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June 21, 2022

Via Overnight Courier
Zoning Board of Appeals
Town of Forestburgh
Attn: Mr. Carl Amaditz, Chair
332 King Road
Forestburgh, NY 12777

Re: In the Matter of the Application of Rose Improvement and Lost Lake Holdings LLC– Petition of The Hartwood Club, Inc. to Appear as Amicus

Our File No. 22-0742

Dear Mr. Amaditz:

This law firm represents The Hartwood Club, Inc., a concerned party in the above-referenced matter.

In accordance with Rule 5.4.1 of the Rules and Procedures of the Zoning Board of Appeals of the Town of Forestburgh (the "Town"), adopted February 14, 2022, The Hartwood Club hereby submits this petition to appear as amicus in the pending appeal submitted by Lost Lake Holdings LLC and Rose Improvement (the "Applicants") concerning the Town's denial of building permits in the Lost Lake zoning district ("Lost Lake"). A report from Sterling Environmental Engineering, P.C. that provides greater detail and specificity about the environmental and SEQRA impacts discussed herein is annexed hereto as **Exhibit A**.

THE HARTWOOD CLUB, INC. MAY APPEAR AS AN AMICUS

In satisfaction of the requirements of Rule 5.4.1, please note the following:

(i) The Hartwood Club, Inc., with a business address at 195 Baer Rd, Forestburgh, NY 12777, desires to appear before the Zoning Board of Appeals (the "Board") as an amicus by and through its attorney, Blustein, Shapiro, Frank & Barone, LLP.

(ii) The Hartwood Club, Inc. has owned and operated land within the Town of Forestburgh since 1893, as part of its principal mission to preserve land and waters for hunting and sporting fishing. The Hartwood Club Constitution provides that the Club's objects are to maintain lands and waters for a fishing and hunting preserve and to devote said lands and waters to the propagation of fish, birds, and game. The Hartwood Club's lands contain within their confines over thirty private homes, a trout stream (the Bush Kill), lakes for fishing and swimming, and several thousand acres of undeveloped land. The parcels owned by The Hartwood Club, Inc. are downstream of the Lost Lake site, and receive water flowing from said site, including from the Bush Kill, which has tributaries originating in the Lost Lake development site, and along which The Hartwood Club's lands border for approximately a mile. Additionally, The Hartwood Club owns lands in the Neversink Unique Area and have fishing rights in said parcel, and said area has water flow into it from the Lost Lake lands via Eden Brook.

(iii) The Hartwood Club, Inc. opposes the instant appeal for the reasons set forth herein.

(iv) The Hartwood Club, Inc. understands and attests that its status as amicus may be granted, denied or revoked at any time in the Board's sole discretion and with no right of appeal.

The particular environmental impacts that would affect The Hartwood Club differently from the rest of the Town of Forestburgh warrant its inclusion as an amicus in the current appeal before the Zoning Board of Appeals.

For example, the New York State Department of Environmental Conservation (DEC) commented during the Lost Lake SEQRA review that at full build-out the average daily flow (ADF) is 870,335 gallons per day (gpd) and the peak daily flow (PDF) is 2,611,005 gpd. The proposed discharge location is to the Bush Kill. Therefore, any changes to the wastewater discharge from the Lost Lake project changes the effect upon the Bush Kill, including the effects upon the trout population of the water. For example, increases in water temperature, changes in vegetation, and alteration of the water flow all affect the viability of trout habitats. The Bush Kill is a head water trout stream along which The Hartwood Club, Inc. owns lands which run for about a mile. The Hartwood Club, Inc. exclusively relies on wild trout in the Bush Kill, such as brook trout and brown trout; it does not stock the waters at all. Changes to the Lost Lake's wastewater discharge that would result in negative impacts on the trout habitats would greatly impact the natural quality of the Bush Kill which The Hartwood Club has a vested interest to protect and has in fact protected for well over a century.

