

**July 26, 2018 Statement Birchwood Neighborhood Association to Town of Colonie  
Town Board  
Public Hearing for the Open Development Area located at 34 Denison Road**

The Birchwood Neighborhood Association previously expressed its concerns with Shelco's proposed ODA application and any future development plans for 34 Denison Road. The Birchwood Neighborhood Association President, Joel Weingarten attended the January 23, 2018 Planning Board hearing and submitted both verbal and written comments. Unaccountably, Joel was not notified of this hearing until July 17<sup>th</sup>, and could not attend due to a work commitment.

We are here tonight to provide the Birchwood Neighborhood's perspective concerning Shelco's ODA application. It is our understanding that the Board or some of the Board members have already heard from the Planning and Economic Development Department about why Town staff is in favor of Shelco's ODA application. Unaccountably, the Town never gave the neighborhood this information.

This is why we are opposed. At first blush, Shelco's application seems reasonable-eliminate 2 curb cuts in favor of one entrance way off of Denison Road for a 3 lot minor subdivision for 3 family members who all want to live near each other. And, as their argument goes this will also minimize the number of mature trees that would need to be clear cut. Chairman Stuto found even that explanation hard to believe as he remarked at the Planning Board hearing "I've seen it before where they have said that. Obviously people change their minds and people fib once in a while."

But IN FACT this site is a very steep hilly area and is precisely where Shelco wanted to locate an access road for a 2009 96 lot subdivision, "Ridgewood".

As part of that Ridgewood concept review, CT Male, Town staff and the Planning Board rejected a permanent and then a proposed emergency access road at exactly that location due to steepness and consequent lack of safety. Again, in December 2009, the Planning Board rejected Shelco's request to utilize this access point due to safety concerns.

Finally, we also know that there is plenty of room available on Shelco's remaining 118 acres of 34 Denison Road for these 3 quote/unquote "family lots" to be located on or off of Newport/Wexford Drive with a direct entrance way to the Londonderry Ridge subdivision. But if you visit that area you will immediately see that the 3 lots would have a front row seat to 2 large very unattractive water tanks with Town of Colonie transmission equipment located on top. And this is where Shelco wanted to locate the neighborhood park in 2009! Town Staff failed to advise the Planning Board that in 2010, Shelco subdivided out over 6 acres out of this Parcel for a minor subdivision where these 3 "family lots" could have been located.

All this leaves us very skeptical of Shelco's motives. We are left to question whether this may be a disingenuous and disguised attempt by Shelco to obtain approval for an access road for a future major subdivision proposal at 34 Denison Road?<sup>1</sup> Does this application signal Shelco's decision to abandon any further consideration of an access road leading out to the Londonderry Ridge Subdivision that was depicted in the 2009 concept approval plan? There is no term in the land use law for "family lots" or deed restriction offered or evidence provided making this proposal disingenuous at best.

We are here tonight to express our grave concern with how this ODA application has been reviewed to date by Town staff, Planning and Economic Development staff and finally the Planning Board. As town residents we expect that our town leaders, staff and appointed Planning Board members will take their fiduciary responsibility seriously to carefully review every development application which comes before them with the utmost regard and care for each development application's compliance with NYS law and the Town of Colonie Land Use Law. We also expect that as part of their statutory responsibilities their consideration will include the interests and concerns of town residents. Unfortunately, we believe that this has not been the case thus far for Shelco's open development area application.

Most importantly, we are very concerned that thus far there has not been a thorough review by Town Staff and the Planning Board to support any findings or conclusions for the Planning Board's January 23, 2018 Special Rule which was forwarded to the Town Board that the proposed open development area access way is suitable pursuant to the requirements of NYS Town Law 280-a. Such legally sufficient findings and conclusion are necessary for this ODA to be legally approved by this Board.

### **Point 1**

**The Special Rule of the Planning Board dated January 23, 2018 forwarded to the Town Board for action at its July 26, 2018 meeting is missing 2 key conditions and multiple revisions that were approved by the Planning Board members on January 23, 2018.**

On July 12, 2018 the Town Board voted to schedule a public hearing after approving Resolution 307 containing Exhibit A which is a January 23, 2018 Special Rule of the Planning Board setting conditions and limitations and recommendations for the establishment of an Open Development Area for 34 Denison Road Town of Colonie pursuant to Section 280-a of the New York State Town Law.

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<sup>1</sup> At the January 23, 2018 Planning Board meeting, PEDD Director Lacivita did not disclose the development history for this site or acknowledge that his department previously approved 2 minor subdivision approvals for Shelco or that Shelco received a 2009 Concept approval for a 96 lot subdivision at 34 Denison Road. He also did not acknowledge that his department was concurrently reviewing another minor subdivision application at Walnut Lane West which had previously been a parcel subdivided out of 34 Denison Road. As a result, the Birchwood Neighborhood Association prepared the attached development history timeline and submitted it to Town officials on April 10, 2018.

