SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

THE FRANK J. LUDOVICO SCULPTURE TRAIL CORP.,

Petitioner,

v.

TOWN OF SENECA FALLS,

Respondent.

NOTICE OF PETITION

Index No. OP 18 1073

PLEASE TAKE NOTICE that, upon the Petition of The Frank J. Ludovico Sculpture Trail Corp., by its Vice President, Elizabeth C. Rosetti, verified on the 11th day of June, 2018, a copy of which is annexed hereto, an application will be made at a Special Term of the Supreme Court of the State of New York, Appellate Division, Fourth Department, to be held at the Courthouse, Room 200, 50 East Avenue, in Rochester, New York, on the 30th day of July, 2018, at 10:00 o'clock in the fore noon of that day, or as soon thereafter as counsel can be heard, for a review under New York's Eminent Domaine Procedure Law §207, more fully set forth and described in said Verified Petition, and for such other and further relief as may be just and proper.

Dated: June 12, 2018

CHALIFOUX LAW, PC
Attorneys for Petitioner
The Frank J. Ludovico Sculpture Trail Corp.

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TO:

TOWN OF SENECA FALLS
130 Ovid Street
Seneca Falls, New York
13148

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

THE FRANK J. LUDOVICO SCULPTURE TRAIL CORP.,

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VERIFIED PETITION

v.

Index No. OP 181073

TOWN OF SENECA FALLS,

Respondent.

The Petition of The Frank J. Ludovico Sculpture Trail Corp. ("Ludovico Sculpture Trail" or "Petitioner") respectfully alleges and shows:

I.

PRELIMINARY STATEMENT

1. The Town of Seneca Falls ("Town") has decided to proceed to acquire a Permanent Easement ("Easement") by Eminent Domain from the Ludovico Sculpture Trail to construct the Kingdom Road Pump Station/Force Main Sewer Project ("Sewer Project"). The proposed Easement runs along the New York State Canal in the historic center of Seneca Falls and is stated to be approximately 20 feet in width and (although the length of the Easement is not stated in the Resolutions adopted) appears to be approximately 4,600 feet in length.

2. Although not addressed in the Board's Determination and Findings, the primary purpose of the Sewer Project appears to be to transport leachate from the Seneca Meadows Landfill ("Landfill") in Waterloo, New York and sewage from the del Lago Casino ("Casino") in Tyre, New York into the Town of Seneca Falls. In a Town already

burdened with constant odor emanating from the Landfill, there has been significant opposition to the Sewer Project, which would greatly increase the amount of leachate and waste coming into the Town.

3. Upon information and belief, the Town Board members of this small town appear to be under continued pressure from big corporations, outside attorneys and the Town's engineers (that also are deeply connected with the Landfill) to push projects such as this one forward at the expense of fundamental municipal procedure – procedure that contemplates, at a minimum, that Town Board members will be familiar with Resolutions on which they vote and that such Resolutions will represent decisions independently reached by that Board.

4. The Resolutions relating to the Determination and Findings and the State Environmental Quality Review Act ("SEQR") adopted on May 1, 2018 (the first meeting following the closure of the March 22, 2018 Public Hearing Record) could not be further from independent determinations of the Town Board, with the Board members asked to rubber-stamp unseen Resolutions that had been pre-prepared by the Town's Special Counsel.

5. Significantly, the Resolutions were belatedly added to the agenda, members of the Board did not have copies of the Resolutions (either in advance of the meeting or at the meeting when they voted on them), the Board had not been provided with over 100 pages of post-Public Hearing submissions relating to the Resolutions on which it was voting, and the Board members did not discuss any of the factors or conclusions set forth in the Resolutions.

6. Following a lengthy Public Hearing, with numerous speakers raising legal and environmental concerns, as well as numerous opinions as to which of two proposed routes would be superior, the Board blindly voted to adopt two of the Special Counsel's pre-prepared Resolutions, a SEQR Resolution "reaffirming" the Board's 2-year old Negative Declaration and a Determination and Findings that selected the Ludovico Sculpture Trail Route. The Board proceeded to decide that there were no significant environmental impacts related to the construction of the controversial sewer line through the Ludovico Sculpture Trail's property and that the Trail route would be superior, without even one word of discussion or consideration as to their decisions.

7. Although there is certainly an element of attorney and engineer involvement in all municipal transactions, the conduct at the May 1, 2018 Town Board meeting was a mockery of municipal procedure. The conduct surrounding the passing of the Resolutions is nothing short of egregious and constitutes a complete disregard for municipal and environmental law, which led to Petitioner's decision to commence this action.

8. Petitioner acknowledges Eminent Domain Procedure Law ("EDPL") §207 challenges are an uphill battle, but the instant facts present a remarkably unique case. The egregious conduct outlined below is so arbitrary and so unreasonable that the Town's decision to proceed to acquire Petitioner's property without any discussion or consideration amounted to an arbitrary and unconstitutional action that has deprived Petitioner of its due process.

