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September 19, 2006

Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: ***Iroquois Gas Transmission System, L.P.***
Docket No. PF05-16-000
Broadway Energy LLC
Docket Nos. CP06-54-000
Broadway Pipeline LLC
Docket Nos. CP06-55-000; CP06-56-000

Dear Secretary Salas:

As stated in prior communications, we represent East End Property, Company #1 LLC ("East End Property") regarding the above. This letter, on behalf of our client, is in reply to the September 8, 2006 submittal of Iroquois Gas Transmission System, L.P. ("Iroquois") which is Iroquois's response to the Scoping comments and is listed by the Commission as a procedural motion of Iroquois. We find that the referenced submittal is not responsive to the Scoping comments and inconsistent with the Commission's July 21, 2006 Notice of Intent to Prepare an Environmental Assessment for the Proposed Brookhaven Lateral Project ("the Notice") under the National Environmental Policy Act ("NEPA"). Furthermore, this letter is in opposition to the motion of Iroquois, which seeks the Commission to find that the Brookhaven Lateral Project will have no significant impact upon the human environment and therefore will not require the preparation of an Environmental Impact Statement ("EIS"). Put succinctly, it is simply absurd to conclude that a 21.5 mile underground natural gas pipeline in an area designated as a sole source aquifer, through Pine Barrens, freshwater wetlands, parkland and suburban neighborhoods will not have a significant impact on the human environment. An objective review of the record of the Scoping simply does not support Iroquois' conclusion.

Indeed, the record of the Scoping, which includes comments from the public, affected property owners, the United States Environmental Protection Agency, the United States Public Health Service, the Suffolk County Legislature, the Town of Smithtown, the Town of Islip, several School Districts, the New York State Department of Transportation, the New York State Department of

Environmental Conservation, as well as Iroquois itself, shows numerous and substantial issues which require further disclosure, assessment and analysis in a complete EIS. Moreover, Iroquois shows its absolute prejudice by not recognizing that the process is not even ripe for such a motion, as even the Environmental Assessment, subject of the Notice, has not been completed and disclosed, nor could the Commission have had the opportunity to complete review of the Scoping record. As set forth herein, in presenting its response Iroquois has ignored issues in the record and indeed offers misguided representations of matters relevant to the Environmental Assessment.

Iroquois is attempting to pervert the process and prevent public scrutiny of its Brookhaven Lateral Project. The Notice respecting the Scoping and Environmental Assessment expressly states that it announces the opening of the Scoping process to determine the issues to be evaluated and that the Commission will prepare an Environmental Assessment. The public, local government and interested agencies submitted such comments. Instead of allowing the Commission to provide a proper evaluation in an Environmental Assessment and analysis in an EIS, with further public, local government and agency participation, Iroquois now prematurely moves to preclude an EIS and the mandated full environmental impact review and process.

Iroquois Has Failed to Present the Need for the Brookhaven Lateral Project

As presented in my earlier communications, the need and purpose for the Brookhaven Lateral Project is at best unclear and at worst a purposeful deception as presented. While Iroquois and the Notices for the Project state that the new pipeline is to fuel the proposed Caithness Power Plant planned for Yaphank, New York, neither Iroquois, Caithness nor the Long Island Power Authority ("LIPA") admit that is so. To the contrary, they have provided sworn statements to the Supreme Court of New York, copies of which are in the record, that they have not decided to fuel Caithness by the Brookhaven Lateral Project. In response to my comments on this issue, even Iroquois now uses words in its September 8th response that it was merely "approached" by LIPA with a request to "investigate the potential development" of the pipeline subject of this proceeding. (See Iroquois September 8, 2006 Response, page 2). By its very own words Iroquois declares the actual need to be vague and uncertain, as LIPA even continues to state it has fueling options for Caithness. Therefore, the entirety of the process, which has consumed enormous resources and time and generated substantial controversy in the community, is based upon speculation.

The potential deception arises when in its September 8th response, Iroqouis evades addressing my comments that the alternative or perhaps the real purpose of this proposed pipeline is to provide a Long Island distribution line for the natural gas the Iroquois pipeline is to receive from the proposed Broadwater Energy Liquid Natural Gas Floating Storage and Regasification Unit and pipeline planned for Long Island Sound. It is for this reason that I have made my comments on the Iroquois Brookhaven Lateral Project also part of the Commission's record on the Broadwater FSRU and pipeline Docket Nos. CP06-54-000, CP06-55-000 and CP06-56-000. The Broadwater FSRU, pipeline and Brookhaven Lateral Project appear inextricably linked.

Issues Raised by East End Property Must be Addressed

Furthermore, Iroquois attempts to dismiss the issues raised on behalf of East End Property by including a copy of the lower court's decision in the litigation against Iroquois, LIPA and Caithness respecting the power plant. Let the record be clear that East End Property is pursuing an appeal of that decision and emphatically disagrees with the court's determination that a failure to provide an environmental quality review of the selection of the fuel source for the power plant is not segmentation, which is strictly prohibited under the State's Environmental Quality Review Act ("SEQRA"). Notably, the United States Environmental Protection Agency states that the Environmental Assessment for the Brookhaven Lateral Project must include a comprehensive evaluation of cumulative, indirect and secondary impacts and that the cumulative impacts analysis should consider the environmental impacts of the pipeline and the Caithness Project which are "inextricably linked". Futhermore, the USEPA states that other reasonably foreseeable energy projects on or near Long Island should be included, as well. One must assume, among other projects, they mean the Broadwater Energy FSRU and pipeline. (See Exhibit "A" to August 23, 2006 Letter of Michael E. White to Commission – August 10, 2006 letter of USEPA). Iroquois improperly attempts to dismiss the issues raised by USEPA, as it has those raised by East End Property.

Also, for the record, attached as Exhibit "A" hereto is a copy of a Petition/Complaint and supporting pleadings, filed against the Town of Brookhaven, Caithness and LIPA relative to the Town's approval of a special permit, variances and waivers for the Caithness Power Plant. In addition to environmental quality review issues under SEQRA, the Petition/Complaint challenges the Town's resolutions as being arbitrary and capricious, failing to comply and inconsistent with Town procedures, the Town Code and Town law. The challenge also states that the so-called "Community Benefits Package" to be provided by LIPA and Caithness to gain acceptance of the plant and upon receipt of which the Town has conditioned its approvals, is "contract zoning" and contrary to law.

Curiously, the Iroquois response to the USEPA, the United States Department of Health and the New York State Department of Environmental Conservation is nothing less than dismissive of these agencies' critical environmental and health expertise and important comments. Iroquois merely states the issues raised will be addressed in its final Resource Reports, but is unwilling to present the issues and analysis of same in an EIS and a further public review process. Furthermore, in a blatant disregard for the potential project related socio-economic impacts, amongst other things, Iroquois concludes the Commission does not have to undertake an environmental justice analysis of the Brookhaven Lateral Project to determine whether any racial, ethnic or socio-economic group is bearing a disproportionate share of the negative environmental consequences of the pipeline project.

Iroquois Has Failed to Address Alternatives

The September 8th response by Iroquois plainly dodges the issue of alternatives, both with regard to the newly preferred route of the pipeline as well as alternative fuel sources for the Caithness Power Plant. First, the record shows that the initially preferred pipeline route, as presented at the so-called "open houses" until the last one held minutes before the August 10, 2006 Public Scoping Session, was one that generally followed public rights of way within and along highways, parkways, and roadways, some of which are already occupied by other utility lines, including a natural gas pipeline. Indeed, as admitted by Iroquois, a full set of Resource Reports were submitted to the Commission presuming the use of these rights of way. However, the New York State Department of Transportation began asking questions Iroquois apparently did not want to take the time to answer, or could not answer. (See Exhibit "B" to August 23, 2006 letter of Michael E. White to Commission – December 20, 2005 and January 9, 2006 letters of New York State DOT). Iroquois recognized that the review process was going to involve appropriate scrutiny and take some time.

Rather than answer the questions, Iroquois then abandoned the initially preferred route in favor of using LIPA rights of way and LIPA, having a stake in the project, apparently agreed. (See Iroquois September 8, 2006 Response, page 3). However, these old LIPA, formerly LILCO, rights of way, part of the electrical energy distribution system on Long Island, run through residential communities, along school grounds, along parkland and even effect County preserve property at the headwaters of the Nissequoque River. Now, by Iroquois fiat, this new route through communities and on private property is the new preferred route and the other declared no longer "feasible". We submit this determination by Iroquois, which the Commission must challenge, is merely based upon self-serving haste rather than all the relevant criteria the Commission must consider.

Notably, there is nothing in the public record from LIPA respecting the use of their rights of way. We might presume LIPA is in favor as it has reportedly taken on the responsibility of making arrangements to provide fuel to the Caithness plant. LIPA continues to avoid comment on the Broadwater Energy FSRU and pipeline as well. One must also question whether LIPA would accept the use of its rights of way by Iroquois to fuel Caithness and/or as a distribution system for the natural gas from the Broadwater Energy FSRU and pipeline. In any case, LIPA has been silent in responding to the concerns expressed at the Scoping session and in the record on the Brookhaven Lateral Project. However, as recognized by Iroquois in its September 8th response, LIPA has responsibility for utilization of its rights of way and remains responsible for protecting the public health, safety and the environment in that regard. (See Iroquois September 8, 2006 Response, page 5). Therefore, it would be derelict for the Commission to close the NEPA review process without LIPA's participation on both the Brookhaven Lateral Project and the Broadwater Project. Indeed, support can be found for this premise in Iroquois' September 8 response, where it states that ". . .the starting point for regulatory review" will be the final contractual arrangements between Iroquois and LIPA. (See Iroquois September 8, 2006 Response, page 14).

An Environmental Quality Review of the Selection of the Brookhaven Lateral Project to Fuel Caithness is Required

Iroquois' purported assessment of the other LIPA fueling alternatives for the Caithness Power Plant is misplaced and insultingly simplistic. Iroquois would have us believe that use of the existing Keyspan natural gas infrastructure is not feasible, but presents no support for this determination except to say that it would require "expansion". (See Iroquois September 8, 2006 Response, page 15). It seems only logical that a lot of "expansion" could be accomplished when weighed against the controversy and cost of a new 21.5 mile pipeline through residential LIPA rights of way. But again, LIPA has refused to publicly disclose its analysis, if any, of these alternatives and no one has apparently even asked Keyspan to present its determination of the capability of its pipeline. Iroquois seems to want to hide behind what one might call the "non-jurisdictional" blinders, as Caithness and the Keyspan pipeline are deemed to be "non-jurisdictional" facilities to the Commission. But the question becomes where does the Commission draw the line between ignoring non-jurisdictional facilities and making a decision in a vacuum.

Similarly, Iroquois boldly determines that the feasibility of the proposed Islander East pipeline is doubtful. This is a "jurisdictional" facility, approved by the Commission. It might be more appropriate for the Commission to consider the feasibility of Islander East rather than have Iroquois do it as the new pipeline proponent. After all the real purpose of the Iroquois Brookhaven Lateral is not public utility but profit.

In sum, the dilemma can be summarized as follows: LIPA and Caithness are looking to maintain the position that the environmental quality review process of the proposed Caithness Power Plant under SEQRA does not have to include a review of the selection of the Iroquois pipeline to provide fuel to Caithness. They say that will be provided in the NEPA review of the Iroquois pipeline under the oversight of the Commission. However, the LIPA SEQRA review presents a cursory review of the impacts of routing and constructing a generic underground pipeline. Now, Iroquois of course presents more details, but an inadequate analysis on the impact of routing and constructing their underground pipeline, but still only a cursory review as to the selection of the Iroquois Brookhaven Lateral Project to fuel Caithness over other alternatives, as well as not showing the need for the pipeline in the first place. As if by conspiring to avoid full public disclosure, scrutiny and regulatory agency analysis, LIPA, Iroquois and Caithness attempt to manipulate the process to create a "Catch 22". On behalf of our clients we demand the Commission dismiss this premise and proceed with a complete review and analysis of the potential impacts of the Brookhaven Lateral Pipeline on the human environment, including alternatives and require a full EIS and process.

In summary, we request the Commission deny Iroquois' motion and determine a full EIS must be prepared on the Brookhaven Lateral Project. The Commission must prepare an EIS to give adequate consideration to the environmental consequences of its actions which will affect the quality of the human environment. Not preparing an EIS and a finding of no significant impact would be

counter to the information and comments already before the Commission on this major action. Indeed, even when the determination of whether a significant impact will or will not result from the proposed action is a close call, an EIS must be prepared.[1]

Very truly yours,

Michael E. White

MEW:kp
Enclosures
cc. Broadwater Energy FSRU Docket Nos. CP06-54-000, CP06-55-000 and CP06-56-000

D#506716F#046435

[1] See National Environmental Policy Act 42 U.S.C.S. §4321 et seq. CEQ regulations 40 C.F.R. §§1500-1508, Natural Resources Defense Council et al. v. United States Army Corps. of Engineers, et al., 399 F.Supp.2d 386 (2005) and National Audubon Society et al. v. Hoffman et al. 132 F.3d7 (1997).

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BV007461

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,	Index No. 06- Plaintiffs Designate Suffolk County as the place of trial The basis of venue is CPLR §504
Petitioners-Plaintiffs	
- against -	**SUMMONS**
TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC	
Respondents-Defendants	
- and -	
LONG ISLAND POWER AUTHORITY,	
Additional Respondent-Defendant (CPLR 1001[a])	Justice Assigned: Hon.

----------X

THE ABOVE NAMED RESPONDENTS-DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Petitioners-Plaintiffs' Attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New

York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: August 22, 2006

ROSENBERG CALICA & BIRNEY LLP

By: _____
Robert M. Calica
Attorneys for Petitioners-Plaintiffs
100 Garden City Plaza, Suite 408
Garden City, New York 11530
516-747-7400

Respondents-Defendants' Addresses:

Town of Brookhaven
1 Independence Hill
Farmingville, New York 11738

Town Board of the Town of Brookhaven
1 Independence Hill
Farmingville, New York 11738

Caithness Long Island, LLC
565 Fifth Avenue
New York, New York 10017

Long Island Power Authority
330 Earle Ovington Boulevard, Suite 403
Uniondale, New York 11553

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs

- against -

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants

- and -

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant
(CPLR 1001[a])

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Index No. 06-

COMBINED VERIFIED PETITION AND COMPLAINT

Justice Assigned:
Hon.

Petitioners-Plaintiffs, by **Rosenberg Calica & Birney LLP**, their attorneys, for their combined verified petition and complaint, allege as follows:

Introduction

1. This combined Article 78 proceeding and action for declaratory, injunctive and related relief seeks to review, invalidate, declare unlawful, and enjoin implementation of certain resolutions of, and actions taken by respondent-defendant, the Town Board of the Town of

BW007464

Brookhaven ("Town Board") on July 25, 2006. The first challenged resolution and action approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-defendant Caithness Long Island, LLC ("Caithness") on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York by granting a special permit required by applicable provisions of the Brookhaven Town Code and substantial variances and waivers from established zoning requirements ("Resolution I"). The second resolution, rendered under the State Environmental Quality Review Act ("SEQRA"), ECL 8-101 et. seq., adopted a Finding Statement under SEQRA, and approved and accepted a prior final environmental impact statement ("FEIS") for the power plant project previously promulgated and adopted by additional respondent-defendant, Long Island Power Authority ("LIPA"), acting as "lead agency" under SEQRA, for the purpose of approving a proposed Power Purchase Agreement ("PPA") between LIPA and Caithness ("Resolution II").

2. Petitioner East End Property Company #1 LLC ("East End") is the owner of a large residential rental complex comprising 795 units on 117 acres and occupied by over 2000 persons located at 1220 Orchid Circle, Bellport, New York known as "*Atlantic Point*", recently constructed and completed (in 2003). The remaining petitioners-plaintiffs (described more fully below) are directly interested and affected persons and Civic Associations, including current residents of Atlantic Point, other nearby residents and Civic Associations comprised of residents of the affected and nearby community.

3. Resolution I is challenged as unlawful and arbitrary and capricious because, inter alia, the Town Board, after initially voting 4-3 on June 6, 2006 to reject the project, then wholly abdicated its legal responsibility and failed to apply statutory standards in re-voting (5-2) on July

BW007465

25, 2006 to grant far-ranging variances and a special permit required under Section 85-3.12, 85-3.13, 85-3.15 and other sections of the Code so as to approve the Project. Specifically, after accepting a $151 million payment from LIPA and the applicant ("Caithness") as an express "*condition*", the Town (following an earlier rejection of the same project on June 6, 2006) resolved on July 25, 2006 to approve an electrical generating project which entails a 170 foot high exhaust stack (more than 50 feet over permitted height), a building reaching heights of 80 feet (in excess of the permitted limitation of 50 feet), and an electrical generating station which will occupy an approximately 15 acre "footprint" on a 96 acre parcel in an "L 1" "light industrial" zone where such uses are not permitted except by "special permit", and only upon a specific finding that "*the use will not prevent the orderly and reasonable use of adjacent properties or of properties in the surrounding area or impair the value thereof*" (Brookhaven Code, Section 85-31.2[B][2] and other sections). In this case, neither LIPA, nor the Town ever commissioned or considered any study of the financial impact of a large scale electrical facility in this sensitive area, relying instead solely upon a study of a potential location 30 miles distant in Melville.

4. Resolution II (as well as Resolution I), are additionally challenged for lack of compliance with both the procedures and substantive requirements of SEQRA when the Town Board reportedly rejected the recommendation of its own Planning Department staff and instead blindly followed the defective and self-serving FEIS and SEQRA Findings made by LIPA when LIPA decided to declare itself the "lead agency" under SEQRA and (unsurprisingly), to approve its own project. In accepting and adopting the LIPA-prepared FEIS as the Town Board's purported compliance with SEQRA, the Town approved a grossly defective FEIS which

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essentially ignored the existence of the nearby (approximately one-half mile) major residential community of over 795 units (occupied by over 2000 persons), relied on stale maps (created from a period before the Atlantic Point community was even in existence), and expressly refused to consider the significant environmental impact of the fact that the project necessarily entails (indeed requires) the construction of a gas pipeline extension of nearly 22 miles (from Commack, New York to Yaphank, New York), thereby unlawfully "segmenting" the SEQRA process. Worse still, if the "assumed" availability of a source of natural gas fuel for the proposed project does not actually materialize, the planned gas fueled power plant with oil as a "back-up" fuel source (estimated for 30 days of oil fuel use per year) will instead become solely an oil fueled plant, producing significant adverse environmental impacts which have not been considered in the FEIS or in Resolution I or Resolution II.

