

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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In the Matter of the Application of

Index No. 10-31117

THE EAST HAMPTON LIBRARY, a non-profit educational
corporation and institution of the University of
the State of New York,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

- against-

ZONING BOARD OF APPEALS OF THE VILLAGE
OF EAST HAMPTON, and the VILLAGE PRESERVATION
SOCIETY INC.,

Respondent.
-----X

**THE EAST HAMPTON LIBRARY'S
MEMORANDUM OF LAW IN
SUPPORT OF PETITION**

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**THE EAST HAMPTON LIBRARY'S
MEMORANDUM OF LAW IN
SUPPORT OF PETITION**

PRELIMINARY STATEMENT

This proceeding seeks to annul two resolutions adopted by the Respondent Zoning Board of Appeals of the Village of East Hampton (“ZBA”) on July 23, 2010: (1) a resolution denying an application by the Petitioner East Hampton Library (the “Library”) for a special permit/interpretation/variances as needed for the construction of a new “Children’s Wing” to the Library, with associated site improvements (Exhibit 1¹), and (2) a resolution adopting a “Findings Statement” under the State Environmental Quality Review Act (“SEQRA”) (Exhibit 2).

The purpose of the Library’s application was to allow a 6,802 square-foot expansion (half of which would be underground) that the Library deemed necessary to meet the educational needs of the three school districts and the general population the Library serves pursuant to a State Education Department Regents Charter. The entire expansion project – including the acquisition of 10,000 new childrens/young adult books and 5,000 adult books – would be 100% paid for by private contributions, making this perhaps the only public library in the State to propose an expansion without any taxpayer dollars. The public, not surprisingly, overwhelmingly supported the project, including by passing a referendum in favor of the expansion by a vote of 657 to 135, or 83% to 17%. (Exhibit 14a)

After an unprecedented seven-year review process, the ZBA denied the application because (1) it believed that this Library should be limited to what the ZBA called a “traditional library,” i.e., “a quiet place, book repository and reference facility” and should not be a library

¹ All references to Exhibits are to the exhibits annexed to the Library’s Verified Petition, bound in a two-volume exhibit set numbered 1 through 50.

that offers children’s literacy “programs” where groups of children convene, (2) it believed that the Library should serve Village residents but residents from other areas of the Town, such as Springs, should build their own library, and (3) it believed that preserving a 1/4-acre portion of the lawn on the Library grounds was more important than providing improved library services.

The ZBA’s Decision is unprecedented in the State of New York as the only reported zoning denial of a Library expansion project. It also appears to be unprecedented in the Village of East Hampton as the only zoning application that was subjected to a full “environmental impact statement” review process, and the only zoning application that took the ZBA more than seven years to process. The ZBA’s Decision is also unprecedented because it is the first reported example of any governmental entity – including the courts, State Education Department, and local agencies – declaring that a Regents-chartered library is not an educational institution.

While the seven-year review process and relevant facts of this proceeding are set forth in more detail in the Verified Petition, this memorandum of law will address the various legal authorities that confirm that the ZBA’s decision was unlawful and unconstitutional.

First, as explained in Point I, despite the ZBA’s refusal to recognize the Library’s educational status, there can be no serious dispute that the Library is, as a matter of State law, an “educational institution,” an “educational corporation,” and a member of the University of the State of New York. The Library’s status as an educational institution, though ignored by the ZBA, is critical to both the SEQRA and zoning issues decided by the ZBA.

Accordingly, as explained in Point II, the Library’s status as an “educational institution” meant that its application for a less-than-10,000 square-foot expansion was exempt from SEQRA review as a “Type II” action under 6 NYCRR § 617.5(c)(8). Despite the Library demonstrating to the ZBA that it was an “educational institution,” despite the Education Department confirming

that status in writing, and despite the NYSDEC – which authored the SEQRA regulations – confirming in a written opinion and amendment to its “SEQRA Handbook” that Regents-chartered libraries were exempt from SEQRA under 6 NYCRR § 617.5(c)(8), the ZBA unlawfully decided that it knew better than the NYSDEC what the SEQRA regulations should mean, and that, in the ZBA’s opinion, the exemption for “educational institutions” should be limited only to schools.

Likewise, as explained in Point III, educational institutions are also entitled to special treatment under zoning laws, including the rules that: (1) educational uses are presumptively beneficial to the community; (2) educational institutions cannot be required to prove the need for an expansion, including the need to expand to the particular location chosen; (3) municipalities may not restrict specific educational programs and accessory uses; (4) the presumptive benefits of an educational institution can only be rebutted with evidence of significant adverse impacts on traffic congestion, property values, municipal services, and the like; and (5) even where impacts are shown, zoning boards must try to accommodate the educational use by imposing conditions designed to mitigate the impacts rather than excluding the use or expansion altogether. The ZBA refused to treat the Library as a protected educational institution and violated each and every one of those rules applicable to such institutions.

As explained in Point III, the ZBA also violated another fundamental zoning and constitutional principle: the prohibitions against exclusionary and discriminatory zoning, particularly with respect to educational institutions. New York law does not allow communities to exercise their zoning powers solely for their own benefit, with no consideration of regional needs. In the context of educational uses, which often serve regions that are broader than the municipalities in which they exist, the courts have been particularly vigilant to protect such uses

from local provincialism. Yet here, the ZBA openly embraced its provincialism and decried the fact that the Library serves a broader area than just the Village. Worse, it embraced a modern version of the long-discredited “separate but equal” rationale for providing educational services, by finding that, instead of expanding this inclusive Library, separate facilities should be built in Springs, where more Hispanics live than in the Village. The ZBA’s decision was unlawful and unconstitutional.

Finally, as explained in Point IV, the ZBA’s decision could not even be sustained on ordinary zoning principles, even if the Library had not been entitled to special treatment. The ZBA predetermined, shortly after the application was filed in 2003, that it disapproved of the Library’s children’s literacy “programs” and that its “only tool is not to let them build it as big as they want to build it.” (Exhibit 16). After a seven-year process that included collusion with the leading opposition group (Respondent Village Preservation Society [“VPS”]) and a refusal to accept the conclusions of the Village’s own traffic engineer, the ZBA followed through with its original decree by denying the expansion as being “too big.”

In short, the ZBA held the Library to a burden that was not the Library’s to meet, failed to apply the presumptions to which the application was entitled, required the Library to comply with a SEQRA process from which it was exempt, and ultimately denied the application based on grounds that were beyond the ZBA’s jurisdiction, on standards that were not applicable to the application, and on theories that have long been declared unconstitutional. The ZBA’s decision must be annulled, and the ZBA must be directed to grant the Library any and all necessary approvals, so the matter can proceed to the site plan review process conducted by the Village’s Design Review Board.

STATEMENT OF FACTS

For the relevant facts of this proceeding, the Court is respectfully referred to the allegations of the Verified Petition, which describe the facts and provide citations to the administrative record, as well as copies of the relevant excerpts of that record.

ARGUMENT

POINT I. THE LIBRARY IS, AS A MATTER OF STATE LAW, AN “EDUCATIONAL INSTITUTION,” “EDUCATIONAL CORPORATION,” AND MEMBER OF THE UNIVERSITY OF THE STATE OF NEW YORK.

The overarching legal issue in this case – because it impacts both the SEQRA claims (Point II) and zoning claims (Point III) – is whether the Library is an educational institution under New York law. A review of both the statutory authorities and the opinion offered by the State Education Department confirms that there can be no rational dispute: the Library is an educational institution as a matter of State law.

Educational institutions are governed by the N.Y. Education Law, which is administered by the Board of Regents/Department of Education, as the head of the University of the State of New York, or “USNY” (not to be confused with the State University of New York, or “SUNY”), a State entity existing under Article 11, § 2 of the N.Y. Constitution and Article 5, §§ 201 et seq, of the Education Law.

The primary stated purpose of the University of the State of New York is “to encourage and promote education....” See Educ. Law § 201. The University of the State of New York is comprised of numerous “institutions” defined under Education Law § 214 (“Institutions in the university”) to include all secondary and higher-education institutions, as well as all “such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university.” (Emphasis added)

The Board of Regents officially admits and incorporates institutions into the university through the issuance of a “charter.” See Education Law § 216. Once the charter has issued, the institution is, as a matter of law, treated as a not-for-profit “educational corporation.” See Education Law § 216-a.

The Education Law and the Board of Regents/Education Department specifically regulate libraries and library services. The Education Law includes a separate section governing libraries (see Educ. Law, Title I, Article 5, Part II - “Libraries,” §§ 245-285), and the Commissioner has promulgated regulations governing libraries, including an entire part (see 8 NYCRR Part 90) devoted to “Public and Free Association Libraries.” The regulations include standards and requirements that must be followed by chartered libraries, including a requirement that the library “maintains a facility to meet community needs, including adequate space, lighting, shelving, seating, and restroom.” See 8 NYCRR § 90.2(a)(8).

The East Hampton Library’s status as an educational institution, educational corporation, and member of the University of the State of New York cannot be disputed. The Library was first incorporated in 1897 as a “free association library,” which means, among other things, that it is “a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located.” See Education Law § 253(2). The Library was first admitted (then under the name “East Hampton Free Library”) into the University of the State of New York by issuance of an “absolute” Regents charter on August 31, 1911, and the charter was amended on November 15, 1991 to reflect the change of name to the “East Hampton Library.” (Exhibit 4). Therefore, the East Hampton Library is, as a matter of State law, an educational “institution” and member of the University of the State of New York (Education Law §§ 214, 216), as well as a not-for-profit “educational corporation.” (Educ. Law § 216-a); *see also Beers*

v. Village of Floral Park, 262 A.D.2d 315, 691 N.Y.S.2d 546 (2d Dep't 1999) (a library "is an educational corporation chartered by the New York State Board of Regents").

Because the ZBA questioned whether the Library really was an educational institution, the Library obtained written confirmation from the New York Education Department as to the Library's status. Senior Attorney of the Education Department, Richard Nabozny, Esq., explained that the Library was "an educational institution pursuant to the provisions of the Education Law," was benefited by the 1911 absolute charter and 1991 amendment to the charter granted by the Board of Regents, and thus was a "Regents-chartered library." He also explained that Regents-chartered libraries are (1) educational institutions pursuant to the provisions of the Education Law; (2) members of the University of the State of New York (USNY) pursuant to Education Law §214; and (3) education corporations generally subject to, with certain exceptions specified in the statute, the provisions of the Not-for-Profit Corporation Law, pursuant to Education Law §216-a. (*Id.*) Although there is nothing ambiguous about the Education Law, the Education Department, as the agency responsible for the enforcement of the Education Law, must be accorded "a high degree of deference" in its interpretation of that law. *See A.C. Transp., Inc. v. Board of Educ.*, 253 A.D.2d 330, 336, 687 N.Y.S.2d 1 (1st Dep't 1999).

While the Library's educational status is irrefutable, if not self-evident, the issue is raised herein because the ZBA refused to accord the Library its proper educational status either in connection with the ZBA's SEQRA review (see Point II) or its review of the zoning aspects of the application (see Point III). The ZBA's refusal to treat the Library as an educational institution is unjustifiable and unlawful and pre-empted by State law.

POINT II. THE ZBA’S SEQRA REVIEW MUST BE ANNULLED BECAUSE THE LIBRARY’S 6,802 SQUARE FOOT EXPANSION WAS A “TYPE II” ACTION EXEMPT FROM SEQRA REVIEW AS A MATTER OF LAW.

The first issue that is directly impacted by the Library’s educational status is whether the ZBA had any authority to conduct a SEQRA review in connection with the Library’s application.

SEQRA is a State law, not a local law. Under SEQRA, and the NYSDEC’s regulations adopted at 6 NYCRR Part 617, all state agencies and “local agencies” must comply with SEQRA when undertaking or approving “actions.” See 6 NYCRR §§ 617.2 and 617.3.

Not all actions, however, are subject to SEQRA review. Rather, SEQRA classifies actions into three categories: “Type I,” “Type II,” and “unlisted,” all of which are defined in 6 NYCRR § 617.2, in pertinent part, as follows:

(ai) Type I action means an action or class of actions identified in section 617.4 of this Part...

(aj) Type II action means an action or class of actions identified in section 617.5 of this Part...

