Appeal No. 532570

To be argued by: Robert S. Rosborough IV
Time Requested: 15 minutes

New York Supreme Court

Appellate Division – Third Department

IN THE MATTER OF

THOMAS HART, LISA HART, KEVIN MCDONALD, SARAH MCDONALD, 1667 WESTERN AVENUE, LLC, AND RED-KAP SALES, INC.,

Petitioners/Plaintiffs-Respondents,

-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,

Respondents/Defendants-Appellants.

BRIEF OF APPELLANTS PYRAMID MANAGEMENT GROUP, LLC, RAPP ROAD DEVELOPMENT, LLC, AND CROSSGATES RELEASECO, LLC

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Appellants Pyramid Management Group, LLC, Rapp Road Development, LLC, and Crossgates Releaseco, LLC (collectively, "Pyramid") submit this brief in support of their appeal from the Judgment of Supreme Court, Albany County (Lynch, J.), entered November 23, 2020, which granted the Amended Verified Petition of Petitioners Thomas Hart, Lisa Hart, Kevin McDonald, Sarah McDonald, 1667 Western Avenue, LLC, and Red-Kap Sales, Inc. to the extent of annulling the Town of Guilderland Planning Board's site plan approval for a residential development and the State Environmental Quality Review Act findings following a coordinated review of a residential development, a proposed Costco retail center on a second site, and a vacant third site.

QUESTIONS PRESENTED

1. Did Supreme Court erroneously decide issues that Petitioners never raised nor argued in the pleadings and principally rely on these new issues to annul the Planning Board's SEQRA findings and site plan approval?

Supreme Court erroneously based its decision on three issues that Petitioners never pled nor argued and that Respondents never had any

opportunity to address.

2. Did the Planning Board, as lead agency, comply with SEQRA's coordinated review procedure when it expanded its initial review of a residential project over which the Zoning Board of Appeals lacked any approval authority to require a coordinated Environmental Impact Statement for potential development on multiple sites, included the ZBA as an involved agency only after the expansion of the action required a ZBA approval for the first time, and provided the ZBA notice and an opportunity to participate in the entire coordinated EIS process?

Supreme Court erroneously held that it was a violation of SEQRA for the Planning Board to have failed to identify the ZBA as an involved agency when the Planning Board initially took on lead agency status for the SEQRA review of the residential project alone, before the ZBA actually became an involved agency.

3. Did Supreme Court, in contravention of established limitations on judicial review, substitute its judgment for the Planning Board's reasoned and comprehensive SEQRA findings that were amply supported in the administrative record?

Supreme Court erroneously substituted its judgment for that of

the Planning Board.

4. Does an aggrieved party abandon all claims on which it was not granted complete relief when it fails to appeal the adverse determination?

This issue was not addressed below but should result in the abandonment of all such claims.

5. Were Petitioners' claims alleging a violation of Environmental Conservation Law § 17-0803, seeking a declaratory judgment under Highway Law § 189, and seeking a declaratory judgment that the Planning Board and ZBA lacked jurisdiction to consider Pyramid's land use applications properly denied?

Supreme Court properly denied these claims, albeit implicitly.

PRELIMINARY STATEMENT

A trial court is not free to disregard the issues raised and argued by the parties, identify specific issues that have not been controverted, and decide a case entirely different than what the parties presented. In an unprecedented departure from well-established principles of conscious judicial restraint, Supreme Court disregarded most of the claims that Petitioners actually raised and that Respondents addressed, identified different purported defects in the Planning Board's SEQRA review *sua sponte*, and annulled the Planning Board's SEQRA findings and site plan approval in a 77-page judgment issued little more than 12 hours after Respondents filed their papers opposing the Petition. Because three of the four issues that the Court decided were not raised in the Petition, Respondents were denied any opportunity to defend the Planning Board's SEQRA review of those issues.

As this Court has repeatedly recognized, deference is owed to a rational and substantiated judgment of a SEQRA lead agency. But Supreme Court did not defer to the Planning Board findings here. Rather, Supreme Court impermissibly ignored the Planning Board's nearly two-year hard look at the action, stepped into the lead agency's

shoes, and substituted its judgment in place of the Planning Board's well-reasoned determination that the projects would not cause any significant adverse environmental impacts.

The Supreme Court judgment contravenes both established law and appropriate policy considerations for judicial review of environmental matters. It was not the Court's role to evaluate the SEQRA record de novo and determine that a "closer look" on fully addressed topics should have been taken. Nor did the Planning Board violate SEQRA's coordinated review procedures because the ZBA was identified as an involved agency and notified of the EIS process after the Planning Board expanded the scope of its review. Because the SEQRA record conclusively establishes that the Planning Board took a hard look at the relevant areas of environmental concern, including at the SEQRA issues identified for the first time by Supreme Court, the judgment should be reversed and Petitioners' claims dismissed in their entirety.

STATEMENT OF FACTS

A. The Town's Transit Oriented Development District is Within a Major Commercial Corridor and is Particularly Suited for the Projects.

For the past 20 years, the Town of Guilderland has planned for and sought to focus commercial development within the Town's major commercial corridor, centered on US Route 20 (Western Avenue), with a direct connection to the interstate highway system (R7644-7646). The center of this corridor is Crossgates Mall, which has been a critically important generator for the local economy since 1984 (R7590). This area also contains many other significant commercial and retail establishments, including, among many others, supermarkets, professional offices, gas stations, a new Hilton hotel, Stuyvesant Plaza, and the Town Center/Price Chopper Plaza (R5256, R6399).[1]

Among the defining characteristics of this major commercial corridor is its access to public transportation through Western Avenue,

[1] Petitioners 1667 Western Avenue, LLC and Red-Kap Sales, Inc. (the "corporate Petitioners") were the owners of a Western Avenue Mobil gas station in this area and opposed the Costco Project solely on economic competition bases (R443). In December 2020, however, Red-Kap Sales closed on the sale of its assets, including the Mobil station, to Stewarts Shops. They no longer have any interest in this proceeding (*see* Stewart's Shops Officially Acquires Assets of Red-Kap and Unveils New Stewart's Express Branding, *available at* https://www.stewartsshops.com/news/stewarts-shops-officially-acquires-assets-of-red-kap-and-unveils-new-stewarts-express-branding/).

the interstate highway system, and the Capital District Transportation Authority ("CDTA") Transit Center located within Crossgates Mall, which provides bus service extending between downtown Albany and the Mall (R1983-1985). Because of these characteristics, the Town's 2001 Comprehensive Plan recognizes that higher density development should be concentrated within this major commercial corridor (R7644).

In 2016, the Town prepared the Westmere Corridor Study ("WCS"), which provided a more localized plan to guide development in the commercial corridor surrounding Crossgates Mall (R6034-6141, R7644-7646). The WCS's core recommendation was to create a Transit Oriented Development District ("TOD") to provide for a mix of housing, shopping, entertainment, and employment within walking distance of the CDTA Transit Center. The WCS recommended transit improvements, pedestrian-bicycle facilities, and redevelopment of vacant lands and concentration of higher density development (R7644-7645).

In 2018, the Town rezoned Crossgates Mall and its surrounding lands to a TOD (Zoning Law § 280-18A) (R6147-6153). The TOD permits a "wide range" of uses, including local and regional shopping

centers, gasoline service stations, and apartment buildings (R2075), while also including design requirements intended to protect nearby residential neighborhoods outside the TOD from adverse visual and density-related impacts (R6147-6153). The TOD provides for minimum lot size, density limits, graduated setbacks, step-back building heights, parking requirements, and other site plan guidelines (the "Design Standards") (R6148-6151). The TOD prohibits construction of new single-family and two-family uses within the TOD as inconsistent with the character of the commercial corridor and also limits new residential uses to multi-family housing (R6147-6152).

At the center of this dispute are three sites within the TOD, adjacent to Crossgates Mall, two of which have been proposed for development consistent with the TOD's goals to focus higher density residential and commercial development in this area of the Town. The projects include (1) a 222-unit apartment project (the "RRDP") on 19.68 acres of vacant land that was last used as a pig farm ("Site 1"); (2) a 160,000-square foot Costco retail store with a fueling facility (the "Costco Project")—Costco's only presence in the Capital Region—on 16 acres east of the intersection of Crossgates Mall Road and Western

Avenue ("Site 2"); and (3) a third vacant 11-acre site on Western Avenue with no current development plans ("Site 3") (Sites 1-3 collectively, the "Projects"). The Projects are collectively situated on land directly adjacent to the 1.7-million square foot Crossgates Mall (R7590, R7643-7646).

(R1992, R7603-7604).

The Projects satisfy, and in some cases exceed, each of the TOD's Design Standards to protect nearby neighborhoods, including berms,

fencing, landscaping, planting of vegetation, and numerous other measures to prevent any potential visual, noise, and other impacts (R1120-1132, R6455-6462). The occupied residential neighborhoods nearby, but outside the TOD, include Westmere Terrace to the south of Site 1 in the Town, Paden Circle to the west of Site 1 in the Town, and the Rapp Road Historic District ("RRHD") to the north of Site 1 in the City of Albany (R1992-1993). The RRHD is a small historic neighborhood comprised of 16 homes that is listed on the National Register of Historic Places due to its cultural significance (R1991-1994).

The Projects also propose numerous other features that connect to Crossgates Mall and the CDTA Transit Center, consistent with the TOD's goals, including creating a network of sidewalks and new pedestrian crossings, pedestrian and bicycle enhancements, a new CDTA bus stop, a new connector road between Western Avenue and Crossgates Mall Road, and a new traffic rotary where Crossgates Mall Road connects with the interstate highway system (R1992-1995, R6409-6412, R6436-6438).

