's "fundamental procedural irregularities" meet the first *DeLeon* due process violation threshold. *DeLeon*, 981 F Supp at 734; and see also *49 WB, LLC v. Vill. of Haverstraw*, 2012 US Dist LEXIS 16518 [SDNY 2012], *aff'd*, 511 F Appx 33 [2d Cir 2013]; "[f]urther, the lack of a legitimate basis for the action may constitute arbitrary or irrational conduct" supporting a substantive due process violation.)

POINT II

MUNICIPAL DEFENDANTS HAVE VIOLATED PLAINTIFFS' PROPERTY INTERESTS SATISFYING THE SECOND *DeLEON* TEST

As above, the second test to determine a due process violation involves "a violation of an identified liberty or property interest." *DeLeon*, 981 F Supp at 734.

As this Court ruled in *Leland v Moran*, 235 F Supp 2d 153 (NDNY 2002):

[I]t is well settled in this Circuit that a constitutionally protected property interest in land use regulation arises only if there is an entitlement to the relief sought by the property owner... A plaintiff has a "legitimate claim of entitlement" to a particular benefit if, "absent the alleged denial of due process, there is a certainty or a very strong likelihood that the benefit would have been granted.... Where a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit. An entitlement to a benefit arises "only when the discretion of the issuing agency is so narrowly circumscribed" as to virtually assure conferral of the benefit.... The issue of whether an individual has such a property interest is a question of law.

Leland, 235 F Supp 2d at 161-162 citing *Gagliardi v Vill. of Pawling*, 18 F2d 188 (2d Cir 1994).

Most relevant here, “the [legal entitlement] test must focus primarily on the degree of discretion enjoyed by the issuing authority...” *RRI Realty Corp. v Southampton*, 870 F2d 911, 918 (2d Cir1989) *cert denied*, 493 US 893 (1989).

Here, the benefit in question is the lead agency’s non-discretionary compliance with SEQRA’s procedures for a project that will forever alter plaintiffs’ community, properties, health, welfare and safety.

As a matter of law, plaintiffs have the right to participate in SEQRA proceedings:

[The] public’s right to participate in environmental decision-making is embodied in the SEQRA legislation, and cannot be waived or forfeited by any party, including the DEC.

Zagata v Freshwater Wetlands Appeals Bd., 244 AD2d 343, 345 (2d Dept 1997); and ECL §8-0109(4) regarding public’s right to file “comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action.)

And, as a matter of law, SEQRA’s procedures are non-discretionary. “Strict compliance” is required. *N.Y.C. Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348 (2003). Thus, New York’s SEQRA has “create[d] a constitutionally protected interest by establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion.” *Movers Warehouse v City of Little Canada*, 71 F3d 716, 719 (8th Cir 1995).

Here, municipal defendants had no discretion to 1) contravene SEQRA’s prohibition against clear cutting property before completion of SEQRA, 2) declare lead agency before circulating details to involved agencies of the development of Sites 2 and 3, and 3) segmenting the SEQRA review by failing to identify the action requires alienation of portions of five roads – Westmere, Lawton, Tiernan, Rielton and Gabriel.

Likewise, municipal defendants have no discretion to bypass the requirement that site plan and subdivision applications be filed with authorization regarding using Town property *before* commencing land use permitting review for the development of Site No. 2.

Because municipal defendants have no discretion to avoid compliance with the laws and regulations cited above, plaintiffs meet *DeLeon's* second test regarding due process property interests. See *RRI*, 870 F2d at 918; “legal entitlement exists where ‘the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.’”

Moreover, plaintiffs are within the “zone of interests” that SEQRA is designed to protect.

In order to demonstrate standing to raise a SEQRA challenge, a plaintiff must suffer harm that “falls within the ‘zone of interests’ sought to be promoted or protected by the statute.”

C&A Carbone, Inc. v Cty. of Rockland, No. 08-CV-6459 (KMK), 2010 US Dist. LEXIS 103464 (SDNY Sep. 30, 2010) citing *Bridon Realty Co. v Town Bd. of Town of Clarkstown*, 250 AD2d 677 (2d Dept 1998).

The development of Site No. 1 proposes to encroach into the McDonalds’ front yard by relocating the Westmere cul-de-sac. The residence across from the McDonalds’ will be demolished to make way for the re-designed and re-alignment of Westmere Terrace.

Both the Harts and McDonalds will no longer be able to enjoy walking in the Lawton neighborhood as those streets will be converted into a commercial development.

Both the Harts’ and McDonalds’ enjoyment of the Lawton woodlands has already been diminished by the clear cutting and the loss of the woodlands has caused them to be exposed to noise and lights from traffic on Western Avenue. And, the construction of Sites 1 and 2 will expose the Harts and McDonalds to nuisance levels of noise, dust and odors as their properties border those sites.

The Harts will be particularly impacted due to their backyard being a couple hundred feet from the Costco entrance. That entrance will service hundreds of cars at peak hours exposing the Harts to motor vehicle exhausts. They will also be exposed to nuisance odors from Costco's fueling facility proposed to be located a few hundred feet from their property and their pool.

Likewise, corporate plaintiffs' business and property are surrounded on three sides by Site No. 3. The construction of commercial uses along with offices and multi-family housing will expose the owners and operators to nuisance levels of noise and dust. And, corporate plaintiffs have standing due to Costco's socio-economic impacts. (See *Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767, 1770 (4th Dept 2016); "[a] town . . . board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development.") Notably, the DEIS does not consider business displacement.

Further, SEQRA requires the lead agency to examine alternatives without pre-determining the outcome of its review.

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

ECL §8-0109(1); See also *Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 425 (2017), "The DEIS and FEIS must analyze the 'environmental impact and any unavoidable adverse environmental effects' of the project under review, as well as "alternatives to the proposed action . . . , including a 'no-action alternative' . . . and mitigation measures."

Predetermination, on the other hand, focuses on agency actions that irretrievably commit resources that could prejudice the selection of alternatives before a final

decision. See 40 CFR. §1502.2(f); *Nat'l Audubon Soc'y v Dep't of Navy*, 422 F3d 174, 206 (4th Cir 2005) (proper inquiry is “not whether an agency has focused on its preferred alternative, but instead whether it has gone too far in doing so, reaching the point where it actually has limited the choice of reasonable alternatives”)

Paradise Ridge Def. Coal., Inc. v Hartman, No. 1:16-cv-374-BLW, 2017 US Dist LEXIS 140141 (D Idaho Aug. 29, 2017) at pg. 27.

As detailed below, the danger of “starting construction prior to the completion of environmental review,” would be “setting off a bureaucratic steamroller... [a] procedural injury that will start the wheels moving, inexorably, toward completion of the project’s current design,” and represent “irreparable harm.” *Richland/Wilkin Joint Powers Auth. v United States Army Corps of Eng'rs*, No. 13-2262 (JRT/LIB), 2015 US Dist LEXIS 82517 (D Minn. 2015).

For all of the above reasons, plaintiffs have demonstrated municipal defendants’ violation of their substantive due process rights satisfying *Deleon’s* second test regarding impacts to plaintiffs’ property interests. 981 F Supp at 734.

POINT III

DEFENDANTS’ ACTIONS REQUIRE A PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO AND RE-ESTABLISH LEAD AGENCY

To obtain injunctive relief requires a showing that that (1) plaintiffs have “suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v Laidlaw Env'tl. Servs.*, 528 US 167, 180-81 (2000); *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992).

Here, an injunction preventing further environmental harm and re-establishment of lead agency will help ensure that another agency corrects defendants' procedural errors.

A. Injury in fact – Irreparable Harm

[A showing of irreparable harm] can be accomplished through demonstrating “injury to their [plaintiffs’] specific environmental interests,” created by the actions taken with “inadequate foresight and deliberation.” See *id.* This may be established by showing that not only will the environment suffer harm, but that the party in question uses the area which will suffer environmental harm, and that their use of it will be negatively impacted by the environmental harm.

Richland/Wilkin Joint Powers Auth. v United States Army Corps of Eng'rs, 826 F3d 1030, 1038 (8th Cir 2016). Significantly, in *Richland*, as here, irreparable harm resulted from construction occurring before completion of the state’s environmental review process:

[Plaintiff] has done more than claim speculative dangers to county land. It has asserted a concrete threat of significant additional flooding due to the diversion project... This concrete threat, combined with a procedural injury that will start the wheels moving, inexorably, toward completion of the project's current design, demonstrates irreparable harm at this stage of the proceedings. See, e.g., *Colorado Wild, Inc. v US Forest Serv.*, 523 F Supp 2d 1213, 1220-21 (D Colo 2007).

Richland/Wilkin, No. 13-2262 (JRT/LIB), 2015 US Dist. LEXIS 82517 (D Minn. June 24, 2015) at page 22.

And, tree cutting is irreparable harm. “[T]he threat of removal of several large trees ... within the disputed property constitutes irreparable harm.” *Walsh v St. Mary's Church*, 248 AD2d 792, 794 (3d Dept 1998). See also *Wiederspiel v Bernholz*, 163 AD2d 774, 775 (3d Dept 1990); “[P]laintiff has proven that defendants have removed large trees from the land and their intention to remove more trees. If plaintiff prevails, the trees cannot be replaced and plaintiff would be irreparably harmed.”)

Here, again, over two acres of trees were cut. Though a cease and desist order was issued, municipal defendants claim they were authorized by NYSDEC to cut the trees. Therefore, the

threat of additional cutting remains. The Harts and McDonalds have already been harmed. The walks they enjoyed in the Lawton neighborhood are now marred by the site of woodlands destruction and the loss of trees now expose them to increased levels of unwanted noise and lights from traffic on Western Avenue.

B. Balance of equities

A court must balance a threat of irreparable harm with any injury an injunction would inflict on other interested parties. *Richland* at 1039 citing *Planned Parenthood Minn., N.D., S.D. v Rounds*, 530 F3d 724, 729 n. 3 (8th Cir. 2008).

Here, defendants are entirely responsible for this harm as they “jumped the gun,” as in *Richland*. The equities favor plaintiffs as all they seek is that the Pyramid’s land use applications conform to the law. It is also equitable to enjoin the Guilderland Planning Board from continuing as lead agency due to its repeated SEQRA violations. The responsibility for any delay falls squarely at the feet of the defendants. They knew or should have known the law requires wetlands and stormwater permits before commencing construction. And, SEQRA provides re-establishment of lead agency as the remedy to allow supplementing a project’s environmental data. 6 NYCRR §617.6(b)(6). Thus, the equities favor plaintiffs.

C. Likelihood of success on the merits

Once the court has considered the threat of irreparable harm and the balance of harms, the appropriateness of an injunction still depends on ‘the probability that the moving party would succeed on the merits. *Rounds*, 530 F.3d at 729 n.3. The plaintiff “need only establish a likelihood of succeeding on the merits of any one of [its] claims.” *Am. Rivers v U.S. Army Corps of Eng’rs*, 271 F Supp 2d 230, 250 (DDC 2003).

Richland, 826 F3d at 1039.

Here, the documentary evidence is indisputable that municipal defendants allowed the clear cutting of the Lawton woodlands without state and federal permits and in violation of

SEQRA. Similarly, lead agency was established before the full scope of the project was revealed and it has engaged in improper segmentation. Also, municipal defendants have no jurisdiction to process Pyramid's incomplete and non-existent land use applications.

For these reasons, plaintiffs demonstrate a likelihood of success on the merits and the enjoining of further construction is warranted because cutting the Lawton woodlands is harm that "may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" *Matter of Essex County v Zagata*, 91 NY2d 447, 453 (1998).

POINT IV

DISQUALIFICATION OF THE LEAD AGENCY IS THE APPROPRIATE REMEDY

SEQRA is "patterned after NEPA."⁷ *Fortress Bible Church v. Feiner*, 694 F3d 208, 216 (2d Cir 2012). Both regulations are designed "to ensure that agencies conduct environmental analyses in a timely and objective fashion by prohibiting them from predetermining the outcome of their review." *Comm. of 100 on the Fed. City v Foxx*, 87 F Supp 3d 191, 206 (DDC 2015).

[A]n EIS must "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"; *id.* §1506.1(a) ("Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives.").

Id. F Supp 3d at 206; see also *Pit River Tribe v United States Forest Serv.*, 469 F3d 768, 785 (9th Cir 2006) where extending property leases before completing an environmental impact statement violated plaintiff's due process rights.

...NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, *when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm*

⁷ The National Environmental Protection Act, 42 USC Ch. 55.

that NEPA intends to prevent has been suffered. . . . Moreover, to set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action.

Sierra Club v Marsh, 872 F2d 497, 500 (1st Cir 1989) (quoting *Commonwealth of Massachusetts v Watt*, 716 F2d 946, 952-53 (1st Cir 1983); (emphasis added in *Marsh*); see also *Friends of the Earth v Hall*, 693 F Supp 904, 913 (WD Wash. 1988) (noting that “the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation”); cf. *Calvert Cliffs' Coordinating Comm. v Atomic Energy Comm'n*, 449 F2d 1109, 1128, 146 US App DC 33 (DC Cir 1971) (noting that where large investments affect the NEPA analysis, the NEPA process becomes a “hollow exercise” and *Comm. of 100 on the Fed. City v. Foxx*, 87 F Supp 3d 191, 206 [D.D.C. 2015]; “[A]n EIS must serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”)

Here, disqualification is the appropriate remedy given the scope and severity of defendants' SEQRA violations, and facilitating CWA and ESA violations. (See *C & W Fish Co. v Fox*, 931 F2d 1556, 1564, [DC Cir 1991]; “an individual should be disqualified from rulemaking only when there has been a clear and convincing showing that the Department member has an unalterably closed mind on matters critical to the disposition of the proceeding” quoting *Ass'n of Nat'l Advertisers, Inc. v FTC*, 627 F2d 1151, [DC Cir 1979] and see *Air Transp. Ass'n v. National Mediation Bd.*, 663 F3d 476, 487, [DC Cir 2011]).

Here, the clear cutting demonstrates an unalterably closed mind. The clear cutting also forgoes any real SEQRA analysis of the “no action” alternative or alternative site layouts that might preserve some or all of the Lawton woodlands.

And, importantly, the neutral consideration of reasonable alternatives is non-discretionary *i.e.* the lead agency “shall act and choose among alternatives.” ECL §8-0109(1).

The tree cutting on Site No. 2 is a *de facto* ruling that no alternative will be considered that preserves the cut area for open space or to balance other environmental impacts. *De facto* reduction of alternatives was exactly the procedural harm discussed in *Calvert*:

By refusing to consider requirement of alterations until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress. It may also foreclose rigorous consideration of environmental factors at the eventual operating license proceedings. If “irreversible and irretrievable commitment[s] of resources” have already been made, the license hearing (and any public intervention therein) may become a hollow exercise. This hardly amounts to consideration of environmental values “to the fullest extent possible.”

Calvert, 499 F2d at 1128; also see *Thomas v Peterson*, 753 F2d 754, 760-761 (9th Cir 1985) where the Forest Service could not issue permits for a service road with no other purpose than to aid a proposed logging program before completing its environmental review.

And, the matter is ripe for review. (See *Osborne v. Fernandez*, 2008 US Dist LEXIS 116797 (SDNY July 16, 2008); ripeness exists for due process “land-use challenges predicated upon an ‘immediately sustained and concretely felt’ injury arising in the absence of a final decision” and see *Adrian v. Town of Yorktown*, 210 Fed Appx 131, 133 n.2 (2d Cir 2006); “a plaintiff asserting a land-use claim based upon an immediate injury involving the process used by a defendant may not have to wait for the defendant to render a final decision in order to present his or her claim in federal court.”)

In sum, the clear cutting of the Lawton woodlands represents an immediate injury and irretrievable and irreparable commitment of resources that cannot be undone. That SEQRA violation was one of a series of municipal defendants' fundamental procedural irregularities violating plaintiffs' substantive due process rights.

CONCLUSION

For all of the above reasons, plaintiffs respectfully request an order 1) enjoining any construction activities on Sites 1-3, and; 2) enjoining the lead agency's SEQRA review, and; 3) requiring re-establishment of lead agency among the other involved agencies as defined pursuant to SEQRA, along with awarding reasonable attorney's fees.

Respectfully submitted this 25th day of April, 2020.

Dated: New Paltz, New York



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FERRANDINO & ASSOCIATES INC.
PLANNING AND DEVELOPMENT CONSULTANTS

MEMORANDUM

To: Chair and Members Town of Guilderland Planning Board

From: Vince Ferrandino, AICP
Principal

Stephan A. Maffia, P.E.
Senior Associate/Traffic Engineer

Date: March 31, 2020

Re: Rapp Road Residential/Western Avenue Mixed Use Redevelopment Projects DEIS

Introduction

These comments are submitted pursuant to the public review provisions of the State Environmental Quality Review Act (SEQRA). Under SEQRA it is the lead agency's responsibility to identify the project's environmental impacts, take a "hard look" at those impacts and set forth a "reasoned elaboration" identifying the measures required to mitigate the project's environmental impacts to the maximum extent practicable. 6 NYCRR §617. As set forth below, the Draft Environmental Impact Statement (DEIS) for the Rapp Road Development, especially as it pertains to Site No. 2, prevents analysis of the project's impacts due to incomplete information on significant aspects of the development.

Ferrandino & Associates Inc. Planning and Development Consultants of Elmsford, NY ("F&A") has been retained by a group of local business owners (including Jonathan Kaplan) to review the final DEIS of the Rapp Road Residential/Western Avenue Mixed Use Redevelopment Projects currently before the Town of Guilderland, New York Planning Board, specifically with respect to "scope adequacy and content," as it pertains to the Site Plan and Special Use Permit applications for Site 2, to wit a 160,000 square foot Costco wholesale retail facility and fueling station, and provide a written report/critique that sets forth our findings and recommendations, in the form of comments on the DEIS. The project's applicant is Rapp Road Development, LLC, a subsidiary of The Pyramid Companies of Albany, New York.

Background Information on the Firm

Ferrandino & Associates Inc. is a multi-disciplinary consulting firm providing an array of planning services to municipalities, private corporations, not-for-profit agencies, institutions and private developers. The firm's range of consulting expertise includes comprehensive planning, land use and zoning studies, transportation planning, urban design, environmental planning, community development, economic development, housing, real estate market analysis and site feasibility.

Vince Ferrandino AICP, a certified planner and principal of the firm, served as the former Commissioner of Planning and Development for the City of Mount Vernon and the Town of

Greenburgh, and as the City Planner for the City of Peekskill, NY. The firm has worked extensively in the Hudson Valley where Mr. Ferrandino has testified before numerous boards and agencies including the Town of Clarkstown where he reviewed and critiqued the Palisades Center Shopping Mall in West Nyack that The Pyramid Companies also developed. He was assisted in this Guilderland review by **Constance G. Post AICP**, a Senior Associate and certified planner with over 35 years of experience, serving in both municipal and private sector roles, and **Caryn Miske**, a Senior Associate, who is an attorney and economic analyst with over 30 years of experience. **Stephan A. Maffia P.E.**, another Senior Associate at the firm, who conducted the parking and traffic review, is a licensed professional engineer with 40 years' experience who has prepared numerous traffic and environmental impact studies and reviews for small and large-scale development projects throughout New York State including New York City, Long Island and Westchester, Putnam, Dutchess, Rockland, Orange and Ulster Counties. In addition, he formerly served as the Town Engineer for the Town of Poughkeepsie, New York.

The Property

F&A conducted an on-site inspection of the property and the neighborhood on February 24, 2020 and March 7, 2020. The subject property (Site 2) shown below is located to the east of the intersection of Western Avenue and Rapp Road and is bounded by Crossgates Mall Road to the north, Western Avenue to the south and Crossgates Mall Road to the west with residential and commercial uses to the east and to the south. It contains thirteen (13) generally vacant houses along with all associated infrastructure and various foliage including mature spruce trees. An on-site inspection was also conducted of the surrounding area.



Subject Property and Surrounding Area

General Observations

Throughout the DEIS, the applicant cites figures that cannot be verified. This lack of transparency is unacceptable. The public should be given the opportunity to independently verify the accuracy of all figures cited. Therefore, the supporting reports, studies and analyses associated with all data cited should be provided in supplemental appendices to the DEIS.

Following is an outline and brief description of the concerns, comments and questions we have with regard to the subject application, more specifically community character, fiscal impacts, traffic and parking. We have keyed our comments and questions into relevant sections of the DEIS deemed complete by the Town of Guilderland Planning Board on February 12, 2020. Please consider these our written comments to be addressed by the applicant under SEQRA.

DEIS SECTION: CHANGE IN INTENSITY OF USE OF LAND AND CAPACITY OF MUNICIPAL UTILITY SERVICE

Page 9:

DEIS statement: Based on consultations with the Town Department of Water & Wastewater Management, the Town's sewer service possesses adequate capacity to meet the current and future needs of the Town and accommodate the proposed development for Sites 1, 2 and 3.

Comment: While this may be accurate, a letter from the Town so stating, including a provision that residents will not bear any tax consequences in either capital or additional maintenance costs due to increased loads should be included. Please provide.

DEIS statement: An adequate supply of water is available to meet required fire flows. Adequate existing firefighting apparatus is available and no adverse impacts on the fire company are anticipated.

Comment: While this may be accurate, a letter from the Fire Department so stating, including a provision that residents will not bear any tax consequences in either capital or additional service costs due to an increased number of incidents should be included. Please provide.

Page 10:

DEIS statement: Police protection will be provided by the Guilderland Police Department, supported by the Albany County Sheriff and the New York State Police as may be required. Rescue and emergency transportation are provided by Guilderland Emergency Medical Services.

Comment: While these statements appear to be accurate, the questions at issue are: (1) what impact will the proposed development have on police and EMS services; (2) potential impacts on response times; (3) increased personnel needs and/or capital expenses; and (4) what will be the cost to local residents in terms of increased taxes for covering capital expenses and/or increased personnel needs? Please amend and provide.

DEIS statement: On average, multi-family developments with 100 units will generate **29** students
On average, single-family developments with 100 units will generate **74** students

Comment: Please see comments related to Appendix H below. Generally, standard multipliers based on the number of bedrooms (not the number of units in a development) drive the number of students generated. Please amend accordingly.

DEIS SECTION: IMPACTS ON THE CHARACTER OR QUALITY OF EXISTING COMMUNITY/ NEIGHBORHOOD CHARACTER

Comment: While this section discusses specific site plan features, it does not discuss the fiscal, community character and socio-economic impacts on the community.