NYS Town Law 280-a requires that building permits can only be issued for structures if a street or highway giving access to such proposed structure has been duly placed on the official map or plan of a Town. An exception is made for a Town Board to establish an open development area within the town where building permits may be issued for the erection of structures to which access is given by right of way or easement, **“upon such conditions and subject to such limitations as may be prescribed by general or special rule of the planning board.”** The Town of Colonie Land Use law was amended in 2013 to authorize the Town Board to establish an Open Development Area “pursuant to Town Law Section 280-a subject to such conditions and limitations as may be prescribed by general or special rule of the Planning Board.” This approval is discretionary.<sup>2</sup> See Land Use Law Section 190-132.

On January 23, 2018, the Planning Board voted to refer Shelco Development’s open development area application to the Town Board with 8 conditions and several language revisions. The Special rule which is included as Exhibit A and forwarded to the Town Board is invalid **because it only contains 6 conditions and does not contain all 8 of the Planning Board’s conditions and the revised wording that was voted upon.**

The following two conditions are missing from the January 23, 2018 Special Rule which was affixed as part of Town Board Resolution No. 307:

**7. "subject to the Town Board SEQR review and determination and Adoption of the ODA does not constitute segmentation under SEQR."**

**8. "A future proposal of a minor subdivision on the remaining lands, must be reviewed and approved by the Town Planning Board."**

In addition, the Special Rule that was forwarded does not reflect PB Member Kathleen Dalton’s request to require the ODA approval condition 1 to be revised to encompass proposed lots 34, 36 and 38. See Tr. at pp. 51-52.

Furthermore, the last whereas clause of the Special Rule was not revised to refer to 3 lots- 34, 36 and 38 at Chairman Stuto’s request. The last whereas clause was also not revised at PB Member Dalton’s request to refer to the further designation of the remaining 112 acres as parcel 40. (Tr. pp 52 and 56).

Accordingly, we urge the Town Board to reject the Planning Board’s Special Rule and either deny Shelco’s application outright or send this matter back to the Planning Board to correct the Special Rule with due notice provided pursuant to Section 190-132 of the Town’s Land Use Law and NYS Town Law.

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<sup>2</sup> Land Use Law Section 190-132 reads “pursuant to Town Law Section 280-a, the Town Board **may**, by resolution, establish open development areas, for which permits **may** be issued for the erection of structures on parcels which are accessed by right-of-way or easement, subject to such conditions and limitations as **may** be prescribed by general or special rule of the Planning Board.” (emphasis added).

## Point 2

### **The Planning Board record provides no basis for the Town Board's finding that Shelco's open development area complies with NYS Town Law 280-a.**

New York Zoning Law and Practice at 2 NY Zoning Law and Practice Section 19:33 describes the Planning Board's statutory obligations pursuant to NYS Town Law 280-a when reviewing Shelco's ODA request. According to this legal treatise, "[t]he statute also does not prescribe the content of the advisory report, but since the purpose of Section 280-a is to insure that provision is made for suitable access to land before a building permit issued, suitability of access will often be the primary focus of the planning board's report. The planning board may look at the number of lots to be served, the sufficiency of the width and grade of the proposed easement access, whether it can accommodate the traffic anticipated to use, whether emergency services personnel obtain access to the building or buildings to be constructed, the number of lots the roadway can serve and the board may consider whether the town comprehensive plan offers any guidance... Furthermore, since some of the issues addressed touch upon an examination of the land in question and the nature of the easement itself, the planning board may wish to have the assistance of an engineer or planner in formulating its report."

The Shelco ODA Planning Board record does not satisfy NYS Town Law requirements for approving an open development area.

First, the Planning Board fundamentally erred when it abrogated its statutory responsibility by not reviewing the suitability of the access way and delegated its review to the Planning and Economic Development Staff after Shelco filed a minor subdivision application. NYS Town Law clearly states that it is a Town planning board that must make findings and recommendations to the Town Board. Town Planning and Economic Development Staff are not authorized to grant an approval for an access way. Under the Colonie land use law, a minor subdivision review application does not require any public notice or hearing.<sup>3</sup> To date, Shelco has not filed a complete minor subdivision application with the Town and may never do so. Shelco has purposely chosen to wait to provide a complete minor subdivision application which would contain detailed engineering and

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<sup>3</sup> Shelco is claiming that they desire a 3 lot minor subdivision necessitating the ODA application in order to build 3 single family residences for 3 related family members who all wish to reside near each other. Tr. at p. 21. Chairman Stuto found that explanation hard to believe as he immediately remarked "I've seen it before where they have said that. Obviously people change their minds and people fib once in a while." Tr. at p. 21. There is no requirement that the ODA approval is contingent upon Shelco or any third party submitting an application for a 3 lot minor subdivision. Shelco's project narrative provided the following summary of hardship "The terrain in the area of development is steep in many areas. In an effort to minimize the site disturbance a shared driveway is proposed to access the three(3) parcels. The intent is to keep as many trees as possible for the development while maintaining screening around the proposed homes."

site plans, likely to avoid having the Planning Board discover the unsuitability of the site for emergency and other access.

