

**STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT  
DUPAGE COUNTY – WHEATON, ILLINOIS**

MEGAN CLIFFORD and PETER )  
CLIFFORD, JESSICA COMMO, )  
KAREN FRANKEN, JASON FULLER, )  
KIMBERLY A. HESS and NANCY HESS, )  
PETER KIENLEN and RACHELLE )  
KIENLEN, ANDREW LIVINGSTON and )  
LELAND LIVINGSTON, DIANA )  
MARTINEZ, KRISTIN MASSA and )  
RICHARD MASSA, MARK SIMON, and )  
MONTESSORI ACADEMY OF GLEN )  
ELLYN, INC., an Illinois corporation, )

Plaintiffs, )

vs. )

Case No. 2017 CH 000780

TRUE NORTH ENERGY, LLC, )  
Delaware limited liability company, and the )  
VILLAGE OF GLEN ELLYN, a home )  
rule municipal corporation, )

Defendants. )

**SECOND AMENDED COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

NOW COME the Plaintiffs, MEGAN CLIFFORD and PETER CLIFFORD, JESSICA COMMO, KAREN FRANKEN, JASON FULLER, KIMBERLY A. HESS and NANCY HESS, PETER KIENLEN and RACHELLE KIENLEN, ANDREW LIVINGSTON and LELAND LIVINGSTON, DIANA MARTINEZ, KRISTIN MASSA and RICHARD MASSA, MARK SIMON, and MONTESSORI ACADEMY OF GLEN ELLYN, INC., an Illinois corporation (“Plaintiffs”), by and through their attorneys, Shapiro & Associates Law, and for their second amended complaint against the Defendants, TRUE NORTH ENERGY, LLC, a Delaware limited

liability company (“True North” or “Applicants”), and the VILLAGE OF GLEN ELLYN, a home rule municipal corporation (the “Village”), states as follows:

### **INTRODUCTION**

1. In a confluence of errors and omissions by the Village to further its own self-interests and add tax dollars to its coffers, the Village knowingly granted an incomplete and inadequate Special Use Permit for the Applicant.

2. In brief, on February 23, 2016, the Village’s Plan Commission heard and rejected Applicant’s request for a Special Use Permit and zoning variations. The Applicants amended their request and returned to the Plan Commission on April 13, 2016. However, in their April hearing, Applicants only requested the zoning variations. Therefore, the Plan Commission only reviewed the zoning variation request (which was approved) but did not review let alone approve, any Special Use Permit for the Applicants at the April hearing.

3. *After* the Board approved the zoning variation and Special Use Permit, the Village then added further conditions to the Special Use Permit without another public hearing thereby denying the ability to cross examine witnesses as required by due process.

4. This action simply seeks to uphold the decision of the Plan Commission, through declaratory and injunctive relief to protect the health, safety and well-being of the Village’s residents and in doing so, asserts that the Village’s approval of a special use ordinance allowing a 12-pump gas station and convenience store was irrational and was arbitrary and capricious.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter pursuant to Article VI, § 9 of the Illinois Constitution. This Court has personal jurisdiction over the Defendants pursuant to 735 ILCS § 5/2-209(a).

6. Venue is proper pursuant to 735 ILCS § 5/2-101, because the subject properties, and the acts from which this cause of action arose, took place in DuPage County, Illinois.

**PARTIES**

7. The individually named Plaintiffs identified herein are members of Protect Glen Ellyn, Inc., an Illinois not-for-profit corporation (“Protect Glen Ellyn”). Protect Glen Ellyn is comprised of community members and organizations who share a common goal to protect the health, safety, and economic well-being of the residents of Glen Ellyn, and educate and advocate for responsible development.

8. The following individual Plaintiffs represent a portion of Protect Glen Ellyn’s membership. They are named as party plaintiffs as those who own and/or reside at properties within 1,200 feet of the Property (defined hereafter) and therefore have standing to bring this instant action.

a. MEGAN CLIFFORD owns and/or resides at 793 Forest Avenue, Glen Ellyn, Illinois which is within 1,200 feet of the Property.

b. PETER CLIFFORD owns and/or resides at 793 Forest Avenue, Glen Ellyn, Illinois which is within 1,200 feet of the Property.

c. JESSICA COMMO owns and/or resides at 771 Forest Avenue, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

d. KAREN FRANKEN owns and/or resides at 590 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

e. JASON FULLER owns and/or resides at 586 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property

f. KIMBERLY A. HESS owns and/or resides at 600 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

g. NANCY HESS owns and/or resides at 600 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

h. PETER KIENLEN owns and/or resides at 757 N. Main Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

i. RACHELLE KIENLEN owns and/or resides at 757 N. Main Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

j. ANDREW LIVINGSTON owns and/or resides at 789 Forest Avenue, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

k. LELAND LIVINGSTON owns and/or resides at 789 Forest Avenue, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

l. DIANA MARTINEZ owns and/or resides at 594 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

m. RICHARD MASSA owns and/or resides at 787 Forest Avenue, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

n. KRISTIN MASSA owns and/or resides at 787 Forest Avenue, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

o. MARK SIMON owns and/or resides at 604 Elm Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

p. MONTESSORI ACADEMY OF GLEN ELLYN, INC., an Illinois corporation, owns and operates a school at 927 N. Main Street, Glen Ellyn, Illinois, which is within 1,200 feet of the Property.

9. Defendant, TRUE NORTH ENERGY, LLC, is a Delaware limited liability company which develops, constructs and/or operates gas stations which include convenience retailing to its customers. True North's principal office is located at 10346 Brecksville Road, Brecksville, Ohio 44141.

