STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

In The Matter Of The Application Of

SENECA MEADOWS, INC.

Petitioner-Plaintiff,

- vs -

TOWN OF SENECA FALLS and
TOWN OF SENECA FALLS TOWN BOARD

Respondents-Defendants,

For a judgment pursuant to Article 78 of the Civil Practice Laws and Rules and CPLR 3001.

Index No. 51652

Hon. Daniel J. Doyle

MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED PETITION/COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

Petitioner-Plaintiff Seneca Meadows, Inc. ("SMI") respectfully submits this Memorandum of Law in support of its Article 78 Verified Petition-Complaint (the "Petition" or "Pet.") against Respondents-Defendants the Town of Seneca Falls (the "Town") and the Town of Seneca Falls Town Board (the "Town Board"). For the reasons that follow, SMI's Petition should be granted in its entirety, and the law at the heart of this dispute should be annulled.

PRELIMINARY STATEMENT

SMI is in a fight for its very survival. Despite the fact that it has been lawfully operating a solid waste management facility in the Town for decades pursuant to permits issued by the New York State Department of Environmental Conservation ("DEC") and the Town itself, the Town Board—or, more accurately, a biased and conflicted former member of the Town Board—decided to do whatever necessary to shut down SMI's operations. To that end, the Town Board voted on and approved a Local Law that endangers SMI's operations under its DEC-issued permit for the next five years and forces SMI to close its doors by no later than December 31, 2025. However, the law is fatally deficient.

First, the process by which the Local Law was passed was improper from the start, as both the law itself and the "Findings" on which it was purportedly based were drafted on behalf of a biased, appointed, and lame-duck board member at the end of her term by her company's attorney. Moreover, the law was passed with unseemly haste as it was rammed through the approval process. As a result, the Town Board had no opportunity to review the purported justifications and conclusions on which the law was based and thus failed to fulfill the statutory requirements of New York's environmental laws, which the Town Board was strictly obligated to follow.

Second, even if the law were properly passed (it was not), it is unconstitutional in any event, as it is both preempted by New York's environmental laws and the DEC permit issued to SMI and violates SMI's substantive due process rights.

SMI has invested tens of millions of dollars into its property in the Town in furtherance of its purpose of operating a solid waste management facility there and in reliance on permits issued by both DEC and the Town itself. Because of its serious and fundamental flaws, the Local Law must not stand.

STATEMENT OF FACTS

SMI operates a solid waste management facility at property it owns in the Town. (Pet. ¶ 15; Affidavit of Kyle Black, sworn to November 21, 2019 (the "Black Aff.") ¶ 3.) SMI's operations are permitted by DEC and are heavily regulated by state and federal law, DEC rules and regulations, and the Town's own Town Code. (Black Aff. ¶ 6.) Although SMI has operated its waste management facility in the Town for several decades, and since 1998 pursuant to a Host Community Agreement with the Town, SMI has faced strong opposition from a vocal minority of community members intent on putting SMI out of business. (*Id.* at ¶ 8.)

A. A Law Taking Direct Aim at SMI, and Only SMI, is First Introduced to the Town Board in 2016.

Waterloo Container Company ("Waterloo Container") one of SMI's neighbors, has been one of its most vocal critics and strongest supporters of SMI's opponents over the years. (Pet. ¶ 18; Black Aff. ¶ 9.) Indeed, it was Waterloo Container's attorney, Douglas Zamelis, Esq., who first introduced the concept of passing a law prohibiting SMI's operations. (Pet. ¶ 18; *see also* Black Aff. ¶ 15; Attorney Affirmation of Scott M. Turner, dated November 22, 2019 (the "Turner Aff.") Ex. B at 2.) During an April 2016 Town Board meeting, Mr. Zamelis provided the Town Board with a draft proposed local law that would ban solid waste management

facilities in the Town and restrict the operation of existing solid waste management facilities, (Pet. ¶ 18; Turner Aff. Ex. B at 2), of which SMI's facility was and still is the only one, (Black Aff. ¶ 4). In other words, the law proposed by Mr. Zamelis took direct aim at SMI (and only SMI), with the goal of shuttering SMI's operations completely.

