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September 21, 2023

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**By Email and Federal Express**

Chairperson Peter Galotti and  
Members of the Zoning Board of Appeals  
Town of Wappinger  
20 Middlebush Road  
Wappingers Falls, NY 12590

RE: Dakota Partners, Inc. & DP 123 LLC  
ZBA Appeal No. 22-7772  
Application: Area Variances for Multifamily Workforce Housing  
Premises: 1404 Route 9, Town of Wappinger  
Parcel ID: 135689-6157-02-707773-0000  
Lot Area: 86.818 acres  
Property Owner: DP 123 LLC  
Zoning District: Shopping Center "SC" District

Dear Chairperson Galotti and Members of the Zoning Board of Appeals:

This letter is respectfully submitted on behalf of Dakota Partners, Inc. ("Dakota") & Diamond Properties through its business affiliate DP 123 LLC (collectively, the "Applicants") in furtherance of their application for area variances to construct a multifamily workforce housing development (the "Project") within the Alpine Commons Shopping Center ("Alpine Commons") located at 1404 Route 9 in the Town of Wappinger, consisting of approximately 86.818 acres, classified in the SC (Shopping Center) zoning district, and bearing a tax parcel identification of 135689-6157-02-707773-0000.

As confirmed during the public meeting on June 27, 2023 and again on August 22, 2023 during the public hearing before the Zoning Board of Appeals ("ZBA") only 2 area variances are required in order for the Applicants to develop multifamily workforce housing along with related amenities and parking facilities as part of a Mixed Use within the existing Alpine Commons Shopping Center, namely from: (i) the Density standard set forth in the Supplementary Special Permit Use Regulations for Mixed Uses in Section 240-81.7 of the Town of Wappinger Zoning Code ("Zoning Code"), and (ii) the Maximum building height (stories/feet)



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codified in the Schedule of Dimensional Regulations for Nonresidential Districts for the SC zoning district.

More particularly, the Applicants are first seeking an area variance from the 2.5 stories / 35-foot height limit where each of the proposed five (5) residential buildings are three stories and every building exceeds the 35-foot height limit. Indeed, the height limit varies from building to building with a range from 42'0" feet to 49'10" based on the way height is measured in the definition of Building Height in the Zoning Code.

Second, the Applicants are requesting an area variance as to the Density standard set forth in the Supplementary Special Permit Use Regulations for Mixed Uses in Zoning Code Section 240-81.7, which provides in sub-section A(1) that the "residential density in a mixed-use development shall not exceed three dwelling units per acre of net lot area devoted to the residential component of the mixed use." Based on the net lot area devoted to the residential component of the Mixed Use here being 16.06 acres (i.e., 17.26 acres – 1.2 acres), Alpine Commons is limited to 48 multifamily units (i.e., 16.06 acres X 3 dwelling units/acre = 48.18 dwelling units rounded downward to 48 multifamily units), where the Project proposes 144 multifamily units.<sup>1</sup>

### **The Supplemental Materials Submitted Further Support No SEQRA Visual Impact**

Consistent with the ZBA's request during the August 22, 2023 public meeting and in anticipation of the continued public hearing before the ZBA on October 10, 2023 relative to this Application, Thriven Design has prepared on behalf of the Applicants a September 2023 supplemental visual analysis identified as Sheet EAF3 entitled "Site Context Plans" (FTP Exhibit 29) expanding upon the Exhibit A: Site Sections / Sheet EAF1 relative to the visibility of the Project from the surrounding neighborhoods, prepared by Thriven Design, submitted to the ZBA on February 3, 2023 (FTP Exhibit 14). Reference to the September 2023 and the February 2023 site sections and site context plans substantiates that the residences on Old Hopewell Road range from 559 lineal feet to 1,091 lineal feet away from the proposed multifamily dwelling units and those Old Hopewell Road residences possess 1<sup>st</sup> floor elevations ranging from comparable to 27 feet *above* the 1<sup>st</sup> floor elevations of the nearest multifamily dwelling units. Similarly, the residences on Sucich Place range from 585 lineal feet to 1,073 lineal feet away from the proposed multifamily dwelling units and those Sucich Place residences possess

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<sup>1</sup> It is important to note that the Gross Commercial FAR for the Property is 1,134,537.624 square feet (i.e., 43,560 s/f X 0.3 FAR x 86.818 acres = 1,134,537.62 s/f).



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1<sup>st</sup> floor elevations ranging from 12 feet to 22 feet *above* the 1<sup>st</sup> floor elevations of the nearest multifamily dwelling units. Additionally, there are dense woods that will substantially, if not fully, reduce any view of the proposed multifamily dwelling units. Further, there are federal and state wetlands as well as flood areas to the East of the Premises off-site between the Sucich Place residences and the Premises that limit development and restrict disturbance of the existing vegetation in this intervening area.