DEIS SECTION: PROJECT BENEFITS

Page 18:

DEIS statement: . . . benefits to the Town, School District and County will be significant as a result of substantial new property taxes to be generated . . .

Comment: See comments related to Appendix H below.

DEIS statement: The applicant also projects more than \$2 million in new annual sales tax being generated as a result of visitors traveling to Albany County and the Town of Guilderland largely driven by the Costco development and new residents being attracted to the new multi-family housing that will attract residents from the region to Guilderland.

Comment: There is no evidence to indicate that the majority of residents will be relocating from out of the county. If the majority of residents are simply moving within the county, the benefits projected are overstated. Similarly, a market study pertaining to visitors traveling to the proposed Costco should be provided to document the primary, secondary and tertiary markets in order to better determine actual capture rates. In addition, the applicant fails to provide details regarding financial offsets/tax incentives being provided by the Town, County and State governments. Such offsets would need to be balanced against projected new annual sales tax benefits. Please provide as noted above.

DEIS statement: Although the following estimated figures are not intended to bind either the applicant or the Town Assessor, it is projected that a potential future assessed value and projected tax revenues are as follows . . .

Comment: The applicant should provide projections for all three sites (rather than only for sites 1 and 2). A letter from the Town Assessor would be useful in better quantifying revenues and should be provided.

DEIS statement: . . . the Project will result in the generation of more than 1,175 construction related employment opportunities. The construction payroll is estimated to be approximately \$53 million. The Project will also create approximately 133 part-time and 189 full time permanent employment opportunities, with an annual payroll of \$16.1 million. The median salary for full time employees at Costco was \$38,810 in 2018.

Comment: Sources and citations, including appropriate multipliers, should be provided for all of the above figures in order to verify authenticity.

Pages 19-68: DESCRIPTION OF PROPOSED ACTION

**Page 69 -96: TRAFFIC AND TRANSPORTATION
(See comments under APPENDIX C TRAFFIC STUDY)**

Page 74: RAPP ROAD HISTORIC DISTRICT

Comments to be provided by others

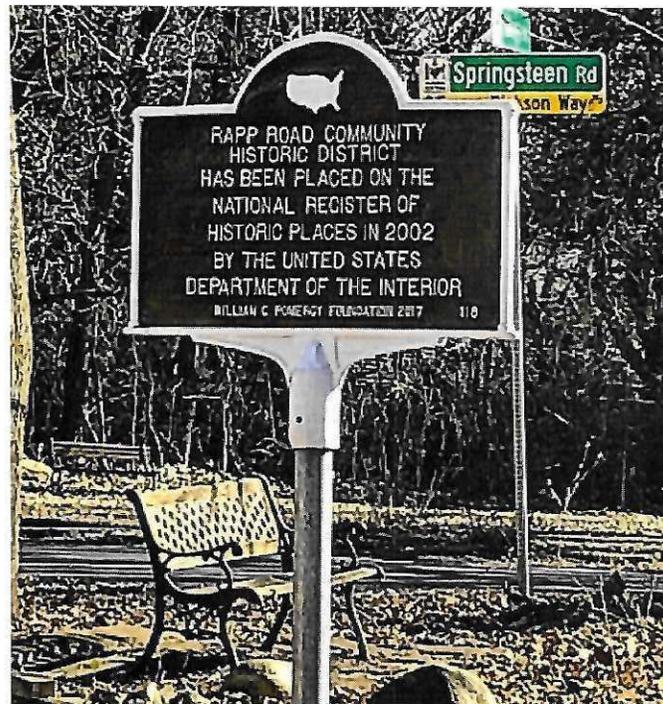


Photo #1- Rapp Road Historic District

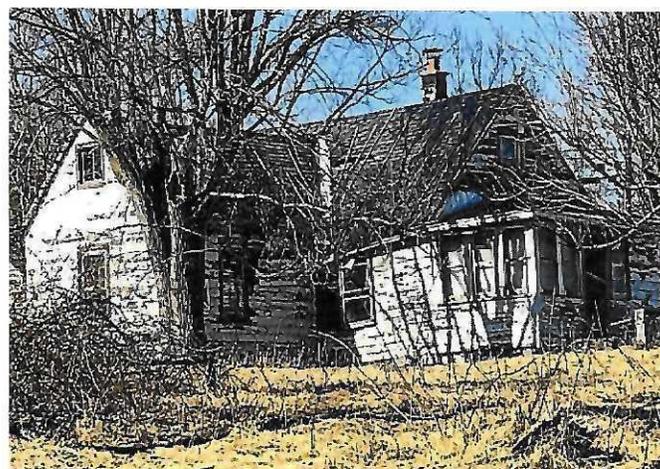


Photo #2- Historic House in the District

Page 75-100: EXISTING ENVIRONMENTAL SETTINGS

Comments to be provided by others



Photo #3-Foliage Area at Tiernan Court and Lawton Terrace



Photo #4-Mature Spruce Trees on Site 2

Page 101:1 CHARACTER OF THE COMMUNITY/NEIGHBORHOOD

DEIS SECTION: EXISTING CONDITIONS

Comment: While this section discusses specific site plan features, it does not discuss the fiscal, community character and socio-economic impacts on the community as per SEQRA requirements. Moreover, the character of the community is not solely based on adjacent residential developments, but the existing commercial businesses within the market area(s).

Comment: While a perfunctory sentence on the surrounding existing businesses is provided, there is no mapping or specific discussion as to the number or locations of these retail and commercial businesses within the market area vis-a-vis the 3 sites, and there is no discussion on potential impacts to those businesses (“relevant establishments”) which provide similar goods and services, or on the physical condition of these clusters of businesses which may be subject to blight. Site 2 fronts on Western Avenue and currently contains several tree lined streets of single-family homes, as shown in **Photos #5 and #6**, that blend with the existing mixed-use small scale residential and small retail and commercial businesses located on both sides of Western Avenue (**see Photos #7 and #8**)². The demolition of these houses and the construction of this big box retail store, with expansive blacktopped parking on this site, is not in keeping with the character of the neighborhood. Costco is a destination location for members and is not an impulse stop for people driving by. In addition, there is no discussion in the DEIS on Costco’s potential impact on and displacement of existing businesses selling similar goods and services as required to be considered by a lead agency under SEQRA. Further, there is no identification or discussion as to how the inclusion of a fueling facility would impact the several existing gas stations (some of which are in poor condition) on Western Avenue and other nearby commercial areas along Johnson Road (**see Photos #9 and #10**). A Costco big box wholesale store with gasoline sales has been shown to have a significant impact on existing gas stations in other communities where they have set up shop. Based on Costco gasoline sales volumes in their other locations, a Costco gasoline station with 18 pumps is estimated to sell between 7 and 10 million gallons of gas each year, which is the equivalent of adding 7 to 10 gas stations that on the average sell 100,000 gallons of gas per years Please take this into account and amend the text accordingly.

¹ Though stormwater is discussed on page 40 of the DEIS and in the Appendix on stormwater management, the cost to the Town in servicing this stormwater is not fully discussed, other than a reference that the property owner is responsible for servicing the on-site system. However, who is responsible for the costs associated with feeder lines, etc.? Please provide.

² On March 26, 2020, The Pyramid Companies arbitrarily and illegally cut trees on the Costco site contrary to SEQRA. The Town intervened and Pyramid was ordered to cease and desist.



Photo #5- Lawton Terrace

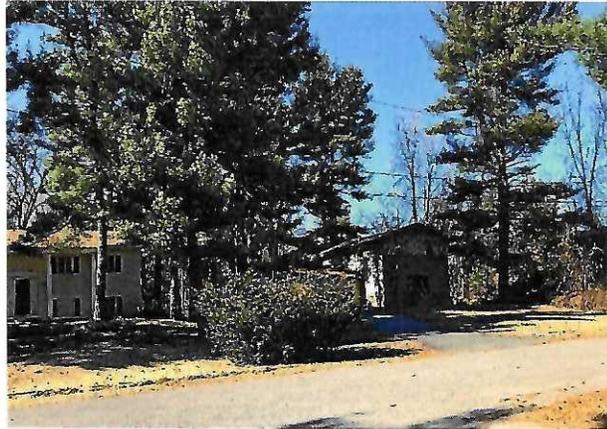


Photo # 6-Tiernan Court

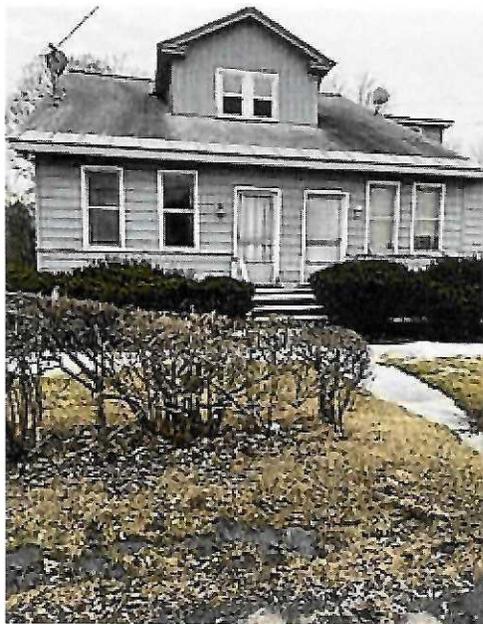


Photo #7- Western Avenue Property



Photo #8-Western Avenue Streetscape



Photo #9: Existing Service Station



Photo #10: Johnson Road Commercial Area

Page 103: LOCAL SERVICES

DEIS SECTION: This section discusses existing local services, including medical, educational, police, ambulance and fire protection services. Existing public utilities are also described including wastewater, water supply, electric and telephone.

Comment: A full range of community services should be included in this section, including but not limited to: recreation (parks, libraries, etc.); internet; health care; child care; cemeteries; solid waste and recycling facilities; and stormwater management. Please provide.

DEIS SECTION: POLICE PROTECTION

Comment: While the applicant outlines the jurisdictional roles of each enforcement authority, the capacity and costs for services are not discussed as required. Costs for (1) additional personnel; (2) capital costs; (3) capacity costs (lock-up capacity, equipment costs, etc.) should be provided, as appropriate, for both law enforcement entities and EMS services. Impacts to response times for all services should also be provided, along with the projected number of increased calls for each jurisdiction, based on standard multipliers. Please provide ³.

DEIS SECTION: FIRE PROTECTION

Comment: While the applicant outlines the services provided and equipment available, the capacity and costs for services are not discussed as required. Impacts related to (1) costs for additional personnel; (2) capital costs; and (3) capacity (especially relevant for volunteer services) should be provided. Impacts to response times for services should also be provided, along with the projected number of increased calls, based on standard multipliers. Please provide.

³ In an article dated February 18, 2020 in the *Alamont Enterprise*, it was noted that Pyramid Management and the Guilderland Police Department had come to an agreement on the payment for increasing patrols at the Crossgates Mall to address “disruptive shoplifting” by groups of people at the Mall. The article further noted that “several brawls at the Mall in recent weeks have shone[sic] a spotlight on the question of the Mall’s safety”. This points to the current need for additional police presence without the proposed Costco store and fueling facility.

Pages 104 and 106:**DEIS SECTION: AMBULANCE SERVICE**

Comment: Again, while the applicant outlines the services provided (though not the equipment available), the capacity and costs for services are not discussed as required. Impacts related to (1) costs for additional personnel; (2) capital costs; and (3) capacity should be provided. Impacts to response times for services should also be provided, along with the projected number of increased calls, based on standard multipliers. Please provide.

DEIS SECTION: SCHOOLS

Comment: The applicant discusses declines in student enrollment, with an unstated implication that the project will bolster declining enrollment numbers. However, the applicant indicated on page 10 of the DEIS that a very modest number of school children will be generated (see comments related to page 10 above). The issue here does not relate per se to declining enrollment. The drop in enrollment has already occurred, and the schools/school district have already recalibrated to reflect these changes. Rather the DEIS should indicate, based on a robust projection of additional school children to be generated, the new costs (personnel, transportation, equipment/supplies, capital costs, etc.) that will be borne by the school district, minus the new revenue slated for the school district that will be generated by the project.

Comment: Multipliers vary and will ultimately dictate the number of school children projected. It is recommended that a range be used, with a minimum and maximum to better predict potential impacts to the school district. The applicant must project the need for increased services and the costs of such services, minus the tax revenues to be generated. Any tax incentives provided by the Town, County and/or State would need to be factored into any related discussion. Please provide.

Pages 105 and 111:**DEIS SECTION: SEWER SERVICE**

Comment: The applicant states current services are adequate to service the new facility. Assuming this is accurate, and capacity is available for this high intensity development (see comment above), the applicant has failed to disclose impacts as required. Impacts related to (1) costs for additional personnel; (2) capital costs; and (3) maintenance costs should be stated. Please provide.

Comment: The applicant calculated GPD needed for the three sites, but did not provide documentation related to the following:

- Documentation from the Sewer District stating adequate supply exists;⁴
- Percentage of capacity remaining for consumptive purposes if this project is approved; and
- Cost of infrastructure for sewer services (construction, maintenance, etc.)

⁴ The applicant notes in the body of the DEIS that a letter was obtained from the Water and Sewer Districts stating that the Town would provide service to the project. Reviewer could not locate said letter in the appendices (though it is possible that it is embedded somewhere within the DEIS). Please provide.

Page 106:**DEIS SECTION: POLICE/FIRE/AMBULANCE**

The applicant must project the need for increased services and the costs of such services, minus the tax revenues to be generated. Any tax incentives provided by the Town, County and/or State would need to be factored into any related discussion.

Page 107:**DEIS SECTION: WATER SERVICE**

Comment: The applicant calculated GPD needed for the three sites, but did not provide documentation related to the following:

- Documentation from the Water District stating adequate supply exists;
- Percentage of water supply remaining for consumptive purposes if this project is approved;
- Trends in water availability due to climate changes; and
- Cost of infrastructure for water services (construction, maintenance, etc.)

Please provide.

Comment: The applicant describes existing infrastructure and capacity generally, and then bootstraps an assertion regarding capacity based on use at two existing homes remaining within Site 2. However, the analysis here needs to determine the total number of gallons of water that will be used for the entirety of the project, minus existing uses (the two remaining homes).

Again, while the applicant outlines the services provided and a portion of the relevant infrastructure, water capacity and costs for services are not discussed as required. Impacts related to (1) costs for additional personnel; (2) capital costs; and (3) maintenance costs should be stated. Please provide.

Page 109:**DEIS SECTION: CUMULATIVE WATER ANALYSIS**

Comment: The applicant calculated water availability for fire protection needed for the three sites, but did not provide documentation related to the following: Please provide.

- Documentation from the Fire Department confirming the applicant's analysis; and
- Cost of infrastructure for fire protection infrastructure on-site (construction, maintenance, etc.)

Pages 113-14:**DEIS SECTION: MITIGATION**

Comment: The applicant states no mitigation is needed as no impacts will occur from this project. It is premature to make such assertions as the necessary analysis has not been completed. See sections above and provide documentation supporting same.

Page 117:

DEIS SECTION: MUNICIPAL REVENUES AND FINANCES

Comments: The positive fiscal impact on the Town depicted by the applicant is likely overstated given that revenues are not balanced against costs. See comments above and substantiate same.

Page 118:

DEIS SECTION: EXISTING CONDITIONS (SCHOOLS)

Comments: The positive fiscal impact on the School District depicted by the applicant is likely overstated given that revenues are not balanced against costs. See comments above and substantiate same.

Pages 118-20:

DEIS SECTION: ANNUAL ECONOMIC BENEFITS

Comments: The positive fiscal impacts depicted by the applicant are likely overstated given that revenues are not balanced against costs. In addition, citations needed to be provided for all figures used. See comments above and substantiate same.

Pages 128-29:

DEIS SECTION: GROWTH INDUCING ASPECTS

DEIS SECTION: The potential impacts associated with the redevelopment of Site 2 have been analyzed in this DEIS. The decision to construct this Project is guided by market and tenant demands.

Comments: Contrary to the statements in this section of the DEIS, except for very vague and perfunctory sentences regarding existing commercial and retail markets, there is no substantive analysis of potential impacts associated with redevelopment of Site 2; therefore, the decision to develop this use lacks empirical evidence that the cited market area will be able to absorb another "big box" establishment without the existing retail and commercial businesses being negatively impacted, given that it will sell goods and services already available in the community. The addition of Costco gasoline and other related sales in other communities like Guilderland has shown that these volumes cannot be absorbed and has led to existing gas stations' volumes significantly decreasing, with the possibility that existing gas stations' gross profits could be cut by up to 50%. Gas stations with convenience store and tires sales could also take a hit. Decreases in gas, snacks, tire

and other related sales (that Costco also sells) could put many of the existing stations in a precarious state. These negative impacts on existing gasoline stations can lead to unemployment, business closures, blight and tax certiorari filings that should be balanced against any tax, other fiscal and community benefits projected by the applicant, and should also be considered by the Lead Agency when gauging the impact of big box stores as required under SEQRA.

Comments: There is no empirical evidence presented that the applicant's determined market area has guided the decision to build. A full market study and community character assessment must be provided as part of the DEIS in order for the lead agency to assess its impacts on the community in compliance with SEQRA. Please provide.

APPENDICES

APPENDIX A: SITE PLAN

APPENDIX B: FINAL SCOPE

Pages 5-6:

Comment: The EAF states that line extensions to service the site are not necessary. This does not seem correct, given that some of this project is on undeveloped land, and should be confirmed as this has impacts related to infrastructure costs

Page 8:

Comment: The applicant states no disposal of solid waste. This seems unlikely. Please provide supporting documentation for same.

APPENDIX C: TRAFFIC IMPACT STUDY

The following is an outline and brief description of the concerns, comments and questions we have in regard to the Traffic Impact Study (TIS) dated February 17, 2020 submitted for the subject application:

A. SCOPE COMPLIANCE

We reviewed the final Scoping Document regarding traffic and the following are the items specifically required by that document and their status in the applicant's submissions:

1. A list of the intersections to study in detail.

Comment: The applicant's updated February 17, 2020 Traffic Impact Study (TIS) includes all of the intersections required in the Scope and each has been studied in detail.

2. Availability of transit and pedestrian facilities proximate to development sites and include the CDTA Transportation Center.

Comment: The applicant's updated TIS mentions data from the CDTA studies for a Bus Rapid Transit (BRT) system but does not include information on the likely timeframe for completion. Also, any details of the operation of the system by CDTA and how its implementation may affect traffic conditions in the study area should be discussed. The text of the TIS describes the potential layout of access at the Mall and Appendix F of the TIS includes a plan showing access alteration to include a pair of roundabouts and peak hour Level of Service analyses. Discussion of pedestrian facilities also is limited to a drawing that shows some sidewalk extensions along Western Avenue and some bicycle paths in the same general areas. If available, the applicant should expand the discussion of the proposed BRT system and its potential impacts on the subject development as well as area development in general to conform with the Scope.

3. Evaluate roundabouts.

Comment: See #2, above. More detailed discussion of the BRT system should be required for the Town to understand potential future traffic conditions and to conform with the Scope.

4. Examine potential transportation alternatives to upper Rapp Road in Albany.

Comment: While previous versions of the TIS contained discussions of possible closing of access on Rapp Road north of Site 1, the current February 17, 2020 TIS makes no mention of any changes to circulation through the Historic District to the north of Site 1. No potential alternative routes or changes in travel patterns are discussed in the current TIS. Trip distributions of newly generated traffic are stated to be based on existing travel patterns – including existing flows through the Historic District between Pine Lane and Washington Avenue. The applicant should include a discussion of impacts on the Historic Community to the north of their sites to conform with the Scope. Reference to previous studies should be included.

5. Discuss reasonable alternates to the proposed development.

Comment: As a function of the broader DEIS, the TIS does not analyze possible alternate development scenarios that may include smaller numbers of dwelling units, smaller areas of retail and office space and changes in the types of developments proposed: or example, less residential and more commercial space, or a more balanced development with a few complementary uses. The applicant should include a discussion of reasonable alternatives to the proposed use of their sites to conform with the Scope.

B. OTHER TRAFFIC COMMENTS

In addition to the Scope Compliance review, we have the following additional concerns, comments and questions:

1. Field Counts at study intersections were conducted in November 2017, November and December 2018 and again in September and October 2019.

Comment: The applicant should address the following: were the 2017 and 2018 counts adjusted to reflect the more recent 2019 levels? Also, were the November and December counts adjusted for the seasonal variations per the New York State Department of Transportation (DOT) database? Please clarify.

2. A Build Year of 2022 was chosen for the completion of the first phases of the project and 2025 was chosen for the completion of the future planned development.

Comment: The applicant should address the following: are those buildout years appropriate given the size of each component, the time it would take to reach full occupancy and the fact that there are a significant number of competing developments already approved and under construction in the Town of Guilderland? (See Comment #4). Please clarify.

3. The TIS uses a background growth factor of 0.5% per year resulting in a small growth factor of 1% or 1.5% for the 2022 Build year.

Comment: The applicant should provide the documentation for this small growth factor, given the rather long list of potential developments in the Town and along Western Avenue. (See Comment #4).

4. The TIS lists other developments as two apartment complexes – one with 210 dwelling units and the other with 120 units.

Comment: The Town's website lists considerably more development – proposed, approved and under construction. That list includes the following:

- a. Cumberland Farms on Western Avenue
- b. The Preserve at West Creek (112 apartments)
- c. Winding Brook Commons PUD (283 units residential, 156,000 sq. ft. office and 7,000 sq. ft. bank and restaurant)
- d. Fuller Station (single family homes)
- e. Great Oaks Office Park (includes 120 apartments)
- f. Pine Bush Seniors (192 units independent and assisted living units)
- g. Hiawatha Trails Seniors (256 units independent living)

- h. The Summit at Mill Hill (92 units senior housing)
- i. Ritano Senior Living (72 units senior housing).

The Summit, Ritano, Winding Brook and 1700 Residences are already under construction. To confirm its accuracy, the applicant should review both the background growth factor and the list of other developments that will contribute traffic to the study area – particularly because of their proximity to Crossgates Mall, a destination that draws and will continue to draw traffic from all parts of the Town and region.

5. Although the CDTA Bus Rapid Transit (BRT) plan is included in the TIS, other transit options are not discussed.

Comment: The applicant should provide a section on public transportation facilities that already exist and could be available to the proposed developments in the absence of the proposed BRT. A broader explanation of pedestrian and bicycle usage should also be provided.

