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September 29, 2011

via FedEx

David Wylock and Valerie LaRobardier, Co-Chairs
and Members of the Planning Board
Town of Dover
126 East Duncan Hill Rd.
Dover Plains, NY 12522

**Re: Dover Village Plaza Expansion - Subdivision and Site Plan Proposal
Tax Grid No. 7063-00-562258
"Dover Village" - Map No. 10031**

Dear Chairpersons Wylock and LaRobardier and Members of the Planning Board:

I contact you on behalf of the owners of the Freshtown Supermarket and the Dover Plains Shopping Center ("Freshtown")¹ regarding the proposal of Cedar Dover Plains LLC to construct a 36,000± sq. ft. food store on the above referenced property directly across Rt. 22 from the Freshtown Supermarket.

INTRODUCTION

All of my comments will address "Concept C", the basic draft proposal first submitted to you on April 13, 2011 and revised several times since. Even though the proposal is incomplete and preliminary that plan shows a 36,000± sq. ft. retail food store - a supermarket - facing a proposed 130± car parking lot to the north of the building which

¹The Katz brothers doing business under the names of Dover Acquisitions LLC and CQM of Dover Plains, Inc.

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will virtually consume a newly created Lot 4 containing $5.3 \pm$ acres - roughly five football fields in size. Existing Lot 3 containing the four existing commercial buildings in the Dover Village Plaza will be reduced to $6.6 \pm$ acres.²

THE QUESTION AT HAND

The proposal before you is to build a $36,000 \pm$ square foot grocery store on a $5 \pm$ acre parcel located on Rt. 22 in the HC zoning district. The ultimate issue you must decide is simple enough.

•After considering all elements of the proposal and its impacts on the community and environment in the light of both SEQRA³ and the requirements of the Town of Dover Zoning Law should the Planning Board issue a special use permit for the proposal?

Freshtown's comments addressed to this core question follow:

I. FRESHTOWN'S STANDING.

Initially, let me make it clear that Freshtown is indeed a potential competitor to the operator of this proposed supermarket. However, under the circumstances at hand when such a competitor brings legitimate environmental and zoning concerns to the attention of

²Lot references are to the lots shown on the three lot "Dover Village" plat (filed Map No. 10031 dated February 13, 1995 and filed on February 23, 1995) which itself is a re-subdivision of two lot plat dated July 24, 1992 and filed on September 10, 1992 as Map No. 9558.

³ECL Article 8 read in conjunction with 6 NYCRR Part 617.

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any agency reviewing the proposal it does not matter if that is the case.⁴ Legitimate objections may be put into issue by a competitor just as surely as anyone else and it matters not if the objector is a nearby competitor.

II. AN ERRONEOUS PERCEPTION PREVAILS.

There seems to be a prevailing notion that because the proposed supermarket is in the HC zoning district the Town's zoning law "allows it" or "the district is zoned for it" and the Planning Board is really engaged in nothing more than an adjustment of the plan elements to see that they fit certain well intentioned planning guidelines, e.g. a better hamlet type appearance. That is an erroneous perception.

The proposal is not permitted or allowed in this district as of right. It is a significant proposal that the Town Board has, through its zoning, placed it in a special category creating a much higher standard to gauge a project by as to whether it can qualify for approval. Such a use may proceed only if the Planning Board issues a special permit for it.⁵

⁴See *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 777, 570 N.Y.S.2d 778, 787 (1991) ("That plaintiff raises economic concerns of course does not foreclose its standing also to raise environmental concerns"); *Heritage Co. of Massena v. Belanger*, 191 A.D.2d 790, 594 N.Y.S.2d 388 (3d Dept., 1993) and *Duke & Benedict Inc. v. Town of Southeast*, 253 A.D.2d 877, 678 N.Y.S.2d 343 (2nd Dept., 1998). See also Gerard, Ruzow, and Weinberg, *Environmental Impact in New York* §7.07[3][b] ("It should be noted, however, that if a plaintiff alleges sufficient environmental injury, he does not lose his standing simply because he is acting primarily out of economic motivations.")

⁵Zoning Law §145-10, "Use Table".

