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October 12, 2021

Zoning Board of Appeals  
Town of Wallkill  
99 Tower Drive Building A  
Middletown, NY 10941

ATTN: Roger de Roziere, Chairman

**RE: Orange County Dinosaur Park - Interpretation**

Dear Chairman de Roziere and Members of the Zoning Board of Appeals:

This firm represents the applicant, Orange County Dinosaur Park LLC, seeking site development plan, special permit and resubdivision approval from the Town of Wallkill Planning Board ("Planning Board") for development of the proposed Orange County Dinosaur Park in the Town of Wallkill located along Weld Road, Tarbell Road and Shawangunk Road (Tax Map #1-3-9 and #1-3-120). Initial applications were made to the Planning Board in August 2020, Sketch Plan Approval was granted on August 19, 2020, and has been under review by the Planning Board at numerous meetings during 2021.

At its October 6, 2021 meeting, the Planning Board adopted a resolution that the matter be referred to the Wallkill Zoning Board of Appeals for an interpretation concerning the use as a specially permitted "public, or private, recreation facility" in the RA Zoning District. [See Wallkill Zoning Law §249-19(C)(4)]. We understand that a separate resolution from the Planning Board to this effect will be forthcoming. Enclosed please find:

1. Completed Application for Interpretation (Wallkill Zoning Law §249-44);
2. Orange County Dinosaur Park Site Plan; and

The Planning Board is the SEQRA lead agency following a coordinated environmental review. This application is a Type 2 action pursuant to SEQRA. [See, 6 NYCRR 617(c)(37)] We respectfully request that this matter be placed on the October 18, 2021 Zoning Board agenda.

If you have any questions on this submission, please feel free to contact me or Ross Winglowitz, P.E. at Engineering & Surveying Properties, PC (845-457-7727). Thank you for your attention to this matter.

Very truly yours,

/s/ *Thomas A. Shepardson*

Thomas A. Shepardson

cc: Neil Gold  
Howard Geneslaw

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October 6, 2021

Planning Department  
Town of Wallkill  
99 Tower Drive Building A  
Middletown, NY 10941

ATTN: Gary Lake, Planning Board Chairman

RE: Orange County Dinosaur Park

Dear Chairman Lake and Planning Board Members:

This firm represents the applicant, Orange County Dinosaur Park LLC, seeking site development plan, special permit and resubdivision approval from the Town of Wallkill Planning Board for development of the proposed Orange County Dinosaur Park (the "Park"). Recently, a comment was made alleging that the Park was not a specially permitted use in the RA Zoning District. This letter updates/supplements our prior September 24, 2021 letter on this topic. This statement is inaccurate for the reasons set forth below.

**I. Public, or Private, Recreation Facilities**

The Park plainly meets the definition of a "public or private recreational facility", a specially permitted use in the RA Zoning District, which is described as:

Public, or private, recreation facilities and open space, other than for a single-family residence, including playgrounds, swimming pools, lakes, golf courses and clubhouse, including the sale of food and drink, provided that:

- a. Such use shall occupy a lot with an area of not less than two acres.
- b. No building or structure shall be erected nearer than 50 feet to any lot line.
- c. Plans for all outdoor public address systems are approved by the Planning Board.

- d. Plans for lighting of outdoor recreational facilities are approved by the Planning Board.

#### A. Analogous to Permitted Golf Course

The Park meets every one of the criteria indicated. In that respect, it is precisely like the example provided of a permitted public, or private, recreational use contained in the zoning code, namely a golf course. The primary use of a golf course is to enable visitors (who may purchase daily, seasonal or annual admission privileges) to play golf. But that is not all a golf club does on its property. It rents golf carts, for example, to provide transportation for those who may prefer not to walk around miles of ground. It may provide caddy services who assist and impart their knowledge to golfers on the course.

At any given time, a golf course may have 20, or more, golf carts in use. These golf carts perform the identical transportation function that is performed by the dinosaur train: the carts help the golfers play the course. The train will help and transport children, parents and grandparents who may not want to walk approximately one kilometer of roadway, but who want to see all the dinosaurs in the Park.

Golf courses and clubhouses typically offer food and refreshments for breakfast, lunch and dinner for golfers or other patrons. However, the golf club's food service is not its principal use but is ancillary to its principal use, which is playing the golf course. The Dinosaur Park's food service is also ancillary to the Park's principal uses: giving children of all ages an opportunity to see dinosaurs they have dreamed about, enjoying the dinosaur playgrounds, riding the individual dinosaurs, and getting to the heart of the dinosaur maze.