(ak) Unlisted action means all actions not identified as a Type I or Type II action in this Part....

New York’s highest court has described those three classifications as follows:

The regulations classify actions as Type I, Type II or unlisted, depending on the potential effects on the environment.... A Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS [environmental impact statement]" (6 NYCRR 617.4 [a] [1]). A Type II action is not subject to SEQRA review because it has "been determined [by DEC] not to have a significant impact on the environment or [is] otherwise precluded from environmental review under Environmental Conservation Law, article 8" (6 NYCRR 617.5 [a]). Finally, all remaining actions are classified as "unlisted" actions (6 NYCRR 617.2 [ak]). Type I and unlisted actions are subject to SEQRA review, and Type I actions "are more likely to require the preparation of an EIS than Unlisted actions" (6 NYCRR 617.4 [a]).

City Council v. Town Bd., 3 N.Y.3d 508, 518, 789 N.Y.S.2d 88 (2004).

Among the three classes, the Library’s application is, as a matter of law, a “Type II” action and is therefore exempt from SEQRA review.

“Type II” actions are governed by section 617.5 of the SEQRA regulations. First, subdivision “(a)” makes it clear that those actions that are on the Type II list are exempt from SEQRA review altogether:

(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies. [Emphasis added]

Subdivision (c) provides what is commonly known as the “Type II list,” and it consists of 37 enumerated classes of actions that are exempt from SEQRA. The eighth class involves expansions of educational institutions and includes:

(8) routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings.... [Emphasis added]

Thus, an “educational institution’s” “expansion of existing facilities by less than 10,000 square feet of gross floor area” is a Type II action exempt from SEQRA review as a matter of State law. Because the Library is (also as a matter of State law) an “educational institution” (see Point I above), its 6,802 square foot expansion is a Type II action exempt from SEQRA review.

Admittedly, when the Library’s initial ZBA review process began, the proposed expansion was 10,300 square feet, and was thus subject to SEQRA. In fact, although a 10,300 square foot addition to a building would ordinarily be an “unlisted action,” its location in a

historic district elevated its classification from unlisted to “Type I” under 6 NYCRR § 617.4(b)(9).² That regulation only applies, however, to “unlisted” actions, meaning that Type II actions located in a historic district are still Type II actions.

In the summer of 2004, the project was reduced voluntarily to only 6,802 square feet. At that point, the project fell well under the 10,000 square-foot threshold of 6 NYCRR § 617.5(c)(8) and thus became exempt from SEQRA review. Unfortunately, all of the participants at the time, including both the ZBA and the Library, simply assumed that the project was still subject to SEQRA. As described in the Petition (¶¶143-150), the ZBA adopted a “Positive Declaration” on September 24, 2004 and required the Library to prepare a costly environmental impact statement.

It was not until after the Library filed its first version of the DEIS (on January 18, 2008) that a critical error was discovered, namely, the failure to recognize that, once the project amendment reduced the size of the expansion to under 10,000 square feet, the project became a Type II exempt action under SEQRA.

Despite numerous ZBA meetings held to discuss the SEQRA issue, and despite obtaining an opinion directly from the NYSDEC on the issue, the ZBA refused again and again to acknowledge that the Library was an “educational institution” under the meaning of SEQRA. The lengthy debate of the issue (which began in March of 2008 and did not end until the ZBA adopted its final SEQRA resolution on July 23, 2010), is detailed at length in the Petition (at ¶¶ 151-177). As explained therein, at first, the ZBA proclaimed that it could not be certain whether the Library was really an “educational institution,” so the Library obtained a letter from the

² The regulation defines the category, in pertinent part, as follows: “(9) any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places....”

Education Department (Exhibit 5) confirming that, as a Regents-chartered library, it was, as a matter of State Law, an “educational institution,” “educational corporation,” and member of the University of the State of New York. Then, the ZBA suggested that it could not be certain whether the *NYSDEC* meant the phrase to include all institutions or just schools, so the Library sought and obtained a written opinion from the NYSDEC, signed by Deputy Commissioner and General Counsel Allison Crocker, in which the NYSDEC concluded “that the East Hampton Library is an ‘educational institution’ within the meaning of 6 NYCRR 617.5(c)(8)” and that, “[s]ince the proposed East Hampton Library children’s wing addition is less than 10,000 square feet, this action can appropriately be classified as a Type II action under 6 NYCRR 617.5(c)(8), and thus be exempt from SEQR review. (Exhibit 24) (emphasis added). At that point, the ZBA’s earlier uncertainty about what the NYSDEC meant when it adopted the regulation became a certainty that the NYSDEC was *wrong* in its interpretation of that regulation. Even after the NYSDEC officially amended its SEQRA instructional document, entitled the “SEQR Handbook,”³ to explain that, for purposes of 6 NYCRR § 617.5(c)(8), “Educational institutions include all schools and libraries chartered and/or registered by the New York State Board of Regents” (Exhibit 26), the ZBA continued to insist that it knew better than the NYSDEC.

Although the ZBA suggested at one point during the debate on the issue that its “interpretation” of SEQRA would be entitled to deference by the Courts, the ZBA is only entitled to deference in the interpretation and application of East Hampton Village zoning code. SEQRA is a *State Law* (ECL Article 8), not a local village zoning code, and thus the ZBA possesses no unique “expertise” over SEQRA so as to warrant deference by the courts.

³ The NYSDEC website describes the SEQR Handbook as being, since 1982, “a standard reference book for state, county and local government officials; environmental consultants; attorneys; permit applicants; and the public.”

Indeed, the specific Type II regulation at issue was promulgated by the NYSDEC, pursuant to its delegated authority over SEQRA. Accordingly, because the NYSDEC is the “rule-maker,” it is the NYSDEC’s interpretation (not the ZBA’s), that must be given deference by the Courts, under the well-settled rule that NYSDEC’s “interpretation and construction of its own regulations and the legislation under which it functions will be given special deference by the courts if that construction is not irrational or unreasonable.” *See James H. Rambo, Inc. v. Jorling*, 177 A.D.2d 577, 576 N.Y.S.2d 292 (1991). The interpretation here was set forth in writing by the Deputy Commissioner and General Counsel of the NYSDEC, who is the highest-ranking legal advisor in the NYSDEC (a State Agency with a billion-dollar annual budget and over 3,700 full time employees) and who is the person officially responsible for “developing and reviewing legislation and regulations” and “providing interpretations and advice.”⁴

The NYSDEC did not just issue a site-specific opinion, but formally amended its SEQR Handbook to put the entire State on notice of its interpretation. The Court of Appeals has relied on the SEQR Handbook as authority for determining the NYSDEC’s position on SEQRA issues, including when a particular action is Type I, Type II, or unlisted. *E.g., City Council of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 518, 789 N.Y.S.2d 88 (2004).

Nor is the NYSDEC’s opinion irrational. To the contrary, before the NYSDEC concluded that Regents-chartered libraries should be deemed “educational institutions” within the meaning of 6 NYCRR § 617.5(c)(8), the NYSDEC reviewed the regulatory history of that provision. The particular Type II category was adopted in 1995 as part of the NYSDEC’s lengthy review of, and substantial revisions to, the original SEQRA regulations that had then been in effect since in 1987. The NYSDEC prepared a “Final Generic Environmental Impact

⁴ See <http://www.dec.ny.gov/about/654.html>

Statement” in 1995 (“FGEIS”) in which it discussed the basis for the amendments to the SEQRA regulations. In the written opinion regarding the Library’s exemption (Exhibit 24), the NYSDEC quoted from the following key section of the FGEIS, which explained why the NYSDEC was adopting the Type II exemption for sub-10,000 sf expansions:

The State Education Department indicates that projects of less than 10,000 square feet would include expansions for new classrooms (typically eight rooms or less), elevators, special facilities for handicapped access, libraries, lunch rooms, special education facilities, computer laboratories, garages, caretaker residences, teacher centers, child-care centers, storage buildings, pole barns, press boxes and greenhouses to name a few. Impacts resulting from these projects have not reached significant levels. Thus, inclusion of these expansion activities on the list of actions that will not require review is warranted. The construction occurs on existing sites that are being used for educational purposes, so there will be no change in use. Also, any new disturbance from projects of this small size usually occurs in areas that have previously been disturbed by construction or school use.

The General Counsel then explains that the State Education Department was the “proponent” of the Type II exemption, and that, in the opinion of the State Education Department, Regents-chartered libraries were indeed “educational institutions.” Thus, the NYSDEC’s General Counsel concluded that the “only reasonable construction” of the term “educational institution” as used in 6 NYCRR § 617.5(c)(8) was that it includes a Regents-chartered Library. (Exhibit 24)

If anything, considering that the Education Department was the “proponent” of the Type II exemption, any other construction of the term “educational institution” would be patently irrational. The Education Department, more than any other entity, is acutely aware of the difference between the narrower phrase “schools” and the broader term, “educational institution,” which includes schools and libraries (and other “Regents-chartered” institutions). If the Education Department wished to provide only for a Type II exemption applicable to schools, it would presumably have used the narrower term “school,” rather than the broader phrase

“educational institution,” when it proposed the exemption to the NYSDEC.

In short, just as the NYSDEC General Counsel and Deputy Commissioner opined, the Library’s 6,802 square-foot expansion is a Type II action exempt from SEQRA. Since the obligation to conduct SEQRA review is only delegated to the ZBA by State law, the ZBA was pre-empted from conducting such review over a Type II action. In fact, SEQRA expressly pre-empted local review of Type II actions in the SEQRA regulations, which state that “[a]n agency may not designate as Type I any action identified as Type II in section 617.5 of this Part.” 6 NYCRR § 617.4(a)(2). The ZBA purported to do just that.

Accordingly, the ZBA’s subsequent SEQRA actions, which began with the hearing on the DEIS beginning in September of 2009 and ended with the the SEQRA “Findings Statement” on July 23, 2010, were without jurisdiction, pre-empted by State law, and otherwise unlawful.

POINT III. THE ZBA’S DECISION MUST BE ANNULLED BECAUSE IT REFUSED TO APPLY THE SPECIAL RULES APPLICABLE TO EDUCATIONAL USES AS A MATTER OF STATE LAW.

The ZBA’s refusal to acknowledge the Library’s educational status not only infected its SEQRA review, but deprived the Library of certain rights afforded to it under State law with respect to a municipality’s zoning restrictions. As explained herein, educational uses are categorized with religious uses as two classes of uses that are presumed to be beneficial and are thus subject to special rules whereby the need for an expansion at a particular site is deemed conclusively presumed, and the beneficial impact of the project is also presumed, subjected to being rebutted with evidence of a substantial impacts on traffic, congestion, municipal services, and the like. (Sub-section A). The ZBA refused, once again, to treat the Library as an educational institution, thereby holding the Library to a burden that was not the Library’s to meet, and applying standards that were not applicable to this application. (Sub-section B). Once

the proper standards are acknowledged, there can be no rational basis that would sustain a denial of the Library's application, since the presumed benefits of the Library's expansion were never rebutted with evidence of substantial impacts on the community. (Sub-section C).

A. Under New York Law, educational uses are entitled to special presumptions, rules, and standards in the review of their zoning applications.

The seminal opinion on the rights of educational (and religious) institutions with respect to local land-use restriction is the Court of Appeals' decision in *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861 (1986).

In *Cornell v. Bagnardi*, the Court of Appeals presented a historical background to the tension between zoning and educational/religious uses. *Id.* at 592-93. The court explained that, while elementary schools and small churches were once welcome in residential neighborhoods, "the advent of the automobile, *as well as the growth and diversification of religious and educational institutions*, brought a host of new problems," because neighbors began viewing the arrival of new schools "with distrust and concern that it would unnecessarily bring people from other communities into the neighborhood to disrupt its peace and quiet." *Id.* (emphasis added). It was because of that "change in attitude" that courts "were thrust into the role of *protecting educational institutions from community hostility*." *Id.* (emphasis added). The Court explained some of the historical holdings by the courts to protect such institutions, including the court-imposed prohibitions against the total exclusion of such facilities, or the discrimination between some types of schools and others. *Id.* at 593-94. On the other hand, the Court of Appeals noted that some courts had appeared to have gone too far, by creating "a full exemption from zoning rules for all educational and church uses," so as to "render municipalities powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be." *Id.* at 594. The Court

of Appeals eschewed such an extreme, absolute exemption from zoning as unsupported by case law or common sense. *Id.*

The *Cornell v. Bagnardi* court posed the issue to be decided as requiring the court to determine “the proper method of balancing the needs and rights of educational institutions that desire to expand or construct into purely residential neighborhoods against the concerns of the surrounding residents about the potential inconveniences.” *Id.* at 589. In the Court of Appeals’ attempt to effectuate a proper balancing of those interests, the *Cornell v. Bagnardi* decision established several related presumptions, rules, and standards that are applicable to educational (and religious) uses, and that have been clarified and applied by the courts in the 24 years since that decision. The following five rules are now well-settled and are critical to this case.