What is the legal effect of the Town Board's decision to approve Shelco's ODA request if Shelco never files that 3 lot minor subdivision application?

The Planning Board voted to abdicate its legal responsibility to require a detailed review of Shelco's ODA request as part of their deliberations. This is a clear departure from the Planning Board's prior ODA review procedure. From 2009 to present, the Planning Board reviewed over 12 ODA applications. For each of these applications, the Planning Board required the applicant to provide detailed technical information to allow the Planning Board to find whether the access way was suitable. It has never voted before to defer this review to the Planning and Economic Development Department staff. For example, the PB required the 29 Bacon Lane ODA applicant to establish whether the proposed access way would have suitable access for emergency response vehicles including fire safety apparatus. The 29 Bacon lane applicant was also required to provide core sampling to validate whether it could support fire apparatus tonnage; engineering data for whether the road for could accommodate snow plowing equipment and whether the road grade was suitable for emergency vehicle access pursuant to the NYS Fire Code.

Second, there was no credible basis for finding that the proposed ODA complies with NYS Town Law 280-a in the Planning Board record.

During the Planning Board review on January 23, 2018, Chairman Stuto was clearly troubled by Shelco's failure to provide any technical information regarding the site topography, road layout and specifications and access for emergency and fire responders. Chairman Stuto even noted that the Planning Board previously reviewed the access road specifications as part of their review for fire and emergency vehicle access during other ODA application reviews. Unfortunately, before he could pursue this line of questioning, Chairman Stuto was interrupted by Town Councilman Rosano who spoke on the record and incorrectly advised the Planning Board that fire safety review for access and design and compliance with Town road standards can be reviewed at the Town Board level. (Tr. pp. 6-8). PEDD Director LaCivita misguided the Planning Board when he stated that the PB can make conditions to make sure that Fire safety has a secondary look to make sure that the access and design and everything else is in compliance with Town Road standards. (Tr. p. 7). Shockingly, PEDD Director LaCivita even admitted that "the only thing that we see here from fire services in their packet on October 4<sup>th</sup> is it says 'we have reviewed the open development area drawings for the above noted project and have only the following comment. A fire hydrant will be required on a cul de sac where the houses will require residential fire sprinklers.'" Shelco's ODA application does not contain any site elevation information which could then have been reviewed by Fire Services

The Planning Board should have had before it the appropriate technical information as well as the completed results of all technical reviews in order to have a legally sufficient basis for the special rule which it was required to forward to the Town Board. However, in a clear departure from prior practice, as Chairman Stuto and Member Mion noted in

their comments, the Planning Board voted to approve and forward the Special Rule to the Town Board. Chairman Stuto's decision was a clear departure from prior Planning Board reviews. At the January 2018 Planning Board hearing, Chairman Stuto referenced the prior Zeh Open Development Area ODA approval and stated "We made them keep coming back until they drew it so we could see what they were putting in, didn't we? I am trying to avoid that." Planning Board Member Mion confirmed that scenario only to be interrupted by Town Council member Rosano who improperly and incorrectly advised that the Planning Board could make this a condition of their special rule. (Tr. at p. 8).

### **Point 3**

#### **Technical concerns regarding the suitability of the proposed ODA access way were raised by the Public and during Prior Department Staff review and were not rebutted or refuted by Shelco**

As discussed in Point 2 above, the ODA application contains no detailed technical analysis pertaining to the suitability of the access road. There was no technical analysis and review contemporaneously conducted by Department Staff as well. Instead, at the outset, Shelco's engineer CT Male stated that they would only provide this technical information after the ODA request was granted and they would "come back for the Town review for a minor subdivision application that will include grading and utility design for the three homes. Right now we do not have that because we don't know if they are going to accept the shared driveway without the ODA." Tr. p 5.

At that point, the Planning Board should have sent Shelco back to the drawing board and insisted that this information be provided before proceeding any further. It is Shelco's statutory burden to demonstrate that the proposed open development area application can be approved. It should not be the responsibility of third party neighborhoods and town residents to raise these public safety issues and demand that the Town and the developer comply with the law.

