

STATE OF NEW YORK  
TOWN OF FORESTBURGH

COUNTY OF SULLIVAN  
ZONING BOARD OF APPEALS

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In the Matter of the Application of:

ROSE IMPROVEMENT and  
LOST LAKE HOLDINGS LLC and

*Applicants – Petitioners*

For Building Permits for Lost Lake Resort Lot 303, and Lots 293, 295,  
297, 298, 300, 389, 392, 393, 394, 395, 396, 397, 398, and 399.

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**RULING ON  
PETITIONS FOR  
APPEAL AND INTERPRETATION**

Dated: November 15, 2022

## **I. INTRODUCTION**

Appellants Lost Lake Holdings LLC (“LLH”) and Rose Improvement (“Rose”) (“LLH” or “Applicant”) appeal the Town of Forestburgh (“Town”) Building Department’s November 23, 2021 denial of an application for a building permit for a single-family unit on lot 303 in the planned development district known as the Lost Lake Resort (“Resort” or the “Project”). Applicant also appeals the Building Department’s January 14, 2022 rejection of Applicant’s January 6, 2022 applications for building permits to construct single-family units on PDD Resort Lots 293, 295, 297, 298, 300, 389, 392, 393, 394, 395, 396, 397, 398, 399.

## **II. SUMMARY OF ISSUES ON APPEAL**

The primary issue on appeal is whether the Town Building Inspector properly denied Applicant’s Lot 303 building permit application based on a finding that Applicant’s application materials were deficient and inconsistent with prior project approvals.

Applicant seeks to overturn a November 23, 2021 determination by the Town Building Inspector denying Applicant’s application for a building permit for a single-family dwelling within the previously approved Lost Lake Resort planned development district (“PDD”). The Building Inspector denied the application finding Applicant’s application materials were deficient and the proposed construction, design, and purpose of the dwelling was inconsistent with prior project purpose and approvals requirements. The Building Inspector’s finding was based on the permitting record, the application materials, and representations made by Applicant’s agents.

On appeal, Applicant argues that: (1) the review and approval of a building permit application is ministerial and that the Building Inspector lacks the authority to deny the permit on the stated grounds; (2) that the Town Code requires building permits to be issued so long as the application complies with New York State Uniform Fire, Building, and Energy Code; (3) the Building Inspector is estopped from denying the instant application because he issued a building permit for a different lot; (4) the denial were arbitrary and capricious because it was based on grounds other than the standards specified in the Town Code; (5) the project approvals do not require residential units to be sold at high price point; (6) the denial was not supported by the record; (7) that Applicant has a vested right in the permit; and (8) the Building Inspector’s decision was improperly influenced by other Town officials. Applicant also requests that the Board issue document and witness subpoenas.

## **III. RESORT PROJECT HISTORY**

### **A. Project Approval History**

In September of 2008, LLH’s predecessor Double Diamond Inc. (“Double Diamond”) proposed to develop a planned resort and residential community on approximately 2,100 acres

located in the Town known as the Lost Lake Resort (R. 1).<sup>1</sup> Double Diamond proposed to construct a resort type development consisting of a gated community of over 2,600 building lots, an 18-hole championship golf course, a clubhouse, hotel, restaurant, conference center, spa, swimming facilities, tennis facilities, wilderness trails, and other resort amenities. The Resort Project also proposed new private roads; a new central water supply from on-site wells; a new central sewage treatment system; and electric utilities, and other necessary infrastructure.

The Resort was proposed to be built in seven phases over ten years. Phase 1 consists of 400 new residential lots, 9 holes of an 18-hole golf course, a sales building, and gated access. Phase 1 requires construction of infrastructure (roads, stormwater management, water supply systems and sewer systems) to service the approved lots.

The Project application was subject to review under the State Environmental Quality Review Act ("SEQRA"), including the preparation of a Draft Environmental Impact Statement ("DEIS") (R. 3 DEIS), a Final Environmental impact Statement ("FEIS") (R. 4 FEIS), and a SEQRA Findings Statement ("FS") (R. 5 FS).

Under the Town's Local Law 3 of 2011, the Forestburgh Town Board ("Town Board") amended its then applicable PDD law to accommodate certain Project components (R. 6).

The Town Board then adopted an August 4, 2011 resolution creating the PDD and approving the Lost Lake Resort (R. 7).<sup>2</sup> Subsequently, on February 28, 2012, the Town Board granted preliminary site plan and subdivision approval for Phase 1 (R. 8). Finally, by resolution of June 25, 2013, the Town Board granted conditional final subdivision approval for Phase 1 of the Resort Project (R. 9).

After receiving the necessary local approvals, Double Diamond started construction of certain Project infrastructure improvements (roads, utilities, etc.). Double Diamond, however, did not complete the infrastructure improvements it had started.

In June of 2020, Double Diamond sold the Project to LLH and Mishconos Mazah LLC ("MM") (R. 19) without having completed the infrastructure improvements or constructing any residential dwellings.

## **B. Building Permit Applications**

While the instant appeal relates to the Building Inspector's denial of Applicant's October 28, 2021 Lot 303 application and rejection of the fourteen January 6, 2022 applications, a review of the Lot 301 and Lot 302 applications is necessary for context.

### **1. Lot 301 and Lot 302 Applications**

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<sup>1</sup> References to "R. \_\_\_" refers to the evidentiary hearing records identified in Appendix A. Note, documents identified as Records 41-50 in Appendix A are briefs, amicus petitions, and the Board's interlocutory rulings, which are not considered "evidence" in the evidentiary hearing record.

<sup>2</sup> A description of the project and scope of approvals is discussed below.

The record shows that in November 2020, LLH, through its agent Rose, submitted two building permit applications to the Town Building Inspector for building permits to construct residential dwellings on tax parcel section/block/lot (“S/B/L”) 3.C-6-5, also identified as Resort Lot 301 on the Town Tax Map section 3C (“Lot 301”) (R. 12.1; R. 29.5), and S/B/L 3.C-6-4 (“Lot 302”) R. 13.1; R. 38.2 at ¶ 7).

The Building Inspector reviewed the applications and issued permits for each lot (R. 12.2; R. 29.6; R. 13.2). According to the Building Inspector, the permits were issued “based in part on representations by the Applicant” (R. 38.2 at ¶ 8). The Building Inspector claims that after issuing the Lots 301 and 302 permits, he discovered Applicant misrepresented that it owned Lot 302 (R. 38.2 at ¶ 8). As a result of this fatal defect, the Building Inspector revoked the Lot 302 permit (R. 38.2 at ¶ 8). The Building Inspector also states that he identified other misrepresentations and deficiencies in the Lot 301 and Lot 302 applications (R. 38.2 at ¶ 8). The Building Inspector states that while the applications for Lots 301 and 302 had similar deficiencies, he did not revoke the permit for Lot 301 because there was no parcel ownership issue with Lot 301.

Upon review, the record supports the Building Inspector’s contentions. First, ownership of Lot 302 is not contended (R. 19). The record also supports the Building Inspector’s claim that the Lot 301 and Lot 302 applications contained other defects (R. 12.1; R. 13.1 [Lot 301 and 302 applications were submitted with sworn statements of electrical completion when no work had commenced and materially false Worker’s Compensation Insurance affidavits]).

## 2. Lot 303 Application

In June of 2021, Applicant submitted another application to the Town Building Inspector for a building permit to construct a residential dwelling on S/B/L 3.C-6-3 (“Lot 303”) (R. 14; R. 38 at ¶ 21). After several communications between Applicant and the Building Department (R. 15, 16, 17), the Town Building Inspector issued an August 18, 2021 Notice of Incomplete Application (“August NOIA”) (R.18). The August NOIA identified application deficiencies, including missing construction design approvals and application fee (R. 18). The missing construction design approvals refers to project documents evidencing the Architectural Control Committee (“ACC”)<sup>3</sup> review of the proposed construction and approval that it is consistent with the 2013 Declaration of Covenants, Conditions and Restrictions (“CC&Rs”) (R. 10) and 2013 Design Guidelines for Single Family Homes (“2013 Design Guidelines”) (R. 3c DEIS at Appx. E2).<sup>4</sup>

The August NOIA also sought additional information from the Applicant, including status of the Resort Project Infrastructure improvements, purpose for the residential dwelling when no utility facilities were complete, and a copy of the Lot 303 deed to confirm ownership. In response, Applicant through counsel, submitted correspondence dated September 13, 2021 (R. 19) addressing the deficiencies identified in the August NOIA, and provided a copy of the property

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<sup>3</sup> Also referred to as the Design Review Board (“DRB”) in the project documents (R. 3b DEIS at 2-19, 2-21, 3.12-6).

<sup>4</sup> The relevance of these documents is discussed below in § V (A) (3), below.

deeds and a September 6, 2021 ACC approval form stating that the ACC purportedly reviewed and approved Lot 303 plans submitted to the ACC on September 5, 2021.<sup>5</sup>

The record shows that while the Building Department was reviewing Applicant's September 13, 2021 submission (R. 19), Applicant sent another submission dated September 20, 2021 (R. 20) attaching a copy of an amended CC&R and Design Guidelines, revised as of September 2021. In response, the Building Inspector issued a September 30, 2021 request for information seeking, in part, clarification on whether the ACC's September 6, 2021 design approval was based on the 2013 CC&R and 2013 Design Guidelines, or whether the ACC's review was based on the 2021 amended documents (R. 21). Applicant, through counsel, confirmed that ACC's review was based on the 2021 amended documents (R. 22).

According to the Building Inspector, the Building Department, through project consultants, performed an independent review of the Lot 303 application for consistency with all applicable project approvals, conditions, and requirements, including the 2013 CC&R and 2013 Design Guidelines (R. 38.2 at ¶¶ 16, 22). The Building Department consultant prepared a report detailing substantive and material deficiencies with the Lot 303 application, proposed building design, and construction plan. The consultant's findings were summarized in the Building Department's October 7, 2021 NOIA sent to Applicant, along with the consultant's October 5, 2021 memorandum (R. 23).

The record shows Applicant subsequently resubmitted another building permit application for Lot 303 dated October 28, 2021 along with responses to the previously issued NOIAs (R. 24, 25; R. 38.2 ¶¶ 27-28). Included in Applicant's October 28, 2021 resubmission was correspondence from Applicant's counsel attempting to address the deficiencies with the Lot 303 application identified in the Town's NOIAs (R. 24). In that letter, Applicant's counsel also represented that "be advised that my client will be offering reasonably priced and affordable units to Hasidic Jewish families who have a very significant unmet demand for such units." (R. 24).

The Building Inspector denied the Lot 303 application on November 23, 2021, on the basis that the application and Applicant's intended purpose were inconsistent with the project approvals. (R. 26). The Building Inspector made this determination based, in part, on his finding that the project approved in 2013 was proposed to be a planned resort community and upscale recreational destination consisting of a gated community of single-family residence lots built to certain design standards, hotel/conference facilities, a cottage and condominium component, and extensive recreational amenities as described below. The Building Inspector further found that

[i]nstead of the project described above and approved in 2013, your attorney represented in his October 28, 2021 letter that Applicant's intent is to build "reasonably priced and affordable [housing] units" with no indication regarding

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<sup>5</sup> This Board takes notice that the ACC's purported review and approval occurred over two months after the Lot 303 application and site plan was submitted to the Building Department.

whether other project components will remain the same or whether anticipated impacts of an affordable housing community were contemplated or reviewed prior to the 2013 approval.