5. Because the Town Board, in Resolution II, adopted LIPA's grossly defective SEQRA procedures and the LIPA-prepared FEIS as its own, Resolution II is unlawful and should be declared invalid for those additional reasons[1].

6. For these, as well as additional reasons more fully detailed below and in the accompanying memorandum of law (incorporated herein), Resolution I and Resolution II should be annulled, declared arbitrary and capricious, null, void and of no effect, and their enforcement permanently enjoined and restrained, and the Court should grant such declaratory relief pursuant

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[1]A separate legal challenge by East End and certain of the other petitioners herein to the LIPA-prepared FEIS and to LIPA's SEQRA and other approvals of the Caithness Project is the subject of a presently pending proceeding by East End and others against LIPA and Caithness pending in the Supreme Court, Nassau County under Nassau County Clerk's Index No. 06-001410 (Hon. R. Bruce Cozzens, Jr., J) [the "Nassau County Action"].

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to CPLR 3001 as may be required in order to fully adjudicate this matter.

Parties

7. Petitioner East End Property Company #1, LLC ("East End") is a Delaware Limited Liability Company authorized to do business in New York, and the owner of a 117-acre parcel of real property improved with 795 rental apartments and town homes, located at 1220 Orchid Circle, Bellport, New York, known as Atlantic Point.

8. Atlantic Point was constructed between 2001 and 2003 as one of the largest residential rental communities on Long Island. Atlantic Point was formerly known as Alexan Brookhaven. In 2005, the name of the complex was changed to Atlantic Point.

9. Petitioner Mark Kaspiev ("Kaspiev") is one of over 2,000 residents of Atlantic Point, residing at Apt. 1482 Yarrow Circle, Bellport, New York and is employed as the Property Manager of Atlantic Point.

10. Petitioners John McConnell and Johan McConnell (the "McConnells") reside at 76 Gerard Road, Yaphank, New York, 11980.

11. Petitioners Donald and Patricia Seubert (the "Seuberts") reside at 56 Robinson Avenue, Medford, New York, 11763.

12. Petitioner Francesca Hurley and her son, Petitioner Michael Hurley, and Petitioner Emily Karlovits, Francesca Hurley's mother, reside at 16 Garden Lane, Yaphank, New York, 11980.

13. Petitioner Laurence Einuis resides at 106 Patchogue-Yaphank Road, Yaphank, New York, 11980.

14. Petitioner Stephen Henry resides at 17 Garden Lane, Yaphank, New York, 11980.

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15. Petitioner The Yaphank Taxpayers and Civic Association, Inc. is a New York not-for-profit corporation consisting of residents of the Yaphank community, including Petitioners Francesca and Michael Hurley, Laurence Einuis, Emily Karlovits and Stephen Henry.

16. Petitioner South Yaphank Civic Association, Inc. is a New York not-for-profit corporation consisting of residents of the South Yaphank community, including the McConnells.

17. Respondent-defendant, the Town of Brookhaven is a duly organized municipal corporation and respondent-defendant Town Board of the Town of Brookhaven ("Town Board") exercises the jurisdiction, powers, duties and authorities of the Town and Town Board as provided by the Town Law, the Town Code of the Town of Brookhaven, and other applicable provisions of law.

18. Respondent-defendant Caithness Long Island, LLC ("Caithness") is, upon information and belief, a Delaware Limited Liability Company authorized to do business in New York with a principal place of business at 565 Fifth Avenue, New York, New York, 10017.

19. Additional respondent-defendant, Long Island Power Authority ("LIPA") is, upon information and belief, a corporate municipal instrumentality created pursuant to the Public Authorities Law for the State of New York and maintains its office at 330 Earle Ovington Boulevard, Suite 403, Uniondale, New York, 11553. LIPA is joined in this proceeding and action solely as a necessary party pursuant to CPLR 1001(a).

Description of the Property

20. The Caithness Project is a proposed dual-fueled combined-cycle power plant designed to generate approximately 350 megawatts of electricity. The Project site would comprise approximately 15 acres within a larger 96-acre parcel within the Pitch Pine-Oak Forest

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of the Pine Barrens located south of the Sills Road interchange of the Long Island Expressway (Exit 66). Natural gas is stated to be the primary fuel with oil serving as a back-up fuel. Natural gas is to be delivered to the Project site via a contemplated 21.6-mile extension of the Iroquois natural gas pipeline which currently terminates in South Commack, New York (the "Iroquois Pipeline"). Oil will be delivered via tractor trailer tank trucks, with 750,000 gallons stored on the Project site. The Project will have an exhaust stack with a height of at least 170 feet above grade. The Project will be constructed over a 26-month time frame. While located in the specially designated Town of Brookhaven Empire Zone, designated to generate jobs and economic development, the Project is expected to generate only 25 permanent jobs.

Standing

21. The Project is a Type 1 action pursuant to 6 NYCRR Part 617.4(b)(6), and was so declared by LIPA. As such, it "*carries with it a presumption that it is likely to have a significant adverse environmental impact on the environment*" as provided in 6 NYCRR Part 617.4(a)(1).

22. Atlantic Point, owned by Petitioner-plaintiff East End, and where Petitioner-plaintiff Kaspiev works and resides, is located between one-half mile and three-quarters of a mile from the Project site directly to the south. Atlantic Point is one of the largest rental housing communities on Long Island, has approximately 2,000 residents in 795 units totaling over 900,000 square feet, and pays $1,603,071.00 annually in property taxes.

23. Atlantic Point was constructed in two phases between 2000 and 2003. Phase I, consisting of 597 units, was acquired by East End on December 18, 2003. Phase II, consisting of 198 units, was acquired by East End on June 29, 2004.

24. The property is extensively landscaped with 14 ponds and includes a clubhouse, four

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swimming pools and three tennis courts. The aesthetically pleasing setting and extremely well-kept grounds are an important amenity in attracting and keeping tenants.

25. The addition of a power plant to the surrounding area will obviously have a significant negative impact on the Atlantic Point environment in terms of air quality, water quality, visual resources, noise and traffic and community character. This is a particularly sensitive issue since the surrounding area already includes a number of uses which result in negative environmental consequences, including the Town of Brookhaven landfill and ashfill, a waste transfer facility, a composting facility, a motocross track, a fireworks manufacturing facility and freight-trucking facility under development, along with hundreds of acres of industrial development. The property is accessible from both Woodside Avenue and Horseblock Road. It is approximately one-half mile from the north entrance to Atlantic Point to the Project. The stack, if not the plant itself, will be fully visible from the entrance to Atlantic Point. Petitioner-plaintiff Kaspiev resides in the Atlantic Point community.

26. According to the FEIS, the Project is being constructed in the Town of Brookhaven's Empire Development Zone, a program designed to attract economic development to the area in which the Project is located. Atlantic Point is located adjacent to the Empire Development Zone. Numerous buildings are now being constructed in the area. The EIS provides no analysis as to the cumulative impacts of all of the present and future land uses, particularly with respect to the Atlantic Point community.

27. The McConnells own the home where they reside, located within approximately one mile to one and a half miles from the Project site.

28. The Seuberts own the home where they reside, located within approximately three

miles of the Project site and within one mile of one of the routes proposed for the Iroquois Pipeline.

29. Francesca Hurley and Emily Karlovits co-own the home where they reside with Michael Hurley, located within approximately two miles of the Project site.

30. Einuis owns the home where he resides, located within approximately one and one half miles of the Project site.

31. Henry owns the home where he resides, located within approximately two miles of the Project site.

32. The Yaphank Taxpayer and Civic Association, Inc. is an organization established for the purposes of advocating to all government agencies with respect to planning, zoning, public works and development in the Yaphank area, and to beautify and improve the Yaphank community.

33. The South Yaphank Civic Association, Inc. is an organization established to provide concerned residents of Yaphank and Brookhaven hamlets with a forum to address issues of concern in the South Yaphank community where the Project is located. Its goals are to advocate for residents' input in all decisions - whether state, county, town or private - affecting the South Yaphank community, to ensure the safety of the neighborhoods, to enhance the property values in the South Yaphank community, and to promote positive and strategic development of the area where appropriate and beneficial.

34. The Project will have an adverse impact on land use, flora, fauna, terrestrial ecology, noise, traffic, air quality, water quality and quantity, human health, aesthetics, community and neighborhood character and property values, causing environmental and economic harm to

Petitioners and the residents of Atlantic Point.

35. Petitioners-plaintiffs are aggrieved by the actions complained of herein and thus have standing to maintain this proceedings and action for declaratory and injunctive relief. In connection with the "payment in lieu of taxes" agreement contained in the Town Board's resolution, petitioners-plaintiffs are further aggrieved as taxpayers

The Documentary Record and Reserved Claims

36. Petitioners-plaintiffs respectfully refer to, and incorporate the contents of the certified transcript of the record of the proceedings under consideration (the "Return") to be filed by the Town Board pursuant to CPLR 7804(e), the content of which is respectfully incorporated herein by reference. Petitioners-plaintiffs specifically reserve the right, and request leave of the Court to supplement and amend the allegations herein when a full copy of the Return is furnished by the Town. Without limitation, petitioners-plaintiffs specifically reserve claims as to whether proper notices of all hearings and proceedings were given in accordance with applicable legal requirements until copies of affidavits of mailing, posting and of publication are filed as part of the Return. Petitioners-plaintiffs also reserve the right to assert that the requirements of the Town of Brookhaven Ethical Disclosure Law and other applicable disclosure statutes were not fully complied with by Board members, based upon a review of the Return, when filed.

37. Without limitation, the relevant documentation includes the following:

a. Town Board Resolution No. 8A dated July 5, 2006, adopting certain "Findings", conclusions and decisions with respect to the application for a special permit and related variances/waivers for a proposed 350 megawatt electrical generating facility by Caithness Long Island LLC (herein "Resolution I" - exhibit A hereto);

b. Resolution No. 8 of the Town Board dated July 25, 2006, inter alia, accepting and adopting a Finding Statement for the Caithness Long Island LLC Project pursuant to SEQRA, 6 NYCRR 617.11 ("Resolution No. II" - exhibit B hereto);

c. The final environmental impact statement for the Caithness Long Island Energy Center dated June 2005 adopted by LIPA (the "FEIS" - exhibit C hereto) [separately bound];

d. The Findings Statement under SEQRA adopted by LIPA dated December 15, 2005 accepting and adopting the FEIS and authorizing execution of a power purchase agreement with Caithness (exhibit D hereto); and

e. Two articles which appeared in Newsday on July 24, 2006 and July 26, 2006 reporting on the Town Board's re-vote on the Caithness Project (collectively, exhibit E).

38. In addition and without limitation, petitioners-respondents herein respectfully adopt and incorporate herein the entirety of the record before the Supreme Court, Nassau County in the Nassau County Action and, without limitation, the following:

a. The Amended Verified Petition Complaint dated March 20, 2006 filed by petitioner-plaintiff East End and certain other of the plaintiffs-petitioners in the Nassau County Action (exhibit F hereto, exhibits thereto omitted);

b. The Memorandum of Law filed on behalf of the petitioners-plaintiffs in support of the Combined Petition and Complaint in the Nassau County Action (exhibit G hereto); and

c. The letter of Michael White, Esq., dated May 26, 2006 submitted to New York State Comptroller Hevesi, and provided to the Town Board as part of the Record herein, including the Report dated April 2006 and affidavit of Botanist Eric Lamont, Ph.D., notarized

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May 17, 2006 annexed thereto (collectively exhibit H hereto).

AS AND FOR A FIRST CLAIM FOR RELIEF

39. For reasons more fully detailed in the accompanying memorandum of law which is respectfully incorporated herein, the Town Board, in adopting Resolution I, violated by the Town Law and the Town Code of the Town of Brookhaven (the "Brookhaven Code") because, inter alia:

a. The Town Board's finding of "hardship" under Brookhaven Code 85-31.2(B)(4) is unsupported by any evidence, and the only matter the Town Board cited as its basis was that absent waivers of the height requirements, the Caithness Project could not proceed;

b. Under Brookhaven Code § 85-31.2(B)(4), the Town Board had no authority to grant a hardship waiver or variance concerning the exhaust stack height "[s]pecial permit criteria" found in § 85-315. The hardship waiver and variance provisions of § 85-31.2(B)(4) apply only to ordinary "zoning district classification" criteria, not to the "[s]pecial permit criteria";

c. The Town Board's multiple failures to consider, inter alia, impacts of a 22 mile gas pipeline extension, the proximity of Atlantic Point and its 2000 inhabitants located within one-half mile, to consider alternatives to the location, and other defects violated the Town Law and the Brookhaven Code; and

d. The Town Board failed to consider economic impacts of the Caithness Project upon the surrounding properties, property owners, future growth, and commissioned no economic impact analysis whatsoever, relying instead solely upon LIPA's flawed analysis of the

impact of a hypothetical plant constructed some 30 miles distant in Melville.

40. Resolution I should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect.

AS AND FOR A SECOND CLAIM FOR RELIEF

41. The Town Board, in adopting and approving Resolution I and Resolution II, violated SEQRA, inter alia, because:

a. There were multiple failures to consider substantial environmental impacts including, inter alia, construction of the anticipated 22 mile long gas pipeline extension from Commack to Yaphank, the existence of the Atlantic Point development and its 2000 inhabitants located within one-half mile of the site, and the presence and existence of a rare pine barrens ecosystem called the Pitch-Pine-Oak-Heath-Woodland at the Caithness Project site;

b. There was a wrongful and unlawful "segmentation" of environmental review concerning the gas impacts of the pipeline extension or other "potential" sources of natural gas fuel for the Caithness plant (see, for example, August 10, 2006 letter of the United States Environmental Protection Agency to the Federal Energy Regulatory Commission, noting that "***the environmental impacts of the pipeline and the Caithness Project ... are inextricably linked***", exhibit I hereto);

c. The Town Board and/or LIPA were required to prepare and adopt a supplemental environmental impact statement ("SEIS") following discovery of a pine barrens ecosystem at the Caithness project site; and

d. The Town Board committed other violations of SEQRA, as more fully set forth in the accompanying memorandum of law, the content of which is respectfully incorporated

herein;

42. Resolutions I and II should therefore be adjudged null, void, arbitrary and capricious, and of no force or effect.

AS AND FOR A THIRD CLAIM FOR RELIEF

43. LIPA's actions under SEQRA and its approval of the Purchase Power Agreement were invalid under SEQRA, Public Authorities law §1020-ff(aa) and State Finance Law §123-b.

44. The Town Board's approvals, and Resolution I and II premised thereon must be annulled, and declared null, void and of no force or effect for reasons more fully set forth in the combined petition and complaint and memorandum of law in the Nassau County Action, the allegations and content of which are respectfully incorporated herein.

AS AND FOR A FOURTH CLAIM FOR RELIEF

45. The Town Board, in or about June 6, 2006, initially voted four-three to disapprove Resolution I and Resolution II. However, upon a further vote thereon taken on July 25, 2006, both Resolutions were approved by a five-two vote, with the only substantive change being a "Community Benefits Package" to be provided by LIPA and Caithness consisting of $139,000,000 of payments in lieu of taxes ("PILOTS") to the local school district, Suffolk County, the Town of Brookhaven, and several special districts, and the making by LIPA and/or Caithness of certain other community payments aggregating $151,000,000.

46. For reasons more fully detailed in the accompanying memorandum of law (incorporated herein), the changed Town Board vote violated, inter alia, SEQRA, the Open Meetings Law (Public Officers Law Article 7), the Town Law, the Brookhaven Code, applicable procedures of the Town Board, and was otherwise the result of unlawful and impermissible

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"contract zoning", and the Resolutions were without authority and jurisdiction were otherwise unlawful, arbitrary and capricious.

47. Resolutions I and II should therefore be adjudged null, void, arbitrary and capricious, and of no force or effect.

AS AND FOR A FIFTH CLAIM FOR RELIEF

48. On June 6, 2006, the Town Board, by a vote of 4-3, voted to disapprove and reject Resolutions I and II.

49. On July 25, 2006, the Town Board purported to "re-vote" upon Resolutions I and II and to adopt them by a vote of 5-2 (herein, the "Re-Vote").

50. The Re-Vote was arbitrary, capricious and unlawful because, inter alia,

a. The Re-Vote resulted from off-record negotiations occurring among members of Town Board, Caithness and LIPA which were not the subject of any hearings or proceedings conducted in accordance with the requirements of law;

b. In adopting the Re-Vote, the Town Board violated its own Rules of Procedure;

c. Under SEQRA, the Town Board lacked authority to hold a Re-Vote concerning the same "action" where there had been no change in the Project or environmental circumstances (6 NYCRR §617.11[a]);

d. Where, as here, the Town Board was exercising the authority of a Zoning Board of Appeals (see, Brookhaven Code §85-31.1), the Town Board was prohibited from reconsidering a previously voted upon matter absent a "unanimous vote of all of the members of the Board then present" and absent a change of circumstances (Town Law §267-a[12] and other authorities cited in the accompanying memorandum of law);

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e. The Re-Vote resulted from a violation of the Open Meetings Law (Public Officers Law Article 7) and otherwise involved an impermissible consideration of evidence taken after the close of the hearing (see Newsday reports of proceedings before the Town Board on the Re-Vote, exhibit E hereto);

f. Upon information and belief, the Town Board failed to follow its own Rules of Procedure in allowing the Re-Vote including, inter alia, by failing to properly agenda the Re-Vote, by failing to provide all councilmembers in advance of the meeting with a "meeting packet", by including a provision purporting to set aside 15% of certain of the Community Benefit Package Funds, all without prior notice to councilmembers, and by reason of other defects set forth in the accompanying memorandum of law; and

g. The Town Board had no legal authority to condition its approvals on the Community Benefits Package "tax," no legal authority to accept a payment in lieu of such unauthorized tax, and no legal authority to unilaterally and without public referendum create an open space special fund into which such "taxes" would be partially diverted. Its creation of such tax and special fund violated the Town Law, the Brookhaven Town Code, Tax Law § 1441, other laws, and was ultra vires as further set forth in the accompanying memorandum of law.

