

January 13, 2017

Keith Cornell, Esq.
Village Attorney
Village of South Nyack
282 South Broadway
South Nyack, New York 10960

Re: Preliminary Summary of Procedural and Substantive Legal
Arguments To Be Presented On Behalf Of Preserve South
Nyack and Its Members

Dear Mr. Cornell:

This preliminary summary is submitted to further supplement our continuing discussions on the issues which have arisen with regard to our clients claims as to the legal invalidity of the actions of the Thruway Authority relating to the Esposito Trail which is parkland owned by the Village of South Nyack. Our clients, Preserve South Nyack and its members emphasize that there are a considerable number of fatal legal deficiencies, both procedural and substantive, with regard to the actions of the New York State Thruway Authority in its attempts to connect the Shared Use Path with the Esposito Trail. Preserve South Nyack and its members do not have any legal concerns or challenges with regard to the central or primary aspects of Plan F which involve the extension of the Shared Use Path from the north side of the new Bridge to a central terminus with parking facilities located exclusively within the helix formed for the intersection of the Thruway/I 87/287 and Route 9W--known as "Interchange 10"-- and on lands owned by the Thruway Authority or the State of New York.

The Esposito Trail is owned by the Village of South Nyack and under applicable law constitutes park or parklands. On this basis, the Esposito Trail is entitled to heightened and enhanced levels of legal protection under both federal and New York State law. These protections have been disregarded and abrogated by the actions to date of the Thruway Authority in its efforts to secure an additional or secondary outlet for bicyclists and pedestrians on the western terminus of the Bridge as now under construction.

In a nutshell, whenever municipal parklands are either involved or impacted, there are required procedures which must be recognized and complied with under federal statutes and regulations, specifically including section 4(f) of the Transportation Act of 1966 (preservation of parklands). The Thruway Authority failed and refused to properly comply with these requirements and the disregard of this important federal statutory and regulatory regime renders the Thruway Authority's actions to date subject to vacatur or set-aside by any federal or state court of competent jurisdiction.

As one member of Preserve South Nyack has recently advised the Village, the federal law and regulations are quite compelling and forceful especially based upon the finding that the Esposito Trail is parkland that should be protected under Section 4(f) (generally known as "Preservation of Parklands" provisions)):

"Section 4(f) of the USDOT Act of 1966 (49 USC § 303; 23 CFR § 774) prohibits the Secretary of Transportation from approving any program or project that requires the "use" of (1) any publicly owned parkland, recreation area ..." (p. S-26-27)

"A 'use' under Section 4(f) of the U.S. Department of Transportation Act of 1966 is prohibited unless there is no feasible and prudent

alternative to the use of such land and such program or project includes all possible planning to minimize harm.” (p. S-26-27)

Despite impact on parkland and availability of feasible alternatives, the spur trail connection was able to get environmental approval because the Village of South Nyack designated the impact as “de minimis,” which abrogated the rigorous requirements of Section 4(f).

To a parallel extent, whenever municipal parklands are either involved or impacted, there are required procedures which must be recognized and complied with under the New York State public trust legal concepts and park alienation doctrines. As examples, according to our understanding, the “Parkland Alienation Municipal Information Form ” and all other relevant documentation have not been prepared or submitted to the New York State Office of Parks, Recreation and Historic Preservation. To our knowledge, neither the Village nor the Thruway Authority have sought legislative approval from the New York State Legislature for the alienation of any aspect of these parklands. Once again, the Thruway Authority failed and refused to comply with these requirements and the disregard of these important constraints of New York law renders the actions of the Thruway Authority and those of the Village to date subject to vacatur or set-aside by a court of competent jurisdiction.

In addition, to the extent that the Village of South Nyack is conveying any legal interest in the Esposito Trail, or in the lands which comprise any aspect or portion of the Village Hall property, to the Thruway Authority, the Village must proceed by formal resolution as a prerequisite. It has not done so by any formal action to date. Any such resolution must be premised upon valid reasons which should be identified by the Village Board in its resolution, usually by a recitation utilizing “Whereas” provisions. As part of this process, any benefits and detriments to the Village and its citizens

must be recognized and a State Environmental Quality Review Act (S.E.Q.R.A.) review is necessitated on this specific resolution and any concomitant action ; the SEQRA review on any proposed Village action, such as the sale or grant of Village Hall lands and grant of easement or rights relating to the Esposito Trail from the Village to the Thruway Authority, is a precondition prior to passage of the proposed resolution.