The following month, Town Board Member and Waterloo Container co-owner, the late Annette Lutz (Turner Aff. Ex. G), officially introduced Mr. Zamelis's proposed law as proposed Local Law #3 of 2016, entitled "Town of Seneca Falls Waste Disposal Law" (as proposed and adopted, the "Local Law"),[1] at the Town Board's May 3, 2016 meeting. (*Id.*, Ex. C at 6; Pet. at ¶ 19; Black Aff. ¶ 16.) Apparently in a hurry to pass the Local Law before members of the community had time to analyze its impacts, the Town Board scheduled a public hearing on the first draft of the Local Law for June 7, 2016—only thirty-five days after it was initially made available to the public. (Pet. ¶ 20; Turner Aff. Ex. C at 9.)

As SMI had a significant interest in the Local Law—its continued existence was in the balance—it requested an adjournment of the June 7 public hearing to allow it sufficient time to review the Local Law's language and to prepare its comments on the proposed law. (*Id.* at ¶ 21; *see also id.* at Ex. 2.) The Town Board ultimately rescheduled the public hearing to September 28, 2016, but then subsequently converted the meeting to a public forum. (*Id.* at ¶¶ 22-24.) Representatives of SMI appeared at the September 28 public forum and provided testimony demonstrating that the factual and technical "Findings" contained in the proposed Local Law were not factually or scientifically supported or accurate. (*Id.* at ¶ 25; Black Aff. ¶ 18.)

[1] The Local Law was initially styled as "Local Law #7." However, as the Local Law was passed as Local Law #3, and for clarity and the avoidance of any confusion, the law is referred to herein both in draft and final form as the "Local Law."

The Local Law was not discussed again at any Town Board meetings until Ms. Lutz re-introduced the topic at the Town Board's November 10, 2016 meeting. (*Id.* at ¶ 27; *see also* Black Aff. ¶ 19; Turner Aff. Ex. D at 1-2.) This meeting also happened to occur only two days after Ms. Lutz—who had run on a campaign of shutting down SMI's operations—lost her election to remain on the Town Board. (Black Aff. ¶ 20.) Clearly sensing that she needed to act quickly as she would no longer enjoy a seat on the Town Board after December, Ms. Lutz made a motion to schedule a public hearing on the Local Law for November 30, 2016. (Pet. ¶ 28; *see also* Black Aff. ¶ 21; Turner Aff. Ex. C at 1-2.) The version of the Local Law provided to the public after the November 10, 2016 Town Board meeting had been significantly amended from the draft previously shared with the public at the September 28, 2016 public forum. (Pet. ¶ 29; Black Aff. ¶ 22.) SMI therefore requested an adjournment of the November 30, 2016 public hearing (which allowed only twenty-days, including the Thanksgiving holiday) for the public and SMI to review the changes to the proposed Local Law and to prepare comments. (*Id.* at ¶ 30; Black Aff. ¶ 22.) The Town ignored the request for an adjournment and went forward with the public hearing on November 30, 2016. (Pet. ¶ 31; Black Aff. ¶ 23.)

B. Board Member Lutz Blindsides the Town Board, SMI, and Members of the Community and Succeeds at Ramming the Local Law Through the Approval Process.

Representatives of SMI appeared at the November 30, 2016 public hearing and again provided testimony and robust written comments demonstrating the inaccuracies in the factual and technical "Findings" of the Local Law and that the Local Law's "Findings" were not scientifically supported. (Pet. ¶ 32; Black Aff. ¶ 24.) Other interested parties and residents of the Town also communicated their opposition to the Local Law. (Pet. ¶ 33.)