1. Educational uses are presumptively beneficial to the community.

One of the principles reaffirmed by the Court of Appeals in *Cornell v. Bagnardi* was the then well-settled rule that educational institutions (as well as religious institutions) have been deemed by the courts to be “inherently beneficial” and “by their very nature” have been held to “singularly serve the public's welfare and morals.” *Id.* at 593. As the Court of Appeals had previously stated: “To be sure, an educational use is, by its very nature, in furtherance of the public morals and general welfare....” *New York Institute of Technology, Inc. v. Le Boutillier*, 33 N.Y.2d 125, 130, 350 N.Y.S.2d 623 (1973).

This presumption of beneficial impact has led to a firm prohibition against municipal attempts to exclude such uses from residential districts. As the Court of Appeals explained in *Cornell v. Bagnardi* (68 N.Y.2d at 594), the exclusion of educational and religious uses is beyond the police powers of a municipality:

Because of the inherently beneficial nature of churches and schools to the public, we held that *the total exclusion of such institutions*

from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community Since a municipality's power to regulate land use is derived solely from its right to use its police powers to promote these goals, such total exclusion is beyond the scope of the localities' zoning authority. [Emphasis added].

The Court of Appeals revisited the issue in *Trustees of Union College v. Members of the Schenectady City Council*, 91 N.Y.2d 161, 667 N.Y.S.2d 978 (1997). There, the court was asked to “consider the novel, but related, question whether a municipality has acted lawfully in excluding educational institutions from a residential *historic* district.” *Id.* at 163 (emphasis in original). While acknowledging that the “preservation of structures and areas with special historic, architectural or cultural significance is surely an important governmental objective,” the Court of Appeals reaffirmed that “the public interest in historical preservation does not as a matter of law override competing educational interests, which by their very nature also are ‘clearly in furtherance of the public morals and general welfare.’” *Id.* at 165-66. Accordingly, the Court held that same standards would apply to historic preservation restrictions, and thus the exclusion of educational institutions from historic districts was unlawful. *Id.* at 166-67.

2. *Educational institutions cannot be required to prove the need for an expansion, including the “need to expand to the particular location chosen.”*

A second key principle is the long-settled rule that “need to expand” is determined by the institution itself, and that need may not be considered, much less second-guessed, by the municipality. As the Court of Appeals succinctly stated, the “need” for the expansion is an “impermissible criterion” for a zoning board’s review, and thus an institution does not have to demonstrate a “*need to expand..., or even more stringently, a need to expand to the particular location chosen...*” *Cornell v. Bagnardi*, 68 N.Y.2d at 596-97 (emphasis added). Any consideration of need “has no bearing whatsoever upon the public's health, safety, welfare or

morals” and “is, therefore, beyond the scope of the municipality's police power, and, thus, impermissible.” *Id.* The Court of Appeals even noted that its prior holding, in *NYIT v. Le Boutillier, supra*, which had suggested that the need to expand must at least be “colorable,” should not be followed to the extent it suggests that an educational institution bears any burden of proving the need for the expansion. *Id.*

Ever since this seminal opinion, the courts of this state have not hesitated to overturn zoning decisions that question the need for an expansion or, more specifically, the need for the expansion at a particular location.

Hence, in *Cornell University v. Beer*, 16 A.D.3d 890, 791 N.Y.S.2d 682 (3d Dep’t 2005), the court overturned the Ithaca Landmark Preservation Commission’s decision to deny Cornell’s application to construct a parking lot in a historic district. One of the grounds the commission asserted to deny the application was that Cornell had not justified the need for the parking lot in this location. The court soundly rejected that ground, holding that the “need” for the parking lot was “presumed,” that Cornell “was not required to demonstrate a special need for the parking lot,” and that the commission “lacked the power to find that the need for the lot at the planned campus location was not proven to their satisfaction.”

And in *Lawrence School Corp. v. Lewis*, 174 A.D.2d 42, 578 N.Y.S.2d 627 (2d Dep’t 1991), the court overturned a zoning board’s denial of an educational institution’s application to build two pools on its property. The applicant asserted that the expansion project was financially needed, but the zoning board found that the financial need was “self created.” The court rejected that rationale. It explained that it “is established law that educational institutions, like religious institutions, enjoy special treatment with respect to residential zoning ordinances because these institutions presumptively serve the public's welfare and morals.” It further noted that, “while

such institutions are not exempt from compliance with a zoning ordinance..., neither are they required to affirmatively demonstrate a special ‘need’ for any expansion.”

Most recently, the Court of Appeals re-affirmed that “it is not the role of zoning officials to second-guess the expansion needs of religious and educational institutions.” *Pine Knolls Alliance Church v. Zoning Bd. of Appeals*, 5 N.Y.3d 407, 413, 804 N.Y.S.2d 708 (2005).

3. *Municipalities may not restrict the specific educational programs and reasonably associated accessory uses of the institution.*

A third related principle is the prohibition against municipalities mis-using zoning powers as a means to prohibit or restrict specific programs and needs of an educational institution, including accessory uses.

Simply put, municipalities cannot regulate the details of educational programs or unduly restrict otherwise permissible educational uses. For example, in *Town of Islip v. Dowling College*, 275 A.D.2d 366, 712 N.Y.S.2d 160 (2d Dep’t 2000), the town sought a declaration that “driver’s education courses for nonmatriculating students at Dowling College are nonpermitted uses” under the town’s code. *Id.* The Second Department held that the “activities at issue in this case are permitted educational uses of the subject property and the restrictions which the plaintiff seeks to place on these activities would be impermissible.” *Id.*

Moreover, the flexibility accorded to educational institutions to fulfill their mandates includes reasonably associated accessory uses. As the Second Department explained in the *Dowling College* case: “Educational institutions are generally permitted to engage in activities and locate on their property facilities for such social, recreational, athletic, and other accessory uses as are reasonably associated with their educational purpose.” *Id.* at 366.

Hence, in *Lawrence School v. Lewis*, *supra*, the Second Department began its opinion by characterizing the case as an “opportunity to remind municipalities that because educational

institutions presumptively serve a beneficial public purpose, local governments may not unreasonably prohibit accessory uses of school premises.” 174 A.D.2d at 43. After explaining that “educational and religious institutions are generally entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes,” the court held that the installation of swimming pools in connection with a summer educational program was within the school’s rights and was improperly prohibited by the municipality. *Id.* at 44-47.

Finally, and perhaps most directly related to this case, the Appellate Division in *Cornell v. Beer, supra*, held that the construction of a parking lot was a “valuable educational use” and a “qualified accessory use” to the institution’s educational purposes. 16 A.D.3d at 894. Accordingly, Cornell “was not required to demonstrate a special need for the parking lot....” *Id.*

4. *The presumptive benefits of an educational institution can only be rebutted with evidence of significant adverse impacts on traffic congestion, property values, municipal services, and the like.*

The fourth related principle governing applications of educational uses is that the presumption of benefits from educational and religious uses relieves the institution of the burden of *disproving* all adverse impacts and places a heightened burden on any opponents to rebut the presumption with *significant* evidence of impacts on the community.

The lower burden of proof on educational institutions (and a corresponding higher burden on opponents) stems from the inherent benefits educational institutions are presumed to have on the public health, safety, and welfare of a community. Accordingly, “[f]actors bearing on the public health, safety and welfare, such as traffic hazards, impairment of the use, enjoyment or value of properties in surrounding areas and deterioration of the appearance of an area, which might warrant denial of a special exception permit for a commercial use, ordinarily will not

suffice to deny an educational use.” *NYIT v. Le Boutillier*, *supra*, 33 N.Y.2d at 131; *see also Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 496, 293 N.Y.S.2d 297 (1968) (“We have said that factors such as potential traffic hazards, effects on property values and noise and decreased enjoyment of neighboring properties cannot justify the exclusion of such structures”). On the other hand, the Court of Appeals explained in *Cornell v. Bagnardi*, *supra*, that a community “should not be obliged to stand helpless in the face of proposed uses that are dangerous to the surrounding area.” 68 N.Y.2d at 595.

Consequently, the Court held that “[t]he presumed beneficial effect may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like.” *Cornell v. Bagnardi*, 68 N.Y.2d at 595 (emphasis supplied).

The courts will not hesitate to annul a zoning board’s refusal to apply the proper standards and burdens or a zoning board’s denial based on insubstantial evidence of impacts. For example, the Court of Appeals in the companion case decided in the same opinion as *Cornell v. Bagnardi*, held that “the board’s requirement in *Sarah Lawrence Coll. v. Zoning Bd. of Appeals*, that the college show that no ill effects will result from the proposed use in order to receive a special permit, is improper because it fails to recognize that educational and religious uses ordinarily have inherent beneficial effects that must be weighed against their potential for harming the community.” 68 N.Y.2d at 597.

Similarly, in *Lawrence School v. Lewis*, *supra*, the Second Department, after reviewing the zoning board’s denial of a variance to allow the construction of swimming pools, concluded that “no persuasive expert or other evidence was offered to demonstrate that the addition of two pools would have a significant adverse impact on, among other things, traffic patterns, property values, or municipal services.” 174 A.D.2d at 47.

And in *Cornell v. Beer*, *supra*, although the landmark preservation commission’s findings of adverse impacts on the “landscape’s physical and visual character” due to the size and scale of the parking lot were allegedly supported by an expert report, both the Supreme Court and Appellate Division scrutinized the report and commission’s findings and found no evidence of a “substantial” impact, but rather evidence “of only a minimal effect” upon the landscape. 16 A.D.3d 890, 892-93; *see also* 5 Misc.3d 1004A, 798 N.Y.S.2d 708 (Sup.Ct., Tompkins Co. 2004). Such evidence therefore was insufficient to rebut the presumption.

5. *Even where impacts are shown, zoning boards must try to accommodate the expansion by imposing conditions designed to mitigate its impacts rather than exclude it altogether.*

In *Cornell v. Bagnardi*, the Court of Appeals explained that, except in extreme cases where total exclusion of the use or expansion can be justified on the particular impacts it would cause, less extreme types of expansions “require a more balanced approach,” such as through the special permit process, where a board can “cushion any adverse effects by the imposition of conditions designed to mitigate them.” 68 N.Y.2d at 595-96. “These conditions, if reasonably designed to counteract the deleterious effects on the public's welfare of a proposed religious or educational use should be upheld by the courts, provided they do not, by their cost, magnitude or volume, operate indirectly to exclude such uses altogether.” *Id.* (citation omitted).

The Court of Appeals’ most recent review of these issues illustrates how a municipality can properly exercise its review powers to ensure safety and mitigate against significant impacts without otherwise interfering with the institution’s need to expand. *See Pine Knolls Alliance Church v. Zoning Bd. of Appeals*, 5 N.Y.3d 407, 804 N.Y.S.2d 708 (2005). Although *Pine Knolls* was a religious use case, the applicable standards are the same. In that case, an existing church acquired additional property and proposed a substantial expansion plan that included

nearly doubling its main church, expanding a youth building, erecting a new counseling center, relocating and expanding a playground, and expanding the parking lot. *Id.* at 409-410.