9. This Court does not need to rely on Town Board minutes which could not aptly demonstrate the atrocity that occurred on the night of May 1, 2018. The Town

Board's rubber-stamping actions were captured on videotape.[1] A flash drive containing a copy of the recording of the May 1, 2018 Town Board meeting and a transcription of the relevant section of that recording (commencing at 19:43 through 55:25) are attached hereto as Exhibit "A."

10. Notably, this story unfolds not long after the Ontario County Supreme Court has struck down another of the Town's Local Laws to extend the life of the Landfill because the Town again failed to take a "hard look" at environmental issues,[2] and at the same time the New York State Comptroller's Office and the Attorney General's Office are proceeding with ongoing investigations regarding the Town's methods of governance and financial dealings, investigations that have been ongoing for over seven months, with representatives from the State Comptroller's Office on site at the Seneca Falls Town Hall since November of 2017.

II.

FACTS

11. Petitioner, The Frank J. Ludovico Sculpture Trail Corp., is a not-for profit corporation organized under the Not-For-Profit Corporation Laws of the State of New York and is the owner of a certain walking Trail located on the south side and bordering the New York State Canal in the Town of Seneca Falls, State of New York, having a tax identification number of SBL 19-1-01 ("Property" or "Trail").

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[1] A videotape of the May 1, 2018 proceeding is also available online at fingerlakestv.org/schedule (search Seneca Falls Town Board) at 19:43–55:25.

[2] A copy of Ontario County Supreme Court Justice Kocher's Decision in *Waterloo Contractors Inc. v. Town of Seneca Falls Town Board et al.*, holding the Town of Seneca Falls failed to take the requisite "hard look" at environmental issues with respect to Local Law No. 2, a law extending the operation of the Seneca Mills Landfill is attached as Exhibit "B."

12. The Trail is adjacent to two historic districts in the center of historic Seneca Falls. It is a popular tourist destination and an integral tribute to the women's rights movement.

13. The first half of the Trail (approximately 2,800 feet in length) is home to 15 unique sculptures, many of prominent women or crafted by female sculptors, and the second half consists of a wooded footpath (approximately 4 feet wide) through approximately 1,800 feet of pristine woods. Notably, the owner of the Trail does not seek to have the Trail widened or improved with a surface to accommodate bicycles, as the Town proposes, as this would destroy the Trail's natural serene setting.

14. Respondent, the small Town of Seneca Falls, is a body corporate and politic organized and existing pursuant to the General Municipal Law of the State of New York.

15. The Sewer Project route alignment alternatives that were proposed by the Town can be generally described as follows: (1) running from Kingdom Road along the north side of New River Road to the Frank J. Ludovico Sculpture Trail (SBL# 19-1-01) on the south side of the Seneca and Cayuga Canal to the Ovid Street Bridge ("Option A" or "Trail Route"); and (2) running along the north side of New River Road and Bayard Street between Kingdom Road and the Ovid Street Bridge ("Option B" or "Bayard Street Route") (collectively, the "Project Routes").

16. On February 2, 2016, the Town completed a general SEQR review ("Original SEQR") of this Type I action and adopted a Negative Declaration, without discussing any of the seven "Moderate to Large" environmental impacts identified in its own Full Environmental Assessment Form ("FEAF"). Presumably, the SEQR review included both Project Routes.

17. The Town conducted a Public Hearing on March 22, 2018, pursuant to EDPL Article 2, for the purpose of hearing all persons in favor of or opposed to the proposed acquisition of the Easement and to select one of the two Project Routes, and the hearing was left open for additional written submissions.

18. Apparently and certainly surprisingly, no Map, Plan and Report or construction reports were prepared for the Sewer Project and no details regarding the specifications of the Sewer Project were provided to the Town or the agencies involved in the SEQR process.[3] Specifically, prior to the SEQR review and prior to the adoption of the Determination and Findings, no details were provided to the Town, reviewing SEQR agencies or Petitioner regarding the width of the proposed Easement, the location of the proposed Easement or the length of the Easement and the amount of the route that is proposed to be horizontally directionally drilled.

19. These basic details were necessary for the Board to make an informed decision as to the route selection and to complete its SEQR review.

20. At the May 1, 2018 Town Board meeting following the Public Hearing, the Town unsuccessfully attempted to correct deficiencies in its compliance with SEQR and proceeded to adopt a SEQR Resolution, attempting to "reaffirm" the original deficient February 2, 2016 Negative Declaration, as well as a Resolution Approving and Adopting the Town's Determination and Findings pursuant to New York's EDPL, where it selected the Trail Route over the Bayard Street Route. Copies of the February 2, 2016 SEQR

[3] No such reports were provided in response to Petitioner's Freedom of Information Law request dated January 18, 2018.

Resolution, the May 1, 2018 affirming SEQR Resolution and the Town's Determination and Findings are attached hereto as Exhibits "C," "D" and "E."

