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## PROPOSED SCOPE OF THE DEIS

East Mountain North (the “Project”) is a Conservation Density Subdivision in the Dutchess County Town of Union Vale. Conservation Density Rules require parcels to have a minimum size of 15 acres and exceed 25 acres on average. The Project’s private roads are maintained by a Homeowners Association.

The DEIS relates to a positive declaration adopted by the Planning Board following a hearing described in the attached Memorandum to Involved and Interested Agencies (Exhibit 1). The Resolution of the Board is attached as Exhibit 2.

The positive declaration contains the preliminary scope of the DEIS. Under 6 NYCRR 617.8 [a], the primary goals of scoping are “to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant.” Under the Summary Order from the US Court of Appeals for the Second Circuit dated September 2, 2016 (the “Order”), the EIS is “an appropriate forum for Plaintiffs to challenge the Board’s assertions” upon which it rescinded the negative declaration, as they did in their Federal complaint (Order, pg 4, B.1). The Board “must then decide whether to issue a negative declaration ...” and decide “... whether to approve the Application” (Order, pg 4, B.1).

### *Potential Adverse Environmental Impact*

The scope of the DEIS is a discussion of the potential adverse environmental impacts referred to in the resolution rescinding the Negative Declaration on June 19, 2013, determining their significance in full compliance with §617.7 [c], as follows”

1. The use of Mack Road to provide non-emergency access to the maximum of four houses in Phases 1 and 2 of the Project.

2. The disturbance of the banks of the regulated trout spawning streams.
3. Stormwater discharge from construction activities of the Project.
4. Any disturbance of the US ACOE wetlands adjoining the proposed road in several areas.
5. The proposal to defer design on the individual lots to the time of individual lot development.
6. Impact to the biodiversity of flora and fauna.
7. Any significant adverse environmental impact resulting from (i) the changes in environmental rules and regulations since 1987 as identified in paragraph 6 of such resolution; or (ii) the changes to the comprehensive plan, the zoning laws, the subdivision laws and other land use laws in the Town of Union Vale as identified in paragraph 7 of such resolution; or (iii) any substantive changes in the Project made since 1987, as identified in paragraph 8 or 9 of such resolution, other than any listed above.

### *Basic Information*

Sponsors believe that the information needed to address these potential impacts is contained in the draft EIS prepared by Sponsors and delivered to the Planning Board. This includes a detailed challenge to the rescission Resolution (Exhibit 3), as well as the Exhibits thereto (listed in Exhibit 4) and the detailed studies included in the Appendix to the DEIS (summarized in Exhibit 5).

Sponsors believe that, as outlined in Exhibit 3, the environmental impacts identified in the Rescission Resolution have been adequately addressed, but Sponsors are continuing to explore any possible mitigating measures. In view of the very simple nature of the Project, Sponsors believe there are no reasonable practicable alternatives to the Project.

PLANNING BOARD REQUESTS INPUT FROM AGENCIES, INCLUDING CAC  
A-262 TO A-265

Town of Union Vale Planning Board  
Union Vale Town Hall  
249 Duncan Road  
LaGrangeville, New York 12540

**MEMORANDUM**

**To:** Involved and Interested Agencies,  
East Mountain - North

**From:** Paul Heslin, Chairperson

**Re:** **SEQRA Public Hearing Scheduled / Input Requested**

**Date:** May 21, 2013

Upon receipt of a sketch plan submission from the Applicant for East Mountain – North, the Union Vale Town Planning Board issued a Notice of Intent to Serve as Lead Agency under SEQRA on October 24, 2011, and subsequently declared itself Lead Agency on February 15, 2012, for coordinated environmental quality review of a Type I Action, this occurring following notice to, and without expression of dissent from, any of the other potential involved agencies.

As stated within the NOI, East Mountain – North involves Applications by E. Deane Leonard, Steven Habiague and Robert Dryfoos to the Town of Union Vale Planning Board under Town Code Chapters 192, Subdivision of Land, and 210, Zoning, and related permits, approvals and compliance determinations from both the Town Planning Board, including Subdivision Plat Approval, Special Use Permits and Certificates of Visual Compatibility, and other involved Town, County, State and federal agencies in the matter of the proposed residential development of the combined Lands of Robert Dryfoos (140 acres) and Lands of Habiague and Leonard (385 acres), TMPs 135400-6860-00-400970 and -578898 totaling 525 acres and located within the Rural Development (RD-10) and Environmental Resource Overlay (ER-O) Districts.

The development is proposed as a conservation density subdivision within a designated open development area and consists of 20 residential building lots served by individual on-site water supply wells and sanitary sewage disposal systems accessed by and with frontage on a proposed HOA-owned and maintained private roadway. The private roadway within East Mountain - North will link with another HOA-owned and maintained private roadway within the East Mountain Farm Subdivision to the south and in combination connect between two public roadways, Wingdale Road (CR 21) to the south and Mack Road to the north. No common open space lands are intended.

As reported in the ENB on August 12, 1987, a Negative Declaration was issued by the Town Planning Board on July 15, 1987, for the East Mountain Farm Subdivision, 58 to 65 lots on 950 acres located between Wingdale and Mack Roads. 18 residential building lots were subsequently platted within the East Mountain Farm Subdivision by

Mssrs. Leonard and Habiague during the period 1987 through 19\_\_ and in some instances their boundaries have since been modified through lot line alterations approved by the Planning Board.

East Mountain – North is proposed on a portion of that portion of the 950 acres either still owned by the Applicant or previously subdivided out and transferred to another owner, Mr. Dryfoos, as a large parcel and now being brought back into the development for further subdivision.

In its role as Lead Agency, the Town Planning Board is advising you of its scheduling at this time of a continued public hearing for **Wednesday, June 19, 2013, at 7:45 p.m. at the Union Vale Town Hall** to provide opportunity for the applicant, the public, and you, as another involved agency with respect to East Mountain – North, to comment as to whether the Negative Declaration issued in 1987 should be considered applicable to the present proposal or whether the Negative Declaration issued in 1987 should be either amended or rescinded as provided for within 6 NYCRR 617.7 (e) and (f).

So that the Town Planning Board may responsibly address this question in the role of SEQRA Lead Agency to which you consented, the Planning Board requests you consider the below enclosed documents submitted by the Applicant in the matter of East Mountain - North and provide your input concerning the subject of the scheduled public hearing particularly in consideration of the required environmental review for matters within your agency's jurisdiction.

- East Mountain - North / Application for Preliminary Plat Approval, March 7, 2012.
- East Mountain - North / Supplemental and Amended Documents for the Application for Preliminary Plat Approval, April 4, 2012.
- East Mountain - North / Supplemental Special Use Permits and Drainage Plan for the Application for Preliminary Plat Approval, April 11, 2012.
- East Mountain – North / Major Conservation Density Subdivision, Subdivision Plan, Sheets 1 of 11 through 11 of 11, dated March 5, 2012, and revised to April 6, 2012, as submitted April 11, 2012.

A copy of a statement issued by the Planning Board on April 17, 2013, concerning this matter is also enclosed for information. Receipt of your input by June 19, 2013, will be greatly appreciated.