The Birchwood Neighborhood Association **repeatedly** raised concerns about the extremely steep slopes located on the parcel and questioned the wisdom of constructing homes and a road on such topography which were never satisfactorily refuted by CT Male or addressed by Town planning staff. (See January 23, 2018 Birchwood Neighborhood Association submission to Planning Board). At the PB hearing, Lawrence Palleschi, a civil engineer and neighbor also questioned how a road could be built on the parcel's steep slopes and pointed out the safety issues with vehicles sliding off the access road onto Denison Road. Mr. Palleschi also questioned whether a 10% maximum grade would be safe at that location due to the existing dimensions of Denison Road. (Tr. at p. 34 and 54.) An unidentified neighbor (who identified himself as a civil engineer) also questioned how it would be possible for a snow plow to climb such a steep hill. Tr. at p. 41. This neighbor also asked "what distance are you going to require from Denison Road going back up that slope to be flat so those people have a chance to stop before sliding out onto Denison Road 10%? That 10% is too steep. They have to have a flat area to stop." Tr.. at. P. 54.

After hearing these concerns, Chairman Stuto was keenly interested for Mr. Palleschi to provide his response to this questioner when he asked “I’m asking you as a civil engineer why you think is safe? Do you think it should be a 10% rate out to the curb.” ( Tr. at p. 54). Wasn’t it incumbent upon Shelco’s consultant to provide this response to Chairman Stuto’s questions? Where was PEDD Staff’s response given the extensive development review history of 34 Denison Road?

PEDD staff was well aware of concerns about the location and safety issues for the ODA access way. The viability of utilizing the ODA access way was examined during the Town’s review of Shelco’s 2007 Ridgewood Subdivision application and rejected by both Department Staff and Shelco’s consultant CT Male. In 2007, CT Male rejected the Town of Colonie Bureau of Engineering and Division of Highway staff request to consider a curb cut at the exact location of the proposed ODA access point on Denison Road. On October 27, 2007, CT Male acknowledged Town Bureau of Engineering and Division of Highway comments that a sight distance analysis for the proposed curb cut on Denison Road must be provided. On November 15, 2007, CT Male advised Department Staff that “this may be difficult due to the classification of constrained lands and existing slopes within the site that are across from Oakhill (Now Forest Hills); therefore a curb cut is not shown at this time.” (See November 15, 2007 letter from Melissa Currier CT Male to Kevin Delaughter). On June 11, 2008 CT Male advised Town Planning Staff that a curb cut that would line up with the proposed curb cut for the now Forest Hills Subdivision **cannot be accomplished due to sight distance constraints and steep slopes**. On August 12, 2008, the Planning Board requested that Shelco/CT Male provide the feasibility of grading the southerly access to Denison Road within the available right-of-way.

Any further consideration of the curb cut was ultimately rejected at the 2009 Concept Approval hearing. At the December 2009 Ridgewood Concept acceptance hearing, Mr. Palleschi voiced the same concerns as he did at the January 2018 hearing. In December 2009, Shelco/CT Male were seeking permission to use the proposed ODA access way to be a temporary access way to the Ridgewood Subdivision while the Londonderry Ridge subdivision remained un built. In 2009, Mr. Palleschi stated “the access roads: that little access road that you’re looking at for your emergency. I would strongly recommend that you don’t ever consider that. That’s a very steep grade right there and you don’t want to be driving emergency vehicles up and down that hill. I would recommend that you go up the water tower road. I would not recommend that little area. That’s just too dangerous... It looks nice on the plans but the reality is that’s a pretty steep slope.” (Ridgewood Concept Acceptance Transcript December 1, 2009 at p. 42) In 2009,

Ms. Currier did not dispute his analysis and merely replied that the access road “it would be temporary only.” Ridgewood Concept Acceptance Transcript December 1, 2009 at p. 42) **She did not refute Mr. Palleschi and the other neighbors concerns at the January 23, 2018 Planning Board hearing either. Instead, Ms. Currier actually admitted that the site grades were greater than 10% and that she will have “to move some more dirt” but never disclosed what the site elevations were and how the**

**access way could be properly constructed. (Tr. at p. 44).** Again, it was the Planning Board's obligation to question Shelco and not let these concerns remain unanswered.

PEDD staff should be quite aware of instances in the past where CT Male's technical review has proven wrong. In 2015, 4 years after the Forest Hills Subdivision received final approval, Ms. Currier wrote to Mike Lyons and admitted that there was a "grade bust" on the Forest Hills site. She explained that the site clearing contractor noticed that his field survey did not agree with the existing grades shown on the plans. Essentially, CT Male's site survey which was submitted for the Forest Hills final subdivision approval was proven to be inaccurate. Ms. Currier and Mr. Vopelak wrote that "actual site grades were generally 2 to 3 feet or more lower in depth and varied more or less across the site." See April 30, 2015 Letter Melissa Currier and Ed Vopelak to Mike Lyons.

