

SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF ULSTER

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In the Matter of the Application of

EDWARD G. WILLIAMS,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

TOWN OF ROSENDALE PLANNING BOARD,  
JOAN S. JORDAN, Records Access Officer, and  
PATRICK McDONOUGH, Records Appeal  
Officer, for the Rosendale Planning Board,

Respondents.  
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PLEASE TAKE NOTICE that, upon the attached petition, verified on March 4, 2008 (the "Petition"), the accompanying Declaration of Edward G. Williams, sworn to on March 4, 2008 and exhibits thereto (the "Williams Declaration"), and for the reasons set forth in the accompanying Memorandum of Law, Edward G. Williams ("Petitioner"), by his attorneys, Stewart Occhipinti LLP, 65 West 36<sup>th</sup> Street, New York, New York 10018, will move this Court, at the courthouse thereof, located at 285 Wall Street, Kingston, New York, before a Judge and in a Courtroom to be assigned, on the 28th day of March, 2008 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for a judgment against Respondents pursuant to Article 78 of the Civil Practice Law and Rules:

- 1) directing Respondents to provide Petitioner with copies of all records requested by Petitioner pursuant to the Freedom of Information Law, Article 6 of the Public Officers Law ("FOIL") in a certain FOIL Request dated and filed on November 7, 2007 with the Records Access

**NOTICE OF  
ARTICLE 78 PETITION**

Index No. \_\_\_\_\_

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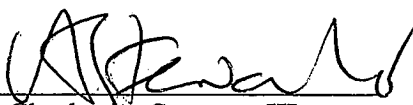
Officer of the Planning Board of the Town of Rosendale (the "November 7 FOIL Request"), a copy of which is attached as Exhibit "A" to the accompanying Williams Declaration;

- 2) determining, after notice and an opportunity to be heard, whether any member of the Rosendale Planning Board, employee of the Town of Rosendale, or Planning Board member, with the intent to prevent the public inspection of a record, willfully concealed or destroyed any record to be produced in response to the November 7 FOIL Request;
- 3) awarding Petitioner his reasonable attorney's fees and other litigation costs reasonably incurred by Petitioner, pursuant to Section 89(4)(c) of the Freedom of Information Law; and further,
- 4) awarding Petitioner such further and different relief as to this Court seems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to § 7804 (c) of the CPLR, Respondents' answer and supporting affidavits, if any, are required to be served upon the undersigned at least five days before the date this Petition is noticed to be heard; and Petitioner's reply and supporting affidavits, if any, will be served at least one day before the date this Petition is noticed to be heard. Pursuant to CPLR § 7804(b), this Court has exclusive jurisdiction over this Article 78 petition and, pursuant to CPLR § 7804(b) and CPLR § 506(b), Petitioner states that Ulster County is a proper venue for this proceeding.

Dated: New York, New York  
March 4, 2008

**STEWART OCCHIPINTI, LLP**

By:   
Charles A. Stewart, III  
Attorneys for Petitioner  
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New York, New York 10018  
Tele: (212) 239-5500

TO: PLANNING BOARD  
Town of Rosendale  
c/o Town Hall, P.O. Box 423  
424 Main Street  
Rosendale, NY 12472  
Tele: (845) 658-8170

MS. JOAN S. JORDAN  
In her official capacity as the  
Records Access Officer for the  
Rosendale Planning Board  
Town Hall, P.O. Box 423  
424 Main Street  
Rosendale, NY 12472  
Tele: (845) 658-3159

MR. PATRICK McDONOUGH  
In his official capacity as the  
Town Supervisor and  
Records Appeal Officer  
for the Town of Rosendale  
Town Hall, P. O. Box 423  
424 Main Street  
Rosendale, NY 12472  
Tele: (845) 658-3159

SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF ULSTER

----- X  
In the Matter of the Application of

EDWARD G. WILLIAMS,

**VERIFIED PETITION**

Petitioner,

For a Judgment Pursuant to CPLR Article 78

**Index No. 08-1050**

-against-

TOWN OF ROSENDALE PLANING BOARD,  
JOAN S. JORDAN, Records Access Officer and  
PATRICK McDONOUGH, Records Appeal  
Officer, for the Rosendale Planning Board,

Respondents.

----- X

*Petitioner*, Edward G. Williams, by his attorneys, Stewart Occhipinti, LLP, 65

West 36<sup>th</sup> Street, New York, NY 10018, as and for his Verified Petition, respectfully

alleges as follows:

**NATURE OF THIS PROCEEDING**

1. This is a special proceeding commenced pursuant to Article 78 of the New York Civil Practice Laws and Rules (the "CPLR") to compel compliance by the Town of Rosendale Planning Board, by its Records Access Officer and FOIL Appeal Officer, with the statutory requirements of the State of New York's Freedom Of Information Law, Article 6 of the Public Officer Law, Section 84 *et seq.* (hereinafter, "FOIL") with respect to a certain FOIL Request dated November 7, 2007 filed by Petitioner with the Rosendale