6. The base trip generation rates for the residential component are acceptable; however, the Costco rates are based on the ITE's Trip Generation Manual for a land use titled "Discount Club."

Comment: While the Discount Club land use may appear to be a match for the proposed Costco, the ITE database used to develop trip rates for that use also probably includes Sam's Clubs and BJ's – the two other major discount club chains. A check of recent revenues for Costco and Sam's indicates the following:

"As of 2018, there were 762 Costco locations worldwide with 527 in the U.S. and Puerto Rico. The company had sales of \$138 billion in FY2018. Sam's Club, which is a division of Walmart, generated \$59 billion in sales in FY2018." (Source: Investopedia)

As noted, Costco sells more than Sam's and BJ's, which is the smallest of the three chains. With more than double the revenue of its closest competitor, one may assume that higher sales translate to more trips generated by a typical Costco than either of the other stores. Therefore, ITE's mixing of trip generation studies from Costco stores with Sam's and BJ's would tend to produce lower overall average rates. The applicant should address the sources of the ITE base data and, if the mix with the smaller generating clubs is determined to exist in the ITE data, the applicant should provide trip rates specific to a Costco store. This can be done by producing additional information that is more indicative of actual Costco trip generation.

A study titled "*Costco Wholesale Specific Plan - Traffic Impact Analysis Report*" prepared for the City of San Marcos, CA by RBF Consulting used trip rates that produced significantly higher PM Peak Hour trips from a slightly smaller proposed Costco store. That study should be reviewed by the Town for applicability to the Guilderland proposal.

In an August 15, 2018 Memorandum prepared by Kittleson & Associates for a Costco Gas Station expansion proposal in La Habra, California, the following statement is made:

“Based on similar Costco Gasoline fuel facilities, the La Habra Costco Gasoline facility is estimated currently to generate approximately 452 total trip ends (or 226 vehicles) during the weekday p.m. peak hour and 516 total trip ends (or 258 vehicles) during the Saturday midday peak hour.”

Comparing Costco’s own internal information from the La Habra facility with 16 fueling positions with that presented in the Guilderland proposal for 18 fueling positions:

Costco Data Source	AM Peak Hour	PM Peak Hour	Saturday Peak Hour
Maser TIS Table No. 2	184	252	230
Kittleson 8/15/18 Memorandum	Not Found	452	516

The data show that there would be significantly more peak hour traffic associated with the gas station than estimated in the applicant’s studies. Please clarify.

While the data presented above represent information from California based studies, there are other Costco stores in this region that could serve as the basis for more accurate trip rates. For example, a review of a proposed Costco in Yorktown, NY by Michael Maris Associates Inc. in October of 2014 produced the following comment:

“We estimated the trip generations of the proposed Costco store using trip generation rates determined by surveys at two existing stores in Melville, New York and Hackensack, New Jersey. While the Institute of Transportation Engineers (ITE) provides trip generation rates for discount club stores in its publication entitled Trip Generation, 9th Edition, those rates are based on surveys of different stores located throughout the United States, and it is our opinion that rates based on surveys of Costco stores that are located in the same general region would provide more accurate results. Following is a summary of our findings:

- a. The surveys at the two existing stores show that they generated an average of 5.98 vehicle trips per 1,000 sf during the Peak PM Highway Hour and 7.39 trips per 1,000 sf during the Peak Saturday Hour.”*
- b. Application of the generation rates to the proposed 151,092 sf Costco store shows that it will generate 904 total trips during the Peak PM Highway Hour and 1,117 total trips during the Peak Saturday Hour.*

For the proposed Yorktown Costco gasoline facility (12 fueling stations), Maris Associates estimated 360 trips during each of the PM and Saturday peak hours.

The Maris Associates review goes on to document the higher store and gas station rates as well as the lower interplay and pass-by reductions that we believe would be appropriate for the Guilderland proposal.

For the Guilderland store, the unadjusted store trips were estimated to be 668 total trips during the PM peak hour and 1,019 total trips during the Saturday peak hour, and for the gasoline facility (18 fueling positions), the estimates were 252 trips and 230 trips during the PM and Saturday peak hour, respectively.

A comparison of the actual Costco data to the estimates made in the Guilderland TIS is presented in the following Table:

SOURCE	PM PEAK HOUR TRIPS			SATURDAY PEAK HOUR TRIPS		
	STORE	GAS STATION	TOTAL	STORE	GAS STATION	TOTAL
Yorktown Review	904	360	1,264	1,117	360	1,477
Guilderland TIS	668	252	920	1,019	230	1,249
UNDERESTIMATE	236	108	344	98	130	228

Based on this comparison, the Guilderland trip estimates significantly underestimate the more realistic traffic potential of the proposed Costco. Subsequent analyses based on those underestimated trips should be revised accordingly. Please comply.

Further, there are stores in Yonkers, New Rochelle, Nanuet, Port Chester and Camillus New York, and stores in Norwalk and Brookfield Connecticut, and East Hanover, New Jersey. Trip information from some or all of these stores should be gathered by the applicant to establish a more accurate Costco trip rate. Also, Costco may have their own trip data estimates as a function of current and/or previous market studies. That information should be shared if available. The low trip rates used in the DEIS should be documented or appropriately increased, and all subsequent analyses revised as needed. Please comply.

7. **The TIS applies a 10% interplay credit between Costco and the mall, a 10% interplay credit between the gas station and the mall and a 25% interplay credit between the gas station and the Costco store. This results in a 45% reduction in traffic generated by Site 2 development. Trips are then further reduced by 25% for “pass-by” trips – a term used to describe a trip that is already on the street passing the site and simply diverts into the site before continuing on to its initial destination.**

Comment: Trip generation rates and adjustments based on interplay and pass-by credits appear to understate the potential traffic from the proposed developments. Trip generation – which may be too low at the outset of the study as outlined above – is further reduced by application of 10% and 25% interplay and pass-by factors, respectively. These reduction factors may be too high. No documentation for the reduction percentages used in the analysis is provided. All interplay and pass-by reductions used in the TIS should be explained and documented. In the San Marcos study noted above, a Costco without a fueling station used a 15% reduction for pass-by trips and no interplay reduction was used. The interplay reductions and high pass-by credits should be documented or reduced/eliminated, and all subsequent analyses revised as needed.

8. **The TIS includes a Synchro Level of Service and capacity analysis that also calculates queue lengths at each intersection analyzed.**

Comment: Field observation on Saturday March 7, 2020 indicated that queuing of vehicles at the study intersections reached significant lengths. In fact, at several mall ring-road intersections, queues developed at the signalized intersections that extended back to the adjacent intersection causing a condition sometimes referred to as gridlock. The applicant should report the queuing information contained in the Synchro analyses and discuss how the significant queues affect flow conditions at the study intersections. The queuing

summaries should be both the average and 95th percentile values. Any unacceptable results should be reported and measures to mitigate those impacts included in the study. Please provide accordingly.

9. The site plans include a number of driveways onto the adjacent streets – Rapp Road and Gabriel Terrace for Sites 1 and 2, respectively.

Comment: The applicant should include sight distance analyses at each driveway to ensure that safe access can be provided in accordance with applicable guidelines. Any locations that do not meet the minimum and desirable standards must be identified and measures to provide the required sight lines must be included in the plans. Please comply.

Comment: The TIS describes Costco’s northern and southern Rapp Road accesses as not allowing left turns. This would mean that all of Costco’s traffic that wants to get to Western Avenue must leave the site at the Gabriel Terrace access or turn right toward the Mall and circulate with other Mall traffic while trying to go south toward Western Avenue. At the same time, the site plan in the TIS shows a left turn lane at the northern exit to Rapp Road. Please clarify. Furthermore, a review of the Costco site plan indicates that the vast amounts of parking spaces are located between the building and Rapp Road and the route to Gabriel Terrace is through a parking aisle in the narrow space between the building and existing properties on Western Avenue. Notwithstanding the apparent left turn restrictions onto Rapp Road, and given the awkward access to Gabriel Terrace, it is likely that many exiting trips will ignore the restriction and turn left from the northern (and possibly the southern) access to get back to Western Avenue. This could have significant negative impacts on traffic conditions at the Western Avenue/Johnston Avenue intersection. Moreover, how would the turn restrictions be enforced? Please clarify.

C. PARKING

As part of our review, the following parking analysis was prepared:

LAND USE	SIZE	NUMBER OF SPACES	
		PER TOWN CODE	PROPOSED
Rapp Road Residential			
- Dwelling Units	222 units	333	-
- Commercial	3,900 sq. ft.	12	-
- Total		345	405
Costco			
- Store	154,300 sq. ft.	618	700
- Gas Station	18 fueling stations	Not listed	-
- Total		618	700

The above information was gathered from the Town’s Zoning Code and information provided on the applicant’s site plans.

Comment: There should be a discussion of the parking supply vs. demand in the Traffic Impact Study. That discussion should include the reasons for the uniformly higher proposed number of

spaces than required by code. This is important for the residential development, especially given the fact that the plan includes parking spaces on Rapp Road along the site frontage. Are the on-street parking spaces needed to meet the requirements for this development? Please clarify.

Also, it is important for the Costco development because all of the additional parking spaces are paved, adding to impervious surface and unnecessarily increasing the amount of stormwater runoff. The reasons for the Rapp Road on-street parking and the general parking over-supply should be provided and explained in the DEIS.

D. MITIGATION

The mitigation measures proposed by the applicant for the various Build scenarios are primarily confined to the Crossgates Mall circulation roadways.

Comment: Based on our field observations and review of the Level of Service and capacity analyses presented in the February 17, 2020 Traffic Impact Study, we believe a more widespread mitigating improvement package should be examined. For example, two Western Avenue intersections are expected to exhibit worsening peak hour conditions as a result of the 2022 and 2025 developments. However, no impact mitigation is offered. The two locations are Western Avenue at Johnston Avenue/Crossgates Mall Road (Rapp Road) and Western Avenue at Gabriel Terrace.

Another location where peak hour conditions are negatively impacted is the Washington Avenue Extension at Springsteen Road/Crossgate Commons intersection. Also, the intersection of the Mall ring road with the relocated Gabriel Terrace was analyzed with a traffic signal, yet the signal is not included on the conceptual improvement plan.

Traffic impact mitigation measures should be further explored and expanded as noted above.

APPENDIX H

Pages 1-7: EXECUTIVE SUMMARY

Comment: All comments related to this summary are captured in the comments below.

Page 8: SALES TAX REVENUE

Comment: The assumptions used to calculate sales tax revenue need to be explicitly stated and sources for assumptions explicitly included. The applicant assumes the vast majority (95%) will be "net new." The basis for this assumption is unclear and not supported by anything other than the applicant's assertion. Therefore, the sales tax revenues may be overstated. Please clarify.

Page 10: CONSTRUCTION PHASE IMPACTS

DEIS statement: . . . assumes 90% of the construction spending would be sourced from within the county and 60% will be sourced from within the town. Using these assumptions, we can project that there will be over \$37.6 million in net new spending in the county and over \$25.0 million in net new spending in the town associated with the construction phase of Site 1.

Comment: What is this assumption based on? Please provide documentation.

Table 16: Economic Impact – Construction Phase

Comment: This assumes that all jobs/wages will be “net new” to the County/Town which is not a likely scenario. Please clarify.

Page 11-12: HOUSEHOLD SPENDING IMPACTS

Comment: Again, the 95% “net new” is neither conservative nor supported by anything other than the applicant’s assertion. The applicant states that the existing housing market is antiquated, with a significant percentage of single-family homes. If this is accurate, it makes sense that demand for new apartments with on-site amenities would be in demand within the Town and County, not only externally. If the “net new” has been over-estimated, household spending impacts are also likely overestimated. This calls into question all figures related to household spending.

It also fails to consider the impacts upon community character if a portion of the Town/County housing stock remains untenanted as residents shift into newly offered housing options. Please clarify.

Page 12: SPENDING BY NEW TENANTS

DEIS statement: . . . \$70,000 and \$99,999 have annual expenditures (excluding housing and utility costs) of \$35,482. Given the range of goods that are available for purchase in Albany County, it is assumed that 70% of total expenditures would occur within Albany County and, therefore, have an impact on the Albany County economy. A lesser portion of the expenditures, 50%, would occur within the Town of Guilderland.

Comment: The percentages noted above have not been adequately documented and the numbers generated from these percentages must therefore be questioned. Moreover, as noted in the comment directly above, the number of “net new” has not been adequately documented. Please clarify.

Page 14: Tables 21-22

Comment: The direct and indirect impacts of the project may be overestimated due to the “net new” calculation. In addition, the assumptions used (multipliers) to generate direct/indirect impacts should be explicitly stated and documented.

IMPACT OF ON SITE EMPLOYMENT

DEIS statement: Taking into account the additional indirect and induced economic impacts on Albany County from the 5 direct jobs, total employment created by Site 1 of the Project in the County is estimated at 10 jobs and over \$485,000 in annual earnings. Nearly \$1.8 million in total sales would be generated as a result of Site 1’s on-site employment.

Comment: The multipliers for indirect/induced impacts, associated job creation and total sales needs to be explicitly stated and documented. Please provide.

Pages 15-16 – Tables 25-26

Comment: See comments above. Impacts likely over estimated.

Page 17: NEW ON- SITE SALES

DEIS statement: 50% of these sales will be considered to be “net new” to Albany County.

Comment: Albany County currently has Sam’s Clubs in Latham and Schenectady, and a Restaurant Depot and BJ’s in Albany. It is unclear how this figure was derived. If a portion of the Costco sales is coming from existing warehouse clubs and other local retailers, this would significantly reduce the new on-site sales projections and tax revenues. Please clarify.

Page 19: CONSTRUCTION PHASE IMPACTS

Comment: The assumptions related to the percentages of new spending, and the associated impacts require more detail to verify. In addition, the applicant outlines construction related revenues to be generated. How many of the construction-related workers will come from the Town of Guilderland? How many from Albany County? For Site 2, will Costco use its own contractors for the building construction? If the majority of workers are not from the Town or the County, the revenue projections would need to be adjusted accordingly. Please provide.

Page 20: ANNUAL OPERATIONS IMPACT

DEIS statement: [The proposed Costco will] capture” some of the sales that are currently going to adjacent municipalities.

Comment: The applicant notes that the Costco store closest to the proposed project is 1.5 hours away. What percentage of the capture rate is coming from a market that travels 1.5 hours to Costco stores? It seems likely that much of the capture will come from the four competitive warehouse retailers within the market area. This issue requires closer examination, and positive tax forecasts may need to be revised. Please provide.

DEIS statement: Customers who would typically shop outside of the municipalities would decide to shop at the Project because of loyalty to and preference for the Costco brand.

Comment: It is unclear where the shopping “outside of the municipality” is occurring and what is the loss of retail revenue based on this seepage. If the loss of revenue in part relates to online shopping opportunities, it is unlikely that Costco will recapture these retail dollars. Please provide additional information.

Page 21: NEW SALES FROM BRAND LOYAL CUSTOMERS

DEIS statement: The Project could potentially also attract loyal Costco customers who would typically shop at similar mass merchandisers outside of the market area or who would choose to shop at Costco over other smaller chains if there was one available.

Comment: Those who would choose to shop at Costco over the existing BJs or Sam’s Clubs are not “net new.” Please revise accordingly.

Comment: The applicant references four existing competitive establishments, but fails to include all of the other retailers that are selling similar goods ranging from gasoline to tires (“relevant establishments”). Again, this reduces the amount of “net new.” Please provide.

Page 22: Table 32: Gap Analysis

Comment: The gap analysis does not indicate retail gaps in auto service stations, florists, photoshops, pharmacies, etc. Again, if the proposed Costco is, in part, redistributing existing annual sales revenues, the sales tax revenues projected need to be adjusted. In addition, this analysis does not quantify impacts on community character.

Comment: The DEIS lacks a standard community character assessment that documents the community before and after Costco is built on Site 2 and quantifies the impacts of the addition of Costco's in store and fuel sales, given that this community already contains retailers selling similar goods, services and gasoline which would be impacted by the addition of a Costco. Please provide.

DEIS statement: . . . we estimate that 50% of sales at Site 2 will be net new to the county and 75% of sales will be net new to the town. Net new sales will be driven by brand-loyal customers travelling from outside of the municipalities to shop at the new Costco and by additional purchases being made in the municipalities to satisfy unmet demand.

Comment: We agree with the applicant that the above figure is imprecise, but it seems unlikely that 75% of the sales will be new to the Town/County and that a significant portion of these new sales will be from customers regularly travelling over an hour for groceries and other consumer products. Additional analysis needs to be undertaken to more accurately determine the amount of actual "net new." Please provide.

Page 24: NEW HOUSEHOLD SPENDING

Comment: The comments related to Site 1 also apply to Site 3.

Page 25: EMPLOYEE EARNINGS AND TOTAL ANNUAL SALES REVENUES.

Comment: The comments related to Site 1 also apply to Site 3.

Page 26: CONSTRUCTION PHASE IMPACTS

Comment: The comments related to Site 1 and 2 also apply to Site 3.

Pages 27-28: SPENDING BY NEW TENANTS

Comment: The comments related to Site 1 also apply to Site 3.

Pages 28-29: ON SITE EMPLOYMENT

Comment: The comments related to Site 1 also apply to Site 3.

Pages 29 – 30: TOTAL ECONOMIC IMPACT

Comment: See comments above.

Summary: The DEIS lacks a fiscal impact analysis pertaining to community services. Tax revenues must be balanced against the cost of municipal services. Based on the DEIS, it appears that the Town and County will incur absolutely no costs in servicing this project. That is simply unrealistic. In addition, any tax incentives provided to the developer by the Town and County must be factored into such a fiscal analysis. The Economic and Fiscal Impact Analysis in Appendix H does not address costs related to community services in any respect. Instead, Appendix H provides an overview of revenues to be captured by the Town and County IF the assumptions presented are correct. However, as noted in one of our comments above, many of the assumptions have not been adequately documented and the revenue streams presented may be unrealistically high. A full market study is needed to better understand projected revenues to be generated by the proposed project.

Similar concerns can be raised regarding other sections of the DEIS reviewed by F&A. In particular, contrary to SEQRA requirements, the applicant failed to provide any assessment related to impacts on community character and the associated fiscal impacts potentially resulting in displacement and blight.

While the applicant's consultant provided a fairly detailed traffic analysis, many of the assumptions used to arrive at traffic generation rates are not fully supported by adequate documentation, and in some cases the assumptions used are questionable at best.

To conclude, throughout the DEIS, the applicant cites studies without the requisite documentation to verify the assumptions used. The data cited by the applicant must be subject to public review. Therefore, all relevant documents, studies, internal analyses, etc. should be provided in supplemental appendices. In addition, the fiscal analysis provided in the DEIS must be balanced and a robust community character assessment must be provided to comply with the "hard look" required by SEQRA.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

THOMAS HART, LISA HART, KEVIN MCDONALD,)	Case No.
SARAH MCDONALD,1667 WESTERN AVENUE, LLC and)	
RED-KAP SALES, INC.)	
)	
Plaintiffs,)	
)	
-against-)	
)	
TOWN OF GUILDERLAND, PLANNING BOARD AND ZONING)	
BOARD OF APPEALS OF GUILDERLAND, PYRAMID)	
MANAGEMENT GROUP, LLC, RAPP ROAD DEVELOPMENT, LLC)	
and CROSSGATES RELEASECO, LLC,)	
)	
Defendants.)	

**AFFIDAVIT OF DR. ERIK KIVIAT IN SUPPORT OF PLAINTIFFS’ MOTION FOR A
PRELIMINARY INJUNCTION AND DECLARATORY JUDGMENT**

ERIK KIVIAT, PhD, being duly sworn, deposes and says:

1. I am a Professional Wetland Scientist and co-founded Hudsonia, Ltd., in 1981 and have served as Executive Director since 1988. (Resume attached as Exhibit A.)

2. Hudsonia does not support or oppose land use proposals; rather, we conduct field work, review documents, maps, and literature, and provide observations, data, analyses, and recommendations as appropriate, to provide a stronger scientific basis for environmental and land use decision-making.

3. I prepared a report entitled “Preliminary Biodiversity Assessment and Comments on the DEIS for the Rapp Road Residential/Western Avenue Mixed Use Redevelopment Projects, Town of Guilderland, Albany County, New York” based upon a field investigation conducted March 15, 2020. Exhibit C included with Affirmation of James Bacon herewith.

4. Together all three sites represent almost 50 acres of wooded habitat within a semi-urban area. That is rare in and of itself as I explained in my comments.
5. I identified that a number of species, including the Indiana bat, a federal and state-listed endangered species and the Northern Long-eared bat, (NLEB), a federal and state-listed threatened species, could occur in the woodlands on the west side of Lawton Terrace where there are dead and live trees with suitable bark voids.
6. My report cited DEC's recommendation that regarding the NLEB, to protect its habitat for summer roosting, all persons should "[l]eave uncut all snag and cavity trees unless their removal is necessary for protection of human life and property." See <https://www.dec.ny.gov/animals/106090.html>.
7. I also identified that all three development sites included habitat potentially suitable for a Special Concern species, (worm snake), in New York and that no surveys were specifically conducted for rare plants.
8. I concluded that "[t]he removal of substantial areas of woodland habitat as a result of the proposed developments has not been adequately assessed..." Id. pgs. 4-5.
9. On March 28, 2020, I learned that clear cutting had occurred on Site No. 2.
10. On April 6, 2020, I visited the area and observed that a large area of Site 2, more than two acres of woodlands, was clearcut including many large trees where eastern cottonwoods and white pines predominate, along with red maple, oaks, and other species. Some white pines in the area measured up to 99 centimeters, (more than 3 feet), dbh (diameter-at-breast-height), although not necessarily cut.
11. The first white pine stump I encountered (freshly-cut) had > 80 rings as shown in the following photograph:



12. Cut trees were lying helter-skelter all over Site No. 2, including many large eastern white pines (*Pinus strobus*) as shown by this photograph looking south towards Western Avenue:.



13. Many eastern cottonwoods, (*Populus deltoids*), and red maples, (*Acer rubrum*), were also cut, some large. Some black oaks, (*Quercus velutina*), were also cut. Cutting occurred mostly east of the drainage ditch/wetland and some trees were cut just to the west of the drainage ditch. There was not much cutting on the dunes in the far northwest of the site (a little on the southeast corner of the big dune), as shown by this photograph looking north towards Crossgates mall:



14. Large trees such as these used to form a forest canopy and provide very important potential habitat features for several bat species, many birds, insects and other invertebrates, mosses, liverworts, lichens, fungi, and other organisms.