21. Subsequently, Respondent published a Synopsis of its Determination and Findings in this matter in the Official Town newspaper, *Reveille Between the Lakes* with the last day of publication being May 17, 2018.

22. Petitioner, an aggrieved party, timely commenced this proceeding and has served a Demand on the Town to file with this Court a copy of the written transcript of the Record of the proceeding before it. A copy of the Demand and the Affidavit of Service by Mail of Sheila M. Chalifoux, Esq., dated June 12, 2018 is attached hereto as Exhibit "F."

III.

CAUSES OF ACTION

A. The Determination And Findings Was Adopted Arbitrarily, Depriving Petitioner Of Due Process Of Law, In Violation Of The Federal And New York State Constitutions.

23. Petitioner repeats and realleges each and every allegation contained in Paragraphs "1" through "22" of this Petition, as though fully set forth herein.

24. The Fifth Amendment to the U. S. Constitution provides that "[n]o person ... shall ... be deprived of property, without due process of law." This mandate applies to state governments through the Fourteenth Amendment which provides, in pertinent part: "... nor shall any state deprive any person of life, liberty, or property without due process of law." *See,* U.S. Constitution, Amendments V and XIV.

25. In addition, Article IX of New York State's Constitution grants local governments the power to take private property by eminent domain, but the due process clause in Article I qualifies this right, providing that no person "shall be deprived of life,

liberty or property without due process of law." *See*, New York State Constitution, Articles I and IX.

26. Over time, the Federal safeguards (applied to local governments through "Dillon's Rule," which provides that local governments have only so much power as the State may grant) and New York's Constitution have worked to protect individuals from all arbitrary governmental action, no matter what level of government is acting.

27. The Town Board's actions, in blindly adopting pre-prepared Resolutions without seeing them, without hearing them, without having a copy (before the meeting or in front of them when they voted), without being provided the complete Record and without engaging in any discussion whatsoever regarding the Resolutions resulted in an arbitrary action rising to the level of bad faith, violated Petitioner's right to due process and resulted in an unconstitutional taking.

28. Absolutely no consideration was given to the decision to select the Trail Route and the Record does not support the selection of the Trail route.

29. The Town Board's failure to engage in *one word* of discussion or consideration relating to the route, with no member voicing any preference for the Trail Route before proceeding to rubber stamp the pre-prepared Resolution, constituted an arbitrary determination made in bad faith.

30. The Due Process clauses of the State and Federal constitutions entitles to Petitioner to obtain, at a minimum, a consideration of the factors upon which its Determination is based. The actions of the Town Board were arbitrary and unsupported by the Record.

31. As Town Board Member Avery frankly stated, after the attorney had read some parts of what was obviously a long Resolution:

> This is a pretty comprehensive document that you have presented and again, we don't have copies of it, we have one copy that Greg has. So, and then finally, we as a Board, we've not mentioned the words Ludovico Sculpture Trail or Eminent Domain since that Public Hearing. We've not talked about it, we've not mentioned it so, I don't see how we can move forward with something this important until we've had a chance to talk, we've had a chance to see that document, we've had a chance to see those written responses.

See, Flash drive containing video of May 1, 2018 Public Hearing (commencing at 19:43) and transcription of that May 1, 2018 meeting, at page 11, line 1, attached hereto as Exhibit "A."

32. The Town Board proceeded to adopt a lengthy Resolution that it had not seen – in advance of the meeting or at the meeting – with absolutely no discussion. None of the factors read from the prepared Resolution by the attorney came as a result of discussion from the Town Board or were discussed or considered by the Town Board.

33. Instead, the Special Counsel *told the Town Board* the reasons that the Trail Route was chosen and the reasons "why the alternative route ('Bayard Street Route') was also considered and it was rejected," apparently by the attorneys and engineers, because no discussion whatsoever was had by the Town Board as to which Route was superior. *See* Exhibit "A," Transcription, Page 7.

34. The Town Board kept the March 22, 2018 Public Hearing Record open until April 5, 2018, and over 100 additional pages of post-hearing material was submitted and accepted by the Town and included in the Public Hearing Record. Although this information was apparently placed on file with the Clerk's Office, it was not provided to the Town Board members prior to the vote.

35. These submissions included, among other things, a slide presentation that the Town would not permit a Trail representative to present at the Public Hearing and a letter from one of the Town's most prominent citizens, Judith Pipher, an astro-physicist who was inducted into the National Women's Hall of Fame in 2007 and who is now a Professor Emeritus at the University of Rochester.

36. Remarkably, when a Town Board member raised the concern that the Town Board was not provided with this information, Special Counsel argued that the information was on file with the Town Clerk and indicated that "there aren't any new materials that were submitted subsequent to the hearing itself" and then, backpedaling, acknowledged there was new material and said "the additional comments that came in were several but were along the lines of the same types of objections that were made at that meeting." *See,* video and transcript of May 1, 2018 meeting attached hereto as Exhibits "A." In fact, over a hundred pages of material was submitted after the Hearing and this information was not provided to the Town Board members.