Planning Board and directed principally to Planning Board member, Jeanne L. Walsh (hereinafter the "November 7 FOIL Request").<sup>1</sup>

**PETITIONER HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES**

2. As set forth in more detail below, an appeal<sup>2</sup> was made by Petitioner from the failure of the Records Access Officer of the Rosendale Planning Board to fully comply with the November 7 FOIL Request; and by letter dated February 14, 2008 (received on February 16, 2008), Petitioner's Appeal was denied by the FOIL Appeal Officer.<sup>3</sup>

3. In a further effort to resolve this matter without the need to seek the intervention of the courts, and to seek clarification concerning confusion<sup>4</sup> evident in the February 14 letter on part of the FOIL Appeal Officer, Petitioner faxed a letter to the FOIL Appeal Officer on February 26, 2008<sup>5</sup> seeking clarification of his February 14 letter. The FOIL Appeal Officer responded by letter dated February 26 (but only faxed to Petitioner on February 29, 2008<sup>6</sup>), correcting his error, but otherwise adhering to his prior position not to turn over any documents evidencing Ms. Walsh's meetings and communications with Canopy Development Company, as requested in the November 7 FOIL Request.

4. Accordingly, Petitioner has exhausted his administrative remedies and this matter is now ripe for judicial review in accordance with Article 78 of the CPLR.

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<sup>1</sup> See Exhibit "A" to the accompanying Declaration of Edward G. Williams sworn to on March 4, 2008, (hereinafter the "Williams Declaration.")

<sup>2</sup> See Exhibit "E" to accompanying Williams Declaration.

<sup>3</sup> See Exhibit "F" to the Williams Declaration.

<sup>4</sup> The Records Appeals Officer somehow erroneously concluded that Petitioner was seeking records pertaining to meetings and communications between Planning Board member Jeanne Walsh and an entity called "Hudson River Valley Resorts", instead of what the November 7 FOIL Request asked for, that is, documents reflecting, referring or constituting Ms. Walsh's meetings and communications with the Canopy Development Company.

<sup>5</sup> See Exhibit "G" to the Williams Declaration

<sup>6</sup> See Exhibit "H" to the Williams Declaration.

## THE PARTIES

5. Petitioner, Edward G. Williams (hereinafter “Mr. Williams” or “Petitioner”) is a citizen of the State of New Jersey and resides at 423 North Ridgewood Road, South Orange, New Jersey 07079. Petitioner is also the owner, together with his son, Gregory P. Williams, through a Limited Liability Company, of property (improved by a small cabin) situated on the north shore of Williams Lake in Rosendale, New York.

6. Respondent, Town of Rosendale Planning Board (hereinafter the “Planning Board”) has a principal place of business and address at 399 Main Street, Rosendale, New York 12472, and is an agency within the meaning of Section 86(3) of FOIL. According to information published on the Town of Rosendale web-site, the Rosendale Planning Board consists of seven members (including Jeanne L. Walsh) and is authorized and empowered to exercise and control powers over subdivisions of land for the purpose of development in the Town of Rosendale.

7. Respondent, Joan S. Jordan (“Ms. Jordan”) is the Records Access Officer for the Town of Rosendale Planning Board, and is named as a respondent in this Article 78 Proceeding in her official capacity. Ms Jordan’s office is located in the Rosendale Town Hall, 424 Main Street, Rosendale, NY 12472.

8. Respondent, Patrick McDonough (“Mr. McDonough”) is the Supervisor of the Town of Rosendale. In this capacity, Mr. McDonough also serves as the FOIL Appeal Officer for FOIL Requests directed to the Rosendale Planning Board. Mr. McDonough is named a respondent in this Article 78 Proceeding in his official capacity. Mr. McDonough’s office is also located in the Rosendale Town Hall, 424 Main Street, Rosendale, NY 12472.

## BACKGROUND

9. Although Petitioner is not required under the law to set forth reasons for making a FOIL Request or to justify the agency's need to comply therewith (the burden is on the agency to establish why it should not be compelled to comply with the Request), it will nonetheless be helpful for the Court to know the facts and circumstances leading up to Petitioner's November 7 FOIL Request directed to the Rosendale Planning Board seeking records which have been withheld by Planning Board member Jeanne L. Walsh (hereinafter, "Jeanne Walsh" or "Ms. Walsh").

10. Although it was not publicly known at the time, on June 6, 2006, several representatives of the Canopy Development Company of Northampton, Massachusetts (hereinafter "Canopy"), including its CEO, came to Rosendale and introduced themselves to Town of Rosendale officials as being interested in purchasing and developing property on which the Williams Lake Hotel is presently situated,<sup>7</sup> as well as additional property owned by other landowners around the Lake.

11. The representatives of Canopy met with a number of Town officials, including the then Town Supervisor, Mr. Robert Gallagher, and the Chair of the Planning Board, Mr. "Billy" Liggan, at the Town Hall in Rosendale, New York.