Additionally, The Hartwood Club , Inc. owns lands in the Neversink Unique Area, where it has fishing rights. The Neversink Unique Area is a highly regarded fishing location and ecologically rich and unique natural area. As described by the DEC on its website, "The Nature Conservancy designated the Neversink River as one of the 75 "Last Great Places" in the United States, Latin America and the Pacific. This unique area is a great destination for hiking and

fishing."[1] The DEC also recognizes that the Unique Area is "[c]onsidered the birthplace of American dry fly fishing...[and] offers world class trout fishing opportunities." *Id.*

The Eden Brook flows out of Lost Lake and into the Neversink Unique Area. Any changes to the Lost Lake project that would impact Eden Brook would also impact the trout habitats in the Neversink Unique Area, which directly implicates the rights and mission of The Hartwood Club and its members.

Beyond the effects to the trout streams to which The Hartwood Club has a vested interest, there would also be run-off flowing into lands owned by The Hartwood Club or which might affect the groundwater of said lands. As discussed in more detail below, the changes to the Lost Lake project by Applicants would result in greater run-off, greater discharge, and other substantial increases in wastewater flow that would directly affect lands owned by The Hartwood Club. This includes increased pollutants, increased thermal effects, and a resulting decrease in water quality. This direct impact upon The Hartwood Club's lands, different from other landowners in the Town of Forestburgh, creates a legal interest of The Hartwood Club. *See Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773-74 (N.Y. 1991).

Therefore, The Hartwood Club, Inc. is entitled to appear as an amicus.

APPLICANTS ARE NOT ENTITLED TO A GRANT OF THEIR APPEAL

Pursuant to Rule 5.4.2 of the Rules and Procedures, the Hartwood Club, Inc. desires to supplement the record with the facts and arguments set forth herein.

To summarize, The Hartwood Club, Inc. respectfully submits that the Applicants are not entitled to a grant of their appeal and a resulting award of building permits. The Building Inspector was fully entitled to withhold building permits because it is readily apparent that the development as now intended by Applicants differs substantially from the project presented to the Town Board over a decade ago by Double Diamond, and to which the Town Board granted PDD approval, completed a SEQRA review, and granted conditional final approval. Applicants are not entitled to approval of the permits for the following reasons:

- Applicants have failed to construct the necessary infrastructure as required by the prior approvals, including but not limited to a sufficient road system, functioning on-site water supply, and a functioning wastewater treatment plant.
- The SEQRA Findings Statement expressly stated if the original developer, 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." Dkt. No. 5 p. 6.
- Applicants have substantially changed the nature and intensity of the proposed development, by providing for faster lot buildout, larger home sizes, contemplated year-round residency, and other changes to past representations about the scope and

[1] *See* https://www.dec.ny.gov/lands/104402.html for the full array of DEC information on the area.

growth of the project. This has been confirmed by the statements made by Applicants' agents and the permit applications indicating the construction sought to be done is for development of different nature than intended by the Town.

- It appears from a review by Sterling Environmental Engineering, P.C. that a number of outside agency permits may be expired, obsolete, or need revisiting in light of the changes to the development project. Indeed, the DEC has required that the Applicants' SPEDES Permit be modified. *See* **Exhibit A**.
- The changes to the development project create changes in environmental impacts that had not been considered by the prior SEQRA review, which warrants at the minimum, the creation of a Supplemental EIS, but may warrant the entire re-opening of SEQRA and/or the rescinding of the prior subdivision approval.

These items, as discussed in more detail below, rendered the Town incapable of approving any building permits, and in fact, if such permits were issued, the Building Inspector would have been required to rescind them, since their issuance would have been a legal error in the first place.

A. Given That The Developer Has Indicated It Will Not Develop the Lost Lake Property In Accordance With the Prior Approvals, the Town is Required to Deny Permits That Would Contravene Said Approvals

The denials of the building permits were done with a rational basis. A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 772 (2nd Dept. 2005).

Here, where Lost Lake Holdings LLC has admitted that its intent in developing the Lost Lake site is substantially different from the purposes advanced by the original developer, Double Diamond, said original purposes being the motivating factor for the project's original approval, and which purposes were incorporated into the prior PDD approval, SEQRA studies, and Conditional Final Approval, there was a rational basis for the denial of the building permits.

