To: The East Hampton Town Planning Board
From: Jaine Mehring
Re: Cilvan Realty LLC, 44 Three Mile Harbor Road: Comments Submitted to the Record In Conjunction with the Public Hearing
Date: April 12, 2023

Dear Chairman Kramer and Members of the Planning Board:

As I understand it, this application related to redevelopment of 44 Three Mile Harbor Road has been pending before the Planning Board for many years, and that it has been reshaped and modified/reduced over that time. Currently, this application proposes the development of 10,081 square feet of GFA (including an increase on the first floor and entirely new second story), plus 5,355 sq feet of usable basement area, for a total building size of 15,436 square feet. When we combine the markedly expanded building with the paving of a very large asphalt parking area to accommodate 48 parking spaces plus likely meaningful truck traffic, this is a very consequential, rather large application for the surrounding area and relative to existing conditions.

For years now, as a part of the Planning Board's review of the application (in its many forms and iterations) for the significant redevelopment of the 0.8 acre parcel at 44 Three Mile Harbor Road, members have, in large part, expressed that they were favorably inclined towards the project, primarily because (a) they believed that the extinguishment of the "nightclub" use would be a positive development, and (b) that they are happy that what they consider to be a poorly maintained property will be cleaned up. Indeed, the Board has repeatedly made presumptions that the public will feel similarly. Tonight, after so many years, we will finally get to hear some insight if the public actually feels the same way you have assumed we do.

I understand that the nightclub has caused late-night disturbance to the surrounding neighbors and mitigating that will be a positive. However, being happy about that should in no be the singular or primary justification to approve this application or in any way cause anyone to overlook the increased density and intensity of use that could very well be created going forward by the proposed project. We must be clear that we do not want to eliminate one "nuisance" (a nightclub with nighttime and seasonal operation) only to replace it with a new "nuisance," potentially one that brings significant noise and traffic to the area 12 or more hours a day, 365 days a year.

Moreover, in this case, "cleaning up the site" seems to mean (a) building a 15,000+ square foot non-corforming building that will now loom over the low-slung, low-key character of the surrounding historically significant community, and (b) also replacing a gravel parking area with something like 20,000 square feet of asphalt paved parking lot. But that undermines a codified responsibility of this Board to protect the rural character of East Hampton by permitting this new suburban aesthetic in its place.

Overall, it is my view that the mass and scale and the probable intensity of use of this proposed development is too large, will not be compatible with the surrounding community (including the historical significance of Freetown) and that reasonable alternatives beneficial to the owner and to the community exist, as there is a very large conforming building envelop on this property.

Over the years, the applicant has been asked why the project cannot be scaled back further. In answer to that, the applicant responds that anything smaller will not make the economics work for them.

During the October 2021 ZBA hearing related to this project, the applicant's architect (at the time) was asked if the project could be reduced in size, to which she responded that they could not make the "economics" work with any reduction in size of the building and threatened that if they didn't get approval of the scale as then currently scoped, they would just leave the nightclub in place. This spec developer trope has been repeated at the Architectural Review Board and the Planning Board.

I do not think our Boards, nor our citizens, are here to be held hostage to or to ensure that the economics of the project meet the desires of a private investor/developer. Any inability to earn their needed profit margin or realize a certain return on a new redevelopment is a self-created problem.

Below are a number of issues I believe must be addressed before any further review of the project, let alone a final decision. All in, given the following, I think this public hearing is somewhat premature. And also, I note for the record, that the complete absence of any documents (surveys, renderings, site plans, memos, etc) posted online together in an electronic public hearing file related to this matter has hindered a proper public hearing process.