However, it quickly became apparent that the November 30, 2016 public hearing was merely a formality and that the Town Board had no intention of actually considering the public's

comments. Instead, immediately after the public hearing had been closed, Ms. Lutz—who only weeks earlier had lost her bid to be re-elected to the Town Board—produced an Environmental Assessment Form (the "EAF") and a negative declaration (the "Negative Declaration") for "consideration" by the Town Board.[2] (*Id.* at ¶ 34; Black Aff. ¶ 25; Turner Aff. Ex. E at 6.) Ms. Lutz announced that the EAF and Negative Declaration had been prepared not by the Town's attorney, but by Waterloo Container's (i.e., her company's) attorney, Mr. Zamelis. (Pet. ¶ 35; Black Aff. ¶ 26.) Not only had Ms. Lutz asked her company's attorney to prepare the EAF and Negative Declaration, she also failed to share these documents with her fellow board members before the November 30, 2016 meeting such that the other board members were completely unaware of the substantive contents or legal import of them. (*See* Pet. ¶ 36; *see also* Turner Aff. Ex. E at 6 (statement in the meeting minutes from the Town Attorney indicating that the Town Board could not conduct the statutorily required environmental review at the meeting because the necessary documents had not been prepared by the Town).) Ms. Lutz then proceeded to read the EAF aloud to the rest of the Town Board and assembled members of the community. (*See* Pet. ¶ 38; *see also* Turner Aff. Ex. E at 6.)

After blindsiding everyone in attendance on November 30 with the EAF and Negative Declaration, Ms. Lutz next introduced a resolution adopting the Negative Declaration. (Pet. ¶ 38; *see also* Black Aff. ¶ 27; Turner Aff. Ex. E at 6.) All the while, Ms. Lutz was receiving direction from her company's attorney, Mr. Zamelis, who had moved from the back of the room to a prominent seat in the front. (Pet. ¶ 37; Black Aff ¶ 28.) Despite the fact that it was obvious

[2] As discussed more fully below, New York statutory law requires governmental authorities to consider whether a proposed action will have a significant impact upon the environment via an environmental assessment form and, only after having given a "hard look" to the environmental assessment, may they declare a negative declaration to that effect. (*See infra,* at Point I.)

that the remainder of the Town Board had never seen nor considered the resolution, Ms. Lutz nonetheless moved for a vote to adopt the Negative Declaration. (Pet. ¶ 39; *see also* Turner Aff. Ex. E at 6-7.) Although none of the members of the Town Board other than Ms. Lutz had previously seen nor considered the Negative Declaration, and despite only having received the Negative Declaration mere minutes before, the Town Board proceeded to adopt the Negative Declaration during the November 30, 2016 meeting. (Pet. ¶ 40; *see also* Turner Aff. Ex. E at 6-7.)

Following its adoption of the Negative Declaration, the Town Board, at its next meeting on December 6, 2016, adopted the Local Law.[3] (Turner Aff. Ex. F at 3.) Pursuant to the Local Law, the Town restricted the number, location, and expansion of solid waste management facilities in the Town and completely prohibited the existence of waste management facilities—*i.e.*, SMI—in the Town after December 31, 2025. (Pet. Ex. 2.) In other words, the Local Law takes direct aim at SMI—the only waste management facility in the Town (Black Aff. ¶ 4)—as it prohibits SMI (and only SMI) from expanding its operations and would require SMI (and only SMI) to completely cease operations and shutter its business within the next five years. (*See* Pet. Ex. 2.)

C. SMI Timely Challenges the Local Law and, While its Challenge is Pending, the Local Law is Repealed.

With its entire business at risk, SMI timely filed a CPLR Article 78 proceeding and declaratory judgment action on February 3, 2017, challenging the Local Law (the "Original

[3] It was no coincidence that Ms. Lutz was the one to propose holding the vote on the Local Law during the December 6 meeting. (Turner Aff. Ex. E at 7.) In proposing this date, Ms. Lutz stated that the Town Board "will have time to look at everything [before the December 6 meeting]," implicitly acknowledging that, in fact, the Town Board took no time to review the EAF prior to voting on the Negative Declaration at the November 30 meeting. (*See id.*)

Proceeding"). (Pet. ¶ 3.) Shortly thereafter, on May 5, 2017 (while the Original Proceeding was still pending), the Town Board adopted Local Law #2 of 2017, repealing the challenged Local Law. (*Id.* at ¶¶ 4, 59.) Because the law that would have prohibited its expansion and ultimately required its closure was no longer on the books, SMI no longer had a justiciable controversy upon which to ground the Original Proceeding and, accordingly, filed a voluntary discontinuance without prejudice on June 14, 2017. (*Id.* at ¶ 5.)