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A special permit is a unique planning tool that allows an approval agency to gauge the impacts of highly intensive uses - such as the one at hand - measured against stated limitations allowing the agency to render a discretionary decision on the advisability of the proposal in light of those limitations. In Dover the defining guiding principle for any special permit is set out in the Zoning Law. In short, no use requiring a special permit shall receive one if it "adversely affects neighboring properties".⁶ That is an important constraint. Uses that require a special permit are not "allowed" or "permitted". The Planning Board must approach this proposal with that overarching constraint in mind.⁷

III. A FULL SEQRA REVIEW IS CALLED FOR.

The Board has already classified the project as a "Type I" SEQRA action.⁸ That classification brings with it a strong presumption that the proposal will require a full Draft Environmental Impact Statement ("DEIS") and environmental review.⁹

⁶Zoning Law §145-60[A].

⁷There is a line of thought that says - correctly - special uses are ones considered compatible with the district in general and thus stand on the same footing as permitted uses provided the particular use in question meets all of the limitations and conditions for such a use that the legislative body has set out in the local ordinance. See *Navaretta v. Town of Oyster Bay*, 72 A.D.3d 823,825 (2nd Dept., 2010). But that is the point. The legislative criteria here is quite specific, i.e. no adverse impact on neighboring properties and property values. This proposal must not violate that constraint. That is a very legitimate goal and resulting constraint upon such a use. See discussions and authorities collected in Salkin, *New York Zoning Law and Practice* §30.17.

⁸Resolution adopted August 1, 2011.

⁹ECL §8-0109[2] and 6 NYCRR §617.4(a)(1).

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SEQRA has a very low threshold for the preparation of a DEIS. A DEIS is mandatory if the lead agency finds that the proposal *may* - not will - have "at least one significant adverse environmental impact".¹⁰ The Courts of this State, recognizing this statutory mandate, have continually opined that if the proposal might have only one significant adverse environmental impact a DEIS must be prepared and reviewed. Here, as outlined below, the possible significant environmental impacts are not just singular - they are many.

Conclusive in this regard is the requirement of the Zoning Law itself mandating a full DEIS for a "major project" such as this under the necessary special use and site plan processes if the proposal "may have a significant effect on the environment", something this Board has already determined.¹¹ The Town's own zoning law mandates ["shall"] a full DEIS-FEIS review in these circumstances.

Unless these multiple and serious environmental concerns are fully aired and rendered subject to the scrutiny of public review and comment the SEQRA process will be seriously incomplete. No public review and professional scrutiny has taken place yet. None of the concerns enumerated below have been fully addressed by the applicant with plan sets and supporting documentation.¹² Nothing of the sort has happened here. The

¹⁰id. See as well *Kahn v. Pasnik*, 231 A.D.2d 568, 647 N.Y.S.2d 279 (2nd Dept., 1996) aff'd 90 N.Y.2d 569 (1997); *Syrop v. City Counsel of City of Yonkers*, 282 D.D.2d 466 (2nd Dept., 2001), and *Uprose v New York Power Authority*, 285 A.D.2d 603, 608 (2nd Dept., 2001).

¹¹Zoning Law §§145-62[D] and 145-66[E].

¹² Cf. *Thorne v. Village of Millbrook Planning Board*, 83 A.D.2d 723, 725 (2nd Dept., 2011). See also *Wilkinson v. Planning Board of the Town of Thompson*, 255 A.D.2d 738, 739-740 (3d Dept., 1998).

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DEIS process is the correct process - indeed the only process - to expose, air and examine the many - and serious - environmental concerns that surround this proposal.¹³

IV. THE ENVIRONMENTAL IMPACTS ARE MANY, SIGNIFICANT, AND UNADDRESSED.

a. A Serious Wetland Degradation Will Be Perpetuated.

The professional team that Freshtown has assembled to assist it in this matter has uncovered a very important aspect about the development site which *in and of itself* compels a full environmental review of this project. It is quite likely that the site is a federally protected wetland which has already been filled in without the benefit of a "Dredge and Fill" permit from the Army Corps of Engineers ("ACOE") as required by the federal Clean Water Act of 1972.¹⁴

A 1989 site specific study prepared for the NY DEC reveals that between the 1940's and the 1960's the development site was originally a stream corridor with wetlands and then, sadly, used as a local garbage dump.¹⁵ That report also reveals that the entire development site - before it was filled in 1988 to its present condition - was a low and marshy depression.¹⁶

¹³Zoning Law §§145-62[D] and 145-66[E].

¹⁴ PL 92-500, Section 404, effective October 18, 1972 codified at 33 USC §1251 *et seq.*

¹⁵The recent NY DEC letter dated September 6, 2011 to the Planning Board confirms these findings.