(R. 25).

### **C. Appeal and Evidentiary Hearing**

On January 6, 2022, Applicant submitted of fourteen other applications for building permits to construct single-family units on Resort Lots 293, 295, 297, 298, 300, 389, 392, 393, 394, 395, 396, 397, 398, 399 located within tax map section 3C block 6 (“Block 6 Applications”) (R. 27). The Building Inspector rejected Applicant’s fourteen new applications on bases that they were materially the same as the denied Lot 303 application (R. 28). Applicant commenced the instant appeal by filing its petition dated January 20, 2022.

Applicant’s appeal was subject to a formal evidentiary hearing in accordance with the Board’s Rules and Procedures.<sup>6</sup> By petition dated June 6, 2022, Petitioner David DiGangi, through his counsel, submitted a request for amicus party status (R. 43, 46). By petition dated June 21, 2022, Petitioner Hartwood Club, through its counsel, also submitted a request for amicus party status (R. 44, 45). Applicant objected to both amici petitions on timeliness and other technical grounds. Applicant also submitted papers in opposition to the DiGangi petition (R. 47). This Board issued a written ruling on the amicus petitions, granting the petitioners amici party status (R. 49).

The evidentiary hearing included six days of witness direct and cross-examination testimony. Testimony was heard from the following witnesses: (1) Glenn Gabard, Town Building Inspector (R. 32 [June 22, 2022 Transcript], R. 33 [June 23, 2022 Transcript], R. 34 [July 11, 2022 Transcript]); (2) Bradley Grant, Town Landscape Architect and outside consultant (R. 35 [July 19, 2022 Transcript], R. 36 [August 8, 2022 Transcript]), (3) Joanne Nagoda, Town Clerk (R. 37 [August 10, 2022 Transcript]); and Yahuda Miller, LLH Officer [August 10, 2022 Transcript]).

The final day of the evidentiary hearing was held on September 29, 2022 at which the Board considered all documentary evidence proffered during the witness testimony and ruled on accepting the documents into the evidentiary hearing record (R. 50 [September 29, 2022 Transcript]).

## **IV. PROJECT SCOPE AND APPROVALS**

### **A. Project Scope**

To understand the basis of the Building Department’s determination and the issues on appeal, it is necessary to review the underlying project application and basis for the 2011-2013 Resort Project approvals.

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<sup>6</sup> Town of Forestburgh, Zoning Board of Appeals, *Rules and Procedures* (Feb. 14, 2022), available at <http://forestburgh.net/wp-content/uploads/2022/02/ADOPTED-ZBA-Rules-and-Procedures-1.pdf>.

The scope and purpose of any land use development project begins with a project sponsor's application. Here, the record shows that the September 2008 application by Double Diamond (LLH's predecessor) proposed to develop a resort and residential community consisting of 2,557 single-family residential lots, a cluster of 30 single family cottages, and 40 condos (a total of 2,627 dwelling units), along with mixed-use commercial elements, including a hotel, lodge, restaurant, spa, golf course, public conference facilities, real estate offices, and public recreational elements (R. 1 at 1-2). According to Double Diamond, its proposal was to develop "an upscale high-end resort development [in which] [t]he amenities package, infrastructure cost, engineering, SEQRA and permitting cost [was] projected to exceed \$48 million." (R. 1 at 5). In its application, Double Diamond also represented that

Double Diamond [was] not a traditional developer seeking to develop and build single-family homes. Rather, the intention [was] to develop and operate a first class golf and recreation resort with a destination inn, and support a future residential population as lots are sold and lot owners build their homes over time. As noted above, the applicant's experience with projects of this type [was] that many lots remain vacant for a long period of time. For example, at the Eagle Rock Resort in Pennsylvania, only 10 percent of the approved lots, at any given time, had been improved with a residence, since opening in the late 1970[.]s.

(R. 1 at 5).

Double Diamond's Resort Project was proposed to be constructed on approximately 2,100 acres located entirely within a residential (RR-1) zoning district which required a minimum lot size of 100,000 square feet ("sq. ft.") (approximately 2.3 acres) with 1 dwelling per lot (R. 1 at 1-2). Double Diamond recognized that the RR-1 bulk standards did not permit the proposed development and asked for a zoning change to a Planned Development District ("PDD") under the Town's then applicable PDD law, which provided the Town flexibility to establish new density standards and grant density bonuses based on project requirements and design feature (R. 1 at 2).

According to Double Diamond, rezoning the property and granting the requested density bonuses was warranted because "[t]he costs associated with developing and constructing a resort and residential community of this caliber requires a density that economically supports the overall development. For a project of this magnitude to be economically feasible, and for lot sale prices to be reasonable, the total number of lots available for sale needs to exceed 2500 lots." (R. 1 at 5).

Double Diamond further justified its rezoning and density bonus request on the basis that

Double Diamond Inc. propose[d] strict Design Guidelines for the development of the residential lots, including the establishment of a Design Review Board to review and approve individual site plans in accordance with the Design Guidelines for Lost Lake Resort, in conjunction with review by the Town for building permits . . . The Design Guidelines for Single Family Homes and Covenants, Restrictions and

Conditions for the Lost Lake Resort and Development (drafts of which accompany this narrative), will provide specific development guidance for owners of each residential lot within Lost Lake Resort . . .

(R. 1 at 5-6).

In furtherance of the Resort Project application, the Town Board commenced review under SEQRA and Environmental Conservation Law (“ECL”) Article 8 and was designated SEQRA lead agency by the New York State Department of Environmental Conservation (“NYSDEC”) Commissioner (R. 2).

## **B. Environmental Review**

In undertaking the requisite SEQRA environmental review, the Town Board required Double Diamond to prepare an environmental impact statement (“EIS”). An EIS is a document that impartially analyzes the full range of potential significant adverse environmental impacts of a proposed action and how those impacts can be avoided or minimized. As part of the EIS process, the Town Board undertook a coordinated review, public scoping, public hearings, and required Double Diamond to prepare a DEIS (R. 3a-3l) and a FEIS (R. 4a- 4j).

The Resort Project’s SEQRA review concluded when the Town Board adopted the SEQRA Findings Statement required under the SEQRA regulations (6 NYCRR 617.11[b]). A Findings Statement is a required step in the environmental review process, prepared following acceptance of a FEIS, and identifies the social and economic, as well as environmental, considerations that have been weighed in deciding to approve or disapprove an action (6 NYCRR 617.11[d]; *Matter of Eadie v. Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 313 (2006) (stating “the Town took the last step in the SEQRA process by adopting a findings statement on April 28, 2004. The findings statement approved a project that included the rezoning of a number of parcels. It described proposed “mitigation measures,” including those contained in its access management plan”). A positive findings statement means that the project can be approved and is one that minimizes or avoids environmental impacts to the maximum extent practicable. Before an action can be approved, an agency’s Findings Statement must articulate that it balanced adverse environmental impacts against the needs for and benefits of the action. (6 NYCRR 617.11[d]).

A review of the DEIS, FEIS, and Findings Statement, here, shows that Double Diamond placed great emphasis on its proposition that the economic viability of the Resort Project depended on a high density of residential dwellings, but that the upscale resort-style nature of the project and inclusion of strict environmental controls mitigated all adverse environmental impacts (R. 4c FEIS at 4-1).<sup>7</sup> A sampling of the environmental record is helpful for resolution of the issues on appeal:

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<sup>7</sup> Double Diamond stating that it “is a resort development company which has developed its business model solely as large scale, residential / luxury recreation land plans. This Applicant bases its investments on a golf-oriented plan supplemented by other types of recreational amenities suitable to the particular site and that appeal to the higher income population of the region. The experience of Double Diamond has been that a considerable number of single-



DEIS § 2.4 (Purpose and Need):

- *The target market for the single family lots is primarily the investor who may or may not build a home but is interested in purchasing a house lot in the resort to take advantage of the recreational amenities offered at the resort to lot owners. Houses are not built on the single family lots by Lost Lake Resort, Inc. but some individual lot owners will choose to build their second or retirement home here in Sullivan County for recreation and leisure, and as a real estate investment (R. 3b at DEIS 2-4).*
- *[Vacant] Lots at Lost Lake Resort are anticipated to be sold for an average sales price of about \$80,000 ranging from \$65,000 to \$375,000 (2009 prices) to appeal as second homes to the older, more affluent segment of the New York metropolitan area population. As a primary residence, a lot in the resort will be considered affordable to moderate and high income individuals (representing some 47.9 percent of the existing Sullivan County households) (R. 3b at DEIS 2-4).*

DEIS § 2.6 (Description)

- *Lost Lake Resort is planned as an upscale residential/recreational resort that will market the sales of individual house lots with memberships to an extensive range of recreational amenities located within the resort community (R. 3b at DEIS 2-9).*
- *The construction of the individual single-family residences will be implemented by the individual lot purchasers, as more fully described below (R. 3b at DEIS 2-9).*
- *Lost Lake Resort, Inc. will require strict adherence to its design guidelines for construction of new single-family homes that are binding to all lot owners (R. 3b at DEIS 2-19).*
- *The owner of each lot within the resort will be subject to a declaration of exceptions, reservations, covenants, restrictions and conditions for the Lost Lake Resort [ ], as well as a Builder's Packet outlining information required to be submitted to the Lost Lake Architectural Control Committee [ ] for*

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family house lots are necessary to support the multi-million dollar investment to construct and manage the resort facilities, upon which it relies and markets to prospective buyers. The Site Master Plan proposed by the Applicant has been designed with attention to the details that will minimize or avoid any significant environmental impacts and achieve the goals of the business model with which it has years of experience developing and managing in other parts of the country.”