#### **Point 4**

#### **Town Staff never completed their review of any potential impacts to the structural integrity of the new Vly Denison Road Water Transmission Line**

There is no technical analysis regarding any potential impacts to the new Vly Denison Road Water transmission line if the proposed Shelco access way is constructed. Division of Latham Water District staff's October 27, 2017 comments advised the PEDD that Shelco had not submitted a grading plan. Consequently, Latham Water District staff could not evaluate the impacts to the existing water main on site. At the January 2018 Planning Board hearing, Mr. Palleschi questioned whether the structural integrity of the Town water transmission line would be compromised if the plan to have the proposed access road traverses the water transmission line occurs. He remarked "I don't know what CT Male was thinking but you cannot build a road up that slope. You cannot walk up that slope. If you cut either side to get a side slope in there to build a road up in there you're going to be in the water line." (Tr. at p. 4). CT Male representative Melissa Currier and Edwin Vopelak did not respond. Chairman Stuto by asking "what waterline are you referring to?" (Tr. at p. 34) clearly showed that he and the PB members had not been adequately briefed on this issue. Mr. Palleschi stated "I know that this is the original plan for this side-they wanted to put a street lining up with this street. I was working with the neighborhood association back then. I said that's not a real good idea. That's a really steep street. Even if you did cut the sides back and put the street in, the cars will be sliding right off onto Denison Road on a slippery day." (Tr. at p. 35)

As the foregoing establishes from the record in this matter, many critical traffic and safety concerns as well as the water transmission line integrity issues which remain unanswered. These unanswered questions clearly refute the Planning Board's finding in submitting the Special Rule to the Town Board that the "access" provided sufficient frontage to allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles as set forth in Town Law Section 280-a. Consequently, the Town Board should not vote to approve Shelco's ODA request.



### **Point 5**

**The PB record does not support the Planning Board's finding that a single driveway will minimize clearing and grading limits and site disturbance to the mature wooded area retaining much of the existing natural buffer.**

There is no tree survey or any vegetation clearing lines noted on the drawings submitted as part of the ODA application. Therefore, there is no basis for the Planning Board's finding that tree removal will be minimized as a result of the ODA application. In fact, Mr. Palleschi pointed out that the steep topography would require extensive grading and site cuts to allow for any access way. Tr. at p 4. Furthermore, the Planning Board did not require Shelco to explore other available locations for this 3 lot minor subdivision on their 118 acres site, including areas on the site located adjacent to the Londonderry Ridge Subdivision which would minimize the need for tree removal.

### **Point 6**

**The Planning Board failed to consider whether the ODA approval is improper segmentation under the NYS Environmental Quality Review Act**

The Birchwood Neighborhood's January 23, 2018 written submission questioned how the ODA application, which would allow a 3 lot minor subdivision, could be approved without considering the overall development plans for the entire 118 acres located at 34 Denison Road and whether this application constitutes unlawful segmentation under the NYS Environmental Quality Review Act.

We have already noted our concern that this proposed ODA access way could become a future access road to the greater adjacent contiguous Shelco parcel as part of a major subdivision application. If the ODA is approved, the applicant for the major subdivision application could then utilize this road as access for the larger subdivision because the Town Board's ODA approval would constitute the Town Board's finding that the ODA access road is suitable for public access. NYS Fire Code requires that there be 2 access roads for large subdivisions. The ODA approval will provide Shelco with the ability to utilize the ODA access way as one of the two required access ways to the larger subdivision. The Planning board hearing contains no consideration of alternative sites for the 3 lot minor subdivision on the greater 118 acres 34 Denison Road parcel or whether this access way could become an access road as part of a larger subdivision application.

During the Planning Board hearing, there were extensive discussions about SEQRA segmentation. PEDD Director LaCivita advised the Planning Board that the Town did not have before it a project on the larger parcel. ( Tr. at p. 47) Chairman Stuto asked Planning Board Attorney Marinelli if she saw anything that triggers segmentation. In response Marinelli stated that she is not the SEQRA expert and that Rebekah Kennedy does that. "I don't see anything off the top of my head. I would have Rebekah review that." Tr. at p. 41. On October 6, 2017, Rebekah Kennedy reviewed the ODA application and her sign

off only stated “no comments on this ODA.” No SEQRA segmentation or other legal analysis was provided. The Birchwood Neighborhood Association pointed out that Shelco had already subdivided 6 acres from the 34 Denison lands and received a minor and major subdivision approvals for acreage located at 33 Denison Road. The PB Condition 7 which is unaccountably missing from the Special Rule expressly provides that their vote was conditioned upon the Town Board SEQRA review and determination that the adoption of the ODA does not constitute segmentation under SEQRA. Without this condition included in the Special Rule we do not know if this segmentation analysis has been done. In another attempt to address the SEQRA segmentation concern, the Planning Board imposed Condition 8 specifically which provides that any further minor subdivision must come back before the Planning Board for review (Shelco’s 3 family lot minor subdivision however would not be required to be reviewed by the Planning Board). This condition was unaccountably left out of the Special Rule which was forwarded to the Town Board for a vote.