Public, or private recreational golf courses also provide additional services and amenities at its Pro Shop, where the sale of golf attire, from socks and shoes to pants, shirts and jackets is available. The shoppers will also be able to purchase golf balls, tees, books about golf, videos to improve their swing and many others golf related items. That is precisely what our Dinosaur Country Store will do: it will sell tee shirts and sweatshirts and caps and aprons marked with our dinosaur logo; it will sell books, toys and music directly related to the world of dinosaurs. The sale of these goods is similarly ancillary to the primary purpose of the Dinosaur Park as is the sale of golf attire and goods ancillary to the purpose of a golf course. The fact that money changes hands when food and clothing and books are exchanged, whether at a golf course or the Dinosaur Park, does not transform the use into a non-permitted commercial venture.

One final comparison with the golf course, which the Code provides as an example of a specially permitted use in the RA zone: all of the activities that children will enjoy at the Dinosaur Park take place outdoors (or are covered by tents during the heat of the sun). They are all recreational.

It should also be pointed out that golf courses are just one example of permitted uses contemplated in this definition. The zone permits "public, or private, recreation facilities...including playgrounds, swimming pools, lakes, golf courses and clubhouse...." Use of the word "facilities" and "including" means that these uses are just illustrative and an array of

others are permitted, such as the proposed Dinosaur Park. Courts have long recognized that the word “Including’ may be used to bring into a definition something that would not be there unless specified, or it may be used to show the meaning of the defined word by listing some of the things meant to be referred to, but not by such listing excluding other of the same kind. Red Hook Cold Storage Co. v. Dep’t of Labor, 295 NY 1, 8 (1945). “The word ‘including’, when followed by a list of examples, is designed to broaden the concept being defined.” Doniger v. Rye Psychiatric Hosp. Ctr., Inc., 122 AD2d 873 (2<sup>nd</sup> Dept. 1986).

Moreover, it is well-established by numerous decisions of New York’s highest court that the Zoning Law being in derogation of a property owner’s common law rights, must be construed strictly against the municipality seeking to enforce said law, with any ambiguity in its provisions to be resolved in favor of the property owner. E.g. Allen v. Adami, 39 NY2d 275, 277 (1976).

### **B. The Site Plan and Recreational Facilities**

The Site Plan not only supports the analogy to a golf course, but also shows that the precise uses at the Park are specifically tailored to education, recreation and general enjoyment, including playgrounds and/or playground activities, as follows:

1. Numerous Playgrounds, with dinosaur themed equipment (“playgrounds” and recreation activities).
2. Mazes (playground, “playground activities” and recreation activities).
3. Walking trails. Audio recordings will be available describing the natural features of many of the more interesting dinosaurs along the trail (“playground, playground activities”, education and recreation activities).

Additional playground, playground activities, education, recreation and enjoyment opportunities can be found within various open air temporary tents, depending upon the weather, including:

1. An Amphitheater (playground, playground activities education and recreation activities).
2. Two children’s Dino-Scooter Tents (playground, playground activities and recreation activities). Individually pedaled for 4- and 5-year-olds, or motor driven at 1 mph.
3. Fossil Skeleton Tent with lectures by graduate student paleontologists (playground, playground activities and education and recreation activities).
4. Dino-Dig Fossil Excavation (playground, playground activities and education and recreation activities). All children will find some ‘Dino teeth’ to take home.
5. Two Children’s Party Tents (playground, playground activities and education and recreation activities).
6. One or two Dining open Tents (playground, playground activities and recreation activities).

Other complementary contemplated playground, playground activities, education, recreation and enjoyment opportunities within the Dinosaur Park include viewing multiple dinosaur exhibits, six geodesic education domes, 60-foot diameter plant conservatory, and a

carousel. These amenities are similar to amenities that families would find in public parks like Bergen County's Van Saun Park and in NYC Central Park as recreational, educational and restful places for children and adults after utilizing the dinosaur walking trail and time spent at the playgrounds and mazes.