15. These forest patches, in an urban environment, are also important for carbon storage, stormwater absorption, microclimatic cooling (via shading and transpiration), maintenance of air quality, and noise buffering.

16. The tree cutting on Site No. 2 also resulted in tracked heavy equipment creating deep ruts in the sandy soils. This will cause eroded sediment to be discharged into the on-site wetlands from stormwater since there was no silt fencing or any other typical stormwater controls. The cutting will also make the site more vulnerable to colonization by weedy nonnative plants.

17. The future of these sites is not a question of restoration of Pine Bush vs. clearing and development, it's a question of maintaining important existing urban ecosystem services vs. losing those services. The applicant's environmental studies omit or minimize discussion of several important features, including naturally-occurring pitch pines, large native trees, and several other native plant species.

18. This the first instance that I am aware of where a site was clearcut during the comment period on a DEIS, an action that is unfathomable since the purpose of an administrative environmental review is to assess a site's natural resources, wildlife, and plants prior to irreparably damaging that inventory.

Sworn to me this 24th
day of April, 2020

Lindsay Harper
NOTARY PUBLIC



ERIK KIVIAT, PhD.



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28 March 2020

ERIK KIVIAT PhD PWS

Recent Professional Experience

Hudsonia Ltd.: Executive Director; 1988- (excepting two years); Ecologist, 1981-1988; Co-founder.

Bard College: Associate Professor then Professor of Environmental Studies; Graduate School of Environmental Studies, 1987-2005; Research Associate, Division of Natural Sciences and Mathematics, 2002-.

Technical assistance to: Non-governmental organizations (land trusts, environmental groups, citizens' groups); landowners; renewable energy developers; other businesses; planning, law, and engineering firms; sporting associations; federal, state and local government; in New York, New Jersey, Connecticut, Massachusetts, Ohio: more than 300 reports prepared, 1975-.

Professional workshops taught or co-taught: Winter Woody Plant Identification; *Phragmites* Ecology and Management; Reptile and Amphibian Survey Methods; Reptiles and Amphibians of the Hudson River; Wetland Habitat Creation and Turtle Conservation; Conservation of Urban Biodiversity; many others.

Fellowships: Cary Summer Research Fellowship 1993, Institute of Ecosystem Studies, Millbrook, NY: Vegetation and biogeochemistry of Blanding's turtle habitats. Short-term Visitor, 1995, Smithsonian Environmental Research Laboratory, Edgewater, MD: Freshwater-tidal and nontidal wetland studies.

Peer Reviewer: *Biological Invasions*; *Chelonian Conservation and Biology*; *Ecosphere*; *Environmental Monitoring and Assessment*; *Estuaries*; *Estuarine, Coastal and Shelf Science*; *Journal of Herpetology*; *Journal of the Marine Biological Association of the United Kingdom*; *Mires & Peat*; *New York State Museum Bulletin*; *Northeastern Naturalist*; *Studies in Avian Biology*; *Urban Habitats*; *Urban Naturalist*; *Wetlands*; *Wetlands Ecology and Management*; *Wilson Bulletin*; American Museum of Natural History; Countryman Press; Hudson River Foundation; Long Island Sound License Plate Fund; Marsh Ecology Research Program (Man.); Marsh Ecology Research Program (NJ); Rutgers University Press; San Francisco Bay-Delta Research Enhancement Program; Connecticut Sea Grant; Rhode Island Sea Grant; State University of New York Press; Nature Conservancy; U.S. Fish and Wildlife Service; U.S. Geological Survey; U.S. Office of Technology Assessment.

PhD thesis committees: SUNY Environmental Science & Forestry; Nelson Mandela Metropolitan University (South Africa; external reader). *Master's thesis committees:* Bard College (many); SUNY Albany; SUNY New Paltz.

Volunteer (selected field biology projects): Turtle research, Jug Bay Wetlands Sanctuary, Maryland, 1990s-2000s; Ontario Breeding Bird Atlas, James Bay - Hudson Bay Lowland, Canada, 1985; Herpetofaunal surveys, Jekyll Island, GA, 1979-2013; Osprey survey and herpetofaunal survey, St. Catherine's Island, GA, 1973; Reptile and amphibian population studies, Kalbfleisch Field Research Station, Long Island, NY, 1964; Additional reptile and amphibian surveys in New York, Massachusetts, Georgia (Sea Islands), and México (Querétaro), American Museum of Natural History, 1961-1979.

Education

PhD Ecology, Union Institute and University, 1991. Thesis: *Wetland human ecology*.

MA Biology, State University at New Paltz, NY, 1979. Thesis: *Hudson Estuary shore zone: Ecology and management*.

BS Natural Sciences, Bard College, 1976. Thesis: *Snapping turtle ecology in a New York tidemarsh*.

Professional courses and workshops taken: Mosses: Structure, Ecology, and Identification (5 days), White Creek Field School, 2017; Wildlife Study Design (1 day), Wildlife Society, 2002; Spiders: Identification, Biology, and Ecology (5 days), Eagle Hill Institute, 2001; Mosquito Identification and Surveillance (2 days), New York State Department of Health, 2000; Applied Multivariate Methods (5 days), Institute for Professional Education, VA, 1995; Control of Mosquitoes and Mosquito-borne Diseases in the U.S. (5 days), International Center for Public Health Research, SC, 1993; Understanding Wetland Soils (2 days), Cook College, Rutgers University, NJ, 1989; Landscape Preservation: Ecological and Social Issues (1 day), Institute of Ecosystem Studies, Millbrook, NY, 1987; Energy Analysis (1 day), University of Georgia, Athens, 1977; Freshwater Fishes of New York (5 days), American Museum of Natural History, New York, NY, 1970.

Research Interests

Nonnative weed ecology and management; Wetland ecology and management; Herpetofaunal ecology and conservation (including estuary, fen, woodland pool, and barrier island faunas); Habitat ecology, assessment, monitoring, creation, restoration; Urban and rural biodiversity, rare or little-known species; Energy development impacts on biodiversity; Human cultural adaptations to wetlands and vector-borne diseases, and human interactions with wetlands; Ethnobotany and economic botany.

Current research projects (with Hudsonia staff, interns, and collaborators): Biodiversity impacts of community and utility-scale solar photovoltaic generating projects; Urban biodiversity and its management, a case study of the New Jersey Meadowlands (includes field surveys of mammals, birds, herpetofauna, butterflies, dragonflies, clam shrimps, land snails, vascular plants, bryophytes, lichens, macrofungi); Long-term response of the threatened Blanding's turtle to created wetland and upland habitats; An old-growth forest in the Hudson Valley after 40 years; Two prickly-pear species near their range limits in rocky habitats of the Hudson Valley; Human-disturbed habitats as sentinels for early detection of nonnative weeds in the Catskill Mountain region; Habitat functions of *Phragmites*, purple loosestrife, and knotweed for organisms from cryptogams to mammals; Bioenergy and other uses of abundant nonnative plants.

Additional Field Work (much of it focused on invasive plants)

Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington; British Columbia, Manitoba, Nova Scotia, Ontario, Québec; México; Trinidad; Czech Republic; France; Germany; Romania; England; Scotland; Hungary; Italy; Botswana.

Languages: French and Spanish (reading knowledge).

Professional Certification: Professional Wetland Scientist, Society of Wetland Scientists, 1995-.

Honors

Awarded to Erik Kiviat or to Hudsonia for projects or programs he directed: Franklin and Eleanor Roosevelt Hudson Valley Vision Award 2018; John and Samuel Bard Award in Medicine and Science 2016; Environmental Consortium Great Work Award 2014; Coastal America Spirit Award, New Jersey Marine

Sciences Consortium Habitat Initiative, 2006; Nominations for National Wetlands Award 2002, 2009-2011; Certificate of Appreciation, New York State Department of Environmental Conservation, 2000; Good Land Award, Winnakee Land Trust, 1999, 2008; Project Facilitation Award, Society for Ecological Restoration, 1997; Marion Thompson Fuller Brown Conservation Award, Garden Clubs of America, 1996; Environmental Award, Museum of the Hudson Highlands, 1996; Award for Environmental Sensitivity, Mohonk Consultations on the Earth's Environment, 1995; Researcher of the Year Award, Hudson River Environmental Society, 1994; Service Award, Dutchess County Environmental Management Council, 1982.

Professional Societies

American Bryological and Lichenological Society; Association of Field Ornithologists; Association of State Wetland Managers; Hudson River Environmental Society; Society for the Study of Amphibians and Reptiles; Society of Wetland Scientists; Southern Appalachian Botanical Society; Torrey Botanical Society; Wilson Ornithological Society.

Public Service

Citizens' Advisory Group, Rebuild by Design Meadowlands Flood Protection Project, 2016-2018; Editorial Board, *Urban Naturalist* 2014- ; Lower Hudson Partnership in Invasive Species Management, 2012- (Steering Committee 2013-2015); Invited participant, recovery workshops for bog turtle, U.S. Fish and Wildlife Service (FWS) and New York State Department of Environmental Conservation (DEC), 2011-2015; Steering Committee, Northeast Natural History Conference, 2010; Invited participant, recovery workshops for Blanding's turtle, timber rattlesnake, northern cricket frog, New England cottontail, DEC, 2009-?; Scientific Advisory Committee, Hudson River Almanac; Advisory Committee for Quadricentennial Exhibit, Albany Institute for History and Art, 2008; co-sponsor, Japanese Knotweed Managers' Workshop, 2005; co-convenor, Hackensack Meadowlands Symposium, 2003; Greene County (NY) Habitat Management Advisory Committee, 2003-2006; Advisory Committee for Hudson River Estuary Exhibit, Liberty Science Center, 2002-2007; Scientific Advisory Committee, New York - New Jersey Trail Conference, 2002-2008; Co-sponsor, *Phragmites* Forum, 2002; Convenor of workshop *Purple Loosestrife and Wildlife in North America*, Northeast Fish and Wildlife Conference, 2001; Conservation and Recovery of the Bog Turtle (invited participant), FWS, 1998; Jug Bay Wetlands Sanctuary (MD) Advisory Committee, 1998-2013; Scientific Advisory Committee, Friends of the Great Swamp, 1998-; New York State Department of Environmental Conservation Hudson River Biodiversity Committee, DEC, 1997-; Scientific Advisory Committee, Hudson River Habitat Restoration Program, U.S. Army Corps of Engineers, 1994-95; Editorial Board, *Water Ways: New York's Waterfront News*, 1990-92; Hudson River National Estuarine Research Reserve Advisory Committee, 1983-84, Hudson River Fisheries Advisory Committee, 1979-83, Hudson River Valley Study Advisory Committee, 1978, DEC; Wildlife Society New York Chapter, Committee on Exotic Plants, 1981-87; Advisory Board of the Trevor Zoo, 1981-94; Dutchess County Environmental Management Council Significant Areas Committee, 1980-82; Storm King School Environmental Institute Advisory Board, 1983-85; Convenor of Hudson River Marsh Workshop, Hudson River Environmental Society, 1976; Hudson River Sloop Clearwater Board of Directors 1975-76.

Presentations at Scientific Conferences More than 85 beginning in 1974.

Technical Publications (* Peer reviewed)

(Papers in preparation with various collaborators on Blanding's turtle habitat restoration, Atlantic Coast leopard frog response to Hurricane Sandy, first records of the potentially invasive plant *Cyperus difformis* in New York, bryophytes and loosestrifes, organisms associated with knotweed.)

- Caponera, V. & E. Kiviat. In press. Painted turtle ecology in a freshwater tidal marsh: Concluding survey. Final Reports of the Polgar Fellowship Program, Hudson River Foundation.
- Kiviat, E. Submitted. Wetland imagery in American novels. *Environmental Values*. *
- Kiviat, E. Submitted. Human outdoor activities on wetland and fill in an urban-industrial coastal environment, the New Jersey Meadowlands. *Urban Naturalist*. *
- Schmidt, R.E., E. Kiviat & S. Mahon. Submitted. Discovery of the clam shrimp, *Limnadia lenticularis* (Linnaeus 1761), in Bergen County, New Jersey. *Check List*. *
- Kiviat, E. & K. MacDonald. Submitted. Conservation of urban biodiversity: A case study of the New Jersey Meadowlands. Lexington Books, Lanham, Maryland. *
- Kiviat, E., L. Stickle & E. Heffernan. 2019. Re-survey of flora and vegetation after four decades in a bog lake, New York. *Castanea* 84(2):290–310. *
- Kiviat, E. 2019. Organisms using *Phragmites australis* are diverse and similar on three continents. *Journal of Natural History* 53(31-32):1975-2010. *
- Kiviat, E., L.A. Meyerson, T.J. Mozdzer, W.J. Allen, G. Bhattarai, H. Brix, J.S. Caplan, K.M. Kettenring, C. Lambertini, J. Weis, D.F. Whigham & J.T. Cronin. 2019. Evidence does not support the targeting of cryptic invaders at the subspecies level using classical biological control: The example of *Phragmites*. *Biological Invasions* 21(8):2529-2541. *
- Schmidt, R.E., E. Kiviat, N. Trigoboff & J. Vanek. 2018. New records of clam shrimp (Laevicaudata, Spinicaudata) from New York. *Northeastern Naturalist* 25(2):N7-N10. *
- Bacon, R.J. & E. Kiviat. 2018. Ecology of painted turtles in a freshwater tidal marsh, Tivoli North Bay, New York. Pages II-1 to II-29 in S.H. Fernald, D.J. Yozzo and H. Andreyko (eds.), Final Reports of the Tibor T. Polgar Fellowship Program, 2015. Hudson River Foundation.
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- Travis, K.B., I. Haeckel, G. Stevens, J. Tesauro & E. Kiviat. 2018. Bog turtle dispersal corridors and conservation in New York, U.S.A. *Herpetological Conservation and Biology* 13(1):257–272. *
- Travis, K.B., E. Kiviat, J. Tesauro, L. Stickle, M. Fadden, V. Steckler & L. Lukas. 2018. Grazing for bog turtle (*Glyptemys muhlenbergii*) habitat management: Case study of a New York fen. *Herpetological Conservation and Biology* 13(3):726–742. *
- Les, J.C. & E. Kiviat. 2016. The conservation status of goldenclub (*Orontium aquaticum*) in the freshwater tidal wetlands of the Hudson River. 41 p. in S.H. Fernald, D.J. Yozzo and H. Andreyko (eds.), Final Reports of the Tibor T. Polgar Fellowship Program, 2014. Hudson River Foundation.
- Strayer, D.L., E. Kiviat, S.E.G. Findlay & N. Slowik. 2016. Vegetation of riprapped revetments along the freshwater tidal Hudson River, New York. *Aquatic Sciences* 78:605-614. *
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- Vaičekonytė, R., E. Kiviat, F. Nsenga & A. Ostfeld. 2014. An exploration of common reed (*Phragmites australis*) bioenergy potential in North America. *Mires & Peat* 13(Article 12):1-9. <http://www.mires-and-peat.net/> *
- Kiviat, E. 2013. Risks to biodiversity from hydraulic fracturing for natural gas in the Marcellus and Utica shales. *The Year in Ecology and Conservation Biology 2012*, *Annals of the New York Academy of Sciences* 1286:1-14. (Invited paper.) *
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RETAIL MARKET ANALYSIS

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RETAIL MARKET ANALYSIS

The existing retail market was analyzed to assess the level of support for the proposed Costco in Yorktown and to evaluate whether the addition of new retail space would cause oversaturation or the physical displacement of pre-existing retails (resulting in materially adverse impacts and blight). The retail demand model indicates that by 2015, the year in which the proposed project is expected to reach its stabilized year of operation, there will be sufficient support in the market areas for the additional new retail space.

Trade Area

A trade area is the geographic area from which a retail sector generates the majority of its steady customer sales. Trade areas differ markedly among varying types of retailers. For example, mass merchandise retailers of high-order goods tend to attract consumers from a wide area; whereas food-oriented retailers tend to attract consumers from the immediate area.

The scope of retail products to be sold at the proposed Costco comprises 9 major merchandise categories¹. Each of the 9 categories is associated with market characteristics and specific consumer behaviors that impact the trade area boundaries, including but not limited to the following:

- Driving time/distance a consumer is willing to travel for a particular product, which is impacted by local traffic conditions and physical barriers such as bridges;
- Travel patterns in a given market area (e.g., highways that dictate north to south versus east to west);
- Location of competing retail establishments available to consumers.
- Physical site location characteristics (accessibility, visibility, parking);
- Social and economic demographics (population, median/average incomes, housing values); and
- Number of households needed to support a given type of merchandise.

Considering these factors, trade rings around the proposed Costco site were drawn for three major sets of the nine merchandise categories (**Table 1**). The three rings are referred to as the “inner market area,” “middle market area” and “outer market area.” The three consumer market areas analyzed are based on national average trade radii for the respective merchandise categories, and adjusted to reflect local market conditions in Westchester and Putnam Counties.

¹ The 9 retail categories comprise: 1) food at home (bakery, cereal, dairy products, fats and oils, fish and seafood, fruits and vegetables, juices, meats, non-alcoholic beverages, prepared foods, sugar and other sweets), 2) food away from home & alcohol (alcoholic beverages at home, lunch, dinner, breakfast and brunch away from home), 3) healthcare (prescription drugs, medical supplies), 4) household furnishings and appliances (bedroom, living/dining room and other furniture, household textiles, major appliances, miscellaneous household equipment, small appliance/houseware), 5) housing related & personal (household repairs, household services, housekeeping supplies, personal expenses and services), 6) personal care & smoking products, 7) sports & entertainment (photographic equipment, reading materials, sports equipment, travel, TV, radio and sound equipment, computers, software & accessories), 8) transportation & auto (gasoline, motor oil), and 9) apparel (women's, men's, girl's, boy's, infant's apparel, footwear, other apparel products).

Table 1: Trade Areas for Merchandise Categories

Outer Market Area	Middle Market	Inner Market Area
Household Furnishings & Appliances	Food Away From Home & Alcohol	Food At Home
Housing Related & Personal Apparel	Sports & Entertainment	Healthcare
		Transportation & Auto Expenses
		Personal Care & Smoking Products

Outer Market Area

The outer market area represents the distance that households are likely to travel for comparison-shopping. This type of merchandise can also be considered destination retail, such that consumers are willing to travel longer distances to make larger and less frequent purchases. Three of the nine merchandise categories fit this description. The comparison-shopping market area was initially defined using Reilly’s *Law of Retail Gravitation*². It is based on the premise that customers are attracted to larger municipalities to do their shopping, but their desire declines with increased time and distance required to travel to those municipalities. Thus, larger municipalities draw customers from a larger trade area than smaller municipalities. Reilly’s Law provides a mathematical formula³ that was used to calculate the distance customers will travel to buy goods after comparing prices, selection, quality and styles. By plugging into the formula population estimates and distance between the host community (Yorktown) and nearby municipalities that host Costco stores (Nanuet, NY, Port Chester, NY, Yonkers, NY, Brookfield, CT and Norwalk, CT), break point distances for the proposed Costco store can be estimated (Table 2). The trade area was then adjusted to reflect the natural patterns of north-south traffic flow and to ensure consistency with the traffic analysis presented in Section III.K and Appendix E of this DEIS, extending further to include additional market area. Figure 1 shows the outer market area in which there were 99,260 households residing in 2010. It is forecast to contain 100,180 households by 2015.

Table 2: Break Point Distances for Proposed Store in Relation to Existing Stores

Municipality	Population (2009)	Distance from Yorktown (miles, store to store)	Break point distance (miles)
Nanuet, NY	17,418	29.1	17.3
Port Chester, NY	28042	28.2	15.1
Yonkers, NY	199,055	24.9	7.5
Brookfield, CT	16,372	31.2	18.8
Norwalk, CT	83,219	32.5	13.1

Source: U.S. Census Bureau, 2005-2009 American Community Survey.
 Extrapolated by Ferrandino & Associates Inc. (June 2011).

² William J. Reilly (1931).

³ Maximum Distance to Smaller Town (Y) = $\frac{\text{Road distance between towns (X) and (Y)}}{1 + \sqrt{\frac{\text{Population of larger town (X)}}{\text{Population of smaller town (Y)}}}}$

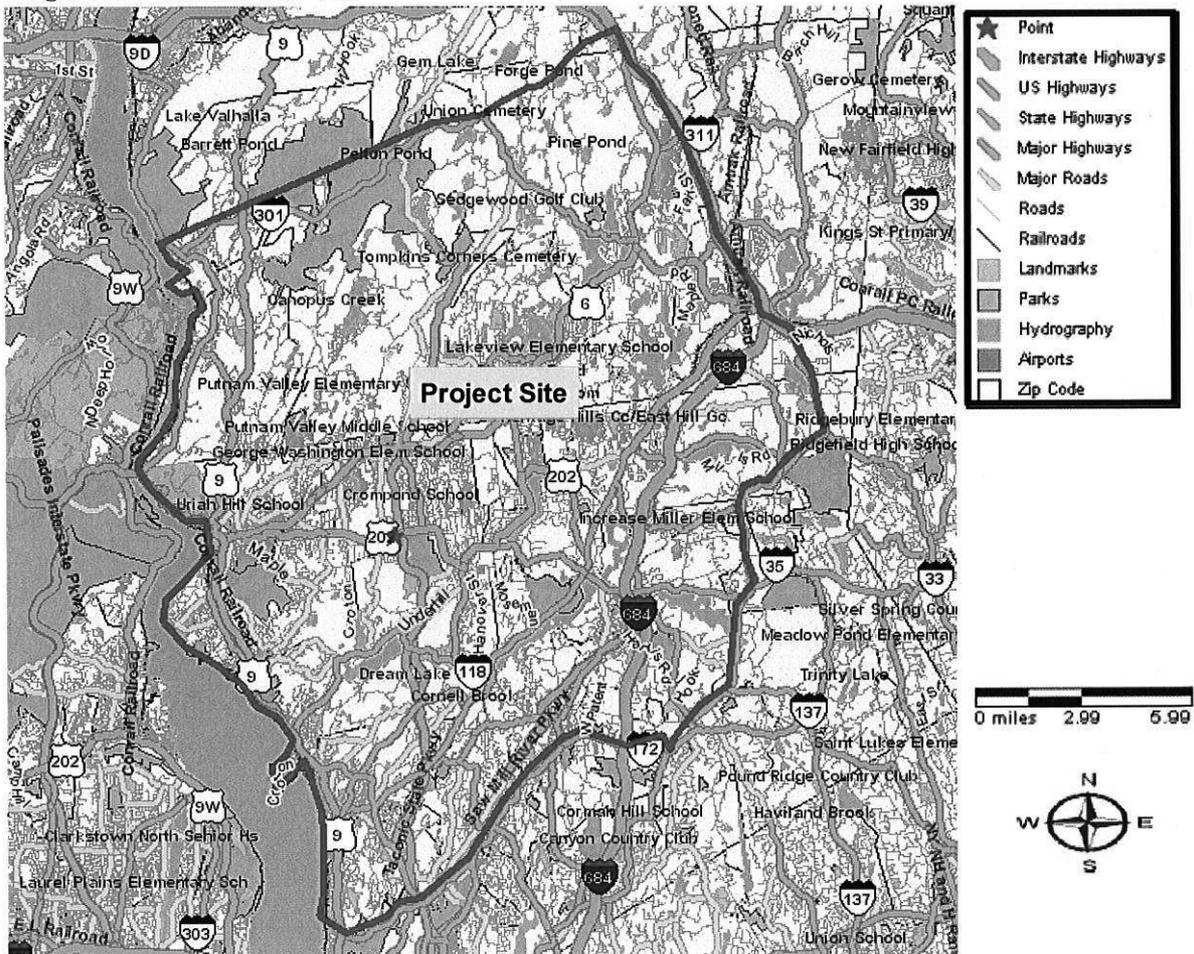
Middle Market Area: 8 Miles

The middle market area represents an 8-mile trade radius (**Figure 2**). This ring represents the distance households are likely to travel for products that are purchased for reasons other than factors of convenience or necessity, but do not require visiting many stores for comparison purposes. Trips are made less frequently to purchase these types of goods when compared with more convenience-oriented products. This distinction applies to two of the nine merchandise categories. As of 2010, the middle market area comprised approximately 63,817 households, and is projected to increase to 64,546 households by 2015.