¹⁶Report of Lawler Matusky and Skelly P.E. of Pearl River NY ("LMS") commissioned by NY DEC dated October 1989 regarding possible hazardous wastes on this site. The report is on file with the DEC.

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The LMS report comports with the USGS maps for the areas (Dover Plains Quadrangle) showing the entire site as a "submerged marsh or swamp" as of date of the 1972 CWA. It also comports with an exhaustive photographic aerial analysis and assessment of the development site done for Freshtown dating back to the 1930's.¹⁷ Numerous aerial photographs and other mappings beginning in 1936 and continuing through 2009 reveal that the site originally had a stream running through wetlands draining into Seven Wells Brook and, in turn, the Ten Mile River, which was disturbed and filled in over the years but to this day exhibits indicia of a federally protected wetland as meant by the CWA. There is little doubt that the development site as well as the Plaza site itself was a protected wetland as of the effective date of the CWA in 1972 - and most likely still is notwithstanding the fill activity and ongoing mowing that minimizes the visibility of hydric vegetation.¹⁸ In that sense the apparent CWA violation is a continuing one.¹⁹

¹⁷Prepared by Carpenter Environmental Associates of Monroe NY ("CEA") at Freshtown's request.

¹⁸The definition of "wetland" under the CWA includes, *inter alia*, "swamps, marshes, bogs and similar areas". See 40 CFR §232.1. The CEA report shows that the site is hydrologically connected to Seven Wells Brook, and Stone Church Brook which, in turn, are connected to the Ten Mile River and, in turn, to the Housatonic River and so on to the open sea. As such these wetlands have a "significant nexus" with navigable waters and thus form part of the "waters of the United States" protected by the CWA. See 33 USC §1362(7) and discussions in *Rapanos v. United States*, 547 U.S. 715 (2006) in particular the comments of Justice Kennedy concurring in the judgment at 547 U.S. 749.

¹⁹The CEA aerial assessment and all related documentation including the LMS Report will be produced at the appropriate time during the ongoing review process. They are voluminous documents and need only be summarized at this point.

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In October 1986 - the owner of the site did secure a local "fill permit" from the Town Code Enforcement Officer ("CEO") under the Town's flood plain protection law²⁰ for a 2± acre site lying between Seven Wells Brook to the south and Stone Church Brook to the north. In 1994 that site became the location of the present day McDonald's fast food restaurant.²¹ *That local fill permit did not cover this development site or the shopping center itself.*

In April of 1988 then Town of Dover CEO Mark Ten Eicken observed ongoing fill activity to the south of the shopping center and advised the owner to secure a local fill permit noting that it would be in his interest to do so thereby removing the site from the 100 year FEMA flood plain.²² But it appears that no local fill permit was ever obtained and the filling continued and was probably completed in the spring or summer of 1988 shortly before LMS did its field investigation of the site.²³

Much more importantly, no fill permit was obtained from the ACOE as required under Section 404 of the federal CWA protecting the waters of the United States including wetlands adjacent to those waters for any fill activity after the effective date of that law in

²⁰Currently contained in Ch. 81 of the Town Code

²¹A copy of this permit and related application materials is on file in the Town CEO's office.

²²Letter Mark Ten Eicken to Robert Keller dated April 6, 1988 in the Town CEO's files.

²³What generated DEC's investigation of the site is not known at the moment. It is possible the Town or a concerned citizen requested a DEC investigation in the face of the ongoing fill activity.

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October 1972.²⁴ That is a much more serious offense than a failure to obtain a local fill permit. It is a continuing one that is subject to punitive action, remediation and restoration of the degraded wetlands.²⁵

The conclusion is inescapable. The development site is a former garbage dump located in the midst of a submerged marsh, wetland, and stream area which was filled in without a local fill permit as required by Chapter 81 of the Town's Code or, far more seriously, without a fill permit from the ACOE under the rigorous standards of the 1972 federal Clean Water Act. It is difficult to imagine a development permit of any kind being issued for this site sitting atop of a garbage dump, a site which has been further spoiled and fouled as the result of unpermitted fill activity occurring because of a disregard of an important regime of laws protecting federal wetlands. This developer should not be rewarded for such transgressions by the issuance of a development permit. Indeed, the protection of the integrity of the wetlands in the Town is one of the stated goals of the zoning law.²⁶ This attempt to capitalize on these failures should be rejected.