Thus, my client, Preserve South Nyack and its members assert that the actions to date and continuing forward of the Thruway Authority, and as a corollary the actions to date and continuing forward of the Village of South Nyack, violate several federal and New York State Laws and Regulations. The specific laws in issue are (1) the federal and state provisions which apply when parkland is impacted or an interest in that parkland is conveyed and (2) the federal and New York State laws applicable to environmental assessments and environmental impact statements.

On the issue of required environmental review and assessment, the process to date on Plan F was legally defective and deficient in multiple ways. The proposal for Plan F was presented as a single issue or proposal for consideration; yet there were material subsets of the plan that were not subjected to formal comment or sufficiently detailed review. In short, Plan F was presented for consideration, including the public hearing on March 16, 2016, as a single unified proposal—there was no recognition that the spur or connection to from the Shared Use Path to the Esposito Trail should be considered and evaluated as a separate and distinct alternative or sub-set. This examination and review should have been accomplished as a separate and distinct analysis under both the federal and state environmental review and assessment laws. This failure renders the Environmental Assessment/SEQRA process defective as a matter of law and vitiates the process.

The issue of the spur and connection to Esposito Trail should have received its own specific analysis as a material but separate and distinct component of the analysis—the issues which derive from the spur or the connection to Esposito have not been properly vetted and evaluated as required under the laws of the United States and this State. In effect there was improper segmentation or bundling of the process which is prohibited under law. As a result there was a complete and utter failure to conduct the required environmental analysis of proposed actions that are certainly very material and concerning proposal which bears with it the potential to environmentally derogate to Village of South Nyack. On this point, one must question how does the Thruway Authority determine the number of pedestrians and bicyclists who will proceed onto and off the Bridge from the terminus with parking spaces to be on located on Thruway property under Plan F as opposed to the the determination of the number of pedestrians and bicyclists who will proceed onto and off the Bridge by use of the spur and connection to the Esposito trail that would terminate in a quiet residential neighborhood with narrow side streets and no adequate parking? The spur and Esposito connection were not even evaluated or reviewed as afterthoughts in the Environmental Assessment and SEQRA process to date; this constitutes an outright disregard and violation of the laws and regulations which control such processes. Without question, there was no “hard look” as required by law concerning the spur and Esposito Trail connection. Furthermore, to our understanding no formal action or determination has been either considered or enacted by the Village of South Nyack which would authorize the conveyance of any interest whether in the nature of easement or fee ownership from the Village to the Thruway Authority.

On these points, the analysis of the connection of the Shared Use Path to the Esposito Trail was conducted on the erroneous premise that the cinder trail itself is the only portion of the proposed project; the entire width of the railroad right of way and not just the cinder portion constitutes the Esposito Trail but all of the environmental assessment and review was not

conducted on that basis. There is considerable vegetation located within the boundaries of this parkland, it parallels the Hudson River and migratory routes connected therewith, and the adverse effect of removal of vegetation and ground cover could in actuality adversely affect endangered species such as Indiana and Long Eared Bats as well as warblers and other avian migrants. These concerns are entitled to much more detailed review-not just the cursory review which was actually undertaken.

The failure of the Village Board to comply with all applicable and required federal and state environmental review procedures is epitomized by the actions of that Board at its meeting on April 12, 2016; without question, the Mayor and the Village Board had a proverbial “wolf at the door” -- it had been faced with several alternative potentially devastating proposals concerning the location and design of the western terminus of the Shared Use Path for the use pedestrians and bicyclists on the north side of the new Bridge, including all necessary vehicular parking to service those individuals. Some of these proposed alternative plans included the exercise of eminent domain and actual destruction and removal of a number of existing residential structures. With great relief, at its meeting on April 12, 2016 the Mayor and Village Board accepted in concept Plan F which primarily would locate the terminus of the Shared Use Path, with its parking facilities, on lands of the Thruway Authority located within the massive helix formed by the intersection of the Thruway/Interstate 287 and Route 9W -- known as Interchange 10. Of course this proposal would be accepted by the Village and the Board agreed in an extremely informal and truncated manner to authorize the Mayor to inform the Thruway Authority and federal and state authorities that Plan F would only have a “de minimus” effect on the Village.