Encl: Planning Board Statement (April 17, 2013)  
Applicant's Submissions (March 7, April 4 and April 12, 2012)

**Distribution with Enclosures:**

Involved Agencies:

- Department of the Army  
New York District, Corps of Engineers  
Jacob K. Javits Federal Building  
26 Federal Plaza  
New York, New York 10278-0090
- New York State Department of Environmental Conservation  
Region 3 Office, Division of Environmental Permits  
21 South Putt Corners Road  
New Paltz, New York 12561
- Dutchess County Health Department  
Environmental Health Division  
387 Main Street  
Poughkeepsie, New York 12601
- Dutchess County Department of Public Works  
22 Market Street  
Poughkeepsie, New York 12601

Interested Agencies and Persons:

- New York State Office for Parks, Recreation and Historic Preservation  
Field Services Bureau  
Peebles Island Complex / Post Office Box 189  
Waterford, New York 12188
- New York State Department of Agriculture & Markets  
10B Airline Drive  
Albany, New York 12233
- Dutchess County Department of Planning and Development  
27 High Street  
Poughkeepsie, New York 12601

**Distribution with Enclosures Available for Review in Planning Board Office:**

- Town of Union Vale Highway Superintendent  
Town Hall, 249 Duncan Road  
Lagrangeville, New York 12540
- Town of Union Vale Zoning Board of Appeals  
Town Hall, 249 Duncan Road  
LaGrangeville, New York 12540

- Town of Union Vale Code Enforcement Officer / Stormwater Management Officer  
Town Hall, 249 Duncan Road  
Lagrangeville, New York 12540
- Town of Union Vale Conservation Advisory Council  
Town Hall, 249 Duncan Road  
Lagrangeville, New York 12540
- Town of Union Vale Fire Advisory Board  
xxxx

RESOLUTION OF 6/19/2013 STATING PURPORTED REASONS TO  
RESCIND THE NEGATIVE DECLARATION A-39 TO A-51

Town of Union Vale Planning Board

**Draft Resolution  
in the matter of  
East Mountain – North / SEQRA Compliance**

Whereas the Applicants, E. Deane Leonard, Steven Habiague and Robert Dryfoos, have submitted an Application for Preliminary Plat Approval to the Town of Union Vale Planning Board (hereinafter "Planning Board") for the property designated as Tax Map Parcels 135400-6860-00-400970 and - 578898 totaling 525 acres, as a conservation density subdivision consisting of 20 residential building lots with private roadway in the Rural Development (RD-10) and Environmental Resource Overlay (ER-O) Districts of the Town of Union Vale and Dutchess County Certified Agricultural District No. 23; and

Whereas, the initial application for sketch plat review contained a Full Environmental Assessment Form (Full EAF) Part 1 and 2 as required by Town Code § 192-21(L); and

Whereas, by a resolution duly adopted by the Town of Union Vale Planning Board on October 19, 2011 directed that a Notice of Intent to Serve as Lead Agency be circulated to all involved agencies; and

Whereas, the Planning Board circulated the Notice of Intent to Serve as Lead Agency to all involved agencies; and

Whereas, no other agency expressed an interest to serve as lead agency and the Planning Board established itself as lead agency by resolution on February 15, 2012; and

Whereas, based on the Full EAF supplied by the applicant, the Planning Board determined that the proposed action is a Type I action; and

Whereas, the Applicant did not object to the circulation for designation of the Planning Board as lead agency; and

Whereas, a document entitled "East Mountain – North, Application for Preliminary Plat Approval" with attachments was submitted by the Applicant on March 7, 2012, and was subsequently amended on April 4, 2012, and April 11, 2012; and

Whereas, a Full Environmental Assessment Form was not submitted with the Preliminary Plat Application and in its place the Applicant submitted a

Memorandum on Environment contending that a prior Negative Declaration issued by the Town of Union Vale Planning Board dated June 30, 1987 concerning the creation of 58 to 65 lots on a 950-acre tract was still in full force and effect; and

Whereas, the Applicant asserted that the June 30, 1987 Negative Declaration should either be amended pursuant to 6 NYCRR 617.7(e) or otherwise should remain unchanged with respect to the instant Application; and

Whereas, the Planning Board sought the advice and counsel of its Town Attorney and Town Planner on the continuing applicability of the 1987 Negative Declaration to the instant Application; and

Whereas, on April 18, 2012, the Planning Board adopted a resolution which determined that the June 30, 1987 Negative Declaration had merged into the prior approval and further determined that the instant application was a new action under SEQRA requiring a new review and approval; and

Whereas, the Applicant commenced a lawsuit against the Planning Board in the Supreme Court State of New York, County of Dutchess, under the caption E. Deane Leonard, et al. v. the Town of Union Vale Planning Board bearing Index Number 2621/12 seeking to annul the April 18, 2012 resolution of the Planning Board; and

Whereas, on March 12, 2013 Supreme Court Justice Maria Rosa issued a Decision and Order annulling the Planning Board's resolution of April 18, 2012, as it was adopted in violation of 6 NYCRR 617.7 (e) and (f), and ordered that the Applicant was entitled to a public hearing before the Planning Board prior to the determination as to whether the June 30, 1987 Negative Declaration should be rescinded or amended as it pertains to the instant Application; and

Whereas, the Planning Board, by its counsel, filed a Notice of Appeal which seeks review of Justice Rosa's Decision and Order dated March 12, 2013; and

Whereas, the Planning Board continues to assert the correctness of its April 18, 2012 decision on appeal, but counsel for the Planning Board entered into a stipulation, without prejudice to its legal position on appeal, with the Applicant in the above entitled action before Justice Rosa on April 30, 2013 to consider the whether the June 30, 1987 Negative Declaration should be amended or rescinded pursuant 6 NYCRR 617.7 (e) and (f) in light of the changes to the project and changes in circumstances; and



Whereas, pursuant to the agreed upon Stipulation in the litigation the Planning Board took the following actions:

- scheduled a public hearing for May 15, 2013, to permit the Applicant, the public and other involved agencies to be heard on whether the 1987 Negative Declaration is applicable to the instant Application or whether the 1987 Negative Declaration should be amended or rescinded;
- directed the Town Engineer and the Town Planner to review the application and to advise the Applicant of what additional information would be required to review the application; and
- advised all parties of opportunity to submit either prior to or at the public hearing any materials they wish the Planning Board to consider in making its determination; and

Whereas, the Planning Board provided the Applicant with the review letters of the Town Engineer and the Town Planner as directed by the Court; and

Whereas, the notice of public hearing was published in the Poughkeepsie Journal, the official newspaper of the Town of Union Vale, on May 1, 2013, and the Planning Board distributed the Application and associated materials to involved and interested agencies on May 23, 2013, after a delay caused by the Applicant's failure to provide copies for the Planning Board's distribution as had been agreed during the Planning Board's meeting of April 17, 2013, and again at a conference before Justice Maria Rosa on April 30, 2013; and