12. As might be expected, news of the meeting leaked out, and inquiries were made, including by the local press.

13. For example, in an article dated June 14, 2007, published in the Ulster County

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<sup>7</sup> Williams Lake Hotel, as a business entity, leases some 50 acres of land and the buildings thereon, which land and buildings are owned by the Williams family corporation, the Binnewater Realty Corporation. Williams Lake Hotel, the d/b/a, itself owns no real property.

Press, headed "*AOL Founder to buy Williams Lake*," Mr. Bob Gallagher, former Town Supervisor and now member of the Rosendale governing Town Board, was quoted in the Ulster County Press article as saying:

“ ‘I’m looking at it strictly as a fiscal acquisition,’ he said. ‘If this project goes through, I think it will be a huge tax benefit to the town.’ Gallagher...said the plans he’s aware of include an ‘upscale gated community’ and rehabilitated hotel, which he said would have a ‘three-to-one employee guest ratio,’ bringing a crop of service-based jobs to the community.”

14. The news article went on to state that “ Canopy’s majority stakeholder is America Online chief Steve Case, who also created the resort-development company Revolution.... He is also the primary stakeholder in Exclusive Resorts, a company that builds ‘luxury vacation residences’ with an average value of \$3 million apiece and five-star hotel amenities – in ‘dozens of the world’s most desirable destinations.’”

#### **PETITIONER’S PRIOR FOIL REQUESTS**

15. Word of the proposed sale of Williams Lake to Canopy, and claims that Canopy’s proposed development would greatly benefit the Town, circulated among the Rosendale townspeople. However, there had not been any meetings of either the Town Board or the Planning Board where the proposed development was on the agenda or discussed. Eventually, however, these statements in favor of the proposed development were traced back to the then Town Supervisor, Robert Gallagher; the Planning Board Chair “Billy” Liggan; and Jack Walsh (the spouse of Planning Board member Jeanne L. Walsh).



16. Accordingly, believing that there must have been private meetings between Town officials and the developer which resulted in members of the Town Board and Planning Board voicing their strong approval of the proposed development, Petitioner filed FOIL Requests with the Rosendale Planning Board on September 1, 2006 (and again on September 13, 2007) relative to possible meetings and communications between Canopy and the Planning Board and its members.

17. As a result of these FOIL Requests, but principally the September 1, 2006 FOIL Request, the Records Access Officer for the Planning Board turned over to Petitioner a number of responsive records maintained by individual members of the Planning Board.

18. Inasmuch as neither the Rosendale Town Board nor the Town Planning Board had yet set up an "official file" in either the Town Hall or Planning Board office to maintain copies of records detailing the Planning Board's communications and meetings with Canopy, the Records Access Officer, in response to these first two FOIL Requests, quite properly requested the Rosendale town officials to turn over documents they individually maintained responsive to the FOIL Requests.

19. Records produced, principally from the files of the Planning Board Chair, Billy Liggan, included e-mails, summaries of meetings, telephone messages, diary entries, memoranda and hand-written notes pertaining to communications and meetings between Planning Board members and Canopy.

#### **DISCLOSURES FROM THESE PRIOR FOIL REQUESTS**

20. Planning Board records turned over to Petitioner in response to his first two

FOIL Requests disclosed, for the first time, a number of non-public meetings between Planning Board members (including Ms. Walsh) and Canopy, and extensive non-public telephonic and e-mail communications between Planning Board members and Canopy, all of which took place outside the public scrutiny of Town Board and/or Planning Board meetings noticed to the public.

21. Set forth below is a summary of the meetings and salient communications, disclosed by the records maintained by Planning Board members, and turned over to Petitioner by the Records Access Officer, in response to Petitioner's September 1, 2006 and September 13, 2007 FOIL Requests.

22. **The June 6, 2006 Meeting.** According to a typewritten summary of the meeting that took place between Rosendale officials and Canopy at the Rosendale Town Hall on June 6, 2006, the Canopy Development representatives, including its CEO:

“spoke of their past individual experiences, their five years of past development projects, and cited several other facilities by *Miraval*, an upscale resort community.” According to meeting notes<sup>8</sup>, “the Canopy representatives stated that they would like to remove existing buildings, infrastructures and rebuild [sic] a high-end Spa and Retreat. They would build a complete Sanitary Septic system, due to the extreme Lake sensitivity. Also construct some very upper- end homes.”

23. Canopy thereafter requested a further meeting with Town representatives, including with the Rosendale Planning Board. Canopy specifically requested (according to notes produced in response to the September 1, 2006 FOIL Request) that the meeting with the Planning Board members be with “less than [a] Quorum.”<sup>9</sup>

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<sup>8</sup> The author of these summary meeting notes is not identified.

<sup>9</sup> This request by Canopy, for “less than a quorum meeting,” shows a deliberate intent to evade the public notice requirements of the Open Meetings Law, in contravention of the statute. *See, Tri-Village Publishers v. St. Johnsville Board of Education*, 110 AD2d 932, 933-934 (1985).