37. Special Counsel continued, seemingly encouraging the Board to dismiss these submissions, by saying "frankly and respectfully, having sat through that hearing, there isn't anything new that you would have gleaned with respect to those comments other than to get them in perhaps more detail or to be able to review them a little bit more at your leisure in writing." *Id.*

38. Recognizing his client had not been provided with the entire Record or a copy of the Resolution on which it was about to vote, Special Counsel had a choice: permit the Board to proceed to vote or put off the vote until the next meeting when the Board members had reviewed the complete Record and could undertake a substantive review of

the factors brought up by those submitting information to the Town. Astonishingly, he permitted, if not encouraged, them to vote, appearing to convince them that the 100+ pages of new material had no value.

39. One Town Board member, recognizing his obligations under the law, openly challenged the suggestion that a Town Board could proceed forward without reviewing the entire record, stating "...[O]ut of an obligation to the people who submitted those, we have an obligation to read them. We can't just say. . . I can't be a part of saying 'Well, they just said the same thing everyone else said that night so we do not to read them.'"

40. The Town Board's vote to adopt a Declaration and Findings and SEQR Resolution without a full Record or any discussion whatsoever was, at a minimum, arbitrary and deprived Petitioner of the review to which it was entitled by the Due Process clauses of the State and Federal Constitutions.

41. Additional due process violations included a failure to provide Petitioner a map or description of the property to be acquired, pursuant to EDPL 203. Although the width of the easement was vaguely included in the Determination and Findings as "approximately 20 feet in width with approximately 10 feet on either side of the actual installed force main pipeline," no such width had been identified prior to the Public Hearing or prior to the SEQR review. The length of the Easement was also not identified before or in the Determination and Findings.

42. The vagueness with respect to the location and dimensions of the Easement is especially significant with respect to the SEQR review, as the archeological area studied would have changed based on the width of the Easement. *See*, Section C, below.

43. The language identifying the width of the Easement is vague and neither the length of the Easement nor the exact location of the Easement is identified, resulting in a Determination and Findings that is unconstitutionally vague.

B. The Record Does Not Contain Evidence To Support The Town Board's Arbitrary Decision To Select The Trail Route.

44. Petitioner repeats and realleges each and every allegation contained in Paragraphs "1" through "43" of this Petition, as though fully set forth herein

45. The basis for the Town Board's conclusion for choosing the Trail Route in its Determination and Findings appears to be six-fold:

- The Trail Route is materially less expensive; and
- The sewer line can be installed through horizontal directional drilling throughout "most" of the Trail Route; and
- The Trail Route impacts fewer property owners (less easements); and
- The Trail Route results in significantly fewer tree removals; and
- The Trial Route requires less time to complete; and
- The Trail Route is less disruptive to the community.

46. The only document in the Record to support these conclusions is the Power Point report of the Town's engineering firm Barton & Loguidice dated March 22, 2018. Attorney for Petitioner submitted a Freedom of Information Law ("FOIL") request seeking all engineering reports to the Town and was provided only general Power Point reports from Barton & Loguidice. A copy of the March 22, 2018 Power Point is included in the Public Hearing Record. Apparently, no other engineering reports were provided to the Town (as they were not provided in response to Petitioner's FOIL request).

47. Although the Town undoubtedly has broad discretion in selecting a Project's route, a Board cannot make an arbitrary Determination to select one route over another without even considering or discussing the basis for such a determination.

48. Significantly, the Determination and Findings did not come from the Town Board. It was a document drafted by attorneys, unseen by the Town Board, and did not come about as a result of the Town Board's discussion or consideration. The Board's failure to give any consideration at all to this Determination and Findings and SEQR review was wholly arbitrary.

49. Moreover, the items identified as a basis for the Board's pre-prepared Resolution are not supported by the Record, leading to an arbitrary determination that constituted violations of Petitioner's Due Process.

- **There Is No Support For The Engineer's Claim That The Trail Route Is Materially Less Expensive.**

50. The Town Board concluded that the Trail Route option was superior as it was "materially less expensive," presumably adopting the engineer's "Construction Cost Comparison" in its March 22, 2018 Power Point, which stated that the construction cost would be $1,743,000 for the Trail Route and $2,451,000 for the Bayard Street Route. In fact, it was impossible for the Board to conclude which Route was economically superior in that the Report contained no details as to how this number was computed.

51. Petitioner's attorney aggressively attempted to obtain some support for the engineer's cost calculations prior to the Public Hearing. Following the receipt of the Town's response to Petitioner's attorney's FOIL request, and realizing that no cost calculations had been provided, Petitioner's attorney reached out to Special Counsel for the Town by emails dated March 11, 2018, March 13, 2018, and March 16, 2018, requesting cost reports that must have been provided to the Town. Copies of these requests are contained in the Public Hearing Record, Exhibit 4, March 22, 2018 Submission of Sheila M. Chalifoux, Esq., (Packets A-H), Packet I. Special Counsel provided no information as to how the costs were

calculated and stated that the engineers would provide project cost information at the March 22, 2018 Public Hearing. In fact, costs presented at the Public Hearing were not detailed and showed no breakdown of the cost calculations making it impossible to compare the costs of the two Route Options.