51. Resolutions I and II should therefore be adjudged null, void, arbitrary and capricious, and of no force or effect.

AS AND FOR A SIXTH CLAIM FOR RELIEF AND CAUSE OF ACTION

52. Pursuant to CPLR 3001, the Court should declare such matters concerning the lawfulness of the procedures preceding the consideration and adoption of, as well as concerning the adoption and the lawfulness of Resolution I, Resolution II, the FEIS, the Findings Statement,

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the re-vote, and all other actions taken by or on behalf of the Town Board to approve the Caithness project which are necessary to result in a full, complete and just resolution of all claims and controversies among the parties relating to such matters.

53. Without limitation, the Court should grant permanent injunctive relief barring the Town Board, Caithness and LIPA from carrying out, implementing or otherwise acting to implement or carry out Resolution I, Resolution II, or to otherwise construct the Caithness Project.

WHEREFORE, petitioners-plaintiffs demand that a judgment be granted pursuant to CPLR Article 78 and a declaratory judgment granted pursuant to CPLR 3001, together with the permanent injunction as follows:

a. Pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of the Town Board dated July 25, 2006 which, inter alia, approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-defendant Caithness, on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (the "Caithness Project") by granting a special permit pursuant to the Brookhaven Town Code and substantial variances and waivers from established zoning requirements (herein "Resolution I");

b. Pursuant to CPLR Article 78, annulling and invalidating a further Resolution of the Town Board granted on July 26, 2006, inter alia, rendered under the State Environmental Quality Review Act ("SEQRA"), by adopting a Finding Statement under SEQRA, by approving and accepting a prior final environmental impact statement ("FEIS") for the Caithness Project promulgated and adopted by Long Island Power Authority ("LIPA"), acting

as purported "lead agency" under SEQRA (herein "Resolution II");

c. Cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by the Town Board and/or the Town of Brookhaven for the purpose of authorizing and implementing the Caithness Project;

d. Pursuant to CPLR 3001, granting a judgment in favor of petitioners-plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness, and implementation of Resolution I, Resolution II and all other actions and authorizations granted by the Town Board and/or the Town of Brookhaven with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

e. Granting a permanent injunction in favor of petitioners-plaintiffs enjoining respondent Town Board, Caithness and LIPA from implementing Resolution I, Resolution II or any other approvals authorizing the construction or implementation of the Caithness Project; and

f. Pursuant to CPLR 7804(e), directing and compelling defendant-respondent Town Board to file, with its answer, a certified transcript of the record of the proceedings under consideration; and

g. Granting petitioners-plaintiffs such other and further relief as the Court may deem appropriate, including awarding the costs and disbursements hereof.

Dated: Garden City, New York
August 17, 2006

ROSENBERG CALICA & BIRNEY LLP

By: _____
Robert M. Calica
Attorneys for Petitioners-Plaintiffs
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

BW007482

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

EDWARD S. PANTZER, being duly sworn, deposes and says:

I am a member of petitioner-plaintiff East End Property Company #1 LLC. I have read the foregoing combined petition and complaint, and the same is true of my own knowledge except as to matters therein alleged upon information and belief and as to those matters I believe it to be true.

_____
EDWARD S. PANTZER

Sworn to before me this
____ day of August, 2006

_____
Notary Public

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BW007483

At an IAS Part ___ of the Supreme Court of the State of New York, County of Suffolk held at the Courthouse located at 235 Griffing Avenue, Riverhead, New York, 11901 on the __ day of August, 2006

PRESENT:

HON.

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EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs

- against -

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants

- and -

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant (CPLR 1001[a])

Index No. 06-

ORDER TO SHOW CAUSE

Justice Assigned: Hon.

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Upon the annexed affirmation of Robert M. Calica, Esq., dated August 22, 2006, the combined Verified Petition and Complaint verified on August 17, 2006, the affidavit of Town of

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Brookhaven Councilmember Carol Bissonette, sworn to August 22, 2006, and upon all the pleadings and proceedings heretofore had herein and in a related pending action entitled "*East End Property Company #1 LLC et al v. Richard M. Kessel, as Chairman of the Board of Trustees of the Long Island Power Authority, LLC, et al*, Nassau County Clerk's index no. 06-001410, it is

ORDERED, that defendants-respondents Town of Brookhaven, the Town Board of the Town of Brookhaven ("Town Board"), Caithness Long Island LLC ("Caithness"), and Long Island Power Authority ("LIPA") show cause before a Justice of this Court to be assigned pursuant to 22 NYCRR §202.8 at 9:30 a.m. on the ___ day of September, 2006 at the Courthouse located at 235 Griffing Avenue, Riverhead, New York, 11901 why an order and judgment should not be granted:

a. Pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of the Town Board dated July 25, 2006 which, inter alia, approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-defendant Caithness, on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (the "Caithness Project") by granting a special permit pursuant to the Brookhaven Town Code and substantial variances and waivers from established zoning requirements (herein "Resolution I");

b. Pursuant to CPLR Article 78, annulling and invalidating a further Resolution of the Town Board granted on July 25, 2006, inter alia, rendered under the State Environmental Quality Review Act ("SEQRA"), by adopting a Finding Statement under SEQRA, by approving and accepting a prior final environmental impact statement ("FEIS") for

the Caithness Project promulgated and adopted by Long Island Power Authority ("LIPA"), acting as purported "lead agency" under SEQRA (herein "Resolution II");

c. Cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by the Town Board and/or the Town of Brookhaven for the purpose of authorizing and implementing the Caithness Project;

d. Pursuant to CPLR 3001, granting a judgment in favor of petitioners-plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness, and implementation of Resolution I, Resolution II and all other actions and authorizations granted by the Town Board and/or the Town of Brookhaven with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

e. Granting a permanent injunction in favor of petitioners-plaintiffs enjoining respondent Town Board, the Town of Brookhaven, Caithness and LIPA from implementing Resolution I, Resolution II or any other approvals authorizing the construction or implementation of the Caithness Project; and

f. Granting petitioners-plaintiffs such other and further relief as the Court may deem appropriate, including awarding the costs and disbursements hereof, and a special preference in hearing and determining this matter pursuant to Town Law §274-b(11), and it is further

ORDERED, pursuant to CPLR 7804(e), that respondents-defendants Town Board and the Town of Brookhaven shall file, together with its Answer, a certified transcript of the record of the proceedings under consideration, and it is further

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ORDERED, sufficient cause appearing therefore, that service of a copy of this Order and the papers upon which it is granted upon defendant-respondent Town Board of the Town of Brookhaven and the Town of Brookhaven pursuant to CPLR 311(a)(5), upon defendant-respondent Caithness by overnight courier, 565 Fifth Avenue, New York, New York, 10017 pursuant to CPLR 311-a(b), and upon LIPA by overnight courier at 33 Earle Ovington Boulevard, Suite 403, Uniondale, New York, 11553 on or before the ___ day of August, 2006 be deemed good and sufficient service hereof.

ENTER:

_____
J.S.C.

Robert M. Calica, Esq., attorney for petitioners-plaintiffs, hereby certifies under 22 NYCRR Part 130 that the above Order to Show Cause is in proper form and that the requested relief is appropriate under the relevant law and facts

Dated: August 22, 2006

_____
ROBERT M. CALICA

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BW007487

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs

- against -

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOHAVEN and CAITHNESS LONG ISLAND, LLC

Respondents-Defendants

- and -

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant
(CPLR 1001[a])

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Index No. 06-

EMERGENCY AFFIRMATION IN SUPPORT OF COMBINED VERIFIED PETITION AND COMPLAINT (And Motion for Special Preference Under Town Law §274-b[11])

Justice Assigned:
Hon.

ROBERT M. CALICA, an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury as follows:

Relief Sought

1. I am a member of the firm of Rosenberg Calica & Birney LLP, attorneys for petitioners-plaintiffs in this combined Article 78 proceeding and action which seeks to review, invalidate, declare unlawful, and enjoin implementation of certain resolutions of, and actions taken by

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respondent-defendant, The Town Board of the Town of Brookhaven ("Town Board") on July 25, 2006.

2. This affirmation is respectfully submitted, together with the accompanying Verified Petition and Complaint, memorandum of law and affidavit of Town of Brookhaven Councilmember Carol Bissonette, in support of petitioners' application for the expedited granting of the attached Order to Show Cause, establishing an early return date for the proceeding, and granting a special preference in the hearing and consideration of this matter as provided by Town Law §274-b(11).

Parties and Description of Proceeding

3. This combined proceeding and action challenges a series of Town Board Resolutions and actions rendered on July 25, 2006 which approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-defendant Caithness Long Island, LLC ("Caithness") on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York. The first challenged resolution granted a special permit required by applicable provisions of the Brookhaven Town Code and substantial variances and waivers from established zoning requirements ("Resolution I"). The second resolution, rendered simultaneously under the State Environmental Quality Review Act ("SEQRA"), ECL 8-101 et. seq., adopted a Finding Statement under SEQRA, and approved and accepted a prior final environmental impact statement ("FEIS") for the power plant project previously promulgated and adopted by additional respondent-defendant, Long Island Power Authority ("LIPA"), acting as "lead agency" under SEQRA, for the purpose of approving a proposed Power Purchase Agreement ("PPA") between LIPA and Caithness ("Resolution II").

4. Petitioner East End Property Company #1 LLC ("East End") is the owner of a large

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residential rental complex comprising 795 units on 117 acres and occupied by over 2000 persons located at 1220 Orchid Circle, Bellport, New York known as "*Atlantic Point*", recently constructed and completed (in 2003). The remaining petitioners-plaintiffs (described more fully in the accompanying petition) are directly interested and affected persons and Civic Associations, including current residents of Atlantic Point, other nearby residents, and Civic Associations comprised of residents of the affected and nearby community.

5. Resolution I is challenged in the attached petition and complaint as unlawful and arbitrary and capricious, arguing, inter alia, that the Town Board, after initially voting 4-3 on June 6, 2006 to reject the project, then wholly abdicated its legal responsibility and failed to apply statutory standards in re-voting (5-2) on July 25, 2006 to grant far-ranging variances and a special permit required under Section 85-3.12, 85-3.13, 85-3.15 and other sections of the Code so as to approve the Project. Specifically, after accepting a $151 million payment from LIPA and the applicant ("Caithness") as an express "*condition*", the Town (following an earlier rejection of the same project on June 6, 2006), resolved on July 25, 2006 to approve an electrical generating project which entails a 170 foot high exhaust stack (more than 50 feet over permitted height), a building reaching heights of 80 feet (in excess of the permitted limitation of 50 feet), and an electrical generating station which will occupy an approximately 15 acre "footprint" on a 96 acre parcel in an "L 1" "light industrial" zone where such uses are not permitted except by "special permit", and only upon a specific finding that "*the use will not prevent the orderly and reasonable use of adjacent properties or of properties in the surrounding area or impair the value thereof*" (Brookhaven Code, Section 85-31.2[B][2] and other sections). In this case, neither LIPA, nor the Town ever commissioned or considered any study of the financial impact of a large scale electrical facility in this sensitive area,

relying instead solely upon a study of a potential location 30 miles distant in Melville.

6. Resolution II (as well as Resolution I), are additionally challenged in the accompanying petition and complaint for lack of compliance with both the procedures and substantive requirements of SEQRA when the Town Board reportedly rejected the recommendation of its own Planning Department staff and instead blindly followed the defective and self-serving FEIS and SEQRA Findings made by LIPA when LIPA decided to declare itself the "lead agency" under SEQRA and (unsurprisingly), to approve its own project. In accepting and adopting the LIPA-prepared FEIS as the Town Board's purported compliance with SEQRA, the petition and complaint asserts that the Town approved a grossly defective FEIS which essentially ignored the existence of the nearby (approximately one-half mile) residential community of over 795 units (occupied by over 2000 persons), relied on stale maps (created from a period before the Atlantic Point community was even in existence), and expressly refused to consider the significant environmental impact of the fact that the project necessarily entails (indeed requires) the construction of a gas pipeline extension of nearly 22 miles (from Commack, New York to Yaphank, New York), thereby unlawfully "segmenting" the SEQRA process. Worse still, as the petition and complaint alleges, if the "assumed" availability of a source of natural gas fuel for the proposed project does not actually materialize, the planned gas fueled power plant with oil as a "back-up" fuel source (estimated for 30 days of oil fuel use per year) will instead become solely an oil fueled plant, producing significant adverse environmental impacts which have not been considered in the FEIS or in Resolution I or Resolution II.

7. For these, as well as additional reasons fully detailed in the accompanying submissions, petitioners-plaintiffs contend that Resolution I and Resolution II should be annulled, declared

invalid, their enforcement permanently enjoined and restrained, and the Court should grant such declaratory relief pursuant to CPLR 3001 as may be required in order to fully adjudicate this matter.

A Special Preference is Warranted

8. Because of the obviously critical character of an Article 78 proceeding seeking to challenge, as here, the approval of a major electrical generation project, to be constructed on a 15 acre "footprint" of an approximately 96 acre parcel located in close proximity to a large, recently constructed major residential community with over 2000 residents and impacting other residential communities, homes and citizens, the Town Law directly specifies that such an action shall be granted a special preference, stating that "*[a]ll issues addressed by the Court in any proceeding under this section shall have a preference over all other actions and proceedings*". Interpreting a similar provision of Town Law §282, the Court of Appeals has observed that a statute which provides that specified proceedings challenging a Planning Board's approval actions are to be given a preference as reflecting "*the legislative concern that such approval decisions receive expeditious review*" (Long Island Pine Barrens Society Inc. v. Planning Board of the Town of Brookhaven, 78 N.Y.2d 608, 614, 578 N.Y.S.2d 466 [1991]). The need for a speedy determination is particularly apt where it involves, as here, challenges based on the State Environmental Quality Review Act ("SEQRA") where "*the environmental status of the entire project [is left] undetermined*" until the challenge is adjudicated.

Conclusion

9. For these reasons, it is respectfully requested that the Court give expedited consideration to the review and granting of the attached Order to Show Cause initiating this combined Article 78 proceeding and action, that the Court fix the earliest possible return date for this proceeding (with due regard for the need of the Town to prepare a certified record of the proceedings under review, i.e., a Return), and that the Court grant a special preference in the adjudication of this matter

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pursuant to Town Law §274-b(11).

10. No prior application has been made for the relief sought herein.

Dated: Garden City, New York
August 22, 2006

ROBERT M. CALICA

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BW007493

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL,DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs

- against -

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants

- and -

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant
(CPLR 1001[a])

Index No. 06-

AFFIDAVIT OF COUNCILMEMBER CAROL BISSONETTE

Justice Assigned:
Hon.

----------X

STATE OF NEW YORK)
)ss:
COUNTY OF SUFFOLK)

CAROL BISSONETTE, being first duly sworn, deposes and states under the penalties of perjury that:

1. I am a Councilmember of the Town Board of the Town of Brookhaven, elected to represent the Sixth Council District in the Town of Brookhaven which includes Shirley, Mastic,

Mastic Beach, Moriches, Center Moriches, East Moriches, Eastport to the Southampton Town Line, Manorville, Uptonville, Greater Peconic, as well as portions of Brookhaven Hamlet, Ridge, East Yaphank and Calverton.

2. I submit this affidavit in order to set forth certain matters which occurred at the time that the Town Board of the Town of Brookhaven ("Town Board") on July 25, 2006 voted to approve a proposed 350 megawatt electrical generating plant, to be constructed by Caithness Long Island, LLC ("Caithness") on an approximately 96 acre plot of land located in Yaphank, New York (the "Caithness Project").

3. Specifically, on July 25, 2006, by a vote of 5-to-2, the Town Board approved a special permit required by the Brookhaven Town Code for maintaining an electric generation facility in the L 1 Industrial District where the facility is to be constructed, agreed to substantial variances and waivers from applicable zoning requirements, and adopted a Finding Statement under the State Environmental Quality Review Act ("SEQRA"). The SEQRA Findings Statement approved and accepted a prior final environmental impact statement ("FEIS") for the power plant project previously prepared by Long Island Power Authority ("LIPA"), acting as "lead agency" under SEQRA.

A. The Town Board's First Vote, Denying the Application and Denying SEQRA Certification

4. Following a period of public hearings, the Caithness Project was initially voted upon by the Town Board at a meeting of June 6, 2006. Presented for vote of the Town Board on that date was whether to approve SEQRA Findings and a certification under SEQRA that the environmental statute had been complied with, and whether to approve the special permit application, which additionally necessitated several substantial waivers and variances. By a vote

of 4-to-3 the Town Board voted against accepting a proposed SEQRA Findings Statement which was to certify that the project complies with SEQRA and its environmental concerns. Because SEQRA approval was denied, the Town Board could not move forward with the permit application, which was therefore effectively denied as well.

B. The lack of further noticed public hearings, and the lack of any changes to the project itself or to its environmental impacts after the no-vote and prior to the July 25, 2006 Town Board Hearing

5. After June 6, 2006 and before July 25, 2006, there were no Town Board hearings at which the Caithness Project was on the agenda, either for consideration or hearing (although citizens were free to and did discuss whatever relevant issues they wished during the intervening Town Board meetings, including the Caithness Project). Moreover, the project itself and its environmental and other impacts on the surrounding communities remained the same since June 6, 2006. Under these circumstances, I am advised it was improper under SEQRA, the Town Law, and the Brookhaven Town Code for the same project to be subjected to a second vote by the Town Board.

C. The failure to comply with Town Board Rules of Procedure

6. Additionally, several of the Town Board's duly adopted Rules of Procedure (Appendix hereto), adopted pursuant to Town Law § 63, prevented the lawful re-submission of the already disapproved Caithness Project before the Town Board.

7. First, Rule of Procedure § 3(A)(2) provides that:

> A motion for reconsideration of a Resolution, Local Law, or Ordinance shall not be in order unless made on the same day of the legislative session or the next succeeding session on which the action proposed to be reconsidered took place....

There was no such motion for reconsideration made either on the day of the June 6, 2006

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meeting at which the project was voted down, or on the next regularly scheduled legislative session.

8. Moreover, Rule of Procedure § 3(A)(5) provides that:

> A Resolution, Local Law or Ordinance that receives less than a majority of votes shall not be reintroduced for ninety days (90) or unless this rule is waived by a super majority vote of the Town Board (emphasis supplied).