24. **The June 16, 2006 Meeting:** Acceding to Canopy's request, and in contravention of the requirements of New York's Open Meeting Law,<sup>10</sup> certain members of the Rosendale Planning Board again met with Canopy representatives to further discuss Canopy's proposed development plans for Williams Lake, and to provide feedback to Canopy with respect to their proposal.

25. Jeanne Walsh attended this meeting with Canopy, along with Planning Board Chair Billy Liggan and Planning Board member Fred Greitzer.

26. The public was not given notice of this meeting; nor was any member of the public present at this meeting.

27. On information and belief, Jeanne Walsh and the other members of the Planning Board who participated in this June 16, 2006 meeting with Canopy were presented with Canopy's plans for the construction at Williams Lake of " 'about' a 100-room Spa and 'about' 100 residential units of some 2,200 square foot each."

28. In addition to being advised of Canopy's plans with respect to its proposed project at this non-public meeting, the Planning Board members provided Canopy, at this same June 16, 2006 meeting, with their impressions and opinions respect to Canopy's plans in their capacity as Planning Board members, all of which is normally done at meetings of the Planning Board open to the public and subject to public scrutiny.

29. Mr. Liggan prepared and sent a brief e-mail summary of this meeting on June 16, 2006 to Jeanne Walsh<sup>11</sup> and others, including Planning Board member, Joseph Havranek.

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<sup>10</sup> It has been long settled that a town Planning Board is an "agency" within the meaning of the Open Meetings Law of the State of New York and that such a board must take submissions from applicants, and deliberate in public, except to the extent a topic may justifiably be considered during an executive session or in consideration of another exemption under the Open Meetings Law.

<sup>11</sup> Although requested in the November 7 FOIL Request, neither Ms. Walsh nor Mr. Havranek produced their copy of this e-mail.

30 Because of the non-public nature of this meeting, it is unknown, at this time, what representations were made by Canopy,<sup>12</sup> if any, to the Planning Board, or what specific responses or recommendations were provided by the Planning Board members to Canopy.<sup>13</sup>

31. **The aborted July 13, 2006 meeting.** Canopy then sought a further private meeting with Planning Board members, and other town officials.

32. The Chair of the Planning Board, "Billy" Liggan, proposed July 13, 2006, as the date for this meeting.

33. Records produced in response to the September 1, 2006 FOIL Request disclose that plans for this meeting with Canopy involved the full membership of the Planning Board (and certain town officials), but that no thought was given to providing notice to the public of this meeting.

34. Mr. Liggan sent an e-mail to Ms. Walsh on June 12, 2006 concerning this additional meeting with Canopy.<sup>14</sup>

35. But with more than a few people now involved, it was becoming more and more difficult for Mr. Liggan to keep things under wraps. In a June 16, 2006 e-mail to an individual Mr. Liggan had invited to the July 13, 2006 meeting with Canopy (produced by Mr. Liggan from his files in response to the September 1, 2006 FOIL Request), Mr. Liggan noted the "problem" he was having with keeping the July 13, 2006 meeting between "the applicant" and the Planning Board "*confidential.*" (Emphasis supplied)

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<sup>12</sup> It has been reported that at one of its private meetings with Town officials, Canopy said that if its plans were approved, that Canopy would buy the Town a new fire engine.

<sup>13</sup> Ms. Walsh did not produce any e-mails, meeting notes, memoranda or any other records in response to the November 7 FOIL Request with respect to this meeting.

<sup>14</sup> Ms. Walsh did not produce this e-mail in response to the November 7 FOIL Request.

36. But Mr. Liggan did his best to comply with Canopy's request to keep things a secret. For example, Mr. Liggan reported to Canopy in an e-mail dated June 30, 2006 (also produced by Mr. Liggan in response to the September 1, 2006 FOIL Request) that he had been "*deliberately vague*" when asked if the property involved Williams Lake.

37. Plans for the July 13, 2006 meeting continued. It was suggested (according to e-mails between Mr. Liggan and Canopy produced by Mr. Liggan from his files in response to the September 1, 2006 FOIL Request) that it might be "*pleasant*" to hold the Planning Board's meeting with Canopy at Williams Lake Hotel,

"in the conference room overlooking the lake - - nice view, plenty of chairs and tables, etc." It was further suggested that they could even "have a BBQ prior to sitting down for the meeting [and] that spouses and children would be welcome for a swim in the lake."

38. Mr. Liggan agreed, and then drew up a list of individuals who he had invited to the meeting at Williams Lake and sent it to Canopy. The list included, in addition to the entire Planning Board (Jeanne Walsh included), the entire Town Board and various other town officials and employees. Mr. Liggan wrote in a June 28, 2006 e-mail to Canopy that it was his intention to invite "as many '*interested parties*' [he] could think of." (Internal quotes in original)

39. Remarkably, it apparently did not ever occur to Mr. Liggan that "*interested parties*" might also include *the public*, that is, the very constituents the Rosendale Planning Board is supposed to serve, including the landowners who own property directly adjacent to the property which is being proposed to be purchased and "re-developed" by Canopy, and whose land is situated less than a half - mile from the conference room where the meeting with Canopy was scheduled to take place.