Moreover, during the Applicants own site visit in February, the attached photograph (FTP Exhibit 30) was taken of the white barn located at 221 Old Hopewell Road. The white barn is barely visible from the edge of the property line during leaf-off conditions and that structure is substantially closer than any of the homes surrounding the site. Further, and as noted on the attached Thriven September 2023 Sheet EAF3 entitled “Site Context Plans” Exhibit the proposed finished floor elevations of the multifamily dwelling units in all cases are equal to or even in some instances 2 full stories *lower* in elevation than the surrounding residences. Thus, although the proposed multifamily dwelling units may be three stories, there will be virtually no visibility “into people’s windows” as many community members suggested at the meeting.

Additionally, as part of the attached Thriven September 2023 Sheet EAF3 entitled “Site Context Plans” Exhibit, the Applicants have provided an overlay of the Premises on the Dutchess County GIS topographical maps to demonstrate the ruggedness of the land surrounding the Premises. The changes in topography create various levels to the tree canopy making the vegetation appear visually denser than if the surrounding area were flat. By example, a resident on Sucich Place may see the trunks of the trees immediately beyond their backyard, but they also would see higher parts of the trees and into the canopy because of the significant drop-off created by the creek running to the East of the Premises. Consequently, even in the winter there would be extremely limited visibility from these residences to the proposed multifamily dwelling units proposed in excess of one-tenth of a mile away. This scenario is true throughout the site.

Finally, the Applicants are hereby submitting a Concept Rendering, prepared by Thriven Design, dated September 15, 2023, (FTP Exhibit 31) to amplify the photographs submitted as part of the Applicants’ April 11, 2023 ZBA Supplemental Submission of more than a dozen comparable projects Dakota has already completed or expects to complete this year throughout Connecticut, Rhode Island, Massachusetts, and New Hampshire (FTP Exhibit 13) and to supplement the Architectural Drawings, prepared by Thriven Design’s predecessor in interest Kitchen & Associates, and previously submitted as part of the Applicants’ original November 14, 2022 ZBA submission (FTP Exhibit 17).



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Accordingly, and based on all these materials, the Applicants respectfully submit that the proposed multifamily workforce housing here will not have a significant adverse visual impact on the environment or the character of the community, particularly given the OPRHP sign-off evidencing no impact to Federal or State designated aesthetic, scenic, historic or archeological resources. Further, in looking at both the SEQRA Handbook (4<sup>th</sup> Addition, 2020) and the DEC Assessing and Mitigating Visual Impacts policy guidance (July 2000), it is important to note that there are no Town of Wappinger resource-focused plans, such as Local Waterfront Revitalization Plans (LWRP), Greenway plans or Heritage Area plans, that have been adopted identifying any designated local aesthetic resources within immediate proximity to the Premises.

In sum, the visual assessments performed have substantiated that there are no federal, state or local resources adversely effected within the Project's viewshed. Potential visibility for a few select dwelling units of a portion of a rooftop or multifamily dwelling unit is very different from clear interference with an inventoried resource. Here, there are no adverse impacts to identified and inventoried scenic or aesthetic resources.

#### **This Workforce Housing complies with the NYS Uniform Fire Prevention and Building Code**

As previously noted, Thriven Design is the professional architectural and planning firm providing services to the Applicants. Stephen L. Schoch, a Principal in that firm, has appeared before the ZBA on several occasions. He is a Registered Architect licensed in New York and a USGBC LEED-AP. Per the enclosed September 20, 2023 letter, Architect Schoch has confirmed that this multifamily workforce housing development within the Alpine Commons Shopping Center complies with the New York State Uniform Fire Prevention and Building Codes. Further, he sets forth that all buildings will be provided with Automatic Fire Suppression Systems and residential units will be separated by fire-rated construction. (FTP Exhibit 32). In addition, he notes that this multifamily workforce housing development within the Alpine Commons Shopping Center is similar in use and life-safety considerations to other two-story and three-story residential construction in the area, including Marshall Square, Oak Tree Gardens, Creekside Commons, Old Hopewell Commons, and Chelsea Ridge.

#### **The Expansive Record is Uncontroverted and Warrants Approval of the Area Variances**

All of these new materials as well as the extensive record relative to this application, which began with the November 14, 2022 submission by the Applicants to the ZBA, have been



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uploaded to an FTP website for the public to access and the Town to download materials, accordingly. The credentials to access that FTP site are set forth below. Kindly note that the username and password are case sensitive:

Web Site: <http://cuddyfeder.ftptoday.com>

Username: Dakota

Password: Dakota39891

The FTP also includes a revised Table of Contents for the Items 1 – 33 uploaded there in furtherance of this Application for Area Variances pursuant to Zoning Code Section 240-107B(2)(b)[2] and New York State Town Law Section 267-b(3).