D. The Local Law is Reinstated, and SMI Renews its Challenge Thereto.

On June 7, 2017, Waterloo Container filed an Article 78 petition challenging the adoption of the law that repealed the Local Law.[4] (*Id.* at ¶¶ 6, 62.) Waterloo Container's Article 78 petition was prepared and filed by none other than Mr. Zamelis, Ms. Lutz's company's attorney and the author of the EAF and Negative Declaration foisted upon the Town Board members at the last moment. (*Id.* at ¶ 62.) In support of its petition, Waterloo Container argued that it had a unique and individualized interest in the validity of the Local Law—and, therefore, the shuttering of SMI—due to its proximity to SMI's facility. (*See* Turner Aff. Ex. I at 2-5.)

On September 13, 2017, the Honorable William F. Kocher, Acting Supreme Court Justice, issued a decision stating that Local Law #2 was annulled. (Pet. at ¶¶ 7, 63.) Justice Kocher's September 13 decision was entered as an Order on October 16, 2017, and, therefore,

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[4] Waterloo Container's Article 78 challenge was styled as *Waterloo Contractors, Inc. v. Town of Seneca Falls Town Board and Town of Seneca Falls Town Clerk* and was filed in the Supreme Court for Seneca County under Index No. 51182. (Turner Aff. Ex. H.) Although the nominal petitioner was Waterloo Contractors, Inc. ("Waterloo Contractors"), as its petition admits, Waterloo Contractors is, in reality, Waterloo Container. (*Id.* at ¶ 2 ("Waterloo Contractors, Inc. . . . is authorized to do business as Waterloo Container Company and is a domestic corporation with a principal place of business and real property at 2311 State Route 414 in the Town of Seneca Falls.").)

the Local Law was reinstated on or about that date. (*Id.* at ¶¶ 8-9, 64-65.) Once again, SMI's operations were in jeopardy.

In response to Justice Kocher's October 16, 2017 Order reinstating the Local Law that requires SMI to shutter its business by December 31, 2025, SMI renewed its Article 78 challenge to the Local Law by commencing the instant proceeding. (*See generally,* Pet.) For the reasons that follow, the Local Law should be vacated, annulled, and declared null and void because it constitutes an unconstitutional violation of SMI's right to substantive due process, is preempted by State law, and was passed without following the requirements of the applicable New York statutes by a town board whose decision was tainted by a biased and conflicted board member in violation of New York ethical standards.

ARGUMENT

POINT I

THE LOCAL LAW IS NULL AND VOID BECAUSE THE TOWN BOARD FAILED TO COMPLY WITH THE REQUIREMENTS OF SEQRA

The State Environmental Quality Review Act, ECL § 8-0101 *et seq.* ("SEQRA"), requires governmental authorities, including town boards, to consider whether a proposed action will have a significant impact upon the environment. ECL § 8-0109(4). SEQRA's implementing regulations first require the completion of an environmental assessment form, which is used to collect information about the proposed action to determine whether the proposed action will have an impact upon the environment. 6 NYCRR 617.6(a)(2), (3).

Using the environmental assessment form, the lead agency next must make a "determination of significance" and decide whether the proposed action "may include the

potential for at least one significant adverse environmental impact."[5] 6 NYCRR 617.7(a)(1). In making this determination, the lead agency must give the environmental assessment form more than a cursory review; instead, courts have described the required environmental assessment review as a "hard look." *See, e.g. La Delfa v. Vill. of Mt. Morris,* 213 A.D.2d 1024 (4th Dept. 1995) (annulling a village board's negative declaration on the basis that the board "did not comply with the requirements of SEQRA" because the board "failed to identify those relevant areas of environmental concerns and take a hard look at them"); *see also* 9 N.Y. PRAC., ENVTL. LAW AND REG. IN N.Y. § 4:17 at n. 2 (2d ed. 2019) ("An agency's duty to take a 'hard look' before making an environmental significance determination under SEQRA is similar to a federal agency's duty to engage in reasoned decision-making prior to promulgating a regulation under the informal rulemaking procedure of the Administrative Procedures Act.").

