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April 25, 2023

By FedEx

Mr. Robert Vicaretti, Sr., Chairman
Town of Deerpark Planning Board
1420 Route 209
Huguenot, New York 12746

Re: *New Century Film Site Plan*
517 Neversink Drive
FE Project 21-48

Dear Mr. Vicaretti:

I am a partner in Ruskin Moscou Faltischek, P.C., attorney for NYenvironcom, a New York not-for-profit advocating for smart land use policies at all levels starting with the residents and communities, up through municipal and state level decision making throughout the mid-Hudson region, and encompassing the Delaware and Hudson watersheds in this area. A number of NYenvironcom's members reside in the Town of Deerpark and live in the vicinity of 517 Neversink Drive. I am writing with regard to the determination under New York State *Environmental Conservation Law* as to whether the proposed project at 517 Neversink Drive requires an Environmental Impact Statement ("EIS") under New York State's Environmental Quality Review Act ("SEQRA"). My understanding is that this project is similar to prior proposals in Riverdale where an EIS was required.

As set forth in the letter from Fellenzer Engineering LLP dated January 25, 2023, the project will disturb a fourteen (14) acre site and will involve the increase in seating of the multi-purpose arena to 3,500, construction of an 85 room hotel, construction of two (2) restaurants and two(2) film offices, a new four (4) story garage, and a sewage treatment plant. Under well-established law, such a large development requires an EIS. It would simply be absurd to find that such a massive alteration to the existing area could not possibly have any adverse environmental impacts. The potential for increased traffic, solid waste, air pollution, water demand, etc., clearly triggers the low threshold for an EIS.

The primary purpose of SEQRA is not to determine whether a governmental agency should undertake a discretionary act, but 'to inject environmental considerations directly into governmental decision making'. *Akpan v. Koch*, 75 N.Y.2d 561, 569 (1990) *quoting Matter of Coca-Cola Bottling Co. v. Bd. of Estimate of City of N.Y.*, 72 N.Y.2d 674, 679 (1988). Under SEQRA and the applicable

regulations, if a governmental body is going to make a discretionary decision, certain specific SEQRA procedures must be followed. *Matter of Custom Topsoil, Inc. v. City of Buffalo*, 12 A.D.3d 1168, 1169 (4th Dep't 2004) ("[I]t is well established that, where a municipal officer has a latitude of choice that takes into account the kinds of environmental concerns that may be raised during the SEQRA process, the official's function is discretionary and thus is subject to SEQRA review").

The first step, after the designation of a lead agency, is the determination whether a proposed action requires an EIS, or whether a negative declaration can be issued so that the project is not subject to the EIS process. The failure to strictly follow required procedures when issuing a negative declaration requires that a negative declaration be annulled. As the Court of Appeals in *Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003) explained:

> The Legislature adopted SEQRA with the express intent that 'the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy' and that SEQRA's policies, statutes and regulations should be implemented 'to the fullest extent possible" (ECL 8-0103 [7], [6]). To that end, the Legislature created 'an elaborate procedural framework' governing the evaluation of the environmental ramifications of a project or action (*Matter of King v. Saratoga County Bd. of Supervisors*, 89 N.Y.2d 341, 347, 653 N.Y.S.2d 233, 675 N.E.2d 1185 [1996]). In assessing the significance of a proposed action under SEQRA, the lead agency must 'thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and *** set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation' (6 NYCRR 617.7[b][3], [4]). Where the lead agency concludes either that 'there will be no adverse environmental impacts [from the action] or that the identified adverse environmental impacts will not be significant,' the agency may issue a negative declaration thus obviating the EIS requirement (6 NYCRR 617.7[a][2]).
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> Judicial review of a lead agency's negative declaration is restricted to 'whether the agency identified the relevant areas of environmental concern, took a "'hard look'" at them, and made a "reasoned elaboration" of the basis for its determination.' (*Matter of Jackson v.*

> *New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 494 N.E.2d 429 [1986]; *see Matter of Merson v. McNally*, 90 N.Y.2d 742, 751, 665 N.Y.S.2d 605, 608 N.E.2d 479 [1997]). As we observed in *Jackson*, SEQRA guarantees that agency decisionmakers 'will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.' (67 N.Y.2d at 414-415, 503 N.Y.S.2d 298, 494 N.E.2d 429).
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> SEQRA's policy of injecting environmental considerations into governmental decisionmaking (*see Matter of Coca-Cola Bottling Co. v. Board of Estimate of City of N.Y.*, 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 532 N.E.2d 1261 [1988]) is 'effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations' (*Matter of Merson*, 90 N.Y.2d at 750, 665 N.Y.S.2d 605, 688 N.E.2d 479). Strict compliance with SEQRA is not 'a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment' (*Matter of King*, 89 N.Y.2d at 348, 653 N.Y.S.2d 233, 675 N.E.2d 1185; *see Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371, 526 N.Y.S.2d 56, 520 N.E.2d 1345 [1988]).
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> Accordingly, where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified (*see e.g. Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 368-369, 509 N.Y.S.2d 499, 502 N.E.2d 176 [1986])."

