

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
COLD SPRING COUNTRY CLUB, INC. and
COLD SPRING DEVELOPMENT PARTNERS, LLC

Petitioners/Plaintiffs,

For an Order Pursuant to Article 78 of the Civil Practice
Law and Rules and Declaratory Relief

-against-

TOWN OF HUNTINGTON, TOWN BOARD OF THE
TOWN OF HUNTINGTON, and KAHN PROPERTY
OWNER, LLC,

Respondents/Defendants,

-and-

JEFFREY KOLESSAR, VICE PRESIDENT OF
DEVELOPMENT AT GF MANAGEMENT LLC AS
RECEIVER, and DAVID I. ROSENBERG, ESQ.,
AS REFEREE,

Additional Respondents/Defendants,

Joined as Necessary Parties
Under CPLR 1001(a).

Index No. _____

SUMMONS

Date Purchased: April 18, 2023


-----X
TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED, to answer the Verified Petition and Complaint in this action and to serve a copy of your Answer on the Petitioners/Plaintiffs' attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service, or within thirty (30) days after the completion of service or service made in any manner other than personal delivery within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Verified Complaint.

The action will be heard in the Supreme Court of the State of New York, in and for the County of Suffolk, based on Defendants' residence.

Dated: Hauppauge, New York
April 18, 2023

AVRUTINE & ASSOCIATES, PLLC
ATTORNEYS AT LAW

By: 
Howard D. Avrutine
2116 Merrick Avenue
Merrick, New York 11566
*Attorneys for Petitioners/Plaintiffs
Cold Spring Country Club, Inc.*

-and-

FARRELL FRITZ, P.C.
100 Motor Parkway
Hauppauge, New York 11788
(631) 547-8400
*Attorneys for Petitioners/Plaintiffs
Cold Spring Development Partners, LLC*

-and-

HERRICK FEINSTEIN LLP
Two Park Avenue
New York, New York 10016
(212) 592-1475
*Attorneys for Petitioners/Plaintiffs
Cold Spring Development Partners, LLC*

To: TOWN OF HUNTINGTON and
TOWN BOARD OF THE TOWN OF HUNTINGTON
100 Main Street
Huntington, New York 11787

KAHN PROPERTY OWNER, LLC
135 West Gate Drive
Huntington, New York 11743

JEFFREY KOLESSAR
1628 John F. Kennedy Boulevard
8 Penn Center, 23rd Floor
Philadelphia, Pennsylvania 19103

DAVID I. ROSENBERG, ESQ. AS REFEREE
666 Old Country Road, Suite 810
Garden City, New York 11530

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
COLD SPRING COUNTRY CLUB, INC. and
COLD SPRING DEVELOPMENT PARTNERS LLC,

Index No.: 23-_____

Petitioners/Plaintiffs,

For an Order Pursuant to Article 78 of the Civil Practice Law and
Rules and Declaratory and Injunctive Relief

VERIFIED
PETITION AND
COMPLAINT

- *against* -

TOWN OF HUNTINGTON, TOWN BOARD OF THE TOWN
OF HUNTINGTON, and KAHN PROPERTY OWNER, LLC

Respondents/Defendants.

-and-

JEFFREY KOLESSAR, VICE PRESIDENT OF DEVELOPMENT
AT GF MANAGEMENT LLC AS RECEIVER, and
DAVID I. ROSENBERG, ESQ. AS REFEREE.

Additional Respondents/Defendants

Joined as Necessary Party
Under CPLR 1001(a).

-----X
Petitioners/Plaintiffs Cold Spring County Club, Inc. ("CSCC"), by its attorneys, Avrutine & Associates, PLLC, and Cold Spring Development Partners LLC ("CSDP"), by and through its attorneys, Herrick, Feinstein LLP and Farrell Fritz, P.C., (collectively "Petitioners" or "Plaintiffs"), as and for their Verified Petition and Complaint in this hybrid Article 78 proceeding, declaratory judgment action pursuant to CPLR §3001, and injunctive relief action ("Hybrid Proceeding") against Respondents/Defendants Town of Huntington ("Town"), Town

Board of the Town of Huntington (“Town Board”), and Kahn Property Owner, LLC (“Kahn”) (collectively “Respondents” or “Defendants”), allege as follows:

INTRODUCTION

1. On March 20, 2023, the Town Board unlawfully adopted Resolution 2023-140 (which amended Resolution 2023-125, dated March 14, 2023 (collectively, the “Resolution”), purporting to enact Local Law Introductory No. 37-2022 of the Town of Huntington (“Local Law”).

2. The Resolution was filed with the Town Clerk on March 20, 2023. True and correct copies of the Resolution and Local Law are attached hereto as Exhibit 1.

3. With the following words, the Town Board in full accord with Kahn’s principal, Gary Melius, acknowledged and rejoiced in the harm to Petitioners inherent in the development scheme that they wholeheartedly embraced and orchestrated through the unlawful adoption of the Resolution and Local Law, which Petitioners seek to vacate, annul, and enjoin through this Hybrid Proceeding:

“I would congratulate the Cold Spring Harbor County Club for now having the most valuable piece of undevelopable land on Long Island and the lawyers will understand that...”

- Town of Huntington Supervisor Edward Smyth, Town Board Public Meeting, March 14, 2023. Ex. 2 at 164:14-18.¹

“You think [CSDP & CSCC] have a chance when the whole community is against them? Never,” [Gary] Melius said, “especially with the political power I have.”

- Gary Melius, Managing Member of Kahn. Ex. 3 at p.2.²

¹ A true and correct copy of the transcript of the proceedings of the Town Board held on March 14, 2023 is annexed hereto as Exhibit 2. See also Agenda Item 66 at 1:41:32 of the videotaped recording of this meeting available at: https://huntingtonny.granicus.com/player/clip/3136?view_id=3&redirect=true&h=2c82bf607251ebaf3194b4e91483c310.

² A true and correct copy of the Long Island Business News article entitled “DUELING DEVELOPMENT Proposed

NATURE OF PROCEEDING AND RELIEF SOUGHT

4. Through this Hybrid Proceeding, Petitioners seek to vacate and annul the Resolution and Local Law because the Town Board acted *ultra vires* by adopting the Resolution and Local Law in excess of its legal authority, and because the Resolution and Local Law were made in violation of lawful procedure, affected by an error of law, arbitrary, capricious, and unlawful products of an egregious abuse of discretion by the Town Board.

5. Petitioners also seek a declaratory judgment pursuant to CPLR §3001 that the Resolution and Local Law are null and void, together with a preliminary injunction, emergency stay, and temporary restraining order pursuant to CPLR §§ 7805, 6301 and 6313 (i) enjoining the enforcement of the Local Law pending the final determination of this proceeding, and (ii) enjoining Kahn from taking any further steps to advance the approval process, including obtaining any permits, approvals or commencing construction based on any rights obtained by or through the Resolution or the Local Law.

6. As explained below, this Hybrid Proceedings arises from the unlawful and ongoing abuse by the Town Board of the limited zoning authority granted to it by the State of New York.

7. The Town Board ignored the plain terms and its authority under §§198-42.1 (B) and (C) of the Town Code's zoning provisions governing the Town's Historic Building Overlay District ("HBOD"), located in the Town Code §198-42.1 ("HBOD Code"). A true and correct copy of the HBOD Code is annexed hereto as Exhibit 4.

8. Under the guise of the HBOD Code, the Town Board abused its authority and authorized, *ultra vires*, Kahn's proposed construction of a 202,000 square-foot, 4-story, 95-unit

Condo Project Pits Neighbor Against Neighbor as Court Fight Looms," is annexed hereto as Exhibit 3.

residential condominium complex with a 240-stall parking garage (“Kahn Condo Complex”) and a sewage treatment plant (“STP”) on a 5.1-acre portion of property located in an underlying Residence-Open Space Cluster District (“R-OSC”).

9. Kahn claimed that the Town Board, in the first instance, had the authority to approve its application under §198-42.1 (B) because the property was already overlaid by the Town’s HBOD and is adjacent to another portion of its property which is improved by the historic Oheka Castle facility (“Oheka Castle”).

10. The portion of Kahn’s property improved by Oheka Castle is in an underlying R-20 Residence District (“R-20”).

11. The entirety of Kahn’s property (both portions located in the R-OSC and R-20 Districts) totals 21.49 acres and is overlaid by the HBOD (the “Kahn Property”).

12. The Town Board adopted the Resolution and Local Law to permit Kahn’s construction of the Kahn Condo Complex in blatant violation of the Town Code and New York law, as set forth in detail below.

13. By doing so, the Town Board has unlawfully denied Petitioners the full use and economic benefit of their adjacent property located in the R-OSC District (known as the Cold Spring County Club) by, among other things, hindering their ability to develop a residential cluster subdivision—a most valuable and unique residential development in the Town and in the County of Suffolk.

PARTIES

14. Petitioner/Plaintiff CSCC is a domestic corporation, with its principal place of business located at 22 East Gate Drive, Huntington, New York.

15. CSCC owns certain property improved by a private golf course and country club

facility known as the known as the Cold Spring Country Club, identified on the Suffolk County Tax Map as 0400-188-01-1, 2, 5, 023.1, 024.1, 024.2, 057.1 and 109, and 0400-132-04-7, 8, 9, and identified on the Nassau County Land and Tax Maps as 014-B-212, 214, 231, 232 and 233 (the “Golf Course Property”).

16. Petitioner/Plaintiff CSDP is a domestic limited liability company with its principal place of business located at One Street, 32nd Floor New York, New York 10004, which is in contract to purchase 13 acres of the Golf Course Property from CSCC for a 175-unit condominium project (“Golf Course Condo Project”) separate and distinct from the Kahn Condo Complex.

17. The Respondent/Defendant Town is a municipal corporation, organized and existing under the Town Law of the State of New York (“Town Law”), with its principal place of business located at 100 Main Street, Huntington, New York 11743.

18. The Respondent/Defendant Town Board is a public body organized and duly constituted by authority of the Town Law.

19. The Town Board is responsible for the management and business of the Town.

20. The Town Board’s principal place of business is located at 100 Main Street, Huntington, New York 11743.

21. The Respondent/Defendant Kahn: (a) is a limited liability company organized and existing under the laws of the State of New York; and (b) has at all relevant times maintained a principal place of business located at 135 West Gate Drive, Huntington, New York 11743, which property is developed with Oheka Castle and identified on the Suffolk County Tax Map as 0400-188-01-025.001—*i.e.*, the Kahn Property.