Ultimately, the record relative to this application is uncontroverted and substantiates that the requested area variances will not produce an undesirable change in the character of the neighborhood, nor act as a detriment to nearby properties, nor will they have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

Moreover, the current situation here is similar to what the New York State Court of Appeals found in WEOK Broadcasting Corp. v. The Planning Bd. of the Town of Lloyd, 79 N.Y.2d 373 (N.Y. 1992), 583 N.Y.S.2d 170, 592 N.E.2d 778 under State law. In WEOK Broadcasting Corp., the Court of Appeals found that while “[w]e do not intend to diminish in any way the importance of public comment with respect to any proposed site plan; SEQRA is designed to encourage public participation in the review process (ECL 8-0109-[6]). However, generalized community objections such as those offered here in response to the comprehensive data provided by petitioner, cannot, alone, constitute substantial evidence, especially in circumstances where there was ample opportunity for respondent to have produced reliable, contrary evidence.” “Negative aesthetic impact considerations, alone, however, unsupported by substantial evidence, may not serve as a basis for denying approval of a proposed “action” pursuant to SEQRA review.” See also Broeders v. Schoenfeld, 155 A.D.2d 639, 640, 548 N.Y.S.2d 231 (2d Dept. 1989)(Court admonished the ZBA for succumbing to community opposition, as voiced at the public hearing, as an improper ground for action).

It is also worth noting that speculative economic loss, such as concern for property values, is not an environmental factor under SEQRA. Indeed, as discussed in the SEQRA Handbook (4th Edition), Chapter 5 on Page 114 in the Answer to Question 9, and emphasized in the Decision by the United States District Court for the Western District of New York in Bell Atlantic Mobile of



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Rochester L.P. v. Town of Irondequoit, 848 F. Supp. 2d 391, 401 (W.D.N.Y. 2012): “[p]urely economic arguments have been disallowed by the courts as a basis for agency conclusions when concluding a SEQRA review by developing Findings. Therefore, **potential effects that a proposed project may have in drawing customers and profits away from established enterprises ... a possible reduction of property values in a community, or a potential economic disadvantage caused by competition or speculative economic loss, are not environmental factors.**”

Similarly, the SEQRA Handbook, Chapter 4 on Page 85 in the Answer to Question 34 states plainly in response to the question as to whether a determination of significance can be based on economic costs and social impacts that: “No. A determination of significance is based on the regulatory criteria relating to environmental significance as set out in 617.7(c). Also, the definition of “environment” set out in 617.2(l) includes “physical conditions” that will be affected by a proposed action. For instance, impacts to physical conditions related to community character would include noise, aesthetics, and traffic, and are properly “environmental”. However, potential impacts relating to lowered real estate values, or net jobs created, would be considered economic alone, not environmental.

Notwithstanding the foregoing, the Applicants, per the ZBA’s direction, did investigate and have established that the Assessed Valuation for the Alpine Commons Shopping Center has precipitously declined according to the records of the New York State Department of Taxation and Finance and those of the Town of Wappinger from a 2020 Tax Year Assessed Valuation of \$23,500,000 to a 2023 Tax Year Assessed Valuation of \$14,000,000. This decrease represents a greater than 40% drop in Assessed Valuation over the past 4 tax years. (FTP Exhibit 33 and also <https://egov.basgov.com/wappinger/>). It is also worth noting that the Applicants could reasonably foresee an Assessed Valuation for this workforce housing project itself of \$10,700,000.

Additionally, In re: Hells Kitchen Neighborhood Association, 81 A.D.3d 460, 915 N.Y.S.2d 565, the NY Appellate Division held that a Board’s responsibility under SEQRA must be viewed in light of a “rule of reason” where not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency’s responsibility”.

Accordingly, the Applicants have substantiated to the ZBA as SEQRA Lead Agency per SEQRA Section 617.7’s criteria that the Applicants are unequivocally entitled to a “Negative Declaration” at this time because the Project as proposed will not result in any significant



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adverse environmental impacts. Indeed, a Negative Declaration is warranted because the ZBA as the lead agency must determine here either that there will be no adverse environmental impacts or that any “identified” adverse environmental impacts will not be significant.

It is also important to underscore that the ZBA in reviewing an application for an Area Variance is governed by the test enunciated in Zoning Code Section 240-107B(2)(b)[2] and New York State Town Law Section 267-b(3). **The overarching theme of the area variance statutory test is that in “making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant.”** This statutory test further enunciates five considerations for the ZBA, namely: “(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.” No where in Section 267-b(3) is the word “precedent” employed.