10. Defendant, VILLAGE OF GLEN ELLYN, is a home rule statutory municipal corporation, located at 535 Duane Street, Glen Ellyn, DuPage County, Illinois. The Village is subject to the limitations of the State Constitution, Illinois Municipal Code, and the Village's Zoning Code.

### **FACTUAL BACKGROUND**

11. In February 2016, the Village of Glen Ellyn Board of Trustees (the "Board") entered into a contract to sell the vacant property at 825 N. Main Street (at the southeast corner of the historic Stacy's Corners intersection, f/k/a Five Corners) to True North Energy, LLC ("True North") which proposed to construct a 12-pump gas station with a 4,200-square foot convenience store open 5am–12am and permitted to sell beer and wine (the "Project"). *See* attached Exhibit A, Proposed Site Plan.

12. The Project, commonly known as 825 N Main Street, consists of approximately 1.35 acres (consisting of three lots), immediately adjacent to a residential neighborhood, and less than 350 feet away from both Forest Glen Elementary School and the Montessori Academy of Glen Ellyn (the "Property"). *See* attached Exhibit B, Aerial of Property.

13. Since a gas station is not a permitted use under the C-2 Community Commercial zoning designation which applies to the Property, True North was required to seek a special use permit from the Village.

14. On March 13, 2017, the Board approved the special use permit, notwithstanding a

unanimous rejection of the Project by the Board's own Plan Commission; a failure to submit the Project to its own Environmental Commission for review; the opposition of over 1,200 residents who signed an online petition opposing the Project; an objection from the Forest Glen PTA that the Project would endanger the health and safety of the students, teachers and staff at Forest Glen; a plea from the president of District 41 (which includes Forest Glen) that the Board perform its due diligence in reference to the safety and well-being of our community; and the objections of hundreds of concerned residents who appeared and spoke out in opposition to the Project at multiple meetings of the Board, the Plan Commission, and the Architectural Review Commission.<sup>1</sup>

15. By approving the special use permit, and the multitude of associated variances that were granted along with it, the Board failed in its obligation to place the health, safety and welfare of the community over its apparent desire to place a vacant land parcel owned by the Village back on the property tax rolls.

16. The Board failed to consider the health dangers posed by siting a large gas station so close to a *residential neighborhood* and an *elementary school*; rejected the unanimous recommendation of its own Plan Commission to deny the special use permit; failed to consider the environmental risks posed by the Project and, refused to refer the Project to its own Environmental Commission for review despite a history of environmental issues; failed to conduct a proper and comprehensive traffic study to evaluate the increased risk to both drivers and pedestrians and, in particular, the dozens of Forest Glen schoolchildren who *walk to school*; failed to consider the negative impact on the values of the adjacent residential properties; failed to prepare an economic development plan for the Project, as required by the Village's own ordinance; failed to adhere to the guidelines set forth in the Village's Comprehensive Plan for the Five Corners area; and

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<sup>1</sup> See Village of Glen Ellyn (2017, March 13). Glen Ellyn Village Board Regular Meeting [video file]. <http://glenellynvillageil.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1251&Format=Minutes>

otherwise failed to satisfy the requirements for granting a special use as set forth in Section 10-10-14(E) of the Village's zoning ordinance.

**The Area Surrounding the Gas Station**

17. Directly south and east of the Property is an R-2 Residential District which contains single-family homes. Many of these homes are within a few hundred feet of the Property.

18. The Forest Glen Elementary School property line is approximately 350 feet away from the Property, along with the Montessori School located to the north on Main Street.

**The Prior Gas Station**

19. The Property used to be occupied by a dilapidated and significantly smaller Marathon gas station, with four pumps and a small store, located on the western edge of the site along Main Street. The prior gas station was situated on less than half the 1.35-acre site at the far northwest corner, and a large tree buffer exists on the other half of the site on the southern and eastern borders, shielding the single-family homes from not only the gas station, but a handful of smaller commercial buildings located at the intersections of Main Street, Geneva Road, and St. Charles Road.

20. In September 2010, the Village Board purchased the Property out of bankruptcy for \$590,000 from David E. Grochocinski, as Trustee for the bankruptcy estate of Sunbeamer Services. At the time, Village Trustee Carl Henninger explained that by having the Village purchase the Property as opposed to a private party, the Board would be able to control the redevelopment of the Property consistent with the Plan and avoid some "modern monstrosity" from going in there.

21. "That's one of the beauties of us owning the property," Trustee Carl Henninger said of the Property which is across from History Park and Stacy's Tavern Museum. "We'll have a lot

of control over the development. So, the idea is that it will be definitely in keeping with the spirit of History Park nearby. It's not going to be some modern monstrosity that won't fit the character of the neighborhood." See Loza, Cyndi (September 29, 2010). Trustees Plan to Purchase and Beautify Vacant 5-Corners Site. *MySuburbanLife.com*. Retrieved from <http://www.mysuburbanlife.com/2010/09/29/trustees-plan-to-purchase-and-beautify-vacant-5-corners-site/zethxhu/>.

22. Resolution No. 10-21, dated September 27, 2010, authorized the purchase of the Property under the premise that the purchase would be “*beneficial to the Village, its residents, and the general community* as it provides a number of opportunities to *beautify and redevelop a key site in the northern gateway to Glen Ellyn...*” A copy of Resolution No. 1021 is attached hereto as Exhibit D.

23. At the time of the Village’s purchase, two of the three lots were zoned C2 Community Commercial, while the eastern most lot was zoned R2 Residential.

24. In 2012, the Village approved a rezoning of the eastern most lot from an R2 Residential District to a C2 Community Commercial District.

### **The Marketing Effort**

25. In June 2011, the Board engaged PPK Architects to develop conceptual plans showing how the Property could potentially be redeveloped. Not one of those conceptual plans proposed or included a gas station.