Whereas, the Planning Board commenced the public hearing during its Regular Meeting on May 15, 2013, and continued the public hearing to its Regular Meeting on June 19, 2013, to provide additional time for receipt of input from the Applicant, the public, interested persons and agencies, and most particularly the other involved agencies; and

Whereas the Planning Board held a Special Meeting on June 5, 2013 and held a work session to review the 1987 Negative Declaration and the changes to the project and changes in circumstances and regulations from 1987 to date; and

Whereas, the Planning Board conducted a site visit to Mack Road on June 19, 2013 at 6:15 p.m., and

Whereas, the Planning Board closed the public hearing on June 19, 2013; and

Whereas, the Applicant and the public has provided written comments to the Planning Board; and

Whereas, the Planning Board has reviewed and considered the requirements of said 6 NYCRR 617.7 (e) and (f), as set forth below verbatim:

(e) Amendment of a negative declaration.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, may amend a negative declaration when substantive:

- i. changes are proposed for the project; or
- ii. new information is discovered; or
- iii. changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

(2) The lead agency must prepare, file and publish the amended negative declaration in accordance with section 617.12 of this Part. The amended negative declaration must contain reference to the original negative declaration and discuss the reasons supporting the amended declaration.

(f) Rescission of negative declarations.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, must rescind a negative declaration when substantive:

- i. changes are proposed for the project; or
- ii. new information is discovered; or
- iii. changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result.

(2) Prior to any rescission, the lead agency must inform other involved agencies and the project sponsor and must provide a reasonable opportunity for the project sponsor to respond.

- (3) If, following reasonable notice to the project sponsor, its determination is the same, the lead agency must prepare, file and publish a positive declaration in accordance with section 617.12 of this Part; and

NOW, THEREFORE, the Town of Union Vale Planning Board, after having due deliberation on all of the information before it, finds and determines as follows:

1. The instant Application for Preliminary Plat Approval is set forth within the following documents submitted by E. Deane Leonard, Steven Habiague and Robert Dryfoos:
  - Application for Preliminary Plat Approval, dated March 7, 2012;
  - Supplemental and Amended Documents for the Application for Preliminary Plat Approval, dated April 4, 2012;
  - Supplemental Special Use Permits and Drainage Plan for the Application for Preliminary Plat Approval, dated April 11, 2012; and
  - Major Conservation Density Subdivision, Subdivision Plan, Sheets 1 of 11 through 11 of 11, dated March 5, 2012, and revised to April 6, 2012, as submitted April 11, 2012.
  - Steven Habiague's response dated May 15, 2013, to report of Town Planner dated May 7, 2013.
2. The Planning Board has received the following written submissions from other parties:
  - Report of Town Engineer dated May 7, 2013.
  - Report of Town Planner dated May 7, 2013.
  - DEC response of January 18, 2013, to Lead Agency Circulation.
  - DEC Letter November 8, 2006.
  - Richard Cantor, Esq., submissions of May 15, 2013, and May 20, 2013, including critique of Applicant's traffic study by Crawford & Associates Engineering, P.C.
  - Matthew Rudikoff Associates, Inc., submissions of July 5, 2012, and June 5, 2013.
  - Etc.

3. The instant Application for Preliminary Plat Approval involves property designated as Tax Map Parcels 135400-6860-00-400970 and -578898 totaling 525 acres, as a conservation density subdivision consisting of 20 residential building lots with private subdivision roadway in the Rural Development (RD-10) and Environmental Resource Overlay (ER-O) Districts of the Town of Union Vale and Dutchess County Certified Agricultural District No. 23.
4. The instant Application for Preliminary Plat Approval indicates the lots are intended for the construction of single-family dwellings and associated site improvements, including individual driveways, individual on-site water supply and sanitary sewage disposal systems, and accessory structures and other residential appurtenances.
5. The provisions of 6 NYCRR 617.7 (e) and (f) require the Planning Board to make a new determination of significance with respect to a Negative Declaration previously issued for a project when there have been substantive changes to the project or there have been substantive changes in circumstances that have not been previously considered in the earlier SEQRA review.
6. The Planning Board hereby finds that there have been substantial changes in environmental laws and regulations since the prior Negative Declaration was issued on June 30, 1987. A list of environmental laws and regulations changed since June 30, 1987 that affect the Application, includes but is not limited to:
  - The Final NYS DEC Freshwater Wetlands Map for the Verbank Quad, which includes the project area, was filed on July 7, 1987. The East Mountain Negative Declaration was dated June 30, 1987, 8 days before the final wetlands map was filed. The impact to state regulated wetlands was not considered by the prior Negative Declaration.
  - Federal Wetlands under the jurisdiction of the US Army Corps of Engineers are located within the project area. Since 1987, federal regulation of freshwater wetlands has changed substantially. The 1987 Negative Declaration did not address impacts to wetlands.
  - On September 7, 1993, NYS DEC adopted regulation 6 NYCRR 701.25 pertaining to Trout Waters within the State of New York which includes the designation of "trout spawning waters (ts)" at 6 NYCRR 701.25(b).
  - In October 2001, NYS DEC assigned the designation of "trout spawning waters (ts)" to certain tributaries of Clove Creek (H-95-25) which are located in the project area. See 6 NYCRR 862.6 Table 1, Item 350.1.

- In accordance with the Federal Clean Water Act and federal regulations adopted under the Clean Water Act, NYS DEC regulates the discharge of stormwater from construction activities. NYS DEC created a State Pollution Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activities in 2002 and the General Permit was revised in 2008 and again in 2010. These general permits were not in place in 1987.
  - Pursuant to the Clean Water Act, the NYSDEC Stormwater Management Design Manual has been updated
  - The current SPDES General Permit for Stormwater Discharges from Construction Activities is GP-0-10-001
  - In 1992 and in 2009, new guidelines for the design of Rural and Town roads were adopted.
  - The regulations pertaining to Endangered and Threatened Species of Fish and Wildlife and Species of Special Concern found at 6 NYCRR Part 182 have been amended several times since 1987. The Bog Turtle, *Glyptemys muhlenbergii*, and the Indiana Bat, *Myotis sodalists* have been identified as Endangered or Threatened Species that may be on the property.
  - To preserve biodiversity, in recent years NYS DEC has required the identification, delineation and protection of vernal pools within the project area, including assessment of their habitat value for State-listed species of Special Concern.
7. The Planning Board hereby finds that there have been substantial changes to the comprehensive plan, the zoning laws, the subdivision laws and other land use laws in the Town of Union Vale including but not limited to:
- Adoption of a new Master Plan for the Town of Union Vale in 2001;
  - Establishment of the RD-10 Zoning District and amendment of the Zoning Map of the Town which zoned the project area to the RD-10 Zoning District.
  - Adoption of new zoning laws codified at Chapter 210 of the Town of Union Vale Code entitled "Zoning," and the following sections have particular relevance to the instant application:
    - Section 210-48, Environmental Resource Overlay (ER-O) District, which requires the issuance of a special permit from the Planning Board for any work proposed to be undertaken within 100 feet of a protected stream or wetland. Of particular importance, 210-48(D)(1), requires the maintenance of a natural 50 buffer around the banks of the regulated stream or the edge of the regulated wetland.
    - Section 210-54(D), regulating Open Area Subdivisions.