In addition, similar to the tram service that is available to assist in the transportation of visitors around the outdoor sculpture park to view various forms of art on the grounds at Storm King Art Center in New Windsor, New York, a tram/train is also available to visitors at the Dinosaur Park to help navigate the varied terrain, and to view various dinosaurs at the Dinosaur Park. The entire reason for visiting the Park is to be able to leisurely recreate while viewing or interacting with dinosaur exhibits. No one will visit the Park, or for that matter, a golf course, because there is a tram/train, or golf cart to assist getting people from one place to another around the Park, or golf course. In other words, no patrons will visit the Dinosaur Park simply because there is a tram/train or a carousel, as dinosaur viewing is the main attraction, and it certainly does not change the public, or private, recreational facility to a different use.

On-site amenities also include buildings or structures that support the educational, recreational and playground primary uses include:

1. Ticket Sales & Gift Shop building (similar to a golf clubhouse/pro shop).
2. Covered open-air Trolley Stations and children's train (recreation activities similar to golf carts at golf courses).
3. Gift & Rental Shop for dinosaur related items and daily wagon and locker rentals (similar to a golf clubhouse/pro shop).
4. First Aid building (required amenity for health and safety typically found at golf courses).
5. Restrooms (required amenity typically found at playgrounds and parks).
6. Train House & Maintenance Building (required amenity for park functioning typically found at playgrounds, parks and golf courses).

Food and beverage services will be available to visitors from stationary food trucks similar to the provision of food services at golf courses.

Each of these Park recreational and educational activities are consistent with the permitted specially permitted use – "public or private **recreation** facility".

## **II. Definition of Recreation**

It is also noted that there are two definitions of "recreation" in the Town's Zoning Law that further support the Park as a specially permitted use.

Recreation, Active - *Leisure activities* usually performed with others, often requiring equipment and taking place at prescribed places, sites or fields. Active recreation *includes but is not limited to* swimming, tennis and other court games, baseball and other field sports, and *playground activities*.

Recreation, Passive - Recreational activities that generally do not require a developed site. This generally includes such activities as hiking, horseback riding, and picnicking.

Therefore, the Park can be further described as a dinosaur themed active or passive recreational venue, consisting of various leisure activities set forth above that are intended and oriented for family enjoyment that “includes but is not limited to ... playground activities”. There are numerous playgrounds, with dinosaur themed equipment for recreation activities; mazes for recreation activities and an approximately one kilometer walking trail for viewing dinosaurs with audio recording that describe the features along the trail for education and recreation activities.

### **III. Sketch Plan Approval**

Moreover, here the minutes of the August 19, 2020 Planning Board meeting reflect that at a prior work session the Park use was determined to constitute a “public, or private, recreational facility”, and a specially permitted use in this RA Zoning District. At this meeting, the Planning Board unanimously granted Sketch Plan approval. Approval of the Sketch Plan is tantamount to approval of the proposed use. §249-40 (D)(1) of the Zoning Law. Because Planning Boards frequently consider issues of whether uses are permitted in a particular zoning district, “the Planning Board’s interpretation of the zoning ordinance is entitled to deference.” Matter of Comm. to Protect Overlook, Inc. v. Town of Woodstock Zoning Bd. of Appeals, 24 AD3d 1103 (3<sup>rd</sup> Dept. 2005). As one court noted: “We accord great deference to a planning board’s interpretation of a zoning ordinance.” Matter of Shop-Rite Supermarkets, Inc. v. Planning Bd of the Town of Wawarsing, 82 AD3d 1384, 1387 (3<sup>rd</sup> Dept. 2011).

Therefore, over one year ago, the Park was determined to be “public, or private, recreation facility” and a specially permitted use in this RA Zoning District, upon which the applicant has relied upon and, since August 2020, expended large sums of money proceeding through an extensive SEQRA review process.

### **IV. Not “commercial recreation”**

Finally, the Park is not a “commercial recreation” use, which is defined as:

Any establishment which receives a fee in return for the provision of some recreational activity, including but not limited to athletic and racquet clubs, amusement parks, auditoriums, bowling alleys, conference centers, museums, performance theaters, pool or billiard halls, and skating rinks. Commercial recreation uses include facilities providing accommodations for individual or organized sports such as sports arenas.

The zoning law does not define “establishment” or “amusement park”, therefore, given the extensive analysis above, any attempt to try and shoehorn an argument that the Dinosaur Park is an amusement park is misguided. It is not an amusement park.