If, after giving the environmental assessment form a "hard look," the lead agency determines that the proposed action may include the potential for at least one significant adverse environmental impact, the agency must then prepare a draft, and then a final, environmental impact statement. ECL § 8-0109(2); 6 NYCRR 617.7(a)(1). On the other hand, if the lead agency determines that significant adverse environmental impacts are not likely, the agency must make a negative declaration to that effect. 6 NYCRR 617.7(b)(2).

A town board fails to take the requisite "hard look," and thus violates SEQRA, when it does "not have sufficient time to make an independent investigation or to fully address any environmental concerns raised by [an] [environmental assessment form]" prior to issuing a negative declaration. *N.Y. Archaeological Council v. Town Bd. of Town of Coxsackie*, 177

[5] Here, the Town Board acted as the "lead agency" for SEQRA purposes. (Turner Aff. Ex. E at 6.)

A.D.2d 923, 925 (3d Dept. 1991). Likewise, a town board acts in an arbitrary and capricious manner in carrying out a SEQRA review where its sole basis for a negative declaration comes from a submission by an interested party. *See id.* at 924–25; *see also Kanaley v. Brennan*, 119 Misc. 2d 1003, 1009 (Sup. Ct. Onondaga Cty. 1983), *aff'd*, 120 A.D.2d 974 (4th Dept. 1986).

Strict compliance with SEQRA's environmental assessment and "hard look" requirements is mandatory, and substantial compliance has been held insufficient. *See King v. Saratoga Bd. of Supervisors*, 89 N.Y.2d 341, 347-48 (1996); *Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Indus. Dev. Agency*, 212 A.D.2d 958 (4th Dept. 1995). Thus, where "the procedure employed to achieve [a] negative declaration violate[s] both the letter and the spirit of SEQRA and its implementing regulations," a lead agency is deemed to have acted arbitrarily and capriciously, requiring the annulment of the negative declaration and any legislation passed pursuant to it. *Shawangunk Mountain Envtl. Ass'n v. Planning Bd. of Town of Gardiner*, 157 A.D.2d 273, 275 (3d Dept. 1990).

Here, the Town Board violated both the letter and the spirit of SEQRA and its implementing regulations when, in the process of enacting the Local Law: (i) the Town Board voted to adopt both the EAF and Negative Declaration without giving either document a "hard look" because none of the members of the Town Board, other than Ms. Lutz, had seen the documents until immediately prior to the vote ; and (ii) the Town Board relied entirely upon an EAF and Negative Declaration drafted by counsel to an interested party, Waterloo Container (and, by extension, Ms. Lutz).

A. The Town Board Failed to Take the Requisite "Hard Look" at the EAF Prior to Adopting the Negative Declaration.

Far from taking a "hard look" at the EAF before adopting the Negative Declaration, the Town Board took no look at all. Instead, the Town Board's SEQRA "review" was independently conducted by two people—an appointed, personally motivated, lame-duck board member and her company's counsel. The Town Board did not formally retain any experts or take any steps to independently verify the "Findings" offered by Ms. Lutz, nor did it even give the EAF a cursory, let alone "hard," look. (*See* Black Aff. ¶ 30.) Instead, the EAF was presented to the Town Board for the first time at the November 30, 2016 meeting, and was immediately followed by the Negative Declaration and resolution adopting the same. (*See* Turner Aff. Ex. E at 6.) Indeed, the minutes of the November 30, 2016 Town Board meeting reflect that after taking public comments, the Town's attorney acknowledged: "[T]he Board is required to take a hard look at the action and determine its environmental significance [but] this is something that is not before the Board at this time, and the Board will not be able to conduct this review this Evening [sic]."[6] (*Id.*) It was after this statement that Ms. Lutz sprung the EAF on the Town Board and proceeded to force a vote on the resolution adopting the Negative Declaration she had previously prepared. (*Id.*)

In similar situations, several courts in New York have found that a short period of time between receipt of an environmental assessment form and/or negative declaration and a town board's approval of same is indicative of a failure to take the requisite "hard look" at the environmental impacts of a proposed action before voting to adopt a negative declaration. As a