We want to alert the Board to a discussion that Susan Quine Laurilliard had with PEDD Director Lacivita on June 5, 2018 following a Town Planning board meeting. After the meeting ended, she was speaking with Supervisor Mahan. Mr. LaCivita was exiting the Operations Center. She stopped and asked Mr. Lacivita if he was aware of any development plans for the remaining portion of 34 Denison Road. Mr. LaCivita stated that he was in “operational discussions” with someone or entity which he was not at liberty to disclose concerning this parcel. She then asked him what “operational discussions” meant- an application filed, pre-application discussions etc. ? Mr. Lacivita refused to provide any details. Less than a week later, on June 11, Mr. LaCivita denied making this statement.

From the foregoing, it is clear that the PEDD director had relevant information concerning the larger Denison Road parcel. When the Planning Board was debating the SEQRA segmentation issues, we believe it was incumbent upon them to demand clarification about any development plans for 34 Denison Road. Mr. LaCivita’s decision to keep this information secret does not serve the public or the current administration.

Even without identified development plans for this site, it is clear that the remaining portion of this property will be the subject of some type of development application in the future. Many of our neighbors have heard rumors that Charlew Builders is interested in purchasing the 34 Denison Road parcel from Jeffory Myers. In 2009, Shelco received a concept approval for a cluster subdivision application for 96 lots. It is almost certain that a development proposal will be forthcoming similar to the 2009 proposal. See Karasz v. Wallace, 134 Misc 2d 1052 (4<sup>th</sup> Dept 1987) (Sup Ct, Saratoga County). Therefore, the Town Board is required to take into account what impact the approval of the ODA request and problematic access road will have on any future development of 34 Denison Road.

## Point 7

### **A Town Board vote in favor of the Shelco ODA request must conform to the Town of Colonie Comprehensive Plan**

The entire 118 acres designated as 34 Denison Road is located in a Conservation Overlay District and is zoned for single family residences. The 2005 Comprehensive Plan recommended that 34 Denison Road along with the other acreage Shelco owned at 33 Denison Road (totaling approximately 198 acres) be placed within a conservation overlay district. In 2007, the Town Zoning was changed to comply with the Comprehensive Plan recommendations and it placed all 198 acres within a conservation overlay district.

The 34 Denison Road Parcel is also one of the 3 largest remaining intact undeveloped parcels in the Town of Colonie. The 2005 Comprehensive Plan recommended that the Town create an open space plan which it has failed to do. At this time, there is no open space inventory which would allow the Town to assess what impact development will have on open space and recreation resources in the Town. The Town Conservation Advisory Council is also required to create and maintain an index of open space land. This index has not been created either. The Town of Colonie's 1988 Land Use Advisory Council Technical Report found that the recreational needs in the Albany Airport Area were inadequate. It was determined that additional parkland was necessary in this area. In 1990, the Albany County Airport Area GEIS findings included the requirement to locate a park in the Vly Denison Road Area **and in particular on the 33 Denison Road parcel**. In 2011, Shelco's final approval for the Forest Hills subdivision **required the park** to be located instead at 34 Denison Road.

The Town Comprehensive plan specifically identified the 34 Denison Road parcel as having environmental significance requiring that it be included in a conservation overlay district. Consequently, Town development review for this parcel would require heightened scrutiny. Shelco has stated that the basis for its ODA application is to create a 3 lot minor subdivision. Minor subdivisions are exempt from the Conservation Overlay District land use law land use law requirements. As a result, these 3.94 acres would be removed from review in accordance with the land use law's conservation overlay district requirements. When 34 Denison Road was reviewed back in 2009, the concept plan included two lots along the frontage of Denison Road and with direct driveway access to Denison Road. There was no third lot located further up the steep slope.

It is not appropriate for Shelco to utilize a minor subdivision application as a technicality to avoid compliance with the conservation overlay district development standards. This is a clear contravention of the Town's Comprehensive Plan. The Town should not proceed with any development approvals without assessing the impacts on the Town's remaining open space and without addressing the Town's unmet recreational needs.

### **Point 8**

#### **Shelco's proposal to connect the 3 parcels to the new high pressure water system is in contravention of the 1990 Albany County Airport Area GEIS**

The 1990 Albany County Airport Area GEIS prohibits the construction of new homes at elevations 410 and above without construction of a new high pressure water tank constructed.<sup>4</sup> While a new high pressure water system has been constructed and only Forest Hills and Londonderry Ridge homes are connected to this new system, Shelco's CT Male is also proposing that the 3 lot minor subdivision will have access to the new High pressure water system. Ironically and unfairly, the existing homes along Denison Road will not have the same access to high water pressure for another 10 years. These very homes and their failed water pressure was the impetus behind the need for the construction of a new high pressure water tank system and the inclusion of the GEIS water mitigation fees for this new high pressure water system as a water infrastructure improvement eligible for Airport Area GEIS mitigation fees. The 2 minor subdivisions which the Town approved at Shelco's request at 33 Denison Road and Walnut Lane West could not connect to the new water system. The 33 Denison Road minor subdivision was required to have private wells.