22. Jeffrey Kolessar, Vice President of Development at GF Management LLC, having

a business address at 1628 John F. Kennedy Boulevard, 8 Penn Center, 23rd Floor, Philadelphia, Pennsylvania 19103, is made a defendant by his appointment as receiver (“Receiver”) of the Kahn Property. A true and correct copy of the Court Order Appointing Receiver (“Receivership Order”) is annexed hereto as Exhibit 5. Mr. Kolessar and GF Management LLC are named as necessary parties and no claims are made against them herein.

23. David I. Rosenberg, Esq., having a business address at 666 Old Country Road, Suite 810, Garden City, New York 11530, is made a defendant by his appointment as referee. A true and correct copy of the Court Order appointing Mr. Rosenberg as Referee (“Referee Order”) is annexed hereto as Exhibit 6. Mr. Rosenberg is named as a necessary party and no claims are made against him herein.

JURISDICTION AND VENUE

24. This Court has jurisdiction over this Hybrid Proceeding, pursuant to Article 78 of the CPLR, §§ 3001, 6301 and 6311 of the CPLR, and the Town Law.

25. Venue is proper, pursuant to CPLR §§ 506(b) and 7804(b) because the acts and omissions complained of herein took place in the Tenth Judicial District and the Kahn Property is located within the Tenth Judicial District.

26. Venue is also proper in this Court pursuant to CPLR §507 because the Kahn Property and the proposed Kahn Condo Complex are located in Suffolk County.

STANDING

27. CSCC and CSDP have standing to commence and maintain this Hybrid Proceeding because they have been aggrieved by the actions of the Town Board in adopting the Resolution and enacting the Local Law.

28. CSCC as the owner of the Golf Course Property, which is an immediate

neighboring property that surrounds and abuts the Kahn Property, will suffer direct harm that is different from the public at large, as the Resolution and Local Law were adopted in violation of the New York State Environmental Quality Review Act ("SEQRA").

29. The Town Board has failed to consider the environmental injuries as well as interference with recreational activities enjoyed in and around the golf course and country club facility by its members.

30. The Resolution and Local Law uniquely impact CSCC and the Golf Course Property by increased noise, traffic, and pollutants from the construction of the Kahn Condo Complex and its associated STP.

31. Further, CSCC, as an abutting and surrounding neighbor, will suffer direct harm that is different from the public at large as the Resolution and Local Law were adopted by the Town Board with the stated purpose of requiring a right of access to the Kahn Condo Complex via East Gate Drive (a private road owned by CSCC), which in turn would require access over the Spur (lands privately owned by CSCC), notwithstanding that Kahn and future residents of the proposed Kahn Condo Complex have no legal right to access either for the proposed Kahn Condo Complex.

32. CSCC, as an abutting and surrounding neighbor, will suffer direct harm that is different from the public at large and is within the zone of interest sought to be protected or promoted by SEQRA, as the Resolution and Local Law were adopted by the Town Board without the Town Board taking the requisite "hard look" or making any "reasoned elaboration" as to traffic or other cumulative environmental impacts associated with the Kahn Condo Complex and the independent development of the Golf Course Property with the Golf Course Condo Project.

33. Both the Town Department of Planning and Environment (“Planning Department”) and the Suffolk County Planning Commission (“SCPC”) have independently stated that a traffic study must be performed regarding the intersection of East Gate Drive and Jericho Turnpike as a condition for their potential recommendation of approval of the Kahn Condo Complex.

34. The Town Board did not require Kahn to prepare such an analysis.

35. Because CSDP is in contract to purchase 13 acres of the Golf Course Property for the Golf Course Condo Project, it is also uniquely aggrieved and has suffered or will suffer each of the foregoing harms as well.

36. Under these circumstances, Petitioners have suffered environmental injury within the zone of interest that is different from that of the public at large.

THE ACTION IS TIMELY

37. An Article 78 proceeding challenging the adoption of the Resolution and enactment of the Local Law is subject to a four-month statute of limitations.

38. As noted above, the Town Board adopted and filed the Resolution with the Town Clerk on March 20, 2023.

39. In addition, the Petitioners’ other claims are timely asserted. Accordingly, Petitioners timely commenced this Hybrid Proceeding.

PRELIMINARY STATEMENT

40. In 2012, Kahn and CSCC, as co-applicants, obtained approval from the Town Board to construct a 190-unit residential condominium development on both the Kahn Property and the Golf Course Property.

41. The applicants’ ability to construct 190 condominium units derived from

development rights (residential yield) taken from the overall 170-acre Golf Course Property and clustered in an underutilized portion of both the Kahn Property and the Golf Course Property.

42. After that approval was obtained, Kahn and CSCC discontinued their joint development project, which was abandoned.

43. Subsequently, on or about 2016, Kahn fell precipitously into severe financial difficulty, unable to repay a \$30 million loan from U.S. Bank National Association, as Trustee (“Trust”).³

44. As a result, the Trust commenced a foreclosure proceeding styled *U.S. Bank, N.A., as Trustee v. Kahn Property Owner, LLC et al.*, which is currently pending before Justice Elizabeth H. Emerson of the Supreme Court, Suffolk County, under Index Number 609493-16 (“Mortgage Foreclosure Proceeding”).

45. On or about January 3, 2019, the Court in the Mortgage Foreclosure Proceeding appointed the Receiver for the Kahn Property pursuant to the Receivership Order.

46. In 2022, Kahn (and not the Receiver)—in an attempt to enhance the value of the Kahn Property and stave off foreclosure and potential bankruptcy—filed an application with the Town Board for the 95-unit Kahn Condo Complex that greatly exceeded the density limitations set forth in the underlying R-OSC district (“Kahn 2022 application”). A true and correct copy of the Kahn 2022 application for the Condo Complex application is annexed hereto as Exhibit 7.

47. Kahn proposed to provide vehicular access for the new condominium residents of the Kahn Condo Complex over East Gate Drive, (a private road owned by CSCC located east of the Kahn Property) and the “Spur” (an L-shaped parcel owned by CSCC that must be traversed

³ The Trust’s full name is “U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America, National Association, as Successor by Merger to LaSalle Bank for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007-LDP12, Commercial Mortgage Pass-Through Certificates, Series 2007-LDP12, Acting by and through its Special Servicer, LNR Partners, LLC.”

to proceed from East Gate Drive to the proposed Kahn's proposed Condo Complex).

48. But Kahn possessed no written instrument, recorded or unrecorded, which authorized its access over the Golf Course Property and Kahn has never established any legal right to utilize any portion of the Golf Course Property for the Kahn Condo Complex.

49. Since utilizing East Gate Drive and the Spur for access necessarily requires Kahn to utilize land owned by CSCC, Kahn does not and cannot provide legal access to the Kahn Property for the Kahn Condo Complex.

50. For this reason alone, the Town Board should have rejected Kahn's application or at the very least required proof that access for 95-condominium units was legally permitted.

51. On March 14, 2023 and as amended on March 20, 2023, the Town Board, by adopting the Resolution and enacting the Local Law, perverted the HBOD Code by interpreting HBOD §198-42.1(B)'s scope: (a) to enable it to grant an "additional use" outside of the existing historic building and (b) in a manner that was *broader* than HBOD §198-42.1(I)(1)'s restrictions that an additional use not exceed the density limitations set forth in the underlying zoning district without first obtaining a variance from the Town's Zoning Board of Appeals ("ZBA").

52. As such, the Town Board approved the 95-unit Kahn Condo Complex in contravention of the fundamental precept that the HBOD, a set of overlay zoning regulations, supplements but does not replace the zoning regulations of the underlying zoning district.

53. As described in detail below, Kahn enlisted the assistance of the Town Board to unlawfully misappropriate development rights (*i.e.*, yield) which belong to the adjacent Golf Course Property to approve the Kahn Condo Complex.

54. Kahn also worked in concert with the Town Board to fast-track its zoning application while Petitioners were actively planning and submitting their own application for the

175-unit Golf Course Condo Project, which was formally submitted to the Town Planning Board on March 8, 2023.

55. The Town Board's actions have made a mockery of the Town Code and New York Town Law §267-b by usurping the exclusive jurisdiction of the ZBA and New York State Town Law §278, which governs the Town's cluster subdivision authority.

56. As a result, the Town Board has not only misinterpreted and derogated the lawful procedures of its Town Code, but also State law.

57. Indeed, the Town Board unlawfully granted Kahn the equivalent of exorbitant density bonuses—variances from the Town's strict density limitations, blatantly ignoring and usurping the legal authority of the ZBA, unlawfully overriding the Town Code, and converting the HBOD into a vehicle to throw a "lifeline" to Kahn in its efforts to stave off an imminent foreclosure proceeding.

58. The HBOD does not apply to Kahn's application to begin with, since Kahn did not seek permission for an "additional use" within its historic building (Oheka Castle) other than those uses permitted as-of-right in the underlying R-OSC District.

59. The HBOD District explicitly limits the Town Board's authority to grant additional "uses of historic buildings" if and only if certain statutory prescribed prerequisites are satisfied (including not exceeding the underlying zoning district's density limitations, unless otherwise determined by the ZBA). *See* Ex. 4 §198-42.1(I).

60. These statutory restrictions are designed and intended to assure that the Town Board only grant uses and residential density in a manner consistent with the Zoning Code, not in contravention of it.

61. Nothing in the HBOD Code allows the Town Board to unilaterally authorize the

construction of a residential condominium development on land adjacent to a historic building, let alone in stark contravention of the underlying zoning district's density limitations without any ZBA determination or approval. It is therefore unsurprising that the Town's own Planning Department questioned the Town Board's authority under the HBOD to grant additional uses outside of historic buildings, particularly by varying density regulations without a ZBA variance.

62. Simply put, Respondents construed a single section of the HBOD in a manner that is inconsistent with its plain text, the HBOD Code as a whole, its purpose, and the central premise of overlay zoning (through which a special zoning district overlays a base zoning district to supplement, but not replace, the underlying zoning district's restrictions) and in a manner that produces absurd, objectionable and unlawful results.

63. Equally dispositive, the Town Board adopted the Resolution and Local Law in flagrant violation of the Suffolk County Administrative Code ("SCAC") in connection with the mandated review and recommendation by SCPC. *See* SCAC §§ A14-22[A][3], A14-24[A] [3].

64. The Resolution and Local Law are, therefore, a nullity, because the Town Board prematurely adopted and enacted them before the SCPC provided its conditional approval letter. The Town Board therefore lacked jurisdiction to act when it did.