Inner Market Area: 5 Miles

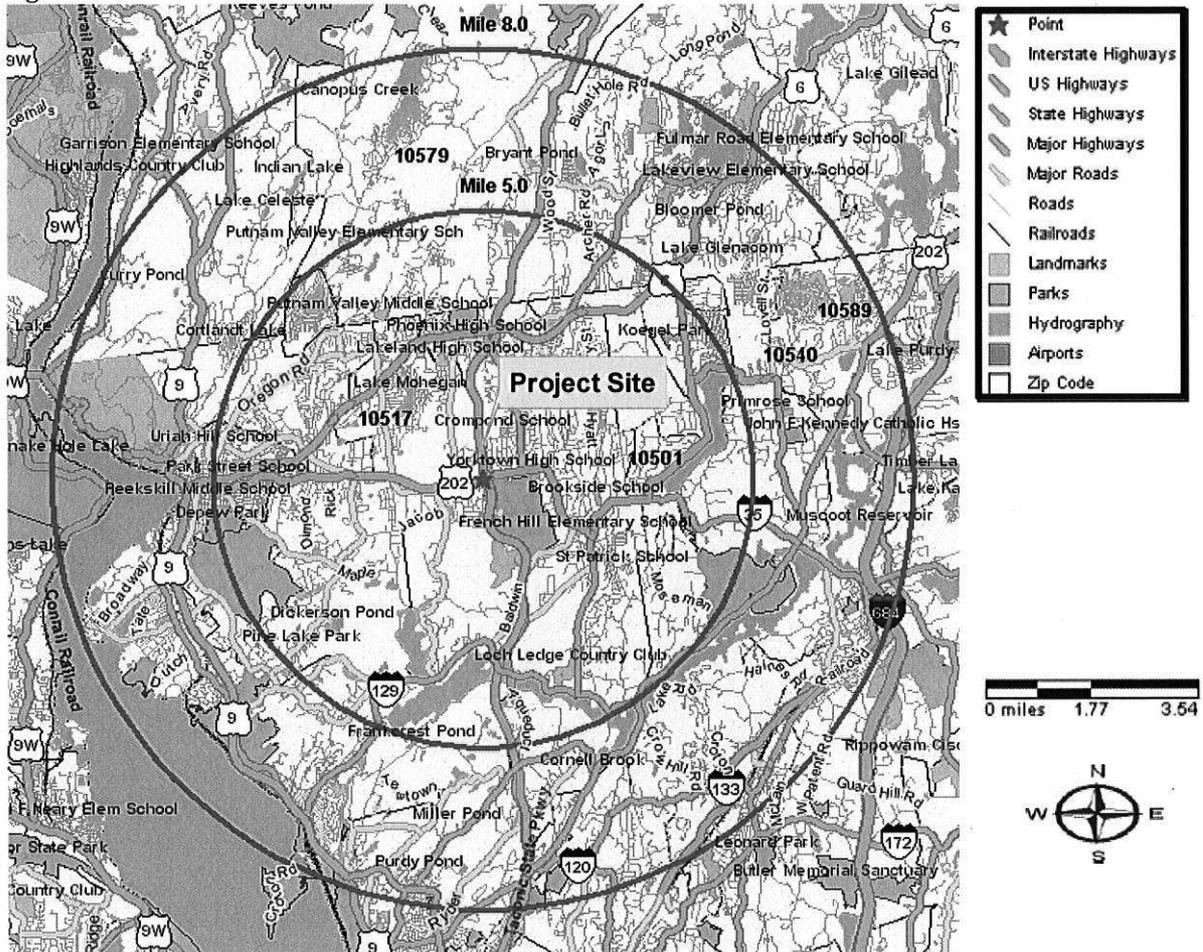
The innermost market area represents a 5-mile trade radius (**Figure 2**). It captures the nearest source of consumers, as it is based on ease of access to obtain these types of products. The inner market area contains households most likely to travel to the proposed Costco for retail that is primarily convenience-oriented. As of 2010, there were approximately 28,676 households residing in the inner market area, and the number of households is projected to increase to 29,166 by 2015.

Figure 1: Outer Market Area



Source: Claritas, Inc. (May 2011).

Figure 2: Inner and Middle Market Areas



Source: Claritas, Inc. (May 2011).

Retail Analysis Methodology

The model developed to calculate supportable retail square footage at the project site relies on two main inputs: consumer spending potential and existing retail sales for the nine retail categories. The analysis considers current and projected market conditions. The basic outline of the model is as follows:

- A. Calculate trade area spending potential for the year when the project is expected to be fully stabilized (2015 projections)
- B. Estimate sales volumes in the market area (2010 estimates)
- C. Calculate unmet spending potential in expected project year, $C = (A - B)$
- D. Estimate sales productivity (sales per SF) for each merchandise category
- E. Calculate supportable square footage based on unmet spending potential, $E = (C / D)$

Step A-1: Household-Based Expenditure Potential

The total retail expenditure potential of trade area households, i.e. dollars available to be spent on the nine Costco merchandise categories was estimated using 2015 consumer spending data provided by Claritas, Inc.⁴ Annual aggregate expenditure estimates by product category were obtained from Claritas' *Consumer Spending Patterns Report*. **Table 3** shows household-based expenditure potential used to estimate market support for the nine merchandise categories in each of the three consumer market areas analyzed. Average household expenditures are shown only for those categories that rely on market support from the respective market area households. For example, given that households residing within the inner market area (closest to the project site) will primarily support the food at home category, only those expenditures on food at home for inner market area households are considered in the market demand model.

Table 3: 2015 Average Annual Household Expenditure Estimates, Consumer Market Area by Merchandise Category

Outer Market Area	
Household Furnishings & Appliances	\$4,211
Housing Related & Personal	\$5,001
Apparel	\$6,595
Total	
Middle Market Area	
Food Away From Home & Alcohol	\$5,177
Sports & Entertainment	\$10,102
Total	
Inner Market Area	
Food At Home	\$7,336
Healthcare	\$3,106
Transportation & Auto Expenses	\$2,336
Personal Care & Smoking Products	\$1,792
Total	

Source: Claritas, Inc.

Extrapolated by Ferrandino & Associates Inc.

⁴ Claritas' *Consumer Spending Patterns Report* is derived from its proprietary Consumer Buying Power (CBP) database using information from the U.S. Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CEX).

Step B: Estimate Existing Sales

Claritas, Inc.⁵ provides annual sales volumes data for all retail establishments found in each of the three consumer market areas. In order to show the growth of potential market demand for new retail space, the model uses an estimate of current year retail sales. For purposes of this analysis, it is assumed that current year market conditions will not change between 2010 and 2015, such that there is no real growth in sales volumes. This is a necessary condition to demonstrate the amount of additional consumer spending potential that can be captured by Costco, or by other establishments elsewhere in the three consumer market areas. It follows that any increases in retail sales volumes in the three market areas would reflect the spending potential that is now lost to other markets, or is not spent at all. The use of 2010 sales data assumes that the proposed Costco and any retail projects expected to come online can potentially capture the unmet spending potential. Retail sales estimates for the nine merchandise categories and respective trade areas are provided in **Table 4**.

Table 4: Estimated Sales by Merchandise Category

SIC Code	Product Category	2010 Supply (Retail Sales)
Outer Market Area		
442, 443111	Household Furnishings & Appliances	\$117,671,603
444	Housing Related & Personal	\$383,022,184
448	Total Apparel	\$151,781,488
	Total	\$652,475,275
Middle Market Area		
7222	Food Away From Home & Alcohol	\$84,566,507
443112, 44312, 44313, 451	Sports & Entertainment	\$128,152,476
	Total	\$212,718,983
Inner Market Area		
445	Food At Home	\$254,156,596
44611, 44613	Healthcare	\$73,471,580
447	Transportation & Auto Expenses	\$86,300,653
44612, 44619	Personal Care & Smoking Products	\$5,968,268
	Total	\$419,897,097

Source: Claritas, Inc.

⁵ Claritas, Inc.'s retail sales database utilizes information from the US Census of Retail Trade and research conducted by InfoUSA Sales Solutions. InfoUSA gathers sales volumes for retail businesses of all sizes on a monthly basis from such sources as: County Courthouse and Secretary of State Data; annual and quarterly phone calls to businesses; annual business reports; 10Ks and other SEC filings; new business registration and incorporations; and articles from leading business magazines and newspapers.

Step C: Unmet Spending Potential (Lost Sales)

In order to determine the amount of unmet spending potential in the consumer market areas, for the stabilized year of the project's operation, the Consultant then compared the total household-based spending potential for the nine types of retail products in 2015 with the estimated sales volumes for these categories. For example, expenditure potential for those categories that are supported by households residing within the inner market area is compared with the estimated annual sales of retailers found within the corresponding market area for the same merchandise categories. The same analysis is conducted for the categories in the middle and outer market areas, respectively.

Table 5 shows the difference between total expenditure potential (column 1) and the respective sales volumes in the merchandise category (column 2), which represents the amount of spending that is either occurring outside the three market areas, or is not being spent at all (column 3). The difference between the total expenditure potential that is available, less currently achieved sales, represents the amount of lost sales or "leakage" that can potentially be recaptured by the proposed Costco. These figures do not represent captured sales by the project, but rather the amount of consumer expenditure available in the market areas that is not currently captured by the establishments within these respective market areas.

Table 5: Unmet Spending Potential (Lost Sales)

	(1)	(2)	(3)
Product Category	Demand (Expenditure Potential)	Supply (Retail Sales)	Unmet Spending Potential (Lost Sales)
Outer Market Area			
Household Furnishings & Appliances	\$421,831,075	\$117,671,603	\$304,159,472
Housing Related & Personal	\$500,987,142	\$383,022,184	\$117,964,958
Apparel	\$660,667,333	\$151,781,488	\$508,885,845
Total	\$1,583,485,550	\$652,475,275	\$931,010,275
Middle Market Area			
Food Away From Home & Alcohol	\$334,137,207	\$84,566,507	\$249,570,700
Sports & Entertainment	\$652,075,731	\$128,152,476	\$523,923,255
Total	\$1,034,835,789	\$212,718,983	\$822,116,806
Inner Market Area			
Food At Home	\$213,969,701	\$254,156,596	(\$40,186,895)
Healthcare	\$90,596,474	\$73,471,580	\$17,124,894
Transportation & Auto Expenses	\$68,124,133	\$86,300,653	(\$18,176,520)
Personal Care & Smoking Products	\$52,251,461	\$5,968,268	\$46,283,193
Total	\$424,941,769	\$419,897,097	\$63,408,087

Source: Claritas, Inc.

Step D: Estimate Sales Productivities

The lost sales for the nine retail categories are translated into a range of supportable square footage estimates using sales productivities, based on industry standards published in Urban Land Institute's *Dollars & Cents of Shopping Centers* (Table 6). The sales productivity estimates reflect the expected performance of new retail space in the consumer markets.

Step E: Supportable Square Footage Estimates

Median sales productivity estimates for each of the nine merchandise categories were used to show the amount of supportable space in the three trade area radii. Total supportable square footage estimates reflect the amount of space that the market can support once the Costco project is in its stabilized year of operation (Table 7). The proposed project will compete with other projects expected to come online during the same period, for market share of the supportable square footage.

Table 6: Sales Productivity by Merchandise Category

Product Category	Median Sales (per SF)
Outer Market Area	
Household Furnishings & Appliances	\$259.43
Housing Related & Personal	\$294.15
Apparel	\$252.41
Middle Market Area	
Food Away From Home & Alcohol	\$232.83
Sports & Entertainment	\$225.61
Inner Market Area	
Food At Home	\$297.46
Healthcare	\$450.61
Transportation & Auto Expenses	\$266.90
Personal Care & Smoking Products	\$374.26

Source: Claritas, Inc.

Table 7: Supportable Space Estimates (SF), 2015

Product Category	Unmet Spending Potential (Lost Sales)	Sales Productivity Median	Net New Supportable Space (SF)
Outer Market Area			
Household Furnishings & Appliances	\$304,159,472	/ \$259.43	1,172,414
Housing Related & Personal	\$117,964,958	/ \$294.15	401,037
Apparel	\$508,885,845	/ \$252.41	2,016,108
Total	\$931,010,275		3,589,559
Middle Market Area			
Food Away From Home & Alcohol	\$249,570,700	/ \$232.83	1,071,901
Sports & Entertainment	\$523,923,255	/ \$225.61	2,322,252
Total	\$773,493,955		3,394,153
Inner Market Area			
Food At Home	(\$40,186,895)	/ \$297.46	(135,100)
Healthcare	\$17,124,894	/ \$450.61	38,004
Transportation & Auto Expenses	(\$18,176,520)	/ \$266.90	(68,102)
Personal Care & Smoking Products	\$46,283,193	/ \$374.26	123,666
Total	\$5,044,672		161,670

Source: Claritas, Inc.

Key Findings

Households from within the outer market area provide support for three categories: household furnishings and appliances, housing related and personal, and apparel. Households living within the boundaries of the middle market area support two categories: food away from home and alcohol, and sports and entertainment. Finally, households from the inner market area support four categories: food at home, healthcare, transportation and auto expenses, and personal care and smoking products.

Household-Based Expenditure Potential

In 2015, households residing in the inner market areas closest to the project site have the potential to spend \$424,941,769 in convenience-oriented retail products. Households comprising the middle market area report a 2015 spending potential of \$1,034,835,789. Finally, it is estimated that households within the outer market area have the potential to spend over \$1,583,485,550 in apparel and home furnishing retail establishments.

Unmet Spending Potential

Total Lost Sales

Claritas, Inc. provides sales data for all retail establishments found in each of the three consumer market areas. The data reflect estimated annual sales volumes for the year 2010. Unmet spending potential represents the total dollars that are either spent by

consumer market area households outside the market areas defined above, or are not being spent at all. It is expected that there will be \$931,010,275 leaking out of the outer market area. There is an additional \$773,493,955 of unmet spending potential forecast for those categories in the middle market area, and another \$63,408,087 of unmet spending potential leaking from the inner market area.

Supportable Space Estimates

To translate the total spending capture for the merchandise categories supported by households in the respective trade areas, the Consultant applied sales per square foot (sales productivity) figures to the unmet spending estimates shown above. Sales productivities are based on industry standards published in Urban Land Institute's *Dollars & Cents of Shopping Centers*. The sales productivities for each merchandise category are then applied to the unmet spending potential estimates derived above. By 2015 the outer market area can support an additional 3,589,559 square feet of additional space in the household furnishings, housing related and personal, and apparel categories. The amount of additional supportable space for the middle market area categories is expected to be about 3,394,153 square feet. Finally, the analysis shows that the inner market area can support an additional 161,670 square feet once the Costco project is expected to be in its stabilized year of operation.

In conclusion, given the size and product line of the proposed Costco, the consumer trade areas can absorb the proposed retail space. For the three market areas, there is more than sufficient market share to absorb the proposed Costco store.



*Traffic and Parking Consultants
Highway and Signal Design*

MICHAEL MARIS ASSOCIATES, INC.

July 6, 2016

Supervisor Williams and Town Board
Chairman McNulty and Planning Board
Town of Patterson
1142 Route 311
Patterson, NY 12563

RE: Patterson Crossing Retail Center
Amended Site Plan Traffic Review

Dear Supervisor, Planning Board Chairman and Board Members:

Michael Maris Associates, Inc. (MMA) has been retained to review the potential traffic impact of the new application to modify previously approved site plans for Patterson Crossing Retail Center.

MMA has been a traffic and parking consulting firm since 1987, during which period it has been involved with hundreds of traffic impact studies for developers and municipalities and has recently provided traffic consulting services to the Town of Greenburgh and the Village of Tarrytown. I have been a traffic consultant for almost 50 years and have worked on thousands of large and small projects throughout the United States and have qualified as a traffic and parking expert in numerous States, municipalities and courts of law (attached is copy of my resume).

It is our understanding that the development of Patterson Crossing was first approved by the Patterson Planning Board in 2008 when it adopted the findings of a DEIS and FEIS that analyzed the impacts of 410,560 sf of retail space. A subsequent request to modify some aspects of the development that did not significantly change the size or type of the development, was reviewed and approved by the Planning Board earlier in 2016. The developer of Patterson Crossing now proposes to further modify the development by replacing a 152,000 sf retail building with a similar sized Costco Discount Club and by replacing a smaller 5,000 sf retail building with a Fueling Station for Costco members. Tim Miller Associates, Inc. (TMA) submitted a letter report entitled Patterson Crossing Retail Center, Amended Site Plan Analysis, dated May 17, 2016 in support of the current application

MMA's review was limited to the currently proposed development changes in order to determine whether they would significantly change the project's traffic impacts to warrant an update of the traffic findings of the DEIS and FEIS. We have completed our review and respectfully submit our observations and findings for the Boards' consideration.

In its letter report of May 17, 2016, TMA concluded that updated analyses and a Traffic Impact Study are not warranted because the development as currently proposed is substantially the same as that approved by the Board in 2008 and earlier in 2016. TMA also stated that traffic in the vicinity of the site has not increased as anticipated in the DEIS and FEIS and, therefore, the combined volumes are the same. We are in disagreement with TMA's conclusion and provide the following observations:

1. Difference in Trip Generations

The most significant aspect in analyzing the impact of new developments is an accurate estimate of its traffic generations. It is our opinion that the new development proposal is substantially different from that analyzed by the DEIS and FEIS and approved in 2008 and earlier in 2016. While it is understood that Costco would replace a retail building of equal size and the Fueling Station would replace a small retail building, the functions of the proposed uses will be different from those of the approved plan and will generate more traffic than was analyzed. Following are some observations regarding the trip generations of the different land uses:

- a. Discount Club Generations - The DEIS and FEIS approved in 2008 and earlier in 2016 did not include the generations of a Costco Discount Club. Although the Costco would replace an approved building, Discount Clubs are known to generate more traffic than general retail uses. For example, trip generation rates published by the Institute of Transportation Engineers (ITE) in its publication entitled Trip Generation, 9th Edition indicate that Discount Clubs generate more traffic. This publication, which is widely accepted as a reliable source, shows the following Average Trip Generation Rates and resulting generations for the two peak hours analyzed in the DEIS and FEIS:

	<u>Peak PM Highway Hour</u>	<u>Peak Saturday Hour</u>
152,000 sf Retail	3.71 trips/1,000 sf = 564	4.82 trips/1,000 sf = 733
152,000 sf Discount Club	4.18 trips/1,000 sf = 635	6.37 trips/1,000 sf = 968

The above comparison of trip generations clearly shows that a Discount Club would generate more traffic than retail space. Further, it is important to note the following regarding the Discount Club generations shown above:

- The rates in the ITE publication reflect different types of Discount Clubs (not just Costco), some of which may generate less traffic than Costco. Surveys performed by MMA at existing Costco Clubs in Melville, NY and Hackensack, NJ identified higher rates than the ITE publication.
- It is known that all shoppers at new retail developments are not new to the area and that some drivers on the surrounding roadway network would stop and shop on their way to another destination (Pass-by Trips). However, due to their requirement for

membership, Discount Clubs do not have as much Pass-by traffic as other retail space. The ITE data indicates that between 26 and 34 percent of the retail generations are already on the roadways (Pass-by Trips). While Pass-by surveys have not been done for Discount Clubs, it is estimated that only 10 percent of their trips are Pass-by.

In summary, from the traffic generation aspect, Discount Clubs are different than typical retail space. Since the DEIS and FEIS that analyzed the Costco building as retail space, their findings do not reflect the actual trip generations and resulting impact of the current proposal.

- b. Fueling Station Generations - The proposed 16-pump Fueling Station will also generate more traffic than the retail space it would replace and analyzed in the DEIS and FEIS. Following is a comparison of the generation based on the Average Rates in the ITE publication:

	<u>Peak PM Highway Hour</u>	<u>Peak Saturday Hour</u>
5,000 sf Retail Space	3.71 trips/1,000 sf = 19	4.82 trips/1,000 sf = 24
16-Pump Fueling Station	13.87 trips/Pump Station = 222	Not Provided

It is noted that the above trip generations for the Fueling Station reflect the trips at the pumps. However, not all these trips will be added to the surrounding roadways since some will be Pass-by and some will also visit Costco (Internal Trips). Based on a study we performed for Costco for a proposed store in Oyster Bay, New York, it is estimated that the Internal Trips will represent approximately 35 percent of the total generations and that the Pass-by Trips will represent another 10 percent. Therefore, the Fueling Station is estimated to generate approximately 122 new trips during the one-hour period. These reduced trips are still substantially more than those of an equal amount of retail space.