Because the Rules of Procedure further require that all non-emergency or "special" matters proposed to be put for vote[1] must be placed on the Agenda in advance of the Town Board meeting (see §§ 5F; 5C; and 6B), I interpret this rule (§ 3(A)(5)) as necessarily meaning that the vote to waive the 90 day delay period cannot be made at the same Town Board meeting at which the resolution is reintroduced. Here, in apparent violation of § 3(A)(5) the Town Board voted to waive the 90 day delay period on July 25, 2006, the same day that it voted in reconsideration of the projected.

9. Additionally, I believe the Town Board violated § 5(F) of the Rules of Procedure in that I and (as far as I am aware) the other Town Board members did not receive a copy of the resolution agenda and packet for the July 25, 2006 Town Board meeting regarding the Caithness project until after that Town Board meeting had commenced.

10. Section 5(F) provides:

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[1]Section 6(C) provides that the Supervisor is allowed to add any "special or emergency" matter to the agenda after the meeting has commenced. The project here, by no means qualified as a special or emergency matter, and to the best of my knowledge, was never purported to be.

The Supervisor's office shall place a copy of the resolution agenda and packet for each Town Board meeting upon the desks of the Councilpersons and Town Clerk no later than the close of business the day before the Work Session preceding each regular meeting (emphasis supplied).

D. The inclusion of unlawful and unauthorized provisions in the Resolutions of July 25, 2006

11. With section 5(F) having apparently been violated, and as I had not been provided in advance with a copy of the resolution agenda specifying the proposed resolution regarding the Caithness Project, when that proposed Resolution was finally first provided to me during the July 25, 2006 meeting, it was then that I first discovered that a new proposal had been added, indicating, among other things, that 15% of certain PILOT payments would be set aside for a special open space environmental fund. I do not consider that provision to be lawful, especially when I do not know of any law which authorizes a Town Board to create such a fund in this context, and the creation of such of fund would, in my view, first require a public referendum, which as far as I know has never occurred.

12. As an elected public official with information concerning the apparent failure of the Town Board to comply with the applicable laws, I have made contact with the attorneys for the petitioners-plaintiffs and agreed to provide this affidavit in order to supply relevant factual material in connection with their challenge to the Town Board's approvals.

_____
CAROL BISSONETTE

Sworn to before me this
__ day of August, 2006

_____
NOTARY PUBLIC

BW007498

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC., and the SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs

- against -

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants

- and -

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant (CPLR 1001[a])

Index No. 06-

Justice Assigned: Hon.

----------X

MEMORANDUM OF LAW IN SUPPORT OF COMBINED ARTICLE 78 PETITION AND COMPLAINT

Preliminary Statement

This combined Article 78 proceeding and action for declaratory, injunctive and related relief seeks to review, invalidate, declare unlawful, and enjoin implementation of certain resolutions of, and actions taken by respondent-defendant, the Town Board of the Town of Brookhaven ("Town Board") on July 25, 2006. The first challenged resolution and action approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-

defendant Caithness Long Island, LLC ("Caithness") on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (the "Caithness Project") by granting a special permit required by applicable provisions of the Brookhaven Town Code and substantial variances and waivers from established zoning requirements ("Resolution I"). The second resolution, rendered under the State Environmental Quality Review Act ("SEQRA"), ECL 8-101 et. seq., adopted a Finding Statement under SEQRA, and approved and accepted a prior final environmental impact statement ("FEIS") for the Caithness Project previously promulgated and adopted by additional respondent-defendant, Long Island Power Authority ("LIPA"), acting as "lead agency" under SEQRA, for the purpose of approving a proposed Power Purchase Agreement ("PPA") between LIPA and Caithness ("Resolution II").

Petitioner East End Property Company #1 LLC ("East End") is the owner of a large residential rental complex comprising 795 units on 117 acres and occupied by over 2000 persons located at 1220 Orchid Circle, Bellport, New York known as "*Atlantic Point*", recently constructed and completed (in 2003) and situated less than one-half mile from the Caithness Project . The remaining petitioners-plaintiffs (described more fully in the combined petition and complaint) are directly interested and affected persons and Civic Associations, including current residents of Atlantic Point, other nearby residents, and Civic Associations comprised of residents of the affected and nearby community.

Resolution I is challenged as unlawful and arbitrary and capricious because, inter alia, the Town Board, after initially voting 4-3 on June 6, 2006 to reject the Caithness Project, then wholly abdicated its legal responsibility and failed to apply statutory standards in granting far-ranging variances and a special permit required under Sections 85-3.12, 85-3.13, 85-3.15 and

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other sections of the Code. Specifically, after accepting a $151 million payment from LIPA and the applicant ("Caithness") as an express "*condition*", the Town (following an earlier rejection of the same project on June 6, 2006) resolved on July 25, 2006 to approve an electrical generating project which entails a 170 foot high exhaust stack (more than 50 feet over permitted height), a building reaching heights of 80 feet (in excess of the permitted limitation of 50 feet), and an electrical generating station which will occupy an approximately 15 acre "footprint" on a 96 acre parcel in an "L 1" "light industrial" zone where such uses are not permitted except by "special permit", and only upon a specific finding that "*the use will not prevent the orderly and reasonable use of adjacent properties or of properties in the surrounding area or impair the value thereof*" (Brookhaven Code, Section 85-31.2[B][2] and other sections). In this case, neither LIPA, nor the Town ever commissioned or considered any study of the financial impact of a large scale electrical facility in this sensitive area, relying instead solely upon a study of a potential location 30 miles distant in Melville.

Resolution II (as well as Resolution I), are additionally challenged for lack of compliance with both the procedures and substantive requirements of SEQRA when the Town Board reportedly rejected the recommendation of its own Planning Department staff, and instead blindly followed the defective and self-serving FEIS and SEQRA Findings made by LIPA when LIPA decided to declare itself the "lead agency" under SEQRA and (unsurprisingly), to approve its own project.

In accepting and adopting the LIPA-prepared FEIS as the Town Board's purported compliance with SEQRA, the Town approved a grossly defective FEIS which essentially ignored the existence of the nearby (approximately one-half mile) residential community of over 795

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units (occupied by over 2000 persons), relied on stale maps (created from a period before the Atlantic Point community was even in existence), and expressly refused to consider the significant environmental impact of the fact that the project necessarily entails (indeed requires) the construction of a gas pipeline extension of nearly 22 miles (from Commack, New York to Yaphank, New York), thereby unlawfully "segmenting" the SEQRA process. Worse still, if the "assumed" availability of a source of natural gas fuel for the proposed project does not actually materialize, the planned gas fueled power plant with oil as a "back-up" fuel source (estimated for 30 days of oil fuel use per year) will instead become solely an oil fueled plant, producing significant adverse environmental impacts which have not been considered in the FEIS or in Resolution I or Resolution II[1].

When special permit, waiver and variance applications came before the Town Board, as the agency best positioned and indeed obligated to evaluate the effects of placing a large electric generation station along with a non-conforming 170 foot high exhaust stack so close to a dense residential community, the Town Board merely hid behind LIPA's self-serving findings and approved the permit with waivers and variances. The Town Board's SEQRA findings, and special permit, waiver and variance approvals must be annulled.

Because the Town Board, in Resolution II, adopted LIPA's grossly defective SEQRA procedures and the LIPA-prepared FEIS as its own, Resolution II is unlawful and should be

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[1]See, for example, August 10, 2006 letter of the United States Environmental Protection Agency to the Federal Energy Regulatory Commission, noting that "***the environmental impacts of the [Iroquois] pipeline and the Caithness Project ... are inextricably linked***", exhibit I to petition.

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declared invalid for those additional reasons[2].

For additional reasons more fully detailed below and in the accompanying petition and complaint, Resolution I and Resolution II should be annulled, declared invalid, their enforcement permanently enjoined and restrained, and the Court should grant such declaratory relief pursuant to CPLR 3001 as may be required in order to fully adjudicate this matter.

Background and Overview

Atlantic Point has a current population of approximately 2,000 persons and is considered one of the premier rental complexes on Long Island, possibly the largest such development in the two-county area in terms of numbers of units and population (Petition, paras 7, 22-24). The owners and residents of Atlantic Point strongly opposed the application both before the Town Board and before the Long Island Power Authority ("LIPA"), which earlier declared itself to be the lead agency under SEQRA for purposes of its entry into contractual agreements with Caithness. LIPA prepared Draft and Final Environmental Impact Statements ("DEIS" and "FEIS"), and issued a Findings Statement which these petitioners have separately challenged in a pending action in the Nassau County Action (exhibit F).

Thereafter, relying principally upon LIPA's defective findings and reportedly rejecting its own Planning Department's findings, the Town Board of the Town of Brookhaven on July 25, 2006 issued a series of Resolutions approving the electric generating station proposed by Caithness, on condition that Caithness and LIPA agree to pay the Town and other districts over

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[2]A separate challenge by East End and certain of the other petitioners herein to the LIPA-prepared FEIS and to LIPA's SEQRA and other approvals of the Caithness Project is the subject of a presently pending proceeding and action by East End and others against LIPA and Caithness pending in the Supreme Court, Nassau County under Index No. 06-001410 (Hon. R. Bruce Cozzens, Jr., J) [the "Nassau County Action"].

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$151 million dollars (exhibits A and B). These approvals include a SEQRA Findings Statement certifying that the Caithness Project complies with all of SEQRA's mandates, approval of a special permit to allow the electric generating station in Light Industrial 1 District (as apposed to the L Industrial 4 District where such stations are otherwise zoned), and the issuance of four waivers/variances allowing a substantially larger facility than zoning in the district permits.

The Town Board's approvals were defective for the same reasons the LIPA's determinations were defective. Moreover, in rendering its determination to approve the Caithness application, the Town Board completely and illegally abdicated its responsibility under SEQRA, the Town Law, and the Brookhaven Town Code. Both LIPA and the Town Board expressly refused to consider the impacts which the Caithness Project would entail in having to connect to a natural gas pipeline over twenty miles away. In doing so, both the bodies impermissibly "segmented" the environmental review, in direct violation of SEQRA. The Town Board's failure to consider the over twenty mile long gas pipeline extension also violated its obligations under the statutes governing special use exceptions and variances.

Additionally, relying almost exclusively upon the earlier LIPA-promulgated SEQRA determination, and rejecting the recommendations of its own staff at the Town Department of Planning, the Town Board failed to consider the impact which the project would have on nearby residents, including the petitioners.

Moreover, the Town Board initially voted against approving the special permit, and only mustered sufficient votes to approve it after negotiating with LIPA and Caithness over essentially a large "payoff" in the form of a $151 million dollar "Community Benefits Package", evincing illegal "contract zoning", a violation of the Open Meetings Law, and a further violation of

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SEQRA. Indeed, the Town Board had no legal authority under SEQRA to hold a re-vote after it expressly determined on June 6, 2006 that the project does not comply with SEQRA. Nether did the Town Board have authority to hold a re-vote concerning the special permit, when it was acting in a quasi-judicial capacity and was prohibited from reversing itself absent a meaningful change in circumstances in the project, and absent a unanimous vote of the Town Board. Additionally, in holding the re-vote, the Town Board violated its own Rules of Procedure in a number of important respects and thereby ensured that no meaningful deliberation of the re-vote could take place. Further rendering the approvals illegal, at the urging and behest of Caithness and LIPA, the Town Board expressly "condition[ed]" its SEQRA and special permit approvals upon an illegal tax in the form of an illegal "payment in lieu of taxes."

Statement of Facts

A. LIPA'S SEQRA Proceedings

1. LIPA as Lead Agency

It is highly questionable whether LIPA should properly have assumed the role of lead agency altogether in connection with its prior action of entering into contractual agreements with Caithness. LIPA has an undisclosed financial interest in the transaction and cannot act as an impartial judge of environmental issues within the contemplation of SEQRA. LIPA announced that it had selected Caithness to build the power plant in this location and had taken formal action to select the Iroquois Pipeline extension as the source of fuel, even before completing the SEQRA proceeding (see exhibits A, C and D), thereby shattering any illusion that the SEQRA proceeding would be designed objectively to evaluate conflicting information and arrive at a fair judgment in the public interest. The extent of LIPA's financial interest can only be gleaned from

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such minimal information as LIPA has seen fit to make public.

What is known, given that it is expressly reflected in the Town Board's "Findings of Fact," is that LIPA has agreed to make PILOT (Payments in Lieu of Taxes) payments to the Town and its component taxing districts (exhibits A and B), a surprising arrangement considering that LIPA is not proposed to be the owner of the plant and Caithness, a private entity subject to taxes, will be the owner. Indeed, Caithness must necessarily be the owner of the plant if it wishes, as it has represented, to make application for Empire State Development Zone credits, since such credits are not payable to a public authority such as LIPA. Since PILOTS are routinely the obligation of the property owner rather than some third party, there must be features of the PPA that will compensate LIPA for its agreement to pay PILOTS – provisions that have never been made known to the public.

2. The Public Outreach Process at the LIPA Stage

Numerous pamphlets, letters and other documents were prepared by LIPA, presumably with the aid of Caithness, to inform the relevant community of plans for the site. Such public outreach was required by law under the now-expired Article X Process and is required in the public interest now that applications for electric generating plants have reverted to the jurisdiction of the local authorities. Once a lead agency decides to engage in scoping, it:

> "must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means." 6 N.Y.C.R.R 617.8(e).

Although LIPA purported to conduct outreach by means of meetings with the public and community groups, it virtually ignored Atlantic Point, despite Atlantic Point's status as the

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largest, most densely populated residential community within a half to three quarters of a mile of the project (Petition, ¶3). To judge by this abortive public outreach exercise, one would never know that Atlantic Point consisting of 117 acres and home to over 2,000 residents so much as even existed in the area.

3. The DEIS and FEIS

LIPA prepared the DEIS and FEIS in an attempt purportedly to comply with SEQRA requirements for Type I actions. The SEQRA regulations contained at 6 N.Y.C.R.R. §§ 617.7(b)(3) and (4) require LIPA to:

> [T]horoughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment ... set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

On November 18, 2004, LIPA issued its determination of significance, a Positive Declaration, determining that the project has the potential to result in one or more significant adverse environmental impacts.

Significantly, LIPA's determination of significance did not include any finding that it believed that circumstances warranted a "segmented" review of the siting, construction and operation of the Caithness generating plant and the natural gas fuel delivery system to be utilized to fuel the project. Thus, segmented review was not permitted for this application, although it impermissibly occurred (see Point II below).

A Draft Scope of Work was released on December 8, 2004, and a Final Scope of Work was issued on January 26, 2005. The Final Scope of Work represented that the DEIS would present a qualitative analysis of the impact on the project to land use, zoning, traffic, flora, fauna,

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public policy, socioeconomic resources and environmental justice, cultural issues and air and water quality.

The January 26, 2005 Final Scope of Work also stated that three natural gas pipeline alternative proposals to fuel the project were under consideration.

However, on January 26, 2005, the same date that the Final Scope of Work for the DEIS for the project was issued, LIPA also adopted a resolution authorizing its Chairman or his designee to enter into an agreement with Iroquois Gas Transmission System, L.P. ("Iroquois") to undertake the permitting and approval phase for a 21.6 mile natural gas pipeline to extend the Iroquois Pipeline from its current termination point in South Commack to the Caithness site in South Yaphank to provide the fuel delivery system for the project.

According to the minutes of January 26, 2005 meeting, LIPA concluded that the Iroquois Pipeline would be the best choice for serving the natural gas fuel requirements of the project. The total cost of the construction of the Iroquois Pipeline was estimated to be $61.9 million, with the cost of the permitting, to which LIPA committed, estimated at $3.1 million.

The January 26, 2005 meeting minutes further noted that LIPA had assumed responsibility for securing the fuel supply and its transportation to the Caithness project. Without a method of natural gas delivery the project would, of necessity, operate only on fuel oil or not at all. Fuel oil would be stored on site in a 750,000 gallon above-ground tank.

On or about March 24, 2005 LIPA accepted for public review and comment the DEIS for the project.

Among other significant inadequacies, the DEIS failed to contain any detailed environmental quality analysis of the alternatives or method of natural gas delivery for the project

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and did not disclose that the extension of the Iroquois Pipeline had already been selected by LIPA to fuel the project. The DEIS represented that besides the 21.6 mile extension of the Iroquois Pipeline, there were two other "potential" modes of gas delivery. The DEIS did disclose that KeySpan Energy Delivery Corp.'s existing natural gas local distribution network, which already runs within 4,000 feet north of the project site, could be extended and adapted to provide natural gas for the project.

Upon information and belief, the improvements to KeySpan's natural gas pipeline could be accomplished for a fraction of the estimated $61.9 million cost of the Iroquois Pipeline extension, with no adverse impact upon the environment (exhibit F).

On or about April 20, 2005, LIPA held a public hearing on the DEIS at which numerous speakers, including Town of Brookhaven representatives, identified the inadequacies and incompleteness of the DEIS, and its failure to provide appropriate description and evaluation of the project or an analysis of its environmental impacts.

On or about June, 2005 LIPA issued a FEIS which contained the same defects as the DEIS (exhibit C).

On or about December, 2005, LIPA issued a Findings Statement (exhibit D) purporting to conclude that the action is one which complies with SEQRA and that the action avoids or minimizes adverse environmental impacts to the maximum extent possible.

Pursuant to a January 31, 2006 Power Purchase Agreement ("PPA"), LIPA agreed to supply the natural gas to the Project, has agreed to be responsible for all real property tax obligations and other tax obligations of the Project and has agreed to purchase the electricity generated from the Project at a price that LIPA, a New York Public Authority, has refused to

disclose.

LIPA's actions are the subject of a currently pending Nassau County Supreme Court proceeding brought by essentially the same petitioners as herein in an action entitled East End Property Company #1, LLC, *et al* v. Richard M. Kessel as Chairman of the Board of Trustees of the Long Island Power Authority, *et al.*, Sup. Ct., Nassau County Index No. 06-001410 (Cozzens, J.). [See exhibits F, G and I].

B. The Town Board's approval of a Special Permit and four waivers/variances

The Town of Brookhaven was an "involved agency" with respect to LIPA's SEQRA determinations, and its staff had submitted to LIPA numerous objections to the DEIS.

