PERILLO HILL

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VIA Email (planning@huntingtonny.gov)

Town of Huntington Planning Board
Planning and Environment
Town of Huntington
100 Main Street
Huntington New York 11743

Att: Hon. Paul Ehrlich, Chairman and Members of the Planning Board

Re: Vineyard Bay Estates, LLC Application for Subdivision
Premises: 78 Bay Avenue & 211 Vineyard Rd., Halesite, NY
SCTM No. 0400-033.00-01.00-001.000

Dear Chairman Ehrlich and Planning Board Members:

As indicated in our correspondence to you this morning, this firm has recently been retained by The Nathan Hale Nature Preserve Committee (the "Committee") to represent it and its members before this Board and all other involved Boards, Commissions, or Departments of the Town in connection with the above-referenced proposed subdivision. By that earlier correspondence, we requested an adjournment of this matter and a reopening of the public hearing regarding same. In the absence of a response to those requests, we herewith submit the following in advance of any vote or resolution that may be scheduled or advanced in connection with the above application.

There are intertwined procedural and substantive issues that preclude any legal approval of the plan, even as a preliminary plat.

The "public hearing" that was held on August 2, 2023 was noticed to be for the purpose of the subdivision plat as then proposed and was indicated to having been made pursuant to Town Law §276. The August 2, 2023 hearing concluded with the Chair announcing, unilaterally, that the hearing was "closed." There was no motion to close the hearing and thus no "second," nor was there a vote of the Board to close the hearing.

Nevertheless, at a subsequent "meeting" (not "hearing") of this Board on October 11, 2023, the applicant presented revised plans and had colloquy with this Board regarding same.

While the submission and apparent acceptance of the revised plans would appear to reflect a re-opening of the record, and the live presentation by the applicant would appear to reflect a re-opening of the public hearing, this Board strictly enforced the "closed" status of the August 2, 2023 hearing and refused any public comment, despite the fact that the plans were changed and that applicant was afforded further opportunity to speak and engage this Board—and despite the fact that both this Board and applicant's counsel offered assurances on the record at the August 2, 2023 hearing that the public would have additional opportunities to be heard.

It cannot be that the record and hearing were reopened for the applicant but not for the public. The self-serving announcement by the applicant, which this Board is apparently crediting, that the revised plans resolved all of the public's concerns is absurd. The public should be able to be heard on the issue of the extent to which its concerns have been addressed. Likewise the Planning Department's own concerns were plainly not ameliorated.

In any case, the August 2, 2023 hearing did not comply with Town Law §276. Town Law §276 provides as follows:

> A preliminary plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the state environmental quality review act. The time periods for review of a preliminary plat shall **begin** upon filing of such negative declaration or such notice of completion.

Here, the negative declaration has not issued at the time of the August 2, 2023 hearing, and indeed has still not yet issued (or is only about to be issued in connection with tonight's proceedings). If the Board is issuing a negative declaration this evening, then, under Town Law §276, the review of the proposed plat can only legally "begin" now, and the public hearing concerning same must be scheduled for some time in the future.

See Kittredge v. Planning Bd., 57 A.D.3d 1336, 1338-1341 (3d Dept 2008). There, the Appellate Division held as follows:

> "We also agree with petitioners' contention that the Board improperly failed to hold a public hearing regarding the proposed subdivision after it issued its negative declaration. The required timing of a public hearing is set forth in Town Law § 276 (5) (d) (i) (1)…."

> "Town Law § 276 establishes a procedural structure for the review of subdivision plats, including provisions for coordination with other agencies by setting time limits in conjunction with SEQRA procedures. In circumstances where no draft environmental impact statement (hereinafter EIS) is required, Town Law § 276

(5) (c) provides that "[t]he time periods for review of a preliminary plat shall begin upon filing of [a] negative declaration." Common sense dictates that a hearing not be held on the preliminary plat until the plat is deemed complete, which occurs when a negative declaration is filed (*see* Town Law § 276 [5] [c])…."

"[w]e conclude that Town Law § 276 (5) (d) (i) (1) [*1341] and Liberty Town Code § 130-13 (D) (3) (a) (1) require that a public hearing be held after a lead agency has completed its initial review pursuant to SEQRA. **Since the Board here failed to hold the requisite hearing, its approval of Menderis's preliminary subdivision plat was contrary to law and must be vacated** (*see* CPLR 7803)."

The same vacatur and annulment will result here if the Board approves the instant application and is required to be challenged in an Article 78 proceeding.

Official guidance from New York State likewise directs:

Can a planning board reviewing a subdivision wait until the close of the public hearing to determine whether to require an EIS?

No. The SEQRA regulations provide that no application for funding or approval of an action is complete until a negative declaration has been issued or a draft EIS has been accepted by the lead agency. Since the public hearing should not be held until the application is complete, the SEQRA determination on whether to require an EIS by necessity precedes the public hearing on the application.

Any negative declaration or determination of significance that would now be issued by this Board, as lead agency, will not have incorporated or considered public input since the August 2, 2023 was not noticed as a SEQRA hearing.

Further, as this is an Unlisted action, it is clear that the extreme and predominant slope defining this parcel—together with an aggressive design proposal involving substantial excavation and installation of retaining walls, extensive clearing and disturbance of wildlife, complex grading and drainage issues—pushes this application to one requiring further environmental impact study. The idea that the design mitigates all the impacts has no basis in fact and is not a basis to ignore the responsibility to carefully consider the potential impacts under SEQRA. There has been no "hard look" as is required to make this determination.

The publicly available record does not include or reflect that the Town's Engineering Division or Planning Department have sufficiently vetted or independently confirmed certain premises of the applicant's proposal. As just two critical examples:

a) aside from a third-party topographical survey, how do we know that all of the development is restricted to the "flat areas" of less than 10% average slope., or that the slope of the flat areas, for the entirety of such areas as are being so assigned for lot area purposes, are in fact less that 10%.
b) What level of engineering has confirmed the structural stability of the retaining walls as proposed?

While Town Law §276 allows for a Planning Board to modify layout of parcels in a subdivision, the approval of this plat is predicated on the relaxation of certain dimensional requirements of the zoning code which would require area variances from the Zoning Board of Appeals that have not been sought or granted. The significant excavation and substantial construction of retaining walls upon which this project is premised will additionally require relief from the Zoning Board of Appeals. These matters appear not to have been referred to or coordinated with the Zoning Board and therefore run afoul of the SEQRA requirements for such coordination. Further deferring environmental analysis until later stages of the project would constitute an impermissible segmentation under SEQRA.

Applying the yield analysis under the Steep Slope Law as provided in Town Code §198-63(B), this parcel **is limited to a two parcel subdivsion**. While an alternate method for yield analysis and calculation exists under §198-63(D) that restricts development to the "flat area" while prohibiting any development in the hillside area, there is nothing on the face of this application that indicates the applicant has elected to invoke or proceed under §198-63(D), nor is §198-63(D) referenced anywhere in the proposed Resolution. Indeed, the applicant's presentation offers the impression that they are voluntarily and magnanimously agreeing to set aside and conserve a large portion of the parcel. But if they are proceeding under §198-63(D), and again that it not stated by them nor acknowledged by the Board, that is not a voluntary concession as development in that area is prohibited.

In any case, the rationale that building eight houses on eight lots in the relatively flat areas is better than building two houses on parcels that partially involve the hillside area presents a false binary. The Planning Board is not constrained to pick one or the other. There are other alternatives including simply denying preliminary plat approval.

It goes without saying that if either the retaining walls or drainage systems failed in any regard, the results could be catastrophic. There is insufficient information by which to evaluate

the structural integrity or future performance of the retaining walls that are not only proposed but upon which the entire concept of the subdivision is premised.

The plans appear misleading insofar as the height of the retaining walls as indicated failed to reflect the berm on top which they are designed to be located and the dropoff behind them (making the real delta or effective wall height closer to 20 feet). The true height and width of the walls is not indicated The required width of the base of the walls may either be or need to be wider than indicated. This is relevant not only to the question of structural stability, but also goes to the issue of the subdivision layout and yield. In some cases, the plans already call for relaxation of the 10 foot setback requirements for the retaining walls to be set off from the lot lines or the boundary of the preserved hillside area. If a wider base or footing is involved, the profile of the wall may in fact be invading the restricted area. Further, there is no excavation plan, but the depth and width of the excavation to accommodate this aggressive design will be massive.

No representation is made as to the global stability of the wall systems. The integrity of a manufactured or predesigned wall system can only be evaluated as incorporated into the actual place of installation, accounting for the slopes and topography at every such location.

Critically, there is no as-built rendering of the walls or project, or even elevation drawings, provided by the applicant. This precludes review of the aesthetic impact of the project. It is of little comfort that a certain portion of the parcel is being conserved when the "cost" of such conservation is a large wall system that negatively transforms the area.

Furthermore, it is indicated in the draft resolution that 3.51 acres of trees – mostly hardwood varieties – will be cut down. This will result in obvious erosion consequences unexamined by the Board.

Given the procedural defects regarding the sequencing of the public hearings and the SEQRA review, and the absence of sufficient information upon which either the public or this Board could possibly make any informed decisions, it is imperative that this Board take this opportunity to "pause" and correct these defects rather than blindly plowing ahead.

Very truly yours,

Perillo Hill LLP

Lisa A. Perillo

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cc: Edward Gathman, Esq., Attorney to the Planning Board