26. In June 2012, the Board issued its first Request for Proposal (“RFP”) seeking to attract interested developers. The RFP was issued a second time in February 2014. The RFPs, stressed that the Five Corners area “*should be revitalized as a neighborhood service area, a showcase for local history, and an attractive gateway to the Glen Ellyn community.*” See attached

Exhibit E.

27. The RFPs further stated that all proposals would be reviewed on several criteria, the first two of which were (1) “Sensitivity and compatibility to the *historic character* of the area;” and (2) “Sensitivity to *nearby single-family residential* properties.” Neither of the RFPs suggested that a large station would be an appropriate use.

28. Although the Board received two proposals in response to the June 2012 RFP, neither of those proposals moved forward for “various reasons” which have never been explained to the public by the Village.

29. In August 2014, the Board directed staff to retain a real estate broker to more appropriately market the Property. The Board approved a contract with real estate firm DK Mallon to market the Property for sale at a price of \$699,000.

30. Ultimately, DK Mallon brought an offer to the Village from True North to purchase the Property for \$630,000 for the development of a gas station.

### **The Comprehensive Plan and Five Corners**

31. In 2001, the Village adopted a Comprehensive Plan (the “Plan”) which provides a long-range vision for physical improvement and development in the Village. The Plan provides recommendations for such things as land use, transportation, community facilities and public facilities. Pertinent sections of the Village’s 2001 Comprehensive Plan are attached hereto as Group Exhibit C.

32. Under “Community Appearance and Character,” the Plan identifies the Goal as: “An attractive and distinctive community image that builds upon and enhances Glen Ellyn’s traditional qualities and characteristics, and distinguishes it from surrounding communities.”

33. To achieve that Goal, the Plan identifies several objectives, the first two of which

are to “maintain and enhance the Village’s ‘small town’ atmosphere and character” as well as “the attractive tree-lined streets, pedestrian scale and other distinguishing qualities of Glen Ellyn’s existing residential neighborhoods.”

34. Specifically, the Plan focuses on three “target” areas: (1) downtown; (2) Roosevelt Road; and (3) the historic Five Corners area, also known as Stacy’s Corners.

35. Five Corners is located at the intersection of Main Street, Geneva Road, and St. Charles Road, at the northern “gateway” to the Village. It has traditionally functioned as a “*small* neighborhood service area” for Glen Ellyn’s northern neighborhoods. It is also the site of Stacy’s Tavern Museum, which is listed on the National Register of Historic Places.

36. According to the Plan, Five Corners was to be revitalized “as a neighborhood service area, a *showcase for local history*, and an *attractive gateway* to the Glen Ellyn community.” The Five Corners area is zoned C-2, Community Commercial, which is intended to “accommodate *limited* neighborhood retail, community and neighborhood services, and offices.” Accordingly, the Plan provides that Five Corners “should continue to consist of a mix of *small* retail, service, residential, public and institutional uses” and specifically notes that the commercial portion of Five Corners “should remain *small and compact*.” Here, the proposed development is large and not in keeping with said plan.

37. The Plan encourages new uses “that would strengthen, enhance and compliment the *historical focus and character* of Five Corners,” suggesting that “small restaurants and gift shops might be developed to serve visitors of the proposed Historical Center.” Indeed, the Plan even suggests that Five Corners be renamed “Stacy’s Corners” to “further *promote historical connotations* and *enhance the distinctive character* of this particular area.”

38. Most importantly, the Plan stresses that “*adjacent residential neighborhoods*,

which contribute to the overall character of Five Corners, should be maintained and *protected*.”

39. Upon information and belief, in November 2002, to further the Plan’s objective to promote the history and “distinctive character” of Five Corners, the Village contributed \$725,000 to help finance the \$1.05 million purchase of 800 N. Main St. and redevelop that property as the History Center.

40. Upon information and belief, in 2005, the Village provided another \$1.2 million in financing to purchase 810-816 N. Main Street for the Historical Society (and later forgave \$845,000 of that debt). At the southwest corner of Five Corners, 820 N. Main St. was purchased in 2008 for \$463,000, the existing building was demolished and a landscaped park created on this corner. Finally, around the corner to the west, the property at 553 Geneva Rd. was purchased in 2006 for \$300,000 by the Historical Society. All told, the Village and/or the Historical Society have invested *more than \$3.0 million* over the last 15 years to preserve and develop Five Corners as a *historical gateway* to the Village.

41. The Village’s Comprehensive Plan, and its historical Five Corners plan, is in complete discord with Ordinance Nos. 6302, 6386, and 6486 (special use permit). This discord violates the Village Zoning Code which specifically requires granted special use permits to be in compliance with the comprehensive plan.

42. The first special use criteria listed in Subsection E of Section 10-10-14 of the Village’s Zoning Ordinance states that in order for the Village Board to grant a special use, it *shall* be “harmonious with and in accordance with the general objectives, or within a specific objective of the comprehensive plan and/or its title.” Village Zoning Ordinance §10-10-14(E) (emphasis added).

43. In this case, the Village of Glen Ellyn’s Zoning Ordinance specifically incorporates

the Comprehensive Plan and its future redevelopment plans for the historic Five Corners neighborhood. Therefore, the Village clearly implemented their Comprehensive Plan in its Zoning Ordinance, as contemplated by the exception in 65 ILCS 5/11-12-6, rendering the Comprehensive Plan as part of its laws to regulate and control land use. Further, the Villages' own Plan Commission determined that the proposed gas station in no way conforms with the Comprehensive Plan for this particular neighborhood.

**Village's Zoning Ordinance: C2 Community Commercial District and R2 Residential District**

44. In 2012, the Village approved a rezoning of the eastern most lot from R2 Residential District to C2 Community Commercial District.