B. The Rapp Road Development Project.

Pyramid applied to the Planning Board for site plan and subdivision approval for the RRDP in November 2018 (R1114-1133). The RRDP features 222 one- and two-bedroom apartments and 3,900 square feet of commercial space, in two five-story buildings along Rapp Road and three two-story buildings in the interior of Site 1. Under the TOD, the RRDP is the only permitted use on the Site (R1980, R1991). The structures will be clustered at the southern end of the site, generally distanced from the RRHD and the primary protected areas of the Albany Pine Bush Preserve (the "Preserve") to the north (R1980-1981, R1991-1994). Notably, the RRDP is well under the permissible maximum build out for the Site, which would permit up to 312 units—90 more than the Project actually proposed (R1999).

The Planning Board began its coordinated SEQRA review and, in December 2018, indicated its intent to be the lead agency (R7646-7647). No identified involved agency, nor any other party, challenged that designation (R1800, R7646-7647). The Town's ZBA was not identified as an involved agency at that time because it does not have any approval authority over the RRDP.

C. The Costco Project and the Planning Board's Decision to Issue a Positive Declaration and Undertake a Coordinated Environmental Review of Sites 1, 2, and 3.

As the SEQRA review of the RRDP neared completion, Pyramid advised the Town that it intended to apply to the ZBA for the development of a 160,000-square foot retail facility on Site 2, south of the RRDP (R7648-7649). The eastern portion of Site 2 consists of 13 vacant residential properties, all of which Pyramid owns, on Lawton Terrace, Tiernan Court, Rielton Court, and Gabriel Terrace (R7608).[2] The western portion of Site 2 is overgrown, non-native vegetation and the remnants of an abandoned Town road, including crumbling pavement and guardrails (R7590-7591, R7609-7610).

In light of the proposed Site 2 development, the Planning Board decided to postpone making any decision on the RRDP alone. Rather, the Planning Board, on its own initiative, expanded the scope of the SEQRA action to include the RRDP, the proposed retail site on Site 2, and potential future development on Site 3, and declared itself SEQRA lead agency for the redefined action in July 2019 (R1771-1798, R1800,

[2] Supreme Court mistakenly found that the Costco project calls for "destruction and removal of all homes within the Lawton Terrace neighborhood" (R81). Site 2 only includes *vacant* homes that Pyramid has owned for years. No occupied residential homes will be demolished as part of the project (R1980, R7590-7591, R7608-7610).

R7648-7650).

Based on this expanded scope, the Planning Board issued a SEQRA positive declaration that required preparation of an environmental impact statement ("EIS") analyzing the potential cumulative environmental impacts of development of all three Sites (R1771-1798). The Planning Board noted in the positive declaration, however, that the RRDP on Site 1 alone would not result in any significant adverse environmental impacts (R1797). Thus, notwithstanding that a negative declaration would have been warranted for the RRDP, the Planning Board demonstrated its commitment to fully meeting SEQRA's requirements by requiring a comprehensive EIS (*id.*).

In its positive declaration, the Planning Board identified the ZBA as an involved agency because the retail development on Site 2 required a special use permit, and directed that notice be sent to the ZBA of the EIS process (R1773). The ZBA was fully apprised at the start of and throughout the EIS process, was free to participate in it and never objected to the Planning Board's lead agency status (R1773).

In November 2019, Pyramid filed a formal application with the

ZBA for a special use permit for the Costco Project on Site 2, which again alerted the ZBA to the ongoing EIS process (R6448-6462). The Costco Project is entirely consistent with the character of the commercial corridor along Western Avenue, and is a use permitted by special use permit in the TOD (R6399, R6412, R6448-6462). Like the RRDP, the Costco Project is not a maximum build scenario under the TOD. Although retail facilities up to 250,000 sq. ft. are permitted, the Project proposes a facility of 160,000 sq. ft.[3]

The Costco Project will create numerous construction and retail jobs, inspire local business growth, and significantly increase tax revenues to the Town, Albany County, and Guilderland School District (R6421-6423, R7590).

D. The Planning Board's Comprehensive SEQRA Review, Adoption of the SEQRA Findings, and Approval of RRDP's Site Plan.

The voluminous SEQRA record demonstrates that the Planning Board's nearly two-year review of the action was comprehensive, with broad-based support from a number of major agencies. After it adopted

[3] The TOD permits any use allowed in the Town's General Business zoning district, which allows "general retail" uses—that is, "use in a structure with a maximum gross floor area of 250,000 square feet" (Town of Guilderland Code § 280-5, *available at* https://ecode360.com/31714682).

its positive declaration, the Planning Board:

(1) Prepared a comprehensive scope for the DEIS, setting forth numerous relevant areas of environmental concern to be analyzed, based on its own review and numerous public comments (R1799-1809, R1944-1966);

(2) Analyzed and reviewed over 3,100 pages of information within the DEIS and provided numerous comments and recommendations pertaining to the DEIS (R1969-R5122);

(3) Reviewed over 600 public comment letters on the DEIS alone (R6472-7508);

(4) Held a nearly 5-hour remote public hearing in May 2020, in which the Planning Board received and considered at least 94 public comments, including from Petitioners (R4488-4583);

(5) Analyzed and commented on over 1,250 pages of information in the FEIS that clarified, corrected, and amplified the information in the DEIS, prior to certifying that the FEIS was complete (R5123- 6325);

(6) Consulted with numerous agencies and interested parties, including the Pine Bush Preserve Commission, the Rapp Road Historic Association, CDTA, the New York State Department of Transportation ("NYSDOT"), City of Albany, the NYS Office of Parks, Recreation and Historic Preservation ("SHPO"), the New York State Department of Environmental Conservation ("NYSDEC"), residents of nearby neighborhoods, the Albany County Planning Board, and numerous experts and professionals retained by the Town and Pyramid to study the action's potential environmental impacts (R6383; 6386); and

(7) As part of the EIS, analyzed numerous studies, reports, and figures, including expert studies on traffic, wildlife, vegetation, endangered species, sound measurement, air quality, stormwater, wetlands, aesthetics and visual impacts, archaeological resources, and economic and fiscal impacts (R6385-6386, R6399, R6416-6419, 6427-6429 [summarizing certain reports analyzed]).

As set forth more fully in Point II *infra*, the Planning Board comprehensively identified, examined, and evaluated relevant areas of environmental concern, including the impacts at issue here: reasonable and feasible alternatives to the Projects within Pyramid's objectives and capabilities; visual impacts, including to the RRHD and the Westmere Terrace neighborhood; traffic impacts; the Projects' collective consistency with the Town's land use goals, as well as the character of the community and the goals of the TOD; wetlands impacts; air quality impacts; socio-economic impacts; impacts to endangered and threatened species; and, finally, impacts to the Preserve (R6383).

The Planning Board's review was also informed by Pyramid's and the Town's public outreach efforts with members of neighboring residential communities, including the Westmere Terrace and Paden Circle neighborhoods and the RRHD (R7585-7587, R7647-7648). From these outreach efforts, Pyramid incorporated numerous additional

protective enhancements in the Projects, including the construction of large 20-foot' tall berms, additional landscaping, fencing, and the relocation of a Pyramid-owned cul-de-sac at the dead end of Westmere Terrace to provide a further buffer between the Westmere Terrace homes and the RRDP (R5145-5146, R5243, R5255, R7585-7587, R7647-7648).

Recognizing the RRHD's cultural significance, Pyramid proposed to convey five properties located in the RRHD to the Rapp Road Historical Association ("Historical Association") for use as open space or development of a cultural center (R1994, R2044-2045). Because the concerns raised during the SEQRA process by the Historical Association and the SHPO were focused on potential increases in traffic along Rapp Road, the Planning Board extensively reviewed nine different traffic circulation alternatives. The Planning Board concluded that the Projects would not result in significant traffic impacts to the RRHD and that current traffic levels of service during peak hours would be maintained (R1854-1863, R1994, R2044-2046).

Based on this extensive review, in August 2020, the Planning Board issued a 58-page SEQRA Findings Statement, which provided a

reasoned elaboration of its conclusion that the Projects, with their numerous TOD-compliant design features, would have no significant adverse impacts (R6380-6443).

On October 28, 2020, following a second site plan public hearing, the Planning Board approved Pyramid's site plan application for the RRDP (R8022-8051).

E. This Proceeding and the Supreme Court Judgment.

Petitioners—four individuals who live in the Westmere Terrace neighborhood and the corporate Petitioners—commenced this proceeding to challenge the Planning Board's SEQRA review, one month before the site plan approval was issued (R335-336). Petitioners alleged that (1) certain limited tree cutting that took place on Site 2 in March 2020 violated the Environmental Conservation Law, (2) the Westmere Terrace cul-de-sac existing on land owned by Pyramid is a "highway by use" under the Highway Law, (3) the Planning Board and ZBA lacked jurisdiction over Pyramid's land use applications, (4) the Planning Board failed to comply with certain of SEQRA's procedural and substantive requirements, and (5) the Town violated the Freedom of Information Law (R337-387).

After the Planning Board granted site plan approval for the RRDP, Petitioners amended the Petition to challenge that approval (R7909-7910). Respondents answered the amended Petition, asserted objections in point of law, and moved for summary judgment dismissing Petitioners' claims for declaratory relief (R1060-1107, R7580-7903, R7966-8106).

Little more than 12 hours after Respondents submitted their opposition papers, the Court issued a 77-page judgment, granting the Petition "to the extent that the Planning Board's acceptance of the DEIS and FEIS, the issuance of the Findings Statement filed August 28, 2020, the issuance of the Site 1 Findings Statement on October 28, 2020, violated SEQRA procedure and the 'hard look' test," and annulled the approvals (R84). The Court, therefore, granted Petitioners' causes of action alleging SEQRA violations, but predominantly did so based on the purported failure to take a hard look at areas of environmental concern that Petitioners never raised in the Petition (R9-84).

Pyramid now appeals from the Supreme Court judgment.