65. This is a fatal jurisdictional defect, rendering the Resolution and Local Law void *ab initio*.

66. Further, in connection with the Resolution and Local Law, the Town Board purported to issue a "Negative Declaration" under SEQRA, concluding that the Kahn Condo Complex would not result in adverse environmental impacts. The Town Board issued this declaration notwithstanding that, on January 24, 2023, the Huntington Town Planning Board ("Planning Board"), through the Planning Department, specifically recommended in its

Environmental Assessment Forms (“EAF”) Parts II & III that the proposed Kahn Condo Complex “not be issued a determination pursuant to SEQRA until some further items are addressed.” A true and correct copy of the EAF Parts II and III is attached hereto as Exhibit 8.

67. In particular, the EAF Parts II and III flagged:

- “whether Town Code Section 198-42.1 can be applied to a new building on a historic property and not just the building itself”;
- “whether a change in residential density is considered a use change” (*i.e.* whether the application is even permitted under the Town Code Section 198-42.1);
- “[t]he issue of road access” which “needs to be carefully considered”;
- the submission of a “traffic study” which should be “reviewed by the Town to determine if East Gate Drive can support more traffic”; and
- “account[ing] for possible signalization at Jericho Turnpike or other mitigation and whether the approval survives if East Gate drive access is not obtained.”

See Ex. 8 at pp 3-4.

68. Although the Planning Board recommended that the proposed Kahn Condo Complex should “*not be issued a determination* pursuant to SEQRA” until the above items were considered and addressed (*id.* emphasis added), the Town Board considered none of them and instead inexplicably “Issue[d] a Negative Declaration based on the reasons outlined in the EAF, Parts II and III” and found “that the requirements for a SEQRA have been met”. Ex. 8 at p. 2.

69. The Town Board therefore abdicated its responsibility to take the requisite “hard look” regarding potential environmental impacts pursuant SEQRA, and its approval was prohibited by SEQRA’s requirement that “[n]o agency involved in an action may undertake, fund, or approve the action until it has complied with the provisions of SEQRA.” 6 NYCRR 617.3(a).

70. The Town Board also mischaracterized the Kahn Condo Complex application as an “Unlisted” action because it is actually a “Type I” action under SEQRA.

71. The Town Board then blatantly violated SEQRA by illegally “segmenting” its review of the Kahn Condo Complex from Petitioners’ pending Golf Course Condo Project, which abuts and surrounds the proposed Kahn Condo Complex.

72. Indeed, as the Planning Board itself recognized in its SEQRA EAF Parts II and III, approval of the Kahn Condo Complex *and* the Golf Course Condo Project would yield approximately 270 residential condominium units, instead of the 190-units project that was previously approved in 2012 in connection with CSCC and Kahn’s abandoned development project. Ex. 8 at p. 10.

73. Thus, in adopting the Resolution and the Local Law, the Town Board illegally segmented its environmental review of the Kahn Condo Complex and made no effort whatsoever to consider the cumulative impacts of the Petitioners’ Golf Course Condo Project (of which the Town was well aware) located right next door.

74. The Resolution and Local Law must be vacated and annulled because they are in violation of several statutory provisions of the Town Code and Town Law, the lawful procedures of the HBOD Code, are affected by an error of law and are arbitrary, capricious, and constitute an abuse of discretion.

75. Based on the foregoing, the Town Board’s conduct should be declared illegal, the Resolution and Local Law should be vacated and annulled, and the Town should be enjoined from hearing or granting any further approvals based on the Resolution and the Local Law.

76. Moreover, as described in detail below, the Town Board’s unlawful actions have already caused and threaten to further cause irreparable injury to Petitioners and their

development plans, by purporting to authorize the Kahn Condo Complex—an unplanned, high-density housing development—on an *ad hoc* and totally arbitrary basis, the exact opposite of what the Town Code and New York law requires.

77. Petitioners are therefore entitled to a stay of enforcement, together with temporary, preliminary and permanent injunctive relief requiring Respondents to refrain from granting any zoning approval unless and until they comply with the requirements of New York law.

78. Petitioners are further entitled to declaratory and injunctive relief prohibiting the Town from acting in further violation of New York law.

**THE TOWN'S HISTORIC BUILDING OVERLAY DISTRICT
AND REGULATORY FRAMEWORK**

A. The HBOD in 1996

79. In 1996, The Town Board adopted Resolution 1996-618 to enact Local Law No. 11 of 1996, entitled Special Historic Building Overlay District, to legalize Kahn's commercial uses of the Oheka Castle for weddings and catered events, concerts, flea markets and other ventures within a private residence in a residential zoning district. A true and correct copy of Resolution 1996-618, adopting Local Law Introductory No. 14-1996, is annexed hereto as Exhibit 9.

80. The 1996 HBOD amended §193-13 of the R-80 Residence District to include subsection (H) thereof, entitled "Uses of Historic Buildings and Buildings in Historic Districts," authorizing the Town Board to permit additional uses in an historic building and in buildings located within an historic district in addition to those permitted as-of-right. *See Ex. 9 §198-13(H)*.

81. The 1996 HBOD did not restrict the Town Board to the bulk, area and height

restrictions of the underlying zoning district. *Id.*

82. In 1997, the Town Board, through Resolution No. 1997-779, adopted Local Law Introductory Law No. 23-1997 and issued an “Additional Use Permit” to the Kahn Property for use as a banquet facility, spa, designer showcase and to exhibit the building to the public. A true and correct copy of Resolution 1997-779 adopting Local Law Introductory No. 23-1997 is annexed hereto as Exhibit 10.

83. Upon information and belief, the Kahn Property was not placed in the HBOD but granted a conditional use permit which permitted the above enumerated uses *within* the Oheka Castle, which is in the Town’s R-20 residential district.

B. The Current HBOD

84. In 2008, the Town Board revised its zoning code by Resolution No. 2008-652, which enacted Local Law Introductory No. 45-2008 amending the Town Code, Chapter 198 (Zoning), Article III (Residence District). That resolution and local law rescinded §198-13 (H) and replaced it with a new section in Article VI (Historic Landmarks and District), §198-42.1 entitled “Historic Building Overlay District.” A true and correct copy of Resolution 2008-652, adopting Local Law Introductory No. 45-2008 is annexed hereto as Exhibit 11.

85. The 2008 HBOD ordinance contained several substantive changes that limits the Town Board’s authority when it acts pursuant to the HBOD.

86. The enactment of Local Law Introductory No. 45-2008 was a new statute and amended the Town Code by creating §198-42.1.

87. Local Law 45-2008 and §198-42.1 of the HBOD Code provided the following mechanism by which existing historic buildings could be used for commercial purposes:

- (B) *Uses of historic buildings.* Notwithstanding any other provision of law to the contrary, in addition to those uses

permitted as-of-right in the zoning district where the historic building is located, the Town Board may permit additional uses after a public hearing, and in accordance with the applicable provisions of this Chapter.

88. Notably, Section 198-42.1(B)'s clarifying heading ("*Uses of historic buildings*") was intentionally included by the Town when the HBOD Code was enacted in 2008. *See* Ex. 11.

89. Unlike the clarifying heading of §198-13(H) of the rescinded HBOD Code (which applied to "Uses of Historic Buildings and Buildings in Historic Districts"), §198-42.1(B)'s clarifying heading applies only to "Uses of historic buildings." *Id.*

90. Thus, by its own terms, §195-42.1(B) is intended to allow non-permitted uses of (or within) historic buildings.

91. While the HBOD enables the Town Board to approve of additional uses in historic buildings located in the Town's HBOD, it does not allow the Town Board to approve of otherwise non-permitted uses in non-historic buildings and certainly not new construction projects located in the HBOD on land adjacent to a historic building, as was unlawfully done here.

92. This plain reading is not only consistent with the section heading of Town Code §198-42.1(B), but also consistent with the related interlocking sections and larger scheme of the HBOD Code.

93. HBOD §198-42.1 (C) requires that the property owner shall apply to the Town Board by filing an application for inclusion in the HBOD and follow the procedure set forth in the Town Code for a change of zone. *See* Ex. 11.

94. The HBOD Code §198-42.1(D) contemplates that a property owner must first apply to the Town Board for inclusion in the HBOD and establish certain minimum requirements to obtain a non-permitted use of *historic buildings*.

- (D) Minimum requirements. An applicant must establish, to the satisfaction of the Town Board, the following:
- (1) *The building or buildings in which* an additional use is sought has been designated a historic landmark in accordance with the provisions of the Code of the Town of Huntington.
 - (2) That *the historic building*, if in a residentially-zoned district, is located within a lot having more than fifteen (15) acres.
 - (3) The use would not create undue traffic congestion or hazard.
 - (4) The use would not negatively impact the value of surrounding properties or adversely affect the character of the neighborhood.
 - (5) There are no structural or decorative additions, alterations or modifications proposed or contemplated that would impair the exterior character of *the building*, or the historical, aesthetic or architectural significance of *the structure*.

Ex. 11 at § 198-42.1(D) (emphasis added).

95. The HBOD Code provides that the application must be forwarded by the Planning Department to the Huntington Historic Preservation Commission for its review and recommendation, including with respect to restrictions or conditions that should be established as a condition of approval. *Id.* §198-42.1(E).

96. With those recommendations in hand, the Town Board may, after a public hearing, approve an application, in whole or in part, and with or without special conditions and restrictions, or may deny the application. *Id.* §198-42.1(F).

97. The HBOD Code also provides examples of conditions the Town Board may impose as it deems necessary. *See id.* at §198-42.1 (H).

98. The HBOD then sets forth certain express statutory restrictions by providing that the bulk, area and height requirements (*i.e.*, density limitations) of the underlying zoning district shall continue to apply to the *historic building*, unless otherwise determined by the Town's ZBA. It states:

- (I) Restrictions: Notwithstanding any other provision of law to the contrary, the following shall apply:
- (1) *All of the bulk, area* and height requirements of the zoning district where the property is located *shall continue to apply to the historic building* unless otherwise determined by the Zoning Board of Appeals.

Id. at §198-42.1(I) (emphasis added).

99. Therefore, in the HBOD, a parcel of land located within the overlay district is subject to two sets of regulations: (i) the underlying zoning district requirements and (ii) the overlay district requirements.

100. This statutory guardrail is a density control restriction, limiting development of the property as restricted by the provisions set forth in the underlying zoning district.

101. Here, the HBOD Code allows for permitted additional uses within the historic building; its rules do not replace the density requirements that exist in the underlying R-OSC base zoning district.

102. This statutory density control is consistent with New York's Town Law §267-b under which Town ZBA's are vested with the exclusive power to grant or deny, in the first instance, area variances from zoning ordinances, as well as the power to grant area variances upon appeal.