The common denominator for the examples of commercial recreation is that the commercial uses are contained within buildings, i.e. racquet clubs, amusement parks, auditoriums, bowling alleys, conference centers, museums, performance theaters, and pool or billiard halls. Skating rinks, however can be out doors or indoors. This fact separates the proposed Dinosaur Park from “commercial recreation” because it is a recreational outdoor use.

It is also noteworthy that the dinosaur animatronic exhibits do not require New York State Department of Labor (“DOL”) permits to operate. The DOL typically permits and inspects all aspects of “amusement parks” operations for safety purposes, such as the numerous mechanical thrill rides and other attractions. At the Dinosaur Park, it is expected that only the tram/train (for necessary transportation purposes), a carousel and temporary tents will require permits. Even assuming such few amenities also might be found an amusement park, issuance of such a DOL permit does not transform the Dinosaur Park from its the main use as a public, or private, recreation facility, to view life-sized dinosaur exhibits, into an amusement park. Neither does people viewing art exhibits located at the Storm King Art Center on a tram make that venue an amusement park.

The Dinosaur Park is virtually the opposite of an amusement park. For instance, Coney Island draws people for its elaborate thrill rides, like the Cyclone roller coaster. This roller coaster is self-described as the “Mother of roller coaster enthusiast culture and the ‘Big Momma’ of Coney Island [and] the Cyclone tops everyone’s list of things to do in New York City,” making that ride, and other similar rides, the main attraction of their amusement park patrons.

While buildings are also specifically contemplated and allowed with “public, or private, recreation uses” in the RA district - i.e. golf “clubhouses” are permitted and the fact that “No building or structure shall be erected nearer than 50 feet to any lot line,” clearly establishes that the similar Dinosaur Park buildings are also authorized. The buildings, however are not the primary use of the Park, unlike the buildings used for bowling, theaters, pool halls, etc. under the commercial recreation definition. It is a public, or private, outdoor recreation facility designed for children/families with its main walking trails, dinosaur mazes and dinosaur themed playgrounds. The other Park amenities are mostly temporary tents and one main building (similar to a clubhouse) and are simply ancillary to the primary, Park recreation facilities.

In situations where uses may not be defined in a zoning law, courts have noted that non-defined terms typically carry their customary meaning and used dictionaries and other references for guidance. As the court did in Haas Hill Property Owners’ Assoc. v. Zoning Board of Appeals of the Town of New Baltimore, 202 AD2d 895 (3<sup>rd</sup> Dept. 1994), where it found that a “use can be classified as ‘recreational’ if it provides diversion or amusement (Webster’s Third New international Dictionary 1899 [unabridged 1986]).” The Complete Illustrated Book of Development Definitions, 4<sup>th</sup> Ed. provides the following definitions:

Amusement machine or device – Any coin-or token -operated machine or device, whether mechanical, electrical, or electronic, that is ready for play by the insertion of a coin or token and operated by the public for use as a game, entertainment, or amusement.

Examples – kiddie rides, games of chance, billiards, pinball machines, shuffleboard, bowling, dartboards, video games



Amusement Park – A facility, primarily outdoors, that may include structures and buildings where there are various devices for entertainment, including rides, booths for the conduct of games or sale of items, as well as buildings for shows, entertainment, restaurants and souvenir sales.

Webster’s Universal College Dictionary (1997) defines “amusement park” as “A park equipped with such recreational devices as a Ferris wheel, roller coaster, etc. and usually having booths for games and refreshments.”

Just because the use is a “public, or private recreation facility,” one should not jump to the erroneous conclusion that it is an undefined “commercial” recreational use. Equating “commercial” with “private” ownership of the Park because a fee for recreational activities is charged for entrance to the Park, or for purchasing dinosaur merchandise, does not transform the Park into a commercial recreation amusement park. Otherwise, an absurd result would be reached, such as a zoo, or a miniature golf course, or even a regular golf course would constitute “commercial recreation”, while simultaneously being private recreation facility.

“A planning board may apply its “discretion and commonsense judgments” to the facts as presented.” Michelson v. Warshavsky, 236 AD2d 406 (2<sup>nd</sup> Dept. 1997) (citing, Matter of Market Sq. Props. v. Town of Guilderland Zoning Board of Appeals, 66 NY2d 893). Review of the above definitions, as compared to the proposed Dinosaur Park use, can only lead to the commonsense conclusion that the proposed use falls within the customary meaning of recreation as a “public, or private, **recreation** facility”, and not an “amusement park”.