40. On July 6, 2006, just one week before the scheduled meeting, it was realized that with news of the meeting now out so extensively, the public would have to be given notice of the meeting. Canopy expressed "concern[ ] that the public will be noticed" and abruptly called off the meeting.

41. Canopy, however, continued to express its desire to Mr. Liggan to have additional meetings with Planning Board members in the future, and suggested, as a way to perhaps avoid giving notice to the public, "that there *not be a quorum*, or whatever other solution you suggest." (E-mail dated July 6, 2006, produced by Mr. Liggan in response to the September 1, 2006 FOIL Request)(Emphasis supplied)

42. **The August 9, 2006 meeting.** The next meeting between Canopy and a Planning Board member(s) occurred on August 9, 2006. No documents have been produced with respect to that meeting, except (a) a handwritten telephone message slip indicating that representatives of Canopy would like to meet with Mr. Billy Liggan "tomorrow"; (b) Mr. Liggan's weekly planner for the week of August 7 through 13, 2006, evidencing that Mr. Liggan had a meeting with Canopy on August 9, 2006; and (c) Mr. Liggan's summary account of that meeting.

43. Upon information and belief, topics discussed at that meeting were those that ordinarily would be required to be presented by "the applicant"<sup>15</sup> and discussed at a publicly-noticed meeting of the Planning Board, such as: (a) concerns about how the development could affect the local community; (b) employment opportunities both during and after the construction phase; (c) where permanent employees (upwards of 400 to 450 full-time employees) would be housed; and (d) the impact the proposed development,

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<sup>15</sup> Ref Mr. Liggan's e-mail dated June 16, 2006.

with hundreds of imported workers, would have on Rosendale schools and Rosendale town services, such as fire, emergency services, police, etc.

44. Upon information and belief, Mr. Liggan shared information about what was discussed with Canopy at this meeting with fellow Planning Board member, Jeanne Walsh.

45. **The March 29, 2007 meeting.** Planning Board members Jeanne Walsh and Billy Liggan then participated in yet an additional non-public meeting with Canopy on March 29, 2007. No notice was given to the public relative to this meeting. Neither the Petitioner nor the public has any direct knowledge of what transpired or was discussed at this meeting. Notably, for purposes of this proceeding, no e-mails, notes, agenda, memoranda or meeting summary have been produced by Ms. Walsh with respect to this meeting in response to Petitioner's November 7 FOIL Request.

46. What we do know about this meeting, however, is that Ms. Walsh attended, and was provided a set of eight (8) "maps" prepared on behalf of Canopy at the March 29, 2007 meeting with Canopy, and that Ms. Walsh kept those documents<sup>16</sup> in her personal possession for over five months until she finally decided to turn them over to the Rosendale Planning Board in September 2007 in response to Petitioner's September 13, 2007 FOIL Request.

47. **Possible Additional Meetings.** There is a reference in the records produced to date, in response to the prior FOIL Requests, to an additional meeting possibly having taken place between certain members of the Planning Board and Canopy on July 7, 2006; and, of course, there may have been additional meetings not yet disclosed. Handwritten

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<sup>16</sup> See Exhibit "B" to the accompanying Williams Declaration.

notes by Mr. Liggan pertaining to undated meetings and/or teleconferences with Canopy have also been produced by Mr. Liggan.

48. A request made to the Town to disclose the dates of all meetings had between Planning Board members and Canopy, and the identities of all attendees thereat, in accordance with the Open Meetings Law, was rebuffed by the Town.

**THE NOVEMBER 7, 2007 FOIL REQUEST AT ISSUE HEREIN**

49. A close analysis of the records maintained by Planning Board members and other town officials, and turned over to the Records Access Officer (principally by Mr. Liggan) in response to Petitioner's September 1, 2006 and September 13, 2007 FOIL Requests, discloses that *not a single e-mail, memorandum, agenda, summary of meeting or other record was ever produced by Ms. Walsh* in response to Petitioner's prior FOIL Requests, notwithstanding:

(a) Ms. Walsh's participation in a number of the non-public meetings had with Canopy, including the March 29, 2007 meeting; and

(b) the documented transmittal of multiple e-mails from the Planning Board Chair Billy Liggan and others to Ms. Walsh<sup>17</sup> (and her presumed receipt of same),

except for (1) a brief note to the Records Access Officer acknowledging that she had attended a meeting with Canopy (not otherwise identified) and (2) the eight "maps" prepared for Canopy and provided by Canopy to Ms. Walsh at the March 29, 2007 meeting, and which she maintained in her files for over five months (and, on information and belief, did not even disclose to her fellow Planning Board members) until she provided them to the Record Access Officer in September 2007.