Moreover, while the church already had one driveway, it proposed to add a second one to accommodate increased traffic. *Id.* at 410. The zoning board ultimately approved all of the proposed structural and parking lot expansions but, based on an expert traffic engineer's recommendations, the zoning board found that the second driveway would create safety issues and impacts on the neighborhood that could be mitigated by widening the existing driveway to two lanes and eliminating the second driveway. *Id.* at 411. The zoning board noted that the denial of the second access was without prejudice to a renewed application if the approved widening of the existing driveway proved inadequate. *Id.*

When the church challenged the denial of its secondary access, the Court of Appeals upheld the decision as a reasonable mitigative condition. *Id.* at 413-414. The Court repeatedly underscored that the zoning board did not preclude the expansion but properly limited its inquiry to "whether the proposed expansion could be accomplished in a manner that mitigated the negative impacts on the surrounding community." *Id.* at 413. The Court held that the mere denial of the second access road was not a denial of the expansion itself, and was thus the "functional equivalent of imposing mitigating conditions on the grant of an application--a practice expressly approved in *Cornell University* as long as such conditions do not 'by their cost, magnitude or volume, operate indirectly to exclude' the religious or educational use of the parcel." *Id.* at 414. Since the denial of the second access road would not have such an indirect effect of preventing the expansion, the Court upheld the zoning board's decision. *Id.*

While *Pine Knolls* is an example of a board that properly used its special permit power not to exclude or impair the need to expand but just to cushion the effects of the expansion, there

are many more examples of boards that improperly failed to make every effort possible to accommodate the expansion and to consider whether mitigative conditions could have addressed their concerns without an outright denial of the project. *See, e.g., Cornell v. Beer, supra*, 16 A.D.3d at 894 (finding that the landmark commission failed to consider “what conditions could reasonably be imposed to mitigate the perceived adverse impacts on the landscape”); *Genesis Assembly of God v. Davies*, 208 A.D.2d 627, 617 N.Y.S.2d 202 (2d Dep’t 1994) (denial of parking variance annulled because board did not do everything to accommodate use and failed to consider conditions to mitigate against impacts); *Lawrence School v. Lewis, supra*, 174 A.D.2d 42 (since conditions could mitigate against impacts, denial of variance was annulled)

B. The ZBA unlawfully refused to apply the proper educational use presumptions and standards to the Library’s application.

From the beginning of what became a more than 7 year review process, until the final decision, the ZBA in this case refused to treat the Library as an educational institution. The Library repeatedly cited *Cornell v. Bagnardi* and many of the other cases discussed above to the ZBA, including the *Cornell v. Beer* case involving many of the same issues of parking-versus-landscaping impacts. Yet the ZBA never once acknowledged that the Library was an educational institution that was subject to special treatment under New York law.

Nor did the ZBA ever explain why it was refusing to apply the educational use presumptions and standards. The opponents argued that the educational institution standards should not apply to a library, because all of the educational institution cases involved different types of schools (whether public or private, or college or lower education), and there was no example of such standards being applied to libraries. What the opponents failed to mention, of course, is that there are no examples of these standards being applied to libraries because there are no examples of any zoning board (or other municipal board) denying an expansion

application of a public or free association library. The East Hampton ZBA appears to be the first municipal board in the State to deny a library expansion project.

None of the cases discussed above purport to limit the doctrines to schools only. To the contrary, the Court of Appeals repeatedly describes the rules as being applicable to “educational institutions,” and even mentions in *Cornell v. Bagnardi* that the heightened judicial scrutiny historically emanated from the “growth and diversification of ... educational institutions” after the advent of the automobile. 68 N.Y.2d at 592-93.

Moreover, as explained in Point I, a Regent-chartered library is an educational institution, educational corporation, and member of the University of the State of New York as a matter of State Law. Considering that libraries are perhaps the only educational institutions open to the entire public – from toddlers to seniors – and that community libraries inherently have smaller impacts than larger schools, it is unfathomable that the rules applicable to all other educational institutions (including elite private schools and large universities) could somehow be inapplicable to a Regents-chartered library/member of the University of the State of New York.

Once the educational institution standards are recognized, there can be no rational basis to sustain the ZBA’s decision, because the ZBA violated every one of the above-described principles in denying the Library’s application.

1. The ZBA improperly found that a library use was inherently detrimental to the residential community.

The ZBA refused to accept the most basic principle that educational institutions, by their very nature, must be deemed inherently beneficial to communities. To the contrary, the ZBA’s final denial of the application includes numerous findings that the Library – just because it is a “nonresidential” use – would have a negative effect on the “character” of the community.

These unlawful findings are reflected in the three final documents adopted by the ZBA

when it denied the application, i.e, its June 25, 2010 “FEIS,” and its July 23, 2010 “Findings Statement” and final zoning resolution. For example, in all three documents, the ZBA repeats that the Village “is primarily a residential community” and that a “primary” Village goal is “to limit the expansion of any non-residential uses within the residential districts.” (Exhibit 1, p. 15; Exhibit 2, p. 8; Exhibit 50, p. 30). And in its final zoning decision, the ZBA found (as reasons to deny the special permit and any required area variance) that (a) the expansion was an “intensification of the non-residential use within a residential district” and would thus be “an undesirable change in the character of the neighborhood (Exhibit 1, ¶8), and (b) “an undesirable change in the character of the neighborhood and detriment to nearby properties would result from the proposed expansion, in that.... the site is in a residential zone and the surrounding neighborhood is primarily residential in character.” (*Id.*, ¶10)

Thus, the ZBA reversed the presumption. Instead of deeming the Library an inherent benefit to the character of the community, it deemed the Library, by its nature, a detriment to the character of the community. Under the numerous authorities addressed above, the ZBA’s findings were beyond its police powers.

2. *The ZBA improperly required the Library to prove the need for the expansion and ultimately found that the expansion was not needed at this location.*

The ZBA also violated the second basic principle governing these applications, namely, the prohibition against requiring an educational institution to demonstrate its need for the expansion, and, more particularly, the need for the expansion at the particular site.

From the inception of the application, the ZBA questioned (1) whether the Library needed as much space as it was proposing and (2) whether the Library needed to expand on this site or whether an alternative location, such as a new library branch in Springs, could accommodate the need for additional space. The ZBA’s early refusal to accept the Library’s

“need” is reflected in the statements made by ZBA members in June of 2004, who emphatically questioned why the Library needed to expand at its existing property. (See Exhibits 16 and 17).

Although the Library never should have been forced to prove its need, it in fact did so in an effort to placate the ZBA’s concerns. The Library’s DEIS includes lengthy and detailed explanations about the need for the expansion and the need to accommodate the expansion on this site, including a 22-page section entitled “Need Assessment” (which explains at length and in detail the specific programmatic needs that will be fulfilled by the expansion) and a 14-page section entitled “Springs Alternative” (which explains why the alternative of locating a new facility off-site in Springs is not feasible or practical, financially or educationally). (Exhibit 20, pp. 24-46, and 89-103). When opponents and ZBA members continued to question the need for the project, the Library submitted expert affidavits, written statements, written reports and oral testimony during the public hearing, explaining further why the expansion was needed and detailing the three-year pre-application planning process that led the Library to assess its need and propose the expansion. (See, e.g., Exhibit 39, pp. 3-7, 50-79, 280-331, 332, 333-344, 345-46, 347-48, 361-62, 367-69, 386-92)

Even after the Library proved its need, the ZBA refused to accept the Library’s proof. Instead, in its final decision, the ZBA reached the opposite conclusion, by finding that the Library either did not need the space it claims to need or did not need to expand the existing facility on this site, but rather had alternative options at some other locations. The ZBA’s improper second-guessing of the Library’s need is reflected in the following:

- the statements on pages 10-12 of the FEIS (Exhibit 50) questioning the need for the size of the new spaces;
- the statement in the FEIS that the ZBA is “persuaded” by a report (submitted by the

opponent group VPS) that questions the Library's need for more shelf space (*Id.*, p. 28);

- the citation in the FEIS to comments by some of the opponents who “questioned the need for any new construction,” including their claims that “each of the schools has an excellent library” and that “the shelving of the books might be made more efficient and the quality of those books improved with editing of the existing collection.” (*Id.*, p. 29);
- the statements in the FEIS questioning why the Library did not more “thoroughly” explore the alternative of locating a new branch in Springs, as opposed to expanding the existing facility (*Id.*, pp. 38-39);
- the finding made in the Findings Statement (Exhibit 2) that the Library may not need to increase its book collection and that the Library's needs “can be realized in something less than a 6,802 square-foot addition” (*Id.*, p. 10);
- the finding in the Findings Statement that the alternative of a full-service branch library in Springs should “have been more thoroughly explored” and “may well be both feasible and realistic” (*Id.*, p. 11);
- the findings in the final zoning resolution that questioned whether the Library needed additional space and opined the Library could meet its needs by other “feasible” alternatives, including a “full-service branch Library” in Spring or a smaller expansion on site, with no expanded lecture room. (See, e.g., Exhibit 1, pp. 4 and 9)

The ZBA's refusal to respect the Library's determination of its needs is not only contrary to the long line of cases discussed above, but fails to accept that the Library is under *State compulsion* to provide reasonable and adequate library services to all the districts it serves, including the Wainscott, Springs and East Hampton School Districts, and that such compulsion includes providing the proper facilities to meet those needs. Under the Education Law, the

Board of Regents/Education Department have the statutory “power to fix standards of library service for every free association, public and hospital library.” See Educ. Law § 254. The Education Department has fixed such standards, which are set forth in Part 90 (“Public and Free Association Libraries”) of the department’s regulations (8 NYCRR §§ 90.1 to 90.19). Among other things, the regulations require chartered libraries to meet the following standards:

- they must have a “board-approved, written long-range plan of service”;
- they must “periodically evaluate[] the effectiveness of the library’s collection and services in meeting community needs”;
- they must “maintain[] a facility to meet community needs, including adequate space, lighting, shelving, seating, and restroom,” and
- they must “provide[] equipment and connections to meet community needs including, but not limited to telephone, photocopier, telefacsimile capability, and microcomputer or terminal with printer...” See 8 NYCRR § 90.2(a).

The Library did what it was charged to do: it studied its needs for 3 years before arriving at a plan to meet those need, and it is attempting to effectuate that plan – in a manner that would not have cost the library patrons a single taxpayer dollar. Yet for the last 7 years, the ZBA has blocked the Library’s efforts and ultimately decided that the ZBA members (who have no library expertise whatsoever) know better than that of the Library Trustees and Director who are charged by the State with providing adequate library services to the public.

The ZBA thus clearly exceeded its lawful jurisdiction by requiring, in the first place, that the Library prove its need and then by rejecting, at the end of the process, the Library’s detailed explanation of need.

3. ***The ZBA admitted that it was using its zoning powers as a “tool” to restrict the Library’s lawful educational programs, which ZBA members did not believe should be offered at a “traditional” and “quiet” library.***

Based on the recorded statements of the ZBA’s own members and its written decisions, it cannot be disputed that the ZBA violated the third principle discussed above, namely, the prohibition against the interference with educational programming and the allowance to educational institutions to include reasonably associated accessory uses.

Specifically, the ZBA disagreed with the Library’s offering of children’s literacy programs (which the ZBA derogatorily referred to as “recreational” programs). The Library has explained, including through educational literature, that offering literacy programs to young children is a valuable educational opportunity that serves the Library’s educational mission (See, e.g., Petition Exhibit 39, pp. 333-344). The programs are small, with an average of 16 parents and children at about 4 literacy programs per week. (Pet. ¶51).

The ZBA, however, made its disapproval of these “programs” known in June of 2004, about a year after the application was first filed and six years before it was finally denied. Based on the transcripts of two ZBA meetings conducted that month (on the 11th [where no library representative was present] and 24th), the ZBA members brazenly suggested that they knew better than the current Library board what a library should and should not be, and, in their opinion, the children’s “programs” should not take place at this Library. (See Petition ¶¶ 118-138, Exs. 16 & 17). The ZBA members’ statements include the following:

- At the June 11th meeting, ZBA Chairman Goldstein, before he had seen the plans for the 6,802 sf reduced-size project, announced that he would accept an expansion of the children's room “a little bit” but was opposed to any “program” room, “because they can deliver those services anywhere” and “can have Bunnies, Bunnies, Bunnies,

Kidnastics anyplace....” (Ex. 16)

- ZBA member Denny stated that she heard the Library was going to have a Girl Scouts meeting, and then questioned, “Why should that be there?” to which Chairman Goldstein added: “Why should it be in the Village?” (*Id.*)
- Voicing her honest opinion about the Library “programs,” member Denny then stated: “Did you all receive the paper of all the programs this summer? (Yes) I do not think, I am not going to say inappropriate but it is just the Library is not the place for that.” (*Id.*) (Emphasis added).
- Chairman Goldstein added: “My view is that if they want to do this, it is fine for them to do it, but they cannot do it there.... If they have increased these programs 62 percent in four years and circulation is flat for the last 4 years... over the last 4 years someone is not showing these kids books while they are in the yoga position as far as I am concerned. So if they want a children’s center, they can have a children’s center but they just cannot have it there. That is what I think...I just think we need to keep our focus.” (*Id.*) (Emphasis added).
- When one ZBA member at the time questioned why the ZBA was so opposed to the application, and stated that he felt the Library was making a good faith effort to compromise, the Chairman stated that the Library was really trying to create “some kind of community children’s center.”
- Chairman Goldstein, perhaps realizing that the ZBA could not legally interfere with the Library’s programming choices, announced that, “we know what they want to do there,” but because the ZBA cannot “say” that what the Library wants to do is a good or bad thing, “our only tool is not to let them build it as big as they want to build it.”