We appreciate the Planning Board’s continued review and attention to this important project. Should you have any further questions, please do not hesitate to contact me.

Very truly yours,

/s/ *Thomas A. Shepardson*

Thomas A. Shepardson

**Zoning Board Application**

APPEAL # Z-2021-023

1	Application Date	10/9/21
2	Applicant(s) Name	Orange County Dinosaur Park, LLC
3	Address	1174 Sussex Road, Teaneck, NJ 07666
4	Phone Number	201-264-0078
5	Email Address	newtongold@icloud.com
6	Property Owners Name	ESPM LLC c/o Silvio Dilorio 180 Connors Road, Middletown NY 10941
7	Property Address	Tarbell Rd, NYS Route 17 & Shawangunk Road
8	Phone Number	845-662-1793
9	Email Address	None
10	Date owner acquired the property	12/2/2004
11	Tax Map Location (Section-Block-Lot)	3-1-9 & 3-1-120
12	Street Address	Tarbell Rd, NYS Route 17 & Shawangunk Road
13	Zoning District (circle one)	<u>RA</u> / RA-1/ R1/ R2/ R-AH/ RM-B/ NC/ TC/ OR/ HC/ ENT-L/ ENT
14	Lot Size and Acreage	137.54
15	Soil Type described in Town Code	Arnot-Lordstown, Bath-Nassau, Catden, Muskego, Pinebog, Erie, Histic Humaquepts, Mardin & Swartwood
16	Application fee	(Check or Cash) Amount-\$ <u>825</u>

**Appeal Request:**

Any Appeal is made or requested by the applicant for the following:

- Interpretation of the Zoning Law
- Commercial Variance
- Use Variance
- Sign Variance
- Area Variance
- Residential (Decks, Shed, Pool, Addition, Accessory bldg. /structure)  (New Structure)
- Accessory building larger than 28ft x 28ft

Other:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Front / Side / Rear / Yard setback from \_\_\_\_\_ to \_\_\_\_\_ Section \_\_\_\_\_

Front / Side / Rear / Yard setback from \_\_\_\_\_ to \_\_\_\_\_ Section \_\_\_\_\_

Front / Side / Rear / Yard setback from \_\_\_\_\_ to \_\_\_\_\_ Section \_\_\_\_\_

Front / Side / Rear / Yard setback from \_\_\_\_\_ to \_\_\_\_\_ Section \_\_\_\_\_

Lot area from \_\_\_\_\_ to \_\_\_\_\_ Section \_\_\_\_\_

State reason and purpose for Request:  
See attached letter

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Applicant must print and submit Environmental Assessment Form. This form must be filled out by going to the following link and following the steps given: [www.dec.ny.gov/cafmapper](http://www.dec.ny.gov/cafmapper)

Has this proposal appeared before the Planning Board?  YES  NO

Property taxes up to date with the Town of Wallkill?  YES  NO

Property owner must have their signature notarized on this application:

Owners Signature: Silvio A. Jona Notary Public: [Signature]

Sworn to before me this date: 10/9/21

State of New York  
County of Orange

Applicant same as owner

Building Inspector signature: [Signature]

Date: 10/14/2021

SUSAN JONES  
NOTARY PUBLIC, STATE OF NEW YORK  
Registration No. 01JO6383658  
Qualified in Orange County County  
Commission Expires November 26, 2022

APPLICANT DISCLOSURE FORM - ORANGE COUNTY, NY REVIEW UNDER SECTION 239-M OF GENERAL MUNICIPAL LAW

The following is information relative to the below named project which is presently pending before the \_\_\_\_\_  
(City/Town/Village) of Wallkill (Planning/Zoning/City/Town/Village) \_\_\_\_\_ Board.

Title of Project: ESPM, LLC

Municipality: Town/Village/City of Wallkill

(underline one of above)

Nature of Owner or Owners (LLC, Corporation, Partnership, Joint Venture, natural person, professional corporation or other type of business entity or combination of the above):

LLC

The names of the Members, Officers, Shareholders, Directors, Beneficial Owners owning at least five percent of the Stock or Membership or Partnership Interest or Beneficial Interest in the project are:

Silvio Dilorio  
\_\_\_\_\_  
\_\_\_\_\_