J. MARK D. GREENBERG

The following comments are taken from correspondence dated April 29, 1996. A copy of this letter is provided in Appendix 1.

1. Comment:

The DGEIS utilizes an economic mitigation scheme that is clearly based on impact fees. Such a scheme is illegal under New York Law. Municipalities may not assess to developers the costs associated with off-site improvements as necessitated as a result of proposed development.

Response:

Refer to the response to Comment I.1.

2. Comment:

The high level of fees proposed in the DGEIS could constitute a form of prohibited exclusionary zoning.

Response:

The mitigation costs proposed are substantially less than those currently in place in other areas of the Town, and are a small proportion of the total cost of a typical residential property in the region. Therefore, they cannot be considered "exclusionary zoning."

3. Comment:

SEQRA is not a substitute for a legislative adoption of impact fee laws. SEQRA permits mitigation of specific actions. It may not be used to circumvent New York's decision to deny municipalities the power to assess impact fees.

Response:

Refer to the response to Comment I.1.

4. Comment:

The DGEIS characterizes its mitigation plan as an equitable scheme to offset the costs of development. An equitable result, however, is purely speculative, due to the nature of forecasting twenty years into the future. Additionally, the scheme acts in a arbitrary fashion by placing new developments at an economic disadvantage as compared to previously approved developments. Aside from its illegal nature, the economic mitigation scheme proposed in the DGEIS may act as a disincentive to economic growth, thereby necessitating a further infusion of taxes.

Response:

Refer to the response to comment I.1.

5. Comment:

The DGEIS creates subareas for the allocation of fees. These subareas are similar to the creation of special improvement districts. The creation of such districts, however, is exclusively governed by Article 12 and 12A of the Town Law and may not be superseded by local legislation. Clearly, the Town may not use SEQRA to accomplish what it may not do under the Town Law.

Response:

The establishment of subareas should not be construed as special districts. The subareas have been established to provide distribution of mitigation costs. The boundaries of individual subareas are based on the portion of the Study Area that will ultimately benefit from the improvement.

6. Comment:

Finally, the DGEIS fails to present a comparison between the current taxation scheme and the proposed mitigation scheme. Apparently, no studies were undertaken to demonstrate the effect if improvements were paid through a general tax.

Response:

Refer to the response to Comment I.5.

7. **Comment:**

The Town of Colonie should recognize that it is proposing a mitigation scheme what is legally unprecedented. Prior to taking such a step, we would ask whether the Town has made plans in the event the mitigation scheme is found illegal. Simply put, how will the Town refund monies once they have been improperly spent on improvements? This question is critical. In Albany Builders, the court focused on the fact that the legislature has specifically promulgated laws and regulations to control the methods by which funds are held and disbursed for public improvements.

Response:

The Town has no plans for the return of collected mitigation fees.