45. Pursuant to Section 10-1-2 of the Village's Zoning Ordinance, the purpose of the zoning code is to *protect and promote the public health, safety, morals, comfort and general welfare*, and accomplishes its purpose by seeking, *inter alia*:

- (A) To establish adequate standards for the provision of light, air and *open spaces*.
- (B) To zone all properties with a view *to conserving the value of buildings and land and encouraging the most appropriate use* of land throughout the village.
- (C) *To lessen congestion on the public streets*, and to facilitate the provision of adequate transportation, and of other public requirements and services such as water, sewerage, schools and parks.
- (D) *To avoid hazards to persons and damage to property from inappropriate development of lands* and provide for adequate drainage, curbing of erosion and reduction of flood damage.
- (E) *To avoid undue concentration of population and to prevent the overcrowding of land*, thereby ensuring proper living and working conditions and preventing the development of blight and slums.
- (F) *To foster a more rational pattern of relationship between residential, business, commercial* and industrial uses for the mutual benefit of all.
- (G) *To provide for and preserve appropriate open space*.

***(H) To protect residential, business, commercial and industrial areas alike from harmful encroachment by incompatible uses, and to ensure that land allocated to a class of uses shall not be usurped by other inappropriate uses.***

***(I) To isolate or control the location of unavoidable nuisance producing uses.***

***(J) To facilitate the preservation of sites, areas and structures of historical, architectural and aesthetic importance...***

***(P) To implement the objectives of the village comprehensive plan, as well as protect all appropriate existing structures and uses.***

Ord. 3617, 5-8-1989, eff. 6-1-1989. (emphasis added to all above).

46. Section 10-3-1(L) of the Village's Zoning Code provides that the C2 Community Commercial District is "intended to provide basic services and conveniences shopping for adjacent neighborhoods as well as the entire community."

47. Pursuant to Section 10-4-14 of the Village Zoning Ordinance, C2 Community Commercial Districts permits, *inter alia*, community support services uses such as:

music and dance school; antique shop; health spa; mail order store; newspaper office; office supply; pet shop; indoor theater; catering; laundry retail; mortuary; photographic and art studio; food store; and employment agency.

48. Section 10-4-14 also allows service uses performed on the premises for needs of a neighborhood, such as:

barber and beauty shop; dressmaking; tailoring; shoe repair; household appliance repair; radio or television sales, service and repair; frozen food locker; locksmith; millinery shop; travel agency; telegraph office; furrier storage, conditioning or sales; picture framing.

49. Directly south and east of the Property is a R-2 Residential District which contains single-family homes. Many of these homes are within a few hundred feet of the Property. Additionally, the Forest Glen Elementary School property line is approximately 350 feet away from the Property, along with the Montessori School located north on Main Street, all indicative of the number of children in the immediate area.

50. Section 10-3-1(F) of the Village’s Zoning Code provides that R2 Residential District “is primarily designed to accommodate *and protect the low density, single-family neighborhoods which comprise the bulk of the land use in Glen Ellyn.*” Village of Glen Ellyn Zoning Ordinance §10-3-1(F) (emphasis added).

**Special Use and Special Use Permits**

51. Under the Village’s Zoning Ordinance, gas stations are classified as “Garage, Service Station” and are defined as follows:

GARAGE, SERVICE STATION: Buildings and premises where gasoline, oil, grease, batteries, tires or motor vehicle accessories may be supplied and dispensed at retail and where, in addition, services and sales incidental to normal maintenance and repair of motor vehicles may be made, but such services and sales shall not include major mechanical and body work, straightening of body parts, painting, welding, storage of automobiles not in operable condition, or other work involving noise, glare, fumes, smoke or other nuisance factors.

52. A “Garage, Service Station” is an enumerated Special Use in C-2 Commercial Community District which requires a special use application, public hearing and permit.

53. Section 10-2-2 of the Village’s Zoning Ordinance defines Special Use as: a) public and quasi-public uses affected with the public interest; b) uses which may have a unique, **special or unusual impact upon the use or enjoyment of neighboring property**; and c) planned unit developments. Glen Ellyn Zoning Ordinance §10-2-2 (emphasis added).

54. Section 10-10-14(B) of the Village’s Zoning Code provides as follows:

A petition or application for a special use shall be filed with the director, department of planning and development, and shall contain at least the following information:

- i. The name, address and phone number of the applicant, pursuant to section 10-10-10 of this chapter;
- ii. Legal description of the property for which the special use is requested;
- iii. Description of the existing use of the affected property;
- iv. The present zoning district of the affected property;

- v. ***Description of the proposed special use;***
- vi. A dimensioned site plan or plat showing at least the location of all buildings, parking areas, traffic access and traffic circulation, open spaces, landscaping, refuse and service areas, utilities, signs, yards and such other information as the plan commission may require determining if the proposed special use meets the intent and requirements of this title; and
- vii. ***A narrative statement evaluating the economic effects on adjoining property, the effect of such elements as noise, glare, odor, fumes and vibration on adjoining property, a discussion of the general compatibility with the adjacent and other properties in the district, the effect of traffic, and the relationship of the proposed use to the comprehensive plan, and how it fulfills the requirements of subsection (E) of this section....***

Glen Ellyn Zoning Ordinance §10-10-14(B) (emphasis added)

55. Subsection (E) of Section 10-10-14 sets forth nine (9) criteria which *must all* be met by the applicant for a Special Use Permit in order for an applicant to be granted same, as follows:

The plan commission shall not recommend that a special use be granted ***nor shall the village board grant a special use***, unless it shall find, based upon the evidence presented to the plan commission in each specific case, that the special use:

- i. ***Will be harmonious with and in accordance with the general objectives, or within a specific objective of the comprehensive plan and/or this title;***
- ii. ***Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area;***
- iii. ***Will not be hazardous or disturbing to existing or future neighborhood uses;***
- iv. ***Will be served adequately by essential public facilities*** and services such as highways, streets, police and fire protection, ***drainage structures***, refuse disposal, ***water, sewers*** and schools, or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services;
- v. Will not create excessive additional requirements at public cost for public facilities and services, and ***will not be detrimental to the economic welfare of the village;***

- vi. *Will not involve uses, activities, processes, materials, equipment and/or conditions of operation that will be detrimental to any persons, property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors;*
- vii. *Will have vehicular approaches to the property, which shall be so designed as not to create an undue interference with traffic on surrounding public streets or roads;*
- viii. Will not increase the potential for flood damage to adjacent property or require additional public expense for flood protection, rescue or relief; and
- ix. *Will not result in destruction, loss or damage of natural, scenic or historic features of major importance to the community.*

**True North Submits Application for Special Use Permit**

56. On January 27, 2017, True North, submitted its application for a special use permit (“Application”), subsequently amended, along with numerous other variance requests, for the Property. A copy of the Application, including the variance requests, is attached herein as Exhibit F.

57. True North’s Application is lacking the required studies to support any indicia of evidence that it has satisfied items 1-7, and 9 above. Additionally, the information that was provided was dated, inaccurate or unreliable.

58. For example, according to the Traffic Impact Study provided by True North, the Project would result in 782 new daily vehicles trips being generated to and from the Property. However, what is unclear from the Study is how said increase in vehicle traffic would directly affect the current traffic conditions on the adjacent roadways. The Traffic Study was completed January 26, 2016, in the middle of winter, when traffic counts tend to be lowest due to periods of inclement weather. A copy of the pertinent portions of the Traffic Impact Study is attached hereto as Exhibit G.

59. The Traffic Impact Study does not address, nor provides any analysis, as to the effects of the increased traffic upon the Forest Glen Elementary School or other nearby schools. Glenbard School District 87 has already deemed Five Corners a serious safety “hazardous zone” based on their 2011 Hazardous Walking Conditions Study as required by the HB3680, Illinois Public Act 94-0439.

60. The lack of a proper traffic impact study violates the fourth and sixth special use criteria which premises approval on being adequately served by public facilities including highway capacity. Without a proper traffic impact study, it is not possible to know whether sufficient road capacity exists to accommodate the increased traffic generated by the Project.

61. True North submitted no study or report to determine how the increase in vehicle traffic would affect the health and safety of hundreds of nearby students at Forest Glen, especially those that walk to and from school. The sixth special use criteria was therefore not met.

62. True North submitted no drawings, studies or elevations relative to the Property showing, among other things, the rear of the building, retention pond, canopy sightlines or landscaping contrary to the second special use requirement. While the use of a gas station generally conflicts with the character of the surrounding area, without essential information such as drawings and elevations, residents and the Village had no way of determining the extent the Project conflicts in design and construction.

63. Without the required drawings, studies, elevations, and daily operating details, the public was unable to evaluate and comment on the Project at the Plan Commission meeting, let alone cross-examine witnesses.

64. The Applicant’s failures to address, let alone meet, the special use criteria constitute violations of the Village’s Zoning Ordinance since every special use application must comply with

the special use criteria per Section 10-1-2 of the Village’s Zoning Ordinance.

**Sale of Property to True North**

65. On February 22, 2016, the Board passed Ordinance No. 6386, authorizing the sale of the Property to True North. The sale was conveniently placed on the Board’s “consent agenda” for the February 22 Board meeting, meaning there was no discussion or debate. A copy of Ordinance No. 6386 is attached hereto as Exhibit H.

66. The Board purported to authorize the sale based on its “home rule” powers set forth in Ordinance No. 6302, dated February 23, 2015, which governs the sale of municipal property for redevelopment. A copy of Ordinance No. 6302 is attached hereto as Exhibit I.

67. Ordinance 6302 requires that a transfer of municipal real estate must be done in accordance with an “approved economic plan” pursuant to which the Village must consider whether the sale price or any other claimed economic benefits “justify the transfer of the real estate.”

68. Ordinance No. 6302 further requires that either the economic development plan or the ordinance approving the contract to sell the Property “shall contain a finding or findings to support the transfer.”

69. No prescribed “economic development plan” was ever created in connection with the sale of the Property to True North.

70. No findings were contained within any economic development plan because, as noted, there was no such plan.

71. Ordinance No. 6386, is absent of any required findings, other than referencing a desire to “place the property back on the property tax rolls” and to “generate sales and motor fuel taxes.”

**The February 23, 2017 Plan Commission Meeting**

72. At its February 23, 2017 meeting, the Village of Glen Ellyn Plan Commission, by a vote of 8-0, recommended to deny the Application request based on following pertinent findings of fact:

- i. The proposed use will not be harmonious and in accordance with the general objectives or within a specific objective of the Comprehensive Plan and/or Zoning Code because the Gas Station as proposed in terms of size and volume does not fit the character of the residential and commercial locale of the corner.
- ii. The proposed project is not designed and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will change the essential character of the area because there is, as currently planned, the lack of a significant buffer between the developed property and the neighborhood and residents that border the property.
- iii. The proposed use will be hazardous or disturbing to existing or future neighborhood uses of the property because of a. the proposed lighting and b. the absence of facts in the application with respect to hours of operation and how the property is going to be operated and managed.

73. The Plan Commission did not consider the variances based on the unanimous recommendation to deny the Application. A copy of the Plan Commission's February 23, 2017 Findings of Facts is attached hereto as Exhibit J.