Further, New York Courts have consistently held that the threshold for requiring an EIS is relatively low. The Appellate Division, in *Matter of Munash v. Town Bd. of the Town of East Hampton*, 297 A.D.2d 345, 347 (2d Dep't 2002), explained:

> 'The basic purpose of SEQR[A] is to incorporate the consideration of environmental factors into the existing planning, review and decision making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR[A] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement' (6 NYCRR 617.1[c]). The EIS, which is '"the heart"' of the SEQRA process (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415, 503 N.Y.S.2d 298, 494 N.E.2d 429) is 'a detailed statement setting forth, *inter alia*, the long- and short-term environmental impacts of the proposed action, the alternatives to the proposed action, and the mitigation measures proposed to minimize the environmental impact' (*Matter of Citizens Against Retail Sprawl v. Giza*, 280 A.D.2d 234, 238, 722 N.Y.S.2d 645). Since SEQRA mandates the preparation of an EIS when the proposed action may include the potential for at least one significant environmental effect, 'there is a relatively low threshold for the preparation of an EIS' (*Matter of UPROSE v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 608, 729 N.Y.S.2d 42; *see Matter of Silvercup Studios v. Power Auth. of State of N.Y.*, 285 A.D.2d 598, 729 N.Y.S.2d 47; *Matter of Omni Partners v. County of Nassau*, 237 A.D.2d 440, 442, 654 N.Y.S.2d 824)."

Similarly, in *Matter of UPROSE v. Power Authority of State of New York*, 285 A.D.2d 603, 608 (2d Dep't 2001), the Appellate Division reversed the refusal to annul a negative declaration and explained:

> SEQRA mandates the preparation of an EIS when the proposed project may include the potential for at least one significant environmental effect (*see, Matter of Omni Partners v. County of Nassau*, 237 A.D.2d 440, 442, 654 N.Y.S.2d 824; *Matter of West Branch Conservation Assn. v. Planning Bd. of Town of Clarkstown*, 207 A.D.2d 837, 839,616 N.Y.S.2d 550). 'Because the operative word triggering the requirement of an EIS is "'may'", there is a relatively low threshold for the preparation of an EIS' (*Matter of Omni Partners v. County of Nassau, supra*, at 442, 654 N.Y.S.2d 824; *see also, Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85

> N.Y.2d 382, 397, 626 N.Y.S.2d 1, 649 N.E.2d 1145; *Matter of Kahn v. Pasnik*, 231 A.D.2d 568, 569, 647 N.Y.S.2d 279, *affd.* 90 N.Y.2d 569,664 N.Y.S.2d 584, 687 N.E.2d 402). Moreover, SEQRA regulations themselves provide that a Type I action, such as the proposed action here, carries the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS (*see*, 6 NYCRR 617.4[a][1]).
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> In light of the undisputed potential adverse health effects that can result from PM 2.5 emissions, we conclude that NYPA failed to take the requisite 'hard look' at this area of environmental concern. An EIS is required if the proposed project '*may include* the potential for at least one significant adverse environmental impact' (6 NYCRR 617.7[a][1] [emphasis supplied]). The analysis undertaken by NYPA, in which it assumed that all PM 10 emissions are PM 2.5 emissions is not sufficiently detailed in the EAF and is not an adequate substitute for addressing the health impacts of PM 2.5 emissions. Thus, NYPA should have issued a positive declaration and prepared an EIS (*see, Matter of Syrop v. City Council of the City of Yonkers*, 282 A.D.2d 466, 722 N.Y.S.2d 741; *Matter of Omni Partners v. County of Nassau, supra*, at 443, 654 N.Y.S.2d 824; *Matter of West Branch Conservation Assn. v. Planning Bd. of Town of Clarkstown, supra*, 207 A.D.2d at 841, 616 N.Y.S.2d 550; *Matter of Holmes v. Brookhaven Town Planning Bd.*, 137 A.D.2d 601, 524 N.Y.S.2d 492). Accordingly, the matter is remitted to NYPA so that an EIS may be prepared (*see, Matter of West Branch Conservation Assn. v. Planning Bd. of Town of Clarkstown, supra*, at 841, 616 N.Y.S.2d 550; *Matter of Holmes v. Brookhaven Town Planning Bd. supra*)."

Also, agencies may not rely on a cursory examination of the proposed environmental impacts in preparing the EAS and issuing a negative declaration. Rather, an agency must take a "hard look" at the "same areas of environmental impacts as would be contained in an EIS, including both the short-term and long-term effects, as well as the primary and secondary effects of an action on the environment". *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 365 (1986) (internal citations and footnote omitted).

Finally, under SEQRA, it is not enough for an agency to consider only the potential impacts a project may have on the physical environment. "[T]he impact that a project may have on

population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis" and must be considered by the lead agency when preparing an EAS. *Id.*, at 366 (internal footnote omitted).

Here, in addition to the physical impacts of the proposed project including the disturbance of fourteen (14) acres of land, increased traffic, increased solid waste, strain on water supply, and increased risk of air pollution, the project clearly may have an impact on the character of the existing neighborhood. These matters need to be addressed in an EIS and a negative declaration would be improper.

Very truly yours,

E. Christopher Murray

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