*internal review for each proposed lot development (R. 3b at DEIS 2-19, 2-20).*

- *This design review board will review and approve individual site plans in accordance with the Design Guidelines for Lost Lake Resort, in conjunction with review by the Town for building permits. A copy of the draft Design Guidelines for Single Family Homes in Lost Lake Resort is included in DEIS Appendix E2 (R. 3b at DEIS 2-19, 2-21).*

#### DEIS § 3.6 (Zoning - Potential Impacts- Density Bonuses)

- *Specific measures proposed at this early stage of design include: . . . strict requirements for individual house lot development contained in the Design Guidelines for Lost Lake (R. 3b DEIS at 3.6-12).*
- *Detailed restrictions on development of the single family lots include: exterior lighting on house lots required to be from non-fossil fuel sources, collection and infiltration for roof runoff on individual lots, promotion of the federal EPA “Energy Star” program and Leadership in Energy and Environmental Design (LEED) standards for all construction, and requiring “Dark Sky” compliance (R. 3b DEIS at 3.6-12).*
- *Many of these restrictions have been implemented at other resort projects of the Applicant with notable success while this project will be the first in which strict adherence to recognized green building design standards will be a commitment of the development at Lost Lake Resort (R. 3b DEIS at 3.6-12).*
- *The Applicant proposes that the value of these proven techniques, which rely on active participation by the developer, the new home builder, and resident representatives from the resort community itself, is a significant ingredient to the sustained quality of life and environmental stewardship in the resort community (R. 3b DEIS at 3.6-12).*
- *The implementation of green building designs and sustainable development practices will be demonstrated in all phases of the project so that from the start of construction the Town will be able to confirm implementation of specific measures for purposes of permitting this density bonus in accordance with the PDD regulation. (Density bonus of 100% is requested based on the investment cost.) (R. 3b DEIS at 3.6-12).*

#### DEIS § 3.9 Fiscal

- *The project applicant has the advantage of having developed a resort community known as Eagle Rock Resort in Hazleton, Pennsylvania, upon which the Lost Lake Resort will be modeled after (R. 3b DEIS at 3.9-2).*
- *The target market for the single family lots is primarily the investor who may or may not build a home but is interested in purchasing a house lot in the resort to take advantage of the recreational amenities offered at the resort to lot owners (R. 3b DEIS at 3.9-2).*
- *Houses are not built on the single family lots by Lost Lake Resort, Inc. but some individual lot owners may choose to build their second or retirement home here in Sullivan County for recreation and leisure, and as a real estate investment (R. 3b DEIS at 3.9-2).*
- *This demographic is consistent with the Applicant's experience in its other resort projects, in particular at Eagle Rock Resort. At Eagle Rock, there have been 6,924 residence lots purchased over the past thirteen years under management of the Applicant (a total of 7,294 lots are currently sold). Of these lot owners, less than twelve percent have chosen to build a house on their property (R. 3b DEIS at 3.9-2).*
- *Approximately 57 percent of the houses that are built are used part time as second homes for weekend and vacation use; only 43% are full time residences (R. 3b DEIS at 3.9-2).*
- *For the purposes of this analysis, a full build scenario is presented and evaluation of impacts utilizes a population representing 43% full time residents (R. 3b DEIS at 3.9-3) (emphasis added).*

#### DEIS § 5.0 (Adverse Impacts)

- *An increase over a long period of time (twenty years or more) in the population of Forestburgh by 3,315 full time residents and associated demand placed on community services (particularly police, fire, EMS), local roads, public recreational facilities, and utilities is a permanent effect (R. 3b DEIS at 5-2).*
- *An increase over a long period of time (twenty years or more) in the school-aged population by 648 full time resident students and associated demand placed on the Monticello Central School District (R. 3b DEIS at 5-2).*

#### DEIS § 7.0 (Growth Inducing)

- *For analysis purposes Phases 1 and 2, which total 635 units, is expected to take up to ten years (R. 3b DEIS at 7-1).*
- *The target market for the single family lots is primarily the investor who may or may not build a home but is interested in purchasing a house lot to take advantage of the recreational amenities offered at the resort to lot owners. This demographic is consistent with the Applicant's experience in its other resort projects, in particular at the Eagle Rock Resort in Pennsylvania, which is the most comparable model for Lost Lake Resort. At Eagle Rock, there have been 6,924 residence lots purchased over the past thirteen years under the management of the Applicant (a total of 7,294 lots are currently sold). Of these lot owners, some eleven percent have chosen to build a house on their property. Approximately 57 percent of the houses built are used part time as second homes (R. 3b DEIS at 7-1).*
- *Given the slow rate of growth envisioned for a resort development of this type, the project is not expected to result in substantial growth inducing impacts, such as the development of similar projects. A more rapid growth rate, should it occur, will accelerate the growth inducing impacts described below. However, since this is a phased subdivision, the growth of the Resort as a whole will be controlled by that approval process (R. 3b DEIS at 7-1).*

#### FEIS § 3.9.8 (Fiscal Analysis)

- *The demographics of the proposed project at Lost Lake will be more consistent with the Eagle Rock Resort than the existing demographics of the Town of Forestburgh since the Eagle Rock model is exactly what is proposed in Forestburgh, thus the future usage of the Lost Lake Resort is better predicted by looking at the usage of Eagle Rock than by the current seasonal use of residences in Forestburgh (R. 4c FEIS at 3.9-1).*
- *The proposed project at Lost Lake is a resort community and as such can be expected to have demographic characteristics which differ from primary-home residential communities. Demographic multipliers are researched and published based upon an evaluation of similar land uses with projections being made that the proposed project will replicate the characteristics of the studied projects. On this basis the proposed Lost Lake project can be expected to closely replicate the already constructed Eagle Rock Resort (R. 4c FEIS at 3.10-12).*

- *Double Diamond is a developer of resort facilities that are built to attract a membership-based, primarily second-home and non-resident population into a unique, recreational setting. The conventional and cluster subdivision development alternatives are entirely inconsistent with the objective of Double Diamond to develop a resort community (R. 4c FEIS at 4-1).*

#### SEQRA Findings Statement

- *The Applicant is required to construct the roads, infrastructure and resort amenities and will market the sale of individual house lots with memberships to an extensive range of recreational amenities in the resort community as described in the DEIS (R. 5 FS at 7).*
- *Individual single-family residences will be constructed by individual lot purchasers (R. 5 FS at 7, 10).*
- *Each lot owner that elects to build a home on a lot will need to do so in full accordance with Design Guidelines that will be set forth in the Offering Plan and POA bylaws, so that the Lost Lake Resort community will maintain its quality, look and aesthetic appeal (R. 5 FS at 7).*
- *The project developer has established the design theme and sustainable design and construction philosophy for Lost Lake Resort in its Design Guidelines which are included in the DEIS (Appendix E2) (R. 5 FS at 7).*
- *Specifications, subject to the review and approval of the Town Engineer and Building Inspector (R. 5 FS at 7).*
- *Lost Lake Resort, Inc. will require strict adherence to its Design Guidelines for Single Family Homes in Lost Lake Resort (Design Guidelines) that are binding on all lot owners (R. 5 FS at 20).*
- *The owner of each lot in the Resort will be subject to a declaration of exceptions, reservations, covenants, restrictions and conditions for the Lost Lake Resort (Declaration), as well as a Builder's Packet outlining information required to be submitted to the Lost Lake Architectural Control Committee (ACC) for internal review for each proposed lot development. This design review board will review and approve individual site plans in accordance with the Design Guidelines in conjunction with*

*review by the Town for building permits. A copy of the draft Design Guidelines is included in DEIS Appendix E2 (R. 5 FS at 20).*

- *The developer will establish and incorporate the Lost Lake Property Owners' Association (POA) as a New "York non-profit association to administer and enforce the easements, covenants, conditions, restrictions, and limitations set forth in the Declaration (R. 5 FS at 20).*
- *Developer requested a 278% increase in density, which was deemed warranted given the design standards proposed to be implemented (R. 5 FS at 9-10).*
- *If at any time in the future, Lost Lake Resort, Inc. sells the project to another entity, the acquiring entity will be required to undertake an environmental assessment of any portion of the proposed future development that significantly deviates from the approved Master Plan proposed and evaluated in the DEIS and FEIS (R. 5 FS at 6).*

### **C. 2011-2013 Resort Project Approvals**

After completing environmental review under SEQRA and adopting the Finding Statement containing the necessary mitigation requirements, the Town Board considered Double Diamond's Resort Project application and took the following actions: (1) adopted Local Law 3 of 2011 on July 7, 2011, amending the Town's existing PDD local law to allow for increased density bonuses to accommodate the Resort Project (R. 6); (2) granted PDD approval to the Resort Project by resolution dated August 4, 2011 (R. 7); (3) granted preliminary site plan and subdivision approval by resolution dated February 28, 2012 (R. 8); and (4) granted conditional final site plan and subdivision approval by resolution on June 25, 2013 (R. 9).

#### **1. 2011 PDD Approval**

After amending the PDD law to accommodate Double Diamonds's requested density increases (R. 6), the Town Board adopted the August 4, 2011 PDD Approval, which authorized the rezoning of the property from a RR-1 zoning district to the PDD, including the additional 278% density bonus to allow Double Diamond to construct the Resort Project. Unlike a conventional subdivision approval or site plan approval, the Town Board's establishment of the PDD was a legislative rezoning of the property (R. 6 PDD § 85-17 [B]) from an RR-1 zoning to a PDD district subject to restrictions and mitigation requirements incorporated into the master plans (R. 4i) and SEQRA Findings Statement (R. 5). Specifically, PDD § 85-17 states that "[t]he approval of a PDD will create a new zoning district on the parcel or parcels of property for which it is proposed that will be governed by the terms, restrictions and conditions of the Town Board's approval for that particular PDD district" (R. 6 PDD § 85-17 [B]). Thus, from a zoning and code enforcement

perspective, the “terms, restrictions and conditions” incorporated into a PDD has the force and effect of conventional zoning regulations. This Board notes the following recitals, findings, and actions set forth in the 2011 PDD Approval Resolution:

#### PDD Recitals

- *WHEREAS, the Applicant has proposed a planned resort community that will provide and upscale recreational destination consisting of a gated community of single family residence lots, hotel/conference facilities, a cottage and condominium component, and extensive recreational amenities . . . (R. 7 at 2).*
- *WHEREAS, on February 3, 2011, the Town Board unanimously passed a resolution accepting the proposed project density in light of its discussion with the Applicant about project phasing as a mitigation measure and the ability of the Town and other permitting agencies to monitor how the project fulfills its specific mitigation commitments while under development and affording agency control over future phases of development (R. 7 at 3).*

#### PDD Findings

- *Possible detrimental impacts to the natural resources of the region and the environment of the local community have been considered and addressed during the SEQRA review of the Lost Lake Resort. The mitigation measures contained in the SEQRA Findings Statement shall be and hereby are conditions of the PDD approval (R. 7 at 6).*
- *In regards to the overall scope of the Lost Lake Resort, combined with the mitigation measures included in the SEQRA Findings Statement, the Lost Lake Resort will further the general welfare of Town residents with sufficient protection for the health and safety of Town residents (R. 7 at 7).*

#### PDD Actions / Conditions of Approval

- *That the Applicant shall comply with the mitigation measures set forth in the SEQRA Findings Statement, a copy of which is annexed hereto and made part of this approval (R. 7 at 8).<sup>8</sup>*

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<sup>8</sup> The referenced attachment refers to the SEQRA Findings Statement (R. 5) prepared after the Town Board accepted the Resort Project FEIS (R. 4a-j). SEQRA Findings Statement contains the applicable “terms, restrictions and conditions” noted in PDD § 85-17 (B) and incorporated all of the specifications set forth in the 2013 Design Guidelines (R. 3c Appx. E2) and 2013 CC&R (R. 10).

- *That the Applicant shall secure all necessary permits, approvals and authorizations required from every other agency having regulatory jurisdiction over the project* (R. 7 at 8).
- *Modifications to any subdivision plat or site plan for the Lost Lake Resort that (1) exceed the overall limits of this PDD approval, (2) exceed the approved overall density, or (3) substantially contradict a mitigation measure set forth in the SEQRA Findings Statement may require a further review or consideration from the Town Board* (R. 7 at 9-10).