1. **It is Not Clear That What is Proposed Is Consistent with the "Letter" or the Intent of the Town Code Related to Pre-existing Non-Conforming Structures:**

We know one relevant section of the code is stated inthe following:

https://ecode360.com/10414216?highlight=nonconforming,nonconforming%20structures,nonconformity,structure,structures&searchId=4135219436579836 2#10414216

"Expansion of nonconforming structures generally. A nonconforming building or structure lawfully existing on any lot, or a building or structure which lawfully exists on a nonconforming lot, may be enlarged, reconstructed, altered, restored, or repaired, in whole or part, provided that the "degree of nonconformity" is not thereby increased. For the purposes of this subsection, an increase in the "degree of nonconformity" shall include an increase in the amount of a nonconforming building's or structure's gross floor area which is located within a required setback area, or an increase in any portion of a building or structure located above the maximum height permitted or within the required pyramid law setback."

First point: the code says "may be enlarged, reconstructed, altered, restored, **OR** repaired." As I would interpret this, I believe it is legitimate to read the "or" literally – as any one action among the list may be permitted. However, the applicant is presenting a project that seeks to both "reconstruct" the existing non-conforming structure AND to enlarge it.

Moreover, in 255-1-20 https://ecode360.com/10413786#10413796 the Town code defines "reconstruction" as the following:

RECONSTRUCTION

The removal and replacement, in place and in kind, of all or a substantial part of a preexisting building or structure. The rebuilding in place and in kind of all or a substantial part of a building or structure which has been damaged or destroyed shall be included in this definition. If the cost of the work in question exceeds 50% of the full replacement cost of the structure as estimated by the Building Inspector, it shall be deemed to involve a "substantial part" of the building or structure. Appeals of the Building Inspector's percentage determination of replacement cost may be made to an emergency appellate panel created pursuant to Town Board resolution. Appeals from that panel may be made to the Zoning Board of Appeals. The word "reconstruct" in its various modes and tenses and its participle form refers to the undertaking of a "reconstruction."
[Added 4-13-2007 by L.L. No. 14-2007]

This project does not meet the "in place and in kind" standard included in the code definition of "reconstruction." First of all, it is not "in place" because the foundation and footprint of the building is indeed changing/expanding, and the building coverage is being increased by 1,597 sq feet or +27%.

Second of all, this project does not meet the "in kind" standard, since "in kind replacement" means substituting a new structure for an existing structure, in total or in part but with no change in size, dimensions, footprint, interior square footage and/or location. However, as proposed, this project includes not only an increase in footprint, but also an expansion and perhaps deepening of the basement, and a very material increase in internal square footage.

If the project does not meet the definition of "reconstruction" or "restoration" then it does not seem justified to allow for such significant increase to a pre-existing non-conforming building. For more on this, see the next item regarding the Zoning Board of Appeals warning and interpretation on this matter.

2. This Application Needs to Return to the Zoning Board for Further Review and Approval:

As you are aware, there was a public hearing in front of the Zoning Board of Appeals in the matter of 3 necessary variances: a parking variance of 11 spots, as well as a setback variance for the two second story apartments, and also for a proposed roof terrace. I watched live when the ZBA public hearing regarding the variances took place on October 19, 2021 as well as their post-hearing decision/vote on January 18, 2022. In preparation for this hearing, this past week, I rewatched these two ZBA session in full via these links respectively:
https://www.youtube.com/watch?v=c2apYqr1wmU
https://www.youtube.com/watch?v=lNTesI7bvS4 (begins 1:02 mark)

Though the ZBA approved the parking and apartments setback variances, both very substantial, they denied the variance for the roof terrace request, finding that it did not meet variance standards.

However, though they approved two of the variances, they did not do so without (1) raising many material questions that went unanswered, (2) flagging several important and significant concerns, and (3) stating conditions of that approval. These things were made crystal clear by the ZBA:

- That any approval of variances would apply to only the plan that was in front of them at the public hearing. They stated clearly that any change to the plan after the hearing, such as rulings from the County on the use of the right of way for vegetation as well as for the proposed multiple ingress/egress points onto Three Mile Harbor road, would not be covered

by their approvals and therefore the Zoning Board would need to reassess variances if changes to the plans were made. The Board's Counsel stated clearly (time mark 1:02 in the video) during the public hearing, in answer to the Board's clear discomfort, that "the decision you make will be on the plans before you; if [the applicant] goes with different configuration, it will have to come back for a rehearing." Indeed, material changes to the plans have been made since the public hearing and the post hearing decision, and therefore I contend that this project requires another review by the ZBA.

- During the public hearing, then Chairman Whelan as well as Member Johan (now vice Chairman) and Vice Chairman Dalene (now Chairman) --the three members of the Board with the significant architectural, structural design and building expertise -- all expressed deep concern that they had been provided NO structural design or architectural plans, and that they also felt this project was not a legitimate renovation or reconstruction of the building in kind and in place, per the intent and requirements of the code, but might instead be complete demolition. Chairman Whelan questioned the applicant intensively and was adamant (four times that evening) that if something like 90% of the current structure "winds up in the dumpster," then the project should be re-designed and built to come into compliance with required setbacks and coverage ratios. (The project architect at the time said she agreed to that statement.)

The ZBA members' legitimate concern was that a cement block foundation and wooden walls that are 70 years or even older would be unable to withstand and support the further proposed excavation and expansion of the basement as well as the addition of a taller and expanded first story as well as a very significant second story especially one with cantilevered overhang.

I acknowledge that I heard it mentioned at the January 18, 2022 decision meeting that after the public hearings, applicant secured a letter from Maresca Engineering that "alleviated concerns as to structural integrity" of the existing building; however, I have not seen this letter as a part of the public file. Moreover, at this point, I don't believe a full construction protocol has been submitted by the applicant or reviewed by the Planning Board or the ZBA.

In fact, just last week at the third ARB review of the application, the applicant was clear that they have not yet "engineered" the structure, and there are many structural details they do not know yet, including where the mechanicals and HVAC systems etc. will be located, because they can't figure that all out until they know what will be the needs/requirements/requests of tenants they say are yet unidentified.

- During the public hearing and then again at their post hearing decision session, the ZBA expressed its significant discomfort with being asked to review and make a decision on an application at such a preliminary and uncertain stage with an application that was lacking a fully vetted/approved site plan or anything close to architectural and structural plans. As they put it, the Zoning Board generally only reviews and makes decision on fully fleshed-out plans and applications, not "half-baked cakes." The board was clear that this application should return to them when the project is scoped and defined with more clarity. As such the Board, at the time, noted their view that the application as it develops further "should find its way back to the ZBA for another hearing."

3.The ARB Remains Largely Opposed to the Mass and Scale of the Project

The ARB has now reviewed the proposed plans for this development three times, the most recent being on April 6, 2023. https://www.youtube.com/watch?v=vy3FNzsZ56k (begins 55 min mark.) As you are likely aware, in their first review, the Board members were unanimous in the view that the entirety of what was proposed architecturally as well as the mass and scale of it was wholly incompatible with the context of the neighborhood. They did not mince words at that review, to put it mildly.

Following the first review, the applicant came back with significant changes to design as well as materials, which the board viewed as an improvement, but at the second public review, the Board members were unanimous that it still did not meet their standards for approval. Further changes were submitted and reviewed again last week. The ARB members all noted the vast improvement in architectural design from the original, but were also still mostly aligned in concerns that the mass and scale of the development was incompatible with the surroundings and neighborhood character and that several important details/elements were still not available or clear. Though they did not take an official vote to disapprove, as they said they were not comfortable getting ahead of the Planning Board public hearing, comments from each Board member indicated that 4 if not all 5 were unwilling to approve the design as currently pending.

I do not believe there should be a public hearing when the ARB still believes the mass and scale of the project is inappropriate relative to code.

4. The applicant's narrative around the two proposed second floor apartments remains deficient regarding "affordability," and moreover, we believe this project could add meaningfully to the Town's affordable housing deficit—something that must be properly analyzed by this Board.

- The applicant's narrative about the two proposed apartments on the second floor has been shockingly unclear and equivocal all through this process. First, they were referred to as "workforce housing," and the applicant was unclear as to if this would be year-round affordable housing for existing community members, or if it would be for shorter term seasonal occupancy by their own workers/managers.