ARGUMENT

POINT I

SUPREME COURT IMPROPERLY RULED ON GROUNDS THAT PETITIONERS NEVER RAISED WITHOUT PROVIDING RESPONDENTS NOTICE

The hallmark of judicial review is that courts, in the exercise of conscious judicial restraint, may only decide those issues that the parties actually present for review. The Court here, however, identified purported flaws in the Planning Board's SEQRA review, *sua sponte*, that Petitioners never alleged nor argued. That was an unprecedented departure from the controlling standard of judicial review.

As the Court of Appeals has instructed, "[c]onscious judicial restraint is essential—its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him" (*Hearst Corp. v Clyne*, 50 NY2d 707, 717 [1980]). Conscious judicial restraint derives from a fundamental principle: a court only has the power to determine "the rights of persons which are *actually controverted* in a particular case pending before the tribunal" (*Matter of Truscott v City of Albany Bd. of Zoning Appeals*, 152 AD3d 1038, 1039 [3d Dept 2017] [emphasis

added]). New York does not permit litigation by surprise (*see Haines v New York Cent. & H.R.R. Co.*, 145 NY 235, 239 [1895]; *see also Eagle-Picher Lead Co. v Mansfield Paint Co.*, 203 App Div 9, 12 [3d Dept 1922]).

The Petition here alleged that the Planning Board (1) failed to comply with SEQRA's "coordinated review requirements," (2) failed to identify that Town roads would be abandoned as part of the proposed Site 2 development, (3) failed to identify and take a hard look at all possible wetlands on the project Sites, (4) failed to use traffic generation figures from other Costco stores in New York or consider the projected volume of gasoline sales when reviewing traffic impacts of the Costco Project, (5) failed to take a hard look at the Costco Project's compatibility with the TOD zoning and community character of the surrounding area, (6) failed to take a hard look at the Costco Project's potential air quality impacts, (7) failed to take a hard look at how the Costco Project would displace nearby businesses, and (8) failed to consider a smaller scale alternative to the Costco Project on Site 2 by removing the fueling facility from the proposal (R7911-7963).

Rather than limiting its review to the controversy before it, the

Court identified three entirely new issues that Petitioners never raised and annulled the Planning Board's SEQRA findings and site plan approval on those new grounds: (1) purported failure to take a hard look at impacts on avian species in the Pine Bush ecosystem, (2) purported failure to take a hard look at visual impacts on the RRHD, and (3) purported failure to consider shorter alternatives to the RRDP and a residential alternative for Site 2 (R9-84). Respondents never had an opportunity to address to these issues that the Court deemed dispositive. Strikingly, the RRHD was not mentioned a *single* time in the Petition. Yet, the Court based its judgment in principal part on its assertion that the RRDP would cause significant adverse visual impacts to the RRHD and that shorter alternatives for two of the five buildings in the RRPD should have been analyzed (R7911-7963).

The Court's judgment effectively amended the Petition *sua sponte* without providing Respondents with notice or any opportunity to address the issues that the court ultimately decided (*see DiMauro v Metro. Suburban Bus Auth.,* 105 AD2d 236, 239-240 [2d Dept 1984] [prejudice exists barring a *sua sponte* amendment of the pleadings "where a defendant 'has been hindered in the preparation of his case or

has been prevented from taking some measure in support of his position,'" quoting *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 (1981)]). That substantially prejudiced Respondents, contravened New York's proscription against litigation by surprise, and was reversible error (*see Matter of Peconic Baykeeper, Inc. v Suffolk County*, 17 AD3d 371, 371 [2d Dept 2005] ["Supreme Court improperly amended the petition, sua sponte" in a CPLR Article 78 proceeding]).

POINT II

THE PLANNING BOARD COMPLIED WITH ITS SEQRA OBLIGATIONS

SEQRA's purpose is to ensure that the environmental impacts of government action are fully considered, weighed, and balanced with social, economic, and other considerations (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415 [1986]). The standard of judicial review in SEQRA challenges is marked by deference, latitude, and flexibility:

> SEQRA allows an administrative agency or governmental body considerable latitude in evaluating the environmental impacts and alternatives discussed in an environmental impact statement to reach a determination concerning a proposed project . . . Thus the general substantive policy of the act is a flexible one. It leaves room for a responsible exercise of

> discretion and does not require particular substantive results in particular problematic instances

(*Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985] [quotation marks omitted]).

Judicial review of SEQRA determinations "is limited to whether the [lead] agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [quotation marks omitted]). As the Court of Appeals has explained, the court's review of a SEQRA determination is "supervisory only"—the court may not "second-guess the agency's choice" of which environmental impacts, mitigation measures, or alternatives must be evaluated and how that review should be undertaken (*Jackson*, 67 NY2d at 417). It is not the court's role to substitute its judgment for that of the SEQRA lead agency (*see id.* at 416; *Matter of Village of Ballston Spa v City of Saratoga Springs*, 163 AD3d 1220, 1223 [3d Dept 2018] ["The court's function is to assure that the agency has satisfied SEQRA, procedurally and substantively, not to evaluate data de novo, weigh the desirability

of any particular action, choose among alternatives or otherwise substitute its judgment for that of the agency." (quotation marks omitted)]).

Additionally, "[t]he agency's substantive obligations under SEQRA must be viewed in light of a rule of reason" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006] [quotation marks omitted]). "[N]ot every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility. The degree of detail—the reasonableness of an agency's action—will depend largely on the circumstances surrounding the proposed action" (*Neville v Koch*, 79 NY2d 416, 424-425 [1992]; *see also Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]; *Akpan v Koch*, 75 NY2d 561, 570 [1990]).

The Court here far exceeded its circumscribed role in reviewing the Planning Board's SEQRA review and instead substituted its judgment for that of the Planning Board. That was reversible error.

A. THE PLANNING BOARD COMPLIED WITH SEQRA'S PROCEDURES.

The Court erred in holding that the Planning Board's purported "procedural failure" to coordinate its lead agency determination with

the ZBA vitiated the entire SEQRA review (R61-67). The Planning Board began its coordinated SEQRA review of the action *before* the ZBA actually became an involved agency when the Site 2 development was proposed (R1771-1773). As soon as the potential Site 2 development was identified, the Planning Board identified the ZBA as an involved agency in the August 2019 positive declaration, and afforded the ZBA a full opportunity to participate in the coordinated SEQRA review of the expanded action (*id.*). That the ZBA acquiesced in the Planning Board's decision-making was no reason to overturn the lengthy EIS process.

As a threshold matter, Petitioners lacked standing to challenge the Planning Board's lead agency designation under this Court's precedent. Only another involved agency may challenge a lead agency's designation (*see Matter of King v County of Saratoga Indus. Dev. Agency*, 208 AD2d 194, 201 [3d Dept 1995]; *see also* 6 NYCRR 617.2[s]; *Matter of Incorporated Vil. of Poquott v Cahill*, 11 AD3d 536, 539 [2d Dept 2004], *lv dismissed in part and denied in part* 5 NY3d 819 [2005]).

Even if Petitioners had standing, this procedural challenge lacks merit. SEQRA requires the lead agency to "make every reasonable effort to involve . . . other agencies" (6 NYCRR 617.3[d]). The Planning

Board identified all necessary involved agencies when the RRDP was initially proposed and the EAF was prepared in November 2018 (R1133-1145). At that time, the RRDP was a standalone application and the ZBA was not an involved agency because it had no approval authority over the RRDP (6 NYCRR 617.2[t]). It was only when the Site 2 retail site development was identified, and the Planning Board conservatively decided to undertake a cumulative review of the potential development of all three Sites, that the ZBA became an involved agency because a special use permit was required for the proposed retail development on Site 2. The Planning Board then identified the ZBA as an involved agency in the positive declaration, and directed that notice of the EIS process be transmitted to the ZBA (R1771-1773). It certainly would not have been "reasonable" for the Planning Board to identify the ZBA as an involved agency before the Site 2 development was proposed because it was not one (6 NYCRR 617.3[d]). Thus, the Planning Board complied strictly with the SEQRA regulations through an evolving situation, which is hardly an uncommon occurrence in the SEQRA process.

Even assuming, *arguendo*, this was a procedural irregularity, however, it would only affect the SEQRA determination's validity if the

irregularity was consequential or substantive (R63, citing *Matter of Cade v Stapf*, 91 AD3d 1229 [3d Dept 2012]; *see also Matter of Rusciano & Son Corp. v Kiernan*, 300 AD2d 590, 590-591 [2d Dept 2002] [non-prejudicial procedural missteps "may be excused as harmless"]). The issue identified by the Court here was entirely inconsequential because it did not deprive the ZBA of an opportunity to be heard during the EIS process for the action. Indeed, the ZBA was provided notice of the positive declaration and the opportunity to participate in the EIS process (R1773). The ZBA never objected to the Planning Board's lead agency status once it was provided notice (R5128). The ZBA, as an involved agency, must also make its own SEQRA findings based on the SEQRA record compiled by the lead agency prior to acting on the Costco Project's special use permit application (*see* 6 NYCRR 617.11[c]).

Supreme Court's holding cannot be reconciled with controlling precedent of this Court. In *Cade*, for example, a town board initially served as lead agency for a planned unit development and commenced a coordinated review, identifying numerous involved agencies (91 AD3d at 1230-1232). When the project was modified to include a subdivision, lead agency status was transferred to the planning board, which

proceeded with a full SEQRA review and EIS (*id.*). Although the modified project also required a height variance from the ZBA for a water tower, the ZBA was never identified as an involved agency. This Court nevertheless held that "the failure to include the ZBA as an involved agency under these circumstances was inconsequential" because the variance wasn't needed when the coordinated review process was performed, and the planning board considered impacts relating to the height of the water tower (*id.*).