## 2. 2012 Preliminary Site Plan and Subdivision Approval for Phase 1

The February 28, 2012 Preliminary Site Plan and Subdivision Approval confirmed that Double Diamond's Phase 1 site plan and subdivision plat were consistent with evaluation and mitigation requirements set forth in the SEQRA Findings Statement and in conformity with the 2011 PDD Approval and PDD site master plan. This Board notes that the 2012 Phase 1 Preliminary Site Plan and Subdivision Approval contained recitals and findings similar to the 2011 PDD Approval, including that "the applicant has proposed a planned resort community that will provide an upscale recreational destination" with "extensive recreational amenities" (R. 8 at 1); and that "[t]he proposed site plan and subdivision plat for Phase 1 of the Lost Lake Resort are consistent with the evaluation and mitigation measures set forth in the SEQRA Findings Statement" (R. 8 at 3).

## 3. 2013 Conditional Final Site Plan and Subdivision Approval for Phase 1

The June 25, 2013 Conditional Final Site Plan and Subdivision Approval for Phase 1 was the final approval required before Double Diamond was authorized to obtain building and construction permits and begin construction on the infrastructure components. Like the 2011 PDD Approval and 2012 Preliminary Site Plan / Subdivision Approval, the 2013 Phase 1 Conditional Final Site Plan / Subdivision Approval acknowledged that the approval was for Double Diamond's upscale recreational destination" with "extensive recreational amenities" (R. 9 at 4) and affirmed the applicability of the mitigation measures set forth in the SEQRA Findings Statement (R. 9 at 3-4).

## V. BUILDING INSPECTOR DETERMINATION

The primary issue in this appeal requires this Board to determine whether the Town Building Inspector's denial of Applicant's Lot 303 building permit application was rational and supported by the record.<sup>9</sup> As set forth in the October 2021 denial letter (R. 26), the Building

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<sup>9</sup> For purposes of this Board's review, the Lot 303 application includes the entirety on the underlying project approval record (R. 1 through R. 11), the June 2021 Lot 303 application (R. 14), as amended or supplemented by Applicant through the following subsequent submissions: R. 15, 16, 17, 19, 20, 22, 24, and 25. The Building Inspector's



Inspector's denial was based on his review of the Lot 303 application materials, the underlying project approval documents, and representations made by Applicant's agents. Specifically, the Building Inspector found that the application materials, along with representations that Applicant "will be offering reasonably priced and affordable units to Hasidic Jewish families who have a very significant unmet demand for such units" (R. 24; R. 26) was "inconsistent with the 2013 project approval documents" (R. 18).

In reviewing the Building Inspector's determination, this Board

may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken (New York Town Law § 267-b [1]).

As detailed below, this Board, after having reviewed the totality of the record, finds that the Building Inspector's findings and determinations are rational and supported by substantial evidence, and hereby affirms the November 23, 2021 denial of the Lot 303 application for the reasons detailed below.<sup>10</sup>

#### **A. Resort Project as Proposed by Double Diamond**

As discussed herein, the 2008 – 2013 permit record establishes the scope of Double Diamond's proposal, the scope of the Town Board's review, and importantly, the scope of the final Project approvals.<sup>11</sup> Double Diamond's stated project purpose and intention is relevant because it formed the foundation and course of the Town's review as evidenced in the Project DEIS Scoping Document (R. 3c DEIS Appx. A1) and the environmental review process. For this Board's analysis, it is important to note that the scope of the Resort Project was set by Double Diamond as clearly detailed in the 2008 PDD application (R. 1).

##### **1. Project Purpose**

The record shows that Double Diamond proposed and ultimately received approvals to develop (in Double Diamond's words) "an upscale high-end resort development [in which] [t]he amenities package, infrastructure cost, engineering, SEQRA and permitting cost is projected to exceed \$48 million." (R. 1 at 5). To emphasize this point, Double Diamond represented that

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determination shall include the entirety on the underlying project approval record (R. 1 through R. 11), the October 2021 denial letter (R. 26), and the following prior notices: R. 18, 21, and 23.

<sup>10</sup> This Board's findings and determination shall also apply to Applicant's Block 6 applications (R. 28) as the issues are the same.

<sup>11</sup> A detailed account of the Resort Project approval history and Project scope is set forth above in section III (A), and IV (A), respectively.

“Double Diamond is not a traditional developer seeking to develop and build single-family homes” (R. 1 at 5), but rather “a resort development company which has developed its business model solely as large scale, residential / luxury recreation land plans” (R. 4c FEIS at 4-1) and its “intention is to develop and operate a first class golf and recreation resort with a destination inn and support a future residential population as lots are sold and lot owners build their homes over time” (R. 1 at 5). Furthermore, Double Diamond made it clear that “conventional and cluster subdivision development alternatives are entirely inconsistent with the objective of Double Diamond to develop a resort community” (R. 4c FEIS at 4-1) and that the Resort “is planned as an upscale residential/recreational resort that will market the sales of individual house lots with memberships to an extensive range of recreational amenities located within the resort community” (R. 3b at DEIS 2-9).

Double Diamond proposed to develop a resort and residential community consisting of 2,557 single-family residential lots, a cluster of 30 single family cottages, and 40 condos (totaling 2627 residential units), along with mixed-use commercial elements, including a hotel, lodge, restaurant, spa, golf course, public conference facilities, real estate offices, and public recreational elements (R. 1 at 1-2).

The Resort Project was proposed to be constructed on approximately 2,100 acres located entirely within a residential (RR-1) zoning district which required a minimum lot size of 100,000 sq. ft. (approximately 2.3 acres) with 1 dwelling per lot (R. 1 at 1-2). Under the Town’s RR-1 zoning district bulk standards, only 491 single-family lots would be permitted on the 2,100-acre property under a conventional subdivision (R. 3b DEIS at 4-11 [Table 4-1]). Double Diamond’s proposal to construct up to 2,627 residential units (R. 5 at 5) represents a 435% increase in allowable density.

Double Diamond recognized that the RR-1 bulk standards did not permit the proposed development and asked for a zoning change to a Planned Development District (“PDD”) under the Town’s then applicable PDD law, which provided the Town flexibility rezone the Project site to establish new density standards and grant density bonuses based on project requirements and design feature (R. 1 at 2; R. 3b DEIS at 2-1, 3.6-2).

The Town’s PDD zoning did not set a defined maximum development density but rather allowed the density to be defined by the mix of residential units, commercial uses, recreational amenities and open space proposed. Under the PDD, density limits are determined by first calculating the “Initial Residential Development Density” (“IRDD”) by considering factors such as gross acreage, development constraints, actual buildable land, and minimum lot specifications. Once the IRDD is calculated, the PDD identifies certain criteria, that if satisfied, allows additional density bonuses beyond the IRDD (R. 3b DEIS at 2-22; R. 3d. DEIS Appx. N at 5 [PDD § 85-18; R. 5 FS at 8 to 10).

The record here shows that the Resort Project IRDD calculation totaled an initial density of 748 units and that Double Diamond sought a density bonus of 1,879 additional units totaling

2,627 units (approximately 250% increase from the IRDD) (R. 3b DEIS at 2-24 [Table 2-5]; R. 5 FS at 8).

Double Diamond's stated need for the 435% increase to the then existing RR-1 bulk standards and 250% increase to the propose PDD IRDD was that developer "is a resort development company which has developed its business model solely as large scale, residential / luxury recreation land plans" that it "bases its investments on a golf-oriented plan supplemented by other types of recreational amenities suitable to the particular site and that appeal to the higher income population of the region" and that "a considerable number of single-family house lots are necessary to support the multi-million dollar investment to construct and manage the resort facilities, upon which it relies and markets to prospective buyers" (R. 4c FEIS at 4-1). This justification was one of the bases for the Town Board's finding that the increased density bonus was warranted (R. 5 FS at 9 to 10).

To evaluate the density bonus increase (and potential adverse impacts), the EIS considered three primary factors: (1) that the nature of its proposed "upscale high-end resort development" (R. 1 at 5) attracts a primarily second-home and non-resident population (R. 3b DEIS at 3.9-2); (2) that its proposed mitigation measures tailored to the resort nature of the Project sufficiently avoided or mitigated any adverse impacts (R. 3b DEIS at 2-19); and (3) that the economic benefits of the project offset any remaining impacts (R. 3b DEIS at 3.6-14).

## 2. Demographics and Intended Market

The record here establishes that Double Diamond's intended target market for the single family lots was "primarily the investor who may or may not build a home but is interested in purchasing a house lot in the resort to take advantage of the recreational amenities offered at the resort to lot owners" (R. 3b DEIS at 2-4). Moreover, Double Diamond represented that the Resort Project will be "built to attract a membership-based, primarily second-home and non-resident population into a unique, recreational setting" (R. 4c FEIS at 4-1). Double Diamond placed great emphasis on its intended market (primarily second-home and non-resident population) because it would allow the developer to request and receive a higher density bonus to be able to sell more Resort Lots.

For example, Double Diamond represented that

[t]he demographics of the proposed project at Lost Lake will be more consistent with the Eagle Rock Resort than the existing demographics of the Town of Forestburgh since the Eagle Rock model is exactly what is proposed in Forestburgh, thus the future usage of the Lost Lake Resort is better predicted by looking at the usage of Eagle Rock than by the current seasonal use of residences in Forestburgh

\* \* \*

[t]he proposed project at Lost Lake is a resort community and as such can be expected to have demographic characteristics which differ from primary-home residential communities. Demographic multipliers are researched and published based upon an evaluation of similar land uses with projections being made that the proposed project will replicate the characteristics of the studied projects. On this basis the proposed Lost Lake project can be expected to closely replicate the already constructed Eagle Rock Resort.

(R. 4c FEIS at 3.9-1, 3.10-12).<sup>12</sup>

In reliance on these representations, the Town Board incorporated Double Diamond's assumptions into its impact analysis using "a population representing 43% full time residents" for its full build scenario (R. 3b DEIS at 3.9-3). The record shows that the seasonal / second home nature of the Resort Project with only 43% of homes occupied by full-time residents was a material assumption in analyzing the following impacts: (a) growth inducing impacts (R. 3b DEIS 7-1); (b) traffic / transportation impacts (R. 3b DEIS 8-5, 8-11); (c) population projections (R. 3b DEIS 3.9-6); (d) fiscal impacts (R. 3b DEIS 1-31); (e) impacts on schools (R. 3b DEIS 1-33); (f) community service impacts (R. 3b DEIS 3.10-2, 1.34); (g) noise impacts (R. 3b DEIS 3.11.9), among others. The EIS impact analysis with its underlying assumptions formed the basis for the SEQRA Finding Statement (R. 5 FS at 1)<sup>13</sup> and ultimately the Town Board's 2011 (R. 7 at 3), 2012 (R. 8 at 2), and 2013 (R. 9 at 2) approvals.