**Harms Caused by the Approval of True North's Special Use Application**

74. The Project will produce traffic, noise, fumes and odors from gasoline, idling cars, and glare from its illuminated canopy, all of which are in direct conflict with criteria for a Special Use Permit in the Village's Zoning Ordinance. The proposed large gasoline station will produce hazards for the existing neighborhood uses, thereby adversely affecting the health, safety and well-being of the Plaintiffs.

75. The scale of the Project will immediately and drastically change the essential character of the area. In fact, no modifications were ever made to the Project to address the Plan

Commissions findings of fact identifying that the gas station size and volume does not conform with the Comprehensive Plan and/or Zoning Code. The Project will adversely impact residential property values by at least 10 percent.

76. According to Amy Bendigkeit, a well-known Glen Ellyn Realtor for Berkshire Hathaway Home Services KoenigRubloff Realty Group, the neighborhood homes closest to the Project will see their values drop as much as 25–35 percent and substantially increase their market time to sell.

77. As a real estate expert and a top producer of over 28 years in the Glen Ellyn micro-market (and top 1/2 percent nationally), Bendigkeit explained that today’s home-buyers are very aware of the area surrounding a home and will see a “mega” gas station, like the one proposed, as a major detractor on the value of nearby homes due to visual and lighting impact, increased noise, additional traffic, and potential environmental pollution from fumes and leaks.

78. PGE has engaged the services of Price Appraisal, Inc., a Chicago based professional MAI appraisal and consulting firm that has been involved with Chicago real estate since 1908 to assess the potential impact of the proposed use on property values of nearby properties. According to Price, the residential properties adjacent to the gas station complex will experience an adverse impact on value such homes due to negative attributes from the proposed development such as: the intensity and size of the use, the visual impact, increased noise, increased traffic, additional lighting, and potential environmental effects.

79. In addition to the potential environmental effects, the existing environmental status is still unknown and currently of concern. On approximately November 1, 2017, the IEPA installed two new monitoring wells on the site to re-evaluate the existing environmental conditions and potential leakage to ground water.

**Special and Unique Damages to the Plaintiffs**

80. Many of the members of Protect Glen Ellyn are located in close proximity to the proposed use. All of the following individual Plaintiffs are members of Protect Glen Ellyn and all own and/or reside in Glen Ellyn within 1,200 feet of the Property.

- a. MEGAN CLIFFORD at 793 Forest Avenue;
- b. PETER CLIFFORD at 793 Forest Avenue;
- c. JESSICA COMMO at 771 Forest Avenue;
- d. KAREN FRANKEN at 590 Elm Street;
- e. JASON FULLER at 586 Elm Street;
- f. KIMBERLY A. HESS at 600 Elm Street;
- g. NANCY HESS at 600 Elm Street;
- h. PETER KIENLEN at 757 N. Main Street;
- i. RACHELLE KIENLEN at 757 N. Main Street;
- j. ANDREW LIVINGSTON at 789 Forest Avenue;
- k. LELAND LIVINGSTON at 789 Forest Avenue;
- l. DIANA MARTINEZ at 594 Elm Street;
- m. RICHARD MASSA at 787 Forest Avenue;
- n. KRISTIN MASSA at 787 Forest Avenue;
- o. MARK SIMON at 604 Elm Street;
- p. MONTESSORI ACADEMY OF GLEN ELLYN, INC. at 927 N. Main Street;

**The March 13, 2017 Board Meeting – Special Use Permit**

81. More than 100 concerned residents attended the March 13, 2017 Board meeting to protest and speak out in opposition to True North’s Project. Not a single person spoke in favor of

the project.

82. Village President Alexander Demos routinely interrupted residents speaking in opposition to the Project by directing them to leave the podium when their three-minute time limit expired.

83. Trustee Mark Senak was the only trustee to express any concerns about True North's Project, and made a motion to table the matter until further information was provided. No other trustee would even second the motion and Trustee Diane McGinley objected to there even being any discussion about it.

#### **The April 24, 2017 Board Meeting - Variances**

84. More than 200 concerned residents attended the April 24, 2017 Board Meeting<sup>2</sup> Residents protested and spoke out in opposition to True North's gas station Project, citing the dangers to their community and the health, safety and welfare of their families. Residents requested the Village revoke the special use permit and walk-away from the deal with True North, which had since fallen out of contract. Not a single person spoke in favor of the Project.

85. During their deliberations, Trustees dismissed the residents' concerns and refused to place certain conditions for various requests, such as: no left turn on Main Street during student arrival and departure times at school; no refueling of underground gas storage tanks during school hours; larger buffer as required by code; reduce the number of pumps, and address Main Street storm water runoff into neighboring homes.

86. At the end of the meeting, the Board voted 5-0 to approve the variance requests, Trustee Mark Senak abstained.

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<sup>2</sup> See Village of Glen Ellyn (2017, April 24). Glen Ellyn Village Board Regular Meeting [Video file]. <http://glenellynvillageil.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1267&Format=Minutes>

### **The May 1, 2017 Board Meeting**

87. The Board met again on May 1, 2017<sup>3</sup>, at which time it imposed certain conditions on the special use permit (including a limit on hours of operation), approved True North's application for a liquor license, and authorized the Village Manager to set a closing date for the sale. Dozens of concerned residents attended the May 1, 2017 Board Meeting and again protested and spoke out in opposition to True North's gas station Project, citing dangers to their community and the health, safety and welfare of their families. Not a single person spoke in favor of the Project.

88. The Board, including Village President Demos, voted 5–2 at the May 1, 2017 meeting to approve the Project, amend the liquor control code to issue an additional liquor license, and move forward with the sale. Three of the five members who voted in favor, including Village President Demos, left office a week later, on May 8, 2017.