52. Most significant is the absence of the costs that will be associated with an unidentified amount of horizontal directional drilling. If "most" of the Trail Route will be directionally drilled, the expense would far exceed the cost of trenching. One of the most basic construction principles is that horizontal directional drilling will double or triple the cost of trench digging but, there is no way of knowing if these costs are reflected in the Town engineer's cost estimate. *See,* Affidavit of Thomas Peaslee, P.E., ¶8, attached hereto as Exhibit "G." If the Town intends to horizontally directionally drill "most" of the Trail Route that spans almost a mile, it is nearly impossible that this could also be the least expensive Route.

53. The Record contains no details of the cost comparison of the two options, only the summary conclusion that the Bayard Street Route would cost $708,000 more, and the Record contains no support for this conclusion. The Town Board did not discuss or consider the costs of either of these Routes.

- **There Is No Support In The Record That The Bayard Street Route Cannot Also Be Installed Using Horizontal Directional Drilling.**

54. The claim that the Trail Route is superior because it can be installed through horizontal directional drilling throughout "most" of the route has no support in the Record. Any route can be horizontally directionally drilled and there is no evidence in the Record that the Bayard Street Route could not also be horizontally directionally drilled. Again, the

Town Board had absolutely no discussion of the Route options and no discussion relating to cost of horizontal drilling.

- **There Is No Support In The Record That The Trail Route Impacts Fewer Property Owners (Less Easements).**

55. The Determination and Findings states that the Trail Route requires "substantially fewer easements." However, nothing in the Record indicates whether the Bayard Street Route could be completed within the Town's existing Right-Of-Way ("ROW"), which is unusually large.

56. Typical Village streets in this area have 50-foot-wide ROWs. However, West Bayard Street's ROW varies from 66 feet to 82.5 feet. *See,* Peaslee Affidavit dated June 8, 2018, ¶10, attached hereto as Exhibit "G."

57. Without this information, there is not a basis for the conclusion that less easements will be required. Again, no discussion regarding the impact on property owners was had.

- **The Trail Route Results in Significantly Fewer Tree Removals.**

58. A large part of the Sewer Project would presumably be placed through the wooded section of the Trail.

59. Until the Determination and Findings was adopted, the width of the Proposed Permanent Easement was not identified.

60. The Town's engineer's assertion that only "0-5" trees will be removed on the Trial Route, which is presumed to require a 20-foot swath through 1,800 feet of woods, is disingenuous, at best. The engineer retained by the Town estimates at least 45 trees would need to be removed if the Trail Route is selected. *See,* Affidavit of Thomas Peaslee, P.E., ¶7, attached hereto as Exhibit "G."

61. The Town engineer argues that directional drilling would limit the number of trees that would be required to be taken down on the Trial Route but fails to apply that theory to the Bayard Street trees. If the same directional drilling analysis were considered for both Routes, the Trail Route would not have been deemed to have significantly fewer tree removals. Notably, the Town Board did not consider or discuss the number of trees that would be impacted or the impact of horizontal drilling or cost prior to voting on the Resolution selecting the Trial Route.

- **The Trail Route Requires Less Time To Complete.**

62. The time frame comparison appears, at best, to be a guess. The engineers reported that it would take "4 weeks" for the Trail Route option and "6-10 weeks" for the Bayard Street Route option. There is no support in the Record as to the basis of these calculations and a two-week differential in a vague estimate is hardly a basis for making a determination as to the superiority of this route. Again, the Board did not give this factor any consideration.

- **The Trail Route Is Less Disruptive To The Community.**

63. Sewer and water projects are customarily undertaken on Village streets. To summarily conclude that the Trail Route is superior to the Bayard Street Route because it would be temporarily disruptive, without any consideration of the significant environmental impacts that may outweigh the disruption, was nothing less than arbitrary.

C. The Town Board Twice Failed to Take a Hard Look at Environmental Issues.

The February 2, 2016 Negative Declaration Shall be Annulled.

64. Petitioner repeats and realleges each and every allegation contained in Paragraphs "1" through "63" of this Petition, as though fully set forth herein

65. This Sewer Project is admittedly a Type I Action under SEQR, which is presumed to require an Environmental Impact Study ("EIS"). The Board was required to "prepare, or cause to be prepared an EIS" on any action it proposes or approves "which *may have a* significant effect on the environment." New York Environmental Conservation Law §8-0109(2) (emphasis added).

66. Despite the fact that there were numerous "Moderate to Large" impacts identified in the EAF that, at a minimum, *may* have an impact on the environment, an EIS was never even considered by the Board as it rushed to rubber-stamp the engineer's Part III and issue its Original Negative Declaration on February 2, 2016, so the Town could complete a grant application.[4] DVDs containing a copy of the videotape illustrating the absence of discussion regarding environmental concerns are attached hereto as Exhibit "H," with the SEQR discussion starting at 1:24 and ending 1:45.