### 3. Proposed Mitigation Tailored to Resort Project

The 2011-2013 Project Approvals also heavily relied on certain mitigation measures considered in the EIS and established on the SEQRA Findings Statement (R. 5 FS at 69), including strict adherence to 2013 CC&Rs (R. 10) and 2013 Design Guidelines (R. 3c DEIS at Appx. E2). As set forth in the DEIS,

Lot ownership will include responsibility as set forth in a Property Owners Association (POA) to operate and maintain the common elements associated with the PDD pursuant to bylaws established for the POA. Each lot owner that elects to build a home on a lot will need to do so in full accordance with Design Guidelines that will be set forth in the Offering Plan and POA bylaws, so that the Lost Lake

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<sup>12</sup> According to Double Diamond, Eagle Rock was another Double Diamond resort community located in Pennsylvania used as a model for the Lost Lake Resort Project (R. 3b DEIS at 1-2, 2-15).

<sup>13</sup> Stating "[t]his Findings Statement draws upon the information in the Town of Forestburgh Town Board (Town Board) record in connection with the application submitted to approve the Lost Lake Resort Planned Development District (PDD), including the Draft Environmental Impact Statement (DEIS) dated May 20, 2010, the substantive comments received on the DEIS and addressed in a Final Environmental Impact Statement (1- LS) dated March 21, 2011 which was accepted as complete by the Town Board on April 7, 2011, and an Addendum to the PHIS dated April 13, 2011 which was accepted as complete by the Town Board on April 20, 2011."

Resort community will maintain its quality, look and aesthetic appeal (R. 3b DEIS at 1-5).

\* \* \*

Lost Lake Resort, Inc. will require strict adherence to its design guidelines for construction of new single-family homes that are binding to all lot owners. . .The Design Guidelines provide specific development guidance for owners of the residential lots within Lost Lake Resort relating to the construction of their homes (R. 3b DEIS at 1-8 to 1-9).

\* \* \*

The owner of each lot will be subject to a declaration of exceptions, reservations, covenants, restrictions and conditions for the Lost Lake Resort (“Declaration”). An Architectural Control Committee will review, approve or disapprove all planned improvements on a lot to regulate conformance with the Resort design theme and architectural guidelines (R. 3b DEIS at 1-39).

\* \* \*

This design review board will review and approve individual site plans in accordance with the Design Guidelines for Lost Lake Resort, in conjunction with review by the Town for building permits. A copy of the draft Design Guidelines for Single Family Homes in Lost Lake Resort is included in DEIS Appendix E2.

(R. 3b DEIS at 2-19; 8-7 to 8-9). While its title may imply otherwise, the 2013 Design Guidelines were intended to be binding mitigation measures (R. 5 FS at 7, 20, 69; R. 7 at 8, ¶ 2) requiring “strict adherence” to “specific development guidance for owners of the residential lots within Lost Lake Resort” (R. 3b DEIS at 1-8 to 1-9). Moreover, the CC&Rs were designed to act as the mechanism by which the 2013 Design Guidelines would be binding to and enforced upon the individual lot owners (R. 5 FS at 20).

Based on the above, this Board finds that the 2013 Design Guidelines and the 2013 CC&Rs are an essential component of the mitigation requirements established in the SEQRA Findings Statement and expressly incorporated in the 2011-2013 decisions as a condition of approval (R. 5 FS at 20; R. 7 at 8, ¶ 2 [stating that “the Planned Development District (PDD) application for the Lost Lake Resort is hereby GRANTED, subject to the following conditions: . . . 2. That the Applicant shall comply with the mitigation measures set forth in the SEQRA Findings Statement . . .”]).

This Board also finds that while the substantive standards and guidelines set forth in the 2013 Design Guidelines and 2013 CC&Rs are binding mitigation requirements, the procedural framework established to enforce the standards is equally material. The procedural framework built into the 2013 Design Guidelines and 2013 CC&R and discussed extensively in the EIS and Findings Statement (R. 3b DEIS at 1-5, 1-8, 2-9, 2-19 to 2-20, 3.10-6; R. 5 FS at 7, 20, 69) relied

on certain material assumptions, that if changed, would undermine if not destroy any protections the 2013 Design Guidelines and 2013 CC&R were intended to provide. These assumptions include:

- a) That the Project developer is required to construct the roads, infrastructure and resort amenities and will market the sale of individual house lots with memberships to the extensive range of recreational amenities in the resort community as described in the DEIS (R. 5 FS at 7).
- b) That the Project developer undertaking the resort-focused development has experience in doing so (R. 5 FS at 6).<sup>14</sup>
- c) Houses are not built on the single family lots by the project developer (R. 3b DEIS at 3.9-2) but rather by the individual lot purchasers (R. 3b at DEIS 2-9; R. 5 FS at 7, 10).
- d) That the Project developer forms a homeowner's association / property owners' association ("HOA" also referred to as "Association" in the 2013 Design Guidelines and 2013 CC&R) as a New York non-profit association, and in accordance with all other applicable laws and regulations related to real estate syndicates, to administer and enforce the CC&Rs (R. 5 FS at 20).
- e) That the Association membership consists of the individual lot owners (R. 3b DEIS at 2-20; R. 5 FS at 20) who elect a governing Board of Directors in accordance with the Association Bylaws
- f) That the Association Board of Directors appoints a 3+ member Architectural Control Committee ("ACC") (R. 3b DEIS at 2-20)
- g) That the ACC reviews and approves all lot owner applications requiring strict adherence to the 2013 Design Guidelines and 2013 CC&Rs (R. 5 FS at 69).

The above framework built into the 2013 CC&R and 2013 Design Standards incorporated into the Findings Statement acts as a check and balance between an individual lot owner's desire to build a house and the community's interest in maintaining the intended design. This is achieved because there is a separation between the ACC as the design and review approving body and the individual homebuilder. The checks and balances are further strengthened because the ACC, being appointed by the Association Board of Directors, is accountable to the Board of Directors, who in turn, is accountable to the Association Members as a whole. This frame is in no way unique to the Resort Project, but rather consistent with New York State law and Attorney General regulations governing real estate syndicates and homeowners' associations (NY General Business Law § 352-e; 13 NYCRR § 22.5).

## **B. Applicant's Changes to the Approved Resort Project**

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<sup>14</sup> Findings Statement, stating "[i]mportantly, the proposed action is being proposed by Lost Lake Resort, Inc. who will construct and operate the Lost Lake Resort, and much of the planned level of development that will occur as a function of time is predicated on their experience with similarly owned developments, most notably Eagle Rock in Pennsylvania. If at any time in the future, Lost Lake Resort, Inc. sells the project to another entity, the acquiring entity will be required to undertake an environmental assessment of any portion of the proposed future development that significantly deviates from the approved Master Plan proposed and evaluated in the DEIS and FEIS" (emphasis added).

This Board undertook review of the 2013 Design Guidelines (R. 3c DEIS Appx E2) and 2013 CC&Rs (R. 10) and compared them to Applicant's revised/amended Design Guidelines and the CC&Rs (R. 20) to ascertain changes and whether such changes are material. A full comparison between the 2013 Design Guidelines and the 2013 CC&Rs incorporated into the SEQRA Findings Statement and adopted by the Town Board as compared to Applicant's 2021 amended documents are appended hereto as Appendix B<sup>15</sup> and C<sup>16</sup>, respectively, showing the changes to the 2013 documents.<sup>17</sup>

As discussed below, the record shows that Applicant's changes to the 2013 Design Guidelines and the 2013 CC&Rs were extensive and material, and that the totality of the changes is strong evidence that the housing development Applicant intends to build is materially different than the Resort Project that was approved.

#### 1. Changes to Substantive Design Requirements, Standards and Guidelines

As noted above, the 2013 Design Guidelines and the 2013 CC&Rs discussed extensively in the EIS (R. 3b DEIS at 1-5, 1-8, 2-9, 2-19 to 2-20, 3.10-6) and made part of the Findings Statement (R. 5 FS at 7, 20, 69) are binding mitigation measures (R. 5 FS at 7, 20, 69; R. 7 at 8, ¶ 2) requiring "strict adherence" to "specific development guidance for owners of the residential lots within Lost Lake Resort" (R. 3b DEIS at 1-8 to 1-9). The substantive requirements in those documents acted as either mitigation measures (*see e.g.* R. 5 FS at 7, 20, 43, 69, 70 [acting as mitigation for visual impacts, energy and water conservation, landscaping, restrictions on further subdivision, tree removal, exterior uses, bulk standard regulation [setbacks, buffers, building height, floor area, lot coverage, etc.], among others), or the basis for why mitigation was not required (*see e.g.* R. 5 FS at 47, 72).

All of Applicant's amendments changing the substantive requirements of the 2013 Design Guidelines are summarized and captured on Appendices B1 and B2. It is, however, worth highlighting a few notable changes such as eliminating: the garage requirement for all single-family residences (Appx. B2 at 8); all building color and exterior form standards (Appx. B2 at 8); requirements to use only natural (stone, wood) exterior materials (Appx. B2 at 5-6, 10, 39); drip irrigation for trees and landscaping (Appx. B2 at 20). Applicant's amendments also alter certain bulk standards such as: change in the minimum roof pitch requirement from 8:12 to 4:12 (Appx. B2 at 12); reduction of rear setbacks from 30 feet to 10 feet (Appx. B2 at 17); elimination of driveway width limitations (Appx. B2 at 22); removal of fence restrictions (Appx. B2 at 23); removal of rear setback encroachment restrictions for lake and golf course lots (Appx. B2 at 17); removal of screening requirement for golf course lots (Appx. B2 at 21); elimination of all

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<sup>15</sup> A summary outline of all changes to the 2013 Design Guidelines is set forth in Appendix B1 and a complete redline is set forth in B2.

<sup>16</sup> A summary outline of all changes to the 2013 CC&R is set forth in Appendix C1 and a complete redline is set forth in C2.

<sup>17</sup> Red text and ~~strikeouts~~ in Appendices B and C indicate the additions and deletions Applicant made to the 2013 Design Guidelines and the 2013 CC&Rs.

construction activity restrictions and noise controls (Appx. B2 at 29); as well as no longer requiring a tree planting and a maintenance plan (Appx. B2 at 19), landscape plan (Appx. B2 at 26), construction management plan (Appx. B2 at 26), and proof of registration with the LEED for Homes Program (Appx. B2 at 40) or the National Green Building Program (Appx. B2 at 40). Applicant's amendments to the 2013 Design Guidelines result in material changes that are inconsistent with required design / construction standards and the required mitigation.

Similarly, Applicant's amendments to the 2013 CC&R also result in material changes with required design / construction standards and the required mitigation. For example, there were certain bulk standards incorporated into the 2013 CC&R that were both mitigation measures and design characteristics in furtherance of the overall Resort Project theme that Applicant has attempted to unilaterally change, including: eliminating the 3000 sq. ft. minimum floor area requirement ("FAR") on lots abutting the golf course (Appx. C2 at 5); eliminating the 1800 sq. ft. minimum FAR on Patio Lots (Appx. C2 at 5); eliminating the 2400 sq. ft. minimum FAR on all other homes (Appx. C2 at 5); establishing a new and reduced 1400 sq. ft. minimum FAR (Appx. C2 at 5); eliminating the 8:12 roof pitch requirement (Appx. C2 at 5); eliminating the requirement that a residential dwelling must have at least one attached car garage (Appx. C2 at 5); eliminating all the siding, color and roof pitch requirements for detached garages (Appx. C2 at 5); reducing the driveway width requirements for Patio Lots from 17 feet to 8 feet (Appx. C2 at 6); removing all driveway width requirements for all other lots (Appx. C2 at 6); removing the requirement to install culverts (Appx. C2 at 6); and authorizing the ACC to grant exceptions to prohibitions against developing within 40 feet of the high-water line (Appx. C2 at 6). Other changes to substantive requirements include: eliminates construction activity time limitations (Appx. C2 at 9); allows trees to be cut for driveways (Appx. C2 at 9); removes minimum cost allocation requirements for landscaping (Appx. C2 at 5); and adds authority for developer to install solar energy facilities (Appx. C2 at 4).