This in my mind is not acceptable for four reasons:

First, At the time of a public hearing, we should know with detail and via publicly available executed covenants and restrictions the nature of these apartments: if this GFA/density is to be added to a non-conforming structure, then the following things should be certain: that these apartments will remain "affordable" for the community "in perpetuity" subject to annual certification by the Town; that these apartments should be made available via lottery to those individuals on the waiting list in East Hampton for year-round affordable apartments. Currently, we do not have in the record any of these assurances or clarity.

Second, the Planning Board and the community need to remain mindful of what happened during the redevelopment and expansion of Damark's—it is an important cautionary tale. As I understand it, the owner had committed to include affordable housing units in the structure, but after approvals were in hand and during construction, they changed their mind, saying they were too costly to add, and proceeded to build the structure to the permitted massing without the apartment. A similar situation cannot be allowed to happen here at 44 Three Mile Harbor.

Third: the applicant threw the question of the apartments into complete flux at the ARB meeting last week. (time mark begin 1:02) The applicant stated clearly that they did not want the two "affordable" units in the project—they asserted that they were only doing it because the Planning Board wanted them to do it – a statement that does not appear to be totally accurate. Moreover, they said that the economics of these two apartments are not appealing or beneficial to them. They told the ARB that rather than reduce the office space on the second floor, they would have to "get rid of" the apartments in order to reduce the mass and scale of the project.

Fourth, we know that there is an urgent need for increased availability of economically accessible/affordable housing in our community, so I understand that without full analysis, it sounds appealing to some Board members to add some apartments here. But let's be clear: the applicant is grudgingly offering just two bedrooms of occupancy in nearly 1400 square feet partly non-conforming GFA in the context of a more than 2000-unit affordable housing deficit in East Hampton Town.

Moreover, the Planning Board has failed to review and assess that this project might be likely to expand the Town's affordable housing deficit substantially. For example, a near 7,000 sq foot retail market would likely require multiple dozens of new employees. How many: 20. 30…50…? How many of them would be paid wages that would allow them to live in market-rate housing in East Hampton or vicinity? And we know that our existing businesses are having massive problems staffing their existing businesses because of the housing crisis, so this new, incremental development will compete with them and pressure them massively. All this must be clearly understood and vetted before moving forward.

In general, the "trojan horsing" of affordable units appears to be a something of a growing trend among developers across our hamlets, as they try to max out their plans and think they can ease their approval path forward by dangling the prospect of adding a few units of workforce housing to an otherwise problematic application.

I know we have an extraordinarily large affordable housing deficit in East Hampton. However, no matter how "desperate"-- as one board member put it at a Planning Board session-- we may be, that cannot justify speculators and developers who want to exploit that need and use the placement of units to curry favor with boards, silence public concerns and distract from other issues for projects that are otherwise totally over-scaled and incompatible with the purposes of our code, and the needs/interests of our community overall. We can and will do better.

5. Need to Confirm that Several "Required" Reviews Have Been Done in Full

In addition to a traffic study referenced below, I believe these two other reviews need to be undertaken if they have not already, and the processes need to be made available to the public:

(1) Given that the site is in Freetown, an archaeological survey should be undertaken, if one hasn't been down already.

(2) The action has already been classified as "Unlisted" under SEQRA. However, the public cannot participate effectively in a public hearing about determining the significance without having the EAF material to review. In addition, the code per 128-3-20 makes clear that Type 1 actions include "Any project having projected traffic volume which would alter the level of service of the adjacent road. 'Level of service' is defined as the operating conditions of a specific highway within the peak fifteen-minute period per day." So, until a traffic study is done, we cannot conclude that this qualifies as an unlisted action.

6. This development as proposed does not at this point or as reviewed by the Planning Board appear to meet standards for "good planning":

First, the developers and their agents have failed to provide a proper narrative of how the dramatically enlarged structure will be used. In particular, none of the Planning Board, the Architectural Review Board, the Zoning Board of Appeals nor the public have an accurate and reliable understanding of what uses will be included within the structure.

