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Attorney Memorandum in address of the April 25, 2019 missive by Ms. Rebecca Martin

Claim #1

By Rebecca Martin (as posted on www.kingstoncitizens.org on 4/25/19)

"Is the (Kingstonian) applicant interpreting the part of the SEQR regulations that reads, "...if the lead agency finds that it does not have sufficient information to make this determination, it may request that the applicant provide it," to mean to work directly with the lead agency (Kingston Planning Board) to provide studies that they request for however long is necessary in order to achieve a neg dec in SEQR?

The inevitable result of this approach that the applicant and lead agency are taking in trying to avoid a pos dec will be to cut the public and involved agencies out of the process. Given that fact alone, the approach they are proposing should be avoided."

Response by Michael Moriello, Kingstonian Attorney:

The Kingstonian Project applicants are not seeking to obviate public participation in any manner. In this regard, there has already been one public hearing in consideration of SEQRA issues and the City of Kingston Planning Board, as lead Agency, has publicly committed to the receipt of additional public hearing comments and submittals during the pendency of SEQRA review [Sec comments of Planning Board Chairman, Mr. Wayne Platte, from the April 10, 2019 City of Kingston Planning Board Meeting.

Moreover, pursuant to 6 NYCRR Part 617.6, a coordinated SEQRA review has been undertaken by the lead Agency, whereby all other involved (discretionary permitting) agencies and interested (ministerial review) agencies have been invited to participate.

The "approach" that the lead agency is following in the instant matter is buttressed by time honored case law from New York State Highest Court Merson v. McNally, 90 NY2d 742 (1997) and statutorily recognized under SEQRA in consideration of the criteria for determining environmental significance. See, 6 NYCRR Part 617.7

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Claim #2

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...When SEQR begins, a series of specific actions are to take place starting with a 30-day window for the involved agencies to approve or deny the request for lead agency. An involved agency may also *"state their interests and concerns regarding selection of lead agency and potential impacts of the overall action"* (SEQR handbook, page 66, item #5). That's exactly what the Historic Landmarks Preservation Commission has done as a responsible involved agency along with three interested State agencies which submitted comments to the Kingston Planning Board within the 30-day window for lead agency selection or the 20-day window for determination of significance which I describe next.

On the heels of the 30-day window for lead agency selection, for any Type 1 Action (which the Kingstonian Project is), there is a 20-day window for lead agency to make a positive (pos) or negative (neg) declaration (dec).

Members of the applicant's team state that they "... do not anticipate a determination of significance under SEQRA for a fairly lengthy period of time." This suggests that their application was filed prematurely. An applicant for a Type 1 Action should file only when they are prepared for lead agency selection and a determination to be made.

Response by Michael Moriello, Kingstonian Attorney

This statement possesses no basis in the law and posits that the applicant should unilaterally determine the breadth and scope of its environmental studies and attendant mitigation measures within, "a 20 day window for lead agency to make a positive (pos) a negative (neg) declaration (dec)." Accordingly Ms. Martin undercuts her own argument, inasmuch as this approach could in fact shield the public from environmental review, were a lead agency disposed to render an improvident determination of environmental significance. Rusciano and Son Corp. v. Kiernan, 752 NYS2d 277 (2002).

I have previously addressed Ms. Martin's redundant speculations in consideration of the 20 day time period and her wholly conclusory statements with respect to EIS requirements under SEQRA and she is wrong as a matter of law in all instances.

[See my March 13, 2019 correspondence to the City of Kingston Planning Board; copy annexed].

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Claim #3

By Rebecca Martin (as posted on www.kingstoncitizens.org on 4/25/19)

Why is the SEQR process being handled in the way that it is?

