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January 28, 2014

Lewisboro Planning Board
Cross River Shopping Center
Cross River NY 10518

Re: Petruccelli

Chairman Kerner and Board Members:

I represent The Three Lakes Council, Inc. an adjoining property owner and a not-for-profit organization that has, as its central mission, the protection of your precious lakes and the watershed within the subject lot is situated. Although I plan to speak at tonight's meeting, I will not repeat the contents of this letter verbatim. We will also be providing the Board with comments from our expert engineer, Leonard Myerson; from Three Lakes member and resident Peter Gross, who will address the issue of "standing," and from Jan Andersen, who will be discussing some of the wetlands maps and calculations, and from others.[1]

Nature of this Application

Let me first summarize, and place into context, the relief sought by the applicant.

1. ***What the applicant seeks***

The applicant seeks to convert a lot that he bought for $4,000 into a valuable

[1] Although I was for 10 years Chair of the Town of Yorktown Zoning Board of Appeals; 20 years General Counsel to the NYS Federation of Lakes; and a trained wetlands delineator, I appear here only as a private attorney.

building lot maybe worth $100,000 or more.[2] In essence, he is asking for the Planning Board to give him a windfall, through non-enforcement of your local zoning, subdivision and wetland laws.

The entire lot is either state wetlands, local wetlands or buffer.

The Applicant wants to build in, or fill, portions of the wetlands, and build in much of the sliver of remaining buffer.

Lack of Mitigation. He is not even able to propose 1:1 replacement of wetland and buffer disruption.[3] Note he says he is proposing a 1 to .94 replacement (Sirignano 11/19/13 Tr.), but this is not even close to being a fair assessment. Preliminarily, note that the applicant must propose mitigation for disturbance of both the wetland, as well as disturbance of the wetland buffer. Protection of buffer is crucial. Not just because that's what the Town Code states,[4] but as our expert Mr. Myerson will explain, buffer ***needs*** protection.

Here is a calculation of what is really happening. The Applicant states that they are proposing to disturb at least 19,100 square feet of wetland and buffer.[5] Their mitigation for this is as follows:

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[2] The applicant has complained that he has paid taxes on this lot for years, but the payment of local property taxes is not a legitimate factor in any "hardship" analysis, just as it would be irrelevant to a "takings" claim. One pays property taxes as a carrying cost, not as a capital investment. There is no dispute that the owner had the full use and enjoyment of his lot all the years before he decided to seek a permit to develop it.

[3] Code Section 217-8E(3) states "Acceptable mitigation must be provided to minimize impacts to the maximum extent practicable, striving for a no-net-loss of wetlands, watercourses and/or buffer areas within the Town."

[4] Code Sec. 217-8E states explicitly, "For the purposes of mitigation, losses of buffer areas will be viewed as losses of wetlands...."

[5] I take this number from "Alternate Plan #3 - Site Plan," last revised June 5, 2013. Under other alternate plans, I understand the disturbance is even greater.

i. ***"Permeable pavers - Area #1"*** – square footage unknown – Astonishingly, the applicant is suggesting that his placement of pavers for the driveway, into the wetland buffer area, is somehow mitigation for his disturbance of wetlands or buffer.[6] I don't think the further disturbance of buffer, can be considered mitigation. But it does raise some questions: first, is the placement of permeable pavers counted in computing wetland and buffer disturbance? I looked for calculations to see how the applicant computed "total disturbance," but could find none. Then I also noticed the applicant is his own engineer, which raises questions in my mind as to all the calculations.[7]

ii. ***"Wetlands Enhancement - Area #2"*** – 3,847 square feet – The Applicant proposes to "enhance" existing local wetlands, by building a five foot (or three?) high retaining wall around it and planting grass seed. Claiming an existing wetland, as mitigation, would be a new first in wetlands analysis. And even if there were some evidence that it would be "enhanced" – which we dispute[8] ... why would local deer and animals and birds want to stop by a site with a five (or three)

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[6] It is unclear if the applicant actually counts the square footage of the pavers as being within the mitigation square footage calculations. It is not listed as a separate line item in the Chart labeled "Wetlands Mitigation #3 Analysis Chart" on the map I am working with.

[7] I do not impugn Mr. Petruccelli's integrity. I only know, from many years on land use boards, we generally want to see the stamp of an independent professional on such drawings and calculations.