(*Id.*) (Emphasis added)

- He then added, “If this were just a room that they were building so they could house all their books I would not have an issue.... But if you look at their materials, it is overwhelming what they want to do there.” (*Id.*)
- Finally, the ZBA members discussed that they would get the message to the Library (through consultant Cross) that the ZBA would approve an expansion for books but not for “programs,” and so they would accept a 1,000 square foot addition on the first floor, with a new 60-person handicap-accessible lecture room in the basement. (*Id.*)
- At the ZBA’s June 25, 2004 meeting, Chairman Goldstein stated to the Library’s counsel, who was asking the ZBA to wait until seeing the new plans before forming an opinion: “I think that you are not listening to me.... Based on the Library’s own materials, there are substantial, let us call them non traditional Library uses that go on here.... We have indicated to you that we are not going to be favorably [disposed] to anything in excess of 1,000 square feet on the first floor.... If they want to spend the money with the architect to have them create plans for something that we are telling you now that we are not going to be happy with, they are free to do that, but it is not going to be productive to your client’s costs.” (Exhibit 17) (Emphasis added)
- Chairman Goldstein then warned the Library’s representatives: “You are free to do what you want to do, you really are but we are committed to not creating a children’s center, community center, library on that corner.” (*Id.*) (Emphasis added)
- He added that “there are certain programmatic events that take place in that Library that can easily be moved to other venues... [T]he fact is that Bunnies, Bunnies, Bunnies does not have to be on the corner of Buell Lane and Route 27, children's

origami does not have to be on that corner....” (*Id.*) (Emphasis added)

As confirmation that these inappropriate statements were not just the personal opinions of one or two board members, the ZBA then proceeded to adopt a formal SEQRA “Positive Declaration” (Exhibit 19) on September 24, 2004, reflecting the same inappropriate interference with the Library’s educational programming. That document attached some Library newsletter describing some of the children’s programs and made the following statements:

- “The principle [sic] concern regarding this application is the gradual transformation of a quiet, village library as a research/information facility and repository of books into a town-wide center of activities designed to bring groups of people to the library at specific times.” (*Id.*) (Emphasis added) (the document later repeats that principal concern was “the gradual transformation of this facility from a traditional library – a quiet place, book repository and reference facility – to a recreational program activity center.” (Emphasis added)
- The document then describes, as if it were a reason for “concern,” (as opposed to a positive educational tool) the fact that the Library, in an effort to “induce increased use of the library,” has introduced “programs... that bring large groups of people to the facility at specific times.”
- The document then states that the “concern” is that “the library will transform into something that is untenable to the residential area.”

As a matter of law, just as the Town of Islip had no power to dictate to Dowling College whether it could offer driver’s education courses (*see Town of Islip v. Dowling College, supra*, 275 A.D.2d 366), the ZBA had no power to interfere with the educational programs offered by the Library. Indeed, the Chairman admitted as much but then added that, because it could not

specifically disapprove of those uses, its “only tool is not to let [the Library] build it as big as they want to build it.” (Exhibit 16). In the end, the ZBA followed through with that threat and denied the uses indirectly, using the “tool” of declaring the project too big.

4. *The ZBA improperly required the Library to carry the burden of disproving any adverse impacts.*

From the beginning to the end of the seven-year review process, the ZBA held the Library to a heavy burden of proving that its expansion would not have any detrimental impacts. The ZBA imposed that heavy burden beginning on September 24, 2004, when it adopted the “Positive Declaration” that forced the Library to prepare a costly environmental impact statement – even though the Library was exempt from SEQRA (see Point II above). And despite the Library acceding to the ZBA’s demands – and preparing that impact statement, with hundreds of pages of supporting materials, as well as presenting numerous expert and fact statements, reports and testimony during the 6-month public hearing process – the ZBA ultimately found that the Library failed to carry its burden of disproving any significant impacts. Indeed, even though four separate engineers – including the Village’s engineer and the State DOT’s engineer (who has jurisdiction over the two adjoining state roads) – all agreed that the project would have “minimal” or “negligible” impacts on traffic, the ZBA opined that its members knew better and they simply believed that there would be significant impacts. And even though the only aesthetic impact experts who reported to the ZBA – including the Village’s historic preservation consultant, the project architect, and the Library’s historic preservation consultant – all opined that the aesthetic impacts would be positive and properly mitigated to preserve substantial open space (actually 84% of the existing open space), the ZBA simply concluded, in its members’ subjective opinions, that the “loss” of ¼ acre of lawn to this project was “unacceptable” and thus too significant an impact to allow the project to proceed. Indeed, the ZBA equated this with

“paving paradise to put up a parking lot.” (Exhibit 50, pp. 6)

This treatment of the Library violated the fourth principle of educational uses discussed above, namely, the rule that educational institutions are presumed to have beneficial impacts that can only be “rebutted” with evidence of “significant” adverse community impacts. The ZBA improperly attempted to put the burden of *disproving* all possible impacts on the Library, and improperly refused to accept that evidence of impacts had to be “substantial,” not merely hypothetical or remotely possible.

In fact, the ZBA’s improper elevation of minimal open space impacts into “substantial” impacts parallels the Ithaca Landmark Preservation Commission’s (“ILPC”) treatment of the Cornell parking lot project at issue in *Cornell v. Beer, supra*. As reflected in both the Supreme Court (5 Misc.3d 1004A) and Appellate Division (16 A.D.3d 890) decisions, the project there involved the construction of a parking lot on an historic property. Much like the ZBA here, the ILPC attempted, in effect, to transform a parcel consisting of lawn and overgrown vegetation into a hallowed, untouchable status. Much like the Library’s plan, which would leave 84% of the open space around the library untouched, both courts in *Cornell v. Beer* noted that the Cornell parking plan would leave 85% of the lawn intact (though it would intrude into overgrown areas as well). Unlike the Library’s application – during which not a single architectural expert or historic preservation expert testified adversely with respect to the Library’s plan – the ILPC’s expert in *Cornell v. Beer* had prepared a report making adverse findings about the parking lot’s impacts. Just as the ZBA found here, the ILPC found in that case that the size and scale of the parking lot would have adverse effects on the “landscape’s physical and visual character” and impair its historic context. Notably, of course, the only board in the Village of East Hampton that exercises design, site plan, and historic preservation

jurisdiction is the DRB, which had granted its preliminary approval in 2003 to the Library's larger version of the project (10,300 sf), thereby finding it compatible with the historic district.

The Supreme Court and Appellate Division in *Cornell v. Beer* did not simply accept the ILPC's findings of visual impacts, but rather scrutinized the evidence carefully before concluding that the so-called impacts were "minimal" and could not rise to the level of substantial impacts sufficient to rebut the presumptions to which educational institutions are entitled. After scrutinizing and rejecting the evidence of impacts, the Appellate Division explained that it was clear that the ILPC really just disapproved of a parking lot in general:

As a result, Supreme Court correctly concluded that none of IPLC's findings has a rational basis in the record and the adverse effects noted cannot reasonably be viewed as substantial. The record also strongly suggests that it is the very nature of a parking lot, rather than the size or scale of this parking lot, that respondents' experts found objectionable and led to rejection of petitioner's application. (16 A.D.2d at 893-894)

In both the Supreme Court and Appellate Division decisions, the courts in *Cornell v. Beer* underscored the educational use issues that permeated the ILPC's decision there (just as they do the ZBA's decision here). For example, the Appellate Division noted statements by ILPC members questioning the need for a parking lot on this property before holding that parking lots, as accessory uses, "constitute valuable educational uses," and that the ILPC "lacked the power to find that the need for the lot at the planned campus location was not proven to their satisfaction." *Id* at 894. Moreover, making findings that could be equally applied here, the Appellate Division concluded that, once the presumed need for the parking lot is accepted, it was clear that ILPC failed to engage in the proper balancing of public interests (in the educational use and the preservation of the property's landscape), failed to make findings that alternative locations on the institution's property would be feasible and meet its needs, failed to consider "what conditions

could reasonably be imposed to mitigate the perceived adverse impacts on the landscape,” and made no attempt to assess the comparative values to the public of the proposed use and loss of landscape.” *Id.* Rather, as the Appellate Division concluded, ILPC unlawfully “presumed that even an unobtrusive change would be unacceptable to the public because it would interfere with the integrity of the overall landscape design.” Here too, of course, the ZBA did precisely the same thing: it surmised that the “destruction” of even a 1/4-acre portion of the green space on the property “for purposes of accommodating a lecture hall and substantially larger Library addition within a residential and historic district is unacceptable.” (Exhibit 1, p. 14)

5. *The ZBA made no effort to accept mitigation measures designed to address the ZBA’s concerns.*

The ZBA here violated the fifth principle described above, i.e., the requirement that a board must make every effort to accommodate the expansion, rather than exclude it, such as by imposing reasonable conditions designed to cushion, or mitigate, any perceived impacts.

No matter what mitigative conditions the Library offered, the ZBA either ignored them or rejected them summarily. While many suggestions were made throughout the 7-year process, some of the notable suggestions ignored or rejected by the ZBA include the following:

- First, the Library voluntarily offered to reduce the size of its proposal from 10,300 sf to 6,802 sf., but the ZBA – even before it had seen the plans – told the Library’s representatives it was not enough, and that the ZBA would only look “favorably” upon a 1,000 square foot (first floor) expansion. (Exhibit 17)
- The Library prepared a landscape plan to mitigate impacts, including by the placement of “screening” between the parking lot and the Osborne Green, and between the Library and neighboring residential properties. (Ex. 13) The Library reminded the ZBA that the landscape plan would be reviewed in detail during site plan review by the DRB.

- To address parking and aesthetic impacts, the Library offered to install how ever many parking spaces the ZBA deemed reasonably appropriate and to use an expensive concrete/grass paving system (with durability equal to that of asphalt) to lessen the amount of impermeable pavement. (See Exhibit. 39, pp. 243-246).
- When the Village’s engineer raised the possibility of a future combination of driveways by the Library and its neighbor, the East Hampton Star, through a cross-easement, the Library readily agreed and even amended the site plan to show the cross-easement, which the Village’s engineer explained was the common way to lay the groundwork for a future merger (see Exhibit 39, 516-519);
- The Library even offered to “landbank” parking spaces initially (i.e., design them but not install them immediately), while giving the ZBA ongoing jurisdiction not only to require those spaces to be installed, but to require any other changes it deemed necessary. The Library even drafted a proposed covenant that would give the ZBA ongoing jurisdiction over the parking lot (Exhibit 39, pp. 483-503).
- In a last-ditch effort to reach a compromise, the Library made a final settlement offer to reduce the expansion by 500 sf, and reduce the lecture room by 5 seats (from 60 to 55), and give the Village, at no cost, a free conservation easement over the entirety of the remaining open space on the Library property.

The ZBA addressed some of these suggestions in a single paragraph in its Findings Statement, wherein it summarily described some of the proposed “Mitigative Measures” before rejecting them all as “either not feasible, or not palatable, or difficult to enforce.” (Exhibit 2, pp. 9-10, ¶8). Elsewhere the ZBA simply ignored the offered mitigating conditions altogether, and instead made exaggerated findings of potential impacts on neighbors from the larger parking lot

(such as “slamming car doors” and “piercing headlights”) without acknowledging the the mitigative effects of landscape screening. (See, e.g., Exhibit 1, p. 8). Some of the proposed mitigations had been rejected before the ZBA even voted on the application, such as the proposal to use a concrete/grass paving system, which the ZBA would not even consider and instead demanded an all-asphalt parking lot (which is later used as a basis to find that the project required too much asphalt). The Library’s final compromise offer was rejected outright.