According to the SEQR Cookbook,*"The lead agency has 20 calendar days to make its determination of significance. If the lead agency finds that it does not have sufficient information to make this determination, it may request that the applicant provide it. The lead agency must make its determination within 20 days of receipt of all the information it reasonably needs. In determining significance, the lead agency must consider: the whole action and the criteria [see 617.7(c)]; the EAF and any other information provided by the applicant; involved agency input, where applicable; and public input, if any."*

Is the applicant interpreting the part of SEQR regulations that reads, "*...if the lead agency finds that it does not have sufficient information to make this determination, it may request that the applicant provide it,"* to mean to work directly with the lead agency (Kingston Planning Board) to provide studies that they request for however long is necessary in order to achieve a neg dec in SEQR?

The inevitable result of this approach that the applicant and lead agency are taking in trying to avoid a pos dec will be to cut the public and involved agencies out of the process. Given that fact alone, the approach they are proposing should be avoided.

Response by Michael Moriello, Kingstonian Attorney

The Kingstonian Project applicant intends to work with the lead agency, involved agencies, interested agencies and members of the public to arrive at a determination of significance. The length of time that this proper process takes will be dependent upon the information requested by the lead agency, environmental analysis in determining significance, proposed mitigation measures and participation of the respective agencies, as well as members of the public, among other factors.

Accordingly, there is no mandated time frame within SEQRA to render a determination of significance, as the courts have dispositively determined that the decision is governed by a, "Rule of Reason" in considering that the particular facts and circumstances of a project do or do not call for the preparation of an EIS Coca-Cola Bottling Co. v. Board of Estimate of the City of Kingston 72 NY2d 674 (1988).

In fact, your writer was successful in defending a negative declaration for a large subdivision before the Appellate Division, 3rd Judicial Department, which was issued following 853 days of SEQRA review Nicklin- McHay v. Town of Marlborough Planning Board, 14 AD3d 858 (3rd Dept. 2005); copy provided. Consequently, Ms. Martin's reasoning is belied by the facts and applicable law, as all involved agencies are required to consider environmental impacts prior to issuance of discretionary permits. This is to occur after the public has been given a continuing right to be heard by the lead agency pursuant to the SEQRA review process.

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Claim #4

By Rebecca Martin (as posted on www.kingstoncitizens.org on 4/25/19)

Is there public input following a neg dec determination in SEQR?

To cut to the chase, the answer is no, at least not as it relates to environmental impacts.

Kingston Mayor Steve Noble and members of the project's development team have been recorded in recent weeks stating that the Kingstonian Project is anticipated to be a neg dec in SEQR. In other words, they are confident that there will not be a single potential significant environmental impact. If the project is a neg dec, the opportunity for an inclusive and comprehensive public process as it relates to environmental impacts is over and the project advances to routine permitting decisions. Public funds, which cannot be released until a neg dec is issued, are now available for use.

Additionally, the Kingstonian Project as a Type 1 Action requires a coordinated review process. *"A coordinated review is the process by which all involved agencies cooperate in one integrated environmental review. Coordinated review has two major elements: establishing a lead agency and making a determination of significance and in scoping an environmental impact statement."* (Ten agencies have been identified as "involved" in this review, including the Historic Landmarks Preservation Commission).

Response by Michael Moriello, Kingstonian Attorney

Again, Ms. Martin is misstating the applicable law. Even after SEQRA is concluded there will be required public hearings in consideration of the required Special Use Permit and the Site Plan pursuant to the City of Kingston Zoning Law and Sections 274-a and 274-b of the Town Law of New York State.

The growing body of law in New York State is that certain circumscribed areas of environmental review (ie; traffic) are relevant under continuing Site Plan and Special Use Permit procedures AJC Associates L.P. v. Town of Perinton, 4 Misc 3d 1009 (2004). Therefore, if there are legitimate permit issues which require attendant analysis within the context of Zoning Law requirements they must be addressed by the applicant under applicable Zoning Law provisions, irrespective of the fact that environmental review may have been completed.

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Claim #5

By Rebecca Martin (as posted on www.kingstoncitizens.org on 4/25/19)

If a neg dec determination is made by the lead agency, then the discretionary reviews of the involved agencies will be bound by this decision. Whether they approve or deny the permit, based on the record, they will not be able to cite environmental impacts in their decision-making. This is significant, particularly when the timeline for their input is not clear. Right now, involved agencies of the Kingstonian Project have only until the public comment period closes (it was opened on April 10 and oddly, a deadline has not yet been set) to weigh in on the potential significant environmental impacts while the Planning Board as lead agency prepares to make its determination of significance (with a pos or neg dec).