- Section 210-48 (D)(5) presenting criteria for development on important farmlands in that the subdivision tract is designated within Dutchess County Certified Agricultural District No. 23.
  - Adoption of new subdivision laws codified at Chapter 192 of the Town of Union Vale Code entitled "Subdivision of Land." Of particular importance is Section 192-25, Conservation Density Subdivision which sets forth various requirements to permanently preserve open space resources and Section 192-18(l) which requires that maximum development envelopes and conservation areas be shown on subdivision plats.
  - Adoption of new stormwater controls within the Town of Union Vale codified at Chapter 122 of the Town of Union Vale Code entitled "Erosion and Sediment Control".
8. The changes to the project since the issuance of the 1987 Negative Declaration have been identified in Document 5, "Analysis of Substantial Changes pursuant to 6 NYCRR 617.7 (e) and (f)", of its Application for Preliminary Plat Approval.
9. The Planning Board finds that the following substantial changes to the project have been made since 1987:
- Mack Road will be used to provide non-emergency access to the 6 lots in Phases 1 and 2 of the project. (See letter from Steven Habiague, Esq. dated June 18, 2013.)
  - Roads in project area have been reduced in length.
  - Mack Road will be used to provide access for construction vehicles to the project.
  - The number of total lots created in the project area was reduced from 65 lots to 38 lots and the size of the lots was increased.
  - A NYS DEC Stream Crossing Permit is required pursuant to 6 NYCRR Part 608 to cross regulated trout spawning streams.
  - Stormwater Management Facilities must be added throughout the subdivision in accordance with SPDES General Permit for Stormwater Discharges from Construction Activities is GP-0-10-001 and Chapter 122 of the Town of Union Vale Code.

- A Stormwater Pollution Prevention Plan must be developed in accordance with SPDES General Permit for Stormwater Discharges from Construction Activities is GP-0-10-001 and Chapter 122 of the Town of Union Vale Code.
- A wetland permit may be required from the US Army Corps of Engineers authorizing any disturbance of federal wetlands within its jurisdiction. (See NYS DEC letter dated January 18, 2012)
- Water Quality Certification from the NYS DEC to the US Army Corps of Engineers may be required. (See NYS DEC letter dated January 18, 2012).
- The current application is made as a Conservation Density Subdivision pursuant to Section 192-25 of the Town of Union Vale Code which requires certain limitations on developments where private roads are authorized.

10. The Planning Board finds that the changes noted in sections 6, 7 and 9 above were not considered during the SEQRA review prior to the issuance of the 1987 Negative Declaration and determination of significance of such changes must now be considered pursuant to 6 NYCRR 617.7 (e) and (f).

11. The Planning Board determines that the use of Mack Road to provide non-emergency access to the 6 lots in Phases 1 and 2 of the project and the use of Mack Road to provide access for construction traffic to the project area may result in a significant adverse environmental impact for the following reasons:

- Mack Road is an unpaved single lane road that provides access to a small number of residences and agricultural uses. At points, the width of the travelled way is 12 feet or less and there are no pull offs to allow for two vehicles to pass each other.
- Because of the unsafe condition of the road, the Millbrook Central School District does not allow school buses to travel on the road and children residing on Mack Road must board school buses at a stop located at the intersection of Mack Road and North Clove Road. (See fax from Brian Fried, Millbrook Central School District Business Administrator dated June 18, 2013.)
- There are no shoulders or sidewalks on Mack Road to allow for pedestrian traffic and the limited width of the travelled way and the proximity of Sweezy Creek to the roadway presents a hazardous condition.

- Additional school students who would be forced to travel Mack Road as pedestrians to get to the bus stop may result in a hazardous condition. No mitigation for this hazardous condition is proposed.
- Any intersections improvements to Mack Road would have to bring the road into compliance with current Federal, State and Town highway standards.
- Right of Way widening and other highway improvements may change the character of the community in the vicinity of Mack Road.

12. The Planning Board determines that the disturbance of the banks of the regulated trout spawning streams may result in a significant adverse environmental impact because:

- The Applicant has provided no description as to how trout spawning streams will be protected during and after construction activities.
- The Town Engineer commented that the plans of stream crossing submitted to date do not provide sufficient detail to demonstrate that the proposed 32-foot spans will not adversely impact the regulated streams.
- Construction activities occurring within 100 feet of the course of protected streams require a special use permit from the Planning Board in accordance with Section 210-48 (D)(1).
- Some of the protected streams terminate within the project area. Delineation of the protected stream boundaries, in consultation with NYS DEC, is required to adequately assess the environmental impacts upon said streams.

13. The Planning Board determines that stormwater discharge from construction activities of the project may result in a significant adverse environmental impact because:

- The design plans for stormwater facilities for the project must be submitted to ascertain their feasibility on the subject property. The applicant has not demonstrated to the satisfaction of the Town Engineer that the conceptually proposed stormwater practices will be sufficient to handle the volume of stormwater flows under the current stormwater permit requirements.



- The Town Engineer noted that the Applicant has indicated that site-specific SWPPP designs will not be provided for each lot. In that this circumstance will require that a full SWPPP be prepared for each lot when construction permitting is requested, the Town Engineer has recommended that the subdivision submission should at least include a typical SWPPP based on one or more of the lots. While a typical lot layout depicting a 3000 s.f. house footprint and 7500 s.f. of additional impervious area associated with the driveway and other structures has been provided to date, it is the Town Engineer's belief that it should be further detailed to more closely represent the site conditions that are anticipated within East Mountain – North, including large building footprints, expansive outdoor patio areas, presence of accessory structures and individual driveways that may approach (or exceed) 1000 feet in length.

In addition, the Town Engineer has reported that in conversation with NYSDEC he has been advised that in its review and as a prerequisite to its approval of the SWPPP appropriate areas will have to be identified on each of the lots for use of the practices employed in the typical plan.

- Design plans for stormwater facilities to process flows from the proposed roads have not been submitted.

14. The Planning Board determines that the project may result in a significant adverse environmental impact to wetland resources within the project area because:

- According to the Sketch Plan submitted by the applicant, US ACOE wetlands adjoin the proposed road in several areas. Road grading details have not been provided to confirm that no disturbance will occur within the regulated wetlands.
- No information has been provided to indicate that the construction activities in the vicinity of the ACOE wetlands will not have an adverse environmental effect.

15. The Planning Board determines that the project sponsor's proposal to defer design on the individual lots to the time of individual lot development is inconsistent with the objectives and criteria for the Board's consideration of a conservation density subdivision for the following reasons:

- There is related requirement for the depiction of building envelopes, i.e. maximum development envelopes, on each of the proposed lots and the imposition of an enforceable legal mechanism to ensure the maintenance and protection, i.e. the

conservation, of those open space lands within the subdivision tract lying outside these envelopes.

- There is further related requirement for demonstration and depiction within each of these envelopes of driveway access designed as to location, sight distance, alignment and grade consistent with the recently adopted driveway standards set forth within Town Code Chapter 111, Driveways; adequate location under Health Department standards for installation of an individual on-site water supply well and individual sanitary sewage disposal system; and an adequate house site, with it documented that neither the envelope nor any of these elements are located such that they might adversely impact wetlands, streams, vernal pools, Threatened or Endangered Species, or other environmental features, such as wildlife corridors, stone walls, healthy forest stands and important farmlands, if any.
  - Related to both the common improvements, i.e. the proposed subdivision roadway and associated storm water management facilities, and the proposed development of each of the lots within the defined envelopes, considered both individually as well as cumulatively, there is requirement for visual assessment under SEQRA and satisfaction of requirements for a Certificate of Visual Compatibility as set forth within Town Code Chapter 210, Zoning, Section 210-48 (D)(4), with it noted that to defer such environmental review to the time of Application for a Certificate of Visual Compatibility on a lot-by-lot basis not only would be to ignore the cumulative impacts that must be considered as part of visual assessment under SEQRA but is also beyond a permitting or approving agency's authority under SEQRA in that "construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (11) and the installation, maintenance and/or upgrade of a drinking water well and a septic system" is classified as a Type II Action under 6 NYCRR Part 617.5 (c)(9) for which environmental review is precluded ;
16. The Planning Board determines that the project may result in an adverse environmental impact to the biodiversity of flora and fauna within the project area due to construction and development activities.
17. The Planning Board further finds that the adverse environmental impacts listed in sections 11 through 16 when considered together result in a substantial adverse impact on the environment as contemplated by 6 NYCRR 617.7(c)(1)(xi).

18. As the Planning Board has determined that the substantial changes to the project and the substantial changes in regulations were not previously considered and may result in a significant adverse environmental impact, the Negative Declaration issued by the Town of Union Vale Planning Board on June 30, 1987 should be rescinded pursuant to 6 NYCRR 617.7(f).
19. The Planning Board further issues the annexed Positive Declaration and directs the Clerk to publish and otherwise distribute the Positive Declaration in the manner prescribed within 6 NYCRR 617.12.

Annexed Document: Positive Declaration

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## RESCISSION CHALLENGE

### *CAC report ignored*

Looking to support its predetermined rescission, the Board circulated a letter labeled “Input Requested” to several agencies (pg 136). Only three agencies responded. One such agency was the Conservation Advisory Council (“CAC”). DEC wrote about general concerns, none applicable to the Project.

Historic Preservation reviewed Sponsors’ thorough Historic Study (Doc 2) and concluded that the Project will result in no Significant Impact upon historic resources.

The CAC, fulfilling its statutory responsibilities, took the time and made the effort required to provide solid advice.

Under GML 239-x [6] [c] and [d] a CAC may request DEC to

[c] provide research on conservation facts and procedures; and

[d] provide, on a consulting basis, technical and research assistance as may be required to assist the council [CAC] in carrying out its work ...

Upon receipt of the Board’s letter, the CAC conducted a thorough review of East Mountain North. Among other impeccable sources, the CAC consulted

with DEC's Chief Counsel, Jeanne Konz. After discussing the issue with her staff she stated,

[Y]es, codes and regulations have changed and become more stringent but the applicant will now be held to the current codes, permits and regulations. The Codes, permits, and regulation changes are not part of the criteria for deciding on keeping, amending, or rescinding the neg dec (Doc 5, pg 19, 5<sup>th</sup> para.).

The Chief Counsel added a suggestion:

... advise the Planning Board as lead agency, that the CAC has taken an "independent hard look" and advise to let the neg dec stand "as is." (Doc 5, pg 19, bottom line)

The Board had no desire to explore this issue. It proceeded to rescind without further inquiry, without discussion and without delay. The District Court noted that,

the Board rescinded the Negative Declaration in the face of CAC's opinion advising that the Board keep the Negative Declaration in place. (pg 19, bottom para).

### ***Summary of the six rescission grounds***

The Board adduced six factual grounds to support rescission. The following summary succinctly rebuts

each ground the Board proffered. Sponsors then provide a more detailed review, with evidentiary references, after the summary.

**First**, Sponsors sought access from the North through Mack Road. This is a local road the Board's Rescission Resolution deemed "dangerous." This finding is contrary to a previous Board determination that Mack Road is safe for use by fully loaded 80,000 lb logging trucks running downhill. The Board provided no explanation for this conflict, making the Rescission Resolution "arbitrary and capricious" under the case law. The District Court noticed the inconsistency, as discussed in more detail below. A claimed "danger" to students was also false on its face, disproved by public safety accident statistics and unsupported by any study.

**Second**, the Board claimed that constructing a bridge to cross a trout stream may damage the stream banks. Harm to a trout stream's banks may occur during stormy weather, when disturbed ground can cause a mud slide. The mud would then cover the trout eggs, which are laid during fall and spring.

The crossing, however, requires a DEC permit allowing construction only in the summer season. Moreover, the Board failed to apply the seven factors required to determine any impact's magnitude (§617.7 [c] [3]). An engineer's report shows that no harm to the stream banks can occur, because they are solid rock (pg 102, ¶20-21). Had the Board applied the §617.7 [c] [3]

factors these facts would have been immediately apparent. 50

**Third**, the Storm Water Pollution Protection Plan (“SWPPP”) is incomplete. DEC regulations adopted after the Board issued the Negative Declaration now require a SWPPP. The purpose of a SWPPP is to minimize erosion during road construction by mandating best construction practices that existed in 1987 but were not uniformly applied. The following deficiencies invalidate this ground: (A) the SWPPP is incomplete because the Town Engineer never finished his review of the road layout before the Board rushed to rescind; without an approved layout Sponsors cannot complete their SWPPP (Doc 8); (B) the Rescission Resolution gives no reason why Sponsors could not complete the SWPPP; (C), this ground is purely speculative and provides no rational basis to determine if a Significant Impact is likely to result; and, (D), storm water runoff was previously considered in 1987 and deemed a small impact (EAF, pg 122; ¶ 4, 3<sup>rd</sup> bullet point).

**Fourth**, that construction of the proposed road within a Town buffer next to a federal wetland may have an adverse impact. Construction, however, cannot proceed without a Town building permit. This ground is invalid because the Town provides no reason why adequate plans cannot be completed. The Town may deny an application for a building permit if the plans

are not satisfactory. This is another speculative ground without a rational basis to identify an impact.

**Fifth**, that leaving construction up to lot purchasers is “inconsistent” with the Town’s Subdivision Law. This ground (i) identifies no impact, and (ii) it is a zoning, not a SEQR issue. It is not a valid rescission ground.

**Sixth**, that construction activity may “impact [ ] the biodiversity of flora and fauna ....” The impact, if any, is extremely small: the Project’s low density allows animals to move away from construction. Moreover, this is a residential subdivision project, so construction was contemplated at its inception. This impact, minuscule as it is, does not result from a project change. It does not qualify as a ground to rescind.

**Substantive changes.** The Rescission Resolution also claims that regulatory changes provide an additional ground to rescind a negative declaration and carry out another initial SEQR review. DEC refuted this blatant falsehood, as reported by the CAC. It is contrary to the express language of §617.7 [f], because the adoption of new regulations cannot increase the significance of an impact that was (i) previously considered and, (ii) found insignificant.

Regulatory changes make best construction practices mandatory. When the Board adopted the negative declaration, it assumed such practices would be followed. The new regulations give teeth to the



Board's assumption. What new regulations cannot do, however, is to transform an impact that has already been determined to be small, into a significant one.

Regulatory changes are subject to SEQR review while they are under consideration by the agency that contemplates their adoption (§617.2 [a]). Once an agency adopts a regulatory change, it is presumed to have no impact because a SEQR review is mandatory before its adoption. The District Court also addressed this issue, concluding that

The propriety of the Board's rescission of the Negative Declaration is further undermined by the fact that the Resolution identifies no change in the Project that would have a significant adverse environmental impact and that the changes in laws and regulations cited in the Resolution as grounds for rescission all result in a lower environmental impact. (pg 20, top para).

### ***Analysis of rescission grounds***

**First Rescission ground.** The Board's leading claim to support rescission is the use of Mack Rd. This road will provide access to four parcels, on the North end of the Project. The Board's Rescission Resolution claims that using Mack Road is "dangerous", first because it is "a single lane road" (pg 54; §11, 1<sup>st</sup> bullet point). This is not true: the road is between 16 and 18 feet in width. Pictorial evidence of a twin axle dump

truck and an SUV, side by side along the road, proves this (pgs 59 – 77). The Project Engineer confirmed it with actual measurements. Only at two points in the road segment examined is the road single lane, because a tree narrows the drivable width.

The Board’s finding that Mack Road is dangerous clashes with its previous determination that fully loaded 80,000 lb logging trucks could run downhill on Mack Road, hundreds of times, without risk. The Board found this in 2010, during the SEQRA review for a 5-year timber harvesting plan for *Ferme Montagne*<sup>1</sup>.

The Rescission Resolution offers no explanation for this glaring contradiction. To answer this, the Board claimed that “the logging permit granted to *Ferme Montagne* in 2009 was deemed an agricultural activity not subject to SEQRA” (pg 81; Brod Affid, ¶17.A.5).

This is also untrue. Part 617.5 [c] [3], exempts only  
agricultural farm management practices,  
including construction, maintenance and repair  
of farm buildings and structures, and land use  
changes consistent with generally accepted  
principles of farming;

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<sup>1</sup> Mountain Farm, in French. The owner is one of the neighbors who sued to stop the Project in 1988 and is bound by an agreement not to directly or indirectly contest the Project.

Moreover, the Board’s own review did not treat the logging project as an exempt agricultural activity. Instead, the tree harvest project—including the trucking of logs— was subjected to a SEQR review. The Board required a Short Form of Environmental Assessment (“EAF”). The EAF’s large caption states: “State Environmental Quality Review” and, below “FOR UNLISTED ACTIONS<sup>2</sup> ONLY” (pg 94; caption). The Board’s Special Use Permit labels the logging operation “an Unlisted Action under SEQRA” (pg 86; 1<sup>st</sup> para.) and found that the heavily laden trucks, which are hard to maneuver on the unpaved road (pg 91; last bullet point), will not affect traffic (pg 95; EAF, point C 1), nor will they have any other adverse effects.

The Town Engineer’s only concern about Mack Road was that “damage ... may result to Mack Road as a result of hauling timber from the site” (pg 92; Engineer’s letter, 2<sup>nd</sup> para.). Unquestionably, the Board did not foresee any danger arising from the use of Mack Road in its review of the timber harvesting plan.

The US District Court focused upon this, stating:

... though the Resolution states that Mack Road is dangerous, Plaintiffs point out that in the midst of a 2010 project, the Town Engineer

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F<sup>n</sup>2 Unlisted Actions are reviewable, but the presumption that they result in a Significant Impact—which applies to Type 1 actions—does not apply to unlisted actions. Type 2 actions, such as the agricultural actions defined above, are exempt from SEQRA.

concluded that the road was safe for loaded logging trucks. The Second Amended Complaint further notes that there have been only two accidents on Mack Road in the last 22 years, which significantly undermines defendants' argument that the road is dangerous (pg 20, top).

**Unexplained opposite determinations.** The Board reached starkly opposite results in its reviews of the logging project and East Mountain North, and it did not explain the reason for such different results. The Board's omission opens the door to a court review, as it is well settled that,

"[j]udicial review of administrative determinations is limited to whether the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" In RE 20 Fifth Avenue, LLC, 109 A.D.3d 159 (1st Dept 2013).

The unexplained opposite results make the Rescission arbitrary and capricious because,

[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious" (Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516 [1985]) at 517. Mtr. of Lantry v. State of NY, 6 N.Y.3d 49 (2005);

Other appellate court cases also find that a failure to explain opposite results makes the finding arbitrary and capricious.

Absent a reasoned explanation for abandonment of the State Social Services Department's expressed original reading of the regulation at the time of promulgation and adoption here of a diametrically opposite interpretation, the agency's change of position was arbitrary and capricious and cannot stand. *Richardson v. NYC DSS Commr.*, 88 N.Y.2d 35 (1996); *In Re Mount Loretto Nursing Home*, 235 A.D.2d 663 [3d Dept 1997]; *United Univ Professors v State of NY*, 36 A.D.3d 297 [3d Dept 2006]

DEC is also mindful of precedent, as it encourages a lead agency to

... review its files on previous significance determinations involving similar projects or geographic locations [because] to some degree these determinations set precedents ... (SEQR Handbook, 3<sup>rd</sup> Ed., pg 78, §3, last para).

The Board's additional claims do not help buttress this arbitrary finding. The Board next claims that Mack Rd is dangerous to students.

**Students.** The Rescission Resolution asserts that students who may reside in East Mountain North will be in danger. It points out that the Millbrook School

bus does not travel on Mack Road, thereby requiring students to walk along a purportedly dangerous road to board their bus. This conclusion is fundamentally flawed: the Project lies entirely in Arlington, a different School District. Arlington buses stop at the southern end of the Project, on County Route 21. No students, therefore, will walk along Mack Road to board their school bus.

**Engineer's view.** The Affidavit of Joseph Berger, P.E., explains that Mack Road is a well maintained local road and is safe at 15 to 20 miles per hour on downhill curves (pg 99; ¶ 9).

Twenty-two years of public safety records (Sheriff's Office and NYS Police records (pgs 107-113)<sup>3</sup> confirm Mr. Berger's opinion. They show no collisions between vehicles on Mack Road for as long as the databases have been in use. By definition, a dangerous road must have experienced accidents over a 22-year period.

**Conclusion.** The Board's leading ground for rescission is, (i) capricious by law (dangerous road claim); (ii) false in fact (Mack Rd. is not single lane and it poses no danger to future students); and, (iii) contradicted by public safety records (no vehicular collisions in 22 years). The use of Mack Road by four additional homes is not a valid ground for rescission.

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F<sup>n3</sup> There are two recorded accidents. A drunk driver lost control of his unregistered pickup and crashed into a tree; and the driver of an unregistered ATV got hurt when he lost control while trying stunts.

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**Second rescission ground.** The next ground invoked for rescission is that the proposed stream crossing may result in a significant impact (pg 45, §12). This is not a valid ground for rescission because (i) it is not the result of a change in the project; (ii) it was previously considered; and, (iii) physical conditions at the crossing make a Significant Impact impossible.

**No project change.** The stream crossing was contemplated in 1987. The Planner claims that Sponsors “never submitted a plan for the subdivision” [of the current project’s land] (pg 82; ¶ B1). The Board’s own record, however, proves this false.

Sponsors’ 1987 sketch plat map (the “1987 Plat”) showed the property, the topography in five foot contours, wetlands, the head waters of the stream discussed here (which must be crossed to connect the North and South parts of Sponsors’ property), the layout of the proposed road and the parcels. Sponsors’ 2012 Application included the 1987 Plat (in reduced size) with their Application (see section of Plat, pgs 114-115). The Planner’s statement is untrue.

**Previously considered.** In yet another untrue statement, the planner claims that “crossing the trout stream was not even discussed” when the Board adopted the Negative Declaration (pg 82; Brod Affd, ¶ B1).

This is not so. Sponsors' 1987 EAF, under the "IMPACT ON WATER" heading shows that the Board evaluated whether the

[p]roposed action will likely cause siltation or other discharge into an existing body of water to the extent that there will be obvious visual contrast to natural conditions (pg 122; §5, 8<sup>th</sup> bullet point).

The Board determined that there would be such an impact, and concluded it would be small. A 1988 Affidavit the Planner prepared in opposition to the neighbors' litigation attests to this. He explains that,

... I prepared the draft resolution after having obtained an indication that the East Mountain Farm sketch plat was satisfactory to the Board and also after I had determined that an Environmental Impact Study was not necessary for this subdivision (pg 128, ¶ 6).

Today, the Planner states (again under oath) that,

Federal wetlands were not addressed in the 1987 Negative Declaration and ... this is definitely a changed circumstance" (pg 73, ¶ D2, bottom).

It is false to say that wetlands were not addressed in 1987, and the Planner's own 1988 testimony proves it.

The Project Engineer, Joseph Berger, has inspected the crossing site and prepared the Application



drawings. He compared his drawings to those submitted in 1987. The stream and wetlands crossing occurs in the same general area (pg 91; Berger Affid., ¶¶ 16 & 17, with ref. to drawings in pgs 114 & 115). This is no substantive project change.

**No Impact.** The Board skipped the §617.7 [c] [3] mandate to evaluate the magnitude of a potential impact by applying seven factors to its circumstances. Sponsors asked the Project Engineer to perform the important evaluation the Board omitted. Each factor is shown below in bold characters; the facts that guide the determination of a potential impact's significance are shown in plain type. The evaluation is as follows:

(i) **its setting:** the action is located at the stream's headwaters, where the current flow is small to nonexistent during summer, and the crossing is at a point where solid rock banks flank the stream bed;

(ii) **its probability of occurrence:** because the banks are solid rock and permitting will require work only during the summer season, the probability of an impact is remote;

(iii) **its duration:** if any of the thin topsoil covering the top of the rock stream banks washes into the stream bed in the dry season, an excavator can remediate it in a matter of hours;

(iv) **its irreversibility:** for the reasons under (iii) above, any topsoil that falls upon the stream bed can be removed; so any Significant Impact will be prevented;

(v) **its geographic scope**: under the conditions above, any soil washed down the rock banks would not exceed a few cubic yards and would occupy a very small area.

(vi) **its magnitude**: small to minuscule

(vii) **number of people** affected: none.

The incontrovertible conclusion of this analysis is that, in a worst case scenario, the potential impact is insignificant (pg 93; Berger Affd. ¶¶ 22 - 25). Part of the reason for such conclusion is that DEC's permit will require that the bridge be installed during summer, when trout are not spawning.

The Board claims that "relying on agency permitting conditions does not count as full mitigation per case law" (pg 72, Brod Affd, §B.3). But neither the Brod Affidavit nor the Answering Memorandum cite a single case in support of such claim. Sponsors' research found one case in which the Appellate Division referred to this issue. The court pointed out that

[T]he concerns identified in the EAF could be mitigated by respondent's compliance with the site review and aquifer permit process to be conducted in the future, as well as complying with applicable State and Federal regulations. *Yellow Lantern Kampground v Cortlandville*, 279 AD2d 6 (3d Dept 2000), at 8.

In some cases a permit may eliminate a potential impact, while in others it may only reduce it. This issue must be determined on the facts of each case.

The designation of the unnamed tributary of Clove Creek as a Class C(ts) stream is a regulatory change that eliminates any possible impact. The permit will require Sponsors to construct the bridge during summer, when the stream current is, at most, a trickle. That and other permit conditions will ensure practices that prevent impacts. (pg 94, Berger Affid, ¶ 26).

**Conclusion.** The evidence proves that (i) the stream crossing was not a project change; (ii) the 1987 review determined that the stream crossing's impact was insignificant; and, (iii) the likelihood of an impact is so remote, and its magnitude so small that it remains insignificant. The stream crossing is not a valid ground for rescission.

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**Third rescission ground.** The Rescission Resolution claims that the Storm Water Pollution Protection Plan ("SWPPP") is not yet adequate (pg 55, §13).

The SWPPP is a regulatory requirement to minimize erosion during construction. It is incomplete because the Board, in its rush to rescission, did not wait for the Town Engineer to approve the road layout. Any change in the road layout requires a recalculation of the SWPPP, so performing calculations before the road

layout is final is a waste of money. This delay was caused by the Town.

New regulations never increase impacts. Before the regulatory change, the developer was assumed to be acting in good faith and use sound construction practices to avoid erosion. The new regulation merely imposes sound construction practices, and sets forth no reason to suggest that Sponsors cannot produce an effective SWPPP once the road layout is approved. Moreover, it is indisputable that the construction of the road was contemplated in 1987 (pg 111 IMPACT ON LAND) and its impact was determined to be insignificant.

Because it was previously contemplated, this is not a valid rescission ground.

**Conclusion.** A SWPPP minimizes the likelihood of an impact determined to be insignificant in the Initial Review. It remains insignificant, it was previously considered and it is not a change. This is not a valid rescission ground.

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**Fourth rescission ground.** The Rescission asserts that lack of details on road construction along the short end of a small, elongated wetland about 1/2 acre in size, may be reasonably expected to result in a significant impact on that wetland (pg 56, §14).

No construction, however, can take place in the wetland buffer without the Town's Special Use Permit, for which Sponsors must submit plans and apply. If construction plans prove unsatisfactory — five or ten years from now — the Town Engineer will reject them. The Planning Board will not issue a Special Use Permit, without which the Building Inspector will not issue a Building Permit. No Significant Impact can occur.

**Conclusion.** Construction of the road will remain within the Town's jurisdiction and, therefore, its control. This assures that no Significant Impact will be allowed to occur. This is not a valid ground for rescission.

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**Fifth rescission ground.** The Rescission asserts that leaving construction up to the purchasers of the lots is “inconsistent” with the Town's Subdivision Law.

This point does not identify any Significant Impact, as the claim addresses zoning matters, not SEQR issues. It is irrelevant to a rescission, but the Rescission Resolution subsequently lumps it together with other claims of environmental harm (pg 57, §17).

**Conclusion.** This is a matter of zoning compliance which identifies no physical harm to the environment and was necessarily considered in a residential subdivision proposal. It does not qualify as a valid rescission ground.

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**Sixth rescission ground.** This is a claim that construction activity “may result in an adverse environmental impact to the biodiversity of flora and fauna within the project area” (pg 57; §16). It is indisputable that this ill-defined impact was contemplated when the Board adopted the Negative Declaration, because it covers the entire area of the current proposal. Moreover, when constructing a house on over 25 plus acres of forest, the effect upon fauna and flora is negligible. Extensive wooded areas allow wild animals to move away from any construction activity. Lower density and larger parcel size further reduce the insignificant impact of the original proposal.

The Board, in its effort to find grounds for rescission, requested nine professional studies during its Project review. They cover traffic, road design, soils, water supply, septic disposal, history and archeology, wetlands, wildlife and vernal pools. These studies are included in the Appendix. Their depth and breadth can support a Draft Environmental Impact Statement, and they show no Significant Impact. There are none.

**Conclusion.** Construction was previously considered, it is not a project change, and any impact it may have on flora and fauna is minuscule. It meets none of the §617.7 [f] [1] rescission parameters. There is no ground to rescind.

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## DEIS EXHIBITS

<b>Date</b>	<b>Description</b>	<b>DEIS Page</b>
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2011	Mack Rd width pictures & measurement	59
2011	Pictures – truck & SUV side by side	59-77
8/21/15	Brod – current Affidavit	78-85
1/19/11	<i>Ferme Montagne</i> – Special Use Permit & Site Plan Approval	86-88
11/11/10	Pl Board Minutes – <i>Ferme Montagne</i>	89
12/13/10	Paggi letter re <i>Ferme Montagne</i>	90-93
10/26/10	EAF – Timber harvest – <i>Ferme Montagne</i>	94-95
9/21/15	Berger Affid – Mack Rd, stream crossing, SWPPP Vehicle safety database reports on Mack Rd	96-106 107-113
1987/2011	Submitted drawings – Stream crossing area	114-115
6/27/87	EAF – East Mountain	116-126
10/7/87	Brod Affidavit supporting review of East Mountain	127-129
6/30/87	East Mountain Negative Declaration	130-132
6/27/87	Brod letter to Board Chair J. Simonetty praises the 1987 East Mtn report: it comes close to a DEIS	133-135
2/21/13	Planning Board requests for agency input – including the CAC – on whether to rescind the neg dec	136-139

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## SUMMARY OF APPENDIX STUDIES

**Doc. 1. Memo on Project changes.** Quantitative and graphic report on changes to the Project filed with the Application in 2012. Most changes, such as fewer parcels, lower density, shorter road, less land disturbance were beneficial. The remaining changes were environmentally neutral.

**Doc. 2. Historic Preservation Study.** This thorough study required significant research. It contains ancient documents and pages of bibliography. The Board provided a copy to the NYS Office of Historic Preservation. The State responded that the Project has no significant impact on historic or archaeological resources.

**Doc. 3. Mack Rd Traffic Report Addendum.** This report shows that Mack Rd is a two-lane road, classified as lying between a class C and a class B road. The Board gave some indications it was considering Mack Rd traffic as a potential significant adverse impact. On their own Sponsors addressed the issue before the Board brought it up by limiting the use of Mack Rd to four parcels permanently. The Report refers to access for six parcels, for a limited time. Sponsors reduced the number of parcels to four. The Board then switched its concern from traffic volume to a claim that Mack Road is dangerous. Four homes will result in 24 Average Daily Trips (Doc 3, pg 3). If all these trips were concentrated on one peak hour in the morning and one in the afternoon, that results in five trips in that hour, or one car in five minutes. The impact is minuscule, and more



so because a significant proportion of the traffic from the four properties with access through Mack Road will use the South access, for the reasons explained in the discussion of Document 4, the Traffic Study.

**Doc. 4. Traffic Study Report.** This was a traffic count in every road intersection lying between the North end of the private road, on Mack Road, and its South end, on Wingdale Road. It includes a page showing the distance to be traveled from a middle point in East Mountain North to several common destinations. Invariably, the shortest and easiest to drive route is from the South side of the Project (Doc 4, pg 31). This indicates that most traffic, even that from the four parcels that would have access to Mack Road, would use the Wingdale Road entrance on the South end of the Project.

**Doc. 5. CAC Report.** Town residents serve *pro bono* in the Conservation Advisory Council, a Town agency that has the statutory power to consult with DEC and advise other Town Agencies, such as the Board, which requested such advice. The Chief Counsel for DEC advised that regulatory changes never result in significant impacts (Doc 5, pg 20). The CAC reported this to the Board, but was ignored. Both the District Court's Opinion and the Summary Order found the Board's disregard for the CAC report objectionable.

**Doc. 6. Stream Crossing Permit Application.** The Board informed Sponsors that they needed DEC approval for a stream crossing in order to obtain Board approval for the Project. DEC turned down the stream crossing application because it was premature.

**Doc. 7. Wetland Delineation Letter.** Sponsors had every State, Federal and Town wetland delineated.

**Doc. 8. SWPPP.** At over 200 pages the Storm Water Pollution Prevention Plan is the largest—and most costly—report Sponsors submitted. It plans road construction to prevent storm water from eroding the soil. The Board pointed out that the SWPPP was incomplete and invoked it as a ground to rescind the Negative Declaration. It did this ignoring the fact that Sponsors could not complete the SWPPP until the Town Engineer approved the layout of the road. The Town Engineer never approved it because the Board rushed to rescind.

**Doc. 9. Engineer Analysis Drawings.** This works as a visual table of contents. It shows on a small map the area covered by each drawing containing the required information for the entire project. It is a graphic display of the individual proposed sections of the Project, which are then shown in full detail in the subsequent pages.

**Doc. 10. Water Supply & Sanitary Sewage.** This report explains that the aquifer recharge rates for the Project can sustain residential development in the 3.2

acre range (Doc 10, pg 3). It points out that, at an average density of 25 acres, the Project parcels are over seven times the minimum recommended density for water supply. Similarly, the 25 acre parcels can easily accommodate septic fields that require .02 acres with the Project's well-drained soils

**Doc. 11. Endangered Species & Habitat Study.** This is an in depth study that required the delineation of and impacts upon wetlands; impacts on endangered species such as the bog turtle and the Indiana bat the Indiana bat, the bog turtle, disturbance of vernal pools. None are present in Sponsors' land, except for bat foraging. DEC has determined that the Indiana bat is not present on the Project site between October 1 to March 31. Limiting tree cutting to that period minimizes any potential adverse effects on the Indiana Bat (Doc 11, pg 12).