Although a zoning board of appeals performs a quasi-judicial function when considering applications for variances, the New York State courts have consistently held for several decades that a decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious. See Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 93, 735 N.Y.S.2d 873, 761 N.E.2d 565, quoting Knight v. Amelkin, 68 N.Y.2d 975, 977, 510 N.Y.S.2d 550, 503 N.E.2d 106; Matter of c/o Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vil. of E. Hampton, 98 A.D.3d 738, 739, 950 N.Y.S.2d 386 ; Matter of Bout v. Zoning Bd. of Appeals of Town of Oyster Bay, 71 A.D.3d 1014, 1014, 897 N.Y.S.2d 205. Therefore, the key phrase is “nor indicates its reasons for reaching a different result on essentially the same facts”. Indeed, where “a zoning board is considering an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result.” In the Matter of Monte Carlo 1, LLC, v. David P Weiss, 142 A.D.3d 1173 (N.Y. 2d Dept, 2016); Matter of c/o Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vil. of E. Hampton, 98 A.D.3d at 739–740,





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950 N.Y.S.2d 386. Moreover, where a zoning board provides a rational explanation for reaching a different result on similar facts, the determination will not be viewed as either arbitrary or capricious”. Matter of Waidler v. Young, 63 A.D.3d 953, 954, 882 N.Y.S.2d 153. Indeed, the zoning board “may refuse to duplicate previous error; it may change its views as to what is for the best interests of the Town; or it may give weight to slight differences which are not easily discernable” so long as it indicates its reasons for reaching a different result on ostensibly similar facts (id. at 954, 882 N.Y.S.2d 153; Matter of Josato, Inc. v. Wright, 35 A.D.3d 470, 471–472, 826 N.Y.S.2d 381).

Here, it is important to underscore that **the instant application is readily distinguishable from any foreseeable future applications**. It is highly dubious that another application will be before the ZBA with essentially the same facts for many reasons. First, the Premises at 86.818 acres is classified in the SC zoning district and there are only 2 other, significantly smaller properties classified in the SC zoning district in the entirety of the Town of Wappinger, namely the 3-lot Wappinger Plaza/Hannaford assemblage at approximately 18 acres and the approximately 5 acres Myers Corner/DeGarmo Plaza. Second, the area variance sought here is specific to the Density standard set forth in the Supplementary Special Permit Use Regulations for Mixed Uses. Third, the additional density is specifically sought for the salutary goal of workforce/affordable multifamily dwelling units in an underdeveloped and underutilized “greyfield” property. Fourth, the Project seeks a variance to build 144 workforce housing units where 48 are allowed yielding less than 100,000 additional residential square feet where the remaining Gross Commercial FAR for the Property exceeds 900,000 additional square feet (i.e., the density variance in actuality seeks to build one-ninth (1/9<sup>th</sup>) the FAR/building area that is permitted by right!

**In view of the above and the record for this application, it is ultimately submitted that approving these area variances relative to the Maximum building height (stories/feet) codified in the Schedule of Dimensional Regulations for Nonresidential Districts for the SC zoning district and the Density standard set forth in the Supplementary Special Permit Use Regulations for Mixed Uses in Section 240-81.7 of the Zoning Code will not result in any significant adverse environmental impacts and will not pose a detriment to the health, safety and welfare of the neighborhood or community, particularly given the documented and pronounced need for workforce housing in the State of New York, County of Dutchess, and Town of Wappinger per numerous housing needs assessments.**





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**Conclusion**

The Applicants look forward to appearing before the Zoning Board of Appeals on October 10, 2023 for a continued public hearing on this application, and respectfully submit that adoption of a SEQRA Negative Declaration and approval of this area variance application is warranted that night, pursuant to Zoning Code Section 240-107B(2)(b)[2] and New York State Town Law Section 267-b(3). Should the Zoning Board of Appeals, its consultants, or Town Staff have any questions or comments in the interim, please feel free to contact me. Thank you in advance for your cooperation and consideration in this matter.

Very truly yours,

A handwritten signature in blue ink, reading 'Neil J. Alexander'. The signature is fluid and cursive, with the first name 'Neil' being more prominent than the last name 'Alexander'.

Neil J. Alexander

**Enclosures**

cc: Barbara Roberti, CEO  
James Horan, Esq., Town Attorney  
Malcolm Simpson, Town Planner  
Timothy Moot, PG, and Jon Bodendorf, PE, Town Engineer  
Ronald Roth, Senior VP of Acquisitions and Finance, Diamond Properties  
Brian Donato, Vice President of Real Estate Development, Dakota Partners  
Brenden Lloyd, Project Manager, Dakota Partners  
Steve Schoch, AIA, LEED AP, Principal, Kitchen & Associates  
Will Walter, PE, Civil/Site Group Manager, Benesch