2. Difference in Trip Distributions

Another significant aspect of Traffic Impact Studies is the distribution of any development's trip generations onto the surrounding roadways. Obviously, a development that adds traffic to a roadway that already experiences delays will have a much greater impact than if it added traffic to a roadway with excess capacity.

It is our opinion that the proposed Costco and its Fueling Station, which will serve only club members, will have a substantially different distribution than general retail space. For example, it is likely that the Costco patrons will travel a longer distance and may be more inclined to use Interstate Route 84 (I-84). The DEIS and FEIS show that, without any improvements, the I-84 ramp intersections with NYS Route 311 will experience long delays and traffic congestion. It is understood that some improvements are proposed for this

segment of the roadway, but without any new analyses, it is not known whether the proposed improvements will be appropriate or sufficient to mitigate the project's impacts.

3. Change in Existing Traffic Volumes

The TMA letter report states that traffic counts were performed in 2013 and 2014 in the vicinity of Patterson Crossing and that a comparison of the new traffic volumes to those in the DEIS and FEIS indicates that traffic has not increased as they estimated when the DEIS and FEIS were prepared. The TMA report also notes that the combination of the Patterson Crossing generations and the existing volumes would be similar to those analyzed in the DEIS and FEIS and, therefore, a new study is not necessary.

We disagree with TMA's conclusion and note that the purpose of a Traffic Impact Study is to identify a project's impacts on existing conditions. The fact that traffic did not increase as previously anticipated should not be a consideration and does not eliminate the need to study the proposed development's impact. It is not likely that TMA would recommend a new study if the existing traffic volumes increased more than was anticipated while the proposed development did not change. The bottom line is that the proposed development has changed and that its impact on existing conditions must be analyzed.

4. Critical Study Locations

The TMA letter report only looked at the development's driveway at NYS Route 311 and states that it is the most critical location in terms of traffic impact since all of the development's traffic would pass through this one location and since the development's generations at other locations would be somewhat less.

While it is true that all of the development's traffic would pass through its driveway, it is not accurate that the development's greatest impact would be to this one location. The driveway would be a new intersection and its geometry could be designed to serve the anticipated traffic volumes. However, other existing intersections may have limitations that cannot be easily addressed. It is noted that the DEIS shows several locations that, without improvements, experience and will continue to experience traffic congestion, whereas the driveway will operate at acceptable conditions. Based on this fact, it is our opinion that the impact of the revised development plan must be analyzed and that the analyses should be performed for all intersections in the DEIS and FEIS.

5. Conclusion

In conclusion, because of the differences in the estimated trip generations, as well as their potentially different distribution onto the surrounding roadway network, it is our opinion that the proposed plan represents a different development project that warrants new traffic

Supervisor Williams and Town Board
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projections and analyses. Further, the fact that traffic has not have increased as previously estimated should not be a consideration in determining the need for new analyses.

Respectfully submitted,
MICHAEL MARIS ASSOCIATES, INC.

A handwritten signature in black ink, appearing to read "Michael Maris". The signature is written in a cursive, flowing style.

Michael Maris
President
mm
att.



*Traffic and Parking Consultants
Highway and Signal Design*

MICHAEL MARIS ASSOCIATES, INC.

MICHAEL MARIS

Education

Polytechnic Institute of Brooklyn, Courses in Civil Engineering
Pratt Institute, Associate Degree in Building Sciences

Professional Associations

Fellow and Life Member, Institute of Transportation Engineers (ITE)
Member, ITE Expert Witness Council

Experience

In almost fifty years of experience as a Traffic and Parking expert, Michael Maris has worked on thousands of large and small development projects throughout the United States. He has been qualified and testified as a traffic and parking expert in fifteen States and hundreds of municipalities, as well as in Courts of Law. In addition to developer/institutional client, he has provide consulting services to a number of municipalities.

1. **Wilbur Smith and Associates, Inc. (1967 to 1971 and 1974 to 1977)** – In 1967, assisted in data collection and design of signal plans for 3,000 intersections in New York City. In 1974, organized and managed a team of professionals to analyze and design signal plans for 500 intersections in Queens, New York. Also, worked on analyses of the parking requirements and toll collection system for Asbury Park, NJ and analyses of an automated toll collection system for the NY State Thruway Authority.
2. **Madigan-Praeger, Inc. (1971 to 1974)** - Data collection and analyses to determine traffic utilization and location of interchanges for a portion of Interstate Route 80 and analyses to identify the need and location of new interchanges along the Florida Turnpike.
3. **Raymond Keyes and Associates, Inc. (1977 to 1987)** - Directed the traffic division of the firm. Responsibilities included project management and coordination, review of technical analyses, client liaison, and governmental approvals for projects throughout the United States. Studies included traffic impact and transportation studies and site layout/parking design for large and small developments, including regional retail centers, industrial parks, institutional developments, office complexes, and residential developments.
4. **Michael Maris Associates, Inc. (1987 to Present)** - Responsible for all administrative and technical aspects of the firm, including project management/coordination, client liaison, and governmental approvals for projects throughout the United States. Work includes traffic impact and transportation studies and site layout/parking design for large and small developments.

Traffic/Parking Expert Testimony at Courts Of Law

Qualified and provided testimony as an expert in traffic and parking at the following Courts of Law:

Administrative Law Court, Towson, MD
NJ Court of Administrative Law, Newark, NJ
US District Court, White Plains, NY

Traffic/Parking Consultant Services to Governmental Agencies

Provided traffic and parking consulting services to following municipalities and governmental agencies in New York and New Jersey:

Bergen County Utilities Authority, New Jersey	Caldwell, New Jersey
Cherry Hill, New Jersey	Essex County, New Jersey
Great Neck School District, New York	Greenburgh, New York
Hoboken, New Jersey	Hoboken Parking Authority, New Jersey
Jersey City Municipal Utilities Authority, New Jersey	Lake Success, New York
Lynbrook, New York	Tarrytown, New York
Weehawken, New Jersey	Westwood, New Jersey

JAMES BRYAN BACON, ESQ., P.C.

Attorney and Counselor at Law

P.O. Box 575

New Paltz, New York 12561

(845) 419-2338

December 23, 2019

Town of Guilderland Planning Board
Guilderland Town Hall – 2nd Floor
5209 Western Turnpike, P.O. Box 339
Guilderland, N.Y. 12084

*Re: Rapp Road Residential Development and Additional Lands-
Rapp Road Development, LLC*

Dear Chairman Feeney and members of the Board,

I represent a property owner adjacent to the above project and request the final scope be amended to include impacts associated with the inclusion of a Costco warehouse.

As you know, the Board accepted the scoping document as complete on October 23, 2019. The scope identified Site #2 as the location for "...development of a ±160,000 square feet retail building and associated fueling facility..."

However, on November 15, 2019, the applicant, (Pyramid), announced that a Costco wholesale retailer was proposed which would include six fuel islands.

As demonstrated in the administrative reviews for Costcos in downstate New York, Costco's traffic and community character/fiscal impacts are more significant than a general retail use.

For example, trip generation rates published by the Institute of Traffic Engineers (ITE), indicate Discount Clubs, such as Costco, generate more traffic than general retail. (See herewith comments of Michael Maris citing ITE publication Trip Generation, 9th Edition).

Further, concerning community character impacts, a Retail Market Analysis for the Costco in Yorktown, New York, showed while most goods and services would not be impacted, the area's existing gasoline market suffered from an 18 million dollar a year deficit. Thus, Costco's impacts upon the viability of neighboring gasoline stations would be significant as a typical gasoline station might sell 500K to one million gallons of gasoline a year, while Costco reported it expected to sell 7-10 million gallons of gasoline a year in the downstate administrative proceedings.

Therefore, in order to adequately examine Costco's impacts upon traffic and community character under SEQRA, the scope should be amended to reflect a Discount Club proposed for Site #2. All environmental impacts should be assessed on that basis and the applicant should identify the frequency and size of fuel truck deliveries in order to properly assess traffic and market impacts.

Respectfully,


James Bacon

Cc: Zoning Board of Appeals

As set forth below, pursuant to SEQRA, the Town Code and applicable case law, the project requires re-design as well as a supplemental EIS (SEIS).

POINT I

THE TOWN’S VIOLATIONS OF SEQRA REQUIRE RE-ESTABLISHMENT OF LEAD AGENCY

Attached herewith is the memorandum of law submitted to the federal court in seeking to enjoin the Planning Board’s SEQRA review and require the re-establishment of lead agency. As detailed therein, the clear cutting of more than two acres of woodlands on Site No. 2, establishment of lead agency before disclosing the action included the development of Sites 2 and 3 and segmentation demonstrates transfer of lead agency status is the appropriate remedy. Therefore, it is respectfully requested that the Planning Board recuse itself and re-circulate all SEQRA documents to all involved agencies to allow re-establishment of lead agency.

POINT II

THE PROJECT IS INCONSISTENT WITH PURPOSES AND GOALS OF BOTH THE WESTMERE CORRIDOR STUDY AND THE TOWN’S TOD ZONING OVERLAY

The proposed use of Site No. 2 as a Costco selling gasoline is contrary to the purposes and goals of the Westmere Corridor Study, (WCS), and the Town’s Transit-Oriented District (TOD) zoning overlay.

As background, it well known that traffic congestion on Western Avenue in the Town of Guilderland is a public, health and safety hazard. According to the state Department of Transportation, the average traffic volume is “more than 29,000 vehicles a day from the proposed Costco site west to Route 155 and more than 51,000 from the Costco site east to Fuller Road.” <https://dailygazette.com/article/2019/11/26/costco-would-take-place-of-mostly-vacant-neighborhood>.

Due to the severe congestion, the Town studied and identified planning and zoning measures in the 2016 Westmere Corridor Study (WCS) to encourage specific types of development to reduce congestion on Western Avenue.

The WCS identified a number of priorities for a new zoning overlay district, the Transit Oriented District (TOD) to:

- Encourage reinvestment and redevelopment of vacant/underutilized buildings and sites...accompanied by repairs and upgrades to the existing infrastructure. (p. IV-16).

- Prepare an access management study/plan to develop guidelines for shared access, shared parking, and the development of access roads. Priority should be given to more creative solutions that provide common parking and shared access for multiple owners.” (p. IV-20)
- Develop a pedestrian access plan for the Route 20 corridor that provides for continuous sidewalks and the development of appropriately located linkages to adjoining neighborhoods.” (p. IV- 20)
- Consider using the Crossgates Ring Road as a bypass around congestion on Route 20/Western Avenue, perhaps with a physical linkage over the Northway to Stuyvesant Plaza.

Most significantly:

A TOD strategy inherently requires a focus on improving access to non-auto oriented modes of transportation and integrated street networks.

WCS at pg. 62, emphasis added.

The WSC pinpointed the Costco site stating:

While several elements of TOD are recommended throughout the Westmere Corridor with regard to access management, traffic calming, pedestrian, bicycle and transit improvements, this particular part of the corridor has critical features that would be necessary for a successful TOD neighborhood. These features include the availability of underutilized or vacant land adjacent to major destinations that attract high volumes of people (such as shopping, entertainment and employment centers) and could support high ridership transit stops. **The missing elements, mixed-use structures and compact, walkable more “urban” form can be created when land exists to integrate and transition uses into a more connected area with short street blocks, mixed use buildings, public spaces and a strong pedestrian, bicycle and transit presence.**

WCS at pg. 56, emphasis added.

And, the WCS warned against the loss of neighborhoods in the TOD overlay:

Focusing density in the proposed TOD area will help protect viable residential areas and neighborhoods from commercial and higher density residential development pressure.

WCS at page 69.

Time and time again, the WCS stresses avoiding automobile- dependent uses, *i.e.* the project area should “Support a Wide Variety of Non-Auto Dependent Land Uses” to “create a walkable, viable mixed use community”:

Within the [proposed TOD] overlay, the permitted uses should include a wide range of residential, institutional, retail, service, entertainment and employment uses found in the “General Business” (GB) District. However, **several auto-dependent uses are also permitted that should be discouraged on the interior of the overlay district area, such as car dealerships, car rentals, car washes, service garages, drive through windows and other like uses.**

WCS pgs. 62-63, emphasis added. Indeed:

A cornerstone element of TOD is to support transit and **reduced emphasis on the automobile** through walkable, compact design. **An abundance of surface parking directly conflicts with this concept in both form and function.**

WCS pg. 64, emphasis added.

The Town adopted its Transit-Oriented Development (TOD) District in 2018. The law specifies its purpose:

A. Purpose. The Transit-Oriented Development (TOD) District is designed to implement the recommendations of the Westmere Corridor Study (study) by using an overlay district to support and incentivize development that **adequately protects nearby residential neighborhoods** and utilizes resources within and near the TOD's boundary, including regional shopping, entertainment, and employment centers, a robust transit service with high ridership and proposed enhancements, direct vehicle access to the interstate highway system, and a nearby local business community. The TOD District encourages more compact development, **traffic-calming measures**, better access management, **improving the environment for non-automobile-oriented modes of transportation**, **reducing the number of required parking spaces**, supporting mixed-use buildings and pedestrian linkages, and **focusing intense development away from existing residential neighborhoods.**

§ 280-18.1, emphasis added.

As set forth below, the Costco project is inherently contrary to the priorities and purposes expressed by the WCS and the TOD zone.

A. Elimination of a residential neighborhood is contrary to the TOD zone

A cornerstone of the TOD was to:

Create... neighborhoods or areas that are pedestrian friendly, supportive of transit and emphasize alternate modes of transportation. The TOD model provides a mix of

housing, shopping, entertainment and employment within walking distance (1/2 mile) of transit... A TOD neighborhood is expected to be fairly dense to keep walking distances shorter and maximize the number of people living in, working and visiting the area.

CWS at pg. 56. Emphasis added.

Here, there is a neighborhood comprised of approximately 20 homes arranged around the four interconnected streets of Gabriel Terrace, Lawton Terrace, Rielton Court, and Tiernan Court. The CWS Map 5-1 identifies this neighborhood as the center of the TOD overlay.

While the DEIS correctly states that single family use is not permitted as a “new” TOD use, that does not mean existing neighborhoods should be demolished. In fact, the CWS specifically stated that streets like Gabriel Terrace, Lawton Terrace, Rielton Court, and Tiernan Court were of the scale and magnitude to be promoted:

The design of new streets in the proposed TOD area should consider shorter blocks, sidewalks and bicycle travel lanes. The following standards could be incorporated: Small blocks, generally 300 feet long or less, with 400 feet as the maximum length of any block or single building.

CWS at page 65.

Moreover, the CWS specifically cited the potential extension of Lawton Terrace and Rielton Court as examples of how this neighborhood could be transformed and integrated into a larger cohesive mixed-use area:

Within the area identified for a potential TOD there are currently a number of existing streets, including dead end neighborhood streets running north and south off Western Avenue and service roads such as Rapp Road and the Crossgates Access Road (ring road). **There are opportunities for future connections to be made across undeveloped or underutilized parcels that could create an integrated street network and pedestrian connections.** The establishment of desired street connections in either a plan or within zoning should be part of the TOD Overlay District. Future development should integrate buildings and streets into a pedestrian and transit environment using build-to lines, maximum setbacks and other site developments techniques.

CWS at page 64, emphasis added.

However, rather than “creating a neighborhood” as repeatedly called for in the CWS, (pgs. 56, 60), the Applicant proposes to entirely eliminate this neighborhood that has functioned for more than 50 years as a safe and secure haven for its residents and has been used by the neighboring Westmere residents for recreational walking and bicycling.

The project proposes no extension of Lawton Terrace or Rielton Court to integrate the existing homes into a larger, cohesive, mutually-beneficial mixed use development.

Instead, the entire neighborhood is to be demolished destroying a once vibrant community and its social threads. The replacement is a single retail use - 700 parking spaces and a 160,000 sq. ft. big box retail store. That proposal is not mixed-use, integrates no street designs or connections and does not meet the CWS' goal of "ringing the mall with smaller businesses creating more of a streetwall effect with community scaled street connections." (pg. 64).

The fact that Pyramid has purchased most of the homes in the neighborhood does not cede the Town's planning and zoning control to Pyramid.

B. Costco's scale and single use is contrary to the TOD purposes

Costco's massive scale and 100% reliance on automobile traffic and explosion in traffic trips violates everything the WCS and TOD were meant to accomplish. There is no "model neighborhood design" and no "mix of housing, shopping, entertainment and employment." And no pedestrian or cyclist is going to carry off multiple boxes of wholesale goods.

There is no more higher traffic generator than a Costco selling cheap fuel. Based on Costco's own reporting and traffic counts at other Costcos, (as detailed below), there will be hundreds of new vehicles flooding the current transportation network. There is no "traffic calming, and pedestrian, bicycle and transit improvements" that can mitigate the new traffic volume. And, a parking lot with 700 parking spaces is entirely at odds with the CWS' recommendation to "Reduce Surface Parking Lots." CWS at 5.2.1.5. And, there is no hint of any potential for shared parking as called for by the CWS. (At pg. 64).

In sum, a Costco with 700 parking spaces selling 7-10 million gallons of gasoline a year, (the Costco in New Rochelle sells 1.4 million gallons every month), conflicts with virtually every sentence in the WCS. While "[a] TOD neighborhood is expected to be fairly dense to keep walking distances shorter and maximize the number of people living, working and visiting the area," an existing residential neighborhood will be replaced by single automobile-centric use.

The County Planning Board's comments are especially relevant:

The purpose of a "Transit Oriented District (TOD) is to encourage more compact development, traffic measures, better access management, improving the environment for non-automobile oriented modes of transportation, reducing the number of required parking spaces, supporting mixed use building and pedestrian linkages, and focusing intense development away from existing residential neighborhoods." The TOG board should encourage significantly reducing the number of parking spaces provide to coincide with the purpose of the TOD....

The proposed single use project does not appear to meet the intent of the re-zoning. If the development is proposed to be in multiple phases then the applicant should demonstrate how the proposed development with or without future phases will support the goals and objectives of the TOD District.

POINT III

THE LEAD AGENCY VIOLATED SEQRA BY ALLOWING THE APPLICANT TO PROPOSE THE COSTCO APPLICATION AFTER COMPLETING SCOPING

Significantly:

The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional, and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an Environmental Impact Statement.

6 New York Codes, Rules and Regulations (NYCRR) Part 617.1(c).

Agencies must strictly adhere to SEQRA's procedures:

SEQRA's policy of injecting environmental considerations into governmental decisionmaking is "effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations.

N.Y.C. Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 348 (2003).

Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

Id. at 348, quoting *Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 348 (1996); *Bauer v County of Tompkins*, 57 AD3d 1152 (3d Dept 2008); "Strict compliance with SEQRA's procedural mechanisms is mandated and anything less will result in annulment of the determination."

Here, rather than "meticulous care" in disclosing every element of the overall project, the Applicant kept secret for more than two years their plan to bring Costco to Site No. 2.

As shown by the Town's website page for the project, there is a link identified as "Stormwater Management Plan Site 2 – Costco."

That link includes a 33-page “Report of Geotechnical Exploration” for a “Proposed COSTCO Wholesale” and references a site plan entitled “Concept Plan SK-2 Revised COSTCO Wholesale, Crossgates Mall, Albany, New York” prepared by Maser Consulting P.A.

The site plan is dated November 1, 2017. It also references a preliminary survey plan entitled “ALTA/NSPS Land Title Survey for COSTCO, Inc; Albany Crossgates Mall,” prepared by Maser Consulting P.A. dated January 5, 2018.

There are dozens of documents from 2018 including Soil Boring plans, (1/2/18), a Soil Profile Map, (2/9/18), Subsurface Profile Maps, (2/12/18), Exploration Logs, (1/12/18) and a lengthy Laboratory Analysis dated 2/15/18.

Work on the Costco site plans continued through 2018 as evidenced by a number of maps, including a National Inventory Wetland Map dated 7/16/18, an Environmental Resource Map dated 8/3/18, Erosion and Sediment Control Plans dated 11/26/18, (7 of 20), and an Erosion Control Final Phase plan dated 11/26/18 , (10 of 20).

When the Applicant appeared before the Planning Board on December 12, 2018, no mention was made of the Costco project. Only the 222-unit Rapp Road segment was discussed as being proposed.

Consequently, the Board circulated its intent to be lead agency advising it intended to conduct a coordinated review on the 222-unit project.

Yet, work on the Costco project continued under the radar as the following month, the Applicant’s consultant produced detailed stormwater calculations in a report entitled “Hydrocad Model Output” (3/27/19). March 2019 – Stormwater Operation and Maintenance Plan” for “Costco Wholesale.”

Before the County Planning Board in March and April 2019, and into July 2019, the Applicant continued to describe the action as primarily residential and limited to Site No. 1:

The proposed action consists of 222 units across five buildings, on a +/-19.68 acre site at Rapp Road, with surface and indoor parking within the buildings, related utilities, sidewalks and ancillary facilities, along with approximately 3,900 SF of commercial area.

County Planning Board Minutes 3/19-4/19.

Then, in August 2019, the Applicant, (or Town), issued Part 3 of the EAF which for the first time states:

A second development area (Site 2 on the attached plan), is a proposed retail site. Site 2 is located on the corner of Crossgates Mall Road and Western Avenue and proposes ±160,000 square foot of retail and a fueling facility on ± 15 acres.

The Town established a Scoping comment period from 8/15/19-10/2/19, yet, the Costco plans remained secret.

As late as September 25, 2019, the Town Planner still advised the public that Sites No. 2 and 3 had been assigned “**a certain number of square feet... for potential buildout**” of those parcels. 9/25/18 Planning Board video at approximately 37 minutes and 40 seconds.

Costco was not announced as the proposed tenant of Site No. 2 until November 19, 2019, almost a month after the close of the scoping comments even though the Applicant had been studying Costco at that location for two years.

As above, the Applicant knew Costco was going to be the tenant of Site No. 2 since November 2017. This evidence suggests the lead agency was well-aware that Costco was going to be the occupant of Site No. 2. However, the Costco plan was not disclosed in the project’s EAF or the scoping document.

As set forth below, Costco’s proposed use presents a unique classification of impacts. A big box store selling fuel to members only is a new use not contemplated by the Code and Costco’s traffic generation is higher than other big box retailers. (See F&A comments.) And, Costco will have significant impacts upon community services and community character, especially other businesses on Western Avenue, including gasoline retailers.