For example, the original Lost Lake resort application to the Town stated that it was "a master planned resort and residential community" that would be engineered to provide a "serene vacation retreat" generating lower traffic volume, fewer school-children, and fewer full-time residents than typical subdivisions. Dkt. No. 1 p. 1. The application states this is not a traditional residential development, but "the 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." *Id.* p. 5. The application further detailed various restrictions, limitations, guidelines, and principles for the project that would be geared towards green, sustainable, and aesthetically unique housing. *Id.* pg. 3-6.

Yet in much more recent correspondence to the Town, the attorney for Lost Lake Holdings, LLC characterized the planned development as consisting of "reasonably priced and affordable" units for which there is a "very significant unmet demand". Dkt. No. 24 p. 1. This indicates that planned scope of development is not to be a "serene vacation retreat," which was the basis of the

entire process before the Town Board, but to instead be a standard massive residential subdivision, which was exactly what the original developer represented the Lost Lake project would not be, and which the Town Board expressly understood would not occur.[2]

Indeed, the Town Board every step of the way acted upon specific representations of Double Diamond regarding the model for the development of the Lost Lake project, and every step of its review, including SEQRA, evaluated the Lost Lake project based on those representations. For example, the DEIS incorporated an original Declaration of Reservations and Design Guidelines, and as an example, made a conclusion that residential influx to the Lost Lake project would be very gradual over the span of two decades. *See generally* Dkt. No. 3a. The FEIS based its assumptions on the Lost Lake project being a seasonal resort centered around a championship golf course. Dkt. No. 4a p. 1. Based on these assumptions, the approvals and SEQRA findings were geared in specific ways.[3]

The Town's consultant, Bergmann, indicated in its October 5, 2021 memorandum how the submitted building permits failed to conform to the prior approvals and binding documents entered into by the original developer, which required the build-out of the Lost Lake site in a particular fashion. Dkt. No. 23 p. 9-11.

Applicants are bound by the zoning ordinance for the Town of Forestburgh, by the restrictive covenants, and by the Town Board's prior approvals. The Zoning Board of Appeals, when considering the instant appeal, cannot waive, modify, or ignore the prior approvals, covenants, or ordinances. *Dost v. Chamberlain-Hellman*, 236 A.D.2d 471 (2d Dept. 1997) (ZBA could not ignore binding conditions when evaluating whether to grant special use permit).

Indeed, the 2013 Restrictive Covenant was entered into precisely to ensure that construction at the Lost Lake site, and the use of the Lost Lake site, conformed with the understandings of the Town Board and the representations made to the Town Board by the original developer. However, in September 2021, the Applicants informed the Town that they had issued an amended Declaration of Reservations, which was never reviewed by the Town and never a part of the discussions that led to the Town's prior approvals.

The 2021 Declaration of Reservations unwinds many of the specific aspects of the 2013 covenant that were incentives for the final approval of the project in the first place. The 2021 Declaration makes many amendments to the 2013 Restrictive Covenant that make many of the required features of the Lost Lake project merely advisable or discretionary, such as providing for particular recreational facilities, providing for specific design and construction standards, the independence of the architectural control committee, having specific square footage requirements, having specific requirements for dwellings constructed on the golf course, etc.[4]

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[2] The original application noted that it was common for the type of resorts Lost Lake was designed to emulate for the vast majority of residential lots to remain vacant for long periods of time. Dkt. No. 1 p. 8.

[3] These are just some examples. The PDD Approval and SEQRA Findings Statement go into very substantial detail regarding the findings they were premised on, all of which reflect an expectation that Lost Lake was going to be developed according to the proposals made to the Town every step of the way. *See* Dkt. No. 5 p. 10-12, 34-35, 45, 53; Dkt. No. 6 p. 1-4.

[4] *See* **Schedule A** annexed hereto for a non-exhaustive list of changes between the two Declarations.

By now relying on the 2021 Declaration that differs from the original in material respects, Lost Lake Holdings, LLC seeks to circumvent the representations and agreements the prior developer had with the Town. The building permits should therefore be held to the standard of the 2013 Restrictive Covenant. To do otherwise would render the prior approvals mere suggestions.

Given all of that, the Town is bound to handle all of the building permit applications for the Lost Lake site pursuant to the approvals the Town Board has issued, without deviation. The building inspector is entitled to interpret the Town zoning ordinance and developer's plans and the inspector's determination that the building permits, in conjunction with the statements of Lost Lake Holdings LLC, indicate a deviation from the previously approved plans, was correct. *See Reichenbach v. Windward at Southampton*, 80 Misc.2d 1031, 1033 (Sup. Ct. Suffolk Cty. 1975) ("The building inspector's interpretation of Land's plans (as well as those of two other projects) as constituting motel and not apartment units is neither irrational nor unreasonable").

The denial is also proper since, if the building permits had been issued, they would have been required to be revoked as void ab initio, regardless of the consequences to Lost Lake Holdings LLC as developer. *Village of Wappingers Falls v. Tomlins*, 87 A.D.3d 630, 631 (2d Dept. 2011) ("A building permit which is issued in contravention of the zoning laws is never valid"); *see also* 4 Am. Law. Zoning § 32:6 (5th ed.). Indeed, the building inspector has no discretion to issue a building permit that does not conform to the law. 12 N.Y. Jur. 2d Buildings § 62.[5] Lost Lake Holdings LLC clearly would know this, since it would be fully aware that the structures being built did not comply with prior approvals and were part of a new plan of development which was never approved by the Town. *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 282 (N.Y. 1988) (noting that where a good faith inquirer should have known a permit issuance was in error, there was no recourse for the revocation of said permit).

Indeed, where, as here, Lost Lake Holdings LLC misrepresented to the Town for over a year that it intended to comply with the prior approvals, if the Town had issued building permits, revocation of them would be proper. *Village of Wappingers Falls v. Tomlins*, 87 A.D.3d 630, 631 (2d Dept. 2011); *Welland Estates, Inc. v. Smith*, 109 A.D.2d 193, 196 (1st Dept. 1985) (no estoppel against government where permit was issued on the basis of a material misrepresentation); *Knispel Const. Co., Inc. v. Missavage*, 102 A.D.2d 1007 (1984) (building inspector was entitled to revoke permit where he "finds that there has been any false statement or misrepresentation as to a material fact in the application, plans or specifications on which the building permit was based").

Additionally, Town Code § 68-4(J) states that "If the Code Enforcement Officer determines that **a building permit was issued in error because of incorrect, inaccurate or incomplete information**, or that the work for which a building permit was issued violates the Uniform Code or the Energy Code, **the Code Enforcement Officer shall revoke the building permit**...." This is clearly the case here.

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[5] The developer claims that the Building Inspector was limited to evaluating compliance with certain state codes, but if this was the case, then the Building Inspector would be forced to grant permits to flagrantly illegal structures, such as structures not permitted in a particular zone, without any ability to say no. The Building Inspector clearly has a responsibility to make sure any permits issued do not conflict with applicable law.

Furthermore, if there are new facts with respect to a plat approval, so long as all interested parties are duly noticed, a plat approval may be reconsidered. *Watkins v. Gormley*, 59 N.Y.S.2d 747, 749 (Sup. Ct. Queens Cty. 1945) (noting that a change of facts or circumstances was required for a board to engage in reconsideration). The Third Department has said that notwithstanding a lack of statutory authority, a board may reconsider a determination if there has been a material change in circumstances since the approval of the plat. *In Matter of Sullivan Farms IV, LLC*, 134 A.D.3d 1275, 1277 (3d Dept. 2015) ("The Planning Board was empowered to rescind an approval that was issued in excess of legal authority and void ab initio").

Therefore, on the basis of the misrepresentations of Applicants, the denial of the building permits was appropriate.

B. The Apparent Changes to the Lost Lake Project Require a Supplemental Environmental Impact Statement and a Potential Re-Opening of SEQRA

6 NYCRR 617.9(a)(7) states that a supplemental EIS may be required, concerning significant adverse environmental impacts not addressed, or inadequately addressed in the original EIS, that arise from changes proposed for the project, newly discovered information, or a change in circumstances related to the project. The Court of Appeals has stated that if environmentally significant modifications are made to a project after the issuance of a FEIS, the lead agency must prepare a supplemental EIS. *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 429 (N.Y. 1986). The environmental record must have adequately reviewed the environmental concerns raised by changes to the project. *Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 223 (1st Dept. 2005).

For example, where a 2009 findings statement was based upon development of a deli/coffee shop and a subsequent development plan changed the use to a large convenience store/gas station, the lead agency was required to take a hard look at the project change to determine if a supplemental EIS was necessary. *Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Board*, 153 A.D.3d 823, 828 (2d Dept. 2017); *see also Oyster Bay Associates Ltd. Partnership v. Town Bd. of Town of Oyster Bay*, 58 A.D.3d 855, 860 (2d Dept. 2009) (Town Board's decision to prepare a supplemental EIS was proper in light of substantial change to size of project that would change environmental impacts).

Furthermore, if a FEIS notes that any environmentally significant changes to a project would require further environmental review before the project could proceed, that project should not be developed until that review, such as a supplemental EIS, be done. *See Highview Estates of Orange County, Inc. v. Town Bd. of Town of Montgomery*, 101 A.D.3d 716, 720 (2d Dept. 2012) (noting that where a FEIS created an "envelope" for assessment of a project, approvals that fell within that envelope were proper).

Here, significant changes to the Lost Lake project make clear that the FEIS and SEQRA Findings Statement would inadequately cover all of the new or enhanced impacts caused by the changes to the project. These changes are discussed in much more detail in the accompanying report from Sterling Environmental Engineering, P.C., at pages 4-7, but some are touched on briefly herein to illustrate the changes.

For example, changes in the 2021 Declaration indicate that there will be larger residential housing, which will increase impervious surfaces to a notable degree, which will notably affect runoff to neighboring areas, including lands owned by The Hartwood Club. The SWPPP was also based upon buildout rates that have not been amended or revised. **Exhibit A**, p. 4.

Similarly, if these changes would reflect an intended residential population that is far larger than that contemplated in the original approvals, then the demands upon water supply and wastewater conveyance would be substantially higher than evaluated.[6] **Exhibit A**, p. 6. There would also be increases in discharge to the Bush Kill and related watercourses that would have environmental effects that require evaluation. *Id.*

Indeed, it is our understanding that the New York State Department of Environmental Conservation has informed Applicants that, at the minimum, they need a modification of their SPEDES permit as well as obtain several other permits before any ground can be broken at the Lost Lake site. This is caused in part by a change in the SPEDES Outfall location[7], and potential changes to the relevant wetlands.

Changes to the scope of the project, the buildout of the project, and the resulting changes in residency would result in changes to traffic and transportation impacts that also have not been properly evaluated at this time. **Exhibit A**, p. 7.

Additionally, in the 2021 Declaration, Lost Lake Holdings, LLC has now represented that it doesn't have a plan to build a "championship 18-hole golf course". The prior environmental findings indicated reliance upon the particular surfaces of the golf course which reduce run-off, so a failure to build the 18-hole golf course as originally planned would result in different runoff calculations and impacts.

These are just some of the items that would appear to result in environmental impacts either not contemplated by the FEIS or create a degree of impact not addressed in the FEIS.

C. The Significant Passage of Time and Changes in the Law Mandates a Supplemental Environmental Impact Statement and a Potential Re-Opening of SEQRA

While the passage of time since a FEIS was issued does not by itself require a supplemental EIS, where that passage of time involves changes to state and local laws and regulations that would impact how a project would affect the environment, SEQRA is not complied with unless a supplemental EIS is required to analyze the change in circumstances. *See Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 394 (2d Dept. 2000) (noting supplemental EIS required where more

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[6] The original application was premised upon 330 gallons per day for a 3-bedroom house, with a population that was mostly seasonal, and the FEIS indicated it was not expected that every lot would be built out. The plan by the new developer appears to change the development to a year-round residential population, with an intention of building on every lot to satisfy, as their attorney put it, "unmet demand". This would result in drastically increased need for water supply beyond what the prior SEQRA contemplated. Increased water discharge would also increase water temperature and water turbidity, which would have to be evaluated.

[7] See Schedule B for a picture showing the discrepancy in Outfall locations.

than 10 years have passed since the FEIS was submitted, and in the interim, the subject property became entangled with subsequent regulations for groundwater protection and open space conservation, which changed the nature of environmental impacts on water use and open space); *Shapiro v. Planning Bd. of Town of Ramapo*, 155 A.D.3d 741, 744 (2d Dept. 2017) (ACOE determination relied on by Planning Board dealt with subdivision plan that had over 300 fewer units than current plan).

Here, regulatory changes have occurred since the original SWPPP was issued in 2010. The 2010 SWPPP was based on the April 2008 New York State Stormwater Design Manual. The most current version of this manual was published in January 2015. It is our understanding that this would require a re-evaluation of the SWPPP, especially in light of the apparent changes to the scale and scope of the Lost Lake project. Erosion and sediment control design was consistent with the April 2005 New York Standards and Specifications for Erosion and Sediment Control. This manual was updated in November 2016. Since the 2005 New York Standards and Specifications were published, the Construction General Permit has been re-issued three times. The most current Construction General Permit is GP-0-20-001, issued January 29, 2020. Therefore, the project would have to be re-evaluated to ensure compliance with environmental protocols, and until then, granting building permits is inadvisable.

Additionally, it appears SEQRA in its entirety should be reopened when substantive changes are proposed for the project or substantive new information is discovered, and significant adverse environmental impacts will result. *See Boyles v. Town Board of Town of Bethlehem*, 278 A.D.2d 688, 691 (3d Dept. 2000); *see also E. Deane Leonard v. Planning Bd. of Town of Union Vale*, 136 A.D.3d 868, 871-72 (2d Dept. 2016) (noting that changes to the project required the Planning Board to assess whether a prior negative declaration should be amended or rescinded).

D. No Vested Rights Have Been Obtained By the Developer

In any case, we note that no vested rights have accrued to the developer. Vested rights accrue only when a developer has incurred significant expenses in the actual development of the land following the issuance of a valid building permit. *Exeter Bldg. Corp. v. Town of Newburgh*, 114 A.D.3d 774, 779 (2d Dept. 2014) ("a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development").[8] As the Town's independent consultant report noted, the required infrastructure and improvements are nowhere near complete.

To the extent the developer would rely upon permit expenditures, this is unavailing, especially when the developer has undertaken its building permit quest with the full knowledge that its intentions for the Lost Lake site differ dramatically from the approvals granted a decade ago. *Preble Aggregate Inc. v. Town of Preble*, 263 A.D.2d 849, 851-52 (3d Dept. 1999) (finding plaintiff's assertion that it spent $240,000 to attempt to obtain permits irrelevant when plaintiff was aware of facts that would lead a reasonable developer to believe that its project was not certain). The developer bought the Lost Lake site with full knowledge of the nature of the Town

[8] The developer here has admitted that its purpose in obtaining the building permits and commencing construction is quite different from the aim and purpose for which the prior approvals was granted.

approvals and of the restrictive covenant, so any claim of hardship is purely self-inflicted. *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 594-99 (N.Y. 1977).

We also note that because the building permits sought construction in violation of the 2013 Restrictive Covenant and other approvals, any work that the developer would have done in breach of the same could not have resulted in any vested rights. *G. M. L. Land Corp. v. Foley*, 20 A.D.2d 645, 646 (2d Dept. 1964); *Reichenbach v. Windward at Southampton*, 80 Misc.2d 1031, 1033 (Sup. Ct. Suffolk Cty. 1975) (an invalid building permit does not create vested rights); *Soros v. Board of Appeals*, Village of Southampton, Suffolk County, 50 Misc.2d 205, 209 (Sup. Ct. Suffolk Cty. 1966) ("Petitioner gains nothing from the short and improper existence of her invalid building permit. It had to be revoked").

CONCLUSION

The Hartwood Club, Inc. respectfully requests that all the facts and arguments presented herein be entered into the record of the instant appeal and that the Board consider such facts and arguments in reaching its decision. As noted, the substantial increase in wastewater, run-off, etc. that would result from the changes in the Lost Lake project would create greater effects upon the Hartwood Club's properties, which rely primarily upon the quality and aesthetics of the natural wilderness present there. The Hartwood Club, Inc. is entitled to take all necessary actions to protect its properties from unwarranted negative impacts on water quality. *See Croton Watershed Clean Water Coalition Inc. v. Planning Bd. of Town of Southeast, Covington Management Co.*, 5 Misc.3d 1010(A) *3 (Sup. Ct. Westchester Cty. 2004); *Many v. Village of Sharon Springs Bd. of Trustees*, 218 A.D.2d 845 (3d Dept. 1995) ("A direct impact on one's drinking water supply is a concern that is plainly within the zone of interest that SEQRA is designed to protect").

Because none of these changes have been evaluated by the Town, there is no basis for any building permits to issue at this time for the Lost Lake Project

For the foregoing reasons, the Zoning Board of Appeals should deny the instant appeal.

Respectfully Submitted,

Brian M. Newman, Esq.

BMN

CC: Steven Barshov, Esq. (Atty for Applicants) (via overnight courier)
Javid Afzali, Esq. (via email JAfzali@HarrisBeach.com)

SCHEDULE A

(i) On the first page the Declaration indicates a fundamentally different approach to the development. "WHEREAS, the Developers and Declarant have determined that to assure a successful Development in which productive use is made of the Property for the benefit of all owners of the Property, ***a different approach to the Development is required*** in which, in addition to homes being constructed by lot individual lot owners [sic], homes would be constructed by the Developers on lots and then sold" (emphasis added). (Dkt No. 20, Amended Declaration of Reservations, at 1.)

(ii) The first sentence of the recitals is amended to change the nature of the development to a "***fully functional self-contained residential community...constructed by the Developers***" (emphasis added). (*Id.*, at 1.)

(iii) Applicants make all the recreational amenities upon which the PDD Approval was conditioned discretionary. "***To the extent that the Declarant, in its sole discretion and expense deems desirable or appropriate,***" the property may contain recreational facilities, such as a golf course, thus qualifying the entire purpose of the development (emphasis added). (*Id.*, at 2.)

(iv) Applicants change the nature of any recreational facilities to generically identify "community facilities" that were not contemplated or included in the PDD Approval. (*Id.*, at 2.)

(v) Applicants grant themselves a new power to "***in [their] sole and complete discretion amend***" all design and construction standards, nullifying prior commitments relating to an Architectural Control Committee (emphasis added). (*Id.*, at 4.)

(vi) Applicants eliminate the independence of the Architectural Control Committee. (*Id.*, at 4-5.)

(vii) Applicants reserve changes to applicable square footage requirements of all structures to "future amendments to this Declaration," making it impossible to determine if Applicants intend to comply with that condition of the PDD Approval. (*Id.*, at 6.)

(viii) Applicants alter the design guidelines for dwellings to eliminate: (a) "contemporary or modern" guidelines; (b) requirements for color and pitch of roof and size of storage buildings; and (c) the restriction that there be 1,800 square feet of heated/cooled floor space and a two-car garage. (*Id.*, at 6.)

(ix) Applicants eliminate requirements regarding the construction material required for the outside wall of a dwelling. (*Id.*, at 6.)

(x) Applicants eliminate requirements for dwellings constructed on a golf course. (*Id.*, at 6.)

(xi) Applicants eliminate budget requirements for landscape/soil erosion equal to 2% of total construction costs. (*Id.*, at 6.)