### **Procedural Due Process Violations**

89. According to Illinois law, in hearings that deal with special uses, the property rights of the interested parties are at issue. In such scenarios, "the municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties.

90. Pursuant to the Illinois Supreme Court, procedural due process requires that during a special use permit approval process in municipalities with less than 500,000 in population, neighboring property owners have the right to a public hearing during which they must have the opportunity to cross-examine witnesses. *See People ex rel. Klaeren v. Vill. of Lisle*, 202 Ill. 2d 164

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<sup>3</sup> See Village of Glen Ellyn (2017, May 1). Glen Ellyn Village Board Regular Meeting [Video file]. <http://glenellynvillageil.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1269&Format=Agenda>

(legislatively reversed on other grounds). This right is in addition to any other rights they may possess at law.

91. Importantly, although some written information was provided to the Plan Commission, written information, such as studies or responses to the Special Use Standards, were absent the Applicant's Application.

92. Also, critical witnesses, such as the Applicant and Village employees, acting on behalf of the Village, as landowner, were not at the meeting and thus did not avail themselves for cross-examine based on the testimony provided in their Application or by those representing the Applicant or Village landowner.

93. In addition to the above, the Plaintiffs' due process rights were violated because any conditions that were eventually placed on the Special Use Permit, were incorporated after it's the only public hearing on the Special Use Permit occurred which was February 2016 by the Plan Commission.

94. Without a public hearing on the conditions of the Special Use Permit, the neighboring property owners were never afforded the opportunity to cross-examine witness regarding the conditions (i.e. the Special Use Permit in full). For the same reason, adequate notice never occurred for the Special Use Permit as required by the Illinois Municipal Code. Therefore, procedural due process was not afforded to the neighboring Plaintiffs.

**Application of the LaSalle/Sinclair Factors**

95. In addition to the above public welfare principles, in Illinois the constitutionality of land use ordinances is determined in part under a set of factors known as the *LaSalle/Sinclair* factors. The *LaSalle/Sinclair* factors applicable to this as-applied challenge are: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by

the particular zoning restrictions; (3) the extent to which diminishing the Plaintiffs' property value promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purpose; (6) the length of time the property has remained vacant as zoned in the context of land development in the vicinity; (7) community need for the proposed use; (8) the care with which the community has undertaken to plan its land use development; and (9) whether there exists a comprehensive zoning plan and, if so, whether the challenged ordinance is in harmony with the comprehensive zoning plan.

96. Pursuant to factor number 1 of *LaSalle/Sinclair* factors, the Ordinance and the activity contemplated by the Ordinance have made the proposed development substantially inconsistent with existing uses and the zoning of nearby property which is predominantly single-family residential with nearby elementary schools and includes a historic district. Any gas station with a convenience store, let alone a gas station of this large size, would severely conflict with the existing low-intensity, family-oriented, and historic uses and zoning in the area.

97. Pursuant to factor number 2 of the *LaSalle/Sinclair* factors, the Ordinance has (a) caused an immediate reduction in the value of other properties in the area including to that of the Plaintiffs, and (b) reduced substantially the development potential of such land, both of which are discussed at length in the context of expert assessment in Paragraphs 76-78. Also as alleged in Paragraphs 76-78, local realtor Amy Bendigkeit with Berkshire Hathaway and Price Appraisals Incorporated, have both advised the Plaintiffs that the proposed gas station will cause a reduction in property values to adjacent properties. Further, the sheer intensity of the development and size and scale of the proposed gas station were one of the three reasons the Plan Commission denied the Project, yet nothing was ever done to address the size or scale throughout the process to approve

the Ordinance.

98. Pursuant to factor number 3 of the *LaSalle/Sinclair* Factors, the Ordinance also allows for the removal of a dense tree buffer that sits on a third of the site shielding the residential neighborhood from not only the large-scale gas station but also the commercial intersection and lights and sounds. By removing this buffer area, the neighborhood will be completely opened up to the commercial corridor. Thus, in addition to the surrounding property values diminishing, there is diminishment to the health, safety, morals or general welfare of the public by removing said dense tree buffering.

99. In addition, the site continues to have unresolved environmental issues related to leaking underground storage tanks (“LUST”), which were located on the Property from 1975 until 2006.

100. While the leaking gasoline tanks were removed in 2006, according to AECOM’s letter to the Village, dated January 9, 2013, there are still unresolved LUST incidents on the Property. *See* attached Group Exhibit I-A which is a compilation of emails, letters and correspondence between the Village, AECOM and Plaintiff’s counsel explaining the unresolved LUST incidents and how they currently endanger the health, safety and general welfare to the public, specifically the residential neighbors immediately adjacent to the Property.

101. The LUST Program requirements have not been completed in order to properly remediate the Property and comply with the Program. The Village simply denies that this is their obligation as new owners to remediate. As evident in the letter from AECOM, the IEPA “will not close the LUST incidents associated with the Site....” Allowing the Defendants to move forward with their proposed plans without addressing these existing LUST incidents on the Property, is in contrast to promoting the health, safety, morals and general welfare of the Village’s residents and

fails under number 3 of the *LaSalle/Sinclair* Factors.

102. Pursuant to factor number 4 of the *LaSalle/Sinclair* factors, there is no relative gain to the public compared to the hardship imposed upon the Plaintiffs, the residents of Glen Ellyn and communities. The Village estimated approximately \$140,000 in annual sales tax revenues to the Village would be generated by the Gas Station. However, not only would this revenue represent an immaterially miniscule portion of the overall Village budget, but as a result of the depreciation of surrounding property values, that sales tax revenue gain would likely be offset by the loss in property tax revenue from surrounding properties. Thus the only potential public benefit—a small boost public finances—from the Project, will likely see a net loss. That is in addition to the personal financial hit the individual homeowners will experience in the surrounding community.

