Knauf Shaw LLP
ATTORNEYS AT LAW

August 18, 2021

VIA ELECTRONIC MAIL
AND HAND DELIVERY

Village of LeRoy Board of Trustees
c/o Sharon Jeary, Village Clerk
3 West Main Street
LeRoy, New York 14482
SJeary@villageofleroy.org

Re: Proposed Rezoning to PUD ("Project")
East Avenue, LeRoy New York

Dear Village Board Members:

We represent Thomas and Charity Condidorio who own property at 38 East Avenue, LeRoy, New York 14482. The Condidorios object to the proposed PUD rezoning.

I appeared on behalf of the Condidorios at the August 2, 2021 meeting of the Village Board. At that meeting, other nearby residents and I raised a number of concerns with the Village Board. The purpose of this letter is to reiterate and elaborate on those concerns in writing for the public record.

PROJECT PLANS NOT AVAILABLE

The Condidorios have objected several times because the plans as they currently exist and the supporting documentation (i.e., stormwater plans, traffic study, Phase IA/ IB Archeological Study), as well as the resolutions under consideration by the Village Board, have not been made available to the public despite several requests. We have only become aware of the content of the Part 1 to the State Environmental Quality Review Act ("SEQRA") Environmental Assessment Form ("EAF") from the documents posted on the Genesee County Planning Board website associated with its conditional approval of the Project. Village residents should not need to search the County website to obtain land use application materials for projects potentially impacting their properties.

Here, the Village utilizes a high speed internet connection and maintains a website. The Village has not posted the proposed SEQRA Resolution or any proposed resolution concerning the Rezoning. There is no reason that posting the resolutions was not practicable. Public Officers Law § 103(e).

It is the Village's obligation to point to how it was impracticable to post the proposed resolution on its website ahead of the meeting. As held in *Circular Energ, LLC v. Town of Romulus*, Index No. 20180124 (Sup. Ct. Seneca Co.), the Open Meetings Law requires the agency to "make a determination as to why it was not 'practicable' to post the materials prior to the

meeting. To hold otherwise would permit an agency to simply state that it was 'not practicable' without explaining why it was 'not practicable' to do so, which would defeat the purposes of Public Officers Law § 103(e)." Accordingly, in the absence of any such determination or justification by the Village here, the Open Meetings Law was clearly violated.

SEQRA REQUIREMENTS

The primary purpose of SEQRA is "to inject environmental considerations directly into governmental decision making." *Matter of Coca-Cola Bottling, Inc. v. Board of Estimate*, 72 N.Y.2d 674, 679 (1988). The heart of SEQRA is ECL §8-0109(4), which requires agencies (including state and municipal boards, agencies and authorities), "[a]s early as possible in the formulation of a proposal for action" to "make an initial determination whether an environmental impact statement need be prepared," and ECL §8-0109(2), which requires all state agencies and municipalities to prepare or cause to be prepared "an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." It is well-established that the SEQRA process applies to projects that require a special use permit, as is the case here. *Michalak v. Zoning Bd. of Appeals of Town of Pomfret*, 286 A.D.2d 906, 731 N.Y.S.2d 129 (4th Dep't 2001).

The legislative intent is clear that "to the fullest extent possible the policies, statutes, regulations and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in [SEQRA]." ECL §8-0103(6). Accordingly, "literal" or "strict compliance" with the SEQRA process has been mandated by the courts, and "substantial compliance" has been held insufficient. *King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341 (1996); *Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958 (4th Dept. 1995), stay vac'd 85 N.Y.2d 961, 628 N.Y.S.2d 48 (1995), app. dis'd 85 N.Y.2d 812 (1995); *Badura v. Guelli*, 94 A.D.2d 972, 973 (4th Dept. 1983).

Accordingly, before an agency can make a "significant authorization" for an "action" subject to SEQRA, it must comply with SEQRA. 6 N.Y.C.R.R. 617.3(a); *Devitt v. Heimbach, 58 N.Y.2d 925* (1983). Otherwise, the action is invalid. *Tri-County Taxpayers Assoc. v. Town Board of Queensbury*, 55 N.Y.2d 41 (1982).

The Project is a SEQRA Type I action because it has been deemed by the State Historic Preservation Office (SHPO) as an archaeologically sensitive location and the Project exceeds 25 percent of the SEQRA Type I thresholds for changes to allowable uses in a zoning district (6.25 acre threshold) and new residential units connecting to existing public water or sewer systems (50 unit threshold). 6 N.Y.C.R.R. § 617.4(b)(9), (2), (5)(iii). Further, the Project may also be a Type I Action because it appears the proposed PUD site may be more than 25 acres (the Project materials we have seen refer to a range from 19.5 acres to "23+ acres" and don't provide properly defined boundaries of the proposed PUD area). 6 N.Y.C.R.R. § 617.4(5)(iii). As a Type I Action, a full EAF must be used to determine the significance of the Project. Instead of a full EAF, from the information available to us, the applicant instead prepared a short form EAF, which violates SEQRA.

As a Type I Action, coordinated SEQRA review is required for the Project. 6 N.Y.C.R.R. §617.6(b)(3). The involved agencies must go through the process set forth at 6 N.Y.C.R.R. § 617.6(b)(3) to designate a lead agency. An "involved agency" is defined as "an agency that has jurisdiction by law to fund, approve or directly undertake an action." 6 N.Y.C.R.R. §617.2(s), which for the Project would include the Planning Board, the Zoning Board of Appeals, and if their approvals are required, the New York State Department of Health or Environmental Conservation. While we understand the Board may have asserted lead agency, we have seen no evidence that a coordinated review was conducted or that the involved agencies consented to the Board's assertion of lead agency as required for Type I Actions by SEQRA.

Under SEQRA, the lead agency must make a "determination of significance" by reviewing the EAF and decide whether the proposal "may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. §617.7(a)(1). If so, a draft, and then a final EIS must be prepared. ECL §8-0109(2); 6 N.Y.C.R.R. §617.7(a)(1). If not, the lead agency must make a negative declaration that the project will not have a significant adverse environmental impact. 6 N.Y.C.R.R. §617.7(b)(2).

To determine the potential for at least one significant adverse environmental impact, the lead agency "must identify 'the relevant areas of environmental concern' and take a 'hard look' at them." *Person v. McNealy*, 90 N.Y.2d 742 (1997); *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997). According to the SEQRA regulations, the lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant effect on the environment." 6 N.Y.C.R.R. §617.7(b)(iii). This scope of analysis is broad, as ECL §8-0109(2) requires that all potential environmental impacts of a project subject to an environmental review be considered, including the long-term and short-term effects of the project. Specifically, 6 N.Y.C.R.R. §617.3(k)(1) provides:

> Considering only a part of segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance and any subsequent EIS the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

Therefore, it is critical that a lead agency be properly designated, and that then the lead agency review the environmental impacts for all actions proposed for this project, with input from the involved agencies, including future plans. Here, upon information and belief, the Project includes approximately 30 duplex patio homes (60 units) as well as the construction of a road. The mayor recently indicated in the Pennysaver that here is a "second part of the project" consisting of 16 to 20 single family homes on an 1,100 continuation of East Avenue. The environmental impacts of all these activities have to be considered together, otherwise it constitutes illegal segmentation under SEQRA.

If a proposed action, considered in its entirety, "may have a significant effect on the environment," ECL §8-0109(2) mandates that a positive declaration and an EIS be prepared. "It is well settled that because the operative word triggering the requirement of an EIS is "may," there is a relatively low threshold for impact statements." *Farrington Close Condominium Bd. of*

Managers v. Incorporated Village of Southampton, 205 A.D.2d 623, 624 (1994). See also, *H. O. M. E. S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 232 (4th Dep't 1979).

This threshold is even lower for Type I actions like the proposal at issue here, since they "are more likely to require the preparation of an EIS" than other actions. 6 N.Y.C.R.R. §617.4(a); see also *Shawangunk Mountain Environmental Association v. Planning Board of Town of Gardiner*, 157 A.D.2d 273 (3d Dep't 1990). Thus, for a "type I action an EIS is presumptively required." *Town of Dickinson v. County of Broome*, 183 A.D.2d 1013, 1014 (3d Dep't 1992); see also *Kahn v. Pasnik*, 231 A.D.2d 568 (2d Dept. 1996); *In the Matter of OMNI Partners L.P. v. County of Nassau*, 237 A.D.2d 440 (2d Dep't 1997). Furthermore, while a negative declaration for an "unlisted action" can be conditioned, 6 N.Y.C.R.R. §617.7(d), a conditioned negative declaration is illegal for a Type I action. *Merson v. McNally*, 90 N.Y.2d 742 (1997); *Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149 (4th Dep't 1992).

Once the lead agency has made its determination of significance, it must also provide a "'reasoned elaboration' of the basis of its determination." *Jaffee v. RCI Corp.*, 119 A.D.2d 854, 855 (1986); *Save the Pine Bush v. Planning Bd. of City of Albany*, 96 A.D.2d 986, 987 (1983), *app. dis'd*, 61 N.Y.2d 668. The lead agency cannot merely set forth a "conclusory statement, unsupported by empirical or experimental data, scientific authorities or any explanatory information." *Tehan v. Serivani*, 97 A.D.2d 768, 769 (2d Dep't 1983).

The lead agency, here the Village Board, cannot delegate its responsibilities to other agencies, like the Department of Health or the Department of Environmental Conservation. It has to review the environmental impacts itself. "A lead agency under SEQRA may not delegate its responsibilities to any other agency." *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 350 (4th Dep't1999). In *Penfield Panorama*, the board:

> conditioned its approval of the project on [the developer's] agreement to get approval of a site remediation plan from the NYSDEC and MCDOH before any construction begins. In our view, however, deferring resolution of the remediation was improper because it shields the remediation plan from public scrutiny, and thus the court properly annulled the determination of the Planning Board.

253 A.D.2d at 349. The Fourth Department held that this violated SEQRA, since "by deferring resolution of the hazardous waste remediation issue, the Planning Board failed to take the requisite hard look at an area of environmental concern." 253 A.D.2d at 350.

SPECIFIC CONCERNS

Because this is a Type I action under SEQRA, there is a presumption that an Environmental Impact Statement ("EIS") should be prepared as discussed above. There are likely to be significant adverse environmental impacts associated with the Project, and therefore the Condidorios request that a lead agency be properly designated, and that it issue a positive declaration and require an EIS.

Aside from the improper EAF Part 1 being prepared, based on the discussion at the August 2, 2021 Village Board Meeting, it is clear that the Environmental Assessment Workbooks were not consulted before Parts 1 and 2 of the SEQRA Environmental Assessment Form were

completed. The Workbooks provide guidance to the reviewing agencies on what constitutes a potentially significant adverse impact and are available at the following link: https://www.dec.ny.gov/permits/90125.html. We encourage the Village Board to review the Workbooks before making a determination of significance.

The proposed Project will generate substantial additional traffic, including construction vehicles and traffic associated with 60 new residential units. At the last public meeting, the Village had not received any traffic study from the Developer and therefore has no way to assess whether the traffic impact would be significant. This is particularly important because we understand that the road is not standard width. As the Genesee County Planning Board noted in its proposed modifications, one point of entry (East Avenue) is not sufficient, particularly considering the units are proposed to be rented to older adults which may require greater access by emergency vehicles. As part of the SEQRA analysis, a traffic study should be prepared and traffic impacts mitigated to the extent necessary. In addition, the developer, not the Village, should be required to improve the roadway to support such an increase in traffic.

Connectivity to South Avenue, which the County Planning Board stated should be completed, is not addressed by the current EAF. Such a connection would require crossing of a stream, and no analysis of stream impacts has been completed. Further, the proximity of the stream and nearby federal and state wetlands suggest that a wetland delineation should be done before the Village Board makes a determination on whether an EIS should be prepared.

In addition, the EAF should fully describe the Applicant's plans for the management of stormwater for the Project, taking into consideration the Project's proximity to the Stream and wetlands. To date, the stormwater plans have not been available for public review and comments. As mentioned above, the Village cannot delegate its obligation to take a "hard look" at all of the environmental impacts of the Project, including the impact of stormwater. This issue is particularly important given recent storm events which produced inches of water in yards along Popular Lane as shown in the attached photographs.

The addition of so much impervious surface will result in a change in the way the water flows throughout the watershed in the area of the Project and may have a significant impact on the nearby Stream and the residents downstream. There is a strong scientific consensus that increasing the percentage of imperviousness in a watershed will alter the pattern of flow coming from it. Typically, increased imperviousness makes a stream become "flashy," meaning there are increases in peak discharge from rainfall events and decreases in discharge between rainfall events. This could have a significant impact downstream of the Project.

Because no analysis has been done of the watershed or the impacts of stormwater in the area of the Stream and wetlands, the Village cannot say there will not be a significant adverse environmental impact caused by stormwater from the Project. For this reason alone an EIS should be required.

Finally, as detailed in the correspondence from SHPO and the County Planning Approval with Modifications, a Phase IA/IB Archeological Study must be completed. The Condidorios are not aware of whether the developer has completed that study. We note that the Village should not

be spending taxpayer dollars to conduct these studies, and the costs incurred by the Village should be billed back to the developer.

For the reasons set forth above, the Condidorios object to the rezoning for the Project based on the numerous environmental impacts which have not been properly studied or addressed. To be clear, the Condidorios do not object to proper development in accordance with the existing zoning.

Thank you for your consideration.

Sincerely,

KNAUF SHAW LLP

Amy K. Kendall

AMY K. KENDALL

Enc.
cc: Thomas and Charity Condidorio

East Ave Development Site

Photo in Area A

Photo in Area B

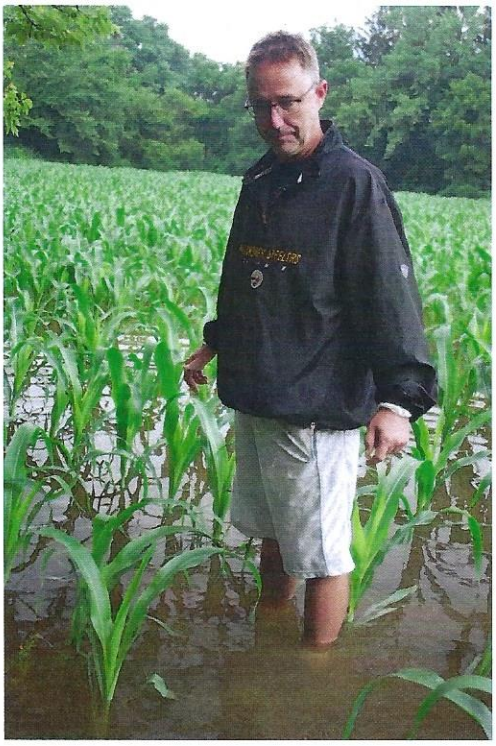

Photo in Area C

Photos at Robinson Residence

LeRoy CC

Mercygrove Property

Flow Under East Ave