Response by Michael Moriello, Kingstonian Attorney

This is a correct statement as a matter of law and this reflects the New York State Legislature's intent that the SEQRA process shall not be an exhaustive exercise in perpetual environmental review. Gordon v. Ruch, 100 NY2d 236 (2003), Ames v. Johnston, 169 AD2d 84 (3rd Dept. 1991).

In fact, the SEQRA Regulations emphasize the foregoing statement within the following directive:

"Agencies must carry out the terms and requirements of the part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings and must expedite all SEQRA proceedings in the interest of prompt review" [6 NYCRR Part 617.3(h)].

Obviously, Ms. Martin does not like the coordinated review process under SEQRA. Parenthetically, I opine that most project opponents share her view. However, the SEQRA Regulations, relevant case law and decades of agency review procedures have operated to protect the rights of applicants, as well as project opponents, during the environmental review process. Accordingly, coordinated review is essential to a lawful procedural and substantive SEQRA process. [see also, Final GEIS on the Proposed Amendments to the SEQRA Regulations by the NYSDEC, September 6, 1995, at 6 NYCRR Part 617.6; copy enclosed].

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Claim #6

By Rebecca Martin (as posted on www.kingstoncitizens.org on 4/25/19)

Is there public input following a pos dec determination in SEQR?

Yes, a pos dec determination will allow for an inclusive and comprehensive public review process.

Currently, a record has been established with comments on potential significant environmental impacts, particularly those that pertain to historic preservation and community character. **Only one potential significant environmental impact needs to be identified to trigger a pos dec.**

In the event of a pos dec, the applicant would be required to create a draft environmental impact statement (draft EIS). Public scoping is then automatic. It is an inclusive process to identify issues that should be studied in the EIS, including potential significant adverse environmental impacts of a proposed project and alternatives that could avoid or minimize these impacts. *"As a result, the draft EIS is concise, accurate and focused on the significant issues…The draft EIS is a primary source of environmental information related to a proposed action (the Kingstonian Project.) The EIS also serves as a means for public review and comment on the potential impacts of the action. After a draft EIS is submitted by the sponsor, the lead agency must determine if it is complete and adequate for public review. Once the draft EIS is deemed complete, a minimum of 30 days is required for public review and comment. A final EIS should be prepared within 45 days of any hearings or 60 days after filing the draft EIS. The final EIS must include: the draft EIS and any revisions/supplements; a summary of substantive comments received; and the lead agency's responses to the comments. Draft and Final EIS's must be published on a publicly available website."*

We hope that many of you will come to our public educational forum on May 21st from 5:30pm - 7:30pm where we will present "SEQR: 101" where we will explore and learn all about the SEQR process and answer questions. Jennifer O'Donnell, a City of Kingston resident, urban planner and local government specialist at the Department of State will be our guest panelist. The event will be held at the Kingston Public Library, is free and will be filmed by The Kingston News for those who can't make it. Brought to you KingstonCitizen.org and co-sponsored by the Kingston Tenants Union.

Response by Michael Moriello, Kingstonian Attorney

It is clear that Ms. Martin is seeking to mischaracterize a lawful and comprehensive SEQRA process in an attempt to cozen the City of Kingston Planning Board into summarily dismissing the Kingstonian Project Applicants rights under SEQRA. Therefore, it is likely that "forum" attendees will be treated to further conclusions, speculations and environmental hyperbole, all under the pretext of Ms. Martin's political agenda.

The Kingstonian Project is undergoing a lawful, coordinated SEQRA review process before the City of Kingston Planning Board which will be procedurally and substantially inviolate upon its conclusion. In this regard, I have every confidence that all lawful procedures embodied within the SEQRA Regulations will be followed by the lead agency in accordance with the memorandum and pursuant to controlling New York State Law.