[6] Of course, the Town Attorney only made this statement because he did not draft the EAF or Negative Declaration and was unaware that Ms. Lutz had taken it upon herself to have her company's counsel prepare these documents.

result, these courts have held that the adoption of the negative declaration was arbitrary and capricious. *See, e.g. N.Y. Archaeological Council*, 177 A.D.2d at 925 (annulling negative declaration and local law where the environmental assessment form "was submitted to the Town Board on August 3, 1989, and Local Law No. 6 and the negative declaration were discussed just a few days later at the August 8, 1989 meeting"); *Kastan v. Town of Gardiner Town Bd.*, 25 Misc. 3d 1225(A) (Sup Ct. Ulster Cty. 2009) (finding town failed to take requisite "hard look" and therefore acted arbitrarily and capriciously where, at most, a few weeks of time "between the Town Board's receipt of the updated viewshed analysis" and issuance of negative declaration left "little time for consideration of the report by the Town Board"); *Munash v. Town Bd. of Town of E. Hampton*, 297 A.D.2d 345, 347 (2d Dept. 2002) (holding that where "the Town Board issued its negative declaration on the same day it received its hydrogeologist's report and the final [environmental assessment form], without waiting for its hydrogeologist to complete her evaluation . . . it cannot be said that the Town Board took the required hard look . . . before issuing its negative declaration."). The time period in each of these cases—the same day, several days, a few weeks—was longer than the period of time the Town Board had to review Ms. Lutz's EAF and Negative Declaration here, which was no time at all.

In light of the fact that the Town Board failed to take the requisite "hard look" before adopting the Negative Declaration, its adoption of the Negative Declaration was arbitrary and capricious and must be annulled. *See N.Y. Archaeological Council*, 177 A.D.2d at 924–25. And, without a properly adopted Negative Declaration, the Local Law cannot stand. *Shawangunk Mountain Envtl. Ass'n*, 157 A.D.2d at 275.

B. The Negative Declaration on Which the Local Law is Based Was Drafted by an Interested Party and, Therefore, the Negative Declaration, and with it the Local Law, is Null and Void.

As noted above, an environmental assessment form drafted by an interested party cannot serve as the basis for a negative declaration and, therefore, any action based on an improper negative declaration is itself null. *See, e.g., N.Y. Archeological Council,* 177 A.D.2d at 924-925; *Kanaley,* 119 Misc. 2d at 1009, *aff'd* 120 A.D.2d 974 (4th Dept. 1986).

Here, the EAF on which the Town Board's Negative Declaration was based was drafted by counsel to Waterloo Container, a neighbor of SMI and Ms. Lutz's business. As a business directly across the street from SMI, Waterloo Container (and, by extension, Ms. Lutz) undoubtedly had a pecuniary interest—and certainly a personal interest as admitted in papers submitted in support of Waterloo Container's Article 78 petition—in the enactment of the Local Law and the shuttering of SMI's operations. (*See* Turner Aff. Ex. I at 2-5.) Thus, the EAF and Negative Declaration on which the Local Law was founded were themselves null and void and, therefore, could not serve as the foundation of the Local Law. *Shawangunk Mountain Envtl. Ass'n*, 157 A.D.2d at 275. On this basis alone, the Local Law should be annulled and declared invalid. *See, e.g., N.Y. Archeological Council,* 177 A.D.2d at 924-925; *Kanaley,* 119 Misc. 2d at 1009.

POINT II

THE LOCAL LAW IS NULL AND VOID BECAUSE THE TOWN BOARD ALLOWED A BIASED AND CONFLICTED MEMBER TO PARTICIPATE IN THE VOTE ADOPTING THE LOCAL LAW

In New York, "[p]ublic policy forbids the sustaining of municipal action founded upon the vote of a member of the municipal governing body in any matter before it which directly or immediately affects him individually," even if the vote of the conflicted board member is not necessary to establish a majority. *Baker v. Marley*, 8 N.Y.2d 365, 367-68 (1960) ("[R]esolution

and other actions of the board relating to the condemnation must be declared void, even though the vote of the Mayor was not necessary, a majority being sufficient."); *Zagoreos v. Conklin*, 109 A.D.2d 281, 288 (2d Dept. 1985) ("It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest." (internal quotation marks and citation omitted)); *Tuxedo Conservation and Taxpayers Assoc. v. Town Bd. of the Town of Tuxedo*, 69 A.D.2d 320, 324 (2d Dept. 1979) (finding public servants must be held to a standard "stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, as then the standard of behavior" (internal quotation marks and citation omitted)).