Based on the above, we find that LLH's amendments to the 2013 Design Guidelines and the 2013 CC&R not only weaken or destroy substantive mitigation measures that formed the basis of the 2011-2013 approvals, but they also show that Applicant's intended development will be materially different than the Resort Project that was approved.

## 2. Sale of Developed Lots

As discussed above, the 2013 Design Guidelines and 2013 CC&R were an integral part of the Resort Project mitigation requirements. They were, however, adopted based on certain material assumptions, that if changed, would negate the intended protective measures (R. 3b DEIS at 1-5, 1-8, 2-9, 2-19 to 2-20, 3.10-6; R. 5 FS at 7, 20, 69).

For example, the framework and procedures for design review of single-family homes was based on the assumption that the Project developer would construct the necessary infrastructure and resort amenities and then market the sell vacant lots to individual owners (R. 5 FS at 7). In fact, the EIS and SEQRA Findings Statement made it clear that houses are not built on the single-



family lots by the project developer (R. 3b DEIS at 3.9-2) but rather by the individual lot purchasers (R. 3b at DEIS 2-9; R. 5 FS at 7, 10). This assumption formed the foundation of the design review process to be undertaken by the ACC whereby individual lot homeowners would present applications and the ACC would ensure strict compliance with the substantive design requirements, standards and guidelines established in 2013 Design Guidelines and 2013 CC&R (R. 5 FS at 69).

The record here is clear, however, that unlike Double Diamond, Applicant intends to build out the single-family lot and sell the houses, rather than sell the vacant lots to individuals (R. 37 Transcript at 30:07-15; R. 24; Appx. C2 at 1 [stating “Developers and Declarant have determined that . . . a different approach to the Development is required in which, in addition to homes being constructed by lot individual lot owners, homes would be constructed by the Developers on lots and then sold”]; Appx. C2 at 2 [acknowledging Applicant’s intent is to “cause the development of . . . housing principally designed for and constructed by the Developers”]).

Applicant’s amendments to the 2013 Design Guidelines and 2013 CC&R also create a whole new design review process, which not only authorizes Applicant to build out the single-family lots (rather than sell vacant lots), it allows the developer to submit an application for approval of one or more prototype home designs, and once a plan is approved, developer is exempt from review processes for future approvals of essentially the same plan on other lots (Appx. B2 at 28; Appx. C2 at 3 to 4), allowing Applicant to construct a “cookie cutter” housing development with little to no oversight (Appx. B2 at 28; Appx. C2 at 3 to 4).

The record, here however, shows not only was this concept and model expressly rejected by Double Diamond (R. 4c FEIS at 4-1)<sup>18</sup>, the entire single-family home design review framework and process was designed based on the fundamental assumption that the individual lots would not be built out by the project developer (R. 3b DEIS at 3.9-2), but rather by the individual lot purchasers (R. 3b at DEIS 2-9; R. 5 FS at 7, 10). As discussed above, the home design review framework was incorporated into the Findings Statement as a mitigation measure and acts as a check and balance between an individual lot-owner’s interests and the community’s interest. Applicant’s business model to construct and sell the homes is fundamentally different and wholly inconsistent with the adopted mitigation and environmental review assumptions. Moreover, this Board notes that many of the mitigation measures required in the Findings Statement was “predicated on [Double Diamond’s] experience with similarly owned developments, most notably Eagle Rock in Pennsylvania” (R. 5 FS at 6), which, as the record shows here, LLH has no experience with (R. 37 Transcript at 37:24 to 38:03 [“Q. Does Lost Lake Holdings, have you built other resort developments across the country? A. No.”]).

Based on the above, we find that the change from having Double Diamond sell vacant lots to individuals desiring to build a house in the resort community (in strict adherence to adopted

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<sup>18</sup> Double Diamond representing that “[t]he conventional and cluster subdivision development alternatives are entirely inconsistent with the objective of Double Diamond to develop a resort community”.

design standards) to now having a developer with no experience with resort developments undertaking the construction of the homes (in accordance with its own design standards) undermines the framework and procedural protections that are fundamental to the 2013 Design Guidelines and 2013 CC&R .

### 3. Changes to Governance Provisions

In addition to Applicant's amendments to the substantive requirements and procedural framework discussed above, Applicant has made extensive and unilateral changes to the governance 2013 Design Guidelines and 2013 CC&R. These changes include:

- a) removes any requirement that LLH develop recreational facilities and empowers developer to do so only "in its sole discretion" to the extent LLH "deems it desirable or appropriate" (Appx. C2 at 2);
- b) authorizes LLH to build "community facilities" for family gatherings, such as reunions and weddings (Appx. C2 at 2);
- c) creates new authority for Applicant to unilaterally amend the 2013 Design Guidelines (Appx. C2 at 3);
- d) divests Association Board of Directors from authority to appoint ACC (Appx. C2 at 3);
- e) vests authority onto LLH to appoint ACC in order to review and approve the LLH's designs/plans (Appx. C2 at 3);
- f) authorizes ACC to "review and approve all applications for building permits for improvements on Lots" (Appx. C2 at 3);
- g) creates a new process by which Applicant can forego review for model homes that have been approved for other lots (Appx. C2 at 3 to 4);
- h) empowers the developer appointed ACC to amend Design Guidelines (Appx. C2 at 4);
- i) changes to the ACC's authority to approve LLH's "model homes" (Appx. C2 at 4) "which can be placed on multiple Lots and for approval of groups of homes" (Appx. C2 at 3 to 4); and
- j) "reserves" the right to construct and install solar energy facilities on the Property (Appx. C2 at 4).

LLH's amendments to the 2013 Design Guidelines and 2013 CC&R is not only a blatant power grab, but if left to stand, would constitute a significant change in the process to SEQRA mitigation measures required for the Resort Project. As LLH's amendments make it clear, LLH intends to exercise the authority to unilaterally establish and modify the applicable design standards (Appx. C2 at 3), appoint the review board tasked with reviewing LLH projects (Appx. C2 at 3; *see also* R. 37 Transcript at 33:06-11; 33:18-24<sup>19</sup>), eliminate any accountability the review

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<sup>19</sup> Yahuda Miller Transcript excerpt: "Q. Did you have anything to do with appointing the individuals to that committee? A. Yes. Q. And who did you appoint? A. I don't recall exact names, but we did it a long time ago. . . Q. And these appointed members of the committee will be approving your houses to build, right? A. I don't understand? My houses? Q. The houses that you intend to construct for sale. A. They will approve, yes."

board has to the homeowner's association, its members, and Resort property owners and residents (Appx. C2 at 3). If this alone does not strain the bounds of credulity, LLH also attempts to create a new truncated design review process that only the developer can enjoy for the rubber-stamping of its cookie-cutter "affordable" homes (Appx. C2 at 3 to 4), and somehow vest that review board with the authority to also approve building permit applications (Appx. C2 at 3).

Based on the above, we find that LLH's amendments to the 2013 Design Guidelines and the 2013 CC&R governance provisions destroys all controls and mitigation measures designed to ensure the Resort Project is built according to the PDD standards adopted by the Town Board and is materially inconsistent the Resort Project that was approved.

#### 4. Changes to the Target Market for Resort Project Lots

As discussed above, Double Diamond's intended target market for the single family lots was "primarily the investor who may or may not build a home but is interested in purchasing a house lot in the resort to take advantage of the recreational amenities offered at the resort to lot owners" (R. 3b DEIS at 2-4) and the community was to be "built to attract a membership-based, primarily second-home and non-resident population into a unique, recreational setting" (R. 4c FEIS at 4-1).

Based on these representations, the Town Board undertook its environmental review impact analysis assuming "a population representing 43% full time residents" for its impact analysis (R. 3b DEIS at 3.9-3). The underlying permit record shows that the seasonal / second home nature of the Resort Project with only 43% of homes occupied by full-time residents was a material assumption in analyzing the following impacts: (a) growth inducing impacts (R. 3b DEIS 7-1); (b) traffic / transportation impacts (R. 3b DEIS 8-5, 8-11); (c) population projections (R. 3b DEIS 3.9-6); (d) fiscal impacts (R. 3b DEIS 1-31); (e) impacts on schools (R. 3b DEIS 1-33); (f) community service impacts (R. 3b DEIS 3.10-2, 1.34); (g) noise impacts (R. 3b DEIS 3.11.9), among others. The EIS impact analysis with its underlying assumptions formed the basis for the SEQRA Finding Statement (R. 5 FS at 1)<sup>20</sup> and ultimately the Town Board's 2011 (R. 7 at 3), 2012 (R. 8 at 2), and 2013 (R. 9 at 2) approvals.

That the target market for LLH's intended development is different from Double Diamond's seasonal / second-home market is well supported by the record. First, LLH's amendments to the 2013 CC&R evidence LLH's intent to expand the Resort Project's target

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<sup>20</sup> Stating "[t]his Findings Statement draws upon the information in the Town of Forestburgh Town Board (Town Board) record in connection with the application submitted to approve the Lost Lake Resort Planned Development District (PDD), including the Draft Environmental Impact Statement (DEIS) dated May 20, 2010, the substantive comments received on the DEIS and addressed in a Final Environmental Impact Statement (1- LS) dated March 21, 2011 which was accepted as complete by the Town Board on April 7, 2011, and an Addendum to the PHIS dated April 13, 2011 which was accepted as complete by the Town Board on April 20, 2011." [Need to cite to the Record here]

market to attract a broader market. For example, LLH “determined that to assure a successful Development . . . a different approach to the Development is required” and found that “amendments to the Declaration are appropriate to enable the vision for the Development to be implemented” to develop a project that is “inclusive, and suitable for families of differing income levels” (Appx. C2 at 1). LLH also amended the 2013 CC&R to recognize “suitability for families with differing income levels” in its home design considerations, deemphasized the Resort Project’s recreational components by adding language to give LLH “sole discretion” as LLH “deems desirable or appropriate” to build such amenities, and added authority to develop family oriented amenities such as “community facilities for family gatherings” (Appx. C2 at 2).