Thus, the ZBA here, like the ILPC in *Cornell v. Beer*, *supra*, 16 A.D.3d at 894, and the ZBA in *Genesis Assembly of God v. Davies*, *supra*, 208 A.D.2d at 617, refused to consider proposed mitigative condition before denying the application outright. Indeed, the ZBA’s refusal to explore several offers – such as the concrete grass paving system – only confirms that the ZBA was intent from the beginning of this 7-year process to deny the application and would not actually try to balance the competing public interests with mitigative conditions.

6. *The ZBA’s prejudgment of the application, delays, improper conduct, inappropriate statements, and patent violation of SEQRA confirm that the denial of the application was a foregone conclusion.*

In *Lawrence School v. Lewis*, *supra*, the Second Department considered a zoning board’s improper procedural conduct as evidence of a predetermined outcome and a refusal to perform the required, deliberative balancing of the educational needs of the institution with the legitimate zoning interests of the community. 174 A.D.2d at 46-47. Specifically, the court stated that the zoning board’s *failure to comply with SEQRA* (ECL article 8) and other statutory procedures led the court to infer “that *outright denial* of the application was virtually a *foregone conclusion and was thus arbitrary and capricious.*” *Id.* (emphasis added).

As the Petition details, there are numerous factors that warrant the same conclusion that the ZBA’s denial of the Library’s expansion was a “foregone conclusion” and that it never

meaningfully engaged in the mandatory deliberative balancing required by law. Most notably, ZBA members made statements at the June 2004 meetings confirming that they had already made up their minds – even before they ever saw the 6,802 square foot plan – that they would only approve a 1,000 sf (first floor) expansion. (See Petition ¶¶120-138, Exs. 16 & 17).

The ZBA's unprecedented procedural conduct confirms that it was intent on stalling the process long enough – and make the process so expensive and time-consuming – so that the Library would eventually give up. The ZBA put the Library through an unprecedented 7-year review process, that included an equally unprecedented demand that the Library prepare a costly Environmental Impact Statement. (Pet. ¶¶6, 13). In one of the most absurd aspects of the proceedings, the ZBA steadfastly maintained that it knew better than the NYSDEC what the NYSDEC's regulations mean, by refusing to accept that the Library's application was exempt from SEQRA review, even after the NYSDEC issued a written opinion and amended its SEQRA Handbook to explain that exemption. (See Point II above). And the ZBA's Chairman – even though he was an officer and trustee of the leading opposition group (Respondent VPS), and even though he had made a private presentation to the VPS in which he explained that the ZBA would only approve a 1,000 sf expansion – refused to recuse himself for a year, until essentially forced to do so, and even then, he was observed at meetings acting in collusion with VPS representatives and sending messages to the ZBA members. (Pet. ¶¶ 178-201)

Even with respect to substantive issues, the ZBA showed that it did not meaningfully weigh and analyze the competing issues. Instead, the ZBA used a shotgun approach, accepting virtually every argument proffered by the opponents and making every possible finding the ZBA could think of to try to justify its decision, no matter how irrational, arbitrary, or unlawful. Indeed, the ZBA even tried to *add* substantive requirements to the application while it was

ongoing such as, for example, stating mid-way through the process that the project required area variances – even after conceding in writing three years earlier that the application required no variances. (Pet. ¶¶207-219). The ZBA even reversed its own prior interpretation, set at a time when the Library application was still pending, that parking areas were exempt from coverage requirements for non-commercial uses in residential districts. (Exhibit 1, ¶¶ 6-7). And some unknown Village officials attempted to make another end-run around the prior precedent – to try to make the Library’s application more difficult – by proposing a code amendment that would have erased the ZBA’s prior precedent. (Pet. ¶¶220-222). Later, after calling upon the Village’s engineer to use his expertise to analyze traffic impacts and after he opined that the traffic impacts would be “minimal” and “negligible,” the ZBA then declared that its members knew better than the Village’s engineer when they concluded that the impacts would be substantial. (See subsection C below). And, throughout the ZBA’s written findings, it makes less-than-candid statements about what the record does and does not show, such as suggesting that the Village Engineer found that the Library expansion would generate up to 48 trips per hour when, in fact, the Village Engineer expressly stated that the 48-trip number was an “over-estimate” of the actual impacts. (Compare Exhibit 2, ¶4 with Exhibit 47).

The inference is unavoidable that the ZBA never intended to approve the project, as proposed, and did everything it could, procedurally and substantively, to stall the application and, when the Library did not give up, to deny it. The denial was a “foregone conclusion,” and the ZBA never – despite seven years of review – engaged in the type of deliberative balancing the law required.

C. The Library is entitled to the necessary ZBA approvals because the presumed benefits of the expansion were not rebutted with significant evidence of adverse impacts, and the DRB’s site plan/historic preservation review will ensure that appropriate conditions are applied.

Once the correct standards are acknowledged, a review of the evidence before the ZBA confirms that there is no rational basis in the record to sustain a denial of the Library’s application. Indeed, as explained in Point V below, even if the educational use standards did not apply, there would be no rational basis to sustain a denial. But under the educational use standards, the *presumption* is that the proposed expansion will be beneficial, and the only way to rebut that presumption is with “evidence of a significant impact on traffic congestion, property values, municipal services and the like.” *Cornell v. Bagnardi*, 68 N.Y.2d at 595. Nothing in the record could sustain a finding that the presumption was rebutted with any of those impacts.

1. Traffic congestion:

Starting with potential impacts on “traffic congestion,” no matter how hard the ZBA tried to suggest that there could be significant impacts from the project, the ZBA cannot avoid the unwavering conclusion of the Village Engineer, Ronald Hill, P.E., that there would be no such impacts. In his first report to the ZBA, the Village Engineer concluded that the “increases in traffic generated by the proposed library expansion and the expansion of the existing library parking lot will be minimal and will have a negligible impact on the surrounding streets.” (Exhibit 45) (emphasis added). In his last report to the ZBA, he reiterated opinion that: “the additional traffic that the Library will generate can be accommodated by the adjacent road system and the proposed modified driveway....” (See Exhibit 47).

The Village’s engineer was not alone in his assessment of the “minimal” and “negligible” traffic impacts. An engineer for the NYSDOT (which has jurisdiction over the two state roads that adjoin the Library) concluded in writing that the “proposed expansion will have minimal

impact on the existing traffic flow at the Route 114 and 27 intersection” and that, “the project does not appear to warrant any additional traffic mitigation measures.” (Exhibit 43). Another independent traffic engineer, Robert Eschbacher, PE, also concluded in writing that “the proposed expansion of the East Hampton Library will have minimal impact on the roadways surrounding the site.” (Exhibit 42). And the Library’s engineer, Michael Salatti, P.E., performed multiple analyses, submitted multiple reports, and testified several times at the public hearing, all to explain his findings that the impacts on traffic would not be noticeable. (See, e.g., Exhibit 39, at pp. 24-101, 223-242).

In all, four traffic engineers, with many decades of combined experience, all agreed that there would be no significant impacts on traffic. Indeed, even the opponent group’s (VPS’s) hired gun, Steven Schneider, P.E., never opined that the impacts on traffic would be significant; rather, he followed VPS’s lead of trying to filibuster the application by suggesting that more studies should be done, as if seven years of studies, and the unanimous opinion from four traffic engineers, were not enough to prove the obvious, namely, that a modest expansion of a library would have no noticeable impact on a State highway system that sees more than 20,000 vehicles pass by daily. In light of the unanimous opinion of the traffic engineers, coupled with the presumption that ordinary traffic generated by educational institutions is in the best interest of the public, there could be no rational basis to find “significant” traffic impacts from the project.

2. *Property values and municipal services:*

With respect to the other types of impacts cited in *Cornell v. Bagnardi*, i.e., “property values,” and “municipal services,” nobody testified to such impacts.

No appraisers testified that property values would be significantly impacted. In fact, none of the adjoining property owners actually opposed the project; and two of the three adjacent owners are controlled by the same person, who owns both the residential property adjacent to the

library's parking lot and the East Hampton Star property to the north of the library, and her newspaper issued multiple editorials in support of the library expansion. (See Exhibit 14)

With respect to municipal services, although the ZBA speculated that the lack of sufficient on-site parking could have an impact on public street parking, the "on-street" parking to which the ZBA refers is *State-owned* parking, not "municipal services." Moreover, even if impacts on State-owned parking did qualify as a permissible consideration by the ZBA, it cannot escape the facts that (1) the Library offered to install however many on-site parking spaces the ZBA deemed "reasonably adequate and appropriate parking"; (2) the Village's engineer, after reviewing the various parking analyses, concluded that 42-spaces on-site would "provide, 'reasonably adequate and appropriate parking' for the expanded use as required by [the Village code]," and (3) the Library's final plan incorporated the Village Engineer's recommendation to provide 42 on-site parking spaces. Thus, there can be no rational basis to support a finding that the Library's project, after adding 17 on-site parking spaces (as deemed appropriate by the Village Engineer), will have a significant adverse impact on municipal parking.

3. *Aesthetics and open space:*

The only other "impacts" found by the ZBA were aesthetic impacts, namely, the impacts that the ZBA perceived would result from the loss of "open space" due to the footprint of the new wing and the additional parking spaces.

As a threshold matter, purely aesthetic impacts are not on par with impacts on "traffic, congestion, property values, and municipal services." Although zoning regulations may be based on aesthetic considerations, the public interest in aesthetics is not as great as that in public safety. *See Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 478, 402 N.Y.S.2d 359, 365–66 (1977); *see also De Sena v. Bd. of Zoning Appeals of Village of Hempstead*, 45 N.Y.2d 105, 408 N.Y.S.2d 14 (1978) (when "a denial of a variance is sought to be justified on aesthetic grounds,

the public interest in regulation is not necessarily as strong as in those cases involving threats to public safety”). Aesthetic factors thus “rate well down in the hierarchy of public purposes.” *Rochester Tel. Corp. v. Vill. of Fairport*, 84 A.D.2d 455, 458, 446 N.Y.S.2d 823, 826 (4th Dep’t 1982). Denials of permits “solely on aesthetic grounds should be based upon a showing that ‘the offense to the eye . . . [is] substantial and . . . [has a] material effect on the community or district pattern.’” *Sackson v. Zimmerman*, 103 A.D.2d 843, 844, 478 N.Y.S.2d 354, 356 (2d Dep’t 1984) (quoting *Matter of Cromwell v. Ferrier*, 19 N.Y.2d 263, 272, 279 N.Y.S.2d 22, 30 (1967)); accord, *Exxon Corp. v. Gallelli*, 192 A.D.2d 706, 597 N.Y.S.2d 139 (2d Dep’t 1993); *Vill. of Hempstead v. SRA Realty Corp.*, 160 Misc. 2d 819, 823, 611 N.Y.S.2d 441, 444 (Sup. Ct. Nassau County), *aff’d*, 208 A.D.2d 713, 617 N.Y.S.2d 794 (2d Dep’t 1994).

Considering that the impacts described by the Court of Appeals in *Cornell v. Bagnardi* as being sufficient to overcome the presumptive benefits of educational institutions are serious public safety-type impacts (see 68 N.Y.2d at 594) and that aesthetic impacts rate lower than public safety impacts as a matter of law, such purely aesthetic impacts should not be upheld as sufficient to overcome an educational institution’s presumptively beneficial impacts.