Indeed, the common law ethical and fiduciary responsibilities of public officials are broad under New York law. Although General Municipal Law article 18 specifies various conflicts of interest, "[i]t is not necessary . . . that a specific provision of the General Municipal Law be violated before there can be an improper conflict of interest." *Zagoreos*, 109 A.D.2d at 287; *see also* Op. State Compt. 88-68 ("[C]ourts of this State have held public officials to a high standard of conduct and, on occasion, have negated certain actions which, although not violating the literal provisions of article 18 of the General Municipal Law, violate the spirit and intent of the statute, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety.").

A party seeking to invalidate an action need not prove an actual conflict; "the test to be applied is not whether there is a conflict, but whether there might be." *Tuxedo Conservation*, 69 A.D.2d at 325; *see also* Op. State Compt. 88-68 (finding that a board member "should consider abstaining from discussions and voting on any matter which, while not violating article 18 or the town's code of ethics, suggests even an appearance of self-interest, partiality or economic impropriety.").

Thus, courts have annulled municipal actions on the basis of demonstrated or perceived financial self-interest and/or personal bias. *See Zagoreos*, 109 A.D.2d at 286 (setting aside decisions of zoning board of appeals and town board due to a perceived conflict of interest, as some board members were employees of utility company seeking variance); *Tuxedo Conservation*, 69 A.D.2d at 323 (finding conflict where town-board member voted to approve multimillion-dollar construction project from which his advertising agency stood to gain financially); Atty. Gen. Opt. 88-60 ("At least, we believe that *a neighbor's opposition to a proposed project creates an appearance of partiality and bias which disqualifies the individual from considering the matter* as a member of a planning board." (emphasis added)); *see also Schweichler v. Vill. of Caledonia*, 45 A.D.3d 1281, 1284 (4th Dept. 2007) (finding "the appearance of bias and actual bias in this case require annulment of the Planning Board's site plan approval" where "although there was no technical violation of the General Municipal Law," three members of the planning board prejudged the application and the planning board's chairperson manifested actual bias in support of the project). These concerns are especially problematic where the matter to be voted on generates substantial controversy. *See Zagoreos*, 109 A.D.2d at 287–88 ("In light of the unusual nature of the applications and the substantial controversy surrounding the matter, it was crucial that the public be assured that the decision would be made by town officials completely free to exercise their best judgment of the public interest, without any suggestion of self-interest or partiality.").

For example, in *Tuxedo Conservation*, the Second Department affirmed the lower court's annulment of a town board's decision approving a residential construction project. 69 A.D.2d at 327. There, a lame-duck town board voted to approve the project, which faced significant public opposition, mere days before their term ended. *Id.* at 323. The Second Department "deplore[d]"

a conflicted town board member's participation in the vote because, as vice-president of an advertising agency with close ties to the developer, he was positioned to gain financially from the approval. *Id.* at 324. Moreover, in affirming the annulment, the Second Department admonished the board for "the unseemly haste by which [the conflicted board member] and two of his colleagues rammed the resolution through the Town Board . . . ." *Id.* at 326.

A. Ms. Lutz's Personal Bias Against SMI and Real or Perceived Financial Interest in the Enactment of the Local Law Poisoned the Town Board's Vote.

Here, both the demonstrated and perceived financial and personal self-interest and bias of Ms. Lutz requires the annulment of the Local Law. Prior to the Town Board's votes to adopt the Negative Declaration and the Local Law, Ms. Lutz openly demonstrated her actual bias towards SMI in public hearings by blaming SMI for her health conditions, disparaging SMI, and calling for SMI's facility to be shut down. (Black Aff. ¶¶ 11-14.) In particular, Ms. Lutz personally attended and helped organize various events for the sole purpose of opposing the operations of SMI. (*Id.* at ¶ 12.) At a public hearing during discussions about SMI's operations on August 10, 2017, Ms. Lutz claimed that, following a diagnosis of Crohn's Disease in 2005, her doctors told her "that a major factor in this disease is environmental, that is my environment was most likely the cause for my body coming down with Crohn's. And that environment was the dump." (*Id.* at ¶ 13.) Ms. Lutz added that in 2011, she "was hit with another health issue, stage 3 breast cancer. I have endured a double mastectomy, chemotherapy, radiation. Was it sheer luck that I was hit with a double whammy?" (*Id.*)

Finally, at that same public hearing, Ms. Lutz disparaged SMI and argued that SMI's operations should be shut down. (*Id.* at ¶ 14.) She passionately urged her fellow citizens to "learn from past disasters such as the Love Canal, the central landfill fire or Flint, Michigan. Shut this nightmare down before something just as, if not more, horrific happens here or will you

kowtow to this multibillion-dollar company that is not even based in New York State and only cares about how high their mountains and bank accounts can get and doesn't care about those of us who live here and [are] affected by their greed." (*Id.*)

Ms. Lutz's personal bias against SMI also goes hand-in-hand with her ties to SMI's neighbor, Waterloo Container. Ms. Lutz was an owner and employee of Waterloo Container. (Turner Aff. Ex. G.) Waterloo Container has openly supported opponents of SMI. (Black Aff. ¶ 9.) Waterloo Container's proximity to SMI and its challenge to the repeal of the Local Law (*see* Turner Aff. Ex. H) creates the appearance that it would stand to gain financially—through property valuation or otherwise—should SMI cease operations. Moreover, Ms. Lutz furthered the pecuniary interest of Waterloo Container by retaining its counsel to advise her on how to proceed in assuring passage of the Local Law.

SMI provided a letter to the Town outlining the above concerns regarding Ms. Lutz's bias on December 5, 2016, and requested that she recuse herself from voting in furtherance of the Local Law. (Pet. Ex. 6.) However, that request was ignored and, as in *Tuxedo Conservation*, Ms. Lutz proceeded with "unseemly haste" and "rammed" the Local Law through the Town Board. Ms. Lutz did so having never been voted into office, having lost her election to continue as a Town Board member, and when she was only weeks away from the expiration of her term. 69 A.D.2d at 324.

It is beyond dispute that Ms. Lutz used her short time as an appointed member of the Town Board to secure privileges for herself and her company and that her involvement was necessary for the Local Law's passage. (*See* Turner Aff. Ex. C at 6 (reflecting that Ms. Lutz first introduced the proposed Local Law to the Town Board; *id.*, Ex. E (reflecting that Ms. Lutz made the motion to adopt the EAF; that Ms. Lutz seconded the motion to designate the Town Board as

the lead agency for SEQRA purposes; that Ms. Lutz made the motion to adopt the Resolution issuing the Negative Declaration; and that Ms. Lutz proposed that the Town Board vote to pass the Local Law at its December 6, 2016 meeting).) The above facts and circumstances made it impossible for Ms. Lutz to be impartial with respect to the Local Law, or at the very least created the appearance of a lack of impartiality over a law that was hotly debated within the Town and opposed vigorously by SMI and members of the community. By failing to recuse herself from the proceedings that resulted in the enactment of the Local Law, Ms. Lutz fatally tainted the Local Law, and it must, therefore, be found null and void.

POINT III

THE LOCAL LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES SMI'S RIGHT TO SUBSTANTIVE DUE PROCESS

The New York Court of Appeals has recognized a two-part test for substantive due process violations in the land-use context requiring "claimants to establish deprivation of a vested property interest and that the challenged governmental action was wholly without legal justification." *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 136 (2010).

A. SMI Has Substantially Changed Its Property and Has Incurred Substantial Expenses to Further Its Development and, Therefore, SMI Unquestionably Has a Vested Property Interest.

"[A] property owner obtains a vested right when 'pