SUPREME COURT	COUNTY OF WESTCHESTER
FRIENDS OF NURSERY FIELD, DAN ADLER, MARK HAYES, GWEN BOYCE, LYNN KAU, JESSICA KAU, PAULA FUNG, DREW FUNG, LAUREN RICH, AGNES RICH, SHANNON SMITH, and LORNE SMITH, Petitioners v. CITY OF RYE, CITY OF RYE CITY COUNCIL, CITY OF RYE BOARD OF APPEALS, and GUY CARPENITO, Respondents.	Index No. _____ Assigned Judge: _____ **VERIFIED PETITION**

PETITIONERS, being duly sworn, by and through their counsel, VENEZIANO & ASSOCIATES, state the following as and for their Verified Petition herein:

THE SUBJECT SITE AND THE PARTIES

1. This proceeding is brought by the Petitioners to (i) set aside the State Environmental Quality Review Act ("SEQRA") Negative Declaration adopted by the Respondent City of Rye and City of Rye City Council with respect to a project action brought by the same City of Rye to replace an existing grass recreation field with a synthetic turf field (the "Project" or "Action") at a property commonly known as "Nursery Field", located at 421 Milton Road, Rye NY ("Nursery Field" or the "Site"), (ii) to overturn the interpretation of the City of Rye Building Inspector determining that the project is not subject to local zoning code compliance, and (iii) order the compliance of the City with the requests of the Petitioners for information and documentation under the Freedom of Information Law ("FOIL").

2. The Project is sponsored by the City and proposes to intensify the use of the existing field within a residential neighborhood at the site deemed least desirable by the City's own study,

by constructing a synthetic field requiring nearly 100,000 square feet of disturbance in a flood plain, adjacent to a wetland, next to the oldest historic home in Westchester County, with the express purpose of increasing the usage of the field while inexplicably repeating the mantra that there will be no change in the field's utilization. Sometimes this oxymoron is stated in the same sentence of the City's application.

3. All of this is proposed without regard to the scientific data presented to the City detailing the health risks of such a filed, the well-documented flooding issues threatening the nearby residents, and the concerns and objections of local and regional agencies who were excluded from the environmental review of the project.

4. The City of Rye ("City") is a municipal corporation in Rye, NY, with an address of 1051 Boston Post Road, Rye, NY.

5. The City of Rye City Council ("Council") is a duly elected council governing the City of Rye with an address of 1051 Boston Post Road, Rye, NY.

6. The Rye Board of Appeals ("ZBA") is a duly established zoning board serving the City of Rye in accordance with state law and local code, with an address of 1051 Boston Post Road, Rye, NY.

7. Guy Carpenito is the Building Inspector for the City of Rye, maintaining an office at 1051 Boston Post Road, Rye, NY.

8. Petitioner Friends of Nursery Field ("FNF") is an unincorporated association of concerned residents of Rye NY. Each member of FNF is a tax paying owner in the City of Rye and their properties are located either contiguous to or nearby the project which is the subject of this proceeding (referred to herein as "Nursery Field").

9. Petitioner Dan Adler is a member a of FNF and is the owners of property at 62 Elmwood Ave., Rye NY, which is contiguous to the Nursery Field site ("Site").

10. Petitioners Mark Hayes and Gwen Boyce are members of FNF and are the owners of property at 68 Elmwood Ave., Rye NY, which is contiguous to the Site.

11. Petitioners Lynn & Jessica Kau are members of FNF and are the owners of property at 66 Elmwood Ave, Rye NY, which is contiguous to the Site.

12. Petitioners Paula & Drew Fung are members of FNF and are the owners of property at 84 Elmwood Ave., Rye NY, which is contiguous to the Site.

13. Petitioners Shannon Smith & Lorne Smith are members of FNF and are the owners of property at 287 Rye Beach Road., Rye NY, which is contiguous to the Site.

14. Petitioners Lauren Rich & Agnes Rich are members of FNF and are the owners of property at 281 Rye Beach Ave., Rye NY, which is contiguous to the Site.

15. Each of the individual Petitioners in paragraphs 8 – 14 bring this proceeding in their individual capacities as natural persons and as members of FNF.

16. This firm represents each and every Petitioner herein.

THE PROJECT

17. The Project is proposed by the City of Rye ("City" or "Applicant").

18. The Project Action is described by the City as the development of an "approximately 82,000-sf athletic field …involv[ing] 100,366-sf (2.3 acres) of site disturbance and is located within an approximately 6.75-acre City-owned property, which also includes an off-street parking area and comfort station…The proposed action would replace the existing grass field with a synthetic turf system, elevate the field at or above the 100-year flood elevation and provide improved subsurface drainage systems. All proposed field improvements would be

substantially within the footprint of the existing athletic field area and would not encroach into the approximately 1.2-acre on-site wetland….Additional improvements include a 4'-0" chain link fence and 20'-0" athletic ball netting system are proposed for the northern extent of the playing surface, a concrete turf anchor/retaining wall running along the northern extent of the field, removal of three trees and the implementation of an enhancement plan including the planting of 20 native tree…The affected area is an approximately 2.3-acre portion of a 6.75-acre City Park, identified as Block 5, Lot 7." **Exhibit A**.

19. The Rye City Council is the applicant in this matter.

20. In September 2023, on the City's behalf, the City's consultants submitted an application with a Coastal Assessment Form and a Long Form EAF for the redevelopment of Nursery Field in accordance with the proposed Project ("Application"). **Exhibit B.**

21. The express purpose of the Project is to increase the intensity of the use of Nursery Field for athletic events.

THE PRIMA FACIA IMPACTS AND ISSUES

Exemption From Zoning

22. First, the disposition of this proceeding turns largely on the City's determination that the Project is exempt from compliance with the City's Zoning Code. This is discussed in greater detail below, but it is a fundamentally flawed determination which diminishes the level of scrutiny to which the Project is subjected both in its design and its environmental impacts.

Executive Summary of Ignored Environmental Concerns

23. Under any reasonable review, the newly developed fields would (without limitation):

a. Be adjacent to Knapp House, believed, by the Applicant's own admission, to be the oldest residence in all of Westchester County, and Milton Cemetery (both of which are listed on the National Historic Registry).
b. be utilized by local and regional sports leagues,
c. allow for more activities to be run simultaneously than are now run at the grass field,
d. attract tournaments and events beyond the confines of the City of Rye, would result in related and significantly increased traffic in the residential neighborhood[1],
e. require substantial disturbance to an already flood-prone site, would be developed in a floodplain,
f. require substantial construction adjacent to a freshwater wetland,
g. be disturbing steep slopes up to and including slopes over 15%;
h. require the use of heavy trucks and equipment for the excavation and import of material sufficient to raise the level of the field to an unspecified number of feet above the 100-year flood plain throughout 80 – 100,000 s.f. of development area,
i. greatly increase noise both during construction and during its intensified use on a surface that does not absorb sound the way the field currently does,
j. increase heat for neighboring homes in the summer,
k. have negative impacts on human health and safety, and

24. Moreover, the site for the location of the new turf field was the subject of an earlier, City-sponsored study of appropriate locations for such a Project, and Nursery Field was identified as the least desirable of the sites considered in that study, yet the City Council ignored their own study in proceeding with this Project. **Exhibit C**.

[1] The Site is in an R5 Residential zoning district.

25. Some of the impacts noted above were addressed in the Negative Declaration, but not all, and where they were addressed, the findings amounted to a restatement of the Applicant's submissions on these subjects and failed to acknowledge any of the submissions of Petitioners or on Petitioners' behalf which provided information counter to the summary conclusions of the Negative Declaration.

PROCEDURAL POSTURE

26. This proceeding is brought pursuant to CPLR Article 78 to challenge the legislative action of the City Council as well as the determination of the ZBA which determined that the application was not subject to zoning regulations.
27. The actions of the City Council and ZBA as aforesaid and as detailed hereinbelow were both arbitrary and capricious, contrary to substantial evidence in the record, unsupported by the record, and contrary to the weight of law governing the actions.
28. The City Council failed to follow the procedural requirements of SEQRA, which is a strict compliance statute.
29. The City Council failed in both its procedural and substantive obligations under SEQRA by improperly "typing" the Action as an Unlisted Action under SEQRA.
30. The City Council failed in both its procedural and substantive obligations under SEQRA by establishing itself as Lead Agency under SEQRA without a coordinated review or circulation to other involved and interested agencies.
31. The City Council failed in both its procedural and substantive obligations under SEQRA by failing to conduct an appropriate review of the environmental impacts of the Project and take the necessary hard look required by law.

32. The ZBA acted arbitrarily and capriciously and without substantial evidence in the record when it determined that the City was not subject to site plan review or wetlands permit requirements. ("Interpretation," **Exhibit D**).

33. The Project was initially "typed" a Type I Action under SEQRA on June 14, 2023 ("Initial SEQRA Resolution" **Exhibit E**.).

34. The Project was then "re-typed" an Unlisted Action under SEQRA on December 6, 2023, after a formal application was filed in the matter ("Second SEQRA Resolution"). *See*, Exhibit A.

35. The Initial SEQRA Resolution was based upon the City's mere authorization of the preparation of an application for an action under SEQRA, which is not, in and of itself, an "action" as defined by SEQRA.

36. Therefore, the Initial SEQRA Resolution was a legal nullity because no action was presented at that time upon which SEQRA could be based.

37. If it is determined that the Initial SEQRA Resolution was not a legal nullity and constituted the commencement of the "Action" challenged herein, then its determination that the Action was a Type I Action under SEQRA should stand.

38. A Type I Action requires either a Positive Declaration or a Negative Declaration under SEQRA, whereas an Unlisted Action allows for a conditioned Negative Declaration where impacts are mitigated by design.

39. Therefore, the proper typing of the Action has a material impact on the level of environmental review to which the Action is subject.

40. Between the time of the Initial SEQRA Resolution and the Second SEQRA Resolution, the City modified the proposal such that it would appear to fall just below the threshold which clearly made it a Type I Action.

41. Nevertheless, even with this alteration, the Project constitutes a Type I Action because it is adjacent to two historic sites and the reduction in area of disturbance to just under the threshold which would trigger a Type I review is a transparent effort to avoid that typing and was inadequately scrutinized by the City despite its dubious nature being pointed out in the record by Petitioners.

42. Whether the Initial SEQRA Resolution stands or falls, the Negative Declaration being challenged was adopted on December 6, 2023, and filed with the City Clerk on December 7, 2023, and is subject to a 120-day statute of Limitations.

43. The ZBA Interpretation appealed herein was adopted December 5, 2023 and Petitioners appealed this Interpretation to the ZBA in a timely manner in order to exhaust its administrative remedies. *See*, Interpretation attached as Exhibit D.

44. This Petition is filed within each applicable statute of limitations, and the matters are combined herein in the interest of judicial economy.

THE DATA IGNORED

45. Prior to the City Council adopting the Negative Declaration, the Petitioners raised numerous serious objections and concerns to the location of the Project, its size and intensity, and the paucity of supporting data to justify the proposed SEQRA posture.

46. In addition to the Petitioners' direct communications, this firm submitted substantial objections in law and fact, including but not limited to the letter attached hereto as **Exhibit F**.

47. Therein we advised that there were significant gaps in the procedural steps taken to comply with SEQRA, which is a strict compliance statute.
48. Our letter also countered a number of substantive assertions made in the EAF and accompanying Expanded Narrative submitted by the private entity working on behalf of the City to advance this Project. Much of that data was simply untrue, but at best was not credible in light of the substantial contrary information available to the City Council.
49. The objections raised, without limitation, included hard and substantial evidence of potential environmental harm and harm to human health and safety related to the substances used in a synthetic turf field of the type proposed, concerns about the clear increase of intensity of use the new surface would engender, including significant noise and traffic increases, the fact that the property was initially acquired in part through an EFC loan for wetland preservation and the nature of this project is counter to that intention, and the fact that no independent review of any of the mitigation measures or environmental conclusions or studies drawn by the Applicant had been conducted to confirm the reliability of the date submitted.
50. This determination was made without substantial or rational reliance on the record and contrary to governing law in the State of New York.
51. We incorporate by reference the entire record of any prior proceedings in this matter before the City Council into the record of these proceedings before your Commission, and request, in accordance with the CPLR, that the City produce the entire record in connection with this proceeding.
52. The Project was also advanced without site plan or wetlands approvals as required by Code.

53. Petitioners submitted a request for interpretation to the City's Building Inspector, Mr. Carpenito, seeking a determination as to whether site plan and wetland approvals ("Code") were required for this Project. On December 5, 2023, the City Building Inspector, Mr. Carpenito, issued an interpretation ("Interpretation"), attached hereto as Exhibit D, relying exclusively on Corporation Counsel's memorandum of law on the point, and determining that the Project was not subject to site plan approval or wetlands law.

SEQRA NON-COMPLIANCE

54. The project is not being considered in compliance with SEQRA.

Lead Agency Has Not Been Properly Established

55. The City Council determined that there were no other involved or interested agencies.

56. Having done so, it was, by default, the Lead Agency under SEQRA.

57. SEQRA defines an involved agency in 617.2(t) as: "an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an 'involved agency' notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced." Petitioners pointed out on the record that there were in fact other involved and interested agencies.

58. The Planning Commission is an involved agency under SEQRA because it has authority to review and approve the site plan and a wetlands permit.

59. Further, by reviewing the Project without requiring site plan approval or a wetlands permit from the Planning Commission as the City Code ("Code") requires, the Planning Commission was excluded from considering its potential role as Lead Agency.

60. The Planning Commission is expressly charged by statute and Code with the review of development projects, and routinely engages in such reviews.

61. The Applicant admits that DEC has jurisdiction to approve State Pollutant Discharge Elimination System (SPDES) and Stormwater Pollution Prevention Plan (SWPPP), making DEC an involved agency as well.

62. Moreover, the City's own Conservation Advisory Council ("CAC") and the Westchester County Planning Commission ("WCP") submitted letters on the record expressing serious concerns about the project which were neither noted nor addressed in the Negative Declaration, and neither entity was deemed an interested agency.

63. Likewise, the Rye Historic Society submitted a letter expressly requesting to be considered an interested agency, which was ignored by the City.

64. Further, Petitioners put on the record a number of other agencies which should be considered interested agencies, as follows: NY Environmental Facilities Corporation, NYS DEC - Office of Climate Change, the EPA, FEMA, the State Historic Preservation Office, Federal Historic Preservation Office, Westchester County Historical Society, Federal Historic Preservation Office New York, Natural Heritage Program, and the U.S. Fish and Wildlife Service, each having the express purpose of environmental protection or regulatory oversight, or both, in disciplines impacted by this Project.

65. Whether or not these additional agencies would ultimately be considered interested agencies is not the salient point for purposes of this Petition; rather, the City's actions with respect to this Project, under SEQRA and otherwise, reflect that they took no note whatsoever of these publicly identified agencies in considering the hard look necessary under SEQRA.

66. In this case, the City Council established, without any independent or consultant expert studies, that the action was Unlisted (a reversal of its Initial SEQRA Resolution determination) and required no circulation as there were no other agencies which had permitting authority over the Project.

The Planning Commission is the Appropriate Lead Agency

67. Had the Planning Commission been recognized as an Involved Agency, it may have asserted its desire to serve as Lead Agency in response to a notice of intent from the City Council, an opportunity it never had.
68. Given its expertise and experience in reviewing such applications, the Planning Commission is the appropriate Lead Agency.

The Project is a Type I Action Under SEQRA

69. The Project is a Type I Action Under SEQRA. The Application suggests that this proposal is an Unlisted Action under SEQRA. However, it is admitted in the Application that the City Council previously determined it to be a Type I Action.
70. The Project is now presented as an Unlisted Action, based upon erroneous and/or unsupported assertions by the Applicant.
71. The purported basis for the reversal from Type I to Unlisted is that "based on the development of more detailed plans and refinements in the project, total site disturbance associated with the construction of the field is estimated to be less than 2.5 acres. The proposed action is now considered to be an Unlisted action since it does not meet or exceed any threshold identified in §617.4, Type I actions, of SEQR."

72. As noted above, the total site disturbance proposed in the Application, using the Applicant's own numbers, is 2.4 acres, an area of disturbance so close to the admitted Type I threshold of 2.5 acres that it must be subjected to careful scrutiny and cannot be established without core careful review and analysis of the plans. Indeed, in their own words the Applicant suggests that the proposed disturbance is "*estimated* to be less than 2.5 acres," a dubious statement upon which to set aside the former Type I designation.
73. For instance, that calculation seems to consider only the dimensions of the artificial surface proposed, and not the actual area of disturbance during, and after, construction. However, even their introductory statements in the "Supplementary Narrative" states that the Project will replace the "1.85 acre… grass field," belying their statement that the plans have been modified to disturb only 1.65 acres.
74. And their narrative admits that in addition to the new field itself, "[a]dditional improvements include a 4'-0" chain link fence and 20'-0" athletic ball netting system are proposed for the northern extent of the playing surface, a concrete turf anchor/retaining wall running along the northern extent of the field, removal of three trees and the implementation of an enhancement plan including the planting of 20 native trees," likewise making it unlikely that the four corners of the field are the true limit of disturbance for the Project.
75. Rather, it seems likely that these "new" calculations are deliberately "estimated" and obfuscated to avoid the Type I classification.
76. The burden of substantiating these claims is on the Applicant.

77. In changing the type from Type I to Unlisted, the City does not address the proximity of the Project to historic Knapp House, an impact which cannot be overcome in triggering a Type I determination.[2]

78. For all of the aforementioned reasons, we submit that the action is a Type I Action.

79. The Application fails to identify involved and interested agencies. The Application makes the erroneous claim that the Rye City Council is the only "involved" agency.

80. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an 'involved agency' notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced." The cover letter for the Application describes the action as "replac[ing] the existing grass surface with a 204' X 345' synthetic turf system."

81. That equates to 70,380 sq. ft. (or 1.62 acres) of disturbance. Subject to confirmation, the site is 6.75 acres in size. Thus, the area of disturbance is purported to be 2.4 acres. But, all of these numbers are subject to confirmation by review of the application materials and an updated survey.

82. Parenthetically, the same minuscule change in the proposed limit of disturbance to side-step a Type I designation must also be carefully scrutinized in the context of the Applicant's statement that "[t]he proposed turf field would also be located within the 3.123-acre "recreation area" that was omitted from Environmental Facilities Corporation (EFC) long-term financing and related restrictions."

[2] The Negative Declaration does purport to minimize the impacts on Knapp House and the Milton Cemetery, but it is the proximity of the Project to those historic features which is the relevant factor in triggering a Type I Action.

83. Nursery Field and the surrounding land was originally purchased using a New York State Environmental Facilities Corporation loan ("EFC Loan") under Section 320 Estuary Program for Long Island Sound.

84. The following is the Project Description from the EFC Loan: "The Parcels being purchased are consistent with the activities 'Conserve and Enhance Natural Resources and Open Spaces' and 'Increase Public Access' included in the recommendation contained in the Comprehensive Conservation and Management Plan for The Long Island Sound, the Westchester County Executive's Citizens Committee on Non-point Source Pollution in Long Island Sound; the City of Rye Local Waterfront Revitalization Plan; and Rye City Development Plan, 1985."

85. When the EFC learned that part of the purchased land was used to construct a natural grass soccer field (contrary to the terms of the loan) the City of Rye was required to pay back a certain amount of the loan--known as the "recreation area".

86. The city has corresponded with the EFC since 2020 determining that the EFC does not have jurisdiction over what the City does within the recreation area, but *do* have jurisdiction over the land that surrounds it. **Exhibit G**.

87. The City has guaranteed the EFC that they will not touch the land still under the EFC loan during any construction of a new field.

An Insufficient Substantive SEQRA Review was Conducted.

88. The application makes inaccurate and/or unsubstantiated factual claims as to impacts which cannot form the basis of SEQRA determination of significance. Without waiving any other objection which might be made at this time or based upon the further review of this Project, we note below several errors and inconsistencies in the Applicant's submission (references

are to the EAF Sections completed by the Applicant [see, Exhibit A, EAF attached thereto] and taken at face value by the City):

a. D.1.c indicates that the Project is ***not*** an "expansion of existing use." This conclusion is contrary to reason and contradicts the City's own statements in the record. The entire justification for the Project is so that the use of Nursery Field can be expanded.

b. In fact, if this field is built, it is inevitable that it will garner more use, not only from the existing local leagues, but from other leagues and organizations. The Negative Declaration *expressly states* that increased use is one of the primary purposes for the Project.

c. D.1.g indicates that the Project is not non-residential construction. This, of course, is not true.

d. D.2.b indicates that the Project will not result in the "alteration of, increase or decrease in size of, or encroachment into any existing wetland … or adjacent area." This is a broad conclusion not substantiated by the Application materials. The limits of the Project as described is within a wetland buffer. An independent wetlands scientist should be retained to review this aspect of the action before any review is concluded.

e. D.3.e indicates that the Project will not "create stormwater runoff, either from new point sources (i.e. ditches, pipes, swales, curbs, gutters or other concentrated flows of stormwater) or non-point source (i.e. sheet flow) during construction or post construction." Yet the Application acknowledges the need for a SWPPP.

f. D.3.j indicates that the Project will create no "substantial increase in traffic above present levels." This conclusion cannot be drawn based upon the submitted Application. This is nonsensical. No traffic study was required of the Applicant or

independently commissioned, even though it is admitted by Applicant that increased use of the field is the purpose of the Application.

g. D.3.n indicates that the Project will require no outdoor lighting. This statement must be tested during the review process. To be clear, FNF does not want lighting. But, although the Applicant states that the field will operate only during daylight hours, it isn't even safe or appropriate to provide for *no lighting* for such a facility. Increased traffic will produce lighting impacts in the early morning and at dusk, weather conditions may require lighting even during traditional daytime hours, and at least some lighting should be anticipated for security and safety purposes when the field is not in use. Perhaps of greatest concern is the likelihood that once operational, the field will attract interest from other leagues and organizations for evening use. For any or all of these reasons, outdoor lighting should be anticipated, and a detailed lighting plan should be required and analyzed.

h. D.3.p&t both indicate that the Project will require no storage of hazardous materials. This is not true. There is substantial scientific data that the material of which synthetic turf is made is, in itself, a hazardous substance. This was made part of the record in submissions by the Petitioners. This scientific literature and opinion was entirely disregarded by the City. The Applicant's self-serving statements on the hazardous substance issue were accepted at face value by the City without any study required of them, without any independent study to verify their statements, and in total disregard for competent evidence to the contrary put on the record by Petitioners.

i. E.3.f indicates that *99.5% of the site has poor drainage*. SEQRA impacts cannot be properly analyzed where such a condition exists when 80,000 sq. feet of field is being

replaced with an impervious surface which will be drained via a substantial stormwater management system for which no detailed designed has been presented or studied.

j. E.3.h indicates a spill history on the site. That history requires further study in order to proceed with a SEQRA determination.

89. The items of insufficiency noted immediately above are representative and are set forth herein without limitation. Petitioners rely upon the entire record as it will be produced by the City in Response to this Petition and reserve the right to supplement these pleadings as the proof may support.

90. The alternatives are not nearly well-enough studied to conclude that this Project has less potential negative environmental impact than the other available alternatives, and the fact that alternate sites were determined to be preferred sites even by prior consultants to the City was ignored in the EAF.

91. Further, the Applicant submits that the maintenance and improvement of the grass field "would require heightened use of fertilizers and herbaceous pesticides to maintain a high-quality grass field." This statement is made without any study or analysis of maintenance which do not include the use of such pesticides. There are numerous alternative modalities for maintenance of the grass field which would not require the use of such substances, many of which are currently used by the City of Rye.

92. Further, the entire "alternatives" section of the Expanded Narrative ignores the fact that there are a number of better alternatives to the Nursery Field site which have been identified in the record but are not part of the analysis submitted with this application.

93. The only study the City has undertaken to determine the best location for a synthetic field places Nursery Field dead last among the numerous sites considered, and placed two existing Rye Recreational fields above it.

94. Further, there are alternative sites on either school owned or privately owned parcels which would be more appropriate. The study is ignored in this submission, and it should be incorporated into this record for review.

95. Nor can LWRP compliance be determined based on the submitted Application. Rye's LWRP sets forth at least three policies which cannot be deemed satisfied on the basis of what has been submitted with this Application. These three policies (Policies 12, 13 and 14) have to do with the Project's impact on existing and future flood conditions. They are discussed immediately below. Policy 12 - Activities or development in the coastal area will be undertaken so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features including beaches, dunes, barrier islands and bluffs.

96. Primary dunes will be protected from all encroachments that could impair their natural protective capacity. Policy 13 - The construction or reconstruction of erosion protection structures shall be undertaken only if they have a reasonable probability of controlling erosion for at least thirty years as demonstrated in design and construction standards and/or assured maintenance or replacement programs. Policy 14 - Activities and development, including the construction or reconstruction of erosion protection structures, shall be undertaken so that there will be no measurable increase in erosion or flooding at the site of such activities or development, or at other locations.

97. No studies have been submitted to support compliance with any of these policies despite well-known flooding issues associated with this site. To confirm compliance with the LWRP without any supporting documentation or detailed design criteria would be to act in an arbitrary manner without substantial evidence in the record. At the very least, it should be noted that the plastic "blades of grass" and other non-organic elements of the synthetic field will send hazardous run-off into the wetlands.

98. Further, under any reasonable review of a project of this scope and size, the Application should have been reviewed by a third-party engineer with experience designing and reviewing such proposals (not a member of, or affiliated with, the Synthetic Turf Council, or the City Planning Staff alone, which has a vested interest in advancing the City Council's agenda). Any recommendation or advisory opinion issued by the Planning Commission without such a review would, by definition, be issued without substantial evidence in the record to support such actions. For one thing, these synthetic fields are a specific sort of design challenge ~~animal~~ with specific impact issues, and review ought to have been conducted by independent consultants with experience in these proposals in order to have any weight at all.

99. This field is proposed in a wetland buffer and in a neighborhood which also already experiences flooding on a regular basis. The sufficiency of the SPDES and SWPPP designs are critically important under these circumstances. In addition, the sort of synthetic field proposed is the subject of substantial data and scientific critique and analysis.

100. For the same reasons set forth above, there is insufficient evidence in the record to issue a wetland permit on this Project. A third-party wetlands scientist, not a member of, or affiliated with, the Synthetic Turf Council should be retained by the City to review the

Application and the proposed mitigation. We note that the Application materials indicate that the Planning Commission is required to perform a "wetlands review."

101. This is misleading. Nearly 1/3 of the proposed construction is to take place in the wetland buffer. As noted above, it should also be noted that the plastic "blades of grass" and other non-organic elements of the synthetic field will send hazardous run-off into the wetlands.

CARPENITO'S INTERPRETATION

102. The Project was advanced without site plan or wetlands approvals as required by Code.

103. Because the City Council "jammed" this action through without complying with Zoning, the many impacts which would have been illuminated by a proper site plan and wetlands permit review were completely overlooked, which, from a perspective of giving the Application the "hard look" required by SEQRA, renders SEQRA review invalid on its face, both procedurally and substantively.

104. The specific reasons why this Project should have been subject to site plan and wetland permit review are alleged immediately below.

105. The Project requires site plan approval. Section 197-7 of the Rye Code requires site plan approval where the subject action proposes: A nonresidential use or structure or a group of uses or structures aggregating more than 1,000 square feet of gross floor or land area. (c) A nonresidential use of vacant land as a main use on a lot.

106. The Application proposes the construction of a non-residential structure of 70,380 square feet. A "structure" is defined in the Code as "an assembly of materials forming a construction framed of component structural parts for … use."

107. The Code defines "use" as "[t]he specific purpose for which land … is designed, arranged, intended or for which it is or may be … maintained." Therefore, the proposal is for a non-residential structure "aggregating more than 1,000 square feet of … land area" as well as a nonresidential "use of … land as a main use on a lot."

108. No site plan application has been made. Petitioners submitted a request for interpretation to your Building Inspector, Mr. Carpenito, seeking a determination as to whether site plan and wetland approvals ("Local Code") were required for this Project. On December 5, 2023, Mr. Carpenito issued that Interpretation, attached hereto as Exhibit D.

109. While Mr. Carpenito issued the Interpretation under his letterhead and in his name, and although by law and Code Mr. Carpenito is the officer charged with interpreting the Code, he did not formulate the Interpretation.

110. Rather, Mr. Carpenito's interpretation relied on a legal memorandum form Corporation Counsel that no site plan or wetlands approval were necessary, which based its conclusions on (i) past practice, (ii) a 21 year-old resolution of the City Counsel having nothing to do with the present Project, and (ii) the application of a Court of Appeals balancing test, which Corporation Counsel deemed satisfied by the present Project. All three premises for exemption from Local Code are misplaced.

Past Practice.

111. Corporation Counsel notes that the City has historically exempted its own projects from its zoning and land use regulations. However, by its own later analysis, Corporation Counsel acknowledges that "the New York Court of Appeals set forth a nine-point balancing test to determine whether the actions of governmental units are exempt from local zoning regulations.

112. This "balancing of public interests" approach focuses on whether or not it is in the public interest to subject the encroaching government to the land use regulations of the host community." The noted balancing test is explicitly to be applied to each Project on its merits. Past practice cannot be used as a "blanket" mechanism for exemption from Local Code.

The 2002 Nursery Field Resolution

113. Counsel next points to a 2002 resolution of the City Council exempting the original creation of Nursery Field from Local Code compliance ("Waiver Resolution"), stating:

> [I]n July 2002, the City Council purposefully stated its intent to authorize a waiver of review by the City's discretionary boards when the City first created Nursery Field….In the Waiver Resolution, the City Council resolved as follows: *that formal review and approval by City boards and commissions of the City's plans for use of the Rye Nursery site are,* to the extent such review and approval is not mandated by the requirements of generally applicable State law, hereby *waived* ....

114. Reliance on this 21-year-old Waiver Resolution is misplaced for several reasons.

115. First, that Waiver Resolution was based upon the *original* Nursery Field project, which was for the establishment of a grass recreational field on existing natural grass surfaces which virtually no associated improvements or engineering design.

116. The Project now under consideration is a massive construction project introducing substantial engineering, drainage, site design, and increased intensity of use through the development of a synthetic field in a wetland buffer, and in a neighborhood now well documented to be subject to flooding and drainage issues, among other significant environmental concerns. Some of these concerns include the nature of the materials which will comprise the field surface, as to which there is considerable scientific data suggesting that there is risk to the environment and the users and neighbors of such a field.

117. The present Nursery Field Project cannot reasonably be compared to the 2002 ~~2002~~ Nursery Field project by any rational standard. To rely on the 2002 Waiver Resolution to exempt this Project is to circumvent the proper exercise of the police power inherent in zoning and planning regulations meant to protect the health, safety and welfare of the City residents.

118. Second, by citing the 2002 Waiver Resolution, the Building Inspector and Counsel admit that such a resolution, with appropriate findings supporting the same, is necessary, and ought to have been considered. No such resolution was adopted by the City Council with respect to the present Project. Consequently, there has been no consideration or determination of the balancing test Counsel acknowledges ought to have been applied, and no reasonable consideration of the issues raised by the public in that regard.

119. Third, even the 2002 Waiver Resolution states that the exemption approved of therein should be limited to cases where such Local Code compliance is not mandated by "generally applicable state law," to wit:

120. The City Council resolved that that formal review and approval by City boards and commissions is not mandated by the requirements of generally applicable State law.

121. General City Law Sec. 27-a sets forth the site plan review requirements and authorizing legislation for such review to be delegated by the City Council, which it has done by establishing the Planning Commission. When such review is required, sub-section 5 allows for those requirements to be waived only where the legislative body has expressly found that compliance is "not required in the interest of the public health, safety and general welfare or inappropriate to a particular site plan," as follows:

GCL Sec. 27-a Site Plan Review

> 5. Waiver of requirements. The legislative body may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of site plans submitted for approval. Any such waiver, which shall be subject to appropriate conditions set forth in the local law adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety and general welfare or inappropriate to a particular site plan.

122. The standard announced in state law, then, requires independent, case-by-case consideration of the particular proposal in light of the protections of health, safety and welfare of the community, and an express legislative finding that exemption is appropriate. This section of the General City Law thus sets forth a "generally applicable state law" which even the City Council's 2002 Waiver Resolution acknowledges must prevail unless its standards are met by *this specific proposal*.

123. For the foregoing reasons, the 2002 Waiver Resolution cannot be the basis for the exemption of the present project from Local Code.

The Court of Appeals Balancing Test.

124. In support of the Interpretation, Corporation Counsel acknowledges the balancing test established by the Court of Appeals in *Matter of County of Monroe v. City of Rochester,* 72 N.Y.2d 338, 533 N.Y.S.2d 702 (1988) "to determine whether the actions of governmental units are exempt from local zoning regulations.

125. This "balancing of public interests" approach focuses on whether or not it is in the public interest to subject the encroaching government to the land use regulations of the host community." The nine factors are correctly stated as consideration of:

1) The nature and scope of the instrumentality seeking immunity;
2) The encroaching government's legislative grant of authority;
3) The kind of function or land use involved;
4) The effect local land use regulation would have upon the enterprise concerned;

5) Alternative locations for the facility in less restrictive zoning areas;

6) The impact upon legitimate local interests;

7) Alternative methods of providing the proposed improvement;

8) The extent of the public interest to be served by the improvements;

9) Intergovernmental participation in the project development process and an opportunity to be heard.

126. The Interpretation finds that the first two tests are met in virtue of the fact that "the City itself that has previously declared and resolved to exempt itself from the discretionary review and approval process." For the reasons set forth above, this prior determination cannot be relied upon in considering the present Project.

127. As to the third test, the kind and function of the land use involved is to provide recreation fields in the least desirable location for such a Project, in a City with existing and alternate locations available for the Project.

128. In addition, the recreational public use at issue here fails to rise to a level which justifies, on balance, the ignorance of the protections of the Code and environment that, for instance, a new municipal building or transportation use would serve.

129. The question in the instant case is not whether such fields serve a public interest, but whether the proposed artificial turf field, with all of its environmental impacts, design components, engineering elements, etc., should reasonably be subject to site plan review.

130. The scope of the Project makes it self-evident that the protections of a site plan review process outweigh the generalized purpose of providing recreational fields. Indeed, if the Project does not go forward at all, Nursery Field will remain a public amenity

providing recreational fields, and alternative sites for the proposed turf field are available to the City.

131. The fourth, sixth, and eighth tests likewise do not balance in favor of waiver. In considering the "effect local land use regulations would have on the enterprise," there can be no doubt that site plan and wetland review and approval could only be advantageous to the City and its residents.

132. If the Project underwent such review and approval, the "impact upon local interests" would be that the public health, safety, and welfare would be assured, and, upon approval, the Project would proceed.

133. If the Project was, for valid reasons, not approved, it would, by definition, be because it was deemed not to have satisfied the design and environmental criteria established to protect the City.

134. No cognizable harm would be done to the City's pursuit of the "enterprise," since recreational fields would still be available at the current Nursery Field as well as Rye Central School District fields, Rye Recreation Fields, and neighboring municipalities' fields, and other sites were identified by the City's own study as being more appropriate for this Project at Sterling Field, Disbrow Park, and Rye Recreation Field.

135. Whatever the outcome of the local review, the "public interest" would be better served by locating this Project elsewhere.