103. Specifically, New York State Town Law §267-b (3) empowers ZBAs to grant area variances "upon an appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law" and enumerates the procedure for ZBA's to follow. NY Town Law §267-b (3) (a) & (b) (McKinney).

104. And, separately, New York State Town Law §274-b (3) directs that an application for an area variance in connection with a proposed special permit use may be made to a ZBA

pursuant to Town Law §267-b. *See* NY Town Law §274-b (McKinney).

105. Moreover, the Town Board acknowledged that only its ZBA can vary density requirements when it enacted the 2008 HBOD by Local Law. *See* Ex. 11 at §198-42.1(I). It therefore may not derogate its own lawful procedures under the HBOD Code by eliminating the role of the ZBA by fiat.

106. The HBOD also explains that where non-permitted uses of historic buildings are terminated or abandoned, they will convert to a conforming use as set forth in the provisions of the underlying base zoning district. *See* Ex. 11 at §198-42.1(I)(1).

THE R-OSC REGULATORY FRAMEWORK FOR CLUSTER SUBDIVISIONS

107. On or about March 9, 2010, the Town Board created the R-OSC district by Local Law No. 4-2010—a true and complete copy of which is annexed hereto as Exhibit 12—which mandates clustering of development (cluster subdivision) to provide for the preservation and enhancement of open space.

108. A critical issue for developers and the community relates to the number of lots or units, commonly referred to as lot “density” or “yield,” which the developer is permitted to build on a parcel or parcels of land.

109. A conventional subdivision divides a parcel of land into residential lots and streets laid out in strict compliance with the minimum zoning and subdivision regulations and other applicable regulations.

110. A “cluster subdivision” or “conservation subdivision” is a technique authorized by New York State Town Law whereby the local legislative body empowers the planning board, when approving subdivisions, including condominium developments, to modify the dimensional requirements of the zoning laws to group or “cluster” structures or lots on the most suitable

portion of the land, leaving other areas open to preserve the natural and scenic values of open space. *See* Town Law §278 (McKinney).

111. While providing flexibility to modify zoning regulations to achieve preservation and environmental goals of a municipality, the clustering of development may not achieve greater development density than would otherwise be permitted for a conventional subdivision. *See* Town Law § 278(3)(b) (McKinney).

112. Essentially, cluster subdivisions are density neutral, meaning that the overall number of lots (density) in a cluster subdivision must be at least the same, but in no case more than as for a conventional subdivision of the same parcel of land.

113. The cluster method is, in effect, a way of controlling density while allowing flexibility in the layout of residential units.

114. Specifically, New York Town Law § 278 statutorily limits the lot density in pertinent part as follows:

A cluster development shall result in a permitted number of building lots or dwelling units, *which in no case exceed the number which could be permitted...if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance in which such land is situated and conforming to all other applicable requirements.*

Town Law § 278(3)(b) (McKinney).

115. In other words, the density in a cluster subdivision cannot exceed the density of a conventional subdivision for the land upon which it is proposed.

116. The HBOD Town Code § 198-42.1 (I) is consistent with the above density restriction enshrined in Town Law § 278.

117. Here, the Town's R-OSC district was created to allow owners of properties containing recreational uses (such as a golf course) to cluster the overall yield of their subject

properties in a certain location to preserve the recreational use and open spaces of their properties. *See* Huntington Town Code § 198-21.3(A)(1).

118. As per Town Code § 198-21.3(B)(3) entitled “Use regulations,” in the R-OSC District, the following uses are permitted:

- (1) Outdoor recreational uses such as tennis courts, swimming pools, and golf courses.
- (2) Private recreational clubs.
- (3) One-family and multi-family homes, duplexes and townhouses, whether attached or detached, on properties containing fifteen (15) acres or more at the time of application for this zoning classification, when developed in accordance with the following requirements:
 - (a) One dwelling unit shall be permitted for every forty thousand (40,000) square feet of lot area.
 - (b) The project shall be designed as a cluster development to provide the open space required under § 198-21.3(E)(1).
 - (c) Open space shall remain accessible for recreational use in perpetuity.
 - (d) Conservation areas shall be managed in accordance with best management practices to preserve the environmental integrity of the property (wildlife and habitat management; chemical use reduction and safety; water conservation; water quality management; and outreach and education).

119. The R-OSC does not provide for any increase in density otherwise permitted for a conventional subdivision.

THE 2012 RESIDENCES @ OHEKA CHANGE OF ZONE

120. In 2012, Kahn and CSCC filed a joint application for a change of zone from the underlying R-10, R-20, R-40, R-80 Residence District and C-6 General Business district to the R-OSC and provided for the development of a 190-unit residential condominium project, known as the Residences @ Oheka Castle.

121. However, it is critical to note that the joint application combined the

approximately 170-acre Golf Course Property with the approximately 21.49-acre Kahn Property, totaling 195 acres for density purposes.

122. The development concept was to “cluster” the units on a smaller area of land to preserve the open space and recreational areas of the Golf Course Property and a small 5-acre portion of the undeveloped Kahn Property.

123. In 2012, the Town Board, by Resolution 2012-91 enacted Introductory Local Law 31-2011 and granted the joint application of Kahn and CSCC for a zone change to R-OSC. A true and correct copy of the Resolution 2012 is annexed hereto as Exhibit 13.

124. Resolution 2012-91 rezoned the entire 170-acre CSCC golf course property and a 5-acre portion of the overall 25-acre Kahn Property into the R-OSC district.

125. The balance of the Kahn Property, approximately 17 acres, (*i.e.*, the portion where the Castle is located), was not rezoned to the R-OSC district and remains in the R-20 district. *Id.*

126. The Residences @ Oheka project was approved by the Town Board as a cluster subdivision placing the “as-of right” residential development density from the Golf Course Property onto 18 acres located in between CSCC’s golf course club house and the Oheka Castle.

127. The approximately 170 acres that were rezoned R-OSC allowed for a cluster development of 190 dwelling units.

128. Of the total yield of 190 units, the 5.1⁴ acres that the overall Kahn Property contributed was only 5 units⁵ or less than 3% of the total number of units.

⁴ The acreage of the portion of the Kahn Property in the R-OSC was extrapolated from Town of Huntington Professional GIS system. A printout from the Huntington GIS is annexed hereto as Exhibit 14.

⁵ Density formula: there are 43,560 square feet in 1 acre. 43560 (square feet) multiplied by 5.1 (acres) equals 222,125 square feet). 221,156 (square feet) divided by 40,000 (the minimum area per dwelling unit in the R-OSC District yields 5.5 units.

129. Of the total yield, CSCC's 170-acre parcel contributed 185 units⁶ or greater than 97% of the total number of allowable units.

130. The R-OSC change of zone approval was conditioned upon the execution and recording of a Declaration of Covenants and Restrictions ("C&Rs") by both CSCC and Kahn. A true and correct copy of the C&R's is annexed hereto as Exhibit 15.

131. As stated in the C&Rs, a total of 190 condominium units was approved by the Town Board, because CSCC agreed to permanently preserve the golf course and/or open space in perpetuity by the filing of a conservation easement on the Golf Course Property.

132. The Residences @ Oheka ultimately received subdivision approval from the Town Planning Board for a 190-unit condominium complex.

133. Sometime after the R-OSC change of zone approval, the partnership between Kahn and CSCC dissolved, and the joint project was not brought to fruition.

134. However, as recently as February 27, 2023, Kahn's land use counsel continued to request an extension of the subdivision approval for the Residences @ Oheka, which is routinely granted by the Planning Board. A true and correct copy of the Subdivision Extension of Time is annexed hereto as Exhibit 16.

135. Since CSCC and Kahn are no longer pursuing a joint development, Kahn cannot cluster, or otherwise annex or appropriate any yield attributed to CSCC's property without CSCC's permission or consent.

136. Stated differently, Kahn has no entitlement to any residential yield attributable to the Golf Course Property.

⁶ 43,560 (square feet) multiplied by 170.1 (acres) equals 7,409,556 (square feet). 7,409,556 (square feet divided by 40,000 yields 185.2 units.

KAHN'S 2019 SUBDIVISION APPLICATION

137. In July 2019, Kahn submitted an application to the Town seeking to subdivide approximately 5 acres of the Kahn Property within the R-OSC District to develop a three-story 50-unit condominium facility on that portion of the property, which is not currently developed ("2019 Application"). A true and correct copy of the 2019 Application is annexed hereto as Exhibit 17.

138. In September 2019, the Town Planning Department issued a letter of denial ("Letter of Denial"), which indicated that the project contemplated under the 2019 Application would require a variance to increase the number of units permitted under the underlying R-20 and R-OSC zoning districts. A true and correct copy of the letter of denial is annexed hereto as Exhibit 18.

139. Specifically, the Letter of Denial noted that under the existing zoning, the proposed subdivision would yield only 20-units and that to reach the requested 50-units, a variance of the minimum lot area would be required. *Id.*

140. Upon information and belief, Kahn was attempting to use the entire Kahn Parcel's 21.95 acres to achieve maximum density on the 5-acre portion of the Kahn Property and would need to obtain significant variances to achieve the requested 50-unit total which is not permitted under the Town Code.

141. Upon information and belief, Kahn abandoned the 2019 Application.

THE TOWN BOARD AND KAHN EMBARK ON A SCHEME TO PERVERT THE PURPOSE AND INTENT OF THE HBOD AND MISAPPROPRIATE THE YIELD OF THE GOLF COURSE PROPERTY

142. On or about June 17, 2022, with the Kahn Property in receivership and facing imminent foreclosure, Kahn filed the Kahn 2022 application, which petitioned the Town Board

for a rezoning of the Kahn Property pursuant to §198-42.1(B). *See* Ex. 7.

143. Pursuant to SEQRA, included in this submission was an EAF Part I. *Id.*

144. The Kahn 2022 application requested as an “additional use” under the HBOD, authorizing construction of the Kahn Condo Complex, a stand-alone 202,000 square-foot, multi-family 4-story modern residential building with 95 condominiums with parking and supporting infrastructure on the 5.1⁷ portion of the Kahn Property located in the R-OSC.

145. The Kahn 2022 application did not meet the minimum statutory requirements for approval of any proposed non-permitted uses under Town Code § 198-42.1(D) because the Kahn Condo Complex is not a historic building and Kahn did not propose to construct the condominiums within Oheka Castle, which is the only historic building on the Kahn Property. *See* Ex. 4 at §198-42.1(D)(1) (“The *building or buildings in which an additional use is sought* has been designated a historic landmark...”) (emphasis added).

146. The “Height, Area and Bulk Regulations” of the Town’s zoning ordinance require that, in the underlying R-OSC district, the minimum area per dwelling unit is 40,000 square feet. A true and correct copy of the “Height, Area and Bulk Regulations” of the Town’s zoning ordinance as Chapter 198, Attachment 1, is annexed hereto as Exhibit 19.

147. There can be no dispute that under the HBOD, an applicant seeking a permit for an additional use within a historic building—*i.e.*, the very purpose for which this overlay district was enacted—must still comply with the underlying density restrictions, unless the ZBA determines otherwise.

148. The Town Board has no discretion to vary underlying density restrictions for historic buildings in the HBOD.

⁷ The 5.1-acre is extrapolated from the EAF Part I (D).1(b)(b) where it states “area to be physically disturbed 5 acres.” *Id.*

149. As set forth above, applying the underlying density restriction of the R-OSC District to the proposed Kahn Condo Complex limits the residential density of that portion of the overall Kahn Property to, at best, only five (5) condominium units.

150. Yet, under the Town Board's construction the HBOD Code, an applicant seeking a permit for an additional use in the HBOD *other than* to a historic building (like the Kahn Condo Complex) may flagrantly exceed the underlying density restrictions without any ZBA variance.

151. On January 24, 2023, the Planning Board allegedly completed the requisite SEQRA EAF Parts II and III which analyzed planning, zoning and environmental issues associated with the Kahn Condo Complex. *See* Ex. 8.

152. The Planning Board raised numerous issues with respect to the proposed Kahn Condo Complex, including but limited to, the facts that because the proposed building "is subject to the underlying zoning" (*i.e.*, the R-OSC zoning regulations), the project would require variances from the ZBA in connection with the building's height and shortage in parking. *See* Ex. 8 at p. 1.

153. The Planning Board also expressly stated that, assuming the underlying zoning applied to the development-for the reasons set forth therein, then the Kahn 2022 application to construct 95 residential units would require an area variance from the ZBA as well:

there are questions that remain to be answered about the allowable yield of the property under the Historic Building Overlay District. There is no mention of development yield in Section 198-42.1 of the Zoning Code. If the yield of the underlying R-20 and R-OSC zoning is found to apply then *95 residential units would not be possible without a variance from the Zoning Board of Appeals.*

Id. at p. 2 (emphasis added).

154. The Planning Board flagged several other issues pertinent to this Hybrid

Proceeding.

155. For example, it also correctly questioned whether the Town Board should approve the Kahn 2022 application, given that the proposed route of access to the Kahn Condo Complex was through CSCC's property:

While Oheka Castle has at least a prescriptive easement to cross Country Club land for service access to the Castle, it is not known whether there are any legal documents that would allow them to expand this right of access to a new building given the written objection of the property owner. As indicated in the Impact on Transportation section this issue affects the potential traffic impacts of the project. The local Cold Spring Hills Civic Association has also written to the Town on the access issue and has stated that they are only in support of a residential project if the access is through East Gate Drive.

See Ex. 8 at p. 2.

156. In fact, the Planning Board indicated that Kahn should be required to "submit proof of access rights across" the Golf Course Property. *Id.* at p. 8.

157. Critically, the Planning Board expressly recommended that the proposed Kahn Condo Complex "*not* be issued a determination pursuant to SEQRA until some further items are addressed," including, but not limited to:

- "whether Town Code Section 198-42.1 can be applied to a new building on a historic property, and not just the historic building itself";
- "whether a change in residential density is considered a use change" (*i.e.*, whether the application is even permitted under Town Code Section 198-42.1);
- "[t]he issue of road access" which "needs to be carefully considered";
- the submission of a "traffic study" which should be "reviewed by the Town to determine if East Gate Drive can support more traffic"; and
- "account[ing] for possible signalization at Jericho Turnpike or other mitigation, and whether the approval survives if East Gate Drive access is not obtained."

Id. at pp. 3-4 (emphasis added).

158. Further, the Planning Board acknowledged that the proposed Kahn Condo Complex must be considered together with the broader development plan in the R-OSC which “could see 270 new units, instead of the 190 units that was considered when the R-OSC zone change application was reviewed by the Town Board and subject to a completed SEQRA review [in 2012].” *Id.*

159. As noted by the Town’s own Planning Department in the EAF Part II and III, there were questions that remained unanswered about the allowable yield (*i.e.*, density) when the underlying zoning for the Kahn Property is R-20 and R-OSC.

160. On January 30, 2023, Petitioners, through counsel, submitted correspondence to the Planning Board objecting to and detailing multiple concerns associated with the Kahn 2022 application. A true and correct copy of the January 30, 2023, letter is annexed hereto as Exhibit 20.

161. On February 1, 2023, Kahn’s land use counsel unabashedly stated on the record before the Town Planning Board “we picked 95 units because it was *half of the original yield of 190* [of the prior 2012 joint condominium project].”⁸

162. Put another way, after Kahn’s failed attempt in 2019 to construct a 50-unit complex utilizing the yield from the Kahn Property, the Kahn 2022 application sought a 95-unit yield by misappropriating density from land it does not own or control—*i.e.*, **taking half** of the legally permitted yield from the Golf Course Property.

163. On February 1, 2023, the Planning Board issued a resolution (the “Planning Board Resolution”) to the Town Board regarding the Kahn 2022 application, noting “that there were a few issues of concern that have to be further investigated with this application” and

⁸ Planning Board Meeting (granicus.com) at 53:11.

“recommend[s] to the Town Board” that it:

- (1) Require and review an updated traffic study for the use of East Gate Drive by additional residential units [of the proposed CSCC 175-unit golf course development]
- (2) Ask [Kahn] to address comments by CSCC regarding their refusal to grant access across their property to serve the new [Condo Complex]; and
- (3) Consider whether the [HBOD] can be used to increase the available residential yield of a new building on the Oheka Castle property.

A true and correct copy the Planning Board resolution dated February 1, 2023 is annexed hereto as Exhibit 21.⁹

164. On February 6, 2023, Petitioners, through counsel, submitted correspondence to the Town Board objecting to the proposed Kahn Condo Complex, detailing the Kahn 2022 application’s jurisdictional and other deficiencies that were highlighted by representatives of Petitioners, as well as concerns raised by the Town’s Planning Department regarding the level of environmental review that is warranted for this application. A true and correct copy of this submission is attached as Exhibit 22.

165. Notwithstanding these fatal deficiencies, on February 7, 2023, the Town Board conducted a public hearing concerning the Kahn 2022 application. A true and correct copy of the transcript of the February 7, 2023 Town Board hearing is annexed hereto as Exhibit 23.

166. At the February 7, 2023 Town Board hearing, Town Board members improperly chastised CSCC’s counsel in this public forum for raising and defending the access issue.

167. Even worse, one of its Councilman implicitly acknowledged that the Town Board lacked the authority to approve the Kahn 2022 application under the HBOD, as written:

⁹ See also Planning Board Meeting (granicus.com) at 1:150:27, comments and revisions to the Planning Board discussed as part of the adoption of the Planning Board Resolution.

COUNCILMAN FERRO: But you can also change the code.

MR. ARMENTATNO (sic): You can always change the code, but today it's this code as you are aware. (*Id.* at 50)

* * * *

MR. ARMENTANO: Just to put that fine point on it and I won't proceed any longer, the real issue, I think you'll have to take very carefully is that the code does not allow this yield from what it exists on. These 5 acres do not allow you to give them 95 units. I think that's pretty clear.

COUNCILMAN FERRO: So if the code were changed –

Mr. ARMENTANO: Of course. You can always change the rules.

See Ex. 23 at 55-56.

168. On March 10, 2023, counsel for CSCC and CSDP submitted additional correspondence objecting to the adoption of the Resolution. A true and correct copy of the March 10, 2023 correspondence is annexed hereto as Exhibit 24.

169. On March 13, 2023, CSDP filed an application for Site Plan Approval with the Town of Huntington Planning, a true and correct copy of which is annexed hereto as Exhibit 25.

170. On March 14, 2023, the Town Board issued the Resolution granting the Kahn 2022 application, rescinding the above referenced C&Rs associated with the 2012 change of zone only with respect to the Kahn Property and with certain conditions, one of which was the establishment of a fund to be used for the preservation of Oheka Castle. A true and correct copy of Town Board Resolution 2023-125, enacting Local Law Introductory Number 37-2022 (the "March 14, 2023 Resolution"), is annexed hereto as Exhibit 26.

171. In the March 14, 2023 Resolution, the Town Board, without any documentation evidencing that it considered or addressed the numerous issues identified by the Planning Board in its EAF Parts II and III, stated that the Kahn 2022 application was an "unlisted" action under SEQRA, issued a "Negative Declaration" purportedly based on the reasons outlined in the

Planning Board's EAF Parts II and III and found that that the requirements for a SEQRA review were met ("Negative Declaration"). *See* Ex. 26.

172. On March 20, 2023, by special meeting, the Town Board amended the March 14, 2023 Resolution, again granting the Kahn 2022 application. *See* Ex. 1.

173. The March 20, 2023 Resolution's only substantive change to the March 14, 2023 Resolution was a clarification as to the specific entity that would administer the Oheka Castle preservation fund. *Id.* The Town Board did not address any of the issues set forth above.

174. On March 24, 2023, Petitioners submitted a Freedom of Information Law ("FOIL") request, seeking "a copy of Amended L[ocal] L[aw], as well as copies of the EAF Parts II and III, and/all SEQRA documents." As of April 13, 2023, the Town Planning Department responded that it is "still waiting for the EAF to be signed so that it is the official document." True and correct copies of the FOIL request and Town e-mail response are annexed hereto as Exhibit 27.

175. Accordingly, Petitioners have no understanding as to whether there exists a revised EAF Part II and III, upon which the Negative Declaration in the Resolution was based.

BLATANT SEQRA VIOLATIONS

A. Residences at Oheka II is a Type I Action, Not an Unlisted Action

176. By adopting and enacting the Resolution and Local Law, the Town Board violated SEQRA in several ways.

177. As an initial matter, the Town Board incorrectly stated in the Resolution that the Kahn 2022 application qualified as an "Unlisted" action instead of a "Type I" action. *See* Ex. 1.

178. Like the Resolution, the EAF Parts II and III—which apparently were never finalized—also incorrectly classify the Kahn 2022 application as an "Unlisted" action. *See*

Ex. 8.

179. The Town Board overlooked that a Type I action includes actions involving properties listed on the National Register of Historic Places that would change the allowable use affecting 6.25 acres or more of the applicable zoning district. 6 NYCRR §617.4(b)(2),(3),(9).

180. Per this standard, the Kahn application was a Type I action because it concerned property in excess of 6.25 acres (Ex. 7 at “Property Size”), is listed in that Register,¹⁰ and also resulted in the rescission of the C&Rs placed on the entire 21.95-acre Kahn Property (Ex. 1).

181. In 2012, the Town Board Resolution #2012-91 for the joint application of the Kahn Property and CSCC Golf Course Property properly classified that prior action as a Type I action, because of the historic designation of the Oheka Castle. *See* Ex. 13.

182. Pursuant to SEQRA, a Type I action is “more likely to require the preparation of an (Environmental Impact Statement) than an Unlisted Action” and is *presumed* to have a significant adverse environmental impact. *See* 6 NYCRR 617.4(a).

183. Here, the Town Board did not require any EIS.

B. The Town Board Improperly Prematurely Issued a Negative Declaration Without Supporting Documentation or Any Reasoned, Written Analysis

184. Second, under SEQRA, “a negative declaration must meet the requirements of subdivision 617.7(b) of this Part” (6 NYCRR 617.12(a)(2)(i)), including by “set[ting] 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)(4).

185. The Town Board’s Negative Declaration failed to set forth in written form a reasoned elaboration with reference to supporting documentation, as required by SEQRA.

186. In fact, the Town Board’s reliance on the Planning Board’s EAF Parts II and III is

¹⁰ *See* <https://catalog.archives.gov/id/75322200> (listing Oheka).

inexplicable, given that the EAF specifically recommended that the Town Board *not* issue an SEQRA determination until the various issues identified therein were considered and addressed, and the Town Board has *never* provided any evidence that it did so.

187. Moreover, although Petitioners have no understanding as to whether there exists a revised EAF Parts II and III, given the Town's acknowledgement that the EAF Parts II and III were not finalized when the Resolution was adopted—apparently, it *still* has not been finalized—the Town Board was not permitted to issue a Negative Declaration and therefore explicitly violated SEQRA, because no agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA. *See* 6 NYCRR 617.3(a).

C. Illegal Segmentation

188. In addition, the SEQRA regulations and well settled caselaw have long held that the proper exercise of environmental review requires that the lead agency, here the Town Board, consider the entirety of the development plan and not in a piecemeal fashion.

189. SEQRA defines “segmentation” as “division of the environmental review of an action such that various activities or stages are addressed under [SEQRA] as though they were independent, unrelated activities, needing individual determination of significance.” 6 NYCRR § 617.2(ah).

190. Segmentation of an action is contrary to the intent of SEQRA. *See* 6 NYCRR 617.3 (g).

191. This “segmentation rule” prevents applicants and agencies from excluding certain activities from a project, thereby circumventing the detailed review required by SEQRA, and will result in the invalidation any SEQRA review.

192. Notwithstanding these SEQRA requirements, the Kahn 2022 application EAF

Part I, only references its 21.95 acres, intentionally excluding the submitted development plan of the Golf Course Condo Project.

193. Yet, recognizing the clear relatedness of the CSCC Golf Course Project, Kahn submitted with its application the C&Rs from the 2012 approval, which unequivocally burden the overall 192 acres of both the Kahn Property and the CSCC Golf Course Property. *See* Ex. 15.

194. Thus, given the clear relationship between the Kahn Property and the Golf Course Property, by entertaining the Kahn 2022 application in a vacuum, the Town Board unlawfully segmented its SEQRA review responsibilities by not including any analysis of the potential development on the Golf Course Property in its cumulative environmental review.

195. The segmentation of environmental review that the Kahn 2022 application requested for the Kahn Condo Complex separate and apart from the currently pending application to build 175 condominium units on the Golf Course Property is improper under SEQRA.

196. The Town Board's improper segmentation of the Kahn Condo Complex from the Golf Course Condo Project instead of considering the cumulative impact of these developments is further supported by the Planning Board's acknowledgement in its EAF Parts II and Part III, of: (1) the possibility of 279 new units instead of the 190 units previously approved; (2) the potential to construct 184 units on CSCC's property and (3) the need for a traffic study to consider the cumulative impacts of these projects. *See* Ex. 8 at p. 10.

197. Moreover, in further violation of the requirement of SEQRA, when the Town Board adopted the Resolution and Local Law, it did not undertake any environmental or traffic study or analysis explaining how the HBOD and underlying existing zoning code to permit the

development of the stand-alone 95-unit Kahn Condo Complex in the HBOD District.

198. In light of the foregoing, the Town Board was not permitted to approve the Resolution and enact the Local Law because it failed to comply with the provisions of SEQRA. *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.”).

**THE RESOLUTION AND LOCAL LAW DEROGATED THE
LAWFUL PROCEDURES OF THE HBOD CODE AND
EXCEEDED THE TOWN’S BOARD AUTHORITY**

199. Nor did the Town Board evaluate any of the HBOD density restraints previously raised in written submissions to the Town Board, notwithstanding the fact that the Kahn 2022 application grossly deviated from the underlying density restrictions of the R-OSC District under the Town Code.

200. By adopting the Resolution enacting the Local Law pursuant to HBOD § 198-42.1(B), the Town Board necessarily acted without authority and in violation of New York State Town Law by usurping the ZBA’s exclusive zoning jurisdiction to grant or deny, in the first instance, area variance(s) for residential unit density from the Town’s zoning ordinance.

201. The Town Board also acted in derogation of the plain text of, and lawful procedures required by, the HBOD, since §198-42.1(B)’s scope limits the Town Board’s authority to permitting uses of a historic building in addition to those already permitted in the underlying zoning district, provided such additional uses otherwise comply with the underlying density restrictions.

202. Nevertheless, under the Town Board’s construction of the HBOD zoning regulations, an applicant seeking a permit for an additional use of a non-historic building that exceeds underlying density would not need an ZBA variance.

203. In addition, no consideration was given whatsoever by Kahn or by the Town Board of the unresolved and unproven access issues to which Kahn has no legal right.

204. To the contrary, in violation of the express requirements of the HBOD and New York law, the Town Board reserved to itself the sole and unfettered discretion to determine whether the proposed 95-unit Kahn Condo Complex was appropriate.

**THE RESOLUTION AND LOCAL LAW IGNORED THAT
KAHN HAS NO LEGAL RIGHT TO THE PROPOSED
VEHICULAR ACCESS TO ITS PROPOSED DEVELOPMENT**

205. A major and dispositive obstacle to this proposed development concerns vehicular access to the Kahn Condo Complex.

206. The plans filed in support of the Kahn 2022 application depict an entrance to the condominium development from East Gate Drive and over property owned by CSCC. *See* Ex. 7.

207. While there is purportedly a limited access easement over a portion of the CSCC's property for delivery vehicles only to access Oheka Castle, Kahn has no rights whatsoever to utilize any portion of the CSCC property for any purpose other than delivery vehicles only.

208. Further, to the extent the application proposes to use any portion of CSCC's property for a septic system or for access to any municipal sewer system, Kahn has no legal right to same and CSCC has not issued and will not issue permission authorizing same.

209. Petitioners repeatedly raised with the Town Board, their vehement objections to Kahn's proposed use of Petitioners' property—East Gate Drive and the Spur—for access to the Kahn Condo Complex. *See* Ex. 20 at pp. 12-13; Ex. 22 at pp. 6-7; Ex. 23 at 83:17-90:17, 95:11-97:8; Ex. 24 at pp. 5-6.

210. Petitioners explained that Kahn possessed no written instrument, recorded or

unrecorded, which authorizes its access through East Gate Drive and via the Spur. *See* Ex. 24 at p. 5.

211. Crucially, Kahn did not dispute this fact. *See* Ex. 23 at 19:11-13; 83:3-9; 90:9-10; 95:12-14.

212. A separate lawsuit styled *Kahn Property Owner, LLC, et al. v. Fruchthandler, et al.*, Index No. 622421/2021 (Sup. Ct. Suffolk Cnty.) (“Kahn Easement Lawsuit”) is presently pending before this Court to determine what rights if any, Kahn has to cross CSCC’s property.

213. Petitioners advised the Town Board of the pendency of the Kahn Easement Lawsuit. *See* Ex. 24 at pp. 5.

214. Nevertheless, the Resolution and Local Law *required* that access to the Kahn Condo Complex *emanate* through Petitioners’ property unless Kahn was actively *precluded* from doing so. *See* Ex. 1 at p. 5 ¶ 3 (“3 Primary Access to and from [the Kahn Condo Complex] *must emanate from East Gate Drive*, and if the applicant is precluded from using East Gate Drive, the applicant shall apply to the Town Board for any modifications to the plan, including an alternate access point.”).

215. The Town Board effectively decreed into law that Kahn must use property to which it has no right unless it was stopped from doing so.

216. But such law is clearly in error, since Kahn never demonstrated—and the Town Board never required it to demonstrate—that it has any legal right to do so.

217. The Town Board’s refusal to await a determination in the Kahn Easement Lawsuit on this very issue highlights the arbitrary and capricious nature of the Resolution and Local Law.

**UNDER THE RECEIVERSHIP ORDER,
KAHN WAS WITHOUT AUTHORITY TO MAKE ITS APPLICATION
AND ANY PERMITS DERIVED THEREFROM WILL NOT INURE TO ITS BENEFIT**

218. As stated above, in the Receivership Order in the Mortgage Foreclosure Proceeding, the “Receivership Property” includes among other things:

The [Kahn] Property and:

(7) All permits, licenses (including liquor licenses), certificates of occupancy or other certificates or governmental approvals....pertaining to the Property and the operations of the Property.

See Ex. 5 ¶ 1.3(7).

219. As of January 3, 2019, the Effective Date of the Receivership Order, the Receiver was “authorized to direct and take immediate possession and full control of the Receivership Property and take such other actions as the Receiver deems reasonable and appropriate to take possession of, exercise full control over, prevent waste at, and to preserve, protect and maintain secure and safeguard the Receivership Property.” *Id.* ¶ 2.4.

220. Under the Receivership Order, Kahn is “enjoined, restrained from, and shall not” among other things:

(5) Transfer or Encumber the Receivership Property. Expend, disburse, transfer, assign, sell, convey, devise, pledge, mortgage, create a security interest in, encumber, conceal, or in any matter whatsoever dispose of the whole or any part of the Receivership Property, including, but not limited to, the [r]ents, **without prior Court order.**

See Ex. 5 ¶ 4.3(5).

221. Upon information and belief, there is no court Order allowing Kahn to make the Kahn 2022 application.

222. Upon information and belief, Kahn is without authority to do so under the Receivership Order.

223. Upon information and belief, the Receiver did not file or consent to the filing of the Kahn 2022 application.

224. Any rights obtained by Kahn through the Kahn 2022 application inure to the benefit of the Receiver and not Kahn.

225. By virtue of the Receivership Order, Kahn has no ability to commence construction or apply for any permits or approvals based on the rights obtained by or through the Resolution or the Local Law.

226. If Kahn were to take any further steps to advance the approval process, including obtaining any permits or approval, based on any rights obtained by or through the Resolution or Local Law, they would inure to the benefit of the Receiver (and not to Kahn).

227. On February 23, 2023, the court granted the Trust's summary judgment motion to foreclose and sell the Kahn Property. A true and correct copy of the court Order granting summary judgment in the foreclosure action is annexed hereto as Exhibit 28.

228. For that reason alone, the Resolution and Local Law must be annulled by this Court.

**THE TOWN BOARD FAILED TO COMPLY WITH
THE SUFFOLK COUNTY ADMINISTRATIVE CODE
REQUIRING ANNULMENT OF ITS DETERMINATIONS**

229. Upon information and belief, on or about February 10, 2023, the Town Planning Department submitted certain documents to the SCPC in attempted compliance with SCAC § A14-24 and § A14-26.

230. Zoning and planning actions in Suffolk County must comply with the referral requirements of SCAC, which requires review and recommendation over a slightly expanded scope *and timing* of zoning actions within the county as compared to GML § 239-m.

231. The SCAC requires that, before taking final action, the Town Board refer land-use applications concerning properties located within 500 feet of County or state highways or roads to the SCPC for review and recommendation. *See* SCAC §A14-22[A][3] & §A14-24[A][3].

232. Pursuant to SCAC §A14-14 (A)(3), entitled, “Referral of Certain Municipal Zoning Action to [SCPC]”:

Each town and village in Suffolk County having jurisdiction to adopt or amend zoning regulations shall, *before taking final action*, refer to the Planning Commission any zoning regulation or any amendment thereof (hereinafter referred to as "municipal zoning action") which would change the district classification of or the regulations applying to real property lying within one mile of a nuclear power plant or airport or within a distance of 500 feet from:

- The right-of-way of any existing or proposed County or state parkway, thruway, expressway, road or highway

233. Pursuant to SCAC §A14-15(C), entitled, “Notice of Referrals; Consideration of Municipal Zoning Actions By [SCPC],” the SCPC is afforded 45 days to issue a report, absent which the proposal is deemed to have been approved at the expiration of the 45-day period:

Subject to the provisions of §§A14-20 and A14-21, upon the referral of a municipal zoning action to the Planning Commission, the Commission, *within 45 days after receipt of a full statement on the proposed action* and after due consideration, may, by resolution, render a report indicating that the proposed action has no significant Countywide or intercommunity impact, render a report approving the proposed action without change, render a report recommending changes in the proposed action and approving the proposed action with such changes or render a report disapproving the proposed action. If the proposed municipal zoning action is not acted upon by the Planning Commission within said forty-five-day period, then the proposed municipal zoning action, as filed or as referred to said Commission, shall be deemed to have been approved as of the expiration of the forty-five-day period. For the purposes of this subsection, "acted upon" shall mean approved, rejected, approved with modifications or approved subject to conditions.

234. A Town Board’s failure to comply with the SCAC’s referral requirements constitutes a jurisdictional defect, rendering its action void *ab initio*.

235. The Kahn 2022 application concerns land located the Town of Huntington in Suffolk County within 500 feet of State Route 25 (Jericho Turnpike) and is, therefore, subject to the SCAC referral procedure.

236. The SCPC received the Town’s referral on February 10, 2023 for a hearing on April 4, 2023. A true and correct copy of the Town’s referral to the SCPS is annexed hereto as Exhibit 29.

237. Simply put, the Town Board adopted the Local Law approving the Kahn application on March 20, 2023, *before* the SCPC adopted its resolutions.

238. The Town Board did not have jurisdiction to act until the time standard outlined in the SCAC had been satisfied. *See* SCAC §A14-14 (A)(3), SCAC §A14-15 (C).

239. This procedural failure is a fatal jurisdictional defect which renders the Resolution and Local Law enactment invalid.

AS AND FOR A FIRST CAUSE OF ACTION
(RELIEF UNDER ARTICLE 78 OF THE CPLR)

240. Petitioners repeat and realleges paragraphs 1 through 239 as if fully set forth at length herein.

241. Under CPLR § 7803(2), a petitioner may commence a proceeding where a body or officer acts or threatens to act without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction.

242. Under CPLR § 7803(3), a petitioner may seek the review and annulment of a determination that was made in violation of lawful procedure, was affected by an error of law or

was arbitrary and capricious or an abuse of discretion.

243. The Resolution and Local Law were adopted by the Town Board in violation of lawful procedure, the adoption was affected by errors of law, was arbitrary, capricious and an abuse of discretion, and rests upon factual findings and determinations that are both unsupported, by and contrary to the Record before the Town Board.

244. The Town Board is prohibited from approving the Kahn 2022 application by adopting the Resolution and Local Law without complying with the requirements and limitations imposed by the Town Code HBOD.

245. The Town Board does not have the jurisdiction to supersede the Huntington Town Code provisions of the HBOD or the bulk and area requirements of the underlying R-OSC zoning district.

246. By reason thereof, a Judgment should be rendered pursuant to the Town Code HBOD and CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

AS AND FOR A SECOND CAUSE OF ACTION

(RELIEF UNDER ARTICLE 78 OF THE CPLR)

247. Petitioners repeat and realleges paragraphs 1 through 246 as if fully set forth at length herein.

248. Under CPLR § 7803(2), a petitioner may commence a proceeding where a body or officer acts or threatens to act without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction.

249. Under CPLR § 7803(3), a petitioner may seek the review and annulment of a determination that was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.

250. The Resolution and Local Law were adopted by the Town Board in violation of lawful procedure, the adoption was affected by errors of law, was arbitrary, capricious and an abuse of discretion, and rests upon factual findings and determinations that are both unsupported, by and contrary to the Record before the Town Board.

251. The Town Board is prohibited from approving the Kahn 2022 application by adopting the Resolution and Local Law without complying with the requirements and limitations imposed by New York Town Law § 267-b.

252. The Town Board does not have the jurisdiction to supersede the jurisdiction of the Town ZBA for any area variances in connection with the Kahn 2022 application pursuant to Town Law § 267-b.

253. The ZBA is the only board that can vary density pursuant to Town Code HBOD §198-42.1(I)), and thus the Town Board may not derogate its own lawful procedures under the HBOD Code by eliminating the role of the ZBA.

254. By reason thereof, a Judgment should be rendered pursuant to New York State Town Law § 274-b and CPLR Article 78, invalidating, rescinding, and annulling the Resolution and Local Law.

AS AND FOR A THIRD CAUSE OF ACTION

(RELIEF UNDER ARTICLE 78 OF THE CPLR)

255. Petitioners repeat and realleges paragraphs 1 through 254 as if fully set forth at length herein.

256. Under CPLR § 7803(2), a petitioner may commence a proceeding where a body or officer acts or threatens to act without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction.

257. Under CPLR § 7803(3), a petitioner may seek the review and annulment of a

determination that was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.

258. The Resolution and Local Law were adopted by the Town Board in violation of lawful procedure, the adoption was affected by errors of law, was arbitrary, capricious and an abuse of discretion, and rests upon factual findings and determinations that are both unsupported, by and contrary to the Record before the Town Board.

259. The Town Board is prohibited from approving the Kahn 2022 application by adopting the Resolution and Local Law without complying with the requirements and limitation imposed by New York Town Law § 278, which governs the Town's cluster subdivision authority.

260. The Town Board does not have the jurisdiction to grant density/variance bonuses in connection with the Kahn 2022 application pursuant to Town Law § 278, which statutorily limits the permitted number of building lots or dwelling units, which in no case exceed the number which could be permitted under the underlying R-OSC zoning district.

261. By reason thereof, a Judgment should be rendered pursuant to New York State Town Law § 278 and CPLR Article 78, rescinding, and annulling the Resolution and Local Law.

AS AND FOR A FOURTH CAUSE OF ACTION

(RELIEF UNDER ARTICLE 78 OF THE CPLR)

262. Plaintiff repeats and realleges paragraphs 1 through 261 as if fully set forth at length herein.

263. Under CPLR §7803(2), a petitioner may commence a proceeding where a body or officer acts or threatens to act without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction.

264. Under CPLR §7803(3), a petitioner may seek the review and annulment of a

determination that was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.

265. 6 NYCRR 617.3(a) provides: “No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA.”

266. The Resolution and Local Law are legislative actions subject to SEQRA but the Town Board failed to comply procedurally and substantively with SEQRA.

267. The Town Board failed to fulfill their obligations required by SEQRA in several ways.

268. *First*, the Town Board incorrectly stated in the Resolution that the Kahn 2022 application qualified as an “Unlisted” action instead of a “Type I” action. Pursuant to SEQRA, a Type I action is more likely to require the preparation of an EIS than an Unlisted Action and is *presumed* to have a significant adverse environmental impact.

269. Because the Town Board improperly concluded that proposed Kahn Condo Complex was an Unlisted action instead of a Type I action, it did not require Kahn to submit an EIS as required.

270. *Second*, pursuant to SEQRA, 6 NYCRR Part 617.12(a)(2)(i), “a negative declaration must meet the requirements of subdivision 617.7(b) of this Part,” *i.e.*, “set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.”

271. The Town Board issued a Negative Declaration without setting forth in written form any reasoned elaboration and supporting documentation, as required. Moreover, the Planning Board has acknowledged that the EAF Parts II and III were not finalized when the Resolution was adopted. As such, the Town Board was not permitted to issue a Negative

Declaration and violated SEQRA.

272. The Town Board did not perform its duty to take a “hard look” at the potential environmental impacts of the Kahn Condo Complex as there was no basis for its issuance of the Negative Declaration, and no corresponding reasoned elaboration or factual underpinnings for it, all in violation of SEQRA’s mandates.

273. *Third*, The Town Board violated SEQRA by segmenting its analysis of the Kahn Condo Project and the Golf Course Condo Project and failing to consider the cumulative impact of both developments. Furthermore, the Town Board violated SEQRA by adopting and enacting the Resolution and Local Law without undertaking any environmental or traffic study or analysis of whether the HBOD and underlying existing zoning code permit the development of the stand-alone 95-unit Kahn Condo Complex in the HBOD District.

274. Accordingly, Petitioners respectfully request that this Court issue an Order and Judgment vacating and invalidating the Resolution and Local Law based upon the Town Board’s failure to comply with the mandates of SEQRA.

275. By reason thereof, a Judgment should be rendered pursuant to SEQRA and CPLR Article 78 invalidating, rescinding and annulling the Resolution and Local Law.

AS AND FOR A FIFTH CAUSE OF ACTION
(RELIEF UNDER ARTICLE 78 OF THE CPLR)

276. Plaintiff repeats and realleges paragraphs 1 through 275 as if fully set forth at length herein.

277. Under CPLR § 7803(2), a petitioner may commence a proceeding where a body or officer acts or threatens to act without jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction.

278. Under CPLR § 7803(3), a petitioner may seek the review and annulment of a

determination that was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.

279. The Resolution and Local Law require that “Primary Access to and from [Kahn Condo Project] *must* emanate from East Gate Drive, and if the applicant is precluded from using East Gate Drive, the applicant shall apply to the Town Board for any modification to the plan, including an alternate access point.” Ex. 1.

280. The Resolution and Local Law are affected by an error in law, since Kahn never demonstrated—and the Town Board never required it to demonstrate—that it has any legal right to access the Golf Course Property for the Khan Condo Complex.

281. The Town Board acted in an arbitrary and capricious manner by failing and refusing to wait for a determination in the Kahn Easement Lawsuit concerning what rights, if any, Kahn has to cross the Golf Course Property (including Kahn’s claim to possess an easement by prescription to use the Golf Course Property for a purpose that does not yet exist) before adopting and enacting the Resolution and Local Law.

282. By reason thereof, a Judgment should be rendered pursuant to CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

AS AND FOR A SIXTH CAUSE OF ACTION

(DECLARATORY JUDGMENT UNDER §3001 OF THE CPLR)

283. Plaintiff repeats and realleges paragraphs 1 through 282 as if fully set forth at length herein.

284. The Town Board is prohibited from approving the Kahn 2022 application by adopting the Resolution and Local Law without complying with the requirements and limitations imposed by the Town Code HBOD, New York Town Law § 274-b and New York Town Law § 278.

285. The Town Board's legislative enactment of the Resolution and Local Law violated the Town Code HBOD, New York Town Law § 274-b and New York Town Law § 278.

286. Accordingly, Petitioners-plaintiffs are entitled to a Judgment declaring that the Resolution and Local Law are null and void as violative of the Town Code HBOD, New York Town Law § 274-b and New York Town Law § 278.

AS AND FOR A SEVENTH CAUSE OF ACTION

(DECLARATORY JUDGMENT UNDER §3001 OF THE CPLR)

287. Plaintiff repeats and realleges paragraphs 1 through 286 as if fully set forth at length herein.

288. Zoning and planning actions in Suffolk County must comply with the referral requirements of the SCAC.

289. SCAC §A14-14 requires that towns and villages refer to the SCPC any zoning regulation or amendment located within Suffolk County.

290. The Kahn 2022 application concerns land located in the Town of Huntington in Suffolk County within 500 feet of New York State Route 25 (Jericho Turnpike) and is, therefore, subject to the SCAC referral procedure.

291. According to the official records of the SCPC, the Town Board adopted the Resolution and Local Law *before* the SCPC adopted its resolution concerning the Kahn 2022 application.

292. The Town Board failed to comply with the referral requirements of the SCAC.

293. The failure to comply with the referral requirements of the SCAC is a jurisdictional defect which renders the adoption of the Resolution and Local Law invalid.

294. Inasmuch as the Town Board's actions in adopting the Resolution and Local Law prior to complying with the referral requirements of the SCAC are invalid, the Resolution and

Local Law are null and void.

295. Accordingly, Petitioners are entitled to a judgment declaring that the Resolution and Local Law are null and void as violative of the SCAC.

AS AND FOR AN EIGHTH CAUSE OF ACTION

(STAY, PRELIMINARY AND PERMANENT INJUNCTION)

296. Plaintiff repeats and realleges paragraphs 1 through 295 as if fully set forth at length herein.

297. Petitioners are entitled to a preliminary injunction, emergency stay, and temporary restraining order pursuant to CPLR §§ 7805, 6301 and 6313, (i) enjoining the enforcement and enactment of the Resolution and Local Law and pending the final determination of this proceeding, and (ii) enjoining Kahn from taking any further steps to advance the approval process, including by obtaining any permits, approvals or commencing construction based on any rights obtained by or through the Amended Local Law and Resolution.

298. Petitioners have established not only a substantial likelihood of success on the merits, but a certainty of success.

299. Petitioners will suffer irreparable injury unless the Court issues an injunction with temporary restraints.

300. As alleged, the Town Board has repeatedly and willfully violated the requirements and limitations of the HBOD and New York State Law to advance their single-minded and unlawful plan to approve the construction of 95 condominium units on the Kahn Property.

301. Since the Town Board has authorized unplanned, high-density housing on an *ad hoc* and totally arbitrary basis and illegally segmented the review of the Kahn Condo Complex from Petitioners' own pending application to construct condominiums on the Golf Course

Property, the Town Board's Resolution and Local Law has made it impossible for Petitioners to obtain their approval for their Golf Course Project and, in turn, has substantially diminished the property's value.

302. Absent an injunction staying enforcement of the illegal Resolution and Local Law, Petitioners' property will be significantly prejudiced because the CSCC's property will be rendered largely undevelopable.

303. Petitioners are now being forced to seek approvals from the Town (possibly including the preparation of an EIS under SEQRA) against the backdrop of the Town's illegally segmented analysis of the Kahn 2022 application, knowing full well that the Town will ultimately reject such an application and will not permit Petitioners to make use of the yield supported by their own property.

304. Indeed, the President of the Cold Spring Hills Civic Association spoke at a February 1, 2023 Planning Board hearing and stated on the record that the association would not support more condominiums than were originally approved (*i.e.*, 190 units).¹¹

305. Town Supervisor Edmund J. Smyth commented on the record that CSCC "now ha[s] the most valuable piece of unbuildable land on Long Island." Ex. 2 at 164:14-20.

306. If Kahn or some purchaser of the Kahn Property was permitted during the pendency of this proceeding to apply for or obtain further governmental approval to advance the Kahn Condo Complex based on the illegal Resolution and Local Law, it could needlessly consume local government and tax payer dollars.

307. If Kahn or some purchaser of the Kahn Property was permitted during the pendency of this proceeding to commence construction based on the illegal Resolution and Local

¹¹ See videotaped recording of this meeting at 1:36:00, which is available at: https://huntingtonny.granicus.com/player/clip/3105?view_id=3&redirect=true&h=e9018eac8b4d254d7ca7bce43ea909ef; see also February 7, 2023 Town Board Hearing, Ex. 23 at 64:2-9.

Law, it could potentially require them to restore the land to its original intended purpose.

308. Either scenario could create unnecessary economic waste.

309. Further, the Town Board's conduct is an *ultra vires* act that provides a sufficient predicate for a finding of irreparable harm.

310. The balance of equities militates in favor of the issuance of injunctive relief, since the enormous risk of irreparable harm to Petitioners greatly outweighs any potential harm to Kahn if an injunction is issued to protect the status quo.

311. Indeed, any short delay to Kahn's development plans could not harm Kahn since the property is in foreclosure and the Temporary Receiver did not make the Kahn 2002 application.

312. As such, staying the enforcement of the Town Board's Resolution—which does not even inure to Kahn's benefit—cannot harm Kahn.

313. Moreover, an injunction would cause no harm to the Town Board or any other administrative agencies, since, as discussed above, a finding that the Local Law and Resolution is an *ultra vires*, unreasonable, arbitrary or capricious act, would save the local government's resources and unnecessary economic waste.

WHEREFORE, Petitioners-Plaintiffs demand judgment on the Hybrid

Proceeding as follows:

A. On the First Cause of Action, invalidating, rescinding and annulling the Resolution and Local Law as arbitrary and capricious, illegal and unlawful, and/or an abuse of discretion.

B. On the Second Cause of Action, pursuant to New York State Town Law § 274-b and CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

C. On the Third Cause of Action, pursuant to New York State Town Law § 278 and CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

D. On the Fourth Cause of Action, pursuant to SEQRA and CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

E. On the Fifth Cause of Action, pursuant to CPLR Article 78, invalidating, rescinding and annulling the Resolution and Local Law.

F. On the Sixth Cause of Action, declaring that the Resolution and Local Law are null and void as violative of the Town Code HBOD, New York Town Law §274-b and New York Town Law § 278.

G. On the Seventh Cause of Action, declaring that the Resolution and Local Law are null and void as violative of the SCAC.

H. On the Eighth Cause of Action, a preliminary injunction, emergency stay, and temporary restraining order pursuant to CPLR §§ 7805, 6301 and 6313, (i) enjoining the enforcement and enactment of the Amended Local Law and Resolution pending the final determination of this proceeding, and (ii) enjoining Kahn from taking any further steps to advance the approval process, including by obtaining any permits, approvals or commencing construction based on any rights obtained by or through the Amended Local Law and Resolution.

Dated: Hauppauge, New York
April 17, 2023

AVRUTINE & ASSOCIATES, PLLC
ATTORNEYS AT LAW

By:



Howard D. Avrutine
2116 Merrick Avenue
Merrick, New York 11566
*Attorneys for Petitioners/Plaintiffs
Cold Spring Country Club, Inc.*

-and-

FARRELL FRITZ, P.C.
100 Motor Parkway
Hauppauge, New York 11788
(631) 547-8400
*Attorneys for Petitioners/Plaintiffs
Cold Spring Development Partners, LLC*

-and-

HERRICK FEINSTEIN LLP
Two Park Avenue
New York, New York 10016
(212) 592-1475
*Attorneys for Petitioners/Plaintiffs
Cold Spring Development Partners, LLC*

To: TOWN OF HUNTINGTON,
TOWN BOARD OF THE TOWN
OF HUNTINGTON
100 Main Street
Huntington, New York 11743

KAHN PROPERTY OWNER, LLC
135 West Gate Drive
Huntington, New York 11743

JEFFREY KOLESSAR, VICE PRESIDENT OF DEVELOPMENT
AT GF MANAGEMENT LLC AS RECEIVER
1628 John F. Kennedy Boulevard
8 Penn Center 23rd Floor
Philadelphia, Pennsylvania 19103

DAVID I. ROSENBERG, ESQ. AS REFEREE.
666 Old Country Road, Suite 810
Garden City, New York 11530