67. The environmental issues identified in Part I and Part II of the Full Environmental Assessment Form are numerous as the Trail is in the center of historic Seneca Falls, contiguous to sites listed on the State or National Register of Historic Places, including the Seneca Falls Village Historic District and the Elizabeth Cady Stanton House, is within an archaeologically sensitive area, contains protected wetlands, is adjacent to four properties with contamination history, will involve construction on land adjacent to the New York State Barge Canal, will involve construction where the water table is less than 3 feet,

[4] The videotape of the February 2, 2016 Town Board meeting indicates that the Town Attorney did not originally intend to conduct a SEQR review on February 2, 2016 but proceeded to do so based on the upcoming grant deadline.

and will involve construction on land that contains an Inland Salt Marsh and habitats related to the Northern Long-Eared Bat, Imperial Moth and the Northern Bog Violet.[5]

68. Despite the fact that it identified at least seven "Moderate to Large" impacts in the Full Environmental Assessment Form, the Board remarkably proceeded to pass a Negative Declaration resolving that "[n]o significant adverse environmental impacts are noted in the FEAF [Full Environmental Assessment Form]."

69. Although the Town's former Town Attorney suggested that the Town Board discuss each of the seven "Moderate to Large" impacts, no discussion regarding environmental impacts ever occurred, except with respect to the Indiana Long-Eared Bat. *See*, video of the February 2, 2016 Town Board Meeting attached hereto as Exhibit "H."

70. The Town Board's failure to consider *any* of the seven "Moderate to Large" impacts identified in the EAF was wholly insufficient. Not only did the Board fail to take a "hard look" at this Type I action, it took no look at all and, accordingly, the Original Negative Declaration should be annulled.

71. In considering a Type I action, the Board had an obligation to discuss each of the impacts identified to ascertain whether any of them *may* have a significant impact on the environment. If so, the Board was obligated to proceed to direct the preparation of an EIS. No discussion of impacts occurred (other than a brief compliment to the engineer for addressing the issue of bats) and no EIS was even considered prior to adopting the Original Negative Declaration.

[5] The Northern Bog Violet was not identified in Part I or Part II of the Environmental Assessment Form and only mentioned in Part III.

- **Impacts On Land.**

72. There was no discussion of limiting and protecting the impacts on the land. Part III of the EAF represents that "only a temporary impact will occur. Existing vegetative cover types, grades and land uses (i.e. roads, grass, sidewalks, etc.) will be restored." In fact, no consideration was given to the fact that, for the Trail Route option, a 20-foot Easement would require the destruction of the tranquil wooded section of the Trail, which covers over 1,800 feet.

73. One reason that no consideration was given to this factor may have been that the width of the Easement was only revealed when the Town Board adopted its Determination and Findings on May 1, 2018, more than two years after the SEQR review was complete. Nor were construction reports or plans ever presented to the Town Board. As the Town Board never discussed these issues, it never obtained these details.

74. The Town Board, in approving Part III of the EAF, did not even inquire as to the size or potential impacts of the Easement. It improperly delegated the decisions as to location and the amount of directional drilling to the discretion of the engineers and contractors, both of which have every incentive, namely economic and ease of work, to avoid directional drilling and no incentive to protect trees, flora, fauna, animals or state-endangered plants and their habitats in the narrow, wooded walking path.

75. Nor was consideration given to the potential impacts on the cultural landscape. Installing a sewer line on the Trail Route would impact the unusual landscape that comprises the Trail's first 2,800-foot section, where 15 sculptures are displayed. They represent not only notable women and women's history, but also use of the land by Cayuga Indians for habitat and livelihood, by the railroad in the 19th century to serve industry, and

by tourists and citizens of the 21st century for relaxation, and the enjoyment of natural and created beauty. This multi-use over time, illustrated by artisans in six trail-side murals, makes the Trail a "cultural landscape" to be preserved and treasured.

76. At least one of the sculptures on the Trail section falls within the 20-foot Easement and presumably would be moved by sewer pipe layers, but no discussion of this occurred.

77. There was also no consideration or discussion of the fact that the construction of the force main would pass through the Sucker Brook, Sampson Creek and Van Cleef Lake wetlands and areas where the water table was less than three feet, other than the Part III comments that vaguely promise directional drilling would be "utilized *when possible*" and that the "waterbodies wetlands and streams will be avoided by re-routing sanitary sewer main locations *to the extent practicable.* If impacts cannot be avoided by re-routing the sanitary sewer piping, the sewer piping *can be* horizontally directionally drilled to avoid impacts."

78. These are issues that should have been discussed at length and the subject of a detailed EIS to determine whether the digging should occur and the impact of such digging. An EIS would have detailed the method that would be employed to limit the environmental impact of open trenching and determined the exact amount and location of directional drilling that would be undertaken.