103. Pursuant to factor number 5 of the *LaSalle/Sinclair* factors, there is no, or relatively little, hardship imposed on the Applicant if it could not operate the proposed facility.

104. Pursuant to factor number 6 of the *LaSalle/Sinclair* factors, the Property has remained vacant as a result of the Village's own doing and its desire to sell the Property to only a tax revenue producing buyer. That is, due to the Village's still-inadequate response to environmental contamination on the site and a failed marketing effort, the Village for several years failed to sell the Property to any buyer until recently and failed to sell it to an appropriate buyer as it had originally intended as discussed *supra* in Paragraphs 25–30.

105. Pursuant to factor number 7 of the *LaSalle/Sinclair* factors, there is no public need for another gas station and convenience store at the desired location, nor has the Defendants submitted any evidence to the contrary. There are nine existing or planned gas stations with convenience stores within approximately two miles from the property, and there is a 7-Eleven convenience store less than 300 feet away. The nearby area is filled with schools, churches, and

children's recreational facilities which would not benefit from unneeded services of a gas station and convenience store.

106. Pursuant to factor number 8 of the *LaSalle/Sinclair* factors, the care taken by the community in planning its land use development greatly favors the Plaintiffs in this case. As discussed *supra* in Paragraphs 31-43, Glen Ellen has taken much effort to plan the area of the Gas Station to preserve and develop the area as a historic district. Not only would any gas station clash with those planning efforts, but moreover, the Application's traffic impact study had critical voids in its analysis that improperly assessed the impact on the surrounding neighborhood and impacts to Forest Glen Elementary. Further, the Applicants submitted insufficient renderings of the proposed development (discussed *supra* in Paragraphs 62-63) leaves impossible a full analysis of the Project's suitability for the area.

107. Pursuant to factor number 9 of the *LaSalle/Sinclair* factors, the Ordinance is at odds with the Comprehensive Plan for the reasons discussed *supra* in Paragraphs 31-43.

108. The Ordinance has deprived and continues to deprive the Plaintiffs of private property rights and privileges secured by the due process clause of Art. 1, § 2 of the Illinois Constitution.

109. The Ordinance is wholly arbitrary, irrational, unreasonable and capricious, and bears no substantial or rational relation to the public health, safety, or welfare.

**COUNT I**  
**DECLARATORY RELIEF**  
(Granting of Special Use Application - Declaratory Judgment - Violation of  
Art. I, §2)

110. The Plaintiffs incorporate by reference as though fully set forth herein, each and every preceding paragraph in this Complaint.

111. An actual controversy has arisen and now exists between the Plaintiffs and the Defendants concerning the Plaintiffs' property and due process rights.

112. More specifically, there is an actual controversy between the Parties regarding: (1) compliance with due process afforded to the neighboring Plaintiffs, (2) adequate notice; (3) compliance with Village Zoning Code relative to special use permits.

113. Under 735 ILCS 5/2-701, the court is vested with the authority to make a binding declaration of rights having the force of a final judgment on the actual controversy between the Plaintiffs and the Defendants. Under 735 ILCS 5/2-701, the court may also make a binding declaration of rights having the force of a final judgment on the construction of Ordinance No. 6486, and any supplemental conditions and variances related to same.

114. The Defendants contend that the hearings relative to the Special Use Permit approval provided adequate due process to the Plaintiffs. Furthermore, Defendant Village contends that True North satisfied its burden in order to receive a Special Use Permit.

115. Plaintiffs seek a judicial determination of whether its due process rights were violated and/or whether the Village complied with the Village's Zoning Ordinance when it approved a special use permit for Defendant True North's Project.

116. Additionally, a judicial determination is necessary and appropriate at this time before Defendants begins construction on the Property.

WHEREFORE, Plaintiffs, respectfully request this Court to enter a declaratory judgment that:

- a. A declaration that the Plaintiffs' procedural and substantive due process rights have been violated;
- b. A declaration that the Project and the special use application does not comply with Sections 10-10-14(B) and 10-10-14(E) of the Village's Zoning Ordinance;

- c. A declaration that the Project violates the Village's own planning principles;
- d. A declaration reversing Special Use Permit Ordinance No. 6486;
- e. An award of costs including attorneys' fees; and
- f. Any such other relief as the Court deems just and proper.

**COUNT II**  
**INJUNCTIVE RELIEF**

(Substantive Due Process/Irrational Granting of Special Use  
Application Injunctive Relief/ As-Applied Challenge)

117. The Plaintiff incorporate by reference as though fully set forth herein, each and every preceding paragraph in this Complaint.

118. At all times herein relevant, the Defendant Village has improperly and unlawfully (1) denied the Plaintiffs their due process rights with respect to the Special Use Permit approval and related public hearings; (2) disregarded Sections 10-10-14(B) and 10-10-14(E) of the Village's Zoning Ordinance; and (3) granted Defendant True North's Application.

119. Unless and until enjoined and restrained by this Court, the actions by the Defendants will cause great and irreparable injury to the Plaintiffs in that (1) many of Protect Glen Ellyn's members will be deprived of the quiet use and enjoyment of their properties; (2) Plaintiffs will be exposed to hazardous elements such as noise, odor, fumes and vibrations from the Proposed Development, and (3) the actions constitute noncompliance with the Village's Zoning Ordinance.

120. Unless enjoined, the Ordinance will have the special negative effects on the Plaintiffs' noted herein.

121. Additionally, not only will the Defendants' conduct cause great and irreparable harm to the Plaintiffs unless and until enjoined, but that same conduct will cause great and