Here, as in *Cade*, the Planning Board fully considered relevant impacts to community character and the Costco Project's consistency with the TOD (*see* Point II(C)(2), *infra*). *Cade*, however, presented far more egregious circumstances. Unlike in *Cade*, where the zoning board was never identified as an involved agency, the ZBA here had ample opportunity to participate as an identified involved agency from the inception of the EIS process (*see e.g. Matter of Gordon v Rush*, 100 NY2d 236, 244 [2003] [where involved agency had notice of matters and opportunity to advise lead agency of any relevant concerns, its failure to do so prior to issuance of negative declaration was self-inflicted]; *Matter of Hingston v New York State Dept. of Envtl. Conservation*, 202 AD2d

877, 879 [3d Dept 1994]; *Matter of Congdon v Washington County*, 130 AD2d 27, 31 [3d Dept 1987]).

The Court's holding, if affirmed, "portends a never-ending return to square one should further modifications be made and additional agencies be identified" after an initial application is received, should the scope of SEQRA review be expanded (*Residents of Bergen Believe in the Envt. and Democracy, Inc. v County of Monroe*, 159 AD2d 81, 84 [4th Dept 1990]). That is not what SEQRA requires.

B. THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK AT ALL RELEVANT AREAS OF ENVIRONMENTAL CONCERN THAT SUPREME COURT IMPROPERLY IDENTIFIED SUA SPONTE.

As established in Point I, *supra*, Supreme Court acted in excess of its jurisdiction in searching the SEQRA record for purported failings not identified in the Petition. Moreover, had it been given the opportunity to do so, the Planning Board would have readily demonstrated that it properly reviewed and took a hard look at the issues that the Court raised *sua sponte*. The record fully supports the Planning Board's determinations respecting the impacts that were raised *sua sponte*, therefore providing an additional basis for reversing the Court's holdings on these issues.

1. The Planning Board Took a Hard Look at Impacts to Avian Populations.

The Court's holding with respect to impacts to avian populations in the Preserve epitomizes its overstepping the SEQRA standard of review. Although finding that the Planning Board, "at first blush," took a hard look at impacts to the Preserve, the Court nevertheless held that the Planning Board should have taken "*a closer look*" at a particular issue never raised by Petitioners below: the potential for "bird strikes" posed by the proposed Site 1 apartment buildings (R83-84 [emphasis added]).

Although the Court "would have liked the Planning Board to take a 'harder look' at certain areas of particular concern to [it], that simply is not the standard of review to be applied to the Planning Board's determination" (*Matter of Save the Pine Bush, Inc. v Planning Bd. of Town of Guilderland*, 217 AD2d 767, 770 [3d Dept 1995]). As the Court of Appeals has specifically recognized, SEQRA review of potential adverse environmental impacts associated with the Preserve need not consider every conceivable environmental impact (*see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 307 [2009]). Supreme Court's holding with respect to bird strikes thus

contravened established law and should be reversed.

The SEQRA record belies the Court's conclusion that the Planning Board did not take a hard look at impacts to avian species within the Preserve. The Planning Board identified the potential for impacts to the Preserve in the scoping process (R1950), fully analyzed those potential impacts in the DEIS and FEIS (R1988-1990; R2024-2043; R5137-5181), then issued extensive findings concluding that no significant adverse impacts to the Preserve would result from the Projects (R6384-6387; R6411; R6419; R6424-6426; R6431-6432; R6441).

The Planning Board's hard look also encompassed avian species. The Planning Board's findings were based on studies and reports from Pyramid's expert, B. Laing Associates ("B. Laing"), which concluded that no potential impacts would result to significant habitat areas based on an extensive multi-year and multi-season examination of the sites (R2407-2439; R2033-2034; R7595). As B. Laing further confirmed, none of the sites contain *any* protected Pine Bush habitat or occurrences of any protected avian species that might perish by hitting the two proposed five-story structures (R2407-2439; R7605-7642).

The Albany Pine Bush Preserve Commission (the "Commission")

supported the Planning Board's findings (R4601-4604; R4505-4506) and concluded that the Projects would not negatively impact the Preserve. The Commission concluded that the Projects would provide a substantial public benefit because Pyramid offered to convey 8.4 acres of high value Pine Bush land to the Commission to add to the Preserve (*id.*; R6384-6387). The Commission supported the DEIS and FEIS's "extensive and detailed analysis concerning endangered and threatened species," including "avian species" and B. Laing's findings, which "concluded that there would be no potential significant adverse environmental impacts on any of such species as a result of the proposed action" (*id.*).

2. The Planning Board Took a Hard Look at Visual Impacts.

The Planning Board identified visual impacts associated with the RRDP as a relevant area of environmental concern in the final scope for the action (R1952). The Planning Board then proceeded to study those impacts, which led Pyramid to include design features beyond TOD requirements to eliminate the possibility of any significant adverse visual impacts could result (R1992-1994; R1998; R2044; R2047; R2073-2076; R2078; R2079; R5245; R5253-5255; R5259; R6388; R6409-6411;

R6436-6438).

Pyramid engaged in extensive outreach with residents in nearby neighborhoods during the early stages of the RRDP review process (R1992). Based on concerns raised by residents of Westmere Terrace and Paden Circle, Pyramid performed photo-simulations to illustrate views of the RRDP from Westmere Terrace and Paden Circle and adopted, in coordination with the Planning Board, numerous enhancements to avoid any significant visual impacts that could otherwise result (R7568; R1992-1993; R7586). These measures, which were analyzed and approved by the Planning Board, included a 20-foot high berm, double rows of 8-10 and 12-15-foot high pine trees, 6-foot high solid panel fencing, and the preservation of existing vegetation to serve as a buffer (*id.*; R6409-6413).

Although Pyramid also consulted with residents of the RRHD, at no point during the Planning Board's SEQRA review did any resident of the RRHD raise any concerns regarding visual impacts. Nor did the Historical Association or the SHPO[4] (R6372-6373; R6377-6379; R1710). The SEQRA review nevertheless analyzed visual impacts to the RRHD.

[4] In fact, the SHPO noted that the RRHD is already protected from visual intrusion by mature vegetation (R6372).

The tallest (five-story) RRDP buildings would be located in the southern portion of Site 1, whereas the RRHD lies to the north of the site. The distance between the southernmost occupied RRHD home and the northernmost five-story building on Site 1 would be 985 feet (R2123).[5] The EIS also considered the effect of an existing 200-foot wide wooded perimeter buffer on the north side of Site 1 between the RRHD homes and Site 1 (R1993-1994; R1998; R2005-2006). The buffer is a heavily wooded area with a secondary growth vegetative community and contains trees approximately 50 feet high, only 5 feet shorter than the two highest proposed RRDP buildings (R2027; R2037).[6] Thus, the Planning Board reasonably concluded that the distance between occupied structures and the intervening heavily wooded area

[5] The Court many times referenced distances between various points on Site 1 and the RRHD (R18, R42-43, R77-78), including distances from the Site 1 northern boundary, the RRHD southern boundary, the closest northernmost 5-story building on Site 1, and the closest occupied house in the RRHD. The relevant distance for purposes of visual impacts is 985 feet from the southernmost occupied house in the RRHD to the northernmost 5-story building on Site 1, as shown on DEIS Figure 11 (R2123). One statement in the SEQRA Findings Statement (R6388) regarding a 1300-foot' distance to the RRHD is inaccurate, but was not the basis for the Planning Board's finding of no significant adverse impact and was immaterial to the overall conclusions reached.

[6] The Court improperly held that the Planning Board was required to perform a graphical viewshed analysis from the perspective of individual homes in the RRHD. That is not what SEQRA requires. As the EAF demonstrates, impacts on aesthetic resources should be analyzed with respect to officially designated federal, state, or local scenic or aesthetic resources or publicly accessible vantage points (R1792). Individual private homes within the RRHD do not qualify for such analysis.

would provide an effective visual buffer and prevent any significant visual impacts (*see e.g. Matter of Cady v Town of Germantown Planning Bd.*, 184 AD3d 983, 987 [3d Dept 2020] [planning board satisfied "hard look" requirement as to visual impacts of a project where it analyzed and accepted design measures that minimized visual disruption]; *Cade*, 91 AD3d at 1232 [planning board took a hard look at project's visual impacts where it required preservation of existing vegetation]).

Supreme Court ignored the Planning Board's hard look at the action's visual impacts and held that the Planning Board's review was deficient because it did not require a graphical viewshed analysis to study visual impacts on the RRHD, based on the Court's hyperbolic and repeated characterization of the five-story structures as "high rise" (*see*, *e.g.*, R0019; R0023; R0025; R0028; R0036). This was error. The Court's role is not to prescribe what particular studies should be conducted. As the Court of Appeals has held, mere "differences of opinion about the best way to address the environmental impacts" is something the agency, and not a reviewing court, must resolve (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare*, 30 NY3d 416, 432 [2017]).

3. Supreme Court Erroneously Held that the Planning Board was Required to Consider Permissive Alternatives to Address Nonexistent Impacts.

SEQRA requires lead agencies to consider 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]). Agencies have "*considerable latitude*" in "choosing between alternative measures" (*Matter of Keil v Greenway Heritage Conservancy for the Hudson Riv. Val., Inc.*, 184 AD3d 1048, 1054 [3d Dept 2020] [emphasis added]). An agency's review of reasonable alternatives must be considered in light of the "rule of reason"; the lead agency need not conduct an "exhaustive analysis of every conceivable alternative" (*Matter of Morse v Town of Gardiner Planning Bd.*, 164 AD2d 336, 339-340 [3d Dept 1990]).