Over the course of the years of review and flux of this application, there has been discussion of a continuing narrative of wet retail market occupying the first floor. The Public Hearing Notice says "The project consists of 6,881 square foot first floor retail space for a wet retail (market), and 3,200 square foot second floor for office space and two (2) second floor affordable apartment."

However, over the course of years of review, applicant has withheld the likely or proposed or possible uses. At one point, their leasing agent marketed a rendering to potential renters that showed the possibility of 6 retail storefronts. Just last week at the ARB meeting, the applicant actively contradicted the "wet retail market" use saying that is not necessarily going to happen, and also suggesting they don't know if the first-floor square footage will be split between two retail uses, or if they will also include office space as part of the first floor.

I understand that speculative development is allowed, however, principles of good planning and orderly growth should require that new development be reviewed and approved with an eye not only toward the legitimate wants of the property owner, but also, the need for and the benefits to the public that will ensue from additional development.

Second: good planning and the requirement of "orderly growth" would guide that sizable new development should be properly reviewed and considered within the context of the scope and scale and context of other proposed and pending development plans in proximity to the proposed. No one material project should be reviewed, let alone approved, in a vacuum without regard what is or is likely to happen around it. In this case, as I understand it, there is a consulting study ongoing evaluating the increasing development of the entire corridor of which this property is a part.

For example, we know that a significant convenience store use is being considered for development on North Main Street by a gas station; a massive extraordinarily high-volume major car wash is planned for Spring Fireplace Road; The Project Most site is being expanded considerably with a large new structure; and the potential redevelopment of the existing Senior Center, possibly to affordable housing, is also possible/pending.

It is my belief that any final review by the public and the Planning Board must be deferred until that consulting report has been completed, submitted to and fully reviewed/considered by the Town Board. Moreover, there should be no further consideration or approval of this project without a proper traffic study for the site.

7. Finally I want to add to the record the text of an email I sent to the Planning Board/Planning Department this morning:

Good morning Chairman Kramer,

I hope you are feeling well, and I have been looking forward to see you “in person” at Town Hall this evening at the Planning Board Meeting. I was finishing the preparation of my comments for this evening’s public hearing in the matter of Cilvan Realty, 44 Three Mile Harbor Road, East Hampton, and consulted the public hearing notice that is attached to the agenda posted on the Planning Board’s page on the town website http://www.ehamptonny.gov/AgendaCenter/ViewFile/Item/2088?fileID=5382 part of which reads as follows:

"…to consider the application of Cilvan Realty, LLC Site Plan/Special Permit to change the use of and expand a nonconforming building by proposing a first-floor retail space, second floor office space, two (2) second floor affordable apartments, paved parking areas, and extensive landscaping. The project consists of 6,881 square foot first floor retail space for a wet retail (market), and 3,200 square foot second floor for office space and two (2) second floor affordable apartment; and a 5,355 square foot basement. The property contains 26,153 square feet (0.803)…"

It is assumed that the "0.803 "refers to the size of the lot in acres.

Therefore, the Notice is inaccurate in one of two ways: 26,153 square feet equates to 0.600 acre, or 0.803 acre equals 34,979 square feet of area.

I do believe that the public should be able to rely on the accuracy of a public hearing notice. This appears to me to be a material mistake in and of itself, but in this case, it is even more important as, in no small part, the public will consider the impact that the proposed expansion of a non-conforming structure will have relative to the size of the lot, as well as in relation to the broader neighborhood context.

In this instance, this mistake is more problematic because there are no other files posted electronically to the agenda related to this public hearing, such as the most recent survey, site plan or building plans, that would allow the public other understanding of the dimensions and scale of the project relative to lot size or setbacks to neighboring properties.

I ask, therefore, that this public hearing be postponed until it can be re-noticed correctly.

Thank you for your consideration of my comments.
Sincerely,
Jaine Mehring