By withholding this information from the public, the Applicant violated SEQRA’s requirement that a project’s environmental considerations be considered at the earliest possible time of governmental decision making. *Matter of WEOK Broadcasting Corp. v Planning Bd.*, 165 AD2d 578 (3d Dept 1991).

POINT IV

COSTCO’S MERGER OF RETAIL USE AND GASOLINE SALES IS A NEW USE IN THE TOWN OF GUILDERLAND AND THEREFORE IS PROHIBITED

A use comprised of a big box retailer selling fuel is not listed as a permitted use and is therefore prohibited by the Town of Guilderland’s zoning code (Code).

The Guilderland Code defines “use” as:

A. The purpose for which a building, structure or land may be arranged, designed, intended, maintained or occupied.

B. An occupation, business activity or operation conducted (or intended to be conducted) in a building or other structure or on land.

Code at §280-5.

And, the Code specifically prohibits any use that is not “in conformity” with the Code’s listed uses:

No structure shall be erected, moved, altered or enlarged, **no use shall take place**, be moved, altered or enlarged, and no land development activity shall take place, **except in conformity with the regulations for the district** in which the lot, structure or use is located and other requirements of this chapter. Where this chapter imposes greater restrictions than those imposed or required by other rules or regulations or ordinances, the provisions of this chapter shall control.

Code at §280-6, emphasis added.

Here, Costco presents an unprecedented combination of retail and services:

The Costco services role call: gas stations, pharmacies, food courts, hearing aid centers, photo processing centers, travel centers, optical dispensing centers (at a majority of its warehouses), **Budget truck rental**, business printing, prescription programs, **RV rentals**, mortgage purchase and refinancing, life insurance, dental plans, identification protection, **Costco auto program**, auto and home insurance, business and personal checks, bottled water delivery, business health insurance and **Costco auto leasing**....

These services account for about 20 percent of Costco’s annual revenues, or about \$30 billion.

Perhaps the most powerful driver for visitation and new membership are Costco’s gas stations. Costco not only has cheaper gas than stations it directly competes with, but it’s also less expensive than other warehouse club chains. This alone compels consumers to become members. There are about 567 Costco gas stations connected to their roughly 768 warehouses across the globe, accounting for roughly \$9 billion in sales or about a third of the total revenues of ancillary services.

While Costco is likely not the first retailer to adopt and build a major services business, it may be the largest in terms of revenues.

<https://www.therobinreport.com/costcos-ancillary-services-are-a-poster-child-for-the-future/>

As detailed below, Costco’s combining gasoline sales with big box retail use is unprecedented in the Town and not permitted by the Code.

A. The Code does not list a big box store selling gasoline as a use

It is well settled that “[i]t is a basic tenet of zoning jurisprudence that an ordinance which lists permitted uses excludes any uses that are not listed.” *Incorporated Vil. of Old Westbury v Alljay Farms*, 100 AD2d 574, 575 (2d Dept 1984), *mod* 64 NY2d 798 (1985).

Here, the proposed “use” is “a Costco retail facility,” - a “+/- 158,202 square foot retail facility with ancillary facilities and infrastructure.” Costco’s ancillary facilities include selling gasoline. November 15, 2019 Special Use Application at pages 1 and 5 at <https://www.townofguilderland.org/zoning-board-appeals/pages/costco-special-use-permit-application>.

The Applicant argues that its use is actual two uses identified in the Town’s Transit Oriented Development (TOD) zone – “Retail, General” and “Automobile Service Station.” https://www.townofguilderland.org/sites/guilderlandny/files/pages/costco_application.pdf.

However, while the TOD zone permits those two uses as independent principal uses, the Applicant’s proposed use is neither “Retail, General” nor an “Automobile Service Station” as defined by the Code.

Instead, the Applicant’s use is a big box store selling gasoline as one of its many ancillary services.

On point is the matter of *Incorporated Vil. of Old Westbury*, cited above, where the applicant argued that two uses could be merged. The Court held:

[T]he... Town’s] definition of farming contemplated the cultivation of crops as a principal use while permitting “incidental live stock” solely as an accessory use [citations omitted]. There is a substantial difference between using land for the cultivation of crops with the accessory right to maintain “incidental live stock” and using it for the breeding and training of horses as an independent and dominant commercial enterprise.

Thus, just as the definition of “farming” could not accommodate a horse breeding operation, here, the definition of “Retail, General” cannot be redefined to include the sale of gasoline, subordinate to the main use of the site as a 160,000 sq. ft. Costco retail outlet.

Indeed, as discussed below, not only is the Code devoid of any provision allowing a large scale retail store to sell gasoline, Costco’s gasoline facility is not an Automobile Service Station, (AuSS), as defined by the Code.

i. “Retail, General”

The Code defines “Retail, General” as “[a] retail use in a structure with a maximum gross floor area of 250,000 square feet.”

The Costco store standing alone fits that definition. However, the sale of gasoline is not permitted under a “Retail, General” use. Instead, the sale of gasoline is only permitted by an AuSS.

ii. “Automobile Service Station” (AuSS)

The Code defines an AuSS as:

A place where gasoline or other motor vehicle engine fuel (stored only in underground tanks), kerosene, motor oil, lubricants, grease (for operation of motor vehicles), **or minor accessories are sold directly to the public** on the premises and where the servicing or repair of automobiles, or installation of mufflers or other specialty items, may occur. **An automobile service station shall not include sale or storage of automobiles or trailers**, new or used, and shall be licensed by the NYS Department of Motor Vehicles. See § 280-40, Supplemental regulations.

§280-5 Zoning Code, emphasis added.

a. “Minor Accessories”

The AuSS definition limits the sale of other non-petroleum retail items to “minor accessories.” The definition does not permit large scale retail. Obviously, Costco’s purpose is to sell far more retail goods than “minor accessories.”

Moreover, the Code provides two definitions for a convenience store – one that sells gasoline and one that does not. (§280-5).

There is no similar provision regarding big box stores selling gasoline.

Thus, had the Town determined that both big box stores and convenience stores could sell gasoline, the Town would have included a separate definition in the Code. It did not. Thus, under the well-settled rules of statutory construction, the Town’s inclusion of gasoline sales for convenience stores but not larger retail stores forbids gasoline sales by big box stores.

b. Gasoline “sold directly to the public”

Costco does not sell gasoline “directly to the public.” Instead, it sells gasoline only to its members. For this reason alone, Costco’s fueling facility is not an Automobile Service Station as defined by the Guilderland zoning code.

c. Prohibition of the sale of automobiles or trailers

The Code’s definition prohibits an AuSS from selling vehicles: “[a]n automobile service station shall not include sale or storage of automobiles or trailers, new or used.” Yet, Costco offers the sale of automobiles and trailers for its members. See Affidavit of James Calvin¹ herewith dated February 27, 2020 at ¶11 and description of Costco’s ancillary services above.

¹ James Calvin is the Chief Executive Officer of the New York Association of Convenience Stores, a private, not-for-profit trade organization representing thousands of neighborhood convenience stores and mini-marts statewide.

In sum, the Costco store is inseparable from its fueling facility as it is located on the same tax lot, operated by Costco employees and sells only Costco's special brand of Kirkland signature gasoline.

Thus, even if Costco's fueling facility fit the AuSS definition, it would be an unlawful conversion of a principal use to an accessory use. (See *Hassett v Horn* 23 NY2d 745 [1968] where the Court held that automobile servicing and retail uses were not accessory to each other, and set aside the special exemption permit that had allowed the auto repair facility to be operated as an accessory use to retail.)

B. The Code prohibits the Costco fueling facility as an accessory use

Costco's proposed sale of gasoline falls squarely within the Code's definition of accessory use:

A use that is incidental and subordinate to the principal use and located on the same lot with such principal use.

Guilderland Code §280-5.

Costco's fueling facilities meet this definition.

First, Costco's fueling facility is located on the same tax lot as Costco's warehouse.

Second, Costco's fueling facility is incidental to Costco's warehouse as noted in the DEIS:

[The Costco site] is analyzed for development of a ±160,000 square feet Costco retail facility and related fueling facility with a kiosk, and associated driveways, parking areas, and other infrastructure.

DEIS page 30. Costco's fueling facility occupies a minor fraction of the total square footage of Costco's retail facility and thus is clearly subordinate in area.

Third, Costco itself defines its fueling facilities as subordinate in extent to its primary use. Gasoline is one of many "[a]ncillary businesses within or next to our warehouses [to] provide expanded products and services and encourage members to shop more frequently." These "ancillary" retail services include pharmacies, optical and hearing aid centers, food courts, and travel services and together total 18% of overall sales. See Affidavit of James Calvin at ¶¶19, 20 citing Costco's 2018 Annual Report.

Costco's fueling facilities are fully merged with Costco's operations and are unique in that they sell fuel only to Costco members.

And, Costco's Annual Reports indicate a more than 20-year record of transporting, handling and delivering gasoline to its members at its 497+ fueling facilities in the United States.

As further proof of the merger of the two uses, Costco's fueling facility only sells Costco's brand of gasoline, *i.e.* "Costco offers a unique blend of gasoline as one of its Kirkland Signature™ products." (See Annual Costco Reports).

Also, the fact that 100% of the fuel customers are Costco members proves its fueling facility is incidental to Costco's primary use. *Aim Rent A Car, Inc. v Zoning Bd. of Appeals*, 156 AD2d 323, 324 (2d Dept 1989).

Moreover, unlike the Code's definition of an AuSS where gasoline is the primary retail product, Costco simply uses low cost gasoline as a means to draw Costco customers to its primary warehouse:

We believe that our gasoline business draws members but it generally has a significantly lower gross margin percentage relative to our nongasoline business.

See Affidavit of James Calvin at ¶14, citing Costco's 2018 Annual Report.²

Therefore, Costco's Annual Reports prove Costco's fueling facility is "incidental and subordinate to the principal use" of Costco's principal warehouse and therefore is an accessory use as defined by Guilderland.

And significantly, restricting the fueling facility to Costco members-only defines the use as accessory as a matter of law. (See *7-11 Tours, Inc. v Board of Zoning Appeals*, 90 AD2d 486 [2d Dept 1982]; "[a]s a matter of law, a travel agency could not be considered an accessory use to a motel unless its services were restricted to the guests of the motel.")

Similarly, in *New York Ambassador, Inc. v Board of Standards & Appeals*, 281 AD 342, (1st Dept 1953), a hotel's laundry service was an accessory use because it was limited to the hotel's guests. (See also, *Dellwood Dairy Co. v City of New Rochelle*, 7 NY2d 374, [1960], restricting vending machine sales to hotel guests rendered the sales an accessory use.)

By contrast, where retail sales are not restricted and open to the public, the use is not accessory.

For example, in *Matter of La Vecchia v Board of Stds. & Appeals of City of N.Y.*, 26 Misc2d 39, (Sup Ct, Bronx County 1960), a hotel's bowling alley that was not restricted to guests was not an accessory use. (See also *7-11 Tours, Inc.* cited above.)

And, in *Cord Meyer Dev. Co. v Bell Bay Drugs, Inc.*, 25 AD2d 744 (2d Dept 1966), *reversed on other grounds*, 20 NY2d 211 (1967), a pharmacy was not an accessory use where it was open to the public rather than restricted to serving "tenants-only" in an apartment building.

Here, again, Costco's gasoline cannot be purchased by the public. Thus, as a matter of law, Costco's "members-only" restriction defines its fueling facility as an accessory use.

² See: <https://www.sec.gov/Archives/edgar/data/909832/000090983218000013/cost10k9218.htm#sB7C2BA5831435E409906549BACAA1ECF>

Notably, Costco has argued successfully in other states that its fueling facilities are accessory uses to its primary retail stores.

For example, in Pennsylvania litigation, the Court held:

Costco argues that its evidence proved that gasoline sales are subordinate to and customarily incidental to Costco's permitted-by-right retail use. We agree that **Costco's evidence established that gasoline filling stations are subordinate to and customarily incidental to its retail use.**

In re Appeal of Costco Wholesale Corp., 49 A.3d 535 (Pa. Commw. Ct. 2012) *app. den.* 63 A.3d 1250 (Pa. 2013) at footnote 7, emphasis added.

Further, in Connecticut, Costco sought and received approval from the Town of Brookfield to allow Costco's fueling facility as an accessory use.³

In sum, as above, §280-6 of the Code prohibits any use that is not specifically authorized. A big box store selling gasoline is that type of use. It is not listed as a permitted use and does not conform to either the Code's definition of Retail, General or an Automobile Service Station. To permit such a use would render the Code's definitions inoperable and therefore be unlawful. (See McKinney's Cons Laws of NY, *op. cit.*, § 98; *Pearson v Pearson*, 81 AD2d 291, 293 [2d Dept 1981] and.; *Grich v Wood & Hyde Leather Co.*, 74 AD2d 183, 184 [3d Dept 1980]; [i]t is also a rule of statutory construction that 'effect and meaning must, if possible, be given to the entire statute and every part and word thereof.'")

C. Costco's fueling facility is not an independent use

The Applicant's special use permit application argues that Costco's fueling facility is an independent use falling under the definition of AuSS.

However, Costco's fueling facility is not an independent use and could never survive independent from the Costco retail facility.

Mr. Calvin confirms that an independent Costco gasoline station is impossible:

[B]ased on my familiarity with hundreds of gas stations in New York and familiarity with fuel facilities accompanying big box retailers such as Costco, Sam's Club and BJ's, a Costco fueling station without a supporting membership scheme is not economically viable.

³ Notably, the Town of Brookfield defines accessory use as:

A land use customarily incidental and clearly subordinate to the principal use or building and located on the same lot with such principal use or building.

Town of Brookfield, Connecticut zoning regulations §242-202.

Calvin Affidavit at ¶12. Indeed:

Claiming that a fueling facility with a kiosk could survive independently of the Costco warehouse is like claiming that the earth could survive independently of the sun. Removing the nurturing radiance and magnetic pull of the Costco warehouse would fundamentally alter the underlying operating conditions of the orbiting fueling facility, exposing it to economic peril...

Id. at ¶16.

Importantly, Costco freely admits that its gasoline “has a significantly lower gross margin percentage relative to our nongasoline business.” (See above pg. 14.) It would be impossible to run a stand-alone business relying 100% on that portion of your business having a “significantly lower gross margin percentage” as compared with your core business.

Indeed, as proved by the closed down Sunoco located on Western Avenue just west of the Crossgates mall entrance – which sold unrestricted profit margin gasoline - even if a stand-alone Costco fueling facility was built, it could not be sustained without support from at least a convenience store.

In fact, there is no such thing as a Costco standalone gasoline station. There is not one in the whole country (as proved by examination of Costco’s annual reports going back to 1999.)

No membership-only fueling facility operates without the benefit of the parent retail operation, whether it is Costco, BJs or Sam’s Club.

Therefore, because the Costco fueling facility is not an independent use and the hard evidence, (Calvin Affidavit, Costco’s annual reports and the closed down Sunoco), all demonstrate that theoretical independence from Costco, (or a convenience store), is impossible, the Costco fueling facility cannot be considered an independent use as defined by the Code.

Further, Costco’s Tire Center is part of the retail giant’s building. Costco’s website explains:

WHAT SERVICES DOES THE COSTCO TIRE CENTER PROVIDE?

The Costco Tire Center offers several installation and maintenance services to get our members on the road, including rotation, balance, nitrogen inflation, nitrogen conversion, and flat repair.

Costco will install any loose trailer tire with the exact same size and load index tire that is currently on the wheel...

https://customerservice.costco.com/app/answers/detail/a_id/9231/~tire-center-faqs#2.

In sum, the meaning of the Guilderland Code is clear in prohibiting a big box retail use adding gasoline sales. The Town Code lists AuSSs as a principal use and not as an accessory use. In light of this clear representation in the Code, no deference is afforded the Board in interpreting the Code any differently:

Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used.

Mamaroneck Beach & Yacht Club, Inc. v Zoning Bd. of Appeals of the Vil. of Mamaroneck, 14 Misc 3d 1221(A), (Sup Ct, Westchester County 2007) *aff'd* 53 AD3d 494 (2d Dept 2008).

The Applicant cannot force a new interpretation of the Town Code. Doing so would be annulled as arbitrary capricious and an abuse of discretion. See *Fornaby v Feriola*, 18 AD2d 215 (2d Dept 1963), where proposed use of a gas station was not permitted in that zone.

POINT V

A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED

SEQRA provides:

The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:

- (‘a’) changes proposed for the project; or
- (‘b’) newly discovered information; or
- (‘c’) a change in circumstances related to the project.⁴

If the lead agency learns of important new issues about significant adverse environmental effects regarding the proposed action in the course of receiving public comments or issues that were omitted or not adequately addressed in an EIS, the lead agency must require the preparation of the SEIS in order to solicit additional public comment on the new issues.⁵ The cure requires the lead agency to prepare a new scoping document requesting not only compliance with all environmental regulations but also a reasonable range of alternatives that will “minimize to the maximum extent practicable” impacts to the environment. ECL §8-0109(2)(f).

⁴ 6 NYCRR §617.9(a)(7)(i).

⁵ 6 NYCRR §617.9(a)(7); and see discussion of *VLG Real Estate Developers v Goold*, Index No. 170227 (Sup. Ct. Rensselear County, December 19, 1989) “Environmental Impact Review in New York State,” *Gerrard, Ruzow, Weinberg* at §3.13[1]).

Here, Ferrandino and Associates, (F&A), reviewed the DEIS and conducted reconnaissance of the area surrounding the project site. F&A have a long history in analyzing projects such as Costco.

As shown by F&A's report, the DEIS utterly fails to contain even the most basic data that would allow analysis of the project's impacts. In every category examined by F&A, the DEIS analysis was determined incomplete. Rather than repeating all of the DEIS' failings here, I note F&A's summary:

- The DEIS lacks a fiscal impact analysis pertaining to community services. Tax revenues must be balanced against the cost of municipal services...
- The Economic and Fiscal Impact Analysis in Appendix H does not address costs related to community services in any respect.....
- A full market study is needed to better understand projected revenues to be generated by the proposed project. In addition, the data cited by the applicant must be subject to public review...
- [C]ontrary to SEQRA requirements, the applicant failed to provide any assessment related to impacts on community character and the associated fiscal impacts potentially resulting in displacement and blight.
- [M]any of the assumptions used to arrive at traffic generation rates are not fully supported by adequate documentation.
- [T]hroughout the DEIS, the applicant cites studies without the requisite documentation to verify the assumptions used. The data cited by the applicant must be subject to public review. Therefore, all relevant documents, studies, internal analyses, etc. should be provided in supplemental appendices. In addition, the fiscal analysis provided in the DEIS must be balanced and robust and a community character assessment must be provided to comply with the "hard look" required by SEQRA.

Certain defects in the DEIS analysis are surprising given that I placed the Planning Board on notice by submitting F&A's analysis of the Costco application in Yorktown, New York – completed on behalf of Costco – to this Board on December 23, 2019, (and the Town's ZBA). (See attached.) The F&A analysis of the Yorktown Costco, is an example of the fiscal/community character impact analysis that SEQRA requires for this type of project.

And, my December 23, 2019, letter to the Board stated that "the applicant should identify the frequency and size of fuel truck deliveries in order to properly assess traffic and market impacts." The lead agency's failure to consider my comments was irrational and arbitrary:

[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully

evaluated the project and its alternatives, these comments may not simply be ignored. There must be a good faith, reasoned analysis in response.

Blik v Town of Webster, 104 Misc2d 852, 863 (Sup Ct Monroe Co 1980) citing *Monroe County Conservation Council v Volpe*, 472 F2d 693, 697 (2d Cir. 1972).

A. Changing the project to include a Costco after Scoping

The Applicant was well-aware since November 2017 that Costco would be the occupant of Site No. 2.

Industry experts identify Costco as unique:

Costco has what some call a cult following. At the very least it's an addictive treasure hunt destination that can't be replicated by others online or offline. I coined the description of their loyal customers as "Costcoholics." Costco carries narrow, highly curated assortments (based on local preferences) of food and beverages, encompassing dry and packaged foods, alcoholic (largest wine purveyor in the U.S.) and nonalcoholic beverages, snack foods, candy, fresh produce, meat, deli and bakery. They carry apparel and small appliances; hardlines include larger appliances, electronics, home improvement merchandise, health and beauty products. And all of these categories are priced lower than Amazon can even match. Costco is able to maintain their pricing strategy because their members (around 94 million in 2018) pay an annual fee of \$60 (\$120 for a premium membership) and 90 percent rejoin every year. The membership fees account for about 75 percent of Costco's earnings. That's why Costco's competitive pricing trumps everybody else, Amazon included. Annual revenues are pushing towards \$150 billion, growing 8 to 9 percent annually.

Costco turns over its entire inventory 12 times per year, which makes the Costcoholics return faster and more often to get their fix (an average of three times a week). And then there's the luxury "surprise" of the week, the totally unexpected treasure that one might find in upscale department stores, certainly not in Costco. Surprises like Waterford Crystal, Coach handbags, Omega watches, Andrew Marc, Calvin Klein, Adidas, Chanel, Breitling and many more are offered at incredibly low prices. Consumers hunt for these surprises weekly. Other treasures include electronics, appliances and other less frequently purchased finds at extremely good prices....

Because Costco constantly delivers beyond expectations, over time they have won their customers' unquestioned loyalty and trust. This allows the brand to expand its DNA to include almost anything their consumers need and want — or more interestingly what they didn't know they wanted until Costco presents it to them.

The Costco services role call: gas stations, pharmacies, food courts, hearing aid centers, photo processing centers, travel centers, optical dispensing centers (at a majority of its warehouses), **Budget truck rental**, business printing, prescription

programs, **RV rentals**, mortgage purchase and refinancing, life insurance, dental plans, identification protection, **Costco auto program**, auto and home insurance, business and personal checks, bottled water delivery, business health insurance and **Costco auto leasing**....

These services account for about 20 percent of Costco's annual revenues, or about \$30 billion.

Perhaps the most powerful driver for visitation and new membership are Costco's gas stations. Costco not only has cheaper gas than stations it directly competes with, but it's also less expensive than other warehouse club chains. This alone compels consumers to become members. There are about 567 Costco gas stations connected to their roughly 768 warehouses across the globe, accounting for roughly \$9 billion in sales or about a third of the total revenues of ancillary services.

While Costco is likely not the first retailer to adopt and build a major services business, it may be the largest in terms of revenues.