SEQRA requires only "a description and evaluation of the *range* of reasonable alternatives to the action that are *feasible*, considering the *objectives and capabilities* of the project sponsor" (6 NYCRR 617.9 [emphasis added]). That range is within the lead agency's discretion to choose (*Friends of P.S. 163*, 30 NY3d at 430). That petitioners, or the

Court, might prefer an analysis of different alternatives "presents a difference of opinion about the best way to address the environmental impacts that the agency, not the courts, must consider and resolve" (*id.*; *see also Morse*, 164 AD2d at 339). Indeed, a "reviewing court may not substitute its judgment of the facts and alternatives for that of the agency" (*Keil*, 184 AD3d at 1051).

Although SEQRA provides that review of a "no action alternative" is mandatory, review of other alternatives within a reasonable range is *permissive* in nature (6 NYCRR 617.9[b][5][v]). The "range of alternatives *may* also include, *as appropriate*," review of other sites, technology, scale or magnitude, design, timing, use, and types of action (*id.* [emphasis added]; *see also Matter of Save Open Space v Planning Bd. of Town of Newburgh*, 74 AD3d 1350, 1352 [2d Dept 2010]).

As a practical matter, where, as here, the applicant is a private developer, New York courts have recognized that "it would be both onerous and unrealistic to require private developers" to conduct an all-encompassing analysis of alternatives (*Horn v International Bus. Machines Corp.*, 110 AD2d 87, 95-96 [2d Dept 1985]; *see also Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148

AD2d 130, 135 [3d Dept 1989]). SEQRA instead allows private developers to formulate their own goals and objectives and to perform an alternatives analysis that is consistent with those objectives (6 NYCRR 617.9[b][5][v]).

Of further critical importance here, an EIS need only consider alternatives responding to identified significant adverse impacts (*see* 6 NYCRR 617.9[b]). Indeed, an alternatives analysis is only necessary where the lead agency finds that an action will cause significant adverse environmental impacts that need to be mitigated (*see Matter of Friends of Stanford Home v Town of Niskayuna*, 50 AD3d 1289, 1291 [3d Dept 2008] [where no adverse impacts are anticipated and a negative declaration is issued, SEQRA does not require a review of alternatives]). Where the lead agency concludes that no significant adverse environmental impacts will result, alternatives other than the "no action" alternative need not be considered (*see* ECL 8-0109[1]; NYSDEC, The SEQRA Handbook, 4th ed. [2020], available at https://www.dec.ny.gov/permits/6188.html [the "SEQRA Handbook"] pp. 100, 103-105, and 117-118).

Taken together, the well-established parameters above set forth a

standard of review that is wholly different than the standard applied by Supreme Court. The Planning Board was only obligated to analyze a range of reasonable and feasible alternatives to the Projects in view of the developer's specific objectives and capabilities and that included a no action alternative. The alternatives analyzed met this standard. For the RRDP, Pyramid's objective was to develop the land to its highest economic use permitted on the Site under the TOD—multi-family dwellings with a non-residential ground floor, which would benefit both Pyramid and the community (R2008-2010). Similarly, Pyramid's objective for Site 2 was to accommodate consumer demands in a difficult and evolving retail environment by bringing a new sought-after retailer—Costco—to the area for its first location in the region, for Pyramid's, the Town's, and the County's economic benefit (*id.*).

The final scope specified that the DEIS's alternatives analysis would include a reasonable range of different considerations, including (1) the "no action" alternative, (2) alternative site layout, including smaller development and location, (3) alternative site uses, and (4) potential traffic circulation alternatives, in view of Pyramid's specific objectives (R1953). The DEIS considered all of these alternatives and

ultimately concluded that, with the exception of the alternative traffic circulation patterns, none of the alternatives considered would "achieve either the same or similar objective to that sought by the project sponsor" (R2100-2104).

Supreme Court once again substituted its judgment for that of the lead agency. Although the Court purported to recognize its "limited scope of review, especially with respect to an agency's identification and evaluation of alternative uses" (R70), it inexplicably held that the Planning Board erred by failing to evaluate two permissive alternatives for Sites 1 and 2—reduced scale alternatives and alternative uses—that the Court preferred (R72-73). The Court's conclusion that "there were better alternatives . . . is not a basis to invalidate" the Planning Board's SEQRA determination (*Uptown Holdings, LLC v City of New York*, 77 AD3d 434, 436 [1st Dept 2010]; *see also Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 777 [2d Dept 2005] ["[a] failure to identify or analyze a particular alternative propounded by opponents or critics of a project does not render a FEIS deficient where, as here, the FEIS identifies and analyzes a reasonable range of alternatives"]).

The smaller scale and use alternatives analysis that the Court

desired is *not* mandatory, but merely permissive (*see* 6 NYCRR 617.9[b][5][v]). In *Save Open Space*, a lead agency's SEQRA findings and approvals for an 850,000-square foot shopping center were challenged based on, *inter alia*, the agency's failure to consider a smaller scale alternative (*see* 74 AD3d 1350 [2d Dept 2010]). The Second Department dismissed the challenge, holding that "[t]he Planning Board was not required to consider the petitioners' proposed alternatives. *Consideration of a smaller scale alternative is permissive*, not mandatory, and alternatives are to be considered in light of the developer's objectives" (*id.* at 1352 [emphasis added]; *see also Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 142 Misc 2d 590, 597 [Sup Ct 1989] ["alternate site consideration is permissive"], *affd* 148 AD2d 130 [3d Dept 1989]). The Court's contrary conclusion here was error.

4. The Planning Board Properly Considered Reasonable Alternatives to the RRDP.

Contrary to the Court's holding, the Planning Board conducted an adequate alternatives analysis for Site 1. At the outset, the Planning Board's review of alternatives for Site 1 must be considered in light of the Board's determination that the RRDP would cause no significant

adverse environmental impacts, thereby negating the need for an alternatives analysis relating to the RRDP beyond the no-action alternative (R1797).

The Planning Board did, however, consider an alternative use of Site 1 by restoring it to pitch pine and scrub oak barrens (R6424), shifting the location of the RRDP to the interior road to the west of Macy's within Crossgates Mall (R2104),[7] different site configurations in relation to the protected butterfly management area and associated mitigation corridor near the site (R2103), nine different traffic circulation alternatives (R1985-1986) and, finally, the required alternative of no development at all (R2104). For each considered alternative, apart from the traffic circulation plans, the Planning Board explained why that particular alternative was infeasible, inconsistent with the objectives of the project sponsor, or unlikely to better minimize potential impacts (*see id.*).

Critically, no alternative residential or commercial land uses are permitted under the TOD for Site 1 (R1998; R6424). Indeed, under the

[7] The DEIS indicated that shifting the RRDP to Crossgates Mall was infeasible because the mall location, which consists of 5.50 acres, is not of sufficient acreage to support the RRDP (R2104; R5293). The location is also currently used as parking and greenspace for Crossgates Mall (R5293).

TOD, only multiple-family dwellings with commercial uses on the first floor up to 4,000 square feet are permitted on Site 1 (*id.*). As the DEIS explained, the use proposed for Site 1 is the "*only allowable use at this location*" (R2075 [emphasis added]). Thus, additional consideration of alternative site uses was not feasible.

The Court nonetheless held that the Planning Board failed to take a hard look because it did not consider alternative uses or reduced building heights for Site 1's two proposed 5-story, 55-foot-tall buildings, a claim that Petitioners never raised. With respect to alternative Site 1 uses, Pyramid worked with the Commission to examine restoring lands on Site 1 to pitch pine-scrub oak barrens. That alternative was rejected as infeasible and not within Pyramid's objectives (R6424).

The Court also incorrectly believed that the Planning Board should have considered reduced scale alternatives to the two 5-story buildings proposed on Site 1 to potentially mitigate any significant adverse visual impacts to nearby neighborhoods (R72). As the DEIS explained, the RRDP complies "in all respects" with the TOD's Design Standards, including *building height*, setbacks, greenspace and *density*, which were designed by the Town Board to mitigate any potential

impacts to the nearby neighborhoods (R1991 [emphasis added]; *see also* R6148-6149 [outlining height and density requirements imposed by TOD]). The five-story buildings on Site 1 are also located 150 feet or more from any adjacent residential districts to further the TOD's goal of increasing building height away from residential zones (R2103). Again, it is critical to note that the RRDP does not constitute a maximum build-out permitted under the Town's Zoning Law (R1999).

The TOD's bulk requirements represent the Town's legislative judgment of the proper scale and density of permissible development that will not adversely affect surrounding areas, including from a visual impact perspective. It was entirely reasonable for the Planning Board to recognize that legislative judgment in analyzing whether the RRDP's scale would cause significant adverse impacts (*see Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373, 383 [1992] [holding that local zoning determinations are relevant in a SEQRA review and "should not be overlooked"]).

In fact, because the Planning Board more than adequately analyzed visual impacts from Site 1 development and determined that no significant adverse visual impacts would result (*see* Point II(B)(2),

supra), the Board was not required to also consider an alternative reduced project scale for the purpose of mitigating significant adverse visual impacts that it had already concluded would not occur. Indeed, the RRHD residents, which the Court determined without record support could be adversely affected, never raised any concerns regarding visual impacts on the RRHD. Nor did the SHPO. Therefore, the Planning Board reasonably excluded a shorter alternative to the RRDP from consideration.

C. THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK AT ALL RELEVANT AREAS OF ENVIRONMENTAL CONCERN THAT PETITIONERS RAISED.

Supreme Court only decided two aspects of the SEQRA hard look issues that Petitioners raised: whether the Planning Board considered reasonable alternatives to the Costco Project, including reduced project scale and alternative use, and whether the Planning Board took a hard look at the Costco Project's consistency with local zoning and community character. The Court did not directly address Petitioners' remaining issues, and thereby implicitly rejected them. This Court, however, should explicitly dismiss Petitioners' remaining SEQRA allegations.

