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Village Board
Town Board
Consolidated Zoning Board of Appeals
Planning Board
Cc: June Patterson, Town Clerk,
Regina Taylor, Village Clerk

January 6, 2023

Dear Boards and Clerks:

I am requesting that the Village Board postpone Monday's vote and give the Town Board an opportunity to rescind their resolution conditionally approving the proposed Tower on 9W at the Highway Garage, which I am also requesting the Town Board to do. In lieu of the Town taking a proper vote, the Village Board should rescind its two previous resolutions governing the proposed Tower on 9W at the Highway Garage. The reason for this is that **all four boards** have made errors in the improperly piecemeal segmented process leading to the approval of this facility.

There are a lot of reasons why this tower is inappropriate; some of these were shared by Mr. Ramus, Ms. Fallon and Ms. Guy at a December 5th 2022 board meeting and by me in letters to the local paper.

However, even where some would like to see a tower in this location, at a minimum, the contract should have mandatory random radiation compliance testing and the Town should also have the ability to get out of the contract every five years (instead of a one-way option for the CellCo); also, the contract should have stronger indemnification provisions. If the Village Board votes to approve the fourth in a series of unlawful resolutions, the conditional approval by the Town will be insisted upon by the CellCo; all resolutions will also be subject to other challenges.

If the Village Board approves the latest resolution on Monday (1/9/23), these are some of the errors made that I believe would convince a court to overturn the approval of this project:

- (1) There is no such thing as the conditional approval of a project, including that of its site plan prior to any SEQRA review. The Town Board erred by taking an action in advance of SEQRA approval. See: [6 NYCRR §617.3\(a\)](#) ("No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA"). See also e.g.: *Ames v. Johnston*, 169 A.D.2d 84, 571 N.Y.S.2d 831 (1991). Furthermore, the Town erred in its resolution asking the Village Board to be lead agency: I will return to this issue subsequently.

Notwithstanding what appears to be a deliberate attempt to stagger voting so that four months would have elapsed since the time the Town took the vote on this improper conditional approval, *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecommunications of City of New York*, 5 NY3d

30, 832 N.E.2d 38 (2005) makes it clear that the clock does not start running to challenge this decision while boards still nominally have the power to make decisions that would ameliorate or negate the Town Board's initial decision, which by itself had no effect absent subsequent decisions being taken by the Village Board.

- (2) The next set of errors was the passage of the Village Board Resolution on October 3, 2022 in which it declared its intention to act as lead agency under SEQRA and to declare that it would treat the review of the Monroe Factors Analysis as an action pursuant to SEQRA. If the Monroe Factors Analysis were indeed an "action", it could not be done prior to the SEQRA analysis (since again, no action can be taken before SEQRA is complete); however, the Monroe Factors analysis is not an action pursuant to [6 NYCRR §617.2\(b\)](#) and in fact must be done prior to a SEQRA analysis.

The policymaking of the Monroe factors analysis would not "commit the *agency to a future* definite course of future decisions"; "agency" refers to the agency taking the so-called action- here that is the Village Board. But, this policymaking would not commit *the Village Board* to a definite course of future decisions. That is because, there would be *no future decisions* by the Village Board in either case- (a) if the Village Board does not exempt the Town from the Village Zoning Code, the Planning Board would determine site plan approval and the Zoning Board would need to grant a variance; (b) if the Village Board does so exempt the Town, the Town's unlawful prior conditional approval of the contract would be deemed site plan approval *ex post facto* (after the fact), the Village Board would be committed to no future course of approval.

Therefore, it was an error to declare the Monroe Factors Analysis "an action".

Furthermore, having improperly locked itself into the incorrect decision in the October 3, 2021 resolution, the Village Board, which declared itself lead agency in its November 21, 2022 resolution, now proposes to conduct a SEQRA analysis and afterwards take what it erroneously deems to be "an action" with a resolution stating that the Town is exempt from its code pursuant to the Monroe Factors Analysis, at which point the Village Board is then no longer an "involved agency" pursuant to SEQRA ([6 NYCRR §617.2\(t\)](#)): uninvolved agencies have no jurisdiction over SEQRA. So, the Village cannot be "involved" to do SEQRA, and then deem itself "uninvolved", having just "involved" itself.

Doing SEQRA before the Monroe Factors Analysis is unlawfully putting the cart before the horse. If the Village Board were to choose not to exempt the Town from the Village Zoning Code, they also could not be lead agency.... but would have just approved SEQRA as an involved agency (having deemed the Monroe Factors to be an "action") leaving the Planning Board to conduct a mere site plan approval after any ZBA variance would be issued.

Since the Monroe Factors analysis is NOT an action, it should be done *prior* to any SEQRA determination (and the October 3, 2021 resolution would have to be invalidated to do so). If the Village were to properly determine that the Town is not subject to its zoning code (via lawful procedure- i.e. conducting the Monroe Factors approval first), the Town then would have the sole responsibility to conduct the SEQRA review (which makes its prior conditional approval of the contract, which contains a so-called site plan- see exhibit B of the contract- further

unlawful (it is *de facto* site plan approval)- as well as making its request for the Village Board to serve as lead agency premature and an indicator of predetermination) which brings me back full circle to point 1- the Town should not have passed a resolution asking the Village Board to be lead agency.

Put another way, if the Village is to be “uninvolved” with declaring that the code does not apply to the project, pursuant to Monroe, then **the Town must be lead agency**; this shows the ruse of the Town’s request in the first resolution for the Village Board to be lead agency- that way the Town’s August 8, 2021 approval will have effectively allowed it to approve a project with NO lawful SEQRA review and no way to amend the site plan with any comments emanating from this SEQRA review (however improperly conducted). This runs contrary to the holding of *Ames v. Johnston*, supra as well as other cases.

Looking at the November 21, 2021 resolution in which the Village did declare itself lead agency, the resolution notes that the Village Board did not hear any opposition or any concern from the Town Board, Zoning Board or Planning Board about any possible issues. That brings me to the third problem:

- (3) The Town Planning Board is represented by the same attorney as the Town Board (Justin Rider). The Consolidated Zoning Board is represented by the same attorney as the Village Board (Alyse Terhune). This is an obvious conflict of interest and a violation of ethics statutes to make decisions on the basis of counsel from attorneys who were duty bound to zealously represent **other boards**.

Upon a rescission of the initial resolution (which would invalidate the subsequent resolutions) or even upon rescission of the Village Board’s previous resolutions, the ZBA and Planning Board should get new counsel for the purpose of advising them on this project. New counsel means neither Ms. Terhune nor Mr. Rider nor anyone associated with firms they work for. Please see: [Village Code: §§§18-4, 18-5, 18-6](#) and [Town Code §§§11-4, 11-5, 11-6](#).

This brings us to the proposed January 9, 2022 resolution, which is infected by all of the previous errors. The fact that this whole vote was a *fait accompli* (“done deal”) from inception is further underscored by the fact that Ms. Terhune has not prepare an alternate resolution for the Village Board to vote on (and never has with either of the two previous votes). The passage of this resolution will have ultimately functioned to allow the Town to approve the site plan in advance of any proper SEQRA review.

This is not the way to do things; rather all boards should follow proper procedure, ethical guidance and transparency.

Even if the aforementioned mistakes had not been made, the photos show a major impact on recreation with the tower being seen from at least the one ballfield depicted and the playground. The claim of no or minimal visual effect is simply false. Furthermore, the Monroe Factors do not support exempting the Town from the code; no alternative locations for the facility have been seriously considered or alternative methods. In any event, the Village Board has not legal basis to apply any reasoning for exempting Village- owned municipal owned land in a prior resolution to Town-owned land.

But again; this determination must be made prior to a SEQR determination. The Village has no authority to function as lead agency if the Town is exempted from the code, and also should not act as same if the Planning Board has site plan approval authority.

Finally, even though the Monroe Factors determination should be done FIRST, I do not believe there is any scenario where the Village Board should be lead agency in this scenario. If the Town is exempt from the code- the Village Board is uninvolved, and Town must be lead agency. If Town is not exempt from the code- the Town should still be lead agency in a coordinated review with the Planning Board pursuant to *Brander v. Town of Warren Town Bd.*, 18 Misc. 3d 477, 847 N.Y.S.2d 450 (2007) and *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625, 773 N.Y.S.2d 224 (2004).

Furthermore, it is not clear that the Village Board should be conducting the Monroe Factors analysis: the Department of State indicates that the Zoning Board of Appeals would be better situated to perform this analysis. See: “Governmental Immunity from Zoning” New York State Division of Local Government Services:

https://dos.ny.gov/system/files/documents/2022/11/governmental-immunity-from-zoning_0.pdf

Village Board, please consider this letter to be my on the record comments prior to your consideration of the next scheduled vote on January 9, 2022. You need time to meaningfully review same, which cannot be made and fully considered in the context of the maximum permissible time for comment- three minutes.

Very truly yours,

Deborah Kopald

/s/ Deborah Kopald