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March 31, 2022

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85 Civic Center Plaza  
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Poughkeepsie, New York 12601

Attention; James Horan, Esq. [jhoran@wallacelaw.net](mailto:jhoran@wallacelaw.net)

Re: Downey Energy w/ Town of Wappinger, et al

Dear Attorney Horan:

This is officially yet another complaint concerning misconduct by certain Town Officials and demand for immediate remedial action. I have previously provided similar letters on June 21, 2021, July 12, 2021, November 9, 2021, December 27, 2021 as well as January 22, 2022 about grossly improper Town actions, but there has been no response nor any remediation of that misconduct. More importantly, there has continued to be illegal conduct by the Town as evidenced at the most recent Town Planning Board Meeting of March 21, 2022 concerning this Downey Energy Project. This will be the last communication to attempt to resolve this matter amicably without Litigation. Your response to outline remedial action by Noon on April 4, 2022 is necessary. If not, the Town is effectively preventing this Application from proceeding forward and my Client will take appropriate action without further notice to the Town.

**ZONE TEXT AMENDMENT**

As you well know, my Client Downey Energy and his representative, Al Cappelli, met with the Town Supervisor years ago to see if the Town was interested in my Client's proposed Project which was to construct a Propane Storage Facility (the "Project"). After considerable discussions, the Town Supervisor advised the Town and Town Board were most interested in this Project. Based upon those representations, my Client agreed to purchase land for this Project within the Town at 199 Old Route 9 (the "Property"). My Client purchased the Property based upon the aforesaid representations of Town Officials. Moreover in confirmation of those representations, the Town Board arranged for the Town Planner to work on a Zone Text Amendment to allow for an "as of right" use in the Town for this type of Facility.

As a result of the foregoing, the Town Planning Professional presented to the Town Board a proposed Zoning Text Amendment to allow a Propane Facility in appropriate locations in the Town with an "as of right" use under the Town Zoning Code.. That Zoning Text Amendment was presented to the Town Board after careful review by the Town's Professional Planner. The Town Board favorably considered that Zoning Text Amendment and, a Local Law was prepared consistent with the Town Professional Planner's recommendations reflecting this Zoning Text Amendment and was later filed with the New York State Secretary of State to become law. The Town provided my Client with a copy of that filed Local Law.

As you also well know, pursuant to New York State General Municipal Home Rule Law, Section 27(3) any Local Law becomes "effective" when filed with the Office of the Secretary of State. Accordingly, this Zone Text Amendment became "effective" on February 3, 2020. (See, e.g. *Marcus v. Board of Trustees*, 62 A.D.3d 799, 802 (2nd Dept. 2009). Moreover, as you also well know, the time for anyone to challenge such an effective Local Law expired four (4) months after said filing. (*Matter of Eadie*, 7 N.Y.3d 306 (2006) ; *Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193 (1987); *Matter of Voelckers v. Guelli*, 58 A.D.2d at 177). As I earlier confirmed in my June 21, 2021 correspondence to you, I understood that there was a question referenced by you that a procedural step by the Town Board to enact this Local Law for the Zone Text Amendment was not taken. Yet, the case law is clear that no one challenging the filing of this Local Law within four (4) months from the New York Secretary of State doing so is an absolute bar to that Local Law being considered not lawful on procedural grounds. (See generally, *JEM Realty Company v. Town Board*, 297 A.D.2d 278 (2<sup>nd</sup> Dept. 2002); *In re Properties of New York, Inc. v. Town of Stuyvesant*, 35 A.D.3d 941 (3<sup>rd</sup> Dept. 2006). As most recently noted in *Jenkins v. Astorino*, 2015 WL 13668848 (Westchester County Supreme Court 2015), a claim that a local law "is invalid based upon defects in the manner in which it was enacted " is time barred if not brought within four months of enactment of the local law.