79. Instead, the Board delegated its duty to protect the wetlands, accepting the engineer's vague conclusions where it proposed to utilize directional drilling "when possible" and "to the extent practicable."

80. An EIS was necessary to determine the extent of the environmental impact on the land. Even a brief discussion by the Town Board would certainly have concluded that there *may* be significant environmental impacts that would necessitate the preparation of an Environmental Impact Statement.

- **Northern Bog Violet, Imperial Moth and Inland Salt Marsh.**

81. The Town Board had no discussion whatsoever of the impact on the plants and animals. No discussion or studies were directed to review the construction's impact on the Northern Bog Violet, the Imperial Moth or the Inland Salt Marsh and how the impacts on these species could be minimized.

82. Part III of the EAF only mentions these endangered plants and animals, stating generally that the contractor will reduce or limit the impact by "limiting clearing" and "following all Federal and State guidelines."

83. The DEC's recommendations regarding these plants and animals were wholly ignored. The DEC identified "[s]tate-listed endangered, threatened or rare animal and plant species, significant natural communities and other significant habitats" in the vicinity of the site and recommended in its November, 2015 letter that the Town have "a professional (biologist, botanist or landscape architect)" familiar with identification of these species, undertake a survey of the literature and determine if the proposed project contains habitats which would favor these species." If favorable habitats existed, the DEC further recommended that "a field survey would be needed to determine if the species is actually present." *See,* Letter from Robert B. Call, DEC Division of Environmental Permits, to Supervisor Donald Earl dated November 15, 2015, Public Hearing Record, Exhibit 4, March 22, 2018 Submission of Sheila M. Chalifoux, Esq., (Packets A-H), Packet B. "If populations

of the endangered or threatened species are found in the project area, project modifications should be considered to avoid or minimize impacts."

84. The Town never discussed the issue of rare plants and animals, specifically the Northern Bog Violet that is a New York State-listed endangered species, wholly ignored the DEC's recommendation to further explore the existence of their habitats and failed to complete the necessary EIS to determine the impacts.

- **Sensitive Archeological Site.**

85. Significantly, there was also no discussion of the Trail's designation as a sensitive archaeological site by the New York State Historic Preservation Office's ("SHPO") archaeological site inventory and the impact of construction through this site. In fact, instead of taking a hard look at the environmental concerns raised by the fact that the proposed Trail Route is located within an archeological district, the Town instead directed the archaeologist to complete a Phase IB on the Bayard Street Route option and expressly directed the archaeologist *not* do complete a Phase IB on the Trail Route, where there was a greater chance of discovering archaeological resources. *See,* Report of Archeological Consulting Experts, LLC, dated February 17, 2018, page 4, Public Hearing Record, Exhibit 4, March 22, 2018 Submission of Sheila M. Chalifoux, Esq., (Packets A-H), Packet A ("Phase IB investigations were restricted to the Kingdom Road Force Main alignment Option B [Bayard Street Option] at the request of the client.")

86. Notably, prior to adopting the "affirming" SEQR Resolution on May 1, 2018, Special Counsel also repeatedly advised the Town Board that both a Phase IA and a Phase IB was completed by Archeological Consulting Engineers LLC, without stating that the

Town had expressly restricted the consultant not to undertake a Phase IB study for the Trail Route.

87. The directive from SHPO recommended that a Phase IB should have been prepared "for all portions of the project route that do not fall between the edge of the pavement and the far edge of an existing excavated ditch or existing utility lines," and that the archaeologist be supplied with "a set of accurate project construction plans before proceeding with Phase IB archaeological testing."

88. The Trail Route does not fall within the limiting parameters set forth by SHPO and no construction plans have been created to date, so this directive was also ignored.

89. Nor did the Town Board discuss any of the archeological impacts – it did not dictate the location or width of the easement area to protect the historically and culturally significant statues or the archaeological resources.

90. Maybe most significantly, on February 2, 2016, the Town Board proceeded to pass the initial Negative Declaration without even waiting for the results of the archaeological study that had been required by SHPO and commissioned by the Town's engineers to be completed for SHPO's approval. The Report of Archaeological Consulting Engineers, LLC is dated February 17, 2016. Had the Town Board discussed the issue of archaeological concerns identified in Parts I and II of the EAF on February 2nd, this may have come up, but the Board engaged in no such discussion.

91. Prior to adopting the reaffirming SEQR Resolution on May 1, 2018, Special Counsel advised his client that there had been "nothing improper with respect" to adopting a SEQR Resolution without having the results of the archeological report and, presumably,

never considering the archeological impacts. In fact, this premature adoption and subsequent failure to discuss any of the conclusions in the report further illustrates the Town's failure to take the requisite "hard look."

- **DEC Recommendation Ignored.**

92. So, too, did the Town Board ignore the recommendations of New York State's Department of Environmental Conservation ("DEC") to locate the Sewer Project on Bayard Street.

