SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CONCERNED CITIZENS FOR THE HUDSON VALLEY,
LEONARD BERGER, ROBERT and ELAINE TITO,
SUSAN and JERRY EZRA, ALISON and NICK GALLO,JOAN DONATO,

Petitioners,

-against-

TOWN OF GOSHEN, TOWN OF GOSHEN PLANNING BOARD, MERLIN ENTERTAINMENT GROUPS, US HOLDINGS, INC., FINI BROTHERS, GOSHEN LAND-OWNER, LLC, BRIAN AND JOAN MARIE CAREY and PC RESERVOIR LLC,

**Index No.: 9517-2017**

Respondents.

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**PETITIONERS' REPLY MEMORANDUM OF LAW**

## A. INTRODUCTION and PROCEDURAL HISTORY

On November 20, 2017, petitioners filed this Article 78 proceeding against respondent Town of Goshen and Merlin and various related property owners. Petitioners challenged as arbitrary, capricious and contrary to law the [i] Town Board's adoption of Local Laws 5 and 6 by which the Town altered its 2009 Comprehensive Plan and zoning law and [ii] Planning Board's grant of site plan approval, including authorization to clear cut about 150 acres of woodlands. In their Verified Petition, Concerned Citizens for the Hudson Valley [CC4HV] and eight individual

petitioners demonstrated that [1] bad faith and pre-judgment infused the entire Town approval process, [2] the Town Board improperly delegated lead agency status for the changes to the Comprehensive Plan and the zoning changes to the Planning Board and failed to complete a Generic Environmental Impact Statement before adopting significant changes to both, including adoption of a new Commercial/Recreation Overlay District covering 522 acres owned or optioned by Merlin, [3] as lead agency for all aspects of the project, including those delegated by law to the Town Board, the Planning Board then engaged in prohibited segmentation, failing to study the impact of the re-zoning on more than 370 acres not planned for immediate development but covered by the changes to both the Comprehensive Plan and the zoning law, [4] the Planning Board thereby and in other ways failed to take a hard look at the cumulative environmental impacts associated with the massive project's development, particularly in light of other very significant temporally-related projects, [5] the approved zoning change constituted impermissible spot zoning, not affecting all properties within the RU and HC districts, but only the property respondent Merlin owed and [6] the project lacks an adequate and reliable water supply.

Related to this legal action, CC4HV presented to the Town Clerk and Supervisor more than 400 signatures of Town voters demanding a referendum on the sale of Town parcels to Merlin. Under Town Law, these voters had a statutory right to demand this referendum and its conduct would have stayed both the sale and further proceedings with the site plan which included those parcels. The Town and Merlin challenged the petitions submitted in support of this referendum, claiming that they lacked sufficient specification of the reasons it was being demanded. State law does not require any such reason, but this Court ruled that the petitions did

not sufficiently explicate the bases for the desired referendum, allowing the sale of the Town parcels to Merlin without one. However, before the parcels could be sold to Merlin, CC4HV filed a notice of appeal from this Court's judgment and obtained a stay of the sales from the Appellate Division for the Second Department. That Court then renewed that stay and the matter is pending on the merits.

After petitioners filed this Article 78 proceeding, the Town and Merlin asked for three week extensions to respond. Petitioners' counsel consented. During this discussion in early December 2017 between counsel, in response to inquiry from petitioners' counsel, the Town's attorney noted his expectation that Merlin would likely begin clear cutting sometime in early January. Neither the Town's counsel nor Merlin's advised petitioners' counsel further with regard to clear-cutting but, in early January 2018, members of CC4HV observed such activities beginning at the site. Petitioners sought a TRO from this Court, citing the irreparable harm which clearing the site would cause, particularly before judicial review could be completed With no express explanation, this Court denied the TRO. On notice to appearing respondents' counsel, petitioners appealed that denial to the Second Department. It reversed this Court's denial of the TRO, stayed clear-cutting activities until further Order of the Court and established an expedited briefing schedule for merits review of this issue.

Meanwhile, on January 8, 2017, respondent Town and Merlin filed separate motions returnable on January 30, 2018 to dismiss petitioners' underlying Article 78 proceeding. Merlin argues that [a] the petition must be dismissed for failure to join a necessary party; [b] petitioners all lack standing; [c] the town did not engage in spot zoning; [d] the town did not engage in pre-

judgment; [e] the town did not violate SEQRA. Respondent Town of Goshen argues that [f] the petition must be dismissed for failure to join a necessary party; [g] petitioners all lack standing; [h] the Town's failure to complete a GEIS did not violate SEQR; [i] the First Cause of Action should be dismissed because [i] the Planning Board was proper lead agency for all purposes and [ii] the comprehensive plan/zoning changes were in accordance with the comprehensive plan and not arbitrary and capricious; [j] the Second Cause of Action should be dismissed because [i] there was no illegal segmentation; [ii] cumulative impacts were studied; [iii] the Planning Board did not act in an arbitrary and capricious manner; [iv] the Planning Board did not violate lawful procedures; [v] the Planning Board did not violate town code; [k] the third cause of action should be dismissed because the Planning Board [i] took a hard look at the effects of construction and operation of the project; [ii] fully complied with SEQRA by reviewing reasonable alternatives and [iii] did not act arbitrarily; [l] the Fourth Cause of Action should be dismissed because [i] Town Board did not engage in illegal spot zoning and [ii] did not act in an arbitrary and capricious manner; [m] the fifth cause of action should be dismissed as no pre-judgment invalidates any action by either Town Board.

Below we address each of these issues after setting forth the proper legal standard for adjudicating a motion to dismiss in an Article 78 proceeding. [1]

## B. **LEGAL STANDARD GOVERNING MOTIONS TO DISMISS**

[1] For each of reference, overlapping Merlin and Town arguments will be addressed together. In addition, reference is made below to Affirmations and Exhibits previously submitted to this Court and not here re-submitted.

Despite some 73 pages of cumulative briefing, understandably, neither movant addresses the standard to be used by this Court in resolving their motions to dismiss and both present alternative sets of facts than those outlined in the Verified Petition to predicate parts of their respective motions.

On a motion to dismiss for failure to state a claim, CPLR section 3211(a)(7) governs. "In the context of as CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction." Goshen v. Mutual Life Ins. of New York, 98 N.Y.2d 314, 326 (2002). The allegations of the Verified Petition must be accepted as true and petitioners accorded "the benefit of every possible favorable inference." Id. Accordingly, the Court is to accept the petitioners' facts and determine whether, on a point of law, a respondent is entitled to dismissal. While respondents do not explicitly contest this rudimentary framework, neither do their motion papers accept it. Rather than take petitioners' facts as a basis for their motions, both respondents set forth an alternative facts and construct legal arguments on that basis. Not only is this procedurally erroneous; the alternative universe constructed is based on sand and, if now examined, should be categorically rejected as such. [2] This, alone, is sufficient grounds to deny their motions to dismiss.

The Town submits that its motion to dismiss is based upon documentary evidence and frames the consequent issue as "whether a cause of action exists based on the evidentiary

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[2] Since the respondent Town insists on making submissions dehors the record and interpreting the record, which it has not submitted, as supporting its motion to dismiss, petitioners herewith submit a second Affidavit from Mr. Fink, a planning expert, who explains, inter alia, how the documentary record does not "utterly refute" any of the points Petitioners made in their Verified Petition, but, instead supports those points. It is our understanding that all of the documents which Mr. Fink references and provides are part of the record in this matter and they are, in any event, referenced in respondents' papers.

material?" But, this is a half statement of the law: a motion to dismiss pursuant to CPLR 3211(a)(1) "on the ground that the acted is barred by documentary evidence…may be appropriately granted only where the documentary evidence utterly refutes [the] factual allegations, [thus] conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. of New York, supra.

## C. **LEGAL ARGUMENT**

### **Point I**

### **LEGOLAND NEW YORK, LLC IS NOT A NECESSARY PARY, BUT, IF IT IS, THE COURT MUST ORDER IT SUMMONED**

Both respondents contend that petitioners' challenge is procedurally defective and should be dismissed because Legoland New York, LLC ("LLNY"), the current owner of six of the fourteen parcels comprising the 522 acres of land constituting the Legoland site, is a necessary party to this proceeding and that petitioners' failure to name it as a respondent is fatal to their claims. But this argument should be rejected.

Petitioners properly named as defendants all parties named in the 2016 action [deemed premature] for review of the approval process and all parties to the approval process. At that time, respondents raised no issue as to an entity named Legoland-NY. That entity did not then exist and was registered to do business in New York State after this proceeding was initiated, in December 2017. See, Exhibit 1 to Sussman Affirmation. Put another way, at the time that entity

was created, all the approvals which are challenged herein had been given to parties properly named. Moreover, Legoland–NY is a subsidiary and under the control of Merlin, a party named herein and, as such, failure to name it has no legal relevance.

Furthermore, under New York's joinder rule, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." N.Y.C.P.L.R. § 1001(a). This rule serves two purposes:

> First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects otherwise absent parties who would be embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard.

Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 820 (2003) (quotations and citations omitted).

Here, LLNY is not a necessary party because complete relief can be afforded petitioners absent its appearance and it would not be "inequitably affected" by a judgment in favor of Petitioners, see, N.Y. C.P.L.R. § 1001(a), especially when the inquiry is viewed in light of the twin purposes of compulsory joinder set forth in Saratoga County Chamber of Commerce. First, there is no risk of inconsistent judgments because the statute of limitations for commencing an Article 78 proceeding challenging the Town's and Planning Board's determinations has run and it is unclear what other proceeding might arise concerning the same controversy.

Second, and more importantly, there are no due process concerns because Merlin and its attorneys adequately represented LLNY in this proceeding. LLNY is a subsidiary of Merlin's, see, Reply Affirmation of Jonathan R. Goldman, Esq., dated January 19, 2018 ("Goldman Reply

Aff."), Exhibit 1 [January 3, 2018 Affidavit of Dominic Cordisco, Esq.] ¶ 9 [identifying LLNY as a "subsidiary of Merlin]; Exhibit 2 [Merlin's Verified Petition in the Matter of the Application of Merlin and Karon, Index No. 008421/2017] at 8 [Phil Royle Verification identifying LLNY as a subsidiary of Merlin]. And, it is apparent from the documentary evidence that this entity has an interlocking directorate with Merlin, compare, e.g., Affidavit of Brian Shaw, sworn to January 15, 2018, submitted with Merlin's papers in opposition to petitioners' application to enjoin clear-cutting ¶ 1 [identifying as "Senior Finance Director of the respondent Merlin"] with Affirmation of Kelly M. Naughton, Esq. dated January 16, 2017 ("Naughton Aff."), Exhibit E [Deed from PCC Reservoir, LLC to LLNY] at 5 [identifying Brian Shaw as Vice President and Member of LLNY]. It also appears that, by dint of Merlin's attorneys' address cited as the "Record and Return" address on each recording page of the deeds conveyed to LLNY, that they also represent LLNY, thus confirming that their presence affords additional protection to LLNY's interests in this proceeding. See, Naughton Aff., Exhibits B, C, D and E. [3]

In this regard, it should also be noted that, throughout the entire application and approval process, Merlin was the project sponsor and the entity which sought and obtained conditional site plan approval. Indeed, several of the permits and related information provided by Respondents in their opposition papers on the clear cutting motion name Merlin, not LLNY, as the permittee or addressee. See, Affirmation of Stephen J. Gaba, Esq. in opposition to petitioners' application to enjoin clear-cutting, dated January 16, 2018 ("Gaba Aff."), Exhibits E & F. Merlin is also presently the contract vendee of the eight parcels of Town-owned land intended for use in the project and which are made a part of the site plan, though conveyance of those properties is

[3] Reference is made to documents submitted to this Court opposing preliminary injunction of clear-cutting.

presently stayed pending appeal of this Court's invalidation of a referendum petition seeking public approval or disapproval of the authorizing resolution. Nothing in the resolution authorizing the sale of such parcels permits the Town to convey the property to any entity other than Merlin. See, Goldman Reply Aff., Exhibit 3.

Moreover, the Host Community Benefit Agreement between Merlin and the Town further demonstrates that Merlin and LLNY are one in the same. That agreement provides that Merlin cannot assign its rights to develop or operate the Legoland project except to a subsidiary of Merlin and, then, only to the extent that "such subsidiary is demonstrated to the satisfaction of the Town to have the requisite assets and financial ability to comply with Merlin's monetary obligations, as set forth in this agreement." See, Goldman Reply Aff., Exhibit 4 at 6-7 [Section 4.B.]. Further, the term "Merlin Entertainments Affiliate," which, pursuant to the terms of the contract is the only such entity to which Merlin is permitted to assign its interests, see id. at 1 [Preamble], is defined by the contract itself as "a directly or indirectly controlled subsidiary of Merlin Entertainments Group Holdings, Inc. that may develop or operate the project," id. at 10.

Thus, to the extent Merlin has actually assigned its rights to develop and operate the site to LLNY, under the terms of the Host Community Benefit Agreement, necessarily LLNY is an entity under the control of Merlin.[4] As such, Merlin's presence in this proceeding is sufficient to protect LLNY's interests and an injunction against Merlin is the same as an injunction against LLNY, which Merlin controls.

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[4] We also note that, to the extent such an assignment has occurred, we are aware of no demonstration by Merlin or LLNY to the satisfaction of the Town that LLNY is able to meet the financial obligations under the HCBA as is required before any such assignment may take place. One would assume that any such discussion would have been made a part of the public record, given that the Town is a public entity, and no such public discussion is part of the public record.

The union between Merlin and LLNY is also further demonstrated by the Affidavit of Ian Sarjeant, sworn to on January 3, 2018 and submitted in opposition to Petitioners' application for a TRO of Merlin's clear-cutting activities. See, Goldman Reply Aff., Exhibit 5. Sarjeant swears that "*MERLIN* has engaged the services of a construction manager, and subcontractor contracts are executed for the commencement of site work," id. ¶ 5 (emphasis added), that "Town Approvals allow *MERLIN* to commence certain site work activities," id. ¶ 6 (emphasis added), that "*MERLIN* may commence tree clearing," id. (emphasis added), that "*MERLIN* has opted at present to clear trees mechanically, and to allow for a brief period of time for *MERLIN* to obtain coverage under GP-0-15-002," id. ¶ 14 (emphasis added) and that, to open on time, "*MERLIN* must commence construction of the main buildings by no later than the middle of 2018," id. ¶ 15 (emphasis added). Notably, not even two weeks later, the same gentleman swore that "*LEGOLAND NEW YORK LLC* has engaged the services of a construction manager, and subcontractor contracts have been executed for the commencement of the work." See, Affidavit of Ian Sarjeant, dated January 15, 2018. The fact that nothing changed from January 3, 2018 to January 15, 2018 *vis-à-vis* Merlin and LLNY, yet this gentleman simply replaced the former with the latter in his updated Affidavit, demonstrates that the two must be one in the same for purposes of developing and operating Legoland.

In other words, LLNY is hardly a new property owner which can claim to be a stranger to these proceedings. And this is certainly not a case in which LLNY could claim to be "embarrassed by [a] judgment[] purporting to bind [its] rights or interests where [it] ha[s] had no opportunity to be heard." See Saratoga County Chamber of Commerce, 100 N.Y.2d at 820. See

Extra Equipamentos E. Exportacao Ltda. v. Case Corp., 361 F.3d 359, 364 (7th Cir. 2004) ("We have great difficulty seeing how a 100 percent subsidiary could ever be an indispensable party.").

Even if against this overwhelming evidence of unity of identity and interest, this Court was to find that LLNY is a necessary party to this proceeding in its own name, such a conclusion would not doom Petitioners' challenge. Section 1001(b) of the CPLR provides that, when a necessary party who has not been joined "is subject to the jurisdiction of the court, the court *shall* order him summoned." N.Y. C.P.L.R. §1001(b) (emphasis added). Reaching the stated conclusion, this Court would order LLNY summoned and made a part of the proceeding.

There can be no dispute that, as an entity authorized to do business in New York and, in fact, one which has engaged in such business by purchasing land that is the proposed site of a multi-million-dollar development, LLNY is subject to this Court's jurisdiction. Accordingly, if it dins LLNY a necessary party, the Court should order LLNY summoned and, so cure any existing procedural defect. See Jenkins v. Astorino, 110 A.D.3d 882, 885 (2d Dep't. 2013); Matter of Mega Sound & Light, LLC v. Commissioner of Labor, 99 A.D.3d 800 (2d Dep't. 2012) (reversing Supreme Court's dismissal of Article 78 proceeding for failure to join necessary because omitted party was subject to court's jurisdiction and, thus, proper course was to order the party summoned); Matter of White v. County of Sullivan, 101 A.D.3d 1552, 1553 (3d Dep't. 2012) (ordering omitted party summoned to appear).

## Point II

### PETITIONERS HAVE STANDING TO CHALLENGE THE TOWN BOARD AND PLANNING BOARD ACTIONS

Respondents both contend that the Verified Petition should be dismissed because Petitioners lack standing. But this argument, made as to both the individual petitioners and CC4HV, is unavailing and the Court should reject it.

To establish standing to challenge determinations like those at issue here, a petitioner must demonstrate (1) an injury-in-fact which (2) "fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." New York State Association of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). The complained of injury "must be more than conjectural," id., and, typically, must be "in some way different from that of the public at large," Association for a Better Long Island, Inc. v. N.Y.S. Dep't. of Environmental Conservation, 23 N.Y.3d 1, 6 (2014). But, while the "harm that is alleged must be specific to the individuals who [claim standing], and must be different in kind or degree from the public at large . . . , it need not be unique." Matter of Sierra Club v. Village of Painted Post, 26 N.Y.301, 311 (2015) (quotations & citations omitted).

Moreover, though there is overlap between New York State's standing rules and those developed in the federal courts, federal standing jurisprudence is rooted in Article III of the U.S. Constitution, which permits the federal judiciary to adjudicate only actual "cases" and "controversies," while New York's standing jurisprudence is rooted in the common law and, thus, is more prudential than jurisdictional and, consequently, more flexible. See, Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 772-73 (1991) (noting origin of federal standing and the lack of a New York State constitutional analogue to Article III of the U.S. Constitution and explaining that New York's standing jurisprudence derives from the common law).

In this spirit, our Court of Appeals has "recognized that standing rules should not be heavy-handed," see, Better Long Island, 23 N.Y.3d at 6, and is "reluctant to apply these [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review," id. See, also Painted Post, 26 N.Y.3d at 311.

Finally, standing with respect to challenges to zoning changes, as distinguished from SEQRA challenges to specific projects, is even broader. See, Sun-Brite Car Wash, Inc. v. Board of Zoning Appeals, 69 N.Y.2d 406, 413-15 (1987). This is because "the welfare of the entire community is involved when enforcement of a zoning law is at stake . . . ." Id. at 413. Accordingly, when it comes to zoning determinations, "[w]hile something more than the interest of the public at large is required to entitle a person to seek judicial review – the petitioning party must have a legally cognizable interest that is or will be affected by the zoning determination – proof of special damage or in-fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affect." Id.

Indeed, the mere "fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent or very close to the property at issue gives rise to a presumption of standing in a zoning case." Id. at 413-14. And, even where such close proximity is not present, proof of an actual, specific injury may still not be necessary because, "a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood." Id. at 414.

The facts presented in the Verified Petition more than suffice to demonstrate that each petitioner has standing. See, Verified Petition ¶¶ 1-43.

For instance, as he avers in the Verified Petition, Petitioner Berger is a landowner whose property immediately adjoins the project site and he "will be particularly impacted by the sounds of construction vehicles, earth-movers, blasting activities as substantial landforms are re-configured, tree-clearing and wood-chipping . . . and the noises made by trucks and other vehicles entering and leaving the proposed project sites 'back of house' area . . . ." See Id. ¶ 10. These are not merely general or conjectural harms undifferentiated from those that might be experienced by the general public. Rather, these are specific, concrete harms that effect Berger, and other adjoining and proximate landowners within eye- and ear-shot of the project site, differently than anybody else in the Town of Goshen.

On this point, the Court of Appeals' decision in Painted Post is instructive. There, the petitioners challenged a number of the Village's determinations with respect to its sale of surplus water. See Painted Post, 26 N.Y.3d at 306-07. Petitioner Marvin averred that he resided about one-half block from the proposed rail loading facility, which was "visible from his doorstep" and that "he and his wife would be 'adversely affected by the significant rail traffic and the increased noise and air contamination caused by the project.'" Id. at 308.

The Appellate Division, Fourth Department had reversed Supreme Court's holding that Marvin had standing, concluding that "inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts different in kind or degree from the public at large.'" Id. at 309-10 (citations and some internal quotation marks omitted).

The Court of Appeals reversed, finding that Marvin sufficiently established standing based on his allegations of increased noise and air pollution emanating from the neighboring property. In reversing the contrary finding below, it concluded that the Appellate Division had "applied an overly restrictive analysis of the requirement to show harm 'different from that of the public at large.'" Id. at 310. Thus, as opposed to the general public, which might complain of an "indirect or collateral effect from the increased train noise," the manner in which such increased train noise impacted Marvin as a proximate landowner was a more "particularized harm" that sufficed to establish standing. See Id. at 311.

The particularized harm petitioner Berger avers goes beyond just the noise and air pollution caused by the construction on his neighboring property, which Respondents assert will be ongoing for about two years. Indeed, "[t]he disruption to local habitats immediately proximate to . . . [his] property will displace bats and cause a higher population of mosquitoes and other insects, creating a very real health threat (encephalitis and other diseases and discomforts)." See First Goldman Aff. Exhibit 1 [Verified Petition] ¶ 16. The clearing of forest will also make it more likely that displaced deer will cross Berger's property, "increasing their exposures to ticks and tick-borne diseases (Lyme, Ehrlichiosis, Babesiosis, Anaplasmosis, Powassan, Rocky Mountain Spotted Fever)." Id.

Tree-clearing by respondent Merlin will also cause aesthetic damage to Berger as these trees will "never be restored during his lifetime, depriving him of current and future opportunities for quiet, solitude, recreation and spiritual renewal which opportunities he regularly exercises." Id. ¶ 17. Indeed, the manner in which the Legoland project – both its construction and ultimate operation – will impact Berger's recreational and aesthetic enjoyment

of his property *vis-à-vis* his neighboring property is quite distinct from the project's impact upon a property-owner on the other side of Town, or anybody else in the community for that matter whose property does not adjoin or is not proximate to the site.

Petitioners Tito, Gallo and Donato are also adjoining landowners, and petitioners Ezra are proximate landowners located about 1,000 feet from the project site, such that the same types of harms caused with respect to petitioner Berger are likely to obtain as to them. See Id. ¶¶ 20, 23, 26, 36. Furthermore, petitioner Donato's property is prone to flooding during heavy rains and/ snowmelts. See Id. ¶ 42. The clearing of trees – and the planned blacktopping of portions of that cleared land – increases the risk of flooding to Donato's property, which is located below the project site. See Id. These harms are sufficiently differentiated from those that might impact the general public, providing these petitioners standing to sue.

Merlin's emphasis on the distance of Petitioners' properties from the specific portion of the 500-acre parcel being developed is misplaced and unavailing. See Merlin Mem. at 10-11. First, as just explained, and unlike the cases Merlin cites at pages 10-11 of its Memorandum of Law, Petitioners here do not just rely solely upon their proximity to establish a "preemption" of harm and, thus, standing. Rather, by dint of their proximity, these Petitioners will be subjected to particularized harms to their properties and daily lives much different than any indirect or collateral harm about which a member of the general public might complain. See Painted Post, 26 N.Y. 3d at 310-11. Indeed, as property owners adjacent to a two-year construction site and then, for decades thereafter, a bustling amusement park expected to draw anywhere from 2-3 million visitors a year, these Petitioners will suffer harm – *e.g.*, in the form of increased noise, traffic, light and air pollution and destruction of their vistas as they have all averred to in the

Verified Petition – much different that any general grievance a member of the general public might raise.

To hold otherwise would be to employ too "heavy-handed" a standing analysis, resulting in an overly-restrictive application that would "completely shield [this project] from judicial review," something the Court of Appeals has admonished against. See Id. at 311.

Moreover, even if the distance from petitioners' properties to the portion of the 500-acre parcel now being developed shed some doubt on the petitioners' standing to challenge the Planning Board's SEQRA and site plan determinations – which it does not – it would not so impact the standing analysis as to petitioners' challenge to the Town's zoning amendment. See Sun-Brite Car Wash, 69 N.Y.2d at 413-14 (recognizing broader standing to challenge zoning determinations). Indeed, even if petitioners reside no less 1,000 feet from the current project development, those whose lands abut the 500-acre parcel are only within 100 feet for of the outer limit of the Commercial Recreation Overlay District, which is conterminous with Legoland's properties, except for a 100-foot buffer. See, Local Law No. 4 of 2017 at 5 [Sec. 3].

Thus, while the current development might be further away, the zoning change allows for development up to just 100 feet from these petitioners' property lines, thus certainly raising a presumption of harm. None of the cases Merlin has cited to support its proximity argument involved zoning determinations. See Merlin Mem. at 10-11.

In short, individual petitioners all have standing because they are proximate property owners who allege injuries more intense and distinct from those of general community members. If these proximate property owners lack standing, who would have standing to challenge the myriad of approvals which enable respondent Merlin to proceed?

Likewise, CC4HV is an incorporated membership organization whose organizational purposes are directly compromised by the illegal approval of Legoland. It includes and represents the interests of proximate property owners and has standing to sue in its own name. Respondents do not contest that the interests CC4HV asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Nor does either respondent claim that this litigation requires the participation of individual group members. Society of Plastics Industries. Inc. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991). Both claim that the Verified Petition does not identify any of the organization's members, but this is not required, as the Verified Petition and supporting submissions plainly aver that CC4HV has as members persons directly affected by the project who have standing. Paragraph 6 of the Verified Petition states, "CC4HV has dues paying members, including numerous members who live within the zone of injury associated with the proposed Legoland development." Christine Miele, who has been active in the organization since its inception, so affirms in her Affidavit. See, Miele Affidavit dated November 16, 2017, para. 10. Accordingly, the sole basis for opposing CC4HV's organizational standing evaporates and the Court should deny that branch of respondents' motion which seeks to dismiss this petitioner for lack of standing.

## Point III

**THE AMENDMENTS TO THE COMPREHENSIVE PLAN ARE RADICALLY INCONSISTENT WITH THE TOWN'S COMPREHENIVE PLAN, INCONSISTENT WITH COUNTY AND STATE TREATMENT OF THE SAME LANDS AND WERE ENACTED WITHOUT CONSIDERATION OF THESE INCONSISTENCIES THOUGH PETITIONERS' EXPERT POINTED THEM OUT BEFORE THE ARBITRARY AND CAPRICIOUS ACTION**

In their first cause of action, petitioners allege that the Town Board was required to conduct a review of the impact of the changes to the comprehensive plan and the zoning law through a GEIS independent of the specific DEIS and FEIS the applicant completed for its proposal. This cause of action further alleges that the Town Board arbitrarily and capriciously approved changes to the comprehensive plan and the zoning law "for the benefit of a single applicant and against the weight of the remaining elements of the Comprehensive Plan."

The Town seeks to dismiss these claims, arguing that preparation of a GEIS is not mandated by SEQRA, that the petitioners have mis-cited the SEQRA handbook and that the changes the Town Board approved "were in accord with the comprehensive plan." Merlin also claims that the Town determined that the amendments to its 2009 Comprehensive Plan were consistent with the 2010 Orange County Comprehensive Plan. Each of these points is demonstrably false and none provides a basis to dismiss any part of the Verified Petition.

### (i) A GEIS WAS REQUIRED TO AVOID SEGMENTATION

Respondents claim that since Merlin now proposes to utilize only 150 acres of its 522-acre parcel, it and the Town need not now assess the broader impacts of the changes to the

comprehensive plan and the overlay district, which cover all 522 acres. The Town claims that conduct of a GEIS is not required in this circumstance because the applicant has done a DEIS and then an FEIS. In so arguing, both respondents ignore the fact that adopting a zoning change or a change to a master plan is a Type 1 action under SEQRA, requiring environmental review. Yet, as the Verified Petition sets forth, Merlin's FEIS studiously ignored the potential use of lands comprehended by the new zoning overlay district, as enabled by the change to the Town's Comprehensive Plan. Indeed, integral to the first cause of action is the undisputed proposition that neither respondent studied or assessed the impact of that zoning change, precisely the point petitioners have made from the outset. And, this review was required and its absence invalidates the zoning change and the amendment to the comprehensive plan.

As Fink explains in the accompanying Affidavit, once the Town adopts changes to the comprehensive plan and the Commercial/Recreation overlay district for 522 acres, the entire property carries the potential for future development at a new intensity and density. For this reason, before approval of Local Laws 3 & 4, both through Fink's prior written submission to the Town [made before approval of either Local Law] and earlier correspondence from their counsel, Michael Sussman, petitioners noted the Town's obligation to conduct a Generic Environmental Impact Statement of the remaining lands not subject to the site-specific FEIS. Fink cited to the SEQR Handbook which explicitly stated, "If the zoning change is proposed by a project sponsor in conjunction with a proposal, the impacts of both the rezoning and the specific development must be considered in determining environmental impacts." As Fink explains, "This means a generic environmental assessment must be made of the proposed zoning changes and a site

specific environmental analysis must be made of the specific development project proposed by the project sponsor." See, Fink Affidavit of January 23, 2018, para. 24.

Responding to this comment in the FEIS, the applicant Merlin claimed that it was "incorrect." As set forth in his accompanying Affidavit, Fink explains that in more than forty years as a planner in our State, he has never seen such a flagrant violation of the SEQR Handbook which is a widely used and accepted reference guide by planners and land use practitioners, not an informal publication as respondents erroneously claim.

In short, there is no doubt that respondents collectively failed to properly study the impact of Local laws 3 and 4, invalidating their adoption. No GEIS was produced, that is indisputable as is the requirement under state law that the study or assessment associated with that document be conducted before adoption of such radical changes in the Town's zoning law and Master Plan.

The Town claims that a GEIS is "optional," but never explains how and when its Town Board studied the impacts of the new zoning overlay and the changes to its comprehensive plan. The Town cites Save the Pine Bush v. City of Albany, 117 A.D.2d 267, 271 (3d Dept. 1986), aff'd, 70 N.Y.2d 193 (1987), but, in fact, the case starkly illustrates why what respondent Town did was illegal. As in our case, *Save the Pine Bush* involved municipal re-zoning of a parcel only a sub-set of which was to be developed by the applicant. The question in the case was whether, before approving such changes, the City was required to study the cumulative impacts of other projects which would be enabled by the zoning change and developed in the re-zoned area. The applicant claimed no such study was required because it did not own the other re-zoned parcels

and the Common Council did not conduct a GEIS. The Third Department annulled the zoning change and our Court of Appeals affirmed because the City of Albany had failed to conduct a study of the cumulative impact enabled by its re-zoning. While the Appellate Division did indicate that performing a GEIS was discretionary, it invalidated the approval granted because "the record reveals that little if any consideration was given to potential cumulative effects. There is no indication that respondent Common Council considered the use of a generic environmental impact statement, and notably absent from the findings of fact adopted by respondent Common Council is any discussion of potential cumulative impact, except in relation to traffic congestion." Applied here, the record similarly shows no discussion of the use of a generic environmental impact statement nor any discussion of the potential cumulative impact of the 370 acres left undeveloped and within the new overlay district. This is a fatal failing of the Town's review process, compelling the same result reached in Save the Pine Bush.

Focusing on whether a GEIS is required obfuscates the issue: what is plainly required and never occurred here was an assessment of the impact of the zoning changes on the entire area covered by such changes. That did not occur and ends the inquiry against respondents.

Claiming that it did not segment review, the Town again cites inapposite cases and attempts to confuse the issue: concededly, the Town never studied the effect of developing 522 acres using the Commercial/Recreational overlay district as the zoning amendment permitted. This was its burden before enacting the zoning change. The Town conflates this obligation by citing cases which do not involve SEQRA review of zoning changes. For example, in Teich v. Buchheit, 221 A.D.2d 452, 633 N.Y.S.2d (1995), the Second Department affirmed Supreme

Court's decision annulling the Planning Board's approval of a 72 spot parking lot on the ground that the Board improperly segmented review of this component of the hospital's overall plan for expansion, violating 6 NYCRR 617.3(k)(1). Likewise, in Maidman v. Inc. Village of Sandy Point, 291 A.D.2d 499, 738 N.Y.S.2d 362 (2d Dept. 2002), the Appellate Division rejected petitioner's claim that the village had improperly segmented SEQRA review of a change in egress to the Village Club from prior SEQRA review of a master plan for the expansion and approval of the club. [5] But, these decisions have nothing to do with the obligation of a municipality to engage in appropriate, unsegmented SEQRA review of proposed zoning changes, which are Type I actions under the statute. 6 NYCRR. 617.4(b)(2).

And, again without reasonable dispute, "SEQRA mandates the preparation of an EIS when a proposed project 'may have a significant effect on the environment. Because the operative word triggering the requirement of an EIS is `may', there is a relatively low threshold for the preparation of an EIS." Matter of Omni Partners v. County of Nassau, 237 A.D.2d 440, 442. SEQRA regulations provide that a Type I action … carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." Id. at 442, 6 NYCRR.4[a][1]. Here, the Town of Goshen determined to create a new overlay district, allowing a radical new land use on 522 acres, twenty times the threshold SEQRA employs to qualify a zoning change as a Type 1 event. Before so proceeding, it needed to study the potential impact of such a change through the preparation of an EIS. It failed to do so. Its claim that a FEIS done with regard to 150 acres of the 522 adequately "covered the field" is unpersuasive

[5] The Town also cites Matter of Village of Tarrytown v. Planning Board of Village of Sleepy Hollow,. 292 A.D.2d 617, 741 N.Y.S.2d 44 (2d Dept. 2002), but, it again has nothing to do with a municipality's obligation to conduct a proper review of a proposed zone change. No zone change was reviewed in that case.

and, if accepted, would undercut the Type 1 designation accorded the zoning change *qua* zoning change.

Petitioners have established that the Planning Board's determination to grant site plan approval violates SEQRA because its environmental review failed to study the impacts of developing the entire Legoland site and, instead, studied only the approximately 150-acre development Legoland put before the board, segmenting this stage of the development from all future stages. See Guerrera Aff., Exhibit 3 at 21-24

As noted above, Respondents do not dispute that SEQRA generally prohibits segmented review. Rather, they contend the Planning Board's review here was not segmented because "no further development of the land beside the current project is proposed . . . ." "As represented by Merlin, there is no present plan to expand the Legoland project to add anything additional."

This conclusory argument is unavailing for at least two reasons. First, it fails to address that future development of the remaining acreage is reasonably likely given the amount of land left, the public statements made by certain Legoland and Town officials and the types of permitted uses in the new district. See Guerrera Aff., Exhibit 3 at 21-24. It also fails to address the reasonable inference of future development drawn from the nature and scope of the two Legoland parks used by Merlin and the Town as comparators, namely Legoland Florida in Winter Haven, Florida, which opened a water park seven months after its initial opening, and Legoland California, in Carlsbad, California, which houses a Sea Life Aquarium and water park. See Naughton Aff., Exhibit K at Exhibit 5 [EY Revenue/Expenditure Analysis] at 3.

And, second, the argument is implausible. Respondents claim that Merlin has no present plans for any further development of the site beyond the approximately 150 acres now planned

for development and which were the subject of Planning Board's study and approval. But the Town's own Zoning Law, which was just amended for the very purpose of accommodating the Legoland development, requires a minimum 200-acre lot for any Commercial Recreation Facility. See Goldman Reply Aff., Exhibit 1 at 2 [Sec. 97-29.1(G)(1)].

To be sure, the new law defines a "Commercial Recreation Facility" as "a business operated for profit offering fully planned, integrated recreational uses including, but not limited to, rides and attractions, an aquarium, theaters, restaurants, hotels, retail offerings and various supporting administrative facilities including offices and staff areas, as well as associated parking and drainage facilities." See Id. at 1 [Sec. 97-84]. The law then provides that "[t]he minimum total consolidated or combined lot area for a Commercial Recreation Facility shall be no less than 200 contiguous acres." Id. at 2 [Sec. 97-29.1(G)(1)]. It is clear from this language that the minimum lot area applies to the developed portion of the overall acreage. In other words, when the Planning Board approved the Legoland project, it studied only the effect of the development of the specific 150-acre portion to be developed for the planned project. See First Goldman Aff., Exhibit 3.

If Merlin plans no further development, then its 150-acre development does not meet the minimum lot requirement for its intended use and, thus, the site plan approval contravenes the Town's zoning law. Thus, either the size plan must fall because of this deficiency or, necessarily, Merlin must develop an additional 50 acres as part of its current plans. If the latter, then the Planning Board's review and approval was improperly segmented because it neither studied under SEQRA, nor approved development of, those additional 50 acres.

(ii) Respondent Town Failed to Study Cumulative Impacts

The Town claims that failing to study the cumulative impact enabled by its re-zoning and change to its comprehensive plan was "entirely proper," citing Schodack Concerned Citizens v. Town Bd. of Town of Schodack, 148 A.D.2d 130, 132-33 (3d Dep't 1989). However, this decision bears little on the current controversy. There, an EIS was prepared for the construction of a proposed supermarket warehouse distribution facility. The facility was designed to serve 23 retail supermarkets that were part of the long range plan of the sponsor. Project opponents argued that the lead agency had improperly segmented the environmental review because it failed to consider the impacts from the construction of the 23 supermarkets. The Court held that to require the EIS to consider the environmental impacts from each of these 23 individual stores was beyond the scope of the review for the distribution center and that each of the sites would be subjected to its own environmental review by the agency required to approve the location. A mere restatement of these salient facts demonstrates how inapposite the case is: here, the issue for review is whether in enacting an overlay district which allows a materially distinct use of property and adopting a related amendment to the Town's comprehensive plan, the Town Board was required to conduct a proper environmental review of the potential consequences of its actions. Coca-Cola Bottling Co. v. City of New York, 72 N.Y.2d 803 (1988), Unquestionably, the Town failed to do so and now seeks harbor in dissimilar circumstances.

(iii) The Town Board was the Proper Lead Agency for Zoning and Comprehensive Plan Changes

The Town Board is the only agency which is authorized by law to adopt a zoning change or to change a Town's comprehensive plan. In this instance, respondent Merlin approached Goshen at a time when the comprehensive plan and zoning law categorically prohibited its

planned amusement park. Rather than reject its site plan application on this basis, as would have been standard practice, see, Andrews Affidavit dated November 15, 2017, para.8, the Planning Board assumed lead agency status, including with regard to the review of measures it could not adopt, namely the zoning and comprehensive plan changes. This process contravenes SEQRA as interpreted by the DEC, the state agency charged with interpreting and implementing that statute. Its interpretation could not be any more clear: "A municipal board may not delegate SEQR to a separate board or agency if the other board or agency does not have decision-making authority for the action being reviewed. SEQR is intended to make boards that are responsible for approving, funding or undertaking *an action* consider the environmental effects of *their* decisions." [emphasis added[. Against this clear authority, the Town of Goshen claims that since the Planning Board ultimately would assume lead agency status for the purpose of site plan review – a review which should never have commenced until proper zoning was in place and an amendment allowing amusement parks was made to the comprehensive plan – it was properly assigned lead agency status for purposes of reviewing the zone change and comprehensive plan amendments for which it had no authority and which is considered a distinct action, requiring environmental review under SEQRA [as explained in the last section of this brief]. However, the Town cites no case which so contravenes the guidance given by the DEC and quoted above. Citizens Against Sprawl v. City of Niagra Falls, 35 A.D.3d 1190, 1192 (4th Dept 2006) involved a zoning change with "little substantive effect" in that "intensive commercial uses previously were permitted in the affected zone." In such an instance, where no effects are contemplated, a Town Board may logically delegate environmental review of a proposed zoning change to a Planning Board reviewing the project considered for the site. But, here, this logic is inapposite: the Town

of Goshen was considering a major change to 522 acres previously zoned for low density development in a manner consistent with its comprehensive plan. Only the Town Board was authorized by law to amend the zoning law and alter the comprehensive plan and, under applicable DEC guidance, only it should have served as lead agency for these actions. Had it conducted [as it did not do] an appropriate environmental review of the full impact of the proposed commercial/recreation overlay district and the changes to the comprehensive plan and approved these following a proper review [which, as explained above, was never done], the Town Board could then have allowed the Planning Board to assume lead agency status for site plan review of a now permitted use; however, the Town Board abdicated its duty and did not perform the role delegated by it.

Likewise, citation to Schodack Concerned Citizens v. Town Bd. of Schodack, supra. at 149 (3d Dept 1989) is equally unavailing as the reasoning adopted by the Third Department does not apply in this case, which is factually different. The Third Department defined the separate functions and processes of re-zoning and changes to a comprehensive plan and site plan review as "one project," because *the applicant* proposed a zoning change as part of *its* application. But, here, the Town Board, not the applicant, proposed creation of a Commercial/Recreational District and a change to the Town's comprehensive plan. This proposal was distinct from the applicant's proposal for site plan approval.

As the originator of the overlay district and changes to the comprehensive plan, the Town Board was required to deliberatively consider the consequences of re-zoning 522 acres or the consequences of the use of that acreage for a myriad of purposes consistent with the proposed

overlay district. See, Fink Affidavit of January 23, 2018, paras. 66, 67 & 73. Rather, before any such re-zoning and any change to the comprehensive plan, the Town deemed Merlin the only party interested in such a matter and linked the zoning and comprehensive plan changes exclusively to this applicant. Contrary to the Town's position and the proposal under review in Schodack Concerned Citizens, here, there were distinct "actions" for SEQRA purposes. First, the Town should have considered whether changing its long-standing ban on amusement parks was consistent with its comprehensive plan. If the Town Board deemed that major change appropriate, it should next have considered where in the Town to allow such deviations from its categorical ban of such uses. This would have properly led to deliberation about what areas in the town were best suited to such uses and to a study of the impacts, including secondary impacts, of such a use in the Town. Neither process occurred. Had they occurred and the Town re-defined its comprehensive plan and identified appropriate areas for this new use, applicants like Legoland then could have presented themselves before the Planning Board for site plan review and approval. Respect for SEQRA would have caused the Town Board to serve as lead agency for the first two aspects of this process since these were its decisions to make and the Planning Board for the third [if the Town Board assented to the first two, following its review and consideration].

By conflating and combining the distinct actions relevant to the ultimate approval of Merlin's application respondents seek to evade controlling SEQRA guidance provided as Exhibit 3 to Sussman Affirmation dated November 19, 2017 at page 182. The Planning Board was not an appropriate lead agency at the time it assumed that status because, at that time, the use proposed by respondent was categorically prohibited in Goshen. That would only change if the

Town Board voted to alter the comprehensive plan and the zoning law, a distinct Type 1 action as defined by SEQRA. Accordingly, the Town errs when it claims that, when it was designated lead agency, the Planning Board was eligible for this status. It was not, precisely because at that time, it had NO ROLE in review of the Legoland project which was then ineligible for consideration because it was proposed for a site which categorically banned it. Indeed, at that time, the "project" did not "involve approval by more than one board;" the project was dead on arrival and could be considered only if and after the Town Board agreed to amend the Comprehensive Plan and the zoning law. No Second Department has ever held to the contrary and respondents cite to no such case.

(iv) The Changes to the Comprehensive Plan and the Zoning Law were Arbitrary

Petitioners also allege in the first cause of action that adoption of the challenged amendment to the comprehensive plan was arbitrary and capricious because it is wholly inconsistent with the extant plan and the Town did not proceed to alter that plan in a logical or comprehensive manner, but, rather proceeded arbitrarily and capriciously, ignoring the central tenets of its comprehensive plan.

On pages 13-14 of its Memorandum of Law, respondent Town submits both that this matter is not subject to judicial review at all. It then argues that judicial review of these action is "necessarily limited." It next submits that the test for judicial review is whether the zoning amendment is rationally related to a permissible state interest. However, Rodgers v. Tarrytown, 302 N.Y. 115, 121, a case the Town cites, sets a different standard: whether the change in zoning is "arbitrary," with that burden resting with petitioners. Put another way, "courts must satisfy

themselves that the rezoning meets the statutory requirement that zoning be "in accordance with the comprehensive plan" of the community. Udell v. Haas, 21 N.Y.2d 463 (1968), Youngewirth v. Town of Ramapo Town Board, __ A.D.3d ___ 2013-06057 (2d Dept 11/8/17)("the power to zone is derived from the Legislature and must be exercised in the case of towns and villages in accordance with a `comprehensive plan'."). Where a petitioner establishes a clear conflict between the challenged re-zoning and the comprehensive plan, it may be struck. "In reviewing whether a zoning change is contrary to a town's comprehensive plan, we must ultimately consider, among other things, whether the change `conflicts with the fundamental land use policies and development plans of the community.' Youngewirth, supra., citing Matter of Bergami v. Town Bd. of the Town of Rotterdam, 97 AD3d 1018, 1020.

Petitioners accept their burden and have demonstrated in their Brief in Chief and again below that the changes to both the comprehensive plan and zoning law are "arbitrary," when measured against the comprehensive plan itself. [6]

> "…the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land. It is the insurance that the public welfare is being served and that zoning not become nothing more than a Gallup poll…There must be some showing that the change does not conflict with the community's basic scheme for land use…One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's land use problems. Where a community, after a careful and deliberate review of "the present and

[6] We note that after presenting an equivocal and shifting analysis of the appropriate legal standard and conclusorily asserting that the town board action was 'consistent' with the Comprehensive Plan, the Town presents no coherent argument on why its behavior was not arbitrary and capricious.

> reasonably foreseeable needs of the community" adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being serviced…Where, however, local officials adopt a zoning amendment to deal with various problems that have arisen, but give no consideration to alternatives which might minimize the adverse effects of a change on particular landowners, and then call in experts to justify the steps already taken in contemplation of anticipated litigation, closer judicial scrutiny is required to determine whether the amendment confirms to the comprehensive plan."
>
> Udell v. Haas, 21 N.Y.2d 463 (1968)

In 2009, the Town of Goshen developed a comprehensive plan utilizing professional planners and community input. That plan represented a balance between competing interests.

In 2016-17, on the contrary, the Town did not engage in a *bona fide* comprehensive planning process and the amendments adopted to the plan were "purely reactionary" and designed to fulfill the stated needs of Merlin Entertainment, ignoring previously recognized compelling public interests reflected in the 2009 Comprehensive Plan which remains in full force and effect.

As long-time planner Fink concludes, "These amendments do not meet legitimate planning practices, were not completed for the benefit of Town residents as a whole, did not follow the guidance provided by the enabling acts, were contrary to the legal memorandum [LU09] published by the New York Department of State Office of General Counsel which required "extensive community input" and result in amendments which do not provide for the

"long -range protection, enhancement, growth and development" of the community as required by Town law section 272-a.1(a)." See, Fink Affidavit, para. 45.

In both 2004 and 2009, the Town developed comprehensive plans through an open process and, on each occasion, the result encouraged "small scale neighborhood commercial **use,**" "a **diverse economic base** that provides tax ratables as well as necessary local services" and concentration of large scale growth in urban centers and, repeatedly, emphasized preserving and protecting the Town's rural character and agriculture. See, Exhibit 1 to Fink Affidavit dated November 17, 2017 for 2009 Comprehensive Plan, pp. 50, 55.

Implementing this primary Town purpose – to conserve and protect the Town's rural character, the Town's zoning law contains the following:

"Purposes. Under this chapter, most of the developable land in the Town of Goshen is located in the RU District. The Town therefore has a vital interest in seeking that this land is either protected from development or developed in a manner that is consistent with the goals of the Comprehensive Plan."

In this light, planner Fink opines, "Amending one narrow Comprehensive Plan goal statement relating to economic development, as Local Law No. 5 did, and then claiming that the Zoning Amendments are consistent with the overall Comprehensive Plan does not follow logical principles." See, Fink Reply Affidavit, para. 46(c).

In comments submitted to the Town before its approval of changes to the comprehensive plan, Fink urged the Town to conduct a comprehensive plan "consistency analysis" before making any final decision on the proposed amendment. The Town did not do so. The result,

Fink explains, is an amendment to the Comprehensive Plan which is inconsistent with its remaining predominant elements, as alleged in the First Cause of Action, thereby enabling approval of a project which is radically discordant with the repeated primary purpose of the plan and inconsistent with the Town's remaining zoning law.

Fink's suggestion that the Town perform a "consistency analysis" recast and essentially repeated the commitment made to the public in the final scoping document for Legoland. On page 20, item III K.2., that document specified an analysis of the project's "consistency with adopted policies and/or plans as set forth within local and regional community land use, planning and development documents, including the Town and County Comprehensive Plans." However, neither the DEIS nor the FEIS analyzed any of the Town's pre-existing policies other than one relating to economic development. Indeed, the Verified Petition alleges that respondents ignored the predominant theme of the Town's Comprehensive Plan, the protection and preservation of rural character precisely because acknowledging the primacy of this objective thoroughly contradicted Merlin's project.

In his pre-approval submission to the Town, petitioners' planner advised that the applicant had ignored the afore-cited scoping requirement and should be required to prepare a Supplemental Environmental Impact Statement as required by 6 NYCRR 617.9(a)(7). Fink also specifically advised the Town that the applicant's exclusive focus on economic development ignored the remaining 40 topics listed by Town Law as relevant to a comprehensive plan and was a wrongful invitation to ad hoc planning.

The challenged Local Laws 3 and 4 clearly conflict with the Town's comprehensive plan, adopted after years of robust citizen involvement which determined the Town's vision for the future. As Fink explains, "The Legoland SEQR process is flawed and this may best be revealed by a statement on page 6 of the FEIS, "The proposed project is consistent with the 2009 Town of Goshen Comprehensive Plan goal #4 to develop a strong and balanced economic base and to attract tax positive commercial developments." A proposed project is not simply "consistent with" a comprehensive plan because it aligns with one statement in the plan. A review of the Comprehensive Plan as a while reveals stark inconsistency with this project." **This may best be understood in this manner: consistent with this 2009 Comprehensive Plan, the town zoning law banned amusement parks from all zoning classifications. The Town supported economic growth from diverse, small scale enterprise which could be developed in a manner consistent with the plan's principle objective – retaining the Town's rural character. Large scale developments with substantial externalities, inducing pollution, traffic and millions of visitors, were entirely inconsistent with this vision, leading to the ban on amusement parks town-wide. In this context, any claim that the current proposal is consistent with the 2009 Comprehensive Plan is arbitrary and capricious.**

Planner Fink expresses the same conclusion, "In my professional opinion, relying on one statement which generically supports economic growth at the expense of the community's basic scheme for land use, reflecting its shared desire to preserve rural lands and promote agriculture and the protection of environmentally sensitive areas is the height of irrationality." See, Fink Affidavit, para. 46(n).

Nor is Legoland even consistent with that sentence in the 2009 Comprehensive Plan which supports the creation of a "balanced" economic base. This statement mirrors the 2004 Comprehensive Plan which supported a "diverse" economic base. Fink notes that balanced and diverse are terms of art which mean much the same thing and are the opposite of reliance on one major engine of economic development like a huge amusement or theme park. As Fink explains, "Economic shocks can and do happen when a single large employer goes belly-up in a small community which has come to depend upon it. If Legoland fails, where will that leave Goshen?" See, Fink Affidavit, para. 46(p).

Moreover, this form of economic development has the strong potential of destroying the rural, environmental and agricultural resources of the community, thereby directly conflicting with the overall vision of the 2009 comprehensive plan. That document plainly states, "The Town recognized that it is presently and appropriately a primarily rural community…The foundation of this Comprehensive Plan is to the recognition that the Town must preserve both its fragile and beautiful rural environment and provide for the needs of its people." See, Exhibit 1 to Fink Affidavit dated November 17, 2017. Fink opines, "The Legoland project represents a substantial turnaround from the 2004 and 2009 comprehensive plans and zoning law. The intent of both is radically ignored." See, Fink Affidavit, para. 39.

And, of course, the site selected for intense development has long been deemed environmentally sensitive and fragile, in both the comprehensive plan and through the Town's zoning law. Ther low density development permitted at most of the site bespeaks to this and is wholly inconsistent with the most intense commercial zoning in the Town that the Commercial/

Recreational Overlay district's new zoning permits. The overlay district is entirely incongruous in this light and should be invalidated. Youngewirth, supra.

Finally, in claiming consistency between the zoning amendments and the comprehensive plan, respondents ignore the secondary impacts which Legoland is sure to induce. Since the zoning law and comprehensive plan both entirely prohibited large scale amusement parks, the Town has not had the occasion to review and plan for the kind of growth such a use will induce. Fink identifies numerous externalities which will derive from such a use and notes that the applicant has made conclusory statements dismissing secondary impacts, but not provided any basis for the soundness of such conclusions. Thus, the applicant claims, "No growth is anticipated to result from the adoption of Introductory Local Laws 5[3] & 6[4]…No residential growth is expected because the available housing stock in the Goshen and Orange County area can easily absorb the incremental increase in employees who may want to relocate to the areas. See, Exhibit 12 to Fink Affidavit for Response B.2 119 and Chapter VIII of the DEIS. As Fink notes, the FEIS presented no evidence in support of this conclusion.

Contrary to respondents' claims, the Verified Petition demonstrates that the adopted amendments will materially alter the Town's 2009 comprehensive plan and create consequences which never have been subjected to a comprehensive planning process as required by Town Law, sec. 272-a. On page 3 of its response, Merlin acknowledges that Local Law 6 represents blatant spot zoning: claiming that creating the overlay district did not change the existing zoning designation of the 500 acres, Merlin ignores the force and effect of an overlay zoning district.

Through the amendment, the Town Board superimposed new zoning only to areas covered by the overlay, here, only to the acres proposed for this project.

Rather than changing permitted uses in the RU and HR zoning districts, the new Commercial Recreation Overlay selects this environmentally sensitive area and allows an entirely new and inconsistent land use, a "mega development" never contemplated by any prior town comprehensive plan.

Here, adoption of Local Laws 3 and 4 will allow a high volume, high impact mass market tourism facility which is expected to generate 2.5 million visitors/year, 10-11,000 vehicle trips/day, an estimated 66,400 truck trips during construction, earth movement comparable to the construction of the Great Pyramid at Giza with 74 acres of impervious surfaces comparable to land needed for 18 Wal-Mart supercenter stores. This would all occur within the most rural and previously protected area of Goshen. As Fink concludes, "These proposed changes are not only significant; they are unprecedented and respondents have presented no logical discussion or analysis and engaged in no community wide planning process necessary before allowing such a massive change to the comprehensive plan and zoning law." See, Fink Affidavit, para. 48.

Nor, contrary Merlin's claim, was the adoption of these Local Laws consistent with County policy. In 2013, the County entered into the Orange County Greenway Compact [adopted by the County legislature] which recommended "rural preservation" for a significant portion of the 522 acres which were the subject of the instant spot zoning. See, Exhibit 16 to Fink Affidavit. Accordingly, to the extent the Town and Merlin submit that the re-zoning and changes to the comprehensive plan are consistent with current county policy, they are wrong.

Nor is the re-zoning of 522 rural acres outside of a village or city consistent with the County's 2010 comprehensive plan which states, "Any development project should seek to preserve important natural and cultural resources, regardless of location…Priority should be given to the Growth Areas, and specifically the Villages and Cities within them, for County support, incentives and investments, and investments in water and sewer infrastructure improvements/extensions, sidewalk construction, transportation infrastructure, opportunity for transit-oriented development, housing and commercial development." See, Exhibit 3 to Fink Affidavit.

As Fink explains, the 522-acre site is not located within either a village or city and, as such, is not a priority for county support. See, Fink Affidavit, para. 12.

Moreover, respondents' action is arbitrary and capricious and contrary to the county's 2010 comprehensive plan because the re-zoning and intensive use of the 522 acres will destroy, not preserve, recognized "natural resources." The DEC has classified as threatened one onsite tributary, H-89-20 Otter Kill/Black Meadow. Merlin's SEQR review omits reference to this classification and the relevant document which states, "Hydrologic/habitat uses in Otter Kill/ Black Meadow Creek **are known to experience threats due to impacts to habitat from increasing development**. The Metropolitan Conservation Alliance of the Wallkill Conservation Society issued a Biodiversity Plan for the Southern Wallkill area, including this watershed. The plan identified Otter Creek as a biodiversity hub that is host to significant biodiversity. The plan noted that portions of the habitat system are **at risk from dense residential development**." See, Exhibit 4 to Fink Affidavit. [emphases added].

In written comments submitted before Town Board and Planning Board approval of Legoland, Fink advised that the FEIS lacked a proper assessment of the impacts on the Otter Kill and understated the impact of the project on a state-designated threatened stream and the related habitat. Increasing residential development poses a threat to both and Fink queried how construction of a far more intense amusement park, then disallowed by existing zoning, would prevent further deterioration of the water quality of that stream. Instead, Fink submitted [and the Town arbitrarily ignored] that the stream would be further degraded by creation of 74 acres of impervious surfaces, removal of 150 acres of vegetation, including significant forested areas, use of pesticides and the presence on site of oil, grease, hydrocarbons and toxic pollutants all of which will flow into this stream and related tributaries. Despite such plain notice, the adopted FEIS does not recognize or mitigate these adverse environmental impacts even while it acknowledges that the applicant's proposed storm water management system will not filter out pollutants like pesticides. In short, the approved project will further degrade the water quality of a steam already designated as 'threatened." Most critically for current purposes, Fink's review concluded that this environmental impact was never addressed or reviewed despite it being raised before approval.

As fundamentally, Merlin errs when it repeatedly claims that its proposal is consistent with both the Mid-Hudson Regional Economic Development Strategy or the Town's Comprehensive Plan. As Fink explains, such claims are based on cherry-picking one very narrow statement from these documents when, in fact, the project contravenes years of Town and Village of Goshen comprehensive planning and zoning and its approval invites *ad hoc* and arbitrary

deviations, contrary to the purposes of such comprehensive planning. See, Fink Affidavit, para. 17.

**Point IV**

**THE TOWN ENGAGED IN ILLEGAL SPOT ZONING**

Spot zoning consists of "singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . . ." Rodgers v. Tarrytown, 302 N.Y. 115, 123-24 (1951), Youngewirth, supra. ["Spot zoning is...the process of singling out a small parcel of land for use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners." Matter of Rotterdam Ventures, Inc. v. Town Bd. of the Town of Rotterdam, 90 A.D.3d 1360, 1362."]. It is the "very antithesis of planned zoning." Id. at 124.

"In evaluating a claim of spot zoning, courts may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels and the recommendation professional planning staff. Matter of Residents for Reasonable Dev. v. City of New York, 128 A.D.3d 609, 611, Matter of Marcus v. Bd. of Trustees of Vil. of Wesley Hills, 96 A.D.3d 1063, 1065-66)."

Petitioners have demonstrated that the Town's adoption of Local Law No. 4 of 2016, which amends the Town's Zoning Law to add a Commercial/Recreation Overlay District and

associated provisions providing for the establishment and operation of a Commercial/Recreation Facility within such a district, constitutes impermissible spot zoning.

More specifically, petitioners have established that the Town's zoning change applies only to those specific lots that make up the Legoland project site. Compare Goldman Reply Aff., Exhibit 1 [Local Law No. 6] at 5, Sec. 3 [identifying subject parcels making up Commercial Recreation Overlay District] with First Goldman Aff., Exhibit 2 [Oct. 19, 2017 Site Plan Approval Resolution] at 1, n. 2 [identifying the same properties as constituting the Legoland project site]. The fact that the zoning change applies to, and benefits, only the Legoland site demonstrates that the Town singled this area out for beneficial treatment for the purpose of benefiting one particular developer – Merlin.

Further evidencing the Town's intent to benefit Merlin and its Legoland development with its zoning change – and no other landowner – is the fact that, by its terms, the Commercial/ Recreation Overlay District was designed to terminate by operation of law "if the Town Planning Board does not approve a special permit and site plan and/or subdivision for a Commercial Recreation Facility within six (6) months of the effective date of this Local Law or, if so approved, the Commercial Recreation Facility is thereafter abandoned." See Goldman Reply Aff., Exhibit 1 at 5, Sec. 4. Expiration. Indeed, from the time this Local Law was introduced to the time it was passed, the only Commercial Recreation Facility under the Planning Board's consideration was Merlin's proposed Legoland development and, indeed, that is the only such facility that could possibly have been under consideration given that the new zoning district applies only to land Merlin then owned or was under contract to buy. The existence of this automatic expiration should Merlin not obtain approval or, thereafter, abandon its plans

demonstrates that the zoning change was intended to benefit no party other than Merlin, confirming its selective, a prominent aspect of spot zoning.

The Commercial/Recreation Overlay District allows for a land use at complete variance the land uses in the immediately surrounding areas, which are, and have always been, primarily rural and hamlet residential. See Goldman Reply Aff., Exhibit 6 [Town of Goshen Zoning Map], Exhibit 7 [Town of Goshen Zoning Code, Chapter 97, Article IV, Development Options in RU District], Exhibit 8 [Town of Goshen Zoning Code, Chapter 97, Article III, Land Use District Regulations, § 97-15, HR District].

The Town Respondents counter that the zoning change does not amount to illegal spot zoning because (1) it is aimed at a small parcel, but rather 14 properties totally about 500 acres; (2) the permitted commercial use is not totally different from the commercial uses permitted in surrounding areas; (3) it is not to the detriment of other owners; and (4) it is permitted by the Town's Comprehensive Plan. See Town Resp. Mem. at 10-11. Each of these arguments is wrong.

First, though the zoning change applies to 14 properties consisting of about 500 acres, the Town does not dispute that the same developer owns [or is under contract to own] all of these properties. Moreover, as part of the approval process, Merlin sought and obtained approval to consolidate these parcels. See First Goldman Aff., Exhibit 2. Thus, in reality, these 500 acres are essentially one parcel, procured by Merlin for the purpose of developing Legoland. And the word "small" as used in Rodgers must be interpreted in relative rather than absolute terms. While 500 acres can seem like a large number in absolute terms, relative to the size of the rest of the Town, which spans just under 44 square miles, see Goldman Reply Aff., Exhibit 9 [US

Census Bureau data] at 2, and none of which is made part of the zoning change here, 500 acres *is* "small."[7]

Second, the permitted commercial use allowed by operation of a Commercial Recreation Facility is totally different from the immediately surrounding uses. The permitted uses in the Commercial Overlay District include, *inter alia*, aquariums, museums, food service, theaters, retail sales, motorized rides, hotels with or without conference space and restaurants. See Id., Exhibit 1 [Local Law No. 6 of 2016] at 3. By contrast, the surrounding rural (RU) and hamlet residential (HR) districts are much more restrictive and consistent with the purposes identified in the Town's comprehensive plan as discussed above. See Id., Exhibits 7 and 8.

Third, the zoning change is to the detriment of other landowners. Beyond the specific harms to adjoining and proximate landowners petitioners have identified as harms to them, see First Goldman Aff., Exhibit 1 [Verified Petition] ¶¶ 8-43, the zoning change works a detriment to the entire community because it is totally inconsistent with the Town's Comprehensive Plan which continues to ban amusement parks from the entire town. See Udell v. Haas, 1 N.Y.2d 463 (1968); Northeastern Environmental Developers, Inc. v. Colonie, 72 A.D.2d 881, 882 (3d Dep't. 1979) ("When a zoning amendment is in derogation of that [comprehensive] plan, it would not be in the interest of the general welfare of the community as a whole, and would be invalid."). The fact that the Town simultaneously amended its Comprehensive Plan does not render the zoning change consistent with the plan and, thus, not an instance of spot zoning. On the contrary, this act only highlights how truly out of sync the zoning change really is. Indeed, the Town's 2009 Comprehensive Plan was developed over the course of several years after much

[7] The Court may take judicial notice that there are 640 acres in 1 square mile. Thus, the zoning change affecting 500 acres affects less than 1/44th of the total area of the Town.

study, including the completion of a GEIS. See Goldman Reply Aff., Exhibit 10 [Town of Goshen 2009 Comprehensive Plan]. The fact that, in pushing through the Legoland project, the Town tweaked a few provisions of the Plan to be more in line with the nature and scope of the development does not mean that the development is in line with the Comprehensive Plan as whole, as opposed to potentially a few aspects of it. Indeed, the word "comprehensive" is used for a reason – the plan is meant to describe a long-term planning strategy that achieves a number of goals and objectives, not just one or two. Indeed, notwithstanding the minor changes just made by the Town, when viewed in light of the totality of the Comprehensive Plan, especially when the zoning and development restrictions in the RU and HR zones as set forth in the Town's Zoning Code are factored in, see Goldman Reply Aff., Exhibits 7 and 8; see also Udell, 21 N.Y. at 471-72 (noting that a "comprehensive plan" is determined by "examining all relevant evidence," including relevant zoning and use regulations), the addition of the Commercial Recreation Overly District, and the uses permitted therein, are simply incompatible with the overall nature and environment of the surrounding lands.

Finally, according to the Verified Petition, the harms to be suffered by neighbors, whether from the tremendous disruption caused by the project's construction, the noise and light and traffic congestion and aesthetic and health impacts from the pollution stemming from its operation, are tremendous and merely confirm the abject inconsistency between this project and surrounding uses.

## POINT V:

## THE TOWN'S PRE-JUDGMENT TAINTED THE APPROVAL PROCESS IN A MANNER WHICH MADE IT ARBITRARY AND CAPRICIOUS

All parties are entitled to "unprejudiced decisionmaking by an administrative agency." Withrow v. Larkin, 421 U.S. 35, 46-47. Any determination made based not on a dispassionate review of facts, but on a body's pre-judgment or biased evaluation must be set aside." Matter of Rotwein [Goodman], 291 N.Y. 116, 123, cited in Warder v. Bd. of Regents, 53 N.Y.2d 186 (1981).

The Verified Petition contains ample evidence that the Town of Goshen and its officers pre-judged this project, tainting the approval process and making the result arbitrary, capricious and contrary to law. In reviewing this issue, the Court is constrained to accept the well-plead factual allegations of the Verified Petition and the accompanying Affidavits and determine whether they make out a claim for pre-judgment under the law. That one or another Town officer or agent denies the comments and/or behavior attributed to him is not relevant on these motions to dismiss and are to be discounted.

In support of the claim that the Town of Goshen supported this project from the "get-go," making the approval process a mere formality, petitioners submitted substantial evidence as follows: one long time Planning Board member, Reynell C. Andrews, reviewed the billing records of the law firm which represents the Town and noted entries which show discussions between said counsel and Legoland's lawyers discussing an expedited review for Legoland. See, Andrews Affidavit, para. 7. These discussions occurred in a certain content: an applicant making a submission for Planning Board review where the comprehensive plan and town zoning law categorically prohibited the use it planned. Mr. Andrews, a Town Planning Board member for seventeen years, explained that "in such a situation, Planning Boards do not normally engage in site plan review or SEQR analysis of the proposal…the applicant is advised to get a zoning

change or seek a variance." Yet, in this case, the Planning Board lawyer advised the Board to proceed with project review despite the Town's prohibition of amusement park uses in any of its zoning classifications. Id. at para. 9. From his 28 years as a member of either the Village or Town Planning Board, Andrews concluded, "To say this was irregular is an understatement." But, this is hardly all the evidence the petitioners presented of prejudgment: as Andrews further narrates, "in July 2016, without any resolution from the Planning Board, the Board's lawyer, Mr. Golden, wrote the County IDA supporting substantial tax breaks, known as PILOTs, for Merlin. Again, this was inconsistent with the status of the review which had by then not yet even started. How can an attorney representing the Planning Board and the Town Board, which had yet to consider major changes to the Town zoning law and the comprehensive plan, be sending such a letter absent profound pre-judgment?" Id. at para. 10. [8]

Andrews also noted pre-judgment at the August 2016 scoping session where Legoland was permitted to play a 20 minute infomercial which touted the company and its project. To Andrews, a Planning Board member, "[t]his was maddening as we were there to decide what issues Merlin needed to study, not for a pep rally or cheerleading session. This display was highly unusual to me and demonstrated the degree of pre-judgment which dominated the Planning Board's consideration of the project." After the scoping session, the Planning Board continued to demonstrate substantial pre-judgment: within ten weeks of the August 2016 scoping session, Merlin prepared and submitted a DEIS totaling more 7,600 pages. Andrews continues, "The chair of the Planning Board had by then made clear that he strongly favored the project and

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[8] Mr. Golden does not disclaim any of the facts set forth in the petition regarding his billing records or their meaning, but instead prefers to engage in name calling, acting as of those on the other side or representing the other side are less experienced that he is in the ways of power and corruption. This may be true, but hardly an appropriate response.

he never convened a work session to thoroughly study the DEIS." Id. at para. 11. And, while the DEIS was sent back for additional work, this did not follow any substantive discussion by Planning Board members who "did not engage in any hard look at the project themselves." Id. at para. 12. Upon the return of the DEIS a few weeks later, "the Planning Board almost immediately declared that it was "complete," though again without substantive discussion." Id. at para. 13. Mr. Andrews further notes that the Board did not carefully review comments from other agencies, often critical of the project, including those from the New York State Department of Transportation. Id. at para. 14.

The Affidavits submitted with the Verified Petition also documents other measures of prejudgment which can be considered as evidence supportive of the claims made in the Verified Petition: in early July 2016, Lee Burgess, the Chair of the Planning Board, handled Deb Corr pro-Legoland literature at the Great American Weekend in Goshen. When she expressed concern about the project's impact on property values and explained where she lived, he responded, "You should be all right over there." On another occasion, Corr saw Burgess wearing a pro Legoland button. Corr further noted that the Town Supervisor attended the ribbon-cutting for a Legoland storefront located in the middle of Goshen. Corr has witnessed the Town Supervisor at several receptions for Legoland and entering/leaving its storefront. See, Corr Affidavit, paras. 5-6. On January 5, 2017, affiant Rothenberger saw Town officials and Legoland counsel and representatives celebrating the closing of the DEIS public hearing at a Goshen eatery. See, Rothenberger Affidavit, paras. 2-4.

Apart from denials of the facts alleged above [which denials are meaningless on a motion to dismiss], the Town claims that these events do not sufficiently demonstrate bias to taint its

approval process. However, these allegations go way beyond "[a] mere allegation of bias." Instead, the facts set forth in the Verified Petition strongly support the conclusion that the Town Supervisor and the Chair of the Planning Board and the Counsel for both bodies [the same person] all took public positions supporting Legoland before the process of review even comments. This is not a "mere allegation of bias." Rather, it is strong evidence of pre-judgment and disposition.

And, contrary to the Town's claim that the Verified Petition does not recite the available evidence of prejudgment, the Court is respectfully directed to paragraphs 103-121 where specific actions taken by Golden and Bloomfield are recounted in detail.

Moreover, the Verified Petition plainly alleges that the actions of those leading the review process, Burgess, Bloomfield and Golden, both reflected pre-judgment and tainted the project's review. Indeed, the outcome not only "flowed from the bias," but was predetermined before the review process commenced as shown above. Cf., In the Matter of Daniel Harris v. Board of Appeals of Town of Carmel, __AD3d ___ (2d Dept 2/1/16). Here, the substance of the Verified Petition as well as the report by petitioners' planning experts [Gross initially and then Fink] is that the Town of Goshen failed to act logically and showed partiality in nearly every critical respect in this review process: by and through the Town Board's summary rejection of a much less dense residential development on part of the same site in April 2016, during which Town Board members noted the traffic congestion, water shortage and other negative impacts of developments on that fragile site, by and through discussions starting the next month even before the applicant made a formal submission between the same Town Board's attorney and Legoland's attorney aimed at expediting project review for a project which was then

categorically prohibited by the Town zoning law and wholly inconsistent with its comprehensive plan and of far greater intensity than the project the Town Board had just summarily rejected, by and through the premature assignment of the project for review by the Planning Board at a time when the Town's comprehensive plan and zoning law categorically disallowed the project, by the expressions of Town support before the County IDA for a PILOT in July 2016 before the Town's project review had even started, by the playing of an infomercial supporting the project before the scoping session even commenced, by the failure of the Planning Board to take a hard look at the project or critical comments received about it before declaring the DEIS complete, by the replacement on the Planning Board of an alleged critic of project, Andrews, at the demand of Merlin, by the failure of the Planning Board to consider the impacts of the zoning overlay district on all land thereby covered, by the failure of the Planning Board to engage in meaningful cumulative impact analysis as is set forth exhaustively in the report by Fink submitted with the Verified Petition – all of these acts and omissions demonstrate that the bias of the leaders of the review process substantially influenced and tainted the review. Matter of Moss v. Chassin, 209 A.D.2d 889 (3rd Dep't. 1994). Unlike Moss, where there was no objective evidence from the professional disciplinary proceeding that bias affected its participants, here, the opposite is true: at every turn, there is evidence that pre-judgment and pre-disposition ruled the process. Accord, Matter of Jeremias v. Snyder, 177 A.D.2d 488 (2d Dep't. 1991)(factual demonstration supporting bias will lead to over-turning of challenged proceeding).

The Town's position borders on the absurd: here, Bloomfield and Burgess led the Town's review process, as Town Supervisor and Chair of the Planning Board. Burgess sported a button supporting the project and handed out pro Legoland-literature before the review process even

started. Analogously, would any court fail to find bias if an allegedly impartial hearing officer in any of the cases respondents cite sported a button deciding the case under review before the case had even been presented or during its presentation? This is what happened here and none of the cases respondents cite suggest that this kind of pre-judgment, when made manifest as explicated above, is insufficient to invalidate a challenged decision as arbitrary and capricious.

Matter of Weber v. State Univ. of N.Y., 150 A.D.3d 142, 1433 (3d Dep't 2017) is inapposite. There, a student challenged the impartiality of a hearing officer in a student discipline case because she allegedly knew the victim, had previously been removed as the hearing officer in the case, had engaged in advocacy and had strong convictions about women's issues and had been an interim administrator at the College. Again, none of these allegations approach the evidence here: according to long time Planning Board member, Legoland/Merlin was treated in a manner entirely dissimilar to prior projects. Where a sponsor came before the Town Planning Board seeking approval to build something discordant with the extant zoning, that applicant would be sent away and told to return when it had attained a zone change or a variance. This is precisely what the Goshen Town Board did the month before Legoland came to Town after hearing from another applicant seeking to present a project for much of the same. The normal applicant's attorney was not then engaged in repeated conversation with the Planning Board/Town Board attorney as to how the project could be expedited. The hearing officer challenged in Weber, supra., did not express, as did Burgess and Bloomfield, strong public support for one side or the other before the disciplinary proceeding was ever commenced. There is no evidence that she allowed one side or the other liberties with the hearing process, analogous

to the playing of an infomercial before the scoping meeting commenced while a captive audience of 1000 people waited to give input.

In further response, the Town cites other cases which either are entirely inapposite or outdated, Matter of Hughes v. Suffolk County Dept. of Civil Service, 74 N.Y.2d 833 (1989), or do not rest, as here, on a plethora of actions showing pre-judgment as recited above, but merely on statements of opposition or support by elected officials. For example, in Webster v. Town of Webster, 59 N.Y.2d 220 (1983), a new Town Board Chairman had made public comments critical of the haste with which the previous Board had approved a specific proposal and expressed opposition to the proposal. Since the plaintiffs "failed to show any action on the part of Kent" that would provide a basis for setting aside the challenged action, this prong of their claim was dismissed. In Matter of Pittsford Canalside Props. LLC v. Village of Pittsford 137 A.D.3d 1566 (2016), two members of a village board voted in support of a positive declaration for a project after having expressed opposition to it. In considering whether elected officials could vote on subjects of public importance, the Fourth Department believed that such expressions of personal opinion were to be encouraged, not penalized. This logic is thoroughly distinguishable from the allegedly deliberative role of members of a Planning Board considering the qualities of a major development proposal. Indeed, the concept of pre-determination contravenes the "hard look" required of those implementing SEQRA. How can the public have any confidence that those involved in this process could or would take a hard look at Merlin's proposal after advocating on behalf of Legoland's receipt of a thirty year tax subsidy before the County IDA before the scoping session for this project even occurred? That is what occurred here. Moreover, there is a distinction between a vote, as in Canalside Props., requiring a development to conduct an EIS so

as to further review a controversial development and a pre-determined vote to approve an FEIS whatever the deficiencies of the product and whatever the notice of deficiencies. The first vote merely ensures a statutorily-required environmental review while the second, if cast by partisans who have failed to take the required hard look, permits a pre-determined project to proceed.

Petitioners here rely on far more than such statements of personal opinion to demonstrate pre-judgment and the record fully supports their claims.

## POINT VI

## THE RESPONDENT TOWN'S DEFENSE OF ITS SEQRA REVIEW DEPENDS ON DISPUTED FACTS WHICH CANNOT BE RESOLVED ON A MOTION TO DISMISS

Respondent Town presents extensive and untimely argument in support of the propriety of its Planning Board's SEQR review and findings concerning Merlin's project. It disputes nearly all of the factual claims set forth in the Verified Petition and supporting Affidavits and Exhibits which challenge the thoroughness of its Planning Board review, specifically claiming, incredibly, and against the available record, for example, that the Village of Goshen has not suffered drought conditions since 2003 [when in April 2016 the Town Board summarily dismissed another developer for part of the same site for which Legoland was just approved in part because of water shortages in the Town [which includes the Village]. The Town presentation omits reference to the highly critical comments concerning Legoland received from the State Department of Transportation and the DEC, the profound impact of clear-cutting 150 acres of forest on land which the comprehensive plan has long deemed amongst the most environmental sensitive in the Town. The Town pretends that the siting of one of the largest power plants in the State and its well-documented impacts on air pollution need not have been studied because, taken alone,

CPV's contribution to air pollution will not exceed national standards. Of course, this is pure sophistry for the relevant issue is whether, when taken together with Amy's Kitchen, CPV and other recent and proposed projects, the cumulative air pollution impact from the traffic congestion inarguably consequent to this development will be injurious to public health, as Dr. Wolfson explains. The respondents cannot make any factual claims about this because they concededly did not study it. Though responsible for approving the scoping document, respondent Town seems to cast blame upon petitioners for this admitted omission.

As noted above, a motion to dismiss pursuant to CPLR 3211(a)(1) "on the ground that the acted is barred by documentary evidence…may be appropriately granted only where the documentary evidence utterly refutes [the] factual allegations, [thus] conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. of New York, supra. We respectfully submit that the respondents' claim that the Planning Board did not act arbitrarily and capriciously [as alleged] in approving Merlin's project for failure to study critical cumulative impacts and for failure to verify bungled water calculations [as explained in the Verified Petitions] should be denied.

In pages 36-97 of Exhibit 6 to the Fink Affidavit dated November 17, 2017, petitioners' expert demonstrates the numerous errors and misstatements which characterize the FEIS. The Planning Board never discussed Fink's comments. See, Fink Affidavit dated January And, while a Board may choose to favor one scientist over another **after considering and discussing the merits of each view**, it may not, as occurred here, simply ignore critical commentary and claim to have taken a hard look at the project. The record reveals that the Planning Board, which meets in public session, NEVER considered Fink's comments or the hundreds of other critical

comments made concerning the FEIS. Nor did the Board discuss the applicant's generally dismissive response to those comments. Again, in this context, Mr. Golden's impressive presentation fades and the Board's over-whelming pre-judgment and pre-determination prevail.

More specifically, as Fink explains in the accompanying Affidavit, his prior comments to the Planning Board [Exhibit 6 to his November 17, 2017 Affidavit] demonstrate that the FEIS did not, *inter alia*, properly assess impacts to the Otter Kill, a stream defined as "threatened" by the DEC. See, Fink Affidavit dated January 23, 2018, paras. 14-16. Likewise, Fink explains that the FEIS did not study the type and level of noise disturbances which neighboring residents will experience from the frequent fire-works planned for the site or the diminution of air quality such firework displays cause. Id. paras. 32-34, 79-80. Similarly, Fink refutes the Town's preposterous claim that Legoland will **reduce** traffic congestion and air pollution. Id., para. 78. Finally, Fink explains that the record supports the conclusion that the Planning Board failed to study or account from secondary impacts predictably caused by a project as massive as Merlin's in violation of 6 NYCRR section 617.7(c)[2].

As Merlin has improvidently written this Court importuning decisions on outstanding matters on *its* time schedule, likewise, as Fink has explained in detail in Exhibit 6 to his Affidavit of November 17, 2017, these respondents rushed approval of this town-changing project. The Planning Board did not take a hard look at the numerous issues raised in the Verified Petition. Its minutes do not reflect any such hard look and the Court should not allow pre-judgment to dictate.

## CONCLUSION

This Court should deny the respondents' motions to dismiss, finding that the petitioners have standing, named all necessary parties and have refuted each of the points of law upon which respondents rely. Answers should be filed and a hearing held on, amongst other issues, that of pre-judgment.

Dated: January 23, 2018

Yours, etc.

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