### **TOWN'S CONTINUED ILLEGAL CONDUCT**

This past Planning Board Meeting of March 21, 2022, I was present at the start of the Workshop Meeting and inquired of the Town's Professional Planner about a Positive Declaration under SEQRA and proposed Resolution being considered that night by the Planning Board. The Town's Planner said he did not have a copy to provide me. Fortunately, a Town employee did later in the aforesaid Meeting provide me with a copy of both. To my surprise, the Town's Planner had given to the Town documents dated March 21, 2022, noting that I had received a copy of those documents when I had **not** been provided with any copy. Equally as troubling was that reference was made in those documents to the Applicant still needing a Zone Text Amendment. I immediately spoke to you about this during the Workshop Meeting, but the Planning Board Chairman interrupted our discussion.

Putting aside the previous issue of the "Secret Meeting" of the Planning Board Members and non-Town Officials that was not disclosed to our Client, putting also aside the Town Planning Board allowing a former Town Official to speak without notice to us before the Planning Board after our matter was called on the Agenda and the Planning Board concluded its consideration of our Project that evening, yet still again putting aside comments made on a Town Video at that same Meeting by certain Planning Board Members prejudging our Project with a disapproval; and furthermore not even considering that for many, many months the Town Planning Board has refused to identify an Expert to review our Project since (in the Planning Board Chairman's own words "we don't want to hire an Expert from this Industry") the Town's conduct at its most recent March 21, 2022 Planning Board Meeting confirms the continued illegal action of the Town toward my Client that will only continue unless action is taken now.

At this most recent Town Board Planning Board Meeting, when I asked the Planning Board Chairman why a Positive Declaration was on the Agenda (when the Agenda did not reflect it being adopted by the Planning Board that night), the Chairman said because the Planning Board "was directed by its Attorney to do so". And when I asked what was the basis for the proposed Positive Declaration, the Chairman noted the materials submitted by a fellow firefighter months ago. When I advised the Chairman that said material did not reflect the now buried storage tanks, the Chairman had no explanation. In complete contrast to the Planning Board Chairman's answer, the Town's Professional Planner upon my request immediately after this March 21, 2022 Planning Board Meeting claimed that the proposed Positive Declaration was based upon materials submitted by my Client. Those materials do not support any Positive Declaration as the proposed now buried tanks are much safer than the prior proposal by my Client that was the basis for a Negative Declaration to be adopted until the Town began to undertake illegal actions.

### **NEED FOR MITIGATION OF MY CLIENT DAMAGES**

Since it is readily apparent that this Town is illegally providing a new obstacle every time my Client's Project is being considered, said Town conduct violates the civil rights of my Client as noted in the Second Circuit holding of *Sherman v. Town of Chester*, 752 F.3d 554 (2<sup>nd</sup> Cir. 2014). My client has committed substantial money resources into this Project that can be recovered under the holding in *Orangetown v. Magee*, 88 N.Y.2d 41 (1996). In an effort to mitigate my Client's damages, demand is hereby made that you advise the Town Board that the Statute of Limitations to challenge the now effective Zone Text Amendment has expired. As such, the Town Board needs to confirm that the said Zone Text Amendment is in effect now.

In addition, the Town has allowed a Positive Declaration to be made on the potential impacts of a current plan for buried tanks that the Planning Board Chairman admitted is not the basis for the Positive Declaration being made. Furthermore, the Town has delayed for many months the hiring of an Expert in the Industry to evaluate any potential impacts of my Client's plan. Demand is also made that the Town acknowledge the same and revise all SEQRA Documents to reflect proper and professional evaluation of my Client's Project. Upon the foregoing taking place, my Client can proceed further with its Application with the expectation that a fair and lawful consideration of the Project will be made by the Town.

Absent your confirming the foregoing by Noon this Monday, April 4, 2022, you will leave my client no other option except to take appropriate action to mitigate its damages as well as recover monetary damages based upon the Town's aforementioned conduct as well as other actions that will be set forth appropriately in another forum as required. Be guided accordingly.

Very truly yours,

  
Dennis E. A. Lynch

Cc: Planning Board