[8] For example, since we do not know the source of the water in the wetland on this lot – is it from the pipe, is it from runoff, is it groundwater discharge – we cannot but wish that a walled wetland will work. (Apologies for intentional alliteration). How will a retaining wall help local wildlife in their trek down to the lake.

foot retaining wall? This should not count as mitigation.[9]

iii. ***Local Seed Mix - Area # 3*** – Unknown square footage. Apparently the applicant proposed to seed the back yard, after filling in the wetlands with hundreds of cubic yards of fill. We submit that this is not mitigation.

iv. ***Seed mix – Area #4*** – 6,041 square feet. The applicant proposes, after trucking in almost a thousand yards of fill to create a septic field, to seed it. This is existing wetland buffer, which will be radically disturbed by the Applicant, who merely proposes to seed it.[10]

v. ***Conservation Easement #5*** – 6,751 square feet. The Applicant proposes, as mitigation for the intrusions into local wetlands and buffer, their creation of a Conservation easement in the DEC wetlands and buffer area. There are several reasons why this should not be counted as mitigation. First, they are already required to do this as mitigation for the DEC wetlands/buffer intrusion, so they are not ***doing*** anything. Second, they are seeking to double-count it as mitigation for local wetland intrusion. Third, this "mitigation" is merely an agreement not to develop something that they cannot develop in the first place ... i.e., DEC wetland and the area immediately adjacent to that wetland. Note finally, this "conservation easement," is right downhill from their septic fields. It's a highly questionable "conservation easement," given this location. To count as mitigation, a

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[9] Imagine the visual. What is now a tranquil but wet lot, will look something akin to a mini golf range, with every square foot of the front of the property crammed with development.

[10] Yes, the seeds are truly special seeds, to be sure. And it will only be mowed twice a year. Until after a few years, people forget.

conservation easement is supposed to be placed on land that would otherwise be developable.[11] This clearly is not mitigation.

vi. ***Created Wetland - Area #6*** – 1,276 square feet - The Applicant proposes to create new wetlands, within the proposed Retaining Wall, right off the road. Because the Applicant has not properly identified the source of the water on this lot, and because the wall would likely interfere with wetland functions, this mitigation should be, at minimum, discounted. Which may be why the creation of on site wetlands is the least favored form of mitigation under your Code.[12] Note also, this new wetland, is at the expense of existing buffer, which is apparently not factored into any analysis.

Subtracting all these non-mitigation proposals, the Applicant has proposed ***no*** real mitigation.

Not every lot is buildable. The Applicant's problem is that he is trying to shoehorn a house into this small, wet lot. Not every lot is a buildable lot. There is good reason why the CAC, 3LC and so many residents have voiced concerns about development of this lot. As I expect Paul Lewis will tell you in greater detail, this Board denied a permit on the adjoining lot – a lot twice the size of this lot, and at a time when, if anything, the regulations were less stringent.

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[11] I understand that the Lewisboro Code contemplates conservation easements being created specifically to preserve wetlands – see Code Section 217-8E(4)(b) but this is "mitigation" that is separate and distinct from the Code's "no net loss" standard under Section 217-8E(3).

[12] See Code 217-8E(4)(d).

There is no hardship

There is no hardship here. The Applicant bought the lot with full knowledge of mapped wetlands. I understand he indicated to this Board, that if the Planning Board does not grant him a wetland permit, he may sue for a regulatory "taking" of his property rights. New York's highest court has foreclosed such a suit, in the *Gazza* case.[13] The Board should not take such a desperate threat seriously.

I heard in the November 19 meeting, the Applicant's counsel argued that, at the time the land was divided in 1972, only the DEC wetlands had been mapped; and that the Town's first water resources map issued in 1973 did not show the "local" wetland. (Sirignano 11/19/13 Tr.). He pointed out that the two lots were created in 1972. I understand his argument is that there may be a "taking" based on the fact the "local" wetlands had not been delineated at the time his client bought Lot 2, which he now seeks to develop. But this argument is unavailing, because:

i. The fact that the small wetland did not show up on the initial town map does not mean it did not exist; the map was not intended to be so site-specific. And that's not what the *Gazza* case was all about - it was the existence of the wetland laws, on the books, at the time one purchases property, that deprives the owner of a

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[13] In *Gazza v. NYS Department of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2.d 555 (1997), New York's highest court held that a property owner could not assert a "takings" claim predicated on the denial of a wetland permit, because the wetlands laws had been in place at the time he had purchased his property:

> Since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interest owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws.