²⁴A recent FOIA request disclose that no ACOE fill permit for the development site or any of the lands in the Dover Village Shopping Plaza was ever sought or obtained. All fill in this area from the McDonald's site south across the shopping plaza to the Nellie Mountain Road intersection was undertaken without an ACOE fill permit.

²⁵It is noteworthy that the Town Board enacted its own local "Erosion and Sediment Control" law (Local Law No. 10 of 1988) on September 29, 1988. This rigorous law is now codified in Chapter 65 of the Town's Code and requires a local fill permit from the Planning Board for wetland and other fill activity. It may be that the fill activity on this site earlier that year triggered the law. The time of the fill and the date of the enactment of the law seems more than coincidental.

²⁶Zoning Law §145-3[D]. See also §145-3[B].

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Indeed, the Town's zoning law recognizes the importance of having "clean hands" when one seeks a special use development permit. No such permit shall be issued if the Board finds that the proposal will not comply with the provisions of "other local laws and regulations".²⁷ Under this clause the fact that this site was filled without a necessary local fill permit as required by Chapter 81 of the Town's Code precludes the issuance of a special use permit.

Although not specifically spelled out in the Town Code the same "clean hands" doctrine should apply to a violation of the CWA occurring by reason of the unpermitted fill. It only makes sense. Otherwise there would be no disincentive for anyone against filling a federally protected wetland and then applying for a local development permit to build a structure on and/or pave over those spoiled wetlands. That misadventure should not be the case.

Somehow - either by action of the Town in conjunction with the ACOE or the courts - those responsible for this fill activity should be directed to restore these spoiled wetlands and flood plains. To exacerbate these failures by allowing a further degradation of this land only makes a mockery of the environmental protections that have carefully been put in place in this nation over the last 35+ years.

²⁷Zoning Law §145-63[B](1).

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b. The "Existing Community" Will Be Negatively Impacted.

The status or condition of the "existing community" is an important component of the environment.²⁸ The impact of the proposal upon the existing community must be part of the DEIS and the overall environmental review. It is under this SEQRA category that the results of the impacts upon other business, as opposed to competition itself, e.g vacancies, blight and other factors, must be examined. There is a sharp difference between the two notions.²⁹ These two ideas must be separated. The socio economic impact that a project has upon the character of this well defined community is very much a part of a SEQRA review.³⁰ This distinction is frequently overlooked with this type of proposal.

Under SEQRA the Planning Board should explore these impacts in great detail. The impact of this very store on the community with resulting possible vacancies and community malaise along the Rt. 22 commercial corridor, the lost jobs and the possible derelict condition of the stores in that corridor must be examined in depth in the SEQRA process. Indeed, the introduction of this store in this limited community could very well

²⁸ECL §8-0103[6] and 6 NYCRR §617.2(l) definition of "Environment". See also *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 94 (2nd Dept., 2007).

²⁹The sharp differences between these two very different concepts - which the developer will want to blur - is explained very well in Gerrard Ruzow and Weinberg, *Environmental Review in New York*, §5.12(10)(b)[v].

³⁰See 6 NYCRR §617.7(c)(vii) and *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 365-366 (1986). The Town's own master plan urges socio- economic impact reviews under SEQRA. See Master Plan at pg. 94 "Community Values" §1.5.

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have the effect of shrinking competition rather than encouraging it. The Board would be remiss if it did not consider all aspects of this condition.³¹

At the appropriate time in this review process Freshtown will introduce professional evidence that this proposal will have an effect not only on the value of its existing store but also will eliminate any chance for the long sought after supermarket in Wingdale at the Dover Knolls site and will produce a negative real property tax effect on the Town taxpayer as a result. Such a result will also detract from the ability of that site to attract other retail tenants and significantly decrease the attractiveness of the site as residential community especially for seniors who depend upon close proximity to retail outlets, and especially supermarkets.

In parallel fashion, both the Town's Master Plan and its Zoning Law also reflect this concern. The concept of the damage to the community resulting from cannibalization of similar business is underscored in the Town's Master Plan. Discussing the recommendations for the Rt. 22 commercial corridor the Plan, while encouraging commercial growth in this area, states that: "*Town officials should work with property owners to ensure a mixed-use approach that supplements the other hamlet commercial*

³¹This resulting debilitating condition is called "Greyfields" or "Ghostboxes". In this big box era this type of community malaise has become a problem all over America. Recently, municipalities nationwide have attempted to counter this condition with local ordinances that cap the size of big box stores or place separation limitations on their locations or, as here, impose a condition that such a big box will not have an adverse impact on the value of neighboring properties. The "Lake Placid" case, discussed later, is a perfect example of this last legislative device employed to preserve existing property values. Some of these legislative techniques are explored in Sochar, *Shining the Light on Greyfields*, 71 Alb. L.R. 697 (2008).

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areas rather than competing with them."³² That is a straight forward admonition by the authors of the Plan that a project of this type could have a negative effect on this commercial sector of the Town.

This approach is wholly consistent with the very purpose of carefully thought out zoning regulations to begin with. When delegating the zoning function to the several towns in the state in 1932 the Legislature set out the purpose of the local zoning function with clarity. The critical passage in that delegation - often overlooked - states as follows:

Such [zoning] regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, *and with a view to conserving the value of buildings . . .* (emphasis supplied).³³

The Town's zoning law implements the Master Plan's concept - and, as well, the general purpose of carefully planned zoning to begin with - in its special permit process (Article IX) relating to commercial enterprises of this sort. In an important statement of policy the Zoning Law states that special permit uses *[shall] not adversely affect neighboring properties.*"³⁴ The Zoning Law goes on to recite that a special permit use in a rural area shall be planned in a way so that it "*does not interfere with or diminish the value*

³²Master Plan pg. 122.

³³TL §263. This provision of state law is specifically incorporated as the "purpose" clause of the Town's zoning law. See Zoning Law §145-3[H], last sentence. It cannot be overlooked here.

³⁴Zoning Law §145-60[A].

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of adjoining property."³⁵ Those two provisions give vitality to the Master Plan's admonition against such a project along the Rt. 22 commercial corridor.

Thus, not only from a perspective of SEQRA must the adverse impact on neighboring properties be examined, but also from the standpoint of the Town's Master Plan as implemented by its Zoning Law. If it is found that this proposal will "adversely effect" and or "diminish the value" of adjoining properties - such as Freshtown's the application would not meet the standards necessary for granting a special permit.³⁶

c. There Storm Water Runoff Concerns are Significant.

There is a long history of flooding and runoff from this site impacting Rt. 22 and neighboring properties. The Town's files indicate that as early as 1986 then Supervisor Sprossel requested the NY DOT to examine and report on continual flooding conditions in the vicinity of this site impacting Rt. 22.³⁷ Even to this day the site has the propensity of

³⁵Zoning Law §145-63. The 2010 U.S. Census shows that the Town of Dover has a population of 8,699 spread over 55.2 square miles for an average density of 157.6 persons per square mile. That places the entire town in a rural classification according to the Census guidelines defining any area outside of an "Urban Area" or a "Urban Cluster" having - at minimum - a population density of 500 persons per square mile. Furthermore, the hamlet of Dover has less than 2,000 residents which again falls into the Census' rural classification category thus, the area is classified as rural based on two distinct measures.

³⁶ This dual approach to this important question was the lynchpin of the court's reasoning in the landmark "Lake Placid" case dealing with this very issue. See *Wal-Mart v. Planning Board of the Town of North Elba*, 338 A.D.2d 93, 97 (3rd Dept., 1998). In that case the court was faced with special permit constraints quite similar to those in the Town of Dover's Zoning Law.

³⁷See letter of Supervisor Sprosell to the NY DOT dated June 11, 1986 and NY DOT's reply dated July 10, 1986 on file in the Town CEO's office.

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retaining standing water for periods of time especially during and after rain events (which may also be evidence of its continued existence as a federally protected wetland).

The impact of storm water runoff is a core element of any environmental review. Since the proposal will impact more than 5 acres (the new store and the STP site on Lot 3 combined) there is need for a NY DEC Storm Water Pollution Prevention Permit ("SWPPP") using the DEC's new regulations as this commercial proposal will disturb more than 1 acre.³⁸ The DEC will consider the cumulative effects upon the receiving stream by reason of the storm water runoff and the discharge from the STP.

The "Erosion Control Plan" submitted by the applicant does not include a storm water runoff analysis and the impact of flows from the site generated by the new impervious areas. The plan does show two above ground detention ponds and one large subsurface storm water detention system but there is no professional textual analysis to support their size or placement. The EAF indicates the depth to ground water is only 5'. That is quite shallow.³⁹ It is questionable if a sub surface detention system can work in this environment. Further, such a subsurface structure and system seems to violates the Zoning Law's prohibition against the same.⁴⁰ Atop of that there are prohibitions against

³⁸The recent Setember 6, 2011 letter of the DEC to the Planning Board confirms this.

³⁹This minimal ground cover is most likely the result of the fill activity of 1988. As the CEA report shows it is difficult to erase the evidence of a wetland altogether.

⁴⁰ Zoning Law §145-65[D](5)(e).

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discharging of storm water into a former dump site.⁴¹ It does not appear that this subsurface proposal can avoid that restriction.

Additionally, Seven Wells Brook and Stone Church Brook are classified as C(t) - trout spawning - and any impacts from the combined introduction of both increased sanitary (see below) and storm water flows containing contaminants such as salt and chlorides used in snow and ice clearing, would have the potential of affecting trout population in these streams. The impact of storm water runoff viewed from a local perspective should be another important aspect of an environmental study.

d. There Is a Need for a SPDES Permit.

Concept "C" puts forth a proposal that will convert the current subsurface sewer disposal system (septics) for the four existing buildings to a sewage treatment plant means of mechanical disposal (an "STP") discharging into Seven Wells Brook or Stone Church Brook - the plan is not at all clear in this regard. Of course, such a conversion will require a NY DEC SPDES permit for the STP.

Earlier this year the owner of the Dover Village shopping center made an application to the DEC to serve the existing center and the adjoining residential complex with an STP - but not the proposed new supermarket. The status of that limited application

⁴¹Noted in the September 6, 2011 DEC letter to the Planning Board.

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has been suspended by the DEC indefinitely.⁴² No application has been made to the DEC for a SPDES permit contemplating this proposal. Such must happen.⁴³ And as the DEC noted at the very least a Transportation Corporation must be formed to administer such a system. Of course, either a sewer district or a Transportation Corporation requires Town Board involvement and approval.⁴⁴ To my knowledge the Town Board has never been approached in this respect.

e. Traffic and Other Significant Environmental Factors Have Not been Addressed.

It goes without saying that a project of this magnitude should be reviewed from a standpoint of its traffic impacts on NY Rt. 22 and how to best ameliorate those impacts be it by traffic light, a second entrance, a four-way intersection with Seven Wells Road, or other means. Traffic impacts are a classic and routine element of any environmental study. There is no traffic study of any kind submitted with the proposal. As an component part of an environmental review of a project such as this the Zoning Law requires a very comprehensive professional traffic study.⁴⁵ It is absent from the submission.

As an illustration, Freshtown, was made to convert the north access point of its shopping center to "one way - entrance right" because of the concern of motorists leaving

⁴²See letter DEC to Dover Village LLC dated May 27, 2011 on file with the DEC.

⁴³Confirmed in the DEC letter to the Planning Board dated September 6, 2011.

⁴⁴See TL Articles 12 and 12A and TCL §116.

⁴⁵Zoning Law §145-40[N].

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his plaza and making a left turn only to be involved with a possible collision with north or south bound traffic on Rt. 22. The same issue would exist at the proposed site, but only worse. There will be much more traffic coupled with traffic that routinely speed down the hill heading north into the Hamlet.

There is evidence via the US Fish and Wildlife Service of the following endangered or threatened specie that are known to be in Dutchess County and which may use the site as nesting or habitat area: the Bald Eagle, the Bog Turtle, The Indiana Bat, and the New England Cottontail to name a few. In this respect the DEC recently sent a letter to the Planning Board confirming these facts.⁴⁶ An environmental review should be undertaken in this respect to see that such species or their habitat is not disturbed and or destroyed by this proposal.

f. There Is a Violation of the Town's Off Street Parking Policy.

The Town Board has adopted a strong policy stating that "large and visible" off-street parking "is one of the most objectionable aspects of commercial development".⁴⁷ Except in limited circumstances, not present here, for new construction the Town Board has directed that all commercial parking be to the side or rear of the building.⁴⁸ That is a strong policy statement about visual impacts for new construction and, as such, a proper

⁴⁶DEC letter to the Planning Board dated September 6, 2011.

⁴⁷Zoning Law §145-38[A](1).

⁴⁸Zoning Law §145-38[A](4)(a)[1]. That command echoes the Master Plan. See Master Plan pg. 121.

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subject of an environmental review. Concept "C" presents a large and quite visible parking area adjacent to the true front of the proposed store. That is not consistent with the Town's visual impact policy statement.

While the Zoning Law defines the "front" of a building as the side closest to the street that definition is incomplete. It does not anticipate a situation such as this where the customer doors and full display windows are not facing the road. Neither the Master Plan nor the Zoning Law contemplated that possibility.

The true "front" of this building is its north face, the one facing the parking lot. The zoning definition should not detract from an environmental review of the proposed parking arrangement made in light of the Town's strong visual impact policy. In any environmental review the Board cannot ignore the obvious, i.e. that the "front" of this building is its north face not its west face.

Additionally, when one is traveling south on Rt. 22 there will be a parking field between the road and the building in the driver's site line making it a "strip" development as specifically described and discouraged by the Master Plan.⁴⁹

⁴⁹Master Plan at pg. 103, "Land Use" §8.5.

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V. ZONING FAILURES.

a. There is a Failure of the Impermeable Surface Coverage Requirements.

This is a serious concern. The importance of limiting impermeable surfaces in the Town can be gleaned from Section 145-19[E] of the Zoning Law stating:

The amount of pavement and building area is a major factor in determining the impact of development. Therefore, limiting impermeable surface coverage (including all roofed areas and areas covered with impermeable pavement) is critical in maintaining environmental integrity.

The Zoning Law's requirements limiting impermeable surface coverage applies to "the entire subdivision" and not just to proposed Lot 4.⁵⁰ Thus, the entire tract - all four lots or the entire 12.9 acres shown on the 1995 "Dover Village" plat - must be considered in the impermeable surface calculation.

The maximum ratio or percentage of impermeable-impervious surface coverage allowed by the Zoning Law is 60% of the land area of the subdivision - here the whole 12.9 acres. A calculation done by Freshtown's professional engineers shows the ratio for Concept "C" using the most recent 100 year flood maps prepared by FEMA⁵¹ at 137.8% if the storm water management devices shown on the plan are considered "watercourses"

⁵⁰Zoning Law §145-11[B] Bulk Table ft. nt. 7. See also §145-19[E].

⁵¹Effective August 15, 1984 and adopted by the Town as its own for floodplain determinations. See Code §81-6.

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and 122.4% if they are not.⁵² Either way that is a significant failure of the Zoning Law's bulk requirement in this respect. That "up front" failure should prevent the Board from considering this proposal at all in its current configuration.

Any counter argument that the site can be raised by additional fill eliminating it from the 100 year FEMA flood plain thereby qualifying the site under this formula is illusory. At the very least such fill requires a local fill permit under Chapter 81, and that, in turn should require an engineering report that the increase fill will not "adversely affect" the area due to increased flooding.⁵³ Additionally, no such local fill permit should be issued if prior federal approvals have not been secured.⁵⁴ That requirement begs the question of the missing CWA dredge and fill permit from the ACOE and the missing local fill permit for the fill activities of 1988 and earlier. It is difficult to see how any new local fill permit could be issued when prior federal and local fill permits for the same area have not been secured.

Indeed, when the development site is viewed as a federal wetland - as it should be - the vast majority of it is "impermeable" as meant by the Zoning Law's definition of that term. This developer should not be "rewarded" for the transgressions of those who filled in

⁵² Report prepared by Pietrzak and Pfau Engineering and Surveying of Goshen NY ("P&P") at Freshtown's request. The P&P report will be submitted at the appropriate time along with the CEA wetland materials spoken about earlier. The definition of "watercourse" includes "drainage channel[s]" and an "area of land that is normally or seasonally filled with water". A stormwater detention area fits that definition.

⁵³Town Code §81-12[A].

⁵⁴Town Code §81-12[A](2).

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these federal wetlands without a permit. Despite the years of fill, seeding and mowing activity on this site the CEA report indicates that it seems to persist as a federally protected wetland. A classification of complete impermeability for new Lot 4 should be the result of such unpermitted fill activity. Additionally, if the site continues as an active protected wetland - and the CEA report indicates it may well be - its entire area of Lot 4 must be deducted from the lot area calculations.⁵⁵ As such the new lot becomes unusable as it fails the minimum area bulk requirements of the HC district. These facts underscore the need to know with certainty, i.e. by core sampling, if the development site is now or was - post 1972 - a federally protected wetland.

b. Revised Lot 3 is a Resulting Illegal Nonconforming Lot

Lots in the HC district must have at least 300' of road frontage on a State, County or Town highway.⁵⁶ Concept "C" proposes to reduce the road frontage for the revised Lot 3 to 171.3' thereby rendering it a nonconforming lot. It is well settled that a subdivision may not create a resulting nonconforming lot. Once again, at the very outset the proposal fails a basic bulk requirement.