Moreover, LLH amended the 2013 Design Guidelines to accommodate “a diverse and inclusive community, with homes at Lost Lake being attainable to a broad range of demographics” (Appx. B2 at 4) and LLH’s vision of diversity in demographics as an integral part of the community which necessitates a balance between aesthetics and attainability for families of all income levels” (Appx. B2 at 5). While LLH’s intent to expand the demographics of the Resort Project can be reasonably inferred from LLH’s amendments to the 2013 CC&R and 2013 Design Guidelines, representations by its counsel confirm the change (R. 24 [LLH counsel stating “be advised that my clients will be offering reasonably priced and affordable units to Hasidic Jewish families who have a very significant unmet demand for such units”]). Even if, however, these written representations are ignored, LLH officer Yehuda Miller admitted during cross-examination that LLH’s marketing was different from Double Diamond as LLH had no marketing plan (R. 37 Transcript at 35:09-15<sup>21</sup>; R. 37 Transcript at 36:19-21<sup>22</sup>)

Based on the above record, LLH’s target market, as evidenced in the record, is materially different than Double Diamond’s “upscale high-end resort development” (R. 1 at 5) “built to attract a membership-based, primarily second-home and non-resident population” (R. 4c FEIS at 4-1) and therefore is “expected to have demographic characteristics which differ from primary-home residential communities” (R. 4c FEIS at 3.9-1, 3.10-12) where “a large proportion of residences would be seasonal, estimated up to 57 percent” (R. 5 FS at 57).

Based on the above, we find that the evidentiary hearing record developed in the course of this appeal shows either LLH’s target market for buildable lots is either materially different from that of Double Diamond, or at best, that LLH has no intended target market. In either case, because assumptions underlying Double Diamond’s stated target market of primarily seasonal / non-residents were fundamental to the lead agency’s impact analysis, the 2011 PDD approval conditions require that the Resort Project undergo supplemental environmental review to ascertain the significance of this change.

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<sup>21</sup> Yahuda Miller Transcript excerpt: “Q. Yes. I’m asking you either who is your primary market going to be? Are they going to be investors or are they going to be individuals who want to reside in the houses? A. I don’t think we made that determination one way or the other. I guess, whoever wants to buy is welcome to buy”.

<sup>22</sup> Yahuda Miller Transcript excerpt: “Q. And have you made a decision as to what market will be targeted? A. No.”

## **VI. BUILDING INSPECTOR AUTHORITY TO DENY PERMIT APPLICATION**

Applicant argues that the Building Inspector lacked authority to deny the Lot 303 application because:

(a) building inspector's decision to grant or deny a building permit was ministerial, non-discretionary action (citing *Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 [1993]; *Matter of Filmways Communications v. Douglas*, 106 A.D.2d 185, aff'd 65 N.Y.2d 878 [4th Dept 1985]);

(b) review and approval is mandated by Town Code § 68-4;

(c) the Building Inspector failed to identify noncompliance with the Uniform Code;

(d) the Building Inspector is estopped from denying the Lot 303 application because he issued a permit on an application for a similar application on a different Lot; (e) the denial was issued on grounds other than the standards specified in the Town Code;

(f) approvals do not require the Sale or marketing of the project's units at a high price point or only to wealthy or "upscale" people; and

(g) the basis for the denial was conclusory and not supported by Record.

### **A. The Building Inspector is Authorized to Review for Conformity with PDD Requirements**

LLH's arguments regarding points (a), (b), (c), (e) (f), and (g) all rely on the proposition that the Building Inspector review of the Lot 303 application was ministerial because it was limited to conformity with Town Code § 68-4, the NYS Uniform Fire Prevention and Building Code (the "Uniform Code"), the NYS Energy Conservation Construction Code (the "Energy Code"), and not extended to the PDD approval or requirements incorporated there to (e.g. 2013 Design Guidelines and 2013 CC&R).

LLH's arguments could have been persuasive if the building lot in question was situated in conventional zoning district and in conformance with the applicable zoning district bulk regulations. Based on its arguments, LLH may not be aware that Lot 303 is not located in a traditional zoning district, but rather a PDD created specifically for the Resort Project, with particularized bulk standard requirements, building design specification, construction requirements, mitigation requirements, and conformity with a PDD Master Plan developed for the Resort Project, the scope of which is detailed above in section IV.

Specifically, as set forth in the Resort Project's 2011 PDD approval resolution, as a condition of approval "Applicant shall comply with the mitigation measures set forth in the SEQRA Findings Statement, a copy of which is annexed hereto and made part of this approval" (R. 7 at 8). The SEQRA Findings Statement requires "strict adherence to its Design Guidelines for Single Family Homes in Lost Lake Resort (Design Guidelines) that are binding on all lot owners" and "subject to a declaration of exceptions, reservations, covenants, restrictions and

conditions for the Lost Lake Resort (Declaration)” (R. 5 FS at 20). Moreover, the application requires that the “the design review board will review and approve individual site plans in accordance with the Design Guidelines in conjunction with review by the Town for building permits” (R. 5 FS at 20) (emphasis added).<sup>23</sup>

Any building permit application must comply with the underlying zoning law and zoning district standards and regulations. In a PDD, the applicable zoning district standards and regulations are unique to that PDD established as part of the PDD approval. The applicable zoning district standards can be expressly detailed in the approval resolution, or more commonly, set forth in another project document and incorporated into the PDD as a condition of approval. In either case, the “terms, restrictions and conditions” of a PDD become the applicable zoning district standards and regulations, and enforceable by the Town and Building Inspector. Moreover, while the “terms, restrictions and conditions” of a PDD may provide the PDD applicant with certain authority to pre-approve land-use application related to a particular lot of property within the PDD, it does not divest the Town or the Building Inspector from its authority to ensure compliance with such terms, restrictions and conditions that have the effect of zoning law. More importantly, because the terms, restrictions and conditions incorporated into the PDD have the force and effect of law, no one other than the municipal corporation following applicable local law or PDD amendment procedures may modify or amend the terms, restrictions, and conditions in the PDD. Nor does the municipal corporation have the authority to divest itself from its planning, zoning, and code enforcement powers and grant them onto a private party. To the extent any project document may suggest otherwise, it is wrong and void as a matter of law.

This made clear in the PDD law, which states:

The Town Board decision to approve the PDD has the effect of amending the Zoning Map with respect to the property approved for the PDD so that the conditions, restrictions and terms of the PDD decision replace the zoning regulations for that PDD district. Such terms, conditions and restrictions run with the land and are enforceable by the Town in the same manner as any other zoning regulations and approval conditions so that all future owners, operators, managers and occupiers shall be subject to same. Such approval and any of its terms, conditions and restrictions may only be amended or modified pursuant to an application for a PDD amendment which shall follow the procedures and guidelines set forth in this section. It is the intention of the PDD procedures that at the time of the Town Board's decision to approve the PDD and rezone the property as set forth above, the Town and the applicant has committed to the PDD in sufficient detail in which to review and administer the actual development of the PDD site pursuant to the terms, conditions and restrictions of the PDD approval.

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<sup>23</sup> To the extent LLH raises the argument in its Point (g) that the Lot 303 denial was not based on the record or (f) that the Building Inspector denied the Lot 303 applications because he mistakenly believed the Project approvals required the sale or marketing of the project's units “at a high price point” or only to wealthy or “upscale” people, its interpretation is misconstrued and belied by the extensive record discussed herein.

(R. 6 PDD at § 85-19 [B] [2] [i]).

As a result, because Lot 303 is subject to a multitude of approval standards, conditions, and mitigation measure, the Building Inspector's authority went beyond mere ministerial review for conformance with Town Code § 68-4, the Uniform Code, and Energy Code, but rather extended to review under the PDD requirements.

#### **B. Building Inspector was not Estopped from Denying the Lot 303 Application**

LLH's argues in its Point (d) that the Building Inspector was required to issue a permit for Lot 303 because issued permit for Lot 301 and that the applications with similarly situated. As discussed above, the record shows that in November 2020, LLH, through its agent Rose, submitted two building permit applications to the Town Building Inspector for building permits to construct residential dwellings on Resort Lot 301 (R. 12.1; R. 29.5) Lot 302 (R. 13.1; R. 38 at ¶ 7). The Building Inspector reviewed the applications and issued permits for each lot (R. 12.2; R. 29.6; R. 13.2). According to the Building Inspector, the permits were issued "based in part on representations by the Applicant" (R. 38 at ¶ 8). After issuing the Lots 301 and 302 permits, the Building Inspector claims he discovered Applicant misrepresented that it owned Lot 302 (R. 38 at ¶ 9). The Building Inspector also states that he identified other misrepresentations and deficiencies in the Lot 301 and Lot 302 applications (R. 38 at ¶ 9). As a result of this fatal defect, the Building Inspector revoked the Lot 302 permit (R. 38 at ¶ 10). The Building Inspector states that while the applications for Lots 301 and 302 had similar deficiencies, he did not revoke the permit for Lot 301 because there was no parcel ownership issue with Lot 301.

Upon review, the record supports the Building Inspector's contentions. The record also supports the Building Inspector's claim that the Lot 301 and Lot 302 applications contained other defects (R. 12.1; R. 13.1 [Lot 301 and 302 applications submitted with sworn statements of electrical completion when no work had commenced and materially false Worker's Compensation Insurance affidavits]). LLH is correct that the Lot 303 and 301 were similar to the extent that the Lot 303 application contain the same misrepresentations and deficiencies as identified in the Lot 301 and Lot 302 applications (R. 18, 21, 23). However, the principle of estoppel may not be invoked to preclude a municipality from "discharging its statutory duties," "ratifying an administrative error," "enforcing the provisions of its zoning laws," or "correcting errors" after "the mistaken or erroneous issuance of a permit . . . even where there are harsh results." *Parkview Assocs. v. New York*, 519 N.E.2d 1372, 1374-75 (1988) (citing cases). Thus, the Building Inspector was within his rights to deny the Lot 303 applications based on identified deficiencies and inconsistencies, as the law in no way requires a Code Enforcement Officer to repeat a mistaken application of the law.

#### **C. Lost Lake Holdings Did Not Have a Vested Right in the Approval of Building Permit Applications**

LLH also contends that the Town Building Inspector's denial of its Lot 303 application deprived it of its vested rights (R. 41 Appeal ¶¶ 113-120). We disagree.

A property owner obtains a vested right in a subdivision permit given final grant of approval when pursuant to the site plan “the landowner demonstrates a commitment to the purpose for which the [plan] was granted by effecting substantial changes and incurring substantial expenses to further the development.” *Glacial Aggregates LLC v Town of Yorkshire*, 14 N.Y.3d 127, 136 (2010); see *Matter of Exeter Bldg. Corp. v Town of Newburgh*, 114 A.D.3d 774, 780 (2d Dept 2014); *Matter of Genser v Bd. of Zoning & Appeals of Town of N. Hempstead*, 65 A.D.3d 1144, 1146 (2d Dept 2009). However, neither the issuance of a permit nor the landowner’s subsequent improvements and expenditures, standing alone, will establish that a right has been vested. See *Town of Orangetown v Magee*, 88 N.Y.2d 41, 47 [1996]). Rather, “[t]he landowner’s actions relying on a valid permit must be so substantial that the municipal action results in a serious loss rendering the improvements essentially valueless.” *Id.* at 47-48.