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<sup>17</sup> Including, but not limited to, e-mails dated June 12, 2006; June 16, 2006; and September 1, 2006.



50. Accordingly, by letter dated November 7, 2007, Petitioner filed a further FOIL Request<sup>18</sup> with the Records Access Officer of the Rosendale Planning Board (the FOIL Request at issue herein), directly principally to Ms. Walsh, and requesting copies of the following documents (among others):

- 1) All records, from June 1, 2006 to the date of this Request, reflecting, referring to or constituting communications (in any form whatsoever), between Jeanne Walsh, a member of the Rosendale Planning Board and the Canopy Development Company (or any one or more of its representatives and/or employees), including but not limited to, plans, proposals, sketches, maps, photographs, correspondence, memoranda, notes, letters (or photocopies of any of the foregoing), and/or any information or communication [concerning Canopy] in electronic form capable of being retrieved in physical form (such as e-mails);
  
- 2) All records, from June 1, 2006 to the date of this Request, reflecting, referring to or constituting communications (in any form whatsoever, including e-mails) between Ms. Walsh and any other member of the Rosendale Planning Board, or between Ms. Walsh and any member of the Rosendale Town Board, concerning or relating, in any way whatsoever, to Canopy Development Company.

51. The November 7 FOIL Request also asked for copies of all communications between the Records Access Officer and Jeanne Walsh relative to Petitioner's September 1, 2006 and September 13, 2007 FOIL Requests. (Exhibit "A" to Williams Declaration)

52. The Town's (delayed) response was surprising. Apparently deciding that "enough was enough," the Records Access Officer and her designee, the Clerk of the Planning Board (Ms. Heidi Haynes) decided (or were instructed) to confine their "search" for the requested documents to the files personally maintained by the Clerk of the Planning Board and Records Access Officer in the Town's files.

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<sup>18</sup> See Exhibit "A" to the accompanying Williams Declaration.

53. As evidence of that, the Clerk of the Planning Board reported to the Record Access Officer in a letter dated November 26, 2007,<sup>19</sup> as follows:

“As part of my record keeping, I only have, in my files, the copy of the maps that Mrs. Walsh submitted [to me] as per Mr. Williams FOIL Request dated September 6 [*sic*], 2007. ... I have no additional records, as Planning Board Clerk, relating to any communications, ‘whatsoever,’ between Jeanne Walsh and the Canopy Development Company, or any representative of that company.”

54. Since, as the Records Access Officer and Clerk of the Planning Board were well aware that the sought - after records were not in the Town’s files, but rather were maintained by Ms. Walsh, it is not surprising that they came up with nothing, and so reported.

55. In a series of letters to the Records Access Officer (see Exhibit “C” to the Williams Declaration), Petitioner complained about the inadequate response, and requested that a search be made of Ms. Walsh’s files.

56. That did not happen.<sup>20</sup> (See letter from Records Access Officer dated January 18, 2008, in which she also apologized for her “tardiness” in replying) (Exhibit “D” to the Williams Declaration).

57. Accordingly, Petitioner then appealed by letter dated January 31, 2008 to the FOIL Appeal Officer (Exhibit “E” to the Williams Declaration) and cited the failure of the Records Access Officer and Clerk of the Planning Board to obtain and produce the requested documents maintained by Ms. Walsh.

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<sup>19</sup> See Exhibit “B” to the accompanying Williams Declaration.

<sup>20</sup> Although the Clerk of the Planning Board e-mailed Ms. Walsh on November 19, 2007, asking her to respond “ASAP” with the requested documents, Ms. Walsh did not respond and did not turn over any of the requested documents. (See Exhibit “B” to Williams Declaration) There is no record of any follow-up by the Town with respect to Ms. Walsh’s failure to respond or produce documents.

58. On Friday, February 14, 2008, the day the response by the FOIL Appeal Officer was due, Petitioner went to Rosendale Town Hall to pick up the FOIL Appeal Officer's response to the Appeal Letter. He was told it was not available. Then, on Saturday, February 16, 2008, Petitioner received a certified letter, dated February 14, 2008, denying Petitioner's appeal. A copy of that letter is attached as Exhibit "F" to the Williams Declaration.

59. Curiously, the FOIL Appeal Officer stated, in his February 14, 2008 letter, that he was responding to Petitioner's appeal complaining about the non-production of records relating to Jeanne Walsh and the "Hudson River Valley Resort," and that "there is no record regarding the Hudson River Valley Resort which has been *submitted to, or maintained by the Town of Rosendale or any of its departments or officers*, which have not been released to you in response to your previous FOIL Requests." (Emphasis supplied)

60. The FOIL Appeal Officer went on to state that:

"More specifically, there is no record regarding the Hudson River Valley Resort development proposal which has been *submitted to, or maintained by, the Town of Rosendale or any of its departments or officers*, that has been submitted and excepted at the request of Jean Walsh." (Emphasis supplied)

61. The FOIL Appeal Officer's response has at least two infirmities. First, and most obvious, Petitioner's November 7, 2007 FOIL Request pertained to records reflecting, constituting or referring to meetings and communication involving *Canopy Development Company*, not the Hudson River Valley Resort. Second, the FOIL Appeal Officer's response, which states that no requested document "has been submitted to, or

maintained by, *the Town of Rosedale, or any of its departments or officers*<sup>21</sup> still leaves unanswered whether Ms. Walsh herself (like “Billy” Liggan), has any of the requested documents.