The Planning Department of the Town of Brookhaven rendered one or more reports to the Town Board with respect to its environmental analysis of the Project in which, upon information and belief, the Planning Department expressed serious concerns about the Project, some of which, in the opinion of the Planning Department, reportedly demonstrated that the Project should not be approved (Petition, 3)

On information and belief, the Planning Department found that the Project could not comply with the standards contained in Sections 85-31.1, 85-31.2, 85-31.3 and 85-309 of the Brookhaven Town Code, because, among other things, the Project would be severely detrimental to property values; would change the character of the neighborhood and would disproportionately and adversely impact the Medford community which has already adversely impacted by a number of undesirable uses such as a car crushing plant, a landfill and other undesirable uses; and that despite Caithness having promoted the Project on the basis that $150,000,000 in community development benefits would be afforded to the Project by virtue of its location in an

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economic development zone, the Project would not qualify for such benefits and, in any event, it was impermissible under the Brookhaven Code to take unrelated community benefits into account in considering an application for a special use permit or height waivers/variances[3].

As further elaborated in the petition, the Town Board initially on June 6, 2006 voted against approving the Project, when it voted down a Resolution certify that the Project complied with SEQRA. The special permit and waivers/variances were thus effectively denied as well. It was only following payment negotiations with LIPA and Caithness concerning a $151 million dollar "Community Benefits Package" that sufficient Town Board members voted to approve the special permit, with waivers/variances on July 25, 2006.

With no basis in the evidence before it, granted the application by a series of resolutions adopted on July 25, 2006, copies of which are attached as Exhibits A and B, including a Findings, Conclusions, and Decision Statement ("Findings Statement").

(1) The failure to consider the existence of the nearby large residential community

Incredibly, the LIPA promulgated FEIS and the Town Board's Findings Statement essentially ignored the fact that there was a 2,000+ person, 795 home community, Atlantic Point, about one-half mile away from the proposed project site (exhibit C). Even in connection with its statutory obligations related to special permit and variance approvals, the Town Board failed to analyze the effect the project would have upon the nearby residents. Neither did the Town Board

[3]Petitioners-plaintiffs respectfully refer to, and incorporate the contents of the certified transcript of the record of the proceedings under consideration (the "Return") to be filed by the Town Board pursuant to CPLR 7804(e), the content of which is respectfully incorporated herein by reference. Petitioners-plaintiffs specifically reserve the right, and request leave of the Court to supplement and amend the allegations herein when a full copy of the Return is furnished by the Town.

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consider other statutorily mandated factors (exhibits A and B).

Both for purposes of SEQRA and compliance with the special permit and variance provisions of the Town Code and Town Law, the LIPA promulgated FEIS, relied upon by the Town, contain no analysis of the effect on property values and, in particular, upon the value and rentability of Atlantic Point's 795 residential units (exhibit C).

In fact, both LIPA's DEIS and FEIS failed to provide even a qualitative evaluation of the project on the residents of Atlantic Point, virtually ignoring the fact that Atlantic Point is home to over 2,000 residents. The DEIS and FEIS failed to evaluate in any way the impact of the project on the property values of a residential rental development such as Atlantic Point or any of the property within the vicinity of the project. The only property value study included in the DEIS was a study prepared for the proposed KeySpan plant on the distant Bethpage Spagnoli Road in the Town of Huntington, New York (some 30 miles distant), an alternative project which was fully approved by the New York State Siting Board but which was rejected by LIPA, which report was specifically limited to a study of single family homes and commercial office buildings.

LIPA also misrepresented the conditions in the area by not only failing to mention or describe Atlantic Point in any meaningful way, but also by relying solely on aged census data from 2000 and aerial maps from 2001, i.e., before the development of Atlantic Point, rather than actually viewing the community or neighborhood to find that Atlantic Point was fully developed at the time the Scope and DEIS were prepared.

The DEIS and FEIS contain maps and aerial photographs of the area affected by the project. Atlantic Point was developed and occupied before the SEQRA process for this project

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began, but photographs and census data from the years 2000 and 2001 predate the development of Atlantic Point and render the DEIS and FEIS useless and misleading. Further, the FEIS expressly and falsely states that there are only six residences one-half mile from the Project and only a small portion of the Project site's one mile radius overlaps another residential development.

(2) The failure to consider the impacts of the over twenty mile extension of the natural gas pipeline

In direct violation of SEQRA, which mandates that no action may be taken prior to the issuance of either a negative declaration or the issuance of a Final EIS (6 NYCRR Part 617.3(a)), LIPA attempted to avoid and insulate its environmental determinations by ignoring the fact that in 2005, prior to its issuance of a FEIS, it entered into agreements to pay for the 21.6 mile extension of the Iroquois Pipeline to connect it to the proposed Caithness facility (see Elkowitz Affidavit). Moreover, in its Final Environmental Impact Statement, LIPA expressly refused and declined to analyze the effects and concerns of the lengthy gas pipeline extension and simply purported to rely on the fact that environmental review of the effects of the extension will be conducted in the future by a different agency (id.). This obviously violated SEQRA and its prohibition against segmented environmental review (6 NYCRR § 617.3(g)). For its part, the Town Board simply and erroneously ignored the fact that it retains ultimate authority over whether to grant the special permit and that it is obligated under SEQRA and laws applicable to special permits to consider the effect which the over twenty-mile gas pipeline will have. Instead, the Town Board merely relied upon LIPA's deferral of consideration of the impacts of the pipeline extension.

Specifically, before the FEIS was adopted in December 2005 (exhibit C), LIPA adopted a

resolution in January 2005 and entered into an agreement with the owner of the Iroquois Pipeline the June 15, 2005 (the "Iroquois Agreement"), whereby LIPA specifically agreed to provide funds for the Iroquois Pipeline Extension for purposes of providing natural gas to fuel the Project.[4] Pursuant to its resolution of January 26, 2005, LIPA clearly identified the Iroquois Pipeline Extension as its preferred source of natural gas to the Caithness project, as apposed to two other available methods of natural gas delivery, including use of the KeySpan gas lateral.[5]

The rationalization offered by LIPA (and inferential by the Town Board when it adopted LIPA's findings without further analysis) that review by the Federal Energy Regulatory Commission's ("FERC") of the Iroquois Pipeline Extension preempts the need for SEQRA appropriate review of the Iroquois Pipeline Extension, completely overlooks that environmental review is not limited to whether the Iroquois Pipeline Extension will meet federal standards, but should include whether alternatives to the Pipeline Extension should be pursued, and whether LIPA could enter into agreements for such extension. Indeed, at the January 26, 2005 LIPA Board Meeting, the minutes reflect that Chairman Kessel stated that "LIPA staff has concluded that this gas lateral is the best choice for serving the gas requirements of a new baseload power plant in Suffolk County."[6].

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[4]A copy of the Iroquois Agreement is contained in the record of the Nassau County Action attacking LIPA's SEQRA determination at Exhibit C to the White Reply.

[5]A copy of the January 26, 2005 resolution is contained in the record of the Nassau County Action attacking LIPA's SEQRA determination at Exhibit 7 to the January 25, 2006 White Affirmation.

[6]A copy of the January 26, 2005 LIPA Board Meeting minutes is also contained in the record of the pending litigation attacking LIPA's SEQRA determination at the referenced Exhibit 7 to the White Affirmation. Moreover, in an affidavit submitted by LIPA in that litigation, the affidavit of Edward J. Grilli (at ¶22), it is asserted that the use of the KeySpan gas lateral, or other alternatives, is "less economical to LIPA customer."

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(3) The Town Board's unlawful agreement to approve the special permit and waivers based upon a "Community Benefits Package"

The Town Board also engaged in improper and unlawful negotiations with LIPA and Caithness whereby it procured an over $150 million dollar "payoff" from Caithness and LIPA in exchange for its SEQRA approval, in violation of both SEQRA and the Open Meetings Law. In fact, the Town Board expressly relied upon the $151 million dollar "Community Benefits Package" in issuing findings that the project supposedly does not violate SEQRA and expressly conditioning its approvals upon such payments (exhibits A and B).

Moreover, as shown in the petition, upon information and belief, after the Town's professional planners and staff reportedly recommended against the granting of approvals, the application was rejected by a majority of the then-newly elected Town Board on June 6, 2006. It was only after the behind-the-scenes and off-record negotiations resulting in the $151 million dollar payoff that town Board members changed their votes to approve the application.

Additionally, it was impermissible under the Brookhaven Code to take unrelated community benefits into account in considering an application for a special use permit or height waivers/variances (see, Point IV below).

(4) The failure to consider alternative siting of the electric generation station

Moreover, the Town Board failed to consider the fact that the electric generating station could just as easily be relocated to another portion of a 96-acre parcel Caithness claims to "control," so as to lessen its adverse impacts. Caithness insisted upon constructing the project in a portion of the Town's Empire Development Zone, claiming that financial benefits will flow to the community as a result. However, as even the Town's professional staff reportedly concluded

(and as ignored by the Town Board) the property does not and will not qualify for Empire Development Zone benefits ("Zone Benefits").

(5) The failure to consider the negative impact upon the Empire Development Zone

According to the FEIS, the Project is being constructed in the Town of Brookhaven's Empire Development Zone, a program designed to attract economic development to the area in which the Project is located. Atlantic Point is located adjacent to the Empire Development Zone. Numerous buildings are now being constructed in the area. Neither the EIS nor the Town Board's Factual Findings provides any analysis as to the cumulative impacts of all of the present and future land uses, particularly with respect to the Atlantic Point community.

(6) The failure to consider the harm to investment backed expectations of surrounding residents and developments

Finally, development of this project is contrary to the assumptions upon which the Town approved the construction of the Atlantic Point development, and inconsistent with the investment-backed expectations of its present owners.

Atlantic Point was approved by the Town of Brookhahven for major use changes to enable the construction, occurring between 2001 and 2003, of 795 residential dwelling units on 117 acres of land. All available information indicates a clear intent on the part of the Town to develop, improve and preserve the relevant area (which had markedly deteriorated over time) as a high-level residential mixed-use community, with nearby light industrial development in an attractive, campus form of development. The improvement of what was previously a blighted area to what is now universally considered a high level, attractive, residential community was clearly a high priority to the Town Board members, as well as to the then owner of what later

became known as Atlantic Point (Petition, exhibit F). There can be no question that the investment-based expectations of Atlantic Point's former and present owners were based upon that premise (id.). Indeed, the present owner acquired it in two phases, on December 18, 2003 and June 29, 2004, both dates predating this proposal (id.).

Construction of the Caithness facility with a 170-foot exhaust stack spewing exhaust gases (no matter how comparatively favorable if compared to a hypothetical stack discharging exhaust gases from the combustion of oil or coal) adds to, and does not subtract from, any existing air contamination in the area. Thus, visibly and by means of the worsening of the present air content, this proposed plant will effect a deterioration of the atmosphere in the surrounding community, particularly to the east, considering the area's prevailing westerly winds. That result must be seen as completely inconsistent with the intent of the Town Board in granting the zoning approvals for the construction of Atlantic Point, and is certainly flatly inconsistent with the reasonable expectations of the present and future tenants of Atlantic Point.

Summary of Legal Arguments

As shown in Point I, below (which incorporates the claims made in the pending Nassau County Action challenging LIPA's determinations), LIPA's determinations violate SEQRA, Public Authorities Law §1020-ff(aa) and State Finance Law §123-b. Accordingly, the Town Board's approvals premised thereon must be annulled.

In Points II and III below, we demonstrate that the Town Board's failures to conduct the necessary inquiry, and failure to give necessary effect to major environmental and non-environmental factors mandates, as a matter of law, that its determinations be annulled under SEQRA, the Town Law, and the Brookhaven Town Code. Specifically, and as already shown

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above, the Town Board:

(a) Failed and refused to consider the over 21 mile gas pipeline extension;

(b) Failed to consider the existence of an over 2000 person residential complex of 795 units located within about one half mile from the proposed location of the oversized electric generation station;

(c) Failed to consider economic impacts of the facility upon the surrounding properties, property owners, and future growth. Indeed, the Town Board commissioned no economic impact analysis of this area whatsoever;

(d) Failed to consider alternatives to the location;

(e) Unlawfully changed its vote based upon the Community Benefits Package

(f) Failed to require a Supplemental EIS after discovery by the Town Director of Environmental Protection and Land Management, and our expert, of the existence of a rare Pine Barrens ecosystem called the Pitch-Pine-Oak-Heath-Woodland at the Caithness project site

Accordingly, as shown in Point II below, the Town Board violated its obligations as an "involved agency" under SEQRA, which mandates that the involved agency look at all of the relevant impacts, and itself ensure and certify that SEQRA has been complied with. Moreover, just like LIPA before it, the Town Board engaged in wrongful "segmentation" of environmental review concerning the pipeline. Additionally, the Town Board or LIPA should have prepared a Supplemental EIS following discovery of the Pine Barrens ecosystem at the project site

In Point III we demonstrate that the Town Board similarly violated the Town Law and the Brookhaven Code in relation to its issuance of a special permit, along with extensive waivers and

variances. Specifically:

(1) The Town Board's finding of hardship under Brookhaven Code 85-31.2(B)(4) is unsupported by <u>any</u> evidence, and the only rationale the Board cited was that absent waivers of the height requirements, the project could not proceed;

(2) Under Brookhaven Code § 85-31.2(B)(4), the Town Board had no authority to grant a hardship waiver or variance concerning the stack height "[s]pecial permit criteria" found in § 85-315. The hardship waiver and variance provisions of § 85-31.2(B)(4) apply only to ordinary "zoning district classification" criteria, <u>not</u> to the "[s]pecial permit criteria"; and

(3) Most pointedly, the multiple failures to consider critically pertinent impacts and failure to consider mandated factors violated the Town Law and the Brookhaven Town Code. LIPA's analysis of economic and other impacts upon the surrounding community and residents was woefully deficient, even under a SEQRA analysis; it could not satisfy the even more demanding requirements for such analysis under the special permit, waiver and variance statutes.

In Point IV we demonstrate that the proceedings before the Town Board, with payments by the applicant and LIPA to the Town and localities in an overt attempt to "buy" SEQRA and zoning approvals, with an improperly noticed "re-vote", with off-record negotiations occurring, and with the Town Board violating its own Rules of Procedure, all require, as a matter of law, that the special permit and SEQRA approvals be annulled. As shown therein:

(1) There was a complete lack of authority to hold a re-vote concerning SEQRA certification;

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(2) There was a complete lack of authority to hold a re-vote concerning the special permit, waivers, and variances;

(3) The Town Board violated the Open Meetings Law and rules against taking evidence after the close of the hearing; and

(4) The July 25th re-vote was the result of multiple violations of the Town Board's Rules of Procedure including (a) the failure to comply with the "super-majority" requirement; (b) the failure to Agenda the re-vote for July 25th; and (c) the failure to provide to Councilmember with a copy of the resolutions and packet in advance of the Town Board meeting

(5) The Community Benefits Package was improperly imposed as a condition of the SEQRA and permit approvals. The payments constituted both illegal "contract zoning" and unlawful special permit and SEQRA "conditions" when the payments were not related to the land, and were almost entirely not aimed at ameliorating environmental or other impacts of the project; and

(6) The Community Benefits Package was at its root unauthorized and unlawful, when there is no authority for a Town board to accept and condition zoning and SEQRA approvals upon "payments in lieu of taxes;" the Town Board was essentially levying a tax without statutory authority; and the designation of a 15% portion of the "tax" payments for a supposed special environmental fund is both without authority and apparently required a public referendum. The Town Board had no legal authority to condition its approvals on the Community Benefits Package "tax," no legal authority to accept a payment in lieu of such unauthorized tax, and no legal authority to unilaterally and

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without public referendum create an open space special fund into which such "taxes" would be partially diverted. Its creation of such tax and special fund violated the Town Law, the Brookhaven Town Code, Tax Law § 1441, other laws, and was ultra vires.

POINT I

LIPA'S DETERMINATIONS VIOLATE SEQRA, PUBLIC AUTHORITIES LAW §1020-FF (AA) AND STATE FINANCE LAW §123-B, AND THE TOWN BOARD'S APPROVALS PREMISED THEREON MUST ACCORDINGLY BE ANNULLED

In the Nassau County Action, Petitioners-Plaintiffs have challenged the adequacy, openness and fairness of the SEQRA proceedings conducted by LIPA in a number of material respects, as more particularly set forth in the Amended Verified Petition-Complaint dated March 20, 2006, a true copy of which is provided as exhibit F, and the allegations of which are incorporated into the Petition herein.

As further and exhaustively set forth in the memorandum of law submitted in support of the Nassau County Action (exhibit G), the environmental review process as conducted by LIPA was procedurally improper from the outset and throughout in contravention of the requirement that SEQRA, Public Authorities Law §1020-ff (aa), and State Finance Law §123-b.

Because the Town Board failed to conduct independent SEQRA proceedings of its own, but relied entirely upon LIPA's SEQRA findings and proceedings, the Town Board approvals must be annulled for the same reasons that LIPA's determinations must be annulled. Indeed, in reviewing actions taken by "involved agencies" under SEQRA, such as the Town Board here, courts consider whether the lead agency (here LIPA) satisfied its obligations under the environmental review statute. See Gordon v. Rush, 100 N.Y.2d 236, 244-245, 762 N.Y.S.2d 18

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(2003) (in proceeding challenging determinations of involved agency, after the Court concluded that involved agency was bound by the lead agency's negative declaration, it proceeded to analyze whether the lead agency had taken the necessary "hard look" and otherwise complied with SEQRA). Thus, for the same reasons set forth in the Nassau County Action, the Town Board's approvals must be annulled as premised upon defective LIPA actions and approvals.