<https://www.therobinreport.com/costcos-ancillary-services-are-a-poster-child-for-the-future/>

Yet, a Costco at Site No. 2 was not disclosed when the Town circulated its intent to be lead agency. And, this proposed use was not in Part I or II of the EAF. No mention was made of Costco at the Board's July 2019 meeting and the positive declaration does not mention Costco. Further, the Scoping document does not mention Costco.

Costco is a use that presents singular environmental impacts. The combining of retail and fuel sales is incompatible with the Town's zoning code and presents unique traffic generation and community character and market impacts.

Costco will generate more traffic because unlike other gasoline retailers: Costco's low gasoline prices will be a major attraction drawing Capital Region consumers... [because]... Costco has 'used it [gasoline] as a loss leader' to draw consumers... Prices can be 10 cents to as much as 20 or 30 cents a gallon cheaper than at other gas retailers...

<https://www.fool.com/investing/2017/04/21/this-category-fuels-costcos-success.aspx>

As result, F&A state in their comments:

Costco sells more [gasoline] than Sam's and BJ's, which is the smallest of the three chains. With more than double the revenue of its closest competitor, one may assume that higher sales translate to more trips generated by a typical Costco than either of the other stores.

And, given the wide range of goods and services, the market impact will be greater and the likelihood of area displacement of businesses will be greater than an average retail use.

Therefore, the proposed Costco is “new information” as defined by 6 NYCRR §617.9(a)(7)(i), and details of its operations – such as fuel deliveries, fuel storage and traffic generation associated with its fueling facility – must be identified and discussed in a SEIS.

B. Conclutory Statements unsupported by empirical evidence

It is well settled that “conclutory statement[s], unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration.” See *Tehan v Scrivani*, 97 AD2d 769, 771 (2d Dept 1983), where the court “forewarned” the Planning Board of the Town of Patterson in Putnam County that in making its SEQRA determination it cannot base its determinations on conclutory statements.

As demonstrated by the F&A report, the DEIS is rife with conclutory statements and findings unsupported by any documentation.

In the absence of supporting data, the DEIS fails to comply with SEQRA.

C. Displacement of Businesses

As a matter of law, any SEQRA findings would be reversed for failure to analyze a big box development’s potential displacement of businesses. Specifically:

With respect to the “community character” of the Village, we note that SEQRA defines “environment” as “the physical conditions which will be affected by a proposed action, including . . .existing community or neighborhood character” (ECL 8-0105 [6]), and “require[s] a lead agency to consider more than impacts upon the physical environment,” including “the potential displacement of local residents and businesses” (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 366, 509 NYS2d 499, 502 NE2d 176 [1986]). Therefore, contrary to the Town Board's apparent conclusion, “[a] town . . . board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development” (SEQR Handbook at 179 [3d ed 2010]; see *Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 94-95, 841 NYS2d 321 [2007], lv dismissed 12 NY3d 793, 906 NE2d 1072, 879 NYS2d 39 [2009], 15 NY3d 817, 934 NE2d 882, 908 NYS2d 149 [2010]; *Matter of Wal-Mart Stores v Planning Bd. of Town of N. Elba*, 238 AD2d 93, 98, 668 NYS2d 774 [1998]). Because there is no evidence in the record before us that the Town Board even considered the impact of the project on the community character of the Village, we conclude that it failed to take a hard look at that impact, requiring annulment of the resolution adopting the negative declaration on that ground as well.

Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1770 (4th Dept 2016), emphasis added.

As detailed by F&A, the DEIS fails to include a fiscal/market/community character assessment to determine business displacement. As I advised the Board in December,

[A] Retail Market Analysis for the Costco in Yorktown, New York, showed while most goods and services would not be impacted, the area's existing gasoline market suffered from an 18 million dollar a year deficit. Thus, Costco's impacts upon the viability of neighboring gasoline stations would be significant as a typical gasoline station might sell 500K⁶ to one million gallons of gasoline a year, while Costco reported it expected to sell 7-10 million gallons of gasoline a year in the downstate administrative proceedings.

And, James Calvin has specifically identified the vulnerability of Western Avenue gasoline stations:

The fact that gasoline retailers have gone out of business on Western Avenue in the immediate vicinity of Costco's proposed site proves there are no additional local dollars to support a new fueling facility that will sell a projected 7-10 million gallons of gasoline a year.

The DEIS fails to include a market retail analysis identifying existing gas stations in the market area, quantifying their employment and tax revenue generated, and comparing how these stations will be impacted and whether economic impacts will result in blighted properties in the Town.

Affidavit of James Calvin at ¶¶24-25.

Further, the Westmere Corridor Study specifically identified as a priority for the Westmere area to "[e]ncourage reinvestment and redevelopment of vacant/underutilized buildings and sites...accompanied by repairs and upgrades to the existing infrastructure. (p. IV-16)."

There are already abandoned gasoline stations on Western Avenue in the vicinity of the proposed Costco. A Costco will impact a wide range of businesses.

Therefore, the DEIS' failure to include a full fiscal impact and market analysis pertaining to community services renders it defective as a matter of law.

D. Failure to assess the project's compliance with zoning

SEQRA explicitly requires inquiry into whether a project creates "a material conflict with a community's current plans or goals as officially approved or adopted" 6 NYCRR §617.7(c) (1) (iv).

⁶ Based on discussions with industry representatives, gasoline sales at fueling facilities in the vicinity of Site No. 2 on Western Avenue in Guilderland may sell an average of 1.5 million gallons a year.

As discussed in Point I, a Costco selling gasoline is not two separate independent uses as defined by the Town Code. Under the Code, a big box store selling gasoline is not listed as a use permitted as of right or by special use permit. The failure of the DEIS to report this fact and discuss the conflict in use renders the DEIS incomplete as a matter of law.

E. Traffic

The Maser Consulting traffic projections do not resemble the actual traffic counts at Costcos in Melville, New York and Hackensack, New Jersey, as well as Costco's own traffic projections for a store in La Habra, California which report the generation of hundreds of more trips as compared with Maser's estimate. See F&A comments at pgs. 16-18.

Specifically, Maser Consulting underestimated PM peak hour trips by 200 and Saturday peak hour trips by 286 trips as compared with Costco's La Habra study. *Id.* at 17. Compared with actual traffic counts at Costcos in New York and New Jersey, Maser underreported traffic trips by over 300 trips. *Id.* at 18.

This is not a disagreement between experts. What is lacking is fundamental reporting of traffic counts representative of other Costcos. Regarding the actual counts at the Melville and Hackensack Costcos, I include herewith Michael Maris full comments on the Yorktown, New York Costco dated October 30, 2014. These are in addition to the July 7, 2016 comments by Mr. Maris on the Patterson, New York, Costco which I supplied to the Town on December 24, 2019.

In my correspondence of that date, I specifically cited Mr. Maris' comments and called upon the DEIS to "identify the frequency and size of fuel truck deliveries in order to properly assess traffic and market impacts." I also identified this was crucial in assessing traffic impacts especially where Costco's own estimates indicated projected sales of 7-10 million gallons of gasoline a year. (Bacon correspondence re-submitted herewith with attachments.)

However, the Guilderland DEIS contains no information on fuel truck deliveries or projected annual sales of gasoline.

Further, Costco's Yorktown FEIS stated "[t]he Costco fueling facility is expected to sell as much as approximately 10,000,000 gallons per year," (see attached excerpt from Costco FEIS).⁷ Costco made that estimate despite at least five (5) Costcos being located within an approximate 25-mile radius of Yorktown - in Nanuet, Yonkers, New Rochelle and Port Chester, NY and in Brookfield, Ct.

The nearest Costco to Guilderland Albany is about 70 miles east in West Springfield, Massachusetts. Therefore, the absence of other Costcos near Guilderland indicates the Guilderland Costco would sell more than 10 million gallons of gasoline a year.

Consequently, pursuant to SEQRA it is reasonable to require analysis of how gasoline sales in excess of 10 million gallons a year would affect traffic generation estimates. In every respect, the lead agency must consider that "[i]n evaluating the potential environmental impact,

⁷ Costco FEIS III.M-4 ¶3, Volume I of the FEIS <https://www.yorktownny.org/planning/costco-feis>.

agencies generally consider the ‘reasonable worst-case scenario,’ with the maximum development and negative environmental impact. *Matter of Ordonez v. City of N.Y.*, 60 Misc. 3d 1213(A) (Sup. Ct. 2018), and see *Neville v. Koch*, 79 NY2d 416, 428 (1992), full analysis of “worst-case” scenarios. Thus, the lead agency must assess the volume of gasoline sales and analyze the issue from a worst case scenario.

In sum, the DEIS is totally inadequate for the purposes of assessing the project’s traffic impacts. Without addition information, it is impossible for the lead agency to consider mitigating traffic impacts to the maximum extent practicable as required by SEQRA, especially when the Guilderland Costco application is compared with the Costco SEQRA reviews in Patterson and Yorktown, New York.

F. Air Quality

Typically, a fueling facility that may transport, handle and sell 10 million gallons of gasoline a year must disclose air quality impacts. *Id.*

However, the DEIS is devoid of any similar analysis or discussion. In fact the term “gasoline” is not even mentioned in the cursory DEIS Air Quality section at 3.9.1.2 or in the air quality study at Appendix P of the DEIS.

Thus, again the DEIS is deficient in identifying and discussing potential air quality impacts resulting from the transport, storage and sale of 10 million gallons of gasoline.

G. Clear cutting on Site No. 2

The damage to Site No. 2 from clear cutting in and of itself is “newly discovered information” involving a significant impact to the environment. Indeed:

An EIS is intended to **provide detailed information about the effect which the proposed action is likely to have** on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. **The EIS, the heart of SEQRA**, clearly is meant to be more than a simple disclosure statement as petitioners would construe it. Rather, it is to be viewed as an environmental "alarm bell" whose purpose **is to alert responsible public officials to environmental changes before they have reached ecological points of no return.**”

Henrietta v. Dep't of Env'tl. Conservation, 76 A.D.2d 215, 220 (App. Div. 4th Dept. 1980); emphasis added.

The Court in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Eng'rs*, No. 13-2262 (JRT/LIB), 2015 U.S. Dist. LEXIS 82517 (D. Minn. June 24, 2015) discussed the danger of “starting construction prior to the completion of environmental review,” as that would be “setting off a bureaucratic steamroller” - a “procedural injury that will start the wheels

moving, inexorably, toward completion of the project’s current design,” described as “irreparable harm.”

As above, SEQRA similarly mandates that “[a] project sponsor may not commence any physical alteration⁸ related to an action until the provisions of SEQR have been complied with.” 6 NYCRR 617.3(a).

Here, the lead agency accepted a DEIS as complete on February 7, 2020 and extended the comment period but allowed Pyramid to clear cut more than two acres of Site No. 2. (See Affidavit of Erik Kiviatt attached hereto.)

Before the public could take any action to prevent the cutting of trees, the Applicant clear cut Site No. 2:



⁸ SEQRA’s definition of “physical alteration... includes, but is not limited to, the following activities: vegetation removal... stockpiling materials, grading and other forms of earthwork...” 6 NYCRR §617.2(ac).



No land use approvals have been granted for Costco by the Town of Guilderland and the trees were cut to avoid potential impacts to threatened and endangered species.

The Town's "bureaucratic steamroller" has now irreparably harmed the environmental review process. (See attached memorandum of law citing *Sierra Club v Marsh*, 872 F2d 497, 500 [1st Cir 1989]; *Friends of the Earth v. Hall*, 693 F Supp 904, 913 [WD Wash 1988]: noting that "the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation"; cf. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F2d 1109, 1128, 146 US App DC 33 [DC Cir 1971]; noting that where large investments affect the NEPA analysis, the NEPA process becomes a "hollow exercise.")

The clear cutting is hard evidence of a pre-determined outcome. Any neutral examination of the "no action" alternative or potential alternatives involving unused or underutilized western areas of the Crossgates Mall would be a "hollow exercise" – meaningless in the context of SEQRA's goals and purposes.

As a result, the appropriate remedy is that the Planning Board of Guilderland surrender its status as lead agency due to the clearcutting of Site No. 2 unleashing the "bureaucratic

steamroller.” (See *Air Transp. Ass'n v National Mediation Bd.*, 663 F3d 476, 487, 398 US App DC 314 [DC Cir 2011]: “Decisionmakers violate the Due Process Clause and must be disqualified when they act with an unalterably closed mind and are unwilling or unable to rationally consider arguments.”)

For the above reasons, a SEIS is the correct procedure for the lead agency is to distribute all SEQRA documents to all involved agencies and re-establish lead agency. This is the only procedure that would provide the public an opportunity to submit substantive comments which must be then be summarized and addressed by an SEIS and ultimately, the FEIS.

For the record, the lead agency would be committing a fatal procedural error in the event it determines to allow the Applicant to prepare an amended FEIS, (AFEIS), as that would entirely prevent substantive public review.

An AFEIS is not permitted by the SEQRA regulations:

SEQRA does not use the term “amended FEIS,” but rather requires an agency to issue a Supplemental Environmental Impact Statement (SEIS) where the initial FEIS is inadequate (6 NYCRR 617.9[a][7]). Accordingly, I would modify the order and judgment only to the extent of directing DOH to issue a SEIS "limited to the specific significant adverse environmental impacts not addressed or inadequately addressed" in the FEIS (6 NYCRR 617.9[a][7]).

Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan, 146 AD3d 576, 582 (1st Dept 2017). Although this quote is from Judge Gesmer’s lengthy dissent, it is true that an AFEIS is not an express option under SEQRA.

POINT VI

THE DEIS FAILS TO ANALYZE A REASONABLE RANGE OF ALTERNATIVES

Pursuant to SEQRA, “any choice among alternatives must be based on an awareness of all reasonable options.” *Matter of Brander v. Town of Warren Town Bd.*, 18 Misc. 3d 477, 481 (Sup. Ct. 2007).

“Courts generally rely on the relevant factors identified by the [NYSDEC] in the SEQR Handbook” in evaluating SEQRA challenges. *Scott v. City of Buffalo* 20 Misc. 3d 1135(A), 872 N.Y.S.2d 693 (Table) (Sup. Ct. Erie Cnty. 2008); *Ass'n for Prot. of Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake*, 17 Misc. 3d 1122(A), 851 N.Y.S.2d 67 (Table) (Sup. Ct. Franklin Cnty. 2007) (The SEQR Handbook promulgated by the DEC ... is a basic source material for agencies to use in interpreting SEQR.)

The goal of the alternatives discussion in an EIS is to investigate means to avoid or reduce one or more identified potentially adverse environmental impacts. Part 617 further requires that the alternatives discussion include a range of reasonable

alternatives which are feasible considering the objectives and capabilities of the project sponsor. In general, the need to discuss alternatives will depend on the significance of the environmental impacts associated with the proposed action. The greater the impacts, the greater the need to discuss alternatives. The discussion of each alternative should specifically include an assessment of its likely effectiveness in reducing or avoiding specific impacts. For projects such as the construction of a residential subdivision or an office building, it is not necessary for every possible alternative density or size to be discussed. A range such as the density or size permitted under the existing zoning, the density or size after taking into consideration environmental constraints (wetlands, steep slopes, etc.), and the density or size if clustering were to be used, may be reasonable alternatives.

SEQRA Handbook at page 127 - <https://www.dec.ny.gov/permits/6188.html>.

Several passages in the SEQRA Handbook are especially relevant with regard to the Costco proposal. Specifically:

Consideration of alternative scales or magnitudes may be reasonable under the following circumstances:

- Some or all potential impacts of the action can be avoided or reduced by a change in project size;
- The change in project size does not reduce the project to the point where it will no longer serve its intended function...., or;
- The reduction in project size may decrease potential profit but does not make the project infeasible.

Consideration of an entirely different use or action may be reasonable in the following circumstances:

- The proposed action does not conform to the current zoning of the site, in which case comparison to the use allowed under the existing zoning may be informative.

Id. at 128-129. Given these parameters applied to the Costco application, the lead agency should analyze an alternative that does not include the Costco fueling facility.

This would accomplish several goals.

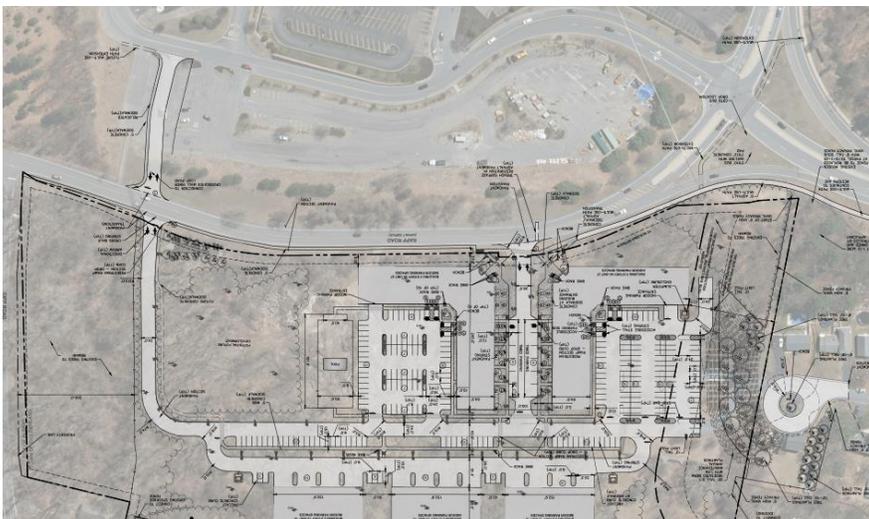
First, as above, it is reasonable to consider a use that conforms in all respects to the zoning code. There is no question that a 160,000 sq. ft. Costco meets the Code's definition of "Retail, General." It is only when that use is merged with elements of the Code's definition of an AuSS that the merged use assumes a new identity that is not listed as a permitted use in the Code. Proposing a Costco that does not sell gasoline avoids all issues regarding the project's conformance with the Town Code identified in Point I above.

Second, it is reasonable under SEQRA to assess a Costco without a fueling facility because that option allows the project's traffic impacts to "reduced by a change in project size." And, a non-fueling facility Costco "does not reduce the project to the point where it will no longer serve its intended function." In fact, as discussed above, (pg. 10), out of 768 warehouses, 567 Costcos sell gasoline, meaning 201 Costcos do not and are warehouses only. Thus, concerning the overall project and its cumulative impacts, proposing a Costco without a fueling station is a reasonable alternative that meets the goals of the Applicant by developing Site No. 2 with a big box store.

Third, the air quality impacts associated with the transport, storage and annual sale of 10 million gallons of gasoline would be eliminated.

Fourth, the "reduction in project size may decrease potential profit but does not make the project infeasible." Indeed, as detailed by Mr. Calvin, Costco draws very little profit, if any, from gasoline sales. Instead, the sale of gasoline acts is defined as just one of Costco's many "amenities" for its members and serves as a "loss leader," *i.e.* "[w]e believe that our gasoline business draws members but it generally has a significantly lower gross margin percentage relative to our nongasoline business." (See above.)

Another alternative is urged by the CWS involving shared parking. Immediately adjacent to Site No. 2 is the Crossgates Mall. The western section of the Mall includes approximately 15 acres of unused and/or underutilized parking. Below is a figure from the DEIS which shows the absence of cars in the western section of the Crossgates Mall. Reconfiguring the Costco to be sited within the Crossgates Mall is a reasonable alternative that meets several key CWS recommendations. First, it would allow Costco and the Rapp Road residences to share parking. Second, the western section of the Mall would no longer be under-utilized. Third, siting Costco in the "inner" circle of the Mall would bring more traffic onto ring road. Fourth, siting Costco next to Rapp Road would actually allow some pedestrian access to Costco, (provided the boxes were not too large). Fifth, Costco could study underground parking and build there building right above the existing parking lot shown below. For all these reasons, this option should be examined (also without a fueling station as that would actually comply with the zoning code.)



Finally, the scope called for reduced scale alternatives and investigating other areas of the Crossgates mall for potential in-fill development; e.g. “[a] retail center of a smaller or larger scale than the redevelopment at Site 2 is possible.” DEIS at pg. 124.

However, Pyramid claimed examination of alternatives was not feasible due to different ownership. However, the ownership of the adjacent mall tax parcels that might be used for in-fill are all owned by Pyramid affiliates or subsidiaries all sharing the same address and contacts, according to the New York State Department of State corporation search database. And, in a public announcement dated March 18, 2020, Pyramid acknowledged ownership and control of the Crossgates mall along with a number of other malls. <https://www.pyramidmg.com/pyramid-announces-closure-of-all-interior-portions-of-its-ny-shopping-centers/>

Specifically, Pyramid stated Governor Cuomo’s Executive Order to close the interior of malls, “impact the following Pyramid-owned and operated centers: “New York, Aviation Mall — Queensbury, NY, Champlain Centre — Champlain, NY [and] Crossgates — Albany, NY.” Id. For more information, Pyramid directs interested parties to its website and address at “www.pyramidmg.com, The Pyramid Companies, The Clinton Exchange, 4 Clinton Square, Syracuse, NY 13202.”

Therefore, it is reasonable for the lead agency to examine in-fill options re-siting portions of the project to the Crossgates mall.

In sum, the above comments and attachments hereto identify numerous previously undisclosed environmental impacts, including traffic and community character impacts uniquely affected by the Costco project. The DEIS contains no identification or analysis of the market area to be impacted by Costco. And, as the Fourth Department has clearly ruled, the lead agency has the absolute obligation under SEQRA to examine areas of the Town “that might suffer business displacement as a result of the approval of the big box development.” *Matter of Wellsville Citizens for Responsible Dev.*, 140 AD3d at 1770.

CONCLUSION

The 160,000 sq. ft Costco selling gasoline is not permitted by the Guilderland zoning code and its auto-centric use with 700 parking spaces is contrary to the purposes and recommendations of the Westmere Corridor Study and the Town’s Transit-Oriented Development overlay district.

The DEIS is fatally deficient under SEQRA lacking fundamental data and hard analysis. The disclosure of new information regarding Costco’s impacts upon traffic, community character and community services along with the DEIS’s failure to examine worst-case scenarios and reasonable alternatives requires an SEIS. Moreover, as detailed in the accompanying memorandum of law, the lead agency’s violations of SEQRA – allowing the clear cutting,

establishing lead agency prior to disclosing the entirety of the action and segmentation – merit the re-establishment of lead agency.

Finally, multiple elements of the Applicant’s proposal require redesign in order to allow the lead agency to proceed and meet their SEQRA obligation to mitigate the overall project’s impacts to the maximum extent practicable.

Dated: May 8, 2020
New Paltz, New York

Respectfully submitted,



James Bacon