62. Accordingly, Petitioner again wrote to the FOIL Appeal Officer (copy attached as Exhibit “G”), seeking clarification of his response which referred to “Hudson River Valley Resorts” (instead of Canopy Development Company), and also seeking clarification whether Planning Board member Jeanne Walsh (in addition to “the Town of Rosendale, or any of its departments or officers”) possessed any of the requested documents.”

63. Petitioner wrote to the FOIL Appeal Officer (See Exhibit “G” to the Williams Declaration) as follows:

“My FOIL Request asks for all records reflecting, referring to or constituting communications between Planning Board member Jean Walsh and *Canopy Development Company* (or any one or more of its representatives and/or employees). Your Denial Letter is written as if the FOIL Request pertains to the Planning Board member in question and the *Hudson River Valley Resort*, which was never even mentioned in the November 7, 2007 FOIL Request.

Accordingly, I respectfully request that you reconsider my Appeal in the context of my FOIL Request and the Appeal as written (i.e., the *Canopy Development Company*) and not some FOIL Request or Appeal never made.

Second, I simply do not understand what you are trying to say in the only sentence of your February 14, 2007 Denial Letter which pertains to the Planning Board member to whom the FOIL Request was directed. You wrote:

“More specifically, there is no record regarding the *Hudson River Valley Resort* development proposal which has been submitted to, or maintained by, the Town of Rosendale or any of its departments or officers, that has been submitted and excepted [sic] at the request of Jean Walsh.”

Putting aside for the moment that the November 7, 2007, FOIL Request pertains to communications and meetings between the Planning Board member Jean

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<sup>21</sup> Ms. Walsh fits none of these categories

Walsh and the *Canopy Development Company* (and not the *Hudson River Valley Resort*), I simply do not understand what you mean in this above-referenced sentence. Accordingly, I would appreciate if you could put it into plain English.

For example, it is still not clear from your Denial Letter if the Records Access Officer (or her designee, the Planning Board Clerk) ever obtained from the Planning Board member in question the requested documents that are *in the Planning Board member's possession* (as opposed to in the possession of, "or maintained by the Town of Rosendale or any of its departments or officers....") Your Denial Letter and the prior responses from the Records Access Officer and the Planning Board Clerk dated December 3 and November 26, 2007, respectively, appear to confirm that the Planning Board Clerk's search in response to the November 7, 2007 FOIL Request was confined to records in the Town files, and did not extend to any diligent search for the requested documents in the files of the Planning Board member in question. This is apparent not only from the very carefully limited manner in which the response was written, but also from the fact that no written communication was ever produced (although requested) from the Planning Board member in question to the Records Access Officer (or to her designee, the Planning Board Clerk) concerning the November 7, 2007 FOIL Request.

If it is the position of the Town (and you, as Appeals Officer) that there is no obligation on the part of the Planning Board member in question to conduct a diligent search for the documents requested in the November 7, 2007 FOIL Request and then to turn all responsive records over to the Records Access Officer (or her designee) in response to that FOIL Request (or to identify any requested documents which she may have destroyed), then please say so clearly and directly in response to my Appeal. Let's not leave this a mystery by a convoluted and ambiguous response, such as the one set forth and quoted above.

If the Planning Board member has no such requested documents, then please have her submit a sworn affidavit to that effect (and identifying responsive documents she may have destroyed) to avoid the likelihood that we will have to litigate this matter. A "certification" from the Records Access Officer that she (i.e., the Records Access Officer) does not have the requested documents in *her* Town files will not suffice."

Very truly yours,

/s/

Edward G. Williams

64. In his February 26, 2008 reply<sup>22</sup>, the FOIL Appeal Officer made light of the

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<sup>22</sup> See McDonough letter dated February 26, 2008 (but only faxed to Petitioner on February 29), Exhibit "H" to the accompanying Williams Declaration.

fact that his earlier letter spoke of the search for records reflecting, constituting or referring to Ms. Walsh's meetings and communications with Hudson River Valley Resorts, instead of *with Canopy*. In addition, he failed to address in any way Petitioner's request for clarification whether a "diligent search" had been made of the documents *maintained by Ms. Walsh* relative to her meetings and communications with Canopy, as opposed to simply having the Records Access Officer and Clerk of the Planning Board merely search the Town's files located in their respective offices, and where, of course, they were well aware that none of the requested documents would be located, since it had already been established that Ms. Walsh and Mr. Liggan had conducted their activities with Canopy "off the books."