93. The DEC concluded that the Bayard Street Route was the preferable location to the Trail Route for the Sewer Project "as it results in less impacts to the stream corridor, and the habitats possibly related to the Northern Long-Eared Bat. . . and will also likely minimize archeological concerns relating to the Seneca River Corridor." The Town did not even consider the DEC's recommendation.

The "Affirming" Negative Declaration Resolution Adopted On May 1, 2018 Must Also Be Annulled.

94. This Affirming Resolution was seemingly adopted to correct the Town Board's failure to wait for the Archaeologist's Report, which Petitioner's attorney pointed out at the Public Hearing, was received ten days after the Original Negative Declaration was adopted.

95. Although it would seem impossible that the new Town Board could have provided even less consideration of the environmental factors involved than the Board did in February of 2016, the new Board succeeded in giving the environment an even shorter shrift on its second go-around. In adopting the Affirming SEQR Resolution on May 1, 2018, the Town Board took less of a "hard look" than it did the first time.

96. Even though the Board had a proverbial "second bite" at the apple, once again, it failed to take any look at all at the environmental issues. This time the Board members did not have a copy of the Resolution (either before or at the meeting) and again, there was no discussion had of any of the "Moderate to Large" impacts that had been identified.

97. This Affirming Resolution only served to affirm the Town Board's failure to take a hard look, in fact, any look, at the environmental issues – each of which should have been further evaluated in an Environmental Impact Statement.

D. The Town Lacks Authority To Proceed As The Approval Of New York State Has Not Been Obtained, As Is Required.

98. Petitioner repeats and realleges each and every allegation contained in Paragraphs "1" through "96" of this Petition, as though fully set forth herein

99. The State of New York placed a 23-year Preservation Covenant (or the useful life of the improvement, whichever is longer) on the Property, dated March 23, 2004, requiring at ¶7 that:

> "7. Alteration to SUBJECT PROPERTY.
>
> a) Before plans for any proposed construction, alteration or demolition affecting the SUBJECT PROPERTY are finalized, the CONTRACTOR will provide such information to the STATE as will reasonably inform the STATE as to the work to be performed, the scope of the work, details of the materials and application, along with any other documentation requested by the STATE that is reasonably needed to define the nature and character of the work to be performed and the anticipated time in which the work is estimated to be completed. The provision of this paragraph as well as those of paragraph eight, shall not apply if the changes are (1) clearly minor in nature and not affecting architectural, archeological or historic values or (2) immediate actions required by casualty or other emergency to stabilize or prevent the loss of the SUBJECT PROPERTY and promptly reported to the STATE pursuant to paragraph eight of this agreement.

b) Secretary of the Interior's Standards. No work affecting the SUBJECT PROPERTY shall commence until the CONTRACTOR has received written certification from the STATE that all work is anticipated to be in substantial conformance with the STANDARDS.

See, Preservation Covenant dated March 23, 2004, and included in the Record of March 22, 2018 Public Hearing, Item 4 (March 22, 2018 Submission of Sheila Chalifoux, Esq. Packets A-H), Packet E "Preservation Covenant"(emphasis added).

100. Upon information and belief, the Town is without authority to proceed to acquire the Easement as no written certification has been received from the State that all work is anticipated to be in conformance with the Secretary of the Interior's Standards.

101. At no time was the State provided the necessary information to determine whether the Secretary of the Interior's Standards were met.

102. The Trail width was never provided to the landowner or the State, as was requested by the State. In any event, the Town's failure to identify the width of the Easement, the length of the Easement or the location of the Easement would have made it impossible to evaluate the archeological impact on the Trail.

103. The Town lacks authority to proceed with the acquisition of the Easement.

WHEREFORE, Petitioner, whose property is proposed to be acquired by Eminent Domain for the purposes of said Sewer Project is aggrieved and prays for a judgment of this Court pursuant to §207 of New York's Eminent Domaine Procedure Law:

A. Annulling and rejecting the Town of Seneca Falls' May 1, 2018 Determination and Findings as the Determination and Findings was adopted arbitrarily and in bad faith, violating Petitioner's fundamental State and Federal Due Process guarantees; and

B. Annulling and rejecting the Town of Seneca Falls' May 1, 2018 Determination and Findings as the Determination and Findings was unconstitutionally vague; and

C. Annulling and rejecting the Town's Determination and Findings and Original Negative Declaration dated February 2, 2016 and Affirming Negative Declaration dated May 1, 2018, as they were not made in accordance with the procedures set forth in Article 2 of the EDPL and Article 8 of New York's Environmental Conservation Law.

D. Annulling and rejecting the Town of Seneca Falls' May 1, 2018 Determination and Findings as the proposed acquisition was not within the Town's authority based on the Town's failure to obtain the permission of New York State, as is required by the terms of the Ludovico Sculpture Trail's Preservation Covenant with New York State.

E. Enjoining the Town from proceeding with the Sewer Project and granting such other and further relief as the Court deems just and proper, including the costs and disbursements of this proceeding.

F. No previous application has been made for the relief sought herein.

Dated: June 11, 2018

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