

Steve Wickham
235 Executive Drive
Guilderland, NY 12084

May 26, 2020

Town of Guilderland Planning Board
Attention: Kenneth Kovalchik, Town Planner, Kovalchikk@togny.org

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

Dear Chairman Feeney and Members of the Guilderland Planning Board:

I'm profoundly disappointed that the Town of Guilderland Planning Board has not yet removed itself as Lead Agency for the proposed development by The Pyramid Companies on Rapp Road, the Mall Ring Road and Western Avenue. At the very least the Board could put the proceedings on hold and postpone making any decisions regarding the Draft Environmental Impact Statement (DEIS) until the pending lawsuit against the Town of Guilderland and The Pyramid Companies regarding the status of the Planning Board remaining as Lead Agency is resolved.

I am, of course, referring to the lawsuit filed by Attorney James Bacon on behalf of 4 residents of Westmere Terrace and the owner of 2 Guilderland gas stations on Western Avenue in proximity to the proposed development in response to the clear-cutting on March 26, 2020 of one of the sites currently in the State Environmental Quality Review Act (SEQRA) process by your board.

There are several reasons why the Guilderland Planning Board should not continue as Lead Agency:

1. The Town allowed illegal alteration during the SEQRA process when The Pyramid Companies clear-cut a large wooded portion of the site of the proposed Costco on March 26, 2020 even though Pyramid provided advance notice of the clear-cutting to the Town which the Town Planner posted to the Town's website after the clear-cutting began. Not only did allowing this clear-cutting defy common sense, it also clearly violated SEQRA law.

Section 6 NYCRR 617.3(a) of the New York State SEQRA prohibits any physical alteration and the regulation definitions at 6 NYCRR 617.2(ac) clearly says "Physical alteration includes, but is not limited to, the following activities: vegetation removal, demolition, stockpiling materials, grading and other forms of earthwork, dumping, filling or depositing, discharges to air or water, excavation or trenching, application of pesticides, herbicides, or other chemicals, application of sewage sludge, dredging, flooding, draining or dewatering, paving, construction of buildings, structures or facilities, and extraction, injection or recharge of resources below ground."

Because of this illegal clear-cutting, the Guilderland Planning Board can no longer act unbiasedly when under the advisement of the Guilderland Town Planner Kenneth Kovalchik who allowed the Costco site to be illegally clear cut while the

proposed development was going through the SEQRA process and which was not stopped by Guilderland Town Supervisor, Peter Barber, until he directed the Chief Building and Zoning Inspector, Jacqueline Coons, to issue a Cease-and-Desist Order on March 27, 2020 after most of the site was already clear cut and the irreversible damage was already done.

2. From the beginning there has been a sense that the intention has been to move this project through the system as quickly as possible despite the fact it will be one of the largest projects in Guilderland since building of the Crossgates Mall itself.

The DEC was the lead agency when Crossgates Mall was built and the original development was ~11.5 acres for buildings and ~62.5 acres with the ring road based on estimates from a March 1985 satellite photo by Andy Arthur, volunteer of Save the Pine Bush. This current project proposes to develop of over ±45 acres over 3 sites.

I understand that there are time tables set out my SEQRA that must be met to be equitable to both the applicant and the public, but several of the intervals in the SEQRA timeline are minimums. If you recall, the Town Planner originally suggested that the Planning Board could have a public hearing on this project in early December 2019 and possibly vote on it before the end of the year.

Fortunately, as I recall, that timeline was changed by delays due to submissions from the Applicant because in December we publicly learned that the applicant was indeed intending to build a Costco on Site 2 and the DEIS was not filed until December 24, 2019.

The only reason we have had the time to review this DEIS as much as we have is because of the technicality of the Public Hearing scheduled on March 11 not being appropriately published followed by the global coronavirus pandemic which shut everything down for several weeks and forced another delay of the public hearing.