This basic failure is sloughed off by the developer by classifying new Lot 3 as a "rear lot" with the reduced dimensional requirements attributable to such a lot.⁵⁷ This attempt

⁵⁵Zoning Law §145-30[A].

⁵⁶Bulk Table, Zoning Law §145-11.

⁵⁷Zoning Law §145-22[A].

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fails. Rear lots are defined as ones where "*most of the land is set back from the road and access is gained through a narrow strip* (emphasis supplied)".⁵⁸ In very large measure revised Lot 3 is located to the north side of Lot 2 (the Post Office lot). It is hardly a lot that is afforded access by a "*narrow strip*" of land with its bulk lying behind the lot with adequate frontage - here the Post Office lot. Revised Lot 3 is a stand alone lot with four large commercial buildings on it only one of which is to the rear of the Post Office lot. The existing development on this revised lot is almost wholly located to the north and the side of the Post Office lot in what should be a "narrow" access strip. It is anything but.

Correctly viewed revised Lot 3 does not conform with the bulk requirements of the zoning law. Like the failure of the impermeable surface ratio this basic failure of the Zoning Law's bulk regulations at the outset should prevent this plan from any consideration in its current configuration.

c. The Plan For the Loading Dock Is Deficient

With respect to loading docks the Zoning Law has definite design criteria for those facilities as well.⁵⁹ The requirement is that loading areas be located so as to minimize "visual intrusion on public spaces" and avoid conflicts between truck traffic and auto traffic. Concept "C" violates those dictates by creating a visual intrusion by the proposed loading dock upon the adjacent Valley View Cemetery, a public cemetery which should be

⁵⁸Zoning Law §145-18[D] emphasis supplied.

⁵⁹Zoning Law §145-38[B](1).

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considered a public space. Furthermore, there would be a conflict between truck traffic accessing or leaving the loading area with the automobile traffic using the drive through facility along the eastern face of the building which appears to be the only way in or out of the loading area.

CONCLUSION

A review of the above concerns reveal many aspects of this proposal that "may" have a significant impact on the environment. Some are very significant, e.g. the negative impact on the existing community and upon the value of adjacent property. Any one of these concerns would trigger the preparation of an DEIS and FEIS under SEQRA. The multiplicity of these important concerns certainly does.

Of most importance the wetland violations regarding this site documented at the outset of these comments raise significant environmental concerns on their own. Should this applicant be rewarded with a development permit after some of the most important environmental laws this nation has developed over the last 35 years have seemingly been ignored? Is the site a continuing federally protected wetland as the CEA report suggests? Those are vital environmental question that must be answered at the outset with a thorough investigation of the site including testing - by core sampling - for the presence of hydric soils and other recognized wetland indicators - after a cessation of manipulative activity such as seeding, mowing and the passage of sufficient analytic time thereafter.

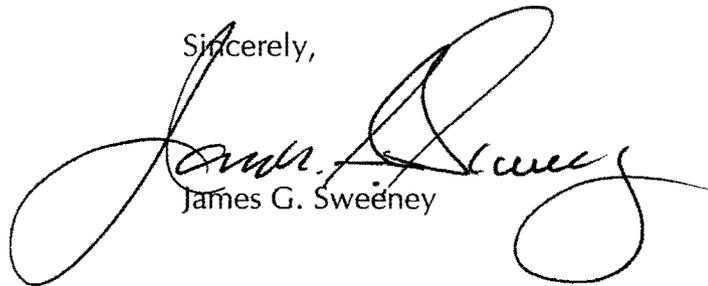
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The plan itself fails to comply with several bulk requirements of the zoning law, e.g. the excessive extent of impermeable and impervious surfaces and the lot area requirements for the resulting Lot 3. These "up front" or *ab initio* design failures should prevent any consideration of the plan as it is presently configured.

It is my hope and expectation that the Board will at the outset reject this plan as failing the basic bulk requirements of the zoning law in its current configuration and as the SEQRA lead agency for this proposal - no matter what its configuration - that it will undertake the EIS process to its fullest extent with necessary scoping for the DEIS being the first steps.

I thank your for your attention and consideration in this regard.

Sincerely,



James G. Sweeney

JGS/aa

cc:

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