Even assuming that purely aesthetic impacts could be considered in an educational use case, there is no evidence that the Library’s proposal would result in a substantial offense to the eye or have a material effect on the area involved so as to overcome the presumption of beneficial impacts. Not one expert architect or historic preservationist who reviewed the project opined that it would have significant aesthetic impacts. (As noted above, in *Cornell v. Beer*, 16 A.D.3d at 894, even though the city’s historic preservationist did opine that there would be impacts on the landscape, the Appellate Division found that opinion unsupported by a rational basis in the record). Moreover, as explained in more detail in the Petition (see, e.g., ¶¶ 285-297,

312-14, 352-58), the ZBA's findings with respect to the open space impacts are flawed and exaggerated on numerous levels. The ZBA tried to elevate the so-called "Osborne Green" (a part of the property donated to the Library in 1943) to a hallowed and sacrosanct protected status, even calling it, at one point, the "Village green" (see Exhibit 2, p. 6). But the Library demonstrated conclusively that the 1943 donation was made with no deed restrictions, and was described at the time as providing the Library with space for future expansions, and was even used for two prior expansions (See Exhibits 8 and 9). The Library also debunked the finding that the property was protected under the Village's official "open space plan" by submitting copies of all the official Village open space plans to show that the Library's property is neither listed as presently protected nor listed as targeted for future protection, despite those documents listing more than a hundred other important open space and historic parcels. (see Exhibit 48). And to the extent that the ZBA lamented that, after the expansion, the amount of open space would be reduced from 70% of the property to 60%, and that such a reduction was "unacceptable" to the ZBA, the Library demonstrated (see Petition ¶¶296-97, 353-55) that:

- this only represented a reduction of ¼-acre (11,795 sf) of open space,
- the project will still leave 84% of the existing open space undisturbed,
- 4,500 square feet of the 11,795 sf reduction of open space had nothing to do with either the new wing or the new parking spaces, but was simply the result of ZBA-requested improvements to the *existing* parking area (such as widening the existing spaces, driveway, and circulation aisle),
- half of the 6,802 square foot addition was to be located underground, and
- a landscaping plan would mitigate against aesthetic impacts.

It is therefore unsurprising that not one architectural or historical preservation expert

offered an opinion that the loss of “open space” was significant, and the opinions from the Library’s architect (Correll) and historic preservation consultant (Studenroth), and Village’s historic preservation consultant (Hefner), all approving the design’s compatibility with the site were un rebutted.

Since there can be no support in the record – a record generated over a seven-year review process – for findings of significant impacts, the Court should declare that the Library is entitled to its requested special permits and, if necessary, area variances.

4. DRB review process:

Since the Village will still have ample opportunity to impose reasonable conditions on the Library’s project through the design/site plan review process and historic compatibility process that are both performed by the DRB, there is no reason to remand the matter to the ZBA for continued review of mitigative conditions.

The ZBA has demonstrated, beyond a doubt, that it prejudged the Library’s application and there is no reason to believe that the ZBA is capable of a fair and honest review of the conditions. In fact, despite a seven-year review process, the ZBA ultimately rejected the Library’s suggestion for many conditions that would have mitigated against the potential impacts of the project that the ZBA later cited as a basis for the denial. Moreover, many of the specific mitigation issues – such as a landscaping plan and the appropriateness of a concrete/grass paver system – fall directly within the DRB’s jurisdiction and would more appropriately be finalized by that board than by the ZBA, which does not have direct jurisdiction over site plans.

The Court should therefore remand the matter to the Village’s DRB, rather than its ZBA, for review of the details of the site plan and the imposition of reasonable conditions. Indeed, under the Village’s code, the DRB is the board entrusted with the primary jurisdiction of determining the details of a site plan.

POINT IV. THE ZBA’S DECISION CONSTITUTED UNLAWFUL EXCLUSIONARY AND DISCRIMINATORY ZONING

The ZBA’s refusal to treat the Library as an education institution was not the only manner in which the ZBA acted beyond its lawful police powers. The ZBA also exceeded those police powers by acting with intentional – and unapologetic – exclusionary purposes and an admitted discriminatory effect.

The principles of “exclusionary zoning” are discussed at length in the Court of Appeals’ decision in *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 681 (N.Y. 1975). In that case, the Court of Appeals explained that, when enacting zoning ordinances, “consideration must be given to regional needs and requirements.” The Court added: “There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met.” While the Court acknowledged that “zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality.” Accordingly, when reviewing local zoning acts, courts “should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities.”

While *Berenson* involved exclusionary zoning in the context of multi-family residential housing, New York courts have applied the doctrine to educational institutions, which often, by their very nature (e.g., colleges and universities, private schools, etc.), serve regional areas that are not strictly coterminous with the municipal boundaries. In *Cornell v. Bagnardi*, the Court of Appeals explained that the court-developed educational/religious rules originated, in part, from the need to protect such institutions against local provincialism. 68 N.Y.2d at 593. Explaining the fears of communities in terms indistinguishable from the “concerns” voiced by the ZBA with

respect to the Library's expansion, the Court of Appeals stated that neighbors began viewing the arrival of new schools "with distrust and concern that it would *unnecessarily bring people from other communities into the neighborhood* to disrupt its peace and quiet." *Id.* (emphasis added). It was because of that "change in attitude" that courts "were thrust into the role of *protecting educational institutions from community hostility.*" *Id.* (emphasis added).

Not surprisingly, whenever local governments suggested that provincialism was involved, the courts rejected such rationales. Thus, in *NYIT v. Le Boutillier, supra*, the Court of Appeals explained that, since educational institutions "promote the welfare of the community at large,... it should be of little significance, in a zoning sense, that the proposed use may serve residents of other communities besides that where it is located." 33 N.Y.2d at 131.

And in *Hofstra College v. Wilmerding*, 24 Misc. 2d 248, 258, 204 N.Y.S.2d 476 (Sup.Ct. Nassau Co 1960), the Village of Old Westbury rejected a special permit application to open a limited-enrollment experimental college in the village's boundaries, citing, among other reasons for the denial, the fact that only 9 students from the village attended the college's Hempstead campus. The Supreme Court rejected that rationale as "unauthorized." *Id.* The court explained that what mattered was whether there was only whether there was "a sufficiently adverse effect on public health, safety, morals and welfare to warrant exclusion of the college from the particular location notwithstanding that schools 'are, in themselves, clearly in furtherance of the public morals and general welfare' ... *not whether sanction of the college use will in some positive way enhance the welfare of village residents.*" *Id.* (emphasis added). The court added: "*The provincialism implicit in the board's reasoning furnishes no basis for exclusion of such socially valuable institutions as churches and schools.*" *Id.* (emphasis added)

From the beginning of the review process, the ZBA members made their own

provincialism known, on the record, by explaining their resentment of the fact that the Library served a broader region than just the Village boundaries (i.e., the Wainscott, Springs, and East Hampton school districts, which include all the hamlets in the western portion of the Town of East Hampton). At a June 11, 2004 ZBA meeting (where no Library representative was present), the ZBA members made several statements announcing their displeasure that the Library's service area was town-wide:

- “I think that we are going to see that the number of children, potential children that can use this are probably 200 kids under 18 who live in the Village and probably about 2,000 kids under 18 who live in the Springs, plus some couple of hundred kids that live in the Northwest and 500 or so kids that live in Northwest and Wainscott. So the bulk of the use is going to come from outside of the Village.” (Exhibit 16) (Emphasis added);
- “[W]e got stuck in the Village with the Town RECenter, they are expecting us to do the same thing with the Library expanding it to include all the Town's children, I do not think that is going to happen. I may be wrong.” (*Id.*) (Emphasis added); and
- “Why should it be in the Village?” (*Id.*)

At the next meeting, when the Library's representative stated that the Library “has an obligation to the community which may be slightly different than the Zoning Board's,” he was interrupted by the Chairman who stated: “Let me tell you what our obligation is. Our obligation is to the Village of East Hampton. Let us understand that and the community that this Library serves and the children that will be served by that Library in terms of the number of children in the Village of East Hampton are minute compared to the number of children that will be served town-wide.” (Exhibit 17) (Emphasis added)

This provincial attitude was not limited to individual statements, but soon became part of

the ZBA's official position. Thus, on September 24, 2004, the ZBA adopted an EAF Part II and Positive Declaration, in which, on the first page of each document, the ZBA described how a prior Town study that advocated putting a "superstore" in the Village became an "experience" from which "the Village learned to distinguish and prioritize it's [sic] obligations to meet the needs of it's [sic] own residents before those of the larger community." (Exhibit 19). Both documents then go on to lament how only 200 of the 3,200 children served by the Library reside in the Village. (*Id.*)

During the public hearing, some members of the public injected an ethnic/racial element to the Village-versus-Town issue, and argued in favor of what was, in essence, a modern version of the long-discredited (and unconstitutional) "separate but equal" doctrine. *See Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"). During the hearing, VPS representatives began discussing how the Springs community in particular was made up of a higher majority of Hispanics than live in the Village of East Hampton, and they then argued that such a community would be better off if it had its own library somewhere in Springs, six miles away from the Village. (See Exhibit 41). One opponent argued that this demographic group, which he titled in his written submission and oral presentation, "the Other Community," and which he defined as "the new immigrants,... the backbone of our restaurants, landscaping, house cleaning, pool cleaning, retail, and construction" should be given its own library in Springs. (See Exhibit 41, p. 172-173). He opined that because 30-40% of the Library's student population was "of Latino extraction," and "somewhere between 600 to 700 students ... from a Spanish-speaking home," the community should "help Latino families become bilingual and acclimate [them] to American education," by creating "an

excellent auxiliary library in the areas where our Latino children live” or even “a virtual library with multiple databases in Spanish as well as English, as well as having a decent book and periodical collection in Spanish.” (*Id.*) He finally argued that the Library should be constructing “two projects: a new childrens’ room in the village and a satellite library for the year round population of children & adults, both Anglo and Latino....” (*Id.*) Other VPS representatives and library opponents echoed similar exclusionary arguments (though generally couched as if they were just looking out for the best interests of the Springs students). (See generally statements contained in Exhibit 41).

Remarkably, rather than eschewing those statements, or the separate-but-equal rationale, the ZBA embraced those statements and philosophy in its own written findings. Specifically, in its FEIS (adopted on June 25, 2010, a month before the final decision), the ZBA went so far as to cite the demographic factor of the “larger Hispanic population [that exists] in Springs than [exists] in the center of the Village” as a reason why locating a branch in Springs might be better for that community than expanding the current Library in the Village, and why it would serve the Comprehensive Plan’s goal of “decentralizing services” away from the Village. (Exhibit 50, p. 39). Indeed, in support of that argument, the ZBA singled out and cited the testimony of the one opponent who had described benefits that a Springs library would have for “the Other Community” of “new immigrants.” (See Exhibit 50, FEIS, p. 39, citing FEIS appendix B, p. 12864). In another paragraph of the FEIS, the ZBA suggested that a library branch in Springs could be “specifically tailored to serving the needs of the Springs population,” a thinly-veiled reference to the ZBA’s observation that the demographics of Springs consists of a higher percentage of Hispanics (*Id.*, pp. 38-39)

A month later, when the ZBA adopted its Findings Statement and final zoning resolution,

the ZBA again proudly reiterated the Village's goal of keeping its resources for Village residents as a basis for denying the Library's application. Specifically, the Findings Statement addresses the "Springs" alternative, and suggests that an "alternative of providing additional facilities in outlying areas, especially a full-service library branch in Springs, could have been more thoroughly explored," and such a Springs branch "would bring the services closer to the people who need them...." (Exhibit 2, p. 11). Then, in the final zoning resolution, the ZBA described, in its conclusion, the competing interests between the Village and the Town before stating "that all necessary steps had to be taken to preserve the beauty and the quality of life for Village residents." (Exhibit 1, p. 15) (emphasis added). That same statement had been previously stated, two other times, in both the FEIS (Exhibit 50, p. 30) and Findings Statement (Exhibit 2, p. 8).

Thus, what began in 2004 as a Village-versus-Town provincialism evolved to include a discredited and discriminatory separate-but-equal rationale of educational opportunities.

Notably, it appears that the Library application is the first and only time that the Village has openly tried to exclude populations outside of the Village from services offered in the Village. For example, despite allowing banks, and stores, and churches to exist in the same commercial and cultural corridor where the Library is located, the ZBA has never previously told a bank, store, or church that it should open up a separate facility outside of the Village so that persons outside of the Village do not have to travel to the Village for banking, or retail, or prayer opportunities. Yet for the Library, which is arguably the most inclusive resource any community has – because it is free and open to everyone – the ZBA has suggested that it should be exclusive, and saved only for Village residents.

The ZBA's candid attempts to isolate its library services from non-Village residents has no place in a modern society, much less a modern theory of zoning and constitutional law.

Although the ZBA's provincialism alone would warrant an annulment of a zoning decision under the cases discussed above, the ZBA here has added an additional level of discriminatory zoning when it cited the "demographic" distinction between the Village and the region of Springs, which has a larger Hispanic population than the Village, as a basis for its recommendation that a separate library be built in Springs. It should go without saying that race and national origin should not factor into a zoning decision at all. Yet here, the ZBA devoted an entire page of its FEIS to the discussion of how, in essence, the Hispanic population of Springs would be served better with a library of their own, "specifically tailed" to their needs, with more volumes of Spanish books. By injecting the issue of race and national origin into the decision-making process, and by coupling that issue to the ZBA's exclusionary rationale (i.e., that Springs residents should have their own library rather than coming into the Village and adding to the Village's "traffic"), the ZBA's denial of the Library's application could be invalidated solely because of its deliberately disparate treatment of people based on national origin.

Therefore, for many reasons, the ZBA's exclusionary rationale must be rejected, and the ZBA's decision annulled as unlawful and unconstitutional.

POINT IV. THE ZBA'S ZONING DECISION WAS ARBITRARY AND CAPRICIOUS.

Even disregarding the presumptions and legal standards that are applicable to educational uses, the ZBA's denial of the Library application would be irrational – and contrary to zoning law – under any standards. While the irrational and unsupported findings are too numerous to cite and discuss herein, the following are some of the more egregious examples.

1. Refusal to accept special permit presumptions:

Under New York law, "a special exception allows the property owner to put his property to a use expressly permitted by the ordinance." *North Shore Steak House, Inc. v. Board of*

Appeals of Inc. Village of Thomaston, 30 N.Y.2d 238, 243, 331 N.Y.S.2d 645 (1972). The inclusion of a special permit use in a zoning code “is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” *Id.*. Hence, a “denial of a special permit may not be based upon general objections to the special use or conclusory findings that the proposed use itself is undesirable.” *Holbrook Assoc. Dev. Co. v. McGowan*, 261 A.D.2d 620, 621, 690 N.Y.S.2d 686, 687 (2d Dep’t 1999). Moreover, once a use is permitted in a residential district either as-of-right or through a special permit, that use becomes defined as a “residential” use, even if it is not strictly a “dwelling.” *See Vergilis v. Planning Board of Village of Fishkill*, 251 A.D.2d 506, 674 N.Y.S.2d 717 (2d Dep’t 1998) (where medical office was permitted by special permit in a residential district, court rejected claim that office was a “nonresidential use”)

A library is a permitted special permit use in the Village’s residential zoning districts. *See Village Code § 278-2(b)(6)*. The Library is thus, by code definition, a “residential” use and is presumed to be in harmony with the general zoning plan and will not adversely affect the neighborhood. Nonetheless, the ZBA repeatedly attempted to distinguish between the Library use and what the ZBA referred to as “residential” uses, and found that the expansion of the Library’s so-called “nonresidential” use would be deleterious to the character of the residential community. Since a special permit use is one that, by definition, is deemed to be in harmony with the community, the expansion of the use itself cannot be a basis to find that it would have a detrimental effect on the “character” of the community. This is perhaps even more critical here, since the actual “character” of the neighborhood that the ZBA repeatedly characterizes as “residential” is not a neighborhood of just single-family homes, but is actually predominantly a commercial and cultural corridor – with numerous civic, historic, cultural, religious, and

commercial uses – within which the Library has existed since 1897. (Pet. ¶¶ 41-64)

2. *Arbitrary code interpretations:*

The ZBA also violated another rule of zoning law, namely, that zoning regulations “are in derogation of the common law” and must therefore “be strictly construed against the municipality,” and “[a]ny ambiguity in the language used in such regulations must be resolved in favor of the property owner.” *See Allen v. Adami*, 39 N.Y.2d 275, 277, 383 N.Y.S.2d 565 (1976).

One of the code interpretation issues presented during the ZBA hearings was whether parking areas should be counted against the Library for coverage purposes. If they were counted, then the Library would require a coverage variance.

In 2004, the ZBA set a precedent in an expansion application by the St. Luke’s church (which is located in the same residential and historic district as the Library), under which all paved areas (including parking areas) were not includable in lot coverage calculations for non-commercial uses in residential districts:

Furthermore, no relief from the lot coverage requirements is necessary. The maximum allowable lot coverage is 20%. Since paved areas are not includable in the lot coverage calculations in residential districts, and because the existing and proposed buildings cover less than 20% of the lot area, the application conforms with the lot coverage requirements. [Exhibit 33, ¶6]

After setting that precedent, some argued on this application that the code was still “ambiguous” and should be re-interpreted as including paved parking areas. In fact, a “clarifying” amendment was proposed to the Zoning Code because of the supposed ambiguity, though that amendment was never adopted. (Petition ¶¶ 220-22)

Despite the prior precedent, despite the admissions that the code was ambiguous, and despite the rule that all ambiguities must be construed in favor of the landowner, the ZBA changed its interpretation of the zoning code from the interpretation set in the St. Luke’s decision

in 2004 and decided, for purposes of the Library's application, that such areas should be included. The only explanation given for arriving at different interpretations between this application and the St. Luke's application was that the church was a "constitutionally protected use" and the Library was "neither a church nor a school." It is unclear, however, why a code should be interpreted one way for a church (or school) but another way for a library. The ZBA's flip-flopping on its interpretation was the definition of arbitrary decision-making.

Likewise, to the extent the ZBA's final decision interpreted the East Hampton Zoning Code as requiring a "front yard" variance for a portion of the Library's proposed Children's Wing, even though all of the new wing would be located in the physical "rear yard" of the property, that interpretation was irrational, arbitrary and capricious. (Exhibit 1, pp. 3-4) The interpretation of a code as requiring a front-yard variance for a rear-yard structure defies logic.

3. *Arbitrary denial of area variances and special permit:*

To the extent a "coverage variance" may be found to have been necessary, the ZBA's denial of said variance, given the tremendous benefits that outweigh any possible "detriments" to the community, was irrational, arbitrary, and capricious.

Area variances are subject to a balancing test, whereby the ZBA was required to consider "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." N.Y. Village Law § 7-712-b(3)(b). But the ZBA essentially cited the same alleged adverse impacts (on traffic and open space) it had cited in its Findings Statement (Exhibit 2) as a basis to find that the benefits to the library (which the ZBA barely addressed) were outweighed by the detriments to the community. (Exhibit 1, pp. 7-9). As explained above, in Point III, even though the Library should never have been obligated to disprove adverse impacts, it did so, and the Village's

engineer and Village's historic preservation consultant agreed. The ZBA's findings are as unsupported in the context of a variance application as they are in the context of a special permit application by an educational institution.

Likewise, even assuming the "front yard" variance had been necessary for the 588-square-foot portion of the addition located within the front-yard setbacks, the ZBA also arbitrarily denied that variance. The ZBA conceded in its decision that "no undesirable change would be produced in the character of the neighborhood or detriment to nearby properties as a result of granting the relief required for the 588-square-foot portion that will be within the required front yard." (Exhibit 1, p. 4) Yet the ZBA then bizarrely found that the variance should be denied because it would allow the rest of the new Children's Wing (which did not require a "front yard" variance) to be constructed. In other words, the ZBA denied the variance to the admittedly "insubstantial" portion of the new wing that required the variance because that would have allowed the construction of the remaining portion of the new wing that did not require a variance. Since the only variance before the ZBA was for the 588 sf portion of the expansion that the ZBA admitted would have no detrimental impacts, the ZBA had no authority to deny that variance because it would, in the ZBA's opinion, "contribute" to the construction of the conforming portion of the Children's Wing, which required no variance.

To the extent that pages 9 to 15 of the ZBA's final decision (Exhibit 1) attempted to make findings that the Library's application failed to meet the special permit criteria of the Village Code, these findings are infected by the same issues that infect the rest of the ZBA's decision. The ZBA essentially found that the same types of impacts that it had already cited (e.g., loss of lawn and purported traffic impacts) meant that most of the special permit criteria were not met, because the proposal would adversely affect the "character" of the community. As

explained above, the claimed impacts on “open space” were overstated and irrational, particularly given the findings of the Village’s historic preservation consultant, and the lack of even one expert opinion finding any such impacts. And, as a matter of law, those aesthetic concerns rank low on the hierarchy of zoning concerns. With respect to traffic, the ZBA irrationally found that the proposal would have an adverse impact on traffic because the ZBA apparently believes that it knows better than the Village’s own engineer, the State DOT’s engineer, and two other traffic engineers as to whether a project will have traffic impacts. There is, however, no rational basis supporting a finding of traffic impacts. (See Point III.C.1, *supra*).

4. *Usurpation of DRB and SCDHS jurisdiction:*

Another manner in which the ZBA’s decision was unlawful is the extent to which the ZBA exceeded its own limited jurisdiction and usurped the jurisdictions of the Village’s DRB and the Suffolk County Department of Health Services.

Although the ZBA’s jurisdiction over parking is, under its code, limited to determining what is “reasonably adequate and appropriate parking,” the ZBA essentially treated that general jurisdiction as if it entitled the ZBA to delve into the details of the site plan, and even dictate such things as the types of surfaces that should be used for a parking lot (i.e., asphalt versus concrete/grass paving). Under the Village Code, however, site plan jurisdiction is entrusted to the Village’s Design Review Board, under Chapter 121 of the Village’s code. Apparently, the ZBA believed that it knew better than the DRB (which had already given its preliminary approval to the project) how to conduct a site plan review.

Similarly, although the ZBA is not charged with “groundwater” protection, and has no particular expertise over such issues, the ZBA intruded into the Suffolk County Health Department’s jurisdiction over sanitary system regulation. As reflected in finding “2” of the Findings Statement (exhibit 2), the ZBA speculated that there could be substantial

“groundwater” impacts based on what it interpreted as the Suffolk County Department of Health Services Sanitary Code formulas, which the ZBA opined the Library could not meet. The Library’s project engineer testified to the ZBA that, because the Library already exists – and can show *actual* effluent flows – the Suffolk County Health Department likely would not resort to generic formulas, which over-estimate the Library’s actual water usage. Showing a patent overstepping of its authority, the ZBA acknowledged that the Suffolk County Health Department might grant a permit by applying actual data taken from the existing Library, but then opined that such a methodology would be “probably inappropriate,” as if the Village ZBA knows better than the Suffolk County Health Department at how to administer the Suffolk County Sanitary Code.

5. *Bias, prejudice, and collusion:*

Finally, the ZBA’s decision, if for no other reason, would be irrational, arbitrary and capricious, and unlawful because it was based upon the prejudice of ZBA members – before they had even seen the final plans, much less opened the public hearing – and upon the collusion between at least one ZBA member and the opposition group. The evidence of bias and prejudice of the application on the part of the ZBA, and the improper collusion with the Respondent VPS, is described in detail in the Petition (see ¶¶121-138, 178-201). The ZBA’s willingness to accept every argument made by the opponents only corroborates what the Library knew from the day the Chairman stated, on the record at the June 11, 2004 and June 25, 2004 meetings, namely, that the ZBA would not be favorably disposed to approve anything other than a 1,000 square foot (first floor) expansion and that it would use, as its only “tool” to prevent the Library’s expansion, its powers to find that the expansion was too “big.” (See Exhibits 16-17).

CONCLUSION

For the reasons set forth herein and in the Verified Petition, the Library respectfully requests that the Court grant a judgment:

- A. Declaring the Library's 6,802 square foot expansion project to be a "Type II action" exempt from SEQRA review and annulling the ZBA's unauthorized actions taken under SEQRA, including the June 25, 2010 resolution adopting a SEQRA FEIS and the July 23, 2010 resolution adopting a SEQRA Findings Statement;
- B. Annulling the ZBA's July 23, 2010 Final Zoning Resolution;
- C. Granting the Library a special permit and, if necessary, an area variance authorizing the Library's 6,802 square foot Children's Wing expansion, with lecture hall;
- D. Authorizing the Library to proceed with its design and site plan application to the Village's Design Review Board; and
- E. Granting the Library such other and further relief as the Court deems just and proper, including the costs of this proceeding.

Respectfully submitted,

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