What I don't fully understand is how the Guilderland Planning Board deemed the DEIS "complete" in February when it was missing a wetlands report for the Costco site and a traffic study that is posted on the Town's website with a date of February 17, 2020, which is 5 days after the DEIS was deemed complete.

It does not seem to me that the Planning Board took the time to critically and fully review the DEIS as they should have before voting to deem it complete and move the process into the next Comment Phase of SEQRA. Fortunately there have been several experts who have been able to assess the DEIS since its release that the public can rely to have a more critical review. More on that below.

3. The Guilderland Planning Board claimed Lead Agency before the full scope of the project was revealed.

When this project was first proposed and Lead Agency was established, it was for

222 apartments on Rapp Road, which is now rereferred to as Site 1. To the credit of the Chair and other members of the Guilderland Planning Board, you required the applicant to reveal any other development that the applicant might be considering.

This was an obvious request since the site plans at the time clearly marked an area for "Future Development" and there were public rumors about development on other sites.

However, when the scoping document for the DEIS was presented to the Board, the public learned officially for the first time that the applicant actually had plans for much more intense development in what is now referred to as Sites 1, 2 and 3.

The Guilderland Planning Board should have immediately restarted the process for determining Lead Agency when the scope of the project was so dramatically changed and included the description for Site 2 that fit the requirements for "a big-box store" regional attraction like the now proposed Costco.

From documents filed with the court for the pending lawsuit mentioned above, the public has now learned that Pyramid had completed its site plan for a Costco in November 2017, while telling the public that it had no other plans.

Because I was running for public office in the Spring of 2019, I was invited by Westmere Terrance residents to be in attendance at two meetings between the applicant, the Town Planner and the residents where the applicant denied any intention of building anything beyond the 222 apartments on Rapp Road in the original proposal. The Town Supervisor was also in attendance at the first meeting which took place in the cul-de-sac at the end of Westmere Terrace.

To me the above is sufficient reason for the Planning Board to remove itself now as Lead Agency and request another agency such as the Albany County Planning Board or the New York DEC to take over the process, if for no other reason than avoid any further appearance of bias towards the Applicant.

I find it very telling that the Defendant's Joint Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction, Document 27, filed on May 18, 2020, that the Town Attorney and the co-defendant Pyramid filed a joint Memorandum of Law. As I understand it, this is unusual and would indicate that they are united in their interests.

Assuming though that the Planning Board will not relinquish Lead Agency unless forced to do so by the court and since the court has not yet ruled one way or the other on this matter, the remainder of my comments will address the issues with the DEIS itself.

1. The DEIS describes development on three sites which in total proposes to build up to 360 Apartments with up to 3 five-story apartment buildings, up to 50,000 sq ft of office space and up to 278,900 sq ft of commercial expansive retail including a Costco with its own 700 car parking lot and an 18 pump gas station.

As many other residents of Guilderland have pointed out in their comments, as

well as the Albany County Planning Board, the proposed development does not meet the purpose of an approved use in a Transit Oriented Development District (TOD) as described in the Town of Guilderland (TOG) Zoning Code Chapter 280-18.1 A. Purpose.

Furthermore, the Albany County Planning Board in their rejection of the Special Use Permit for the Costco stated:

- a. Large warehouse stores are typically found in auto-oriented commercial zones that rely on highway infrastructure and are not found in TOD zones that promote walkability.
 - b. Majority of customers visiting warehouse stores drive in. The closest Costco store is two hours away. Conceivable customers will be driving from many miles away to buy in bulk and leave. In this situation customers will typically not travel by bicycles or bus.
 - i. I can attest to this as I lived 0.9 miles from a Costco for over 5 years when I lived in El Cerrito, California. Shopping at Costco was actually one of the few places I drove my car to. Most of the time when I needed to go somewhere I walked, rode my bicycle and/or took Bay Area Rapid Transit (BART). Since Costco sells mostly in bulk, it is not practical to shop there without a motorized vehicle even if you live within walking distance.
 - c. The proposed warehouse along with 700 parking spaces does not show evidence of reducing the number of parking spaces and is in direct contradiction of the purpose of a TOD zone. The Albany County Planning Board made similar comments in the past regarding the number of parking spaces for the proposed apartment development on Rapp Road.
2. In general, I found that throughout the DEIS the applicant made conclusionary statements without fully backing up those assertions. The detailed analysis by Ferrandino and Associates (F&A) submitted to the Planning Board by Attorney James Bacon in his comments raised similar concerns and they pointed out very specific instances which need to be addressed. I wish to also emphasize the following from the F&A analysis of the DEIS:
- a. The DEIS traffic studies are likely understating the probable impacts of the traffic, particularly due to the Costco.
 - b. The DEIS is not fully and properly addressing the economic impacts of the Costco on other local businesses and likely overstating economic benefits to the Town and County since it does not appropriately balance revenue against costs. The DEIS paints a very rosy picture of how the Town and County will benefit and, of course, all of this "analysis" was done pre-coronavirus outbreak.

- i. I find it particularly interesting that the Town and many local businesses, as well as the Chamber of Commerce, seem to think that bringing Costco here will enhance rather than compete with existing businesses. Indeed, during the virtual public hearing 2 local jewelers claimed they expected to increase business with the Costco, and another caller specifically said she currently drives out of town to purchase jewelry at a Costco.
- ii. As part of his comments, Attorney James Bacon also submitted an affidavit by James Calvin, who for the past 22 years has served as the CEO of the New York Association of Convenience Stores, which describes in detail how difficult it will be for existing gas stations to compete with the Costco's gas station.
- iii. The market analysis of the Costco in Yorktown, NY reported that the Costco there expected to sell 7-10 million gallons of gasoline per year and that the typical gasoline station would sell 500,000 to 1 million gallons per year. So a Costco in Guilderland could sell potentially the equivalent of at least 7 existing gas stations and probably much more than that.
- iv. Dr. Jedediah Brewer, a private-sector consultant in the convenience retail and petroleum markets stated during the virtual public hearing on the DEIS, that a big-box store like Costco will likely have competitive impacts on gas stations up to three miles way.

By my count, there are currently 6 existing convenience store gas stations and 3 gas stations that have already gone out of business on Western Avenue within 3 miles to each side of the proposed Costco gas station.

Is the Guilderland Planning Board prepared to take responsibility for allowing any one of these currently operating gas stations be added to the list of gas stations in Guilderland have gone belly up? Or for that matter any other existing business that Costco competes with?

- 3. The DEIS does not adequately address reasonable alternatives for the development or mitigation efforts.
 - a. In section 3.4.1.3.2 Road Alternatives it describes 7 potential alternatives to mitigate traffic through the Rapp Road Historic District. None of these alternatives are really viable and expose how the only real alternative to this development is to not do it at all.
 - i. The City of Albany has advocated for the "Eastern Bypass" which would go directly through the land the applicant is offering to protect as a "mitigation" measure for destroying the ecosystems of Site 1. The land for the "Eastern Bypass" is designated for Full Protection by the Albany Pine Bush Commission.

- ii. Both options for the "Western Bypasses" have similar ecological concerns as the "Eastern Bypass" and would require land not owned by the applicant.
 - iii. Alternates 4, 5, 6 and 9 will all cause hardships to current residents on Gipp Road, Paden Circle, Wilan Lane, Pine Lane and/or residents of the Rapp Road Historic District. Some alternatives would annex Wilan Lane from the City of Albany.
- b. There are clearly potential opportunities to move the proposed developments inside the Mall Ring Road and make better use of existing parking lots and bring people to Crossgates Mall itself. In section 5.4 Alternative Locations, the applicant claims "the Rapp Road development does not have common ownership with Crossgates Mall" but it's my understanding that the Pyramid companies are behind all of this development and they own the Mall. In fact, Guilderland Police waited for representatives of Crossgates Mall management to arrive and file a formal complaint against me when I attempted to stop the illegal clear-cutting in act of spontaneous civil-disobedience on March 26, 2020. If there is no common ownership, where did these representatives have the authority to file that complaint?
- c. In section 3.3.1.7.2 Proposed Donation of "Full Protection" Land to Pine Bush Preserve, the applicant proposes as a mitigative measure for development on Site 1 to donate 8.4 acres of land designated for Full Protection that the applicant owns and is frankly unlikely to be able to ever develop because of its location and designation.

During the virtual Public Hearing on the DEIS, Dr. Cynthia Lane who is an ecologist with 30 years of experience and who is a recognized expert on Karner Blue Butterflies, said "the rationale for justifying mitigating the loss of the 19.68 Acres in Site #1 with the protection of 8.4 acres to the north is lacking. There is really no stated reason why you could protect one area that's already habitat and then lose 19 acres."

She also stated, "the mitigation measures that are presented in my opinion, based on my experience are insufficient and unsupported. So, what is the rationale for a 200 foot buffer on the other side of Site 1? Why 200 feet? What is the buffer actually specifically there to do? Is it there to prevent light pollution, create a barrier to reduce human use? Buffers are specific to what the threat or what the habitat needed so it needs to be much more clear and say that this is what the buffer is going to do and this is why it needs to be this height and this width which I don't believe has been done in any way."

4. Attorney James Bacon also submitted an affidavit by Dr. Erik Kiviat, Professional Wetland Scientist and Executive Director of Hudsonia. Dr. Kiviat had identified that all three development sites included habitat potentially suitable for a Special Concern species, (worm snake), in New York and that no surveys were specifically conducted for rare plants.

Dr. Kiviat also states, and I fully agree with him, "The future of these sites is not a question of restoration of Pine Bush vs clearing and development, it's question of maintaining important existing urban ecosystem services vs losing those services." He continues saying, "The applicant's environmental studies omit or minimize discussion of several important features, including naturally-occurring pitch pines, large native trees, and several other native species."

Dr. Kiviat further asserts that this is the first instance that he is aware of where a site was clear-cut during the comment period on a DEIS, "an action that is unfathomable since the purpose of the administrative environmental review is to assess a site's natural resources, wildlife, and plants prior to irreparably damaging that inventory."

5. The DEIS asserts that none of the three sites are suitable for Pine Bush ecology, which is contradicted by comments Dr. Jeffrey D. Corbin, Professor of Biological Sciences at Union College. Dr Corbin's analysis says, "the conditions that support pine barren vegetation including pitch pines, scrub oaks, and lupines and associated animals including endangered species and species of special concern can be restored" and that based on his research, the DEIS is factually incorrect when it states on p.31 that, "...converting of (sic) this site to Pine Bush habitat would be very challenging, if not impossible given the enormous costs involved in creating what amounts to new ecological conditions, as no qualities of the natural state remain."

Dr Corbin further states that the DEIS is also factually incorrect when it states on p. 18 that "no significant impacts are anticipated" because "the site is currently disturbed and lacks any characteristics of the Albany Pine Bush habitats..." Dr. Corbin says that this statement ignores the documentation of at least 44 plants, 36 birds, 91 invertebrates, one frog, and four mammal species at the site (DEIS 2019) and that these species provide ecosystem services including pollination, pest control, carbon storage, and water retention that benefits nearby residents and the APB ecosystem itself. These services and benefits are a function of the existing habitat conditions, to say nothing of the potential services if the site is restored as other forested sites within the Preserve have been restored.

Lastly Dr. Corbin asserts, with emphasis, that the *"The DEIS incorrectly writes off the woodlot as having no value, either in its present 'green' state, or as a potential future site for restoration back to pine barren habitat."*

In conclusion, I think it would best for Planning Board to remove itself now as Lead Agency without fighting to stay in that position and let this process continue with a different agency. The applicant should also provide a DEIS that more completely addresses the true costs this development will have both economically and environmentally, with real alternatives, if they insist on moving forward.

Thank You,
Steve Wickham
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