LLH argues that it has a vested right to building permits to construct units in Phase I of the Project because (1) the Town Board approved Double Diamond’s PDD application and final subdivision plat for Phase I of the Resort Project; (2) other governmental bodies, specifically the New York State Department of Environmental Conservation (“DEC”), the New York State Department of Health (“DOH”), and the Delaware River Basin Commission, granted LLH certain permits and approvals for construction of the Project; (3) LLH and its predecessor, Double Diamond, expended millions of dollars in construction and installation of sewer lines, electrical power infrastructure, roads, and other infrastructure; (4) the Town Building Inspector issued a building permit for the first units to be built under circumstances similar to that of the Second and Third Applications; and (5) the Second and Third Applications comply with the Town Building Code and all permit and approval conditions (R. 41 Brief ¶¶ 10, 115, 116, 117).

LLH does not have a vested right solely on the basis of the Town’s approval of Double Diamond’s PDD application and site plan because LLH is not seeking to build the resort community, which is the purpose of the PDD. See *Glacial Aggregates LLC*, 14 NY3d at 136; see *Exeter Bldg. Corp.*, 114 AD3d at 780; *Genser*, 65 AD3d at 1146. As stated in the Town’s resolution approving the PDD, the purpose of the PDD was to establish a resort community (R. 5 at 5). LLH’s purpose in building on the above described lots is to provide “reasonably priced and affordable [housing] units,” which contravenes the stated purpose of the approved PDD (R. 5; R. 7). Although DEC, DOH, and the Delaware River Basin Commission issued certain permits and approvals for construction of the Project, the Town Building Inspector was not automatically required to grant LLH’s building permit application on that basis (see e.g. Town Code § 68-4 [D]).

LLH’s argument that it has a vested right in a permit for Lot 303 because the Town Building Inspector issued a building permit for another lot in the subdivision is also without merit. As discussed above, the Town Building Inspector erroneously approved the First Application. A landowner cannot acquire vested rights in reliance on a building permit that is invalid. *Natchev v Klein*, 41 N.Y.2d 833, 834 (1977); *Matter of Perlbinde Holdings, LLC v Srinivasan*, 27 N.Y.3d 1, 9 (2016). Thus, the Town cannot be estopped from denying building permits for LLH remaining lots solely based on the Town Building Inspector’s erroneous approval of LLH’s building permit because “estoppel is not available against a local governmental unit for the purpose of ratifying an



administrative error.” *Showers v Poestenkill Zoning Bd. of Appeals*, 176 A.D.2d 1157, 1159 (3d Dept 1991).

LLH also argues that it has a vested right because it expended millions in construction on infrastructure. Even if LLH made substantial improvements and expenditures, it must have done so in reliance on a validly issued permit or, in the case of subdivisions, final grant of plat approval. *See Matter of Exeter Bldg. Corp. v Town of Newburgh*, 114 A.D.3d 774, 780 (2d Dept 2014). The expenditures LLH made were not in reliance on the PDD or final plat approval because as discussed above, LLH’s intended development is inconsistent with the purpose of the PDD and PDD approvals. Further, LLH did not make expenditures in reliance on validly issued permit because the permit was issued erroneously. *See Glacial Aggregates LLC*, 14 N.Y.3d at 136; *see Exeter Bldg. Corp.*, 114 A.D.3d at 780; *Genser*, 65 A.D.3d at 1146; *Matter of Perlbinde Holdings, LLC v Srinivasan*, 27 NY3d 1, 8 (2016).

Based on the foregoing, LLH did not have a vested right in the approval of the Lot 303 application.

## VII. FINDINGS AND DETERMINATIONS

Based on the above, we find:

(1) Applicant’s Lot 303 application for a building permit (R. 14), as amended by Applicant’s supplemental submissions (R. 15, 16, 17, 19, 20, 22, 24 and 25), and Applicant’s Block 6 applications (R. 27) was and is subject to and required to be in compliance with: (a) Town Code Chapter 68 (Building Code Administration), which includes compliance with the NYS Uniform Code and NYS Energy Code, as defined therein; and (b) Town Code Chapter 180 (Zoning), which includes compliance with all applicable district regulations.

(2) That as the Report Project is located within the PDD zoning district created specifically for the Project, the Lot 303 and Block 6 applications were also subject to Local Law 3 of 2011 (R. 6), as amended, by Local Law 2 of 2017, and in accordance with all terms and conditions set forth in the 2011 PDD Approval Resolution (R. 7) including Condition 2 requiring “[t]hat the Applicant shall comply with the mitigation measures set forth in the SEQRA Findings Statement” (R. 7 at 8), which contains applicable and enforceable bulk standards, land use regulations, construction and design specifications, and mitigation measures referenced therein and incorporated thereto by referenced appendices, including the 2013 Design Guidelines (R. 3c Appx. E2) and 2013 CC&R (R. 10).

(3) Notwithstanding any contrary provision or language in the SEQRA Findings Statement or appendices thereto, the Town, through its Building Department, retains authority and jurisdiction to enforce all terms and conditions set forth in the 2011 PDD Approval Resolution, including all referenced materials, because once adopted, they have the force and effect of the law as the applicable zoning standards and regulations for the PDD (R. 6 PDD § 85-17 [B]). Further, that notwithstanding any contrary provision or language in the SEQRA Findings Statement or appendices thereto, the Town, as the municipal corporation authorized to establish the Resort PDD,

retains and remains the sole authority to amend any term, restriction and condition of the Resort PDD, because as a matter of law, such authority belongs solely to the municipal authority and may not be vested unto any private party (R. 6 PDD at § 85-19 [B] [2] [i]).<sup>24</sup>

(4) That while PDD Local Law 3 of 2011, as amended, was repealed under Local Law 1 of 2020, the Resort Project PDD approval remains valid and subject to the repealed PDD local laws, but only to the extent the Resort Project complies with the limitations set forth in Town Code Chapter 180, Article III as a non-conforming use or structures, and complies with all Project approval terms, conditions, and restrictions discussed above (R. 7).

(5) That because the Resort Project was subject to site plan review and subdivision approval, and granted approval therewith (R. 8, R. 13), the Lot 303 and Block 6 applications was and continues to be subject to all applicable provisions in Town Code Chapter 148 (Subdivisions) and Town Code Chapter 180, Article VII (Site Plan Approval), as limited by Town Code Chapter 180, Article III as a non-conforming use or structure, and subject to all terms, restrictions and conditions set forth in the 2011 PDD approval resolution (R. 7).

(6) Based on the above findings and determinations, the Building Inspector properly considered the Resort Project approvals as a basis for his determination to deny LLH's applications because said applications were subject to conformance with the 2011 PDD Approval Resolution (R. 7) including Condition 2 requiring "[t]hat the Applicant shall comply with the mitigation measures set forth in the SEQRA Findings Statement" (R. 7 at 8), which contains applicable and enforceable bulk standards, land use regulations, construction and design specifications, and mitigation measures referenced therein and incorporated thereto by referenced appendices, including the 2013 Design Guidelines (R. 3c Appx. E2) and 2013 CC&R (R. 10); as well as the 2012 and 2013 preliminary and conditional final site plan and subdivision approvals.

(7) that the Building Inspector's determination that the Lot 303 application was not consistent with the Resort Project approvals is based on and sufficiently supported by the record as discussed in this Decision.

(8) that this Board's review, under New York Town Law § 267-b (1) and after a well-developed record, finds substantial evidence in the record (as discussed above) that LLH has undertaken a course of action that is inconsistent with and materially different from the terms and conditions set forth and granted to LLH's predecessor Double Diamond, including but not limited to:

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<sup>24</sup> Which states: "The Town Board decision to approve the PDD has the effect of amending the Zoning Map with respect to the property approved for the PDD so that the conditions, restrictions and terms of the PDD decision replace the zoning regulations for that PDD district. Such terms, conditions and restrictions run with the land and are enforceable by the Town in the same manner as any other zoning regulations and approval conditions so that all future owners, operators, managers and occupiers shall be subject to same. Such approval and any of its terms, conditions and restrictions may only be amended or modified pursuant to an application for a PDD amendment which shall follow the procedures and guidelines set forth in this section. It is the intention of the PDD procedures that at the time of the Town Board's decision to approve the PDD and rezone the property as set forth above, the Town and the applicant has committed to the PDD in sufficient detail in which to review and administer the actual development of the PDD site pursuant to the terms, conditions and restrictions of the PDD approval."

- (a) the unauthorized unilateral and substantive amendments to the 2013 Design Guidelines (R. 3c Appx. E2) and 2013 CC&R (R. 10) appended to the SEQRA Findings Statement, which serves, in part as the PDD zoning regulations and Project mitigation requirements, and have the force of law under PDD §§ 85-17 (B), 85-19 [B] [2] [i] (R. 6);
  - (b) that LLH's amendments to the 2013 Design Guidelines and 2013 CC&R, LLH's written representations, and witness testimony, are sufficient evidence of LLH's intent to construct a housing development that is materially different from the Resort Project proposed by Double Diamond and reviewed and approved by the Town. These modifications include:
    - i. a change to the proposed 2,500+ single family residential lots to be constructed by individual lot owners in strict accordance with the 2013 Design Guidelines (R. 3c Appx. E2) and 2013 CC&R (R. 10) to now designed and built by developer in accordance with its own standards;
    - ii. a change to the primary target for the Project, which was material to the PDD density bonuses that were granted, in part, on the representation and assumption that the homes would be primarily marketed to the seasonal / second home market with an expected demographic of on 47% full time residents; and a change to the target market would require, at minimum, reconsideration as to whether such 278% density bonus must be readjusted if LLH intends to construct model homes and sell to a primarily first or single home market..
- (9) that this Board's finding that LLH's intended development is materially different from the approved Resort Project proposed, and inconsistent with the approval terms, conditions and restrictions granted to LLH's predecessor Double Diamond trigger the following:
- (a) 2011 PDD condition that "[m]odifications to any subdivision plat or site plan for the Lost Lake Resort that (1) exceed the overall limits of this PDD approval, (2) exceed the approved overall density, or (3) substantially contradict a mitigation measure set forth in the SEQRA Findings Statement may require a further review or consideration from the Town Board (R. 7 at 9-10).
  - (b) SEQRA Findings Statement: "If at any time in the future, Lost Lake Resort, Inc. sells the project to another entity, the acquiring entity will be required to undertake an environmental assessment of any portion of the proposed future development that significantly deviates from the approved Master Plan proposed and evaluated in the DEIS and FEIS" (R. 5 FS at 6).

Any issue raised by Applicant and not addressed expressly herein shall be deemed denied. This shall constitute the final determination of the Board.

On a motion by Zoning Board of Appeals Member Carl W. Amaditz seconded by Member James Steinberg, the Decision and Ruling was adopted on a roll call vote, the results which follow:

Chairman Carl Amaditz	Aye <input checked="" type="checkbox"/> Nay - Abstain
Dave Griffin, ZBA Member	Aye <input checked="" type="checkbox"/> Nay - Abstain
Hilda Lehr, ZBA Member	Aye <input checked="" type="checkbox"/> Nay - Abstain
James Steinberg, ZBA Member	Aye <input checked="" type="checkbox"/> Nay - Abstain
Edward Pajak, ZBA Member	Aye <input checked="" type="checkbox"/> Nay - Abstain

Adopted this 15th day of November 2022.

By Order of the Forestburgh Zoning Board Appeals

Carl W. Amaditz

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TOWN CLERK'S OFFICE