Therein lies the rub. The issue of egress and ingress to the Shared Use Path by pedestrians and bicyclists from the connection with the Esposito Trail was not sufficiently analyzed or evaluated nor was the potential impact on the entry and discharge point which is located in a

residential neighborhood reviewed as to potential environmental impact under federal or state law. The Village Board in its perfunctory discussion made remarks to the effect that all issues with regard to the Esposito Trail, which is admittedly parkland, and any connection to the Shared Use path would be dealt with at a later date. That date has never come; that environmental review as required under all applicable federal and state laws and regulations never occurred.

There are several additional points, primarily procedural, which should be noted, on this matter:

First, on the issue of standing, there are members of Preserve South Nyack who own properties which immediately adjoin or abut the Esposito Trail and there are also those members who own property within several hundred feet of that Trail. On this basis, there is sufficient involvement of this organization and its members to meet all required jurisdictional factors required in SEQRA litigation concerning standing to institute legal proceedings.

Second, all applicable statutes of limitation or time limitations, which apply to any of the claims which our clients may have to assert, either in federal or state court proceedings, have not run or expired. The SEQRA process as to the proposed spur alternative and connection of the Shared Use Path has never been properly completed in the manner required under federal law and New York State law; on this basis, any purported time limitations have not commenced running. It must also be noted that there are alternative statutes of limitation or time periods which would apply to any claims which our clients may institute in federal or New York State courts to the extent that any proceeding challenging the actions of the Thruway Authority and Village is instituted as a declaratory judgment action -- 6 year statute of limitations on issues such as the conveyance of any interest in parkland, etc. -- which apply in addition to those time limits which

might be based upon Article 78 of the New York Civil Practice Law and Rules.

We transmit this to you in your capacity as Village Attorney for the Village of South Nyack in order to address on a preliminary basis the environmental, legal and practical issues raised by the proposed spur and connection of the Shared Use Path to the Esposito Trail. Our clients expressly reserve the right to assert additional grounds and legal arguments in support of their claims if litigation proves necessary including, but not limited to, causes of action for inverse condemnation, violation of federal and New York State Freedom of Information Laws, expansion of use of the easement as originally established to an inordinate and inappropriate degree and civil nuisance claims.

Preserve South Nyack now demands the immediate discontinuation of any and all actions by the Village of South Nyack and the New York State Thruway Authority which are intended in any manner to prepare for or complete the construction of the spur or connection between the Shared Use Path and the Esposito Trail. If the issues and concerns raised by the Preserve South Nyack organization as set forth herein and elsewhere cannot be resolved to the satisfaction of our clients, legal proceedings will be instituted to enforce the rights of Preserve South Nyack and the rights of its members. We are sure that you are aware that there is a considerable legal duty on the part of my clients to institute suit at the earliest possible date to preserve its rights.

Recognizing all of these these facts including recently available alternative options as a result of the closure of Thruway entryway located immediately to the south of Village Hall, the Thruway Authority and its representatives should now revisit the matter of the spur and proposed connection of the Shared Use Path with the Esposito Trail and discontinue that plan with all deliberate speed.

In closing, please be advised that this communication is transmitted on behalf of my clients for notice, informational and settlement purposes only without prejudice, and reserving all legal rights of my clients Preserve South Nyack and its members including all constitutional and associational rights. Please feel free to share it with anyone from the Village and with the Thruway Authority and its representatives and agents.

Thank you for your review and consideration of this submission. If you have any questions or seek any additional comments or information, please contact me at your earliest convenience. You have my cell phone.

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Cc: Preserve South Nyack
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