The Court is respectfully referred to the accompanying memorandum of law submitted in the Nassau County Action (exhibit G), which establishes, among other things, that:

> In conducting the environmental review of the Project, LIPA, among other failings, **[1]** failed to undertake the basic procedural steps necessary to commence the environmental review process properly or in a timely fashion, **[2]** engaged in impermissible segmentation by failing to include in the environmental review the already selected preferred gas delivery method to fuel the Project, a 21.6 mile extension of a gas pipeline operated by Iroquois Gas Transmission System, LP ..., **[3]** relied on conclusory assertions and computer modeling data with respect to air quality impacts despite the fact that the area is in a severe ozone non-attainment zone, **[4]** failed to obtain groundwater measurements to determine whether the Project will lie within a Deep Groundwater Recharge Zone, despite scientific evidence that indicates that the Project is located immediately adjacent to a fluid border of a Deep Groundwater Recharge Zone, **[5]** failed to analyze the cumulative impacts both existing and new impacts associated with putting this Project in the Empire Development Zone, **[6]** failed to conduct an honest qualitative analysis of the alternatives to this Project and all its component parts, **[7]** failed to undertake appropriate public outreach to the community which will be burdened by the Project and failed to disclose and adequately analyze impacts on **[8]** traffic, **[9]** noise, **[10]** visual resources, **[11]** aesthetics, **[12]** land use, **[13]** community and neighbor character and **[14]** property values of petitioners and, specifically in the case of petitioner Atlantic Point, **[15]** "rentability".
>
> **[16]** Moreover, in addition to the flaws in the Final Environmental Impact Statement ("FEIS"), LIPA was obligated to require a Supplemental Environmental Impact Statement prior to adopting the Findings Statement to include in the environmental review

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> additional air quality monitoring conducted by LIPA, the negotiation of community benefit packages to be paid by LIPA in the form of increased PILOT payments, the only legitimate purpose of which would be to mitigate adverse environmental impacts that the FEIS asserts the Project does not have, and to address the fact that Iroquois had commenced the pre-filing process for the Iroquois Pipeline Extension, expressly on behalf of LIPA, before the Federal Energy Regulatory Commission (FERC).
>
> **[17]** Not only did LIPA fail to conduct a proper environmental review, the contracts which LIPA has entered into with respect to the Project, the PPA, and the already selected method of gas delivery to the Project, a 21.6 extension of the natural gas pipeline owned by Iroquois, were entered into without review by the New York State Public Authorities Control Board as required by Public Authorities Law §1020-f (aa). LIPA has refused to submit the agreement with Iroquois to the PACB, asserting that an agreement to pay for the cost of permitting the 21.6 mile extension of a natural gas pipeline is within the day to day operations of LIPA, a provider of electricity. Critically, the PPA contains no provision for approval by the PACB demonstrating that LIPA has no intention of seeking approval of the PPA from the PACB. This is particularly troubling since LIPA refuses to disclose the true economics of the PPA to the rate paying and tax paying public.

Therefore, for the reasons previously set forth in the memorandum of law in the Nassau County Action, petitioners-plaintiffs are entitled to a judgment annulling the Findings Statement and resolution pre-approving the PPA adopted by the LIPA Board on December 15, 2005 and directing that LIPA conduct a proper environmental review of the Project, with all of its component parts, including the method of natural gas delivery. Petitioners-plaintiffs are also entitled to a declaratory judgment directing that the PPA and the Iroquois Agreement be submitted to the PACB for review.

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POINT II

THE TOWN BOARD FURTHER VIOLATED SEQRA

A. The Town Board Failed to Perform its Obligations as an "Involved Agency" under SEQRA

As set forth at length above, LIPA's Final Environmental Impact Statement was wholly deficient and the Town Board wrongly failed to cure those deficiencies. The LIPA promulgated FEIS completely refused to consider the impact of the over twenty mile long extension of the natural gas pipeline, wrongly indicated that there were only six residences within a half mile vicinity of the Project (see Exhibit C at p. 2-1); engaged in unlawful "segmentation" of environmental review when it refused to consider the massive impacts of the pipeline extension (which the EPA has recently determined to be "***inextricably linked***" to the Caithness Project, exhibit I), essentially ignored the fact that Atlantic Point is located with about a half mile from the proposed electric generation facility and has 2,000 residents in 795 dwellings, ignored the economic impacts of the facility upon the surrounding community, including the residents and Atlantic Point, failed to consider alternative placement of the project, and other major defects more further set forth in the Petition herein and the Statement of Facts, above. Thus, the Town Board failed to perform its obligations as an "involved agency" under SEQRA. 6 N.Y.C.R.R. § 617.11(d).

This is not a case where a negative declaration was issued by the lead agency, such that the Town Board, as an involved agency, is bound thereby and may make no new determinations that the proposed action involves no significant environmental impacts (see, Gordon v. Rush, supra). An FEIS (and not a negative declaration) was prepared here by the lead agency, LIPA, and the purpose of that FEIS was to serve as an aid to all agencies making determinations

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concerning the action. 6 N.Y.C.R.R. 617.3(b). The Town Board had independent obligations as an "involved agency" in rendering approvals concerning the action in order to ensure that SEQRA was complied with, and its failure to do so mandates annulment of its approvals.

Thus, the regulations promulgated under SEQRA specify that even though the statute grants one agency "lead" status, that does not alter the relative jurisdictions of other agencies, even in relation to environmental determinations. Specifically, "*SEQRA does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies.*" 6 N.Y.C.R.R. 617.3(b).

The Town Board here had exclusive authority to deny the special use permit and waivers/variances, even on the basis of environmental issues found not to be significant impacts in the LIPA promulgated FEIS. See State v. White Oak Co., LLC, 13 A.D.3d 435, 787 N.Y.S.2d 333 (2d Dept. 2004) (even though DEC was only an involved agency, and the lead agency ruled that the project as modified adequately protected endangered species, the DEC had authority to grant or deny an Endangered Species Permit); Goldhirsch v. Flacke, 114 A.D.2d 998, 495 N.Y.S.2d 436 (2d Dept. 1985) (involved agency properly denied permit application based on same environmental impacts which the lead agency had found were not significant under SEQRA); City of New York v. Mancini-Ciolo, Inc., 188 A.D.2d 633, 591 N.Y.S.2d 518 (2d Dept. 1992) (similar).

Indeed, following the issuance of an FEIS, an "involved agency," such as the Town Board here, explicitly has the authority under SEQRA to impose conditions upon its approval of an action, so long as those conditions are "reasonably related" to environmental impacts identified in the FEIS. 6 N.Y.C.R.R. 617.3(b). See also White v. Westage Development Group, Inc., 191

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A.D.2d 687, 690, 595 N.Y.S.2d 507, 508 (2d Dept. 1993) (involved agency had authority to impose the very conditions which were found unnecessary by the lead agency).

Moreover, the responsibilities imposed upon "involved agencies" reflect that such agencies are themselves responsible for ensuring that environmental impacts are dealt with, even if those impacts were not considered or meaningfully considered in the FEIS. Section 617.11(d) of the regulations requires involved agencies to issue a findings statement as follows:

> (d) Findings must:
>
> > (1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS;
> >
> > (2) weigh and balance relevant environmental impacts with social, economic and other considerations;
> >
> > (3) provide a rationale for the agency's decision;
> >
> > (4) certify that the requirements of this Part have been met; and
> >
> > (5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable. (emphasis supplied).

As demonstrated above, the Town Board, like LIPA, did not take into consideration the over twenty mile long pipeline extension which would have to be constructed and maintained, essentially ignored the presence of a large residential community about a half mile away from the project site, failed to consider alternative placement of the electric generation facility, and other major failures. Thus, the Town Board violated SERQA in that it:

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(1) failed to "*weigh and balance relevant environmental impacts with social, economic and other considerations*,"

(2) failed to provide "*a rationale for the agency's decision*,"

(3) failed to ensure that "*the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable*," and

(4) failed to ensure that "*adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable*."

Inasmuch as both "strict" and "literal compliance" with the letter and spirit of SEQRA is required, and since substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act, the Town Board's failures to comply with SEQRA mandate annulment of its determinations and approvals. New York City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 348, 763 N.Y.S.2d 530 (2003); Stony Brook Village v. Reilly, 299 A.D.2d 481, 483 750 N.Y.S.2d 126, 128,(2d Dept. 2002); Matter of Golten Mar. Co. v. New York State Dept. of Envtl. Conservation, 193 A.D.2d 742, 743-744, 598 N.Y.S.2d 59 (2d Dept. 1993).

B. The Town Board Improperly "Segmented" its Environmental Review

In direct violation of SEQRA, which mandates that no action may be taken prior to the issuance of either a negative declaration of the issuance of a final EIS (6 NYCRR Part 617.3(a)), LIPA attempted to avoid and insulate its environmental determinations by ignoring the fact that in 2005, prior to its issuance of a Final EIS, it had already entered into agreements to pay for the 21.6 mile extension of the Iroquois Pipeline to connect it to the proposed Caithness Project (see

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Petition/Complaint in the Nassau County Action, exhibit F, and memorandum of law submitted therein, exhibit G). Moreover, in its Final EIS, LIPA expressly refused and declined to analyze the effects and concerns of the lengthy gas pipeline extension, or alternatives thereto, including KeySpan Energy Delivery Corp.'s existing natural gas local distribution network, which already runs within 4,000 feet north of the project site (see id.), and simply purported to rely on the fact that environmental review of the effects of the extension will be conducted in the future by a different agency. As further discussed in the said memorandum of law (exhibit G), this clearly violated SEQRA and its prohibition against segmented environmental review (6 NYCRR § 617.3(g)).

For its part, the Town Board merely adopted the deficient and non-existent findings of the LIPA promulgated FEIS in this regard and did not even endeavor to consider the impacts and effects of constructing and maintaining an over 21 mile gas pipeline extension to the project location or the clearly available alternatives thereto. Accordingly, for the same reasons set forth in exhibit G, the Town Board violated SEQRA by segmenting the Iroquois Pipeline Expansion from its environmental review. See additionally Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, — A.D.2d —, --- N.Y.S.2d ----, 2006 WL 2257507 (2d Dept. August 8, 2006).

Importantly, the United States Environmental Protection Agency, in commenting to the Federal Energy Regulatory Commission ("FERC") regarding the proposed pipeline extension (exhibit G to the petition), noted that "***the environmental impacts of the pipeline and the Caithness Project which are inextricably linked***".

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C. The Town Board or LIPA wrongly failed to prepare a Supplemental EIS following discovery of the Pine Barrens ecosystem at the project site

As shown, as an involved agency, the Town Board was obligated to ensure compliance with SEQRA before it could render any approvals concerning the action. 6 N.Y.C.R.R. § 617.11(d). The Town Board learned in April 2006, after LIPA issued its FEIS, that the Town's own Director of Environmental Protection and Land Management, as well as a highly renowned botanist, discovered the existence of a rare Pine Barrens ecosystem called the Pitch-Pine-Oak-Heath-Woodland at the Caithness project site (see, Michael White affirmation and Dr. Eric Lamont affidavit in Nassau County Action, exhibit H to petition). The Town Board ignored this newly discovered fact of pivotal environmental significance which, if considered, would prohibit the project at the subject site (see exhibit B, Findings Statement). Instead, the Town Board issued its special permit approvals without obtaining a Supplemental EIS from LIPA or preparing one itself.

SEQRA regulations, at 6 NYCRR § 617.9(a)(7), provides, in part:

> (7) Supplemental EISs.
>
> (i) The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:
>
> (a) changes proposed for the project;
>
> (b) newly discovered information; or
>
> (c) a change in circumstances related to the project.

Rendering approvals concerning an action without a SEIS when new and intervening information significantly impacting the FEIS analysis has come to light, mandates annulment of the approvals and a direction that no approvals be rendered until a SEIS is prepared. See

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Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, — A.D.2d —, — N.Y.S.2d —, 2006 WL 2257507, 2006 (2d Dept., August 08, 2006) (agency erred in failing to prepare SEIS after discovery of pertinent new information).

POINT III

THE TOWN BOARD FAILED TO PERFORM ITS OBLIGATIONS UNDER THE TOWN LAW AND THE BROOKHAVEN TOWN CODE

Both the Town Law and the Brookhaven Town Code impose specific restrictions upon the Town Board's authority to grant a special permit or area variances. The Town Board failed to comply with its responsibilities under both the Town Law and its own Code, and its determination must be annulled as arbitrary and capricious and unsupported by substantial evidence. Clute v. Town of Wilton Zoning Bd. of Appeals, 177 A.D.2d 925, 576 N.Y.S.2d 469 (3d Dept. 1991) (Board wrongly granted variances where there was lack of evidence to support the grant, and Board failed to give proper effect to evidence militating against the grant); see also Markowitz v. Town Bd. of Town of Oyster Bay, 200 A.D.2d 673, 606 N.Y.S.2d 705 (2d Dept. 1994); Kidd-Kott Const. Co., Inc. v. Lillis, 508 N.Y.S.2d 792 (4th Dept. 1986); Peccoraro v. Humenik, 258 A.D.2d 465, 684 N.Y.S.2d 588 (2d Dept. 1999); Kidd-Kott Const. Co., Inc. v. Lillis, 508 N.Y.S.2d 792 (N.Y.A.D. 4 Dept. 1986); Matter of Necker Pottick, Fox Run Woods Builders Corp. v. Duncan, 251 A.D.2d 333, 673 N.Y.S.2d 740; Matter of Baker v. Brownlie, 248 A.D.2d 527, 670 N.Y.S.2d 216; Matter of Padwee v. Bronnes, 242 A.D.2d 334, 661 N.Y.S.2d 52; Matter of Frank v. Scheyer, 227 A.D.2d 558, 642 N.Y.S.2d 956.

It was illegal for the Town Board to ignore the community impacts which LIPA self-servingly ignored, particularly when it was the Town Board, which was statutorily charged with

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evaluating the propriety of placing a large non-conforming electric generating station in an area close to a large residential community (Town Law 267-b; Brookhaven Town Code § 85-31.2; § 85-31.3; § 85-309; § 85-313; § 85-315). As set forth above, the Town Board failed to consider the most fundamental of impacts of the project, including the nearby residences and large residential community, the gas pipeline extension, the available alternatives to the pipeline extension, and the available movement of the facility to a different area.

LIPA's analysis of economic and other impacts on the surrounding community and residents was woefully deficient, even under a SEQRA analysis, and could not satisfy the even more demanding requirements for such analysis under the special permit, waiver and variance statutes (Town Law 267-b; Brookhaven Town Code § 85-31.2; § 85-31.3; § 85-309; § 85-313; § 85-315). Moreover, over and above its failure to consider these pivotal impacts, the Town Board's determination that the applicant would suffer a "hardship" if the waivers or variances were not granted (Brookhaven Town Code § 85-31.2(B)(4)), is completely unsupported and is based on no cognizable hardship whatsoever. Additionally, as to the "special permit criteria" of Brookhaven Town Code § 85-315, the Town Board did not have authority to grant a waiver or variance concerning the stack height restriction.

(A) The unsupported finding of "hardship"

The Brookhaven Town Code zones electric generating facilities in the L Industrial 4 District ("LI4 District"). Nevertheless, certain such facilities meeting specific limits and criteria can be maintained in the L Industrial 1 District ("LI1 District") if the Town Board issues a special permit so allowing. See Brookhaven Town Code § 85-336 (providing that the only allowable uses in the LI4 District are *"the generation, transmission and distribution of electrical*

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energy by a corporation subject to the jurisdiction of the Public Service Commission of the State of New York"); § 85-309 (electric generating facilities prohibited in LI1 District unless a special permit is issue and the specified criteria are met).

And, expressly because those facilities which do not meet the limits and criteria for a LI1 District normally belong in the LI4 District, the Town Code specifies that the Town Board is prohibited from issuing a special permit where the proposed facility does not meet the specified criteria for that district unless the applicant proves, and the Town Board finds, that compliance with the criteria would constitute a "hardship." (Brookhaven Town Code § 85-31.2(B)(4) ("*Compliance must be demonstrated with the specific criteria set forth within the applicable zoning district classifications, including the dimensional requirements contained therein, unless the Town Board finds that compliance with such provisions constitutes a hardship requiring the waiver or modification of such requirements*") (emphasis supplied)). In this regard, the "hardship" requirement reflects that a failure to meet the specified criteria concerning size of the facility is not a mere request akin to an "area variance", it is more like a "use variance" as to which the hardship standard generally applies (see Town Law 267-b), because the larger facilities simply do not belong in the light industrial LI1 District.

Here, in granting the special permit along with waivers and variances from the express criteria set forth in the Town Code for electric generating facilities in the LI1 District, and by allowing a substantially larger facility than as allowed in the district, the Town Board's only finding concerning hardship was that without the four waivers it was granting concerning the size

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of the facility[7], the project could not be approved. That is, the Town Board's finding of hardship amounted to no hardship at all, other than the hardship inherent in every application--that if it is not granted it may not proceed. The Town Board merely stated: *"In the absence of the requested waivers, the applicant will suffer hardship because the applicant will not be able to proceed with the proposed project ...."* See also Conte v. Town of Norfolk Zoning Bd. of Appeals, 261 A.D.2d 734, 689 N.Y.S.2d 735 (3d Dept. 1999) (Board wrongly granted a variance based on hardship; "the hardship must relate to the land, and a variance may not be granted merely to ease the personal difficulties of the current landowner"). Moreover, upon information and belief, there is absolutely nothing in the record to even suggest that LIPA or any other entity cannot relocate the facility to a properly zoned area on Long Island.

Neither did Caithness establish hardship, nor could it, given that any "hardship" in proposing to place the facility in the LI1 District is a non-cognizable "self-created" hardship. Compare Brandman v. Board of Standards and Appeals of City of N.Y., 213 A.D.2d 204, 205, 623 N.Y.S.2d 246 (1st Dept. 1995) (applicant was entitled to special permit where applicant "was not responsible for the original placement of the existing building ... [and] did not ... cause the hardship which warrants the special permit"). In the zoning context, "hardship" is a well-defined standard and it expressly does not include "self-created" hardships. Id.; see e.g. the express definition of "hardship" given with respect to use variances in Town Law 267-b and Brookhaven Town Code § 85-31.3(1) (which is the very next section of the Brookhaven Town

[7]The Town Board ruled it would allow four waivers of the criteria set forth in the LI 1 District provisions. First, it waived the 50 foot restriction found in § 85-313(G)(2) to allow a 75 foot high electric generation building; second, it waived the same restrict to allow an 85 foot heat recovery steam generator; third, it waived this restriction again to allow an 85 foot air-cooled condenser; and fourth, it waived the maximum 125 foot stack height restriction found in § 85-315B(1) to allow an obtrusive and highly visible 170 foot stack.

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Code which follows the "hardship" requirement of § 85-31.2(B)(4)), both of which require that "the alleged hardship has not been self-created."

(B) The lack of authority to grant a waiver or variance concerning the stack height criteria for a special permit

It is settled that absent an express grant of authority to waive or vary a statutory criterion for a special permit, the applicable Board possesses no authority grant a waiver or variance concerning that special permit criteria. Moss v. Planning Bd. of the Village of Montgomery, 251 A.D.2d 418, 674 N.Y.S.2d 94 (2d Dept. 1998.); AA & L Associates, L.P. v. Casella, 207 A.D.2d 1012, 616 N.Y.S.2d 825 (4th Dept. 1994). The Brookhaven Code imposes two types of restrictions upon electric generating facilities: (1) ordinary zoning district classification criteria relating to the district, limiting certain heights and other area restrictions (§ 85-313[8]), and (2)

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[8]The ordinary zoning district classification criteria set forth in § 85-313 are:

> A. Minimum lot area. (1) Except as otherwise provided herein, the minimum required lot area shall be 40,000 square feet.
>
> . . . .
>
> (6) The minimum requirement for lot area for an electric generating facility shall be 20 acres.
>
> B. Minimum width of lot throughout. (1) Except as otherwise provided herein, the minimum required width of lot throughout shall be 100 feet.
>
> . . . .
>
> (3) The minimum required width of lot throughout for a parcel within a designated hydrogeologic sensitive zone, or for an electric generating facility or transportation terminal/facility shall be 200 feet.
>
> . . . .
>
> E. Minimum rear yard setback. (1) Except as otherwise provided herein, the minimum required rear yard setback shall be 50 feet.
>
> (2) The minimum requirement for a rear yard setback for an electric generating facility

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express "[s]pecial permit criteria" found in § 85-315, which, among other things, mandates that no special permit may be granted where the height of the stack is higher than 125 feet.

The Town Board treated the latter stack height "[s]pecial permit criteria" as if it were a routine zoning district classification criteria which is subject to waiver or variance. It emphatically is not. As previously quoted, Brookhaven Town Code § 85-31.2(B)(4) only authorized the Town Board to grand a hardship waiver or variance to "zoning district classification[]" criteria, not to the actual conditions and criteria for a special permit itself, found in § 85-315. See Town Code § 85-31.2(B)(4) ("*Compliance must be demonstrated with the specific criteria set forth within the applicable zoning district classifications, including the dimensional requirements contained therein, unless the Town Board finds that compliance with such provisions constitutes a hardship requiring the waiver or modification of such requirements*").

Accordingly, the Town Board had no authority altogether to "waive" the 125 foot stack height "special permit criteria" (§ 85-315) and its determination to grant the special permit must, as a matter of law, be annulled. Moss, supra; Casella, supra.

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shall be 100 feet.

F. Maximum permitted floor area ratio (FAR). (1) Except as otherwise provided herein, the maximum permitted FAR shall be 35%.

. . . .

(3) The maximum permitted FAR for an electric generating facility shall be 25%.

G. Maximum permitted height. (1) The maximum permitted height for all structures shall be 50 feet or three stories.

(2) The maximum permitted building height for an electric generating facility shall be 50 feet.

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(C) The failure to consider pivotal impacts of the proposed electric generation facility violated the Town Law and the Brookhaven Town Code

LIPA's self-serving approval, through wholly deficient and incomplete analysis of its own project was, unsurprising. What is more troubling is that the Town Board, the body charged with considering the zoning effects of the oversized electric generation plant located near a large residential community, would pursue the same deficient and incomplete analysis. Moreover the economic impact on a community and its residents may be a somewhat secondary consideration in SEQRA environmental review, but it is a central consideration of special permit, waiver and variance review (Town Law 267-b; Brookhaven Town Code § 85-31.2; § 85-31.3; § 85-309; § 85-313; § 85-315). The Town Board failed to evaluate the necessary factors, and had it done so, it would have been compelled to deny the special permit.

The Brookhaven Town Code and the New York Town Law specifically require the Town Board to consider a significant number of factors so as to support its determinations. See Town Law 267-b (which is applicable to the Town Board and not just to zoning boards of appeal, see Fleck Town of Colden, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005)); Brookhaven Town Code § 85-31.2; § 85-31.3; § 85-309; § 85-313; § 85-315. As shown, in approving the special permit, waivers and variances, the Town Board failed to analyze pivotal impacts of the proposed electric generation facility. In fact, the Town Board did not even discuss most of the statutorily required factors, and otherwise tacked on a conclusory claim that all of the criteria have been satisfied (exhibit B, Findings Statement, "CONCLUSIONS").

It is well settled that upon Article 78 review, the obligation of the Court is to reject all determinations which are made without consideration of the dictated factors, or where the Town Board or other body merely contended in a conclusory manner that the factors have been

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satisfied. Peccoraro v. Humenik, 258 A.D.2d 465, 684 N.Y.S.2d 588 (2d Dept. 1999) (annulling determination when the Board "failed to consider four of the five relevant statutory factors, and to engage in the requisite balancing test"); Necker Pottick, Fox Run Woods Builders Corp. v. Duncan, 251 A.D.2d 333, 673 N.Y.S.2d 740 (2d Dept. 1998) (annulling determination when the "Board merely reiterated the prongs of the Town Law § 267-b(3) balancing test without stating the specific facts or reasons that it relied upon in making its determination"); Markowitz v. Town Bd. of Town of Oyster Bay, 200 A.D.2d 673, 606 N.Y.S.2d 705 (2d Dept. 1994) (board's determination annulled as contrary to substantial evidence and arbitrary and capricious when "there is no evidentiary support in the record for the Board's conclusion" in relation to a certain specified factor).

Here, the following Town Law and Town Code statutes mandated meaningful consideration of the economic impact the electric generating facility would have on nearby communities, property values, and expectation, as well as consideration of the effect of a 21 mile gas pipeline extension, of the fact that a large residential community is nearby the facility, and of the available alternative sites for the facility, as well as all of the other aspects of the project which the Town Board ignored.

Thus, § 85-31.2. of the Brookhaven Town Code specifies the following in relation to special permits:

> (2) No special permit shall be granted by the Town Board unless it shall determine: (a) **That the use will not prevent the orderly and reasonable use of adjacent properties or of properties in the surrounding area or impair the value thereof.**
>
> (b) That **the use will not prevent the orderly and reasonable use of permitted or legally established uses** in the district wherein the proposed use is to be located or of permitted **or legally established uses in adjacent districts.**

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(c) That **the safety, health, welfare, comfort, convenience or order of the Town will not be adversely affected** by the proposed use and its location.

(d) That **the use will be in harmony with and promote the general purposes and intent of this chapter**.

(3) In making such determination, **the Town Board shall give consideration**, among other things, to: (a) **The character of the existing and probable development of uses in the district and the peculiar suitability of such district for the location of any of such permissive uses.**

(b) **The conservation of property values and the encouragement of the most appropriate uses of land.**

(c) The effect that the location of the proposed use may have upon the creation or undue increase of traffic congestion on public streets, highways or waterways.

(d) The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent, whether liquid, solid, gaseous or otherwise, that may be caused or created by or as a result of the use.

(e) Whether the use or materials incidental thereto or produced thereby may give off obnoxious gases, odors, smoke or soot.

(f) Whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise.

(g) Whether the operation in pursuance of the use will cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities, if existing or if proposed by the Town or by other competent governmental agency.

(h) The necessity for an asphaltic or concrete surfaced area for purposes of off-street parking and loading of vehicles incidental to the use and whether such area is reasonably adequate and appropriate and can be furnished by the owner of the plot sought to be used within or adjacent to the plot wherein the use shall be had.

(i) Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use or by the structures to be used therefor or by the inaccessibility of the plot or structures thereon for the convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assemblage of persons upon such plot.

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(j) Whether the use or the structures to be used therefor all cause an overcrowding of land or undue concentration of population.

(k) **Whether the plot area is sufficient, appropriate and adequate for the use and the reasonable anticipated operation and expansion thereof.**

(l) The physical characteristics and topography of the land.

(m) Whether the use to be operated is unreasonably near to a church, school, theater, recreational area or place of public assembly (emphasis supplied).

These considerations are not typical of special permit conditions, and require a detailed and comprehensive determination concerning numerous factors which are not easily established. Accordingly, while the Court of Appeals held in Tandem Holding Corp. v. Board of Zoning Appeals of Town of Hempstead, 43 N.Y.2d 801, 402 N.Y.S.2d 388 (1977), that special permits in general need only be supported by proof that the conditions to the permit issuance have been met, the statute here imposes specifically enumerated major and intensive conditions which were required to be satisfied and which were not.

The failure to meaningfully consider the effect upon property values and on nearby residents directly violated the above highlighted factors. It was particularly wrong given that LIPA had done the precise same thing, and since appraisers have, in fact, estimated that the existence of such a large electric generation station nearby the Atlantic Point property would likely cause a 50% drop in its value. As the petitioners informed the Town Board in their submission in opposition to the special permit:

> "It is directly mandated by SEQRA that the FEIS prepared in connection with a project present an analysis of the project's "significant adverse effects" which, in the case of Atlantic Point, involves property value and hence rentability. 6 N.Y.C.R.R. § 617.9(b)(1). There is no material by expert witnesses or otherwise contained in the SEQRA proceedings conducted by LIPA that addressed the impact of property values in the area of the project

> or, indeed, in Brookhaven Town. Although such material presented by LIPA was a consulting report on KeySpan's proposed electrical generating plant for Spagnoli Road in Melville, New York, in the Town of Huntington, it is totally inapplicable to the project site.
>
> An Affidavit of Michael Pantzer submitted in the aforementioned lawsuit against LIPA, gives a good description of the Atlantic Point property, and it is attached to this Memorandum. The Atlantic Point property pays $1,603,071.30 in annual taxes to the Town, a good indicator of the Town's estimate of the value of the property. **Atlantic Point's appraisers advise us that the value of the property could likely drop by 50% if the electric generating plant and stack are constructed nearby"** (emphasis supplied).

A copy of the referenced Pantzer Affidavit is respectfully incorporated from the Nassau County Action by reference.

The Town Board further failed to comply with its responsibility under § 85-31.3, which provides with respect to area variances:

> (c) **In making its determination for such area variances, the Town Board shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant.** In making such determination, the Board shall also consider: [1] **Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;**
>
> [2] Whether the benefit sought by the applicant **can be achieved by some method, feasible for the applicant to pursue, other than an area variance;**
>
> [3] **Whether the requested area variance is substantial;**
>
> [4] **Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district**; and

> [5] **Whether the alleged difficulty was self-created**, which consideration shall be relevant to the decision of the Town Board, but shall not necessarily preclude the granting of the area variance (emphasis supplied).

Town Law 267-b(b) imposes the same restrictions upon the granting of area variances and the Court of Appeals has squarely held that "before granting an area variance, [the Board] must engage in a balancing test, considering the factors outlined in the statute and weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community." Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351-352, 639 N.Y.S.2d 302 (1996). As shown, the Town Board failed to meaningfully consider the above highlighted factors in that it wholly failed to even address or meaningfully address the most pivotal of issues.

Moreover, by not considering the availability of alternative sites for the facility, or even moving the facility to a different area of the larger parcel owned by Caithness, the Town Board directly violated its obligations (see factor [2] quoted above). As the Practice Commentary to Town Law 267-b explains, "*[w]hether an applicant's objectives can be attained by some approach other than a variance is a significant matter in determining whether an area variance should be granted ... [and] the failure or refusal to consider alternatives is a negative consideration in determining if relief should be granted.*" Citing Robbins v. Seife, 215 A.D.2d 665, 628 N.Y.S.2d 311 (2d Dept. 1995); Sakrel v. Roth, 182 A.D.2d 763, 582 N.Y.S.2d 492 (2d Dept. 1992); Stengel v. Town of Woodstock Zoning Board of Appeals, 155 A.D.2d 854, 547 N.Y.S.2d 961 (3d Dept. 1989).

All evidence points to the future development of the proposed 96-acre site and its immediate surrounding lands, in the absence of grant of this application, for non-controversial,

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non-intrusive light industrial uses as permitted under the Town's L-1 Industrial classification; and to the continued enjoyment of surrounding residential lands, in which substantial sums have been invested, and in which many thousands of Town residents have invested their lives. Thus, construction of the plant has not been shown, as required by the Town Code, to be protective of the "*character of the existing and probable development of uses*"; the "*conservation of property values*"; and the existing condition of the community which at present is relatively free from "*obnoxious gases, odors, smoke or soot.*" The Town Board failed to perform its obligations to meaningfully analyze the impacts of the project, and its determination to approve the permit along with waivers and variances should be annulled as a matter of law.

POINT IV

THE TOWN BOARD HAD NO AUTHORITY TO RE-VOTE ON THE CAITHNESS PROJECT AFTER IT VOTED TO REJECT IT; ITS ACTIONS OTHERWISE CONSTITUTED ILLEGAL "CONTRACT ZONING" AND VIOLATED OTHER LAWS

The proceedings before the Town Board, with payments by the applicant and LIPA to the Town and localities in an overt attempt to "buy" SEQRA and zoning approvals, with an unauthorized and improperly noticed re-vote, with off-record negotiations occurring, and with the Town Board violating its own Rules of Procedure, all require, as a matter of law, that the special permit and SEQRA approvals be annulled. Because at each step in the process, the Town Board acted illegally in a number of manners, we address each illegal act chronologically.

A. The Lack of Authority to Hold a Re-Vote Concerning SEQRA Certification

On June 6, 2006, the Caithness Project and SEQRA findings duly came on for a vote before the Town Board, and they were voted down, with four out of the seven Councilmembers

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voting against it. (Petition, para. 3; Bissonette Aff., ¶4).

The effect of a no-vote was significant. It meant that under SEQRA, there was no authority to hold a re-vote concerning the same "action," because there had been no change in the project or environmental circumstances (6 N.Y.C.R.R. 617.11(a)).

As respects a re-vote on the determination to deny SEQRA certification and approval, which certification by an involved agency is mandated by 6 N.Y.C.R.R. 617.11(d) (see Point II, above), the Town Board was legally prohibited from voting again on the issue of SEQRA compliance because SEQRA expressly precludes a body from reconsidering its determination that a project posses unacceptable environmental impacts. In fact, 6 N.Y.C.R.R. 617.11(a) expressly limits the bases upon which an agency may change its SEQRA findings, and these do not include a higher payment of funds to the agency in exchange for its approval, or anything else, other than a change in the actual project or environmental circumstances. "If a project modification or change of circumstance related to the project requires a lead or involved agency to substantively modify its decision, findings may be amended and filed ...." (emphasis supplied). There was no project modification or change of circumstances "related to the project" and the Town Board was accordingly without authority to simply vote again on the same SEQRA certification. See Two Trees Farm, Inc. v. Planning Bd. of Town of Southampton, 29 A.D.3d 915, 815 N.Y.S.2d 704 (2d Dept. 2006) (Planning Board lacked legal authority to reconsider and amend its DEIS in response to a non-environmental concern; its decision to do so was as a matter of law arbitrary and capricious). As with the cases where an agency purports to issue an "amended" SEQRA determination, the total absence of procedural authority for the agency to simply take another vote concerning the same environmental impacts must result in an annulment

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of the action, particularly when "literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice." Golten Marine Co., Inc. v. New York State Dept. of Environmental Conservation, 193 A.D.2d 742, 598 N.Y.S.2d 59 (2d Dept. 1993) (amended negative declaration was without authority); see Chinese Staff and Workers Assn. v. City of New York, 68 N.Y.2d 359, 369, 509 N.Y.S.2d 499 (1986) (same).

B. The Lack of Authority to Hold a Re-Vote Concerning the Special Permit, Waivers, and Variances

There is no Town Law authority to simply re-vote on a previously denied special permit. Indeed, the authority is to the contrary. RATHKOPF'S THE LAW OF ZONING AND PLANNING § 57:72, *Power to Reconsider Decision Already Made.*

It is settled that when a local town code empowers the Town Board, as opposed to the Zoning Board, to issue a special permit, the Town Board is acting "in the place of" the Zoning Board and is subject to the rules attendant to Zoning Boards. See Brookhaven Town Code § 85-31.1.[9] Thus, in Fleck v.. Town of Colden, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005), the Court held that when a Town Board is asked to grant a variance, it is subject to the rules for variances applicable to Zoning Boards as set forth in Town Law 267-b, inasmuch as the Town Board is "*acting in the place of the zoning board.*"

As a matter of statutory law, and because its function in issuing waivers or variances is quasi-judicial and with collateral estoppel effect, a Zoning Board is prohibited from reconsidering a matter previously voted upon unless *"[a] unanimous vote of all members of the*

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[9]§ 85-31.1 of the Code of the Town of Brookhaven reserves "*certain powers, actions, functions and responsibilities authorized to and performed by the Board of Appeals to the Town Board of the Town of Brookhaven.*" This power includes the approval of special permits and granting waivers or variances in relation to such approvals.

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board then present" vote to allow a rehearing, absent changed circumstances. Town Law 267-a(12). Indeed, even aside from this statute, re-voting prior denials of permits or variances is generally not permitted, by any municipal body, particularly given that the original determinations are accorded collateral estoppel effect by the courts. Jensen v. Zoning Bd. of Appeals of Village of Old Westbury, 130 A.D.2d 549, 550-51, 515 N.Y.S.2d 283, 284-85 (2d Dept. 1987) (zoning board acts in quasi-judicial capacity and renewal of already denied application is not permitted); Crandell v. Wigle, 148 A.D.2d 943, 539 N.Y.S.2d 184 (4th Dept. 1989) (same); see also Manitou Sand & Gravel Co. v. Town of Ogden, 55 N.Y.2d 790, 792, 447 N.Y.S.2d 250 (1981) (collateral estoppel effect also can be accorded to Town Board denials, absent a sufficient change in circumstances); RATHKOPF'S THE LAW OF ZONING AND PLANNING § 57:72, *Power to Reconsider Decision Already Made*, supra ("*Since the function of the board is quasi-judicial, it has no inherent power to review its decision by vacating, rescinding, or altering it after it has been made*").

Acting in the place of other quasi-judicial boards (see Town Law § 267-b [area variances by Zoning Board]; § 274-b [special permits by Planning Board]), the Town Board was engaged in a quasi-judicial function when it originally voted down the Caithness Project special permit, waivers and variances. It had no authority to re-vote on the application, there was no change of circumstances, and the re-vote was otherwise not authorized by unanimous vote of the Councilmembers.

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C. The violation the Open Meetings Law and of rules against taking evidence after the close of the hearing

Notwithstanding that it had no authority to do so, the Town Board determined on July 25, 2006 to take a "new" vote concerning the project's SEQRA compliance and the special permit, waivers and variances application. The only event which occurred in the interim was that the applicant and LIPA had agreed to make additional millions of dollars in "community benefits package" payments and Town officials determined to amend the package by setting aside 15% of certian of the payments to a particular fund. See newspapers accounts, exhibit E. However, as the Town's Return will reflect, between the date of the no-vote on June 6, 2006 and the date of the re-vote on July 25, 2006, there had been no public hearings scheduled to reconsider the Caithness project. In fact, Councilmembers admitted in media reports (exhibit E) that they were contemplating changing their votes based entirely on, or in large part on behind-the-scenes wheeling and dealing by Councilmembers with the applicant and LIPA, over further payments to localities in exchange for a "yes" vote. Aside from this constituting overt "contract zoning" (see below), it violated the Open Meetings Law (Public Officers Law Article 7), as well as the statutes requiring public hearings in relation to special permits (Town Law § 274-b(6); Brookhaven Code § 85-31.2).

The Town Board is made up of only seven Councilmembers, meaning the a mere four Councilmembers meeting together with LIPA and/or Caithness constituted a quorum. The public record and newspaper accounts reasonably infer that such a quorum was present during the admitted behind-the-scenes meetings resulting in a change in vote. See exhibit E.

"The Open Meetings Law, passed in 1976 after the crisis of confidence in American

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politics occasioned by Watergate, was intended--as its very name suggests--to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities." "Thus, the statute provides generally that '[e]very meeting of a public body shall be open to the general public' (Public Officers Law § 103 [a])" and "this explicit declaration" must be "liberally construed in accordance with the statute's purposes ." Gordon v. Village of Monticello, Inc., 87 N.Y.2d 124, 126-127, 637 N.Y.S.2d 961 (1995). Particularly when the non-public meetings concern essentially bartering away the approvals in exchange for money payments, the Open Meetings Law violation should be remedied by annulling the resulting approvals.

Moreover, by all accounts (see exhibit E), Caithness has had conversations outside the record and after the period for public comment has been closed. The Second Department, along with other courts, has continually held that information received after the "close" of public hearings may not be considered by the Zoning Board, or in this case the Town Board, acting as a Zoning Board, in making an determination.[10] Sunset Sanitation Service Corp. v. Board of Zoning Appeals of Town of Smithtown, 172 A.D.2d. 755, 569 N,Y.S.2d 141 (2d Dept. 1991) (improper for Zoning Board to consider report from Planning Department received subsequent to the close of the public hearing on the petitioner's application; rehearing was necessary); Stein v. Board of Appeals of Town of Islip, 100 A.D.2d 590, 473 N.Y.S.2d 535 (2d Dept. 1984) (petitioners "due process rights were violated by the board's ex parte receipt and consideration"

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[10]Again, § 85-31.1 of the Code of the Town of Brookhaven reserves "certain powers, actions, functions and responsibilities authorized to and performed by the Board of Appeals to the Town Board of the Town of Brookhaven." This power includes the approval of special permits.

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of evidence which the board had no right to consider because the public hearing had ended); Hampshire Management Co. v. Nadel, 241 A.D.2d 496, 660 N.Y.S.2d 64 (2d Dept. 1997) (Zoning Board could not consider a newspaper article published after the close of public hearings on the application); Fulton v. Board of Appeals of Town of Oyster Bay, 152 N.Y.S.2d 974 (Sup. Ct., Nassau County 1956) ("the Board arrived at its decision with the aid of 'new evidence' which it had no right to consider except at a new public hearing..."); Cilla v. Mansi, 2002 WL 1275122 (S.C. Suffolk Cty. 2002); See also Terry Rice, Zoning and Land Use, 48 SYRACUSE L. REV. 1075, 1105-1106 (1998).

D. The July 25th Re-Vote was the result of multiple violations of the Town Board's Rules of Procedure including (1) the failure to comply with the "super-majority" requirement; (2) the failure to Agenda the re-vote for July 25th; and (3) the failure to provide to Councilmember with a copy of the resolutions and packet in advance of the Town Board meeting

Additionally, even if the Town Board had authority to render a successive vote on already rejected SEQRA compliance certification and special permit with waivers and variances application, it failed in multiple respects, to follow its own Rules of Procedure when it allowed the re-vote. Individually and certainly cumulatively, these serious diversions from mandatory procedures requires, as a matter of law, that the re-votes taken on July 25th with respect to the subject project be annulled. See Syquia v. Board of Educ. of Harpursville Cent. School, 80 N.Y.2d 531, 591 N.Y.S.2d 996 (1992).

As there was no Town Board meeting between June 6th and July 25th during which the Caithness Project was an agendaed item which was heard, there was no advance "super majority" vote to allow the Caithness application to be re-calendared for a re-vote. The Town Board's Rules of Procedure, § 63(A)(5), mandate that a matter which has already been voted upon cannot

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be brought on for a successive vote unless a super-majority of the Councilmembers vote to allow it (see Bissonette Aff., ¶8). The statute must reasonably be interpreted to require that the super-majority vote to allow a re-vote must occur on a date prior to the re-vote, given that the re-vote cannot even be placed on the agenda until after the super-majority has voted to allow the re-vote, and the Town Board's rules require an advanced agenda (id.).

Thus, in calendaring the re-vote for the same date and same proceeding at which the vote to allow a re-vote was taken, the Town Board violated its own procedures and its actions must be annulled as arbitrary and capricious as a matter of law on that ground.

Additionally, upon information and belief (the source of which is statements and the Affidavit of Councilmember Bissonette), the actual Agenda for the July 25, 2006 Town Board meeting did not include a re-vote on the Caithness project, in violation of the Town Board's own Rules of Procedure, including §§ 5F; 5C; and 6B.

Thirdly, as reported by Councilmember Bissonette in her Affidavit (¶9), the Councilmembers were not provided with an advance copy of the resolution containing the amended Community Benefits Package and the meeting packet until after the July 25, 2006 meeting commenced, in direct violation of the Town Board's Rules of Procedure, including §5(f) which mandates that all resolutions and packets be provided to Councilmembers well in advance of the meeting at which they are voted upon. The resolution first produced and circulated to the Councilmembers during the July 25th meeting was the first to contain a provision purporting to set aside 15% of certain of the funds being paid by Caithness/LIPA for a fund to be created.

These procedures, aimed at protecting the integrity of the process and which are stated with mandatory language, are not merely advisory or directory–they are mandatory procedures

which when violated require, as a matter of law, that the resulting decision or votes be annulled. See Syquia v. Board of Educ. of Harpursville Cent. School, 80 N.Y.2d 531, 591 N.Y.S.2d 996 (1992). Moreover, even if prejudice needed to be shown, the multiple violations directly impacted whether the re-vote could even be taken and the Councilmembers' ability to make a reasoned deliberation over the resolutions. The Court must conclude that the violations inherently were prejudicial enough to mandate annulment.

E. The Community Benefits Package was improperly imposed as a "condition" of the SEQRA and permit approvals.

The unseemly and improper negotiation by the Town Board with the applicant and LIPA over the amount of "Community Benefits Package" payments they would make to the Town and other localities was in fact unlawful, particularly when its increase was the inducement which caused the Town Board to change its vote from "no" to "yes".

The fine line which the Court of Appeals allowed in Church v. Town of Islip, 8 N.Y.2d 254, 203 N.Y.S.2d 866 (1960)–that conditions may be imposed on zoning approvals, so long as those condition reasonably relate to ameliorating the effect of the approval and it is not a quid pro quo contract–was not followed by the Town Board here. The change in vote compellingly proves that there was a "bargaining away" of discretion in this case. See City of New York v. 17 Vista Associates 84 N.Y.2d 299, 306, 618 N.Y.S.2d 249 (1994). Moreover, statements of Councilmembers reported in the media openly admit that after they had voted down the project, two of them undertook to negotiate with Caithness over higher payments in exchange for a change in their vote (see e.g., exhibit E). The Town Board's conduct constituted unlawful contract zoning, whereby "*in exchange for a predetermined sum of money*" it agreed to provide

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Caithness an expedited and favorable determination. Id..

Additionally, aside from its contract zoning features, the Community Benefits Package was not sufficiently related to the effect which the project would have either in terms of zoning or SEQRA. The package is little more than a "payoff"–with agreements to fund community centers in key Counselmembers' districts and other payments to such districts. The vast majority of the payments have nothing whatsoever to do either with environmental or land use impacts remediation. In fact, the package is expressly designated as "payments-in-lieu-of-taxes" (PILOT) (Town Board Factual Findings, para Fifteenth), which is a payment having nothing to do with the property's zoning status or environmental impact.

An involved agency under SEQRA is only permitted to "*incorporate as conditions to the decision those mitigative measures that were identified as practicable*." (emphasis supplied).§ 617.11(d)(5). Here, the Town Board included in its SEQRA findings themselves the Community Benefits Package conditions (exhibits A and B), and they plainly do not qualify as environmental "mitigative measures," nor was the need for community centers or payoffs identified in the FEIS as a practicable means of ameliorating the harmful effects of an oversized electric generation plant not far from a large residential community.

Moreover, the Community Benefits Package was not an appropriate condition of the special permit, waivers and variances, when the condition does not directly relate to and is not incidental to the proposed use of the property, and does not minimize any adverse impacts resulting from the variance. Town Law § 267-b(4); Baker v. Brownlie, 270 AD.2d 484, 705 N.Y.S2d 611 (2d Dept. 2000) ("*in considering applications for use or area variances, a zoning board is authorized to impose such reasonable conditions as (1) are directly related and*

incidental to the proposed use of the property, (2) are consistent with the spirit and intent of the zoning ordinance, (3) and minimize any adverse impacts resulting from the variance"). Moreover, inasmuch as the Town Board was acting in the place of a planning board under Town Law 274-b in issuing a special permit with conditions, it was only authorized to rest its approvals on "such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit." Town Law 274-b(4) (emphasis supplied). Under law, "*[c]onditions which are unrelated to the purposes of the zoning, or to the variance to which the conditions are attached, are unauthorized.*" N.Y. JUR., BUILDINGS § 364, *Propriety of conditions* (citing St. Onge, supra; Brous v Planning Bd. of Southampton, 191 A.D.2d 553, 594 N.Y.S.2d 816 (2d Dept 1993); Fine v Town of Hempstead, 199 A.D.2d 300, 605 N.Y.S.2d 302 (2d Dept 1993); Gordon v Zoning Bd. of Appeals, 126 Misc. 2d 75, 481 N.Y.S.2d 275 (Sup. Ct.1984); Oakwood Island Yacht Club, Inc. v Board of Appeals, 32 Misc. 2d 677, 223 N.Y.S.2d 907 (1961)). "Thus, conditions which relate not to the real estate involved but to the person who owns or occupies it are invalid." Id. (citing D'Alessandro v Board of Zoning & Appeals, 177 A.D.2d 694, 577 N.Y.S.2d 79 (2d Dept 1991); Finger v Levenson, 163 A.D.2d 477, 558 N.Y.S.2d 163 (2d Dept 1990); Holthaus v Zoning Bd. of Appeals, 209 A.D.2d 698, 619 N.Y.S.2d 160 (2d Dept 1994).

Thus, in St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988), the Court of Appeals held that "*[a] zoning board may, where appropriate, impose 'reasonable conditions incidental to the proposed use of the property', and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit.*" Id. at 516. The Court went on to say that the condition imposed by a zoning board must be related to the purposes of

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the zoning. Id. Following the dictates of St. Onge and Town Law § 267-b(4), Courts have not hesitated to invalidate approvals made upon unauthorized conditions. Baker, supra; Brous, supra; Gordon, supra; Oakwood Island Yacht Club, supra; D'Alessandro, supra; Finger, supra; Holthaus, supra.

F. The Town Board had no legal authority to condition its approvals on the Community Benefits Package "tax," no legal authority to accept a payment in lieu of such unauthorized tax, and no legal authority to create a special fund into which such "taxes" would be partially diverted.

The special permit section of the Town Law, § 274-b, does not authorize the planning board, or in this case the Town Board acting in the place of the planning board, to impose fees, levies or taxes. Compare Town Law § 274-a(6)(c), which provides statutory authority to impose a fee "in lieu of" parkland dedication, if made in accordance with an express local statute, where the fee is directly related to parkland preservation, and the funds all go to such purpose. The only fees allowed in the Brookhaven Town Code for special permits are those set forth in Chapter 29 thereof, which limit the fees to $500 and other lesser amounts (Brookhaven Code § 29-7). Additionally, the Brookhaven Town Code provisions regarding taxes (Chapter 65), do not authorize the tax or "payment in lieu of taxes" imposed, or authorize the Town Board to segregate received taxes to a special fund, such as the 15% fund provided for in the special permit condition here. There is, therefore, no authority under the Brookhaven Town Code for the Town Board to impose as a condition the Community Benefits Package, whether it was a fee, a tax, or a payment in lieu of taxes ("PILOT").

Even if there had been Brookhaven Town Code provision so providing, there is no state law allowing the Community Benefits Package PILOT Agreement. In this context, state law

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allows PILOT Agreements only with respect to power plants owned or controlled by LIPA; not privately owned facilities who sell power to LIPA. See Public Authorities Law § 1020-p; Public Authorities Law § 1020-q (captioned: "*Payments in lieu of taxes*"); see also Town of Islip v. Long Island Power Authority, 301 A.D.2d 1, 4, 752 N.Y.S.2d 320 (2d Dept. 2002) (explaining that while LIPA is generally tax exempt, it must make PILOT payments to local municipalities in connection with property taxes). In general, PILOT Agreements are limited to those authorized by particular statutes, the most common of which are agreement with low income housing redevelopment companies under Private Housing Finance Law §125. See also Town Law § 64-a (authorizing a PILOT Agreement only with respect to a certain Town of Hempstead property).

The condition imposed by the Town Board here was explicitly claimed to be a PILOT tax agreement, and moreover, it is plainly and inherently a tax agreement. See Albany Area Builders Association v. Town of Guilderland, 141 A.D.2d 293, 534 N.Y.S.2d 791 (3d Dept. 1988) (a tax is one which is "imposed for the purpose of defraying the costs of government services generally"); Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. of Roslyn Harbor, 40 N.Y.2d 158, 162, 386 N.Y.S.2d 198 (1976) (a municipality's authority to impose "fees" is strictly limited to those "reasonably necessary to the accomplishment of the statutory command," they may not be "open-ended" or potentially unlimited, and must be "assessed or estimated on the basis of reliable factual studies or statistics"); see also Kencar Associates, LLC v. Town of Kent, 27 A.D.3d 423, 812 N.Y.S.2d 587 (2d Dept. 2006). The Community Benefits Package here provided for payments to various "community centers," to non-Town entities, as well as provided for large money payments to the Town, all of which plainly reflect a taxing purpose of defraying costs of general government services and not merely costs of specific

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services occasioned by the project. Moreover, the payments do not qualify as a "fee" under Jewish Reconstructionist Synagogue, supra, when there most certainly is no Brookhaven statute delineating any mathematical basis for the amount of the payments; the amounts exacted by the Town Board were, prior to the permit approval, explicitly open-ended and subject to increase (they in fact were increased following the no-vote); and the amounts were not assessed based on reliable factual studies or statistics (Jewish Reconstructionist Synagogue, supra).

Further, there is no state or local law which authorizes a municipal board hearing SEQRA and/or special permit matters to impose ad hoc taxes or payments in lieu thereof.

Additionally, as it relates to the 15% open space fund portion of the Community Package Agreement, Councilmember Carol Bissonette is quite correct in her belief (see her Affidavit accompanying the Petition herein, ¶11) that it is unlawful and would require a public referendum. Tax Law §1441 provides that the Town of Brookhaven cannot "impos[e], repeal[] or reimpos[e]" a tax upon real property for use in connection with an open space "preservation fund" unless it is first "subject[ed] to a mandatory referendum pursuant to section twenty-three of the municipal home rule law." The said Tax Law, as well as Town Law § 64(f), further impose other highly detailed requirements for such taxes, none of which were complied with here.

The applicant, Caithness, was a motivating participant in the inclusion of unauthorized PILOT Agreement in the approval Resolutions. In fact, the "condition" concerning the large PILOT payments was a principle inducements which Caithness used to turn the Board to its favor and to change its "no" vote into a "yes" vote, even under SEQRA. The proper relief under such circumstances must be to annul the approvals, a main component and inducement of which was the unlawful and ultra vires Community Benefits Package.

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Conclusion

Petitioners-plaintiffs respectfully request that a judgment be granted pursuant to CPLR Article 78 and a declaratory judgment granted pursuant to CPLR 3001, together with the permanent injunction as follows:

a. Pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of the Town Board dated July 25, 2006 which, inter alia, approved a proposed 350 megawatt electrical generating plant, to be constructed by respondent-defendant Caithness, on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (the "Caithness Project") by granting a special permit pursuant to the Brookhaven Town Code and substantial variances and waivers from established zoning requirements (herein "Resolution I");

b. Pursuant to CPLR Article 78, annulling and invalidating a further Resolution of the Town Board granted on July 26, 2006, inter alia, rendered under the State Environmental Quality Review Act ("SEQRA"), by adopting a Finding Statement under SEQRA, by approving and accepting a prior final environmental impact statement ("FEIS") for the Caithness Project promulgated and adopted by Long Island Power Authority ("LIPA"), acting as purported "lead agency" under SEQRA (herein "Resolution II");

c. Cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by the Town Board and/or the Town of Brookhaven for the purpose of authorizing and implementing the Caithness Project;

d. Pursuant to CPLR 3001, granting a judgment in favor of petitioners-

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plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness, and implementation of Resolution I, Resolution II and all other actions and authorizations granted by the Town Board and/or the Town of Brookhaven with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

e. Granting a permanent injunction in favor of petitioners-plaintiffs enjoining respondent Town Board, Caithness and LIPA from implementing Resolution I, Resolution II or any other approvals authorizing the construction or implementation of the Caithness Project; and

f. Pursuant to CPLR 7804(e), directing and compelling defendant-respondent Town Board to file, with its answer, a certified transcript of the record of the proceedings under consideration; and

g. Granting petitioners-plaintiffs such other and further relief as the Court may deem appropriate, including awarding the costs and disbursements hereof.

Dated: Garden City, New York
August 22, 2006

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