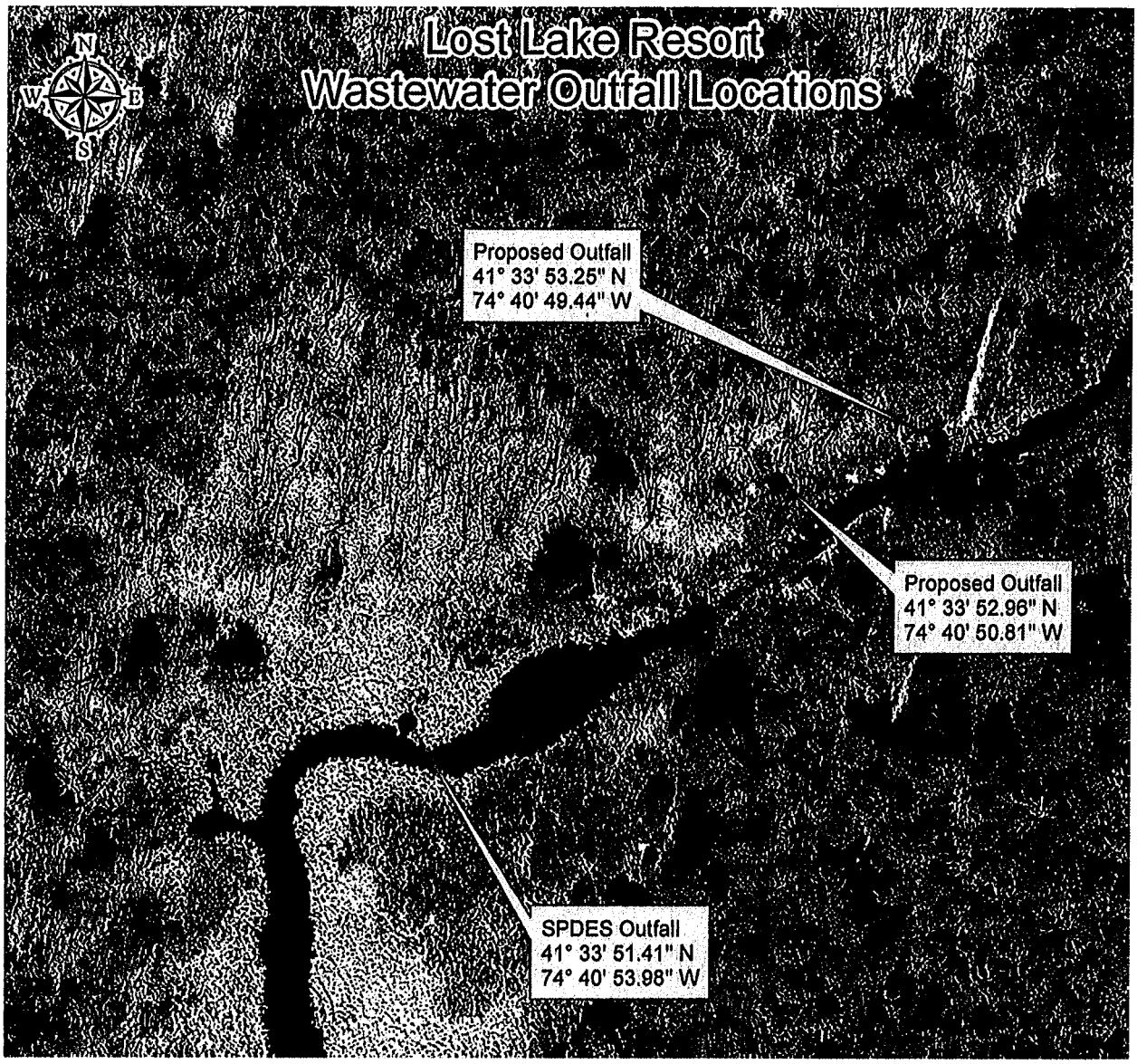
(xii) Applicants change boundaries for the location of dwellings within a Lot. (*Id.*, at 7.)

(xiii) Applicants change requirements for driveways. (*Id.*, at 7.)

(xiv) Applicants eliminate the requirement that "no construction activity other than work performed on the inside of a closed-in residential dwelling is permitted between the hours of 7PM and 7AM," which was a condition of the PDD Approval. (*Id.*, at 10.)

(xv) Applicants expand their tree removal powers, *id.*, at 1

SCHEDULE B


Lost Lake Resort
Wastewater Outfall Locations
N
W
E
S
Proposed Outfall
41° 33' 53.25" N
74° 40' 49.44" W
Proposed Outfall
41° 33' 52.96" N
74° 40' 50.81" W
SPDES Outfall
41° 33' 51.41" N
74° 40' 53.98" W