1. The Planning Board Considered Reasonable Alternatives to Site 2 Development.

Supreme Court held the Planning Board's alternatives analysis for Site 2 was deficient for not considering a residential use or a reduced project scale. This was error. As the Court recognized, the DEIS contained an analysis of three distinct categories of alternative uses for Site 2 (R0028-0030):

1. The DEIS identified numerous uses that are typical components of a shopping center, such as retail outlets, department stores, theaters, appliance, and furniture stores, but explained that those uses did not meet Pyramid's primary objective for Site 2 to bring a *new* retailer to the region (R2008-2010) because they already existed in the immediate vicinity of Site 2 at Crossgates Mall or were already proposed within the Costco Project itself (R2100).

2. The DEIS listed numerous uses permitted within the General Business zone, such as commercial schools, public buildings, or hospitals, that were not feasible for Pyramid to develop, lease, or operate because they are beyond Pyramid's area of expertise in the industry (R2100-2101).

3. The DEIS comprehensively evaluated the alternative of developing a free-standing office building on Site 2, with supporting calculations and data relating to acreage, density, parking spaces, road access, water requirements, traffic counts, and vacancy rates for nearby office space (R2100-2103). The DEIS concluded that use of the site to support an office building was unreasonable because it would result in "more peak

> hour traffic," less of an economic benefit through generation of sales tax for the Town, and also a substantial financial risk for Pyramid, given the vacancy rates of other office space in the surrounding area (*id.*).

Contrary to the Court's view, the Planning Board was not required to analyze a residential alternative for Site 2, a permissive consideration under SEQRA.[8] Because the Planning Board had more than ample information to make a "reasoned conclusion" regarding the costs and benefits of alternative uses on Site 2, it satisfied SEQRA's requirements (*Coalition Against Lincoln W., Inc. v City of New York*, 94 AD2d 483, 492 [1st Dept 1983], *affd* 60 NY2d 805 [1983]).

The Court also improperly faulted the Planning Board for accepting the fact that a smaller retail facility on Site 2 would not be feasible (R73). Preliminarily, this plainly overlooks the fact that the Costco Project is 90,000 sq. ft. smaller than the permitted maximum build under the TOD. In any event, the Planning Board was not required to study a smaller scale alternative because it determined that

[8] Petitioners also claimed below that the Planning Board should have considered whether the Costco Project could be sited at Crossgates Mall (R7951). It would have also been infeasible to site the Costco facility, which is proposed for development on a 15-acre site, on the same 5.5-acre of the Crossgates Mall property that was rejected as too small to fit the RRDP, which is proposed on a 19-acre site (R2104).

the Costco Project, as proposed, would not result in any significant adverse environmental impacts. The Court did not dispute that finding.

Moreover, consideration of a reduced project scale is not necessary where a change in project size "would reduce the project to the point where it will no longer serve its intended function" (SEQRA Handbook, p. 119). It would be futile to study alternatives that do not meet the needs of the intended tenant, without which there would be no project at all. Should a tenant demand a certain size of a facility or a certain configuration for its business, and have other options where it can satisfy those needs, reduced scale alternatives are not "*feasible*, considering the *objectives and capabilities* of the project sponsor" and need not be considered (6 NYCRR 617.9).

The DEIS explained that the Costco Project "is tenant driven by a new use to this market area and specific demands for required space for their stores . . . the proposed Project is *the minimum size* that would meet the needs of the new use" (R2102 [emphasis added]). Any change in the size of the Costco Project would have eliminated that Project altogether (*id.*). Costco surely would have gone elsewhere if its requirements were not satisfied. That would not have served Pyramid's

objectives or the Town's economic goals.

2. The Planning Board Took a Hard Look at the Costco Project's consistency with Zoning and Community Character.

Petitioners conceded that the proposed Costco retail facility was fully consistent with the TOD and objected only to the included fueling facilities, presumably because of the corporate Petitioners' economic interests (R5292). Supreme Court held that the Costco Project was nevertheless inconsistent with certain stated purposes of the TOD. The record renders that assertion indefensible.

The Planning Board conducted an extensive review of the Costco Project's consistency with zoning and community character, including the goals of the TOD. These issues were identified as relevant areas of environmental concern in the scoping process (R1803; R1806-1807), discussed at length in the DEIS (R1983-1985; R1991-1993; R2077-R2081), and comprehensively addressed in the FEIS (R5234-R5263).

The Planning Board examined the Costco Project's consistency with the major commercial corridor surrounding Site 2, which features a mix of extensive commercial and business uses (R2080-2081; R5253). The Planning Board concluded that the 160,000 sq. ft. Costco Project,

which proposes retail development *1/10 the size* of the adjacent Crossgates Mall and well below the permissible 250,000 sq. ft. maximum build, was compatible with these surrounding uses (R6409-6413).

The Planning Board likewise analyzed the Town's comprehensive plan, the WCS, and the TOD's legislative history to determine whether the Costco Project would create significant adverse impacts to local land use and planning goals. The SEQRA record confirms that it would not and that the Costco Project is consistent with the Town's years' long effort to enact a zoning district with a mixed community of housing, shopping, entertainment, and employment within walking distance of the major CDTA transit center at Crossgates Mall (R5238; R5242, R6399-6413).

The Planning Board also recognized that the Costco Project is a specially permitted use in the TOD, which is "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the local community" (*WEOK Broadcasting Corp.*, 79 NY2d at 382-383; *Matter of Blanchfield v Town of Hoosick*, 149 AD3d 1380, 1383 [3d Dept 2017]).

The Court nevertheless faulted the Planning Board for relying on the fact that the Costco Project was permitted under local zoning. This was error. Local zoning laws are indisputably relevant "to determinations made pursuant to SEQRA" (*WEOK Broadcasting Corp*., 79 NY2d at 382-383). Indeed, as the Court of Appeals instructed, a lead agency is encouraged to consider whether a project is permitted under local zoning during a SEQRA review (*id*. at 382-383).

The Planning Board's analysis did not end with its recognition that the Costco Project is permitted by special use permit.[9] The Planning Board also provided a reasoned elaboration in support of its conclusion that the Costco Project satisfied specific purposes and goals of the TOD (R6147-6152). The Planning Board concluded that the Costco Project fully complied with the TOD's Design Standards (*id*.) and proposes numerous other TOD features encouraged in Zoning Law § 280-18A(G), including:

1. Pedestrian and bicycle accommodations and improvements, including a new enhanced pedestrian

[9] The Court's holding attempts to draw a distinction between a permitted use and one authorized by special permit (R78-79). The distinction is irrelevant here, because the Planning Board did not rely exclusively on the Costco's Project status as a specially permitted use to determine its consistency with the Town's land use goals. In any event, this Court's 2017 decision in *Blanchfield* involved a specially permitted use and draws no such distinction (149 AD3d at 1383).

crossing, multi-use trail, sidewalk improvements and the integration of bike lanes (R6406-6408);

2. Access management and transit improvements in design and layout, including the reduction of lanes on Crossgates Mall road, the construction of a new roundabout to process traffic more efficiently, the reconfiguration of a major intersection to reduce vehicular speed and a new CDTA bus stop, which the CDTA itself confirmed would ease congestion, improve safety and result in a "marked improvement for customers" in the area (*id.*; *see also* R4612);

3. The construction of a new connector road to Crossgates Mall Road (R6406-6407); and

4. Numerous project design features to prevent visual, noise, and other impacts, including, but not limited to, berms, fencing, and landscaping (R6409-6413).

Thus, the Planning Board took the requisite hard look and concluded that the Project, particularly when viewed concomitantly with the RRDP, was squarely aligned with the TOD's goal to promote a mix of residential and commercial development in combination with public transportation services and pedestrian improvements (R5254).

Supreme Court wholly disregarded the Planning Board's analysis, and instead conducted its own review, finding that the Costco Project was inconsistent with the TOD's legislative intent and insisting, without support, that the Project would result in "the destruction of the

relevant neighborhoods, all to authorize a mass retailer that will promote automobile modes of transportation" (R81-82). That decision far exceeded the parameters of the Court's judicial review. SEQRA review "may not serve as a vehicle for adjudicating legal issues concerning compliance with local government zoning" (*WEOK Broadcasting Corp.*, 79 NY2d at 382-383; *see also Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004] ["[t]he judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them"]). The Court's role thus should have been limited to determining whether the Planning Board took a hard look at the Costco Project's consistency with the TOD and community character.

The Court's holding calls into question not only the Planning Board's reasoned analysis, but also the Town Board's legislative decision to permit development of commercial retail uses like the Costco Project in the TOD. Effectively, the Court scuttled years' worth of the Town's planning efforts to concentrate commercial development in the TOD, in violation of the Town's constitutionally guaranteed zoning powers (*see* Municipal Home Rule Law § 10[1][ii][a][11], [12]; Town Law

§ 261).

3. The Planning Board Took a Hard Look at the Remaining SEQRA Impacts that Petitioners Raised and Supreme Court Implicitly Rejected.

Supreme Court did not rule expressly on the remaining SEQRA impacts that Petitioners alleged, including that the Planning Board failed to take a hard look at (1) the Town's property ownership of certain Town roads, (2) wetlands impacts resulting from the Costco Project, (3) traffic impacts resulting from the Costco Project, (4) air quality, (5) business displacement resulting from the Costco Project, and (6) the Projects' impacts on endangered bat species (R7942-7953). The Court implicitly rejected those claims, all of which were addressed by the Planning Board. This Court should as well.

First, the Planning Board identified that the action required certain "governmental approvals" from the Town Board, including the "discontinuance of all or portions of Town roads, approval of road improvements, and acceptance of the dedication of extended Gabriel Terrace" (R2013; R2103, R5131; R7653-7655).[10] It was certainly reasonable for the Planning Board to conclude that no significant

[10] Petitioners argued that the Town Board should have abandoned the Town roads *before* the Planning Board, as lead agency, completed its SEQRA review. SEQRA, however, does not permit that to occur (R7654).

adverse environmental impacts would result from the mere legislative abandonment of the roads and transfer of legal title (*see Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Matter of Trude v Town Bd. of Town of Cohocton*, 17 Misc 3d 1104[A] [Sup Ct 2007]).