136. The fifth and seventh tests are patently failed by the Project. At every stage of the City Council's consideration of the Project, alternative sites and alternative solutions to the issue of recreational fields were identified, and ignored by the City Council, which single-mindedly pursued the Nursery Field option despite a finding in a previously commissioned

study that Nursery Field was not the best location for the Project. [cite] does something else needed to be added besides "cite"?

137. Finally, the ninth test is inapplicable here, because there is no other government entity involved in the proposal or review of the Project.

138. For all of the foregoing reasons, the Project fails the balancing test set forth by the Court of Appeals, and ought to have been subject to Local Code.

Lack of Independent Regulatory Review.

139. The Court of Appeals decision in *Monroe* announcing the balancing test, it has been held that site plan review is properly required where the agency proposing the action (in this case the City Council) "does not have its own land use approval process." In *Volunteer Fire Association of Tappan, Inc. V. Town Of Orangetown*, 54 A.D.3d 850 (2nd Dept. 2008), ther Court upheld a local ZBA interpretation that site plan review should be required using the following reasoning:

> During the pendency of the action, the Zoning Board of Appeals (hereinafter the ZBA) held a hearing for the purpose of conducting a "balancing of the public interests" pursuant to *Matter of County of Monroe*, 72 N.Y.2d 338, 341, 533 N.Y.S.2d 702, 530 N.E.2d 202 and making its own determination as to whether the Petitioner was exempt from the Town's zoning laws. After the hearing, the ZBA determined that the Petitioner would be exempt from applying for variances from the Town's zoning regulations but would nevertheless be required to submit its site plan to the Planning Board for site plan review.
>
> ***
>
> The Supreme Court, after conducting its own balancing of the public interests, properly found that the Petitioner is not exempt from submitting its site plan to the Planning Board for site plan review. Unlike the encroaching governmental unit in *Matter of County of Monroe,* the Petitioner in this case *does not have its own land use approval process with public hearings and a comment period, and if the project were not subjected to site plan review by the Planning Board, there would be no equivalent review by any other entity. (Emphasis added).*

140. The same is true here. Although the City did conduct a public meeting to hear concerns of the public, it was expressly *not* a public hearing, and no aspects of site planning review were undertaken independently by the City Council.

141. Allowing the project to go forward without site plan review and wetlands approvals therefore entirely strips the community of the protections afforded by those discretionary processes.

THE ZBA DECISION

142. Petitioners appealed the Interpretation to the ZBA in a timely manner pursuant to the Code ("ZBA Appeal")

143. On February 16, 2024, the ZBA heard the ZBA Appeal.

144. Without further inquiry, and at the conclusion of a single meeting considering the matter, the ZBA authorized its Corporation Counsel (the same Corporation Counsel which had written the initial ZBA Determination) to draft a resolution for adoption at its next meeting which would uphold the Interpretation.

145. No decision was rendered at the ZBA's March 21, 2024 meeting, and, upon information and belief, not decision has been rendered to date.

146. In the interest of judicial economy, this Petition challenging the Interpretation has been commenced because the issues upon which that Interpretation turns are a matter of law on which the ZBA has said on the record it is satisfied with as the basis for confirming the Interpretation.

FAILURE TO RESPOND TO FOIL REQUESTS

147. Throughout the City's consideration of the Nursery Field Project, the Petitioner or their representatives made numerous requests pursuant to the Freedom of Information Law

("FOIL") for documents and records related to the Project which were either ignored or responded to with inadequate or untimely responses, and in some cases *entirely* redacted documents, without proving reasons for the redactions (despite requests).

148. The failure of the City to respond to those FOIL requests properly or timely is a violation of state law.

149. Upon information and belief, the public records which should have been produced in response to those FOIL requests would have been, material in connection with the record supporting or opposing the City's actions as alleged herein.

REQUEST FOR RELIEF

150. No other application has been made to this or any other court for the relief requested herein.

WHEREFORE, for the foregoing reasons, and upon all other submissions and aspects of the record in this matter, Petitioners respectfully request an Order:

1) Setting aside the Initial and Second SEQRA Resolutions;
2) Remanding the Action to the City Council for reconsideration of the Type of Action and the Lead Agency Determination in accordance with the procedural and substantive requirements of SEQRA;
3) Setting aside the Building Inspector's Interpretation;
4) Determining that the Project is subject to site plan review;
5) Determining that the Project requires a Wetland Permit;
6) Ordering the City to comply with the FOIL requests of the Petitioners; and
7) Such other and further relief as to the Court may seem just and proper.

Dated: April 5, 2024

VENEZIANO & ASSOCIATES
Attorneys for Petitioners

By: _____
(845) 417-4267

VERIFICATION

Joseph P. Eriole, Esq., an attorney duly licensed to practice law in the State of New York, affirms that within Petition is true to his knowledge, except as to matters alleged on information and belief, and that as to those matters he believes it to be true. The basis of his knowledge is his personal involvement in the matter during its pendency, his review of the record related to the matter, and consultation with the Petitioners. The reason he makes this verification as opposed to the Petition being verified by one or more Petitioners is that the attorney's office is not in the county where the Petitioners reside or work.

Affirmed:

_____