How is it possible, then, that the Latham Water District will allow Shelco's 3 lot minor subdivision to be connected to the new water system when the existing neighbors along Denison Road who have inadequate water pressure were told that they will not be allowed to connect to that system for another 10 years? The inadequate water pressure for current town residents was the basis for the GEIS mitigation fee scheme to pay for the needed water improvements in our neighborhood. These GEIS mitigation fees were not authorized or designed to be paid for what is ostensibly now an exclusive water system.

The Board should suspend the review of Shelco's minor subdivision application and any further development applications in this area until the 1990 Airport Area GEIS, only valid for 20 years, is updated. The Town of Colonie is now engaged in the formal scoping process for the GEIS update. No further development in the Albany Airport GEIS area should be reviewed until the Town finishes this process.

### **Point 9**

#### **CT Male should be precluded from appearing before the Town Planning Board and Town Board on Shelco's ODA application**

CT Male's representation of Shelco before the Town Planning Board and Town Board arguably constitutes a conflict of interest and at a minimum raises an appearance of impropriety. CT Male, as Shelco's consultant is appearing before the very same Town Department personnel for whom it is currently providing engineering services to the Town for the former Shelco Forest Hills development immediately across Denison Road. CT Male was Shelco's consultant when Forest Hills received final subdivision approval

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in 2011. It is our understanding that CT Male provides construction observation services at the Forest Hills Subdivision under contract to the Town of Colonie. CT Male has served as the construction manager and the design engineer for the Vly Denison High Service Area Pump Station and Water Tank project, as well. This project encompassed the very lands where the Shelco ODA access road would be located and the location of the water transmission line- a project for which CT Male was paid over \$350,000 in Airport Area GEIS Mitigation fees as the Water tank agreement construction manager.

The nature of this longstanding relationship between the Town and CT Male is reflected in a December 21, 2011 email conversation between Gary Male who was the President of CT Male and John Frazer, Superintendent Latham Water District. The following excerpts from that email exchange occurred the following morning after Shelco/CT Male received final approval for Forest Hills:

8:10 am Gary Male- John Frazer “Got final approval last night”.

8:53 am John Frazer-Gary Male “Gary, Congratulations! I think that project has been around longer than the Latham Tanks Project.”

9:09 am Gary Male-John Frazer “Thank you. I understand Peter Stuto made it happen. The residents wanted to go back to square 1. I'd like to talk to you about your planned implementation of the pressure zone. Going into the first winter with only whatever new homes they get connected has the potential for problems at the tank. I'd very much like you to connect up a bunch of the existing homes. 1 pipeline connection could get enough water use to alleviate problems.”

#### **Point 10**

#### **Town Councilman Rosano should recuse himself from participating as a Town Board member in the ODA application decision.**

Town Board Councilman Paul Rosano's participation in the Planning Board's deliberations on January 23, 2018 appeared to be in his capacity as a Town Board member. First, NYS Town Law does not permit a Town Board member to be appointed as a member of a Town Planning Board. It is unclear why the Planning Board Chairman allowed Mr. Rosano to speak and give advice to the Planning Board as he is a Town Board member and therefore precluded from participating in any Planning Board deliberations in his official capacity. Town Councilman Rosano's comments related specifically to how the Planning Board should review the application and how the Town Board will approve that application. “Peter we have done that before. Lou and I worked on a couple. You can put it in your comments for us to review at the Town Board level. If we accept it, then we accept it as long as it is spelled out. We did the same thing for Bacon Lane.” (Tr. at p. 8). Councilman Rosano further advised Chairman Stuto that the Planning Board could see this application again and make the requirements for the dimensions and suitability of the access road to be a condition ( Tr. p. 7). Second, it was also incumbent upon Town Councilman Rosano to refrain from actively participating in the Planning Board hearing as he was statutorily responsible for approving the ODA application.

Councilman Rosano's statements on the January 2018 Planning Board record demonstrated a pre-formed point of view or judgment concerning the ODA application. Rosano interrupted a citizen who was commenting on the ODA application and accused her of having ulterior motives for expressing her concerns about the ODA application:

MR. ROSANO: Actually we had two meetings and Joel and Jessica were at them. I will clarify this. They want water pressure and they have not wanted Forest Hills. They never wanted water tanks, but they can't have water pressure without water tanks. MS.

MAHAR: Excuse me, Paul, don't put words in my mouth. I didn't even live here back then. MR. ROSANO: I'm sorry, Jessica. I'm just telling you the facts. They need water pressure and they need it desperately. The only way you get water pressure up there was with the new water tanks. As they were at the meeting, and Joel was there, there has to be a new line run that will probably go down Vly Road and cut over – (tr. at p. 38-39.)