Second, in assessing potential wetlands impacts on Site 2, the Planning Board analyzed the B. Laing studies, which investigated each site for wetlands and concluded that no significant adverse impacts would result to the only identified federally regulated .093-acre wetland on Site 2 (R2800-2816; R7610-7617; R7595-7596). B. Laing further concluded that the 0.093-acre wetland would be filled in accordance with the Army Corp of Engineers ("ACOE") Nationwide Permit process (R2022; *see also* R6427). This opinion was supported and confirmed by the ACOE itself, the regulatory agency with authority to identify federally protected wetlands (R6427).

Petitioners nonetheless argued that the Planning Board should have accepted their consultant's speculative opinion that "Site 2 *may* contain additional federal wetlands" (R7884). That, however, provided no basis to annul the Planning Board's SEQRA review because "the

choice between conflicting expert testimony rests in the discretion of the" lead agency (*Matter of Kirquel Dev., Ltd. v Planning Bd. of Town of Cortlandt*, 96 AD3d 754, 756 [2d Dept 2012]).

Third, as Supreme Court recognized, the Planning Board's review of traffic impacts was "encyclopedic in scope" (R78). This included the analyses of the Planning Board's traffic engineer, Greeman Pederson, Inc. ("GPI"), NYSDOT traffic engineers, and Pyramid's traffic engineer, Maser Consulting P.A. (R6393). Maser used the Institute of Transportation Engineers ("ITE") traffic methodology for forecasting trip generation that correlates to the Costco Project's use, rather than that of a typical retailer (R5192-5194). The DEIS and FEIS analyzed, at length, the Project's potential to cause traffic impacts and proposed measures designed to prevent any potential impacts (R2047-2075; R5184-5203).

Among the plethora of documents that the Planning Board reviewed was the Projects' Traffic Impact Study ("TIS"), which was revised based on comments and modifications made by the Planning Board and its traffic engineers, as well as NYSDOT, the Albany County Department of Public Works, the Albany County Planning Board, City

of Albany, and members of the public. The TIS ultimately concluded that the Projects would not "result in significant impact on the existing roadway network" (R1982).

The Planning Board's SEQRA Findings Statement concluded that the Projects would cause no significant adverse traffic impacts, and that Pyramid had "agreed to facilitate" numerous traffic improvements in consultation with members of the "public, NYSDOT, interested and involved agencies, town officials and consulting engineers" (R6394). In light of this extensive review of traffic impacts, Petitioners' claim should fail (*see e.g. Matter of Wellsville Citizens for Responsible Dev., Inc.*, 140 AD3d 1767, 1768 [4th Dept 2016]; *Finger v DelFino*, 275 AD2d 745 [2d Dept 2000], *lv. denied* 96 NY2d 703 [2001]).

To the extent that Petitioners contend that the Planning Board's review of traffic impacts was deficient because the Board should have relied "upon modelled traffic counts" that were "representative of other Costcos," including those counts calculated by a traffic engineer with respect to a Costco site in Yorktown, New York, Petitioners are incorrect (R7885). As the FEIS concluded, "[t]he traffic counts, projections and mitigation in other locations in New York and New

Jersey are dissimilar to traffic conditions in Guilderland, New York. The trip generation [in the TIS] was based on ITE standards and were reviewed by the Town's traffic consultant and NYSDOT and were found to be reasonable" (R5224). The Planning Board thus has a rational basis to reject the opinion of a traffic engineer related to dissimilar traffic conditions (*see e.g. Village of Chestnut Ridge v Town of Ramapo*, 99 AD3d 918, 925 [2d Dept 2012]; *see also Matter of Brunner v Town of Schodack Planning Bd.*, 178 AD3d 1181, 1182 n * [3d Dept 2019] [planning board was not required to adopt certain methodologies in traffic studies]).[11]

Fourth, the Planning Board identified air quality impacts as a relevant area of environmental concern in the Final Scope (R1952), and concluded that the Projects posed no significant adverse impacts to air quality (R6418-6420). The Planning Board based that conclusion on a B. Laing expert air quality analysis and impact report, which concluded that "[n]o significant air quality impacts are anticipated as a result of the buildout of the Project[s]" (R1995; R2723-2737). Indeed, as the Planning Board noted, the Projects include measures to benefit air

[11] Petitioners also argued that the Planning Board failed to consider the impact of fuel truck deliveries or the impact of annual sales of gasoline. The record refutes that claim as well (R2028; R5247-5249; R5272; R5277-5278).

quality, such as a roundabout that will reduce vehicle emissions and fuel consumption (R6418-6420).

Fifth, the Planning Board considered the Projects' potential impact on displacement of other existing retail businesses. The corporate Petitioners operated a Western Avenue gas station, which they argued might experience increased competition and an adverse impact in sales from Costco's proposed gasoline facility, and sought to use this proceeding to minimize a threat to their business (R7857). Environmental and zoning laws, however, cannot be used by a business competitor as a means to seek redress for economic injury (*Tilcon New York, Inc. v Town of New Windsor*, 172 AD3d 942, 945 [2d Dept 2019]). Potential economic competition to a nearby gas station simply is not the type of displacement affecting neighborhood character that is part of a SEQRA review.

In any case, the Planning Board comprehensively considered socio-economic impacts, including business displacement (R2106-2107; R5250-5251; R1995-1996; R5261-5263). The Planning Board considered expert market evaluations prepared by Camoin Associates, which concluded that the Costco Project would grow the overall market

potential of the trade area (R1995-1996; R2010-2011; R2096; R2509-2544). The Planning Board thus rationally concluded in its SEQRA Findings that the Projects are expected to confer a positive economic benefit by providing jobs for hundreds of area workers, significant tax revenues, and increased patronage to local businesses (R6413; R6421-6423).

Sixth, the Planning Board carefully considered whether any endangered bat species inhabited the Sites and would be significantly impacted by development. The B. Laing Vegetation Wildlife and Soil Conditions report found no evidence that protected bat species were located on the sites and that there was no confirmed occurrence of the northern long-eared bat in Albany County (R1147-1170). The Planning Board also "consult[ed] with NYSDEC," which confirmed "that no endangered bat species are known to exist at this location" (R6387), and relied on expert acoustic survey information, which reached the same conclusion (R6432). The Planning Board, therefore, determined that no anticipated adverse impacts on the protected bat species would result, especially because the development was proposed outside of the 5-mile radius of protected hibernaculum (R1164-1165; R2031; R5160-6161;

R5174-5175; R7611-7616).

Lastly, Petitioners alleged that the outcome of the Planning Board's SEQRA review was predetermined by tree cutting that occurred on Site 2 in March 2020 because it restricted the consideration of alternatives or mitigation measures.[12] Contrary to Petitioners' allegations, the Planning Board fully considered whether potential protected bat habitat existed on Site 2 and whether any potential adverse impacts would result from the activity. In particular, the Planning Board reviewed the Town's and the Pyramid Defendants' communications with NYSDEC and the B. Laing report findings, all of which determined that the "tree cutting activity was outside of the 5-mile protected radius of bat habitat, and therefore was not prohibited" (R6432-6434).

The Planning Board also determined that the tree cutting was not a prohibited "physical alteration"[13] before the completion of SEQRA

[12] Relatedly, Petitioners also alleged that the Town Planner lacked any authority to permit the tree cutting. This assertion is belied by the record, as no Town permit was required for the work (R6432-6434 ["[t]he Town Code does not require a permit for such tree cutting activity"]; R7658-7660).

[13] SEQRA does not specify any particular relief should a lead agency conclude that a physical alteration of land occurred during the course of a SEQRA review (*see* 6 NYCRR 617.3 [a]). It is left to the lead agency's considerable discretion to

because the activity did not remove stumps or otherwise disturb the soil (*Id; see also* R5296; R6313-6316). The Planning Board therefore concluded that "there was no potentially significant environmental impact" from the tree cutting activities (*id.*).

The Planning Board's SEQRA findings also established that the tree cutting did not affect the Planning Board's ability to consider potential alternatives to the proposed developments, thus dispelling any notion that its review was in any way predetermined (R6432-6434). Indeed, Petitioners never identified any alternative the tree-cutting precluded.

POINT III

PETITIONERS HAVE ABANDONED ALL CLAIMS FOR RELIEF NOT EXPRESSLY GRANTED BY SUPREME COURT

Although Petitioners pled 10 claims, the Supreme Court judgment granted relief only on Petitioners' second (challenge to SEQRA procedures), fourth (challenge to SEQRA substance), and tenth (challenge to the site plan approval) causes of action, but did not address expressly the remaining seven claims.

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determine the impact of any physical alteration of land and to weigh it in the SEQRA findings for the proposed action.

As this Court has recognized, "[a] court's failure to specifically address a motion or a part thereof is equivalent to a denial" (*Dickson v Slezak*, 73 AD3d 1249, 1251 [3d Dept 2010]). Because the judgment did not address Petitioners' first, third, and fifth through ninth causes of action, they have been denied, and Petitioners were aggrieved thereby (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]).

Petitioners, however, failed to timely cross appeal from the final judgment (*see* CPLR 5511, 5513 [c]). This Court, therefore, lacks jurisdiction to grant Petitioners any affirmative relief on those claims and they have been abandoned (*see Hobler v Hussain*, 111 AD3d 1006, 1009 [3d Dept 2013]; Siegel, NY Prac § 525 [6th ed] ["If the respondent—the overall winner who is opposing the appeal—asked for any kind of affirmative relief below and was denied it, that party should himself consider taking an appeal or a cross-appeal in respect of the denial. Stated otherwise, the rule is that the nonappealing party cannot be granted affirmative relief" (footnote omitted)]).