later "takings" claim. Just like the zoning laws; one purchases a bundle of property rights that is shaped and defined in part by the possibility of local regulation. And there is no doubt the wetlands laws were on the books at the time the Applicant bought this lot.

ii. As discussed in *Gazza*, here the applicant knew there was a wetland law, and knew the lot was wet. He bought with full knowledge of the law, and therefore cannot claim a "taking" today, if a wetland permit is denied. The Applicant bought the lot in 1982. His experts have opined that the wetland was created sometime between 1960s and 1976, after berms were constructed, and a neighbor's pipe was installed; and the wetland can be seen on 1976 aerial.

iii. Finally, should there be any concerns about a hardship, Three Lakes Council has offered, in writing, to purchase the land. We have offered $10,000 for the lot. Attached as an exhibit hereto, is a written, irrevocable offer to purchase the lot for $10,000, which will remain open for 60 days.

What is the quantity of wetland that is to be destroyed?

We don't know the precise area. As Jan Andersen will explain, the delineated wetland has shifted over time. The Board should not simply use a delineation taken during a "dry" year, but should recognize, given the primary function of this wetland (to retain water for flood control etc.), it should reflect a "wet" year. Compare 2004 (when the earlier delineation was made) with 2012 (when the current delineation was made). According to NOAA, 2012 was substantially dryer than normal. I understand the Board prefers this delineation to be updated, but the Board should at least consider the 2004 delineation, and not the 2012 delineation that is more

favorable to the applicant. Indeed, just compare the 2012 plans with the 2013 plans, and the shift is dramatic. See exhibit hereto.

We can see that the wetlands, as existing, are substantially larger than the area as delineated in 2012. See photos attached hereto. There is standing water, well beyond the wetland flags, even at time when there has not been any recent precipitation. Even when we looked at this property a couple weeks ago, I could see standing water all over much of the lot. So I think there's a serious question of delineating this wetland in the dryest time of the year, when, as seems clear, there is standing water during much of the rest of the year.

The Simpson report, evaluating the adjoining lot now owned by Three Lakes Council, identified the wetland on that lot as being part of a contiguous wetland which spanned into the subject lot. This is addressed in detail by Mr. Myerson.

What is the importance of this wetland?[14]

The applicant suggests that the local wetland has limited value, based on a "functional analysis." Mr. Marino's eight-point analysis comes from Hollands & McGee, and is described as "rapid" analysis that can be completed with minimal observation. I suggest that you should not place great reliance on this superficial methodology.

Look at Simpson (1988). This lot probably serves as detention for up to 4.6 acres of lake watershed. Not just Mr. Rosenbaum's pipe. It's interesting, there is no calculation of what amount of water goes into this wetland. Where the water comes from. The only "analysis" is that the applicant's expert went to the site two days in September-October of 2013, observed

[14] See Code Article 217 discussion of the importance of wetlands and their many functions.

mosquitos. Didn't see any animals. Didn't observe hydric soils. Mr. Marino's report does admit to the presence of red maples – typically a wetland species, as well as what he refers to as "FACW" species, winterberry and spice bush. You should be aware, that FACW means "facultative species that are probable indicators of wetlands." So, we have large amounts of standing water, lots of wetland species; there is no doubt these are wetlands.

As residents can attest, the lot also attracts lots of wildlife, and serves wetland functions. Local deer, rabbits, even a fox, birds , peepers (deafening), frogs, and warblers, all frequent this lot. Animals regularly use this lot and the adjoining 3LC lot as a habitat corridor to go down to the lake that is only 400 feet away. These wetland constituents are discounted in the expert's report.

Thus, the applicant's "rapid functional analysis" is not a fair assessment of the impact of destruction of the wetlands and buffer. Since we do not know the source of the water that resides on this lot, we cannot know if the "constructed wetlands" will serve any wetland function. Nor can one argue that the constructed wetlands will serve equally well to support local animals.

Standard to guide permit issuance

Some of the standards for permit issuance are set forth in your Code. Lewisboro Code Section 217-8 states:

In granting, denying, or conditioning any activity permit, the Planning Board shall evaluate wetland, watercourse and/or buffer area functions and the role of the wetland, watercourse and/or buffer area in the hydrologic and ecological system, and shall determine the impact of the proposed activity upon public health and safety; special concern, rare, threatened and endangered species; water quality and additional wetland, watercourse and/or buffer area functions listed in § 217-1 of this chapter. In this determination, the Planning Board shall take into consideration the following factors:

(1) The overall impact of the proposed activity, and existing and reasonably anticipated similar activities, upon neighboring land uses and wetland, watercourse and/or buffer area functions as set forth in § 217-1 of this chapter, including but not limited to the:

(a) Milling of a wetland, watercourse and/or buffer area, and other modification of natural topographic contours. (Note the Code apparently means "filling")

Comment - the Applicant will be trucking almost 1,000 cubic yards of fill to the site, according to his own engineering calculations.

(b) Disturbance or destruction of native flora and fauna.

Comment - the Applicant's own calculations suggest over 19,000 square feet of existing wetland and buffer will be disturbed, i.e. destroyed.

(c) Influx of sediments or other materials causing increased water turbidity and/or substrate aggradations.

Comment - with no clear science as to the source of the water that comes to this site, we do not know the effects.

(d) Removal or disturbance of wetland, watercourse or buffer area soils.

Comment - the Applicant's own calculations suggest over 19,000 square feet of existing wetland and buffer will be disturbed, i.e. destroyed.

(e) Reductions or increases in wetland or watercourse water supply.

Comment - with no clear science as to the source of the water that comes to this site, we do not know the effects.

(f) Interference with wetland or watercourse water circulation and flow.

Comment - with no clear science as to the source of the water that comes to this site, we do not know the effects.

(g) Changes in the amount or type of wetland or watercourse nutrients.

Comment - the wetlands are located in close proximity to protected lakes; even minimal additional contribution of phosphorus and nitrogen, will have adverse impacts. The Board should err on the side of protection, not on the side of development.

(h) Influx or discharge of toxic chemicals and/or heavy metals.

Comment - unknown.

(i) Physical and chemical changes to the wetland or watercourse water supply.

Comment - with no clear science as to the source of the water that comes to this site, we do not know the effects.

(j) Destruction, reduction and diminution of natural and native aesthetic values.

Comment - the proposal would disrupt local wildlife and create the vista of a mini golf range.

(k) Reduction in public recreational or educational use and access.

Comment - the incremental impact of the precious waterbodies only 400 feet away, will be adverse.

(l) Impact to and alteration or disturbance of buffer areas.

Comment – there is nothing but destruction of wetlands and buffer areas. There is no mitigation proposed, that would conserve any developable non-constrained land.

(2) Any existing wetland, watercourse and/or buffer area impacts and the cumulative effect of reasonably anticipated future wetland, watercourse and/or buffer area activities in the wetland, watercourse and/or buffer area subject to the application.

Comment - the Board should consider the possible future effect of this case as precedent, should the Board grant a wetland permit with no real mitigation.

(3) The impact of the proposed activity and reasonably anticipated similar activities upon flood flows, flood storage, storm barriers, and water quality.

Comment - with no clear science as to the source of the water that comes to this site, we do not know the effects.

(4) The potential effect of flooding, erosion, hurricane winds, soil limitations, and other hazards on the proposed activity, and possible losses to the applicant and subsequent purchasers of the land.

Comment - it seems likely that whoever buys the home proposed to be built here, will

keep their basement sump pump running 24/7. And maybe need to install one to keep the infiltrator working, and to keep the back yard from turning into a swimming pool.

(5) The adequacy of water supply and waste disposal for the proposed use.
(6) Consistency with federal, state, county, regional and local comprehensive land use plans and regulations.
(7) The availability of preferable or environmentally compatible alternative locations on the subject parcel or, in the case of an activity which cannot be undertaken on the property without disturbance to wetlands, watercourses and/or buffer areas, the availability of other reasonable or practicable locations for the activity.

Some additional observations about water source(s)

What is the real source of the water coming to this lot? How much water is there? We don't know, because there has been no detailed analysis.

The applicant proposes to remove the Rosenbaum pipe – which, according to the applicant, is the source of all the water going into the existing wetland. So, understand, there will be NO wetlands on the property when he gets through with it. Yes, he will build a retaining wall and seed it with special seeds, but the water that was the source of the wetland, will be gone. So, when they say they are creating and improving wetlands, that might not be so.

But what if, as Simpson said, this lot may serve to detain runoff and groundwater for up to 4.6 acres of the area. The land slopes up, across the road, up to a small mountain. It seems probable that people built these berms some 40 or more years ago, because water was running off. Or perhaps groundwater discharges from the land at this location. We certainly know the basements are all wet in this area.

Who's right? The applicant, or me? It doesn't matter, because either way, some really bad things will happen. A host of potentially significant adverse environmental impacts:

a. If Rosenbaum's pipe is put into a drywell, what impact will this have on the

level of groundwater? Although the measurements they submit, say 8 feet to groundwater, that seems crazy.[15] As can be seen, there is standing water over much of the lot, for much of the year. Whatever the actual depth to groundwater, what will it be with Rosenbaum's pipe added to it? (Note we do not know what goes into his pipe ... just his roof drain, curtain drains, upland groundwater flow? We have no idea).

b. Since we really don't know the source of the water that comes to rest on this lot – there has been no study of this – it could be (a) from Rosenbaum's pipe, (b) from upland runoff, (c) from groundwater discharge – which seems likely given the topography and history of the lot. Or some combination.

c. What we DO know is that, if the applicant builds a five (or three) foot high retaining wall around his new wetland, water that comes from groundwater discharge or surface runoff along the westerly boundary, won't necessarily be able to access the new wetlands. Without a detailed hydrology profile of this area, you can't know the impact of what you are being asked to approve. We also know a retaining will could pose impediments to wildlife. And that the destruction of wetlands and buffer will interfere with habitat corridor.

Our Appeal to ZBA

Unfortunately, the Building Inspector has rendered an opinion that the lot to be created by this subdivision, is not required to comply with at least some of the current development regulations. As you know, you can't approve the subdivision without making this a

[15] If that were so, why does Rosenbaum need a sump pump in his basement?

legal building lot, but you are not allowed to look at all of your current zoning requirements – which you would normally do with any subdivision. Specifically, he apparently determined, at an earlier point in this process, that at least some of the current requirements do not apply – such as the minimum contiguous buildable area – because the lot was created back in 1972, before those requirements took effect. We disagree, because, among other things, the 1972 "subdivision" did not comply with the laws in effect at that time, and therefore should not be rewarded. We have therefore attempted to send this important decision to the ZBA.[16]

Does the current Code have any relevance? Of course it does; your Code's requirements in regard to minimum buildable area and other requirements, represent the opinion of your Town as to the minimum standards for good development. Somebody in Lewisboro thinks it's a ***good idea*** to have 20,000 square feet of contiguous buildable area, excluding wetlands.[17] Even if it's not legally required of this Applicant (unless the ZBA reverses the Building Inspector's opinion), the Board should recognize this standard – and its violation by the proposal now before the Board.

This Board's independent duty of review

This Board should not simply accept that the County Board of Health is supposedly ready to certify the SSDS as legal to install. The Planning Board retains an independent obligation to review the impacts of the SSDS. Walsh v. Spadaccia, 73 Misc.2d 866, 343 N.Y.S.2d 45 (S. Ct. Westch. Co. 1973). There, the Town of Yorktown had approved a

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[16] I wish to correct the statement in our Notice of Appeal that there is a stay in effect. This has been discussed between counsel, and all agree, there is no stay of these proceedings.

[17] Code Sec. 220E-(2)(a).

development on Lake Mohegan, which included a septic system. The local board declined to consider the effect of the septic system on the lake, reasoning that the County had approved the system. The Court reversed, stating:

> Even if the septic system for the proposed Chalet Home Apartments should be deemed to have met County and State requirements, this would not abrogate the need for compliance with the more stringent Town requirements.... The County Health Department made no inspection of the site, nor did it take any tests concerning the quality of the water of Lake Mohegan.
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> In the DEC permits to excavate perc and deep test borings, and to install the septic, DEC's standard boilerplate states explicitly:
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> "Granting of this permit does not relieve the permittee of the responsibility of obtaining any other permission, consent, or approval from any other federal, state, or local government which may be required."

The Board should consider precedent

The Board should consider the importance of consistent application of the Town's wetlands laws, as emphasized by the Manbeck v. Lewisboro case.[18] I am told that the Town has never granted a wetland permit in a case where, as here, the applicant is proposing development on a lot that's 100% wetlands and buffer; without any real mitigation for loss of wetlands and buffer; sensitive land located in close proximity to waterbodies, with little analysis of the risks. We ask that you not do so here.

Sincerely,

David O. Wright

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[18] See *Manbeck v. Town of Lewisboro*, 333 Fed. Appx. 599, 2009 Westlaw 1505253 (2d Cir.), ruling *inter alia*, that Town's enforcement of wetlands law did not violate Equal Protection or constitute selective enforcement.