Is the Town Council member's statement a representation of the Town's official position that any and all development must be approved in the Denison Vly Road area just because the Town needed a new water tank to be paid for out of the Airport Area GEIS water mitigation fees?

### **Conclusion**

Based upon the foregoing, the Birchwood Neighborhood Association urges the Town Board to deny Shelco's ODA request due to the procedural defect with the Planning Board's Special Rule. NYS Town Law 280-a does not set a time period within which the Town Board must act. Therefore, it would be beneficial and in the interest of good government, for the Town Board to adjourn this hearing and take the time to review the written submissions that have been received tonight. This will allow the Board the opportunity to reconvene after giving due consideration to the public's concerns.

Town residents elected this Board to ensure that the town laws are followed and enforced. Applicants for development approvals have the burden to demonstrate that their projects meet all regulatory requirements. PEDD staff and the Planning Board must assure that they do. It is extremely frustrating as a resident and project neighbor to have to point out glaring omissions in a project's submissions and the Town's review. We remind the Town Board that it is not the Birchwood Neighborhood Association's obligation. Rather, it is the applicant's and the Town Board's obligation to make sure that there is compliance with all legal requirements for project reviews and that all pertinent information related to that review are properly disclosed. Town staff must also first and foremost do their job and carefully review all development applications without becoming the advocate for developers and their projects.<sup>5</sup> Unfortunately, for unknown reasons, the Department Staff and the Planning Board have departed from previous ODA

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<sup>5</sup> The Birchwood Neighborhood Association repeatedly requested information from Town Staff regarding the details of the ODA application prior to the January 23, 2018 Planning Board meeting. Town Staff were not forthcoming with this information which necessitated a January 19, 2018 Freedom of Information Law request.

review procedures and abdicated these responsibilities when reviewing Shelco's ODA application.

There is a happy medium where development can occur in our town and the legitimate interests of developers, residents and project neighbors can be accommodated. However, in Colonie this situation has become lopsided in favor of developers. The treatment of Shelco's ODA application is one further example of this unfortunate situation.

We request that the Birchwood Neighborhood Association's prepared written remarks be entered as part of the Town Board's record for the ODA application.

The following exhibits are included as part of this submission:

1. Resolution 307 for 2018 and Exhibit A;
2. The January 23, 2018 Birchwood Neighborhood Association Submission to the Planning Board;
3. Documents received pursuant to a January 19, 2018 FOIL which were not provided until after the January 23, 2018 Planning Board meeting including:
  - (a) October 26, 2007 Letter from Melissa Currier to CT Male Associates to Kevin DeLaughter, Senior Planner Town of Colonie;
  - (b) November 15, 2007 letter from Melissa Currier of CT Male Associates to Kevin DeLaughter, Senior Planner Town of Colonie;
  - (c) January 29, 2008 and August 12, 2008 Planning Board Minutes for Ridgewood Subdivision Concept approval;
  - (d) June 11, 2008 Letter from Melissa Currier to Kevin DeLaughter Senior Planner Town of Colonie;
4. Development Timeline for 33 and 34 Denison Road which was submitted by the Birchwood Neighborhood Association to Supervisor Mahan and reviewed by PEDD after the January 23, 2018 hearing;
5. 2009 Ridgewood Concept Site Plan;
6. April 30, 2015 Email/memorandum from Melissa Currier CT Male to Mike Lyons Senior Planner;
7. January 22, 2010 Letter Kevin DeLaughter Town of Colonie Senior Planner to Jeffery Myers Ridgewood Subdivision re: Concept Acceptance;
8. Email exchange between Gary Male, President CT Male and John Frazer Division of Latham Water December 21, 2011 at 9:09 am

9. October 6, 2017 Memorandum Rebekah Kennedy to PEDD re: Town Attorney Review;
10. October 27, 2017 email from Daniel Seaver Division of Latham Water to Steve Brustle DPW;
11. July 19, 2018 Email exchange between Birchwood Neighborhood President Joel Weingarten and Supervisor Paula Mahan.
12. January 16, 2018 Email exchange between Michael Tengeler and Joseph LaCivita which forwarded email from Joel Weingarten to Supervisor Mahan.

We also request that the Town Board's record include the July 24, 2017 ODA application as updated prior to the January 23, 2018 Planning Board meeting and Town staff review and comments which were received by PEDD prior to the January 23, 2018 hearing .

We also request that the Town Board take official notice of the Planning Board's December 1, 2009 transcript for the Ridgewood concept acceptance; the January 23, 2018 Planning Board hearing transcript for the ODA and the following Planning Board hearings for the prior approved Open Development Area Applications: UHULLC 611; Scaringe ODA; O'Connor ODA; Zeh ODA; Hawkyard ODA; Doran ODA; Peek ODA.