Even if this Court could take jurisdiction over Petitioners' first,

third, and fifth through ninth causes of action,[14] Supreme Court properly denied Petitioners relief, and this Court should dismiss those claims expressly, for the following reasons (*see Giaimo v Vitale*, 101 AD3d 523, 524 [1st Dept 2012] ["Since the entire record is included on appeal, it is sensible and economical for us to decide this issue rather than remand the issue to the motion court for further consideration."]; *see also generally Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 52-53 [1999]).

A. PETITIONERS LACK CAPACITY TO SUE UNDER ENVIRONMENTAL CONSERVATION LAW § 17-1103.

Petitioners' first cause of action alleged that Pyramid violated ECL Article 17, Titles 7 and 8 because it did not obtain a State Pollutant Discharge Elimination System permit before cutting the trees on Site 2, which Petitioners speculate could have resulted in a prohibited discharge into on site wetlands (R7876-7879]).

Petitioners lack capacity to allege that Pyramid violated ECL Article 17. "The plain language of ECL 17–1103 clearly evinces the legislative intent that an action or proceeding to enforce the

[14] Petitioners' ninth cause of action alleged a violation of the Freedom of Information Law against the Town (R7899). Because this claim was not brought against Pyramid, it is not addressed in this brief.

prohibitions contained . . . in the Act and the regulations promulgated thereunder may be maintained only by the State" (*Hudson Val. Oil Heat Council, Inc. v Town of Warwick*, 7 AD3d 572, 574 [2d Dept 2004]; *see* ECL 17-1103).

The first cause of action also fails on its merits. To establish a violation of ECL 17-0803, Petitioners were required to demonstrate that an unauthorized discharge had occurred to a regulated wetland (*see* ECL 17-0803; *see also e.g. State of New York v City of Yonkers*, 35 AD3d 719, 719 [2006]; *Matter of Colella v New York State Dept. of Envtl. Conservation*, 196 AD2d 162, 168 [3d Dept 1994]). No evidence exists that a prohibited discharge occurred within the 0.093-acre wetlands area on Site 2, a very narrow strip of land that exists at the bottom of a drainage ditch (R7609-7617). In fact, B. Laing's April 28, 2020 water quality test, one month after the trees were cut, confirmed that no discharges occurred to the small Site 2 wetland (*id.*; *see also* R5296-5298). Petitioners' speculation otherwise was insufficient to rebut that undisputed record evidence (R7936; *see also* R394).

B. PETITIONERS LACK STANDING UNDER THE HIGHWAY LAW AND FAILED TO DEMONSTRATE THAT THE PRIVATELY-OWNED CUL-DE-SAC AT THE END OF WESTMERE TERRACE IS A HIGHWAY BY USE.

Highway Law § 189 provides that "[a]ll lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway." Petitioners' third cause of action alleged that a cul-de-sac at the end of Westmere Terrace in the Town should be declared a highway by use under section 189.

Westmere Terrace is a Town road, but it ends *before* the cul-de-sac at the dead end of the street on a private parcel of land that Pyramid owns, and for which Pyramid pays property, school, and county taxes (R8094; R7655-7656; R7584-7592). No houses are located on the cul-de-sac, no driveways are connected to it, and no residential development is built directly around it (R8096).

1. Petitioners' Lack Standing Under Highway Law § 189.

Petitioners alleged that they would be harmed if the cul-de-sac was not declared a highway by use because the McDonalds live close to it, have used it in the past, and believe that "more than 600 square feet of area currently used by the McDonald Petitioners as their front lawn

will be converted into a roadway" as part of the RRDP (R0438). These allegations are insufficient for standing.

First, the cul-de-sac is proposed to be relocated to a different portion of Pyramid's property, and will not occupy any portion of the McDonalds' parcel (R7584-7592; R1992]). Second, because the cul-de-sac will only be relocated one tax lot over, not removed, it will still be available for use, including by the McDonalds (R7584-7592). The McDonalds will not, therefore, suffer any actual harm at all.

The McDonalds' allegations that their home is proximately close to the cul-de-sac is also insufficient to establish their standing under the Highway Law (*see 159-MP Corp. v CAB Bedford, LLC*, 181 AD3d 758, 761-762 [2d Dept 2020]). None of the "injuries" that Petitioners have identified could be remedied by a judgment declaring the cul-de-sac a highway by use, and Petitioners have not explained how the grant of such an easement to the Town would benefit them.

Petitioners are also not within the zone of interests protected by the statute. Section 189 is intended to grant a town an easement over a roadway that is actually and routinely used by the general public to permit the town to maintain and improve the road over privately owned

property as necessary to ensure safe passage (*see Dutcher v Town of Shandaken*, 23 AD3d 781, 782 [3d Dept 2005]; *Matter of Usher v Mobbs*, 129 Misc 2d 529, 529-532 [Sup Ct 1985]). The statute does not confer any rights on private property owners to compel the Town to maintain a privately-owned cul-de-sac as a highway when the public does not use it regularly and the Town has already decided not to do so.

2. Petitioners Did Not Establish that the Cul-De-Sac Has Been Regularly Used by the Public and that the Town Has Exercised Dominion and Control Over It Throughout the Statutory Period.

Even if Petitioners had standing, their third cause of action fails on its merits. A highway by use is established where the record evidence shows two things: first, that "for a period of at least 10 years, the road at issue was used by the public," and second, during that same 10 year-period, "the municipality exercised dominion and control over the road" (*State of New York v Town of Horicon*, 46 AD3d 1287, 1289 n 2 [3d Dept 2007]). Mere intermittent public use is insufficient (*see Long Pond Assn., Inc. v Town of Carmel*, 87 AD3d 525, 526 [2d Dept 2011]).

Petitioners' only allegation is that the McDonalds have personally used the cul-de-sac for recreational purposes as a "quiet turnaround" for approximately six years (R7914; R406-407). That does not show

consistent public use of the cul-de-sac for ten years.

Nor did Petitioners produce any evidence that the Town assumed full dominion and control over the cul-de-sac (R7965 [single conclusory allegation of the Town "regularly maintaining and plowing Westmere Terrace and its cul-de-sac including chipping the road and cul-de-sac approximately five years ago"]). As Town Highway Superintendent Gregory Wier attested, the cul-de-sac "is not part of the Town of Guilderland's highway system" and does not appear on the Town's official street map maintained under Town Law § 270 (R8082-8083; *see* Town Law § 270 [an official map "shall be final and conclusive with respect to the location and width of streets and highways"]). Petitioners' conclusory proof was, therefore, insufficient (*see Long Pond Assn., Inc.*, 87 AD3d at 526 ["some evidence" that a town has "plowed snow from the subject roads" is alone "insufficient to raise a triable issue of fact as to whether the Town exercised dominion and control over the roads in the absence of proof of regular maintenance and repair of the roads"]; *La France v Town of Altamont*, 277 App Div 917, 917 [3d Dept 1950]).

C. PETITIONERS WERE NOT ENTITLED TO DECLARATORY RELIEF THAT THE PLANNING BOARD WAS UNAUTHORIZED TO CONSIDER PYRAMID'S LAND USE APPLICATIONS.[15]

In their fifth and eighth causes of action, Petitioners alleged that the Town violated Town Law § 64(2), which governs the acquisition and conveyance of real property owned by a town, "by allowing Pyramid to unlawfully assume control over Town properties," including "all of the Town roads known as Lawton Terrace, Tiernan Court, Rielton Court and Gabriel Terrace without formal conveyance of an interest in the Town's properties" (R7957). The listed Town roads are only on Sites 2 and 3. Because the Town never granted any approvals for development on Sites 2 or 3, those claims remain unripe for review.

Moreover, the Town did not allow Pyramid to "unlawfully assume control" over Town roads. The record shows that the Town intends to satisfy all legal obligations with respect to these Town roads, *prior* to the development of the Costco Project (*see e.g.* R984; R2013; R2103; R5131). Although Petitioners suggested that the abandonment of these roads needed to occur before the Planning Board completed its SEQRA

[15] Relatedly, Petitioners also sought injunctive relief enjoining further administrative land use review of Sites 1-3 unless and until the Town alienated certain Town roads and a subdivision and site plan application was submitted for Site 2 (R7961-7962). Even if Petitioners preserved this related relief for this Court's review, Petitioners were not entitled to it below.

review, granting such an approval before completing the coordinated SEQRA review would have been contrary to SEQRA's mandates (*see* 6 NYCRR § 617.3[a]; R7653).

Nor does the Town's Zoning Code require that the Town Board abandon any roads before the ZBA considers or determines the special use permit application for Site 2. Indeed, municipal boards often make compliance with legal requirements like obtaining various approvals from other agencies conditions of municipal approvals (*see* Town of Guilderland Code § 280-52[F], *available at* https://www.ecode360.com/31716179 [last accessed Jan. 24, 2021]). Doing so ensures that all applicable legal requirements are satisfied before the project may be developed (*see e.g.* Town Law § 274-a[4]). Petitioners' fifth and eight causes of action were properly denied.

CONCLUSION

For the foregoing reasons, Appellants Pyramid Management Group, LLC, Rapp Road Development, LLC, and Crossgates Releaseco, LLC respectfully request that this Court reverse the Supreme Court judgment, and dismiss all claims in their entirety.

Dated: January 25, 2021
Albany, New York

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Rule 1250.8(j) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.8 [j]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016.

I further certify that this brief complies with the typeface, point size, and line spacing requirements of Rules 1250.8(f)(1) and 1250.8(h) because it was prepared using a proportional typeface named Century Schoolbook, the body of the brief is 14-point type and double-spaced, the footnotes of the brief are 12-point type and single-spaced, and the margins of the brief are one inch on all sides of the page.

I further certify that this brief complies with the word count requirement of Rule 1250.8(f)(2) because the total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 13,892.

Dated: January 25, 2021

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