65. The fact that the FOIL Appeals Officer replied in his February 14, 2008 letter (Exhibit "F" to the Williams Declaration) that the Town had searched for documents relative to an entity called the Hudson Valley River Resort (instead of Canopy Development), and had found none, might well reflect the nature of the "diligent search" done by the Town. But more to the point, the FOIL Appeal's Officers "excuse" for his mix-up is lame: "all parties involved in this matter are clear that the terms [Hudson Valley River Resorts and Canopy] are, and have been, used interchangeably."

66. It may well have been perfectly "clear", of course, for the "in folks" like the Town Supervisor and those on the Planning Board who had multiple meetings and communications with Canopy (or Planning Board members who were aware of the same) to know that the terms Hudson Valley River Resorts and Canopy Development, in the words of the FOIL Appeal Officer "are, and have been, used interchangeably"<sup>23</sup>; but that

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<sup>23</sup> The "Hudson River Valley Resort, LLC" and "Canopy Development Company" are two entirely different corporate entities.

certainly was/is not “clear” to Petitioner, who could only go on the minimum information that was publicly available or disclosed as a result of his FOIL Requests. The first time the name “Hudson Valley River Resorts” was publicly used was when the agenda for the December 5, 2008, Town Board meeting was posted just a few days before that meeting, which was well after Petitioner’s November 7, 2008 FOIL Request, at issue herein.

67. More disappointing, however, than the FOIL Appeal Officer’s attempt to justify his erroneous reference to Hudson Valley River Resorts (as opposed to Canopy) in his February 14, 2008 response letter, is the FOIL Appeal Officer’s response to Petitioner’s request seeking clarification asking whether Jeanne Walsh (as opposed to “the Town of Rosendale, or any of its departments or officers<sup>24</sup>”) has in her possession any of the requested documents.

68. The FOIL Appeal Officer, in his February 26, 2008 reply (Exhibit “H” to the Williams Declaration) simply refused to reply to this question and reiterated his prior answer verbatim (except to substitute the words “Canopy Development” for “Hudson Valley River Resorts” wherever the words “Hudson Valley River Resorts” appear). (*Id.*)

69. The FOIL Appeal Officer’s amended denial letter further states that the Town will not provide a certification from Ms. Walsh that she has complied with the FOIL Request. (See Exhibit “H” to the Williams Declaration for a true and complete response by the Rosendale FOIL Appeal Officer faxed to Petitioner on Feb. 29, 2008).

70. The failure and refusal of the Records Access Officer and FOIL Appeal Officer to have Planning Board member Jeanne Walsh turn over documents responsive to the Petitioner’s November 7 FOIL Request, which include documents that are uncontrovertibly known to exist (or alternatively, to provide a certification that the

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<sup>24</sup> As a Planning Board member, Ms. Walsh is does not fall within any of these three categories.

documents have been destroyed and detailing the circumstances of their destruction) makes this Article 78 Petition necessary.

*WHEREFORE*, Petitioner respectfully requests that this Court grant judgment in favor of Petitioner, and against Respondents, as follows:

a. directing Respondents to provide Petitioner with copies of all records specified in Petitioner's FOIL Request dated November 7, 2007 and filed with the Records Access Officer of the Planning Board of the Town of Rosendale (copy attached as Exhibit "A" to the accompanying Williams Declaration);

b. determining, after notice and an opportunity to be heard, whether any member of the Rosendale Planning Board, employee of the Town of Rosendale, and/or Planning Board member, with the intent to prevent the public inspection of a record, has willfully concealed or destroyed any record to be produced in response to the November 7, 2008 FOIL Request;


c. awarding Petitioner his reasonable attorney's fees and other litigation costs reasonably incurred by Petitioner in this cause, pursuant to Section 89(c) of the Freedom of Information Law on the grounds that the records are of clearly significant interest to the general public and the Planning Board lacked a reasonable basis for withholding the records ; and further,

d. awarding Petitioner such further and different relief as to this Court seems just and proper.

Dated: New York, New York  
March 4, 2008

Respectfully submitted,

**STEWART OCCHIPINTI, LLP**

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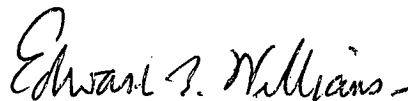


## VERIFICATION

*EDWARD G. WILLIAMS*, Petitioner herein, hereby certifies pursuant to Title 28 United States Code, Section 1746, that I have read the foregoing Petition and know the contents thereof; the same is true to my knowledge, except as to matters alleged upon information and belief, and as to those matters, I believe them to be true. My belief, as to matters therein not stated upon knowledge, is based on the following: a close analysis of the records produced by the Records Access Officer for the Town of Rosendale in response to my FOIL Requests; additional relevant documents uncovered by my own independent investigation of the matters stated therein; admissions by Town of Rosendale officials, employees and Board members; and conversations with Rosendale residents and other individuals who stated to me that they have personal knowledge of the matters asserted therein.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York, on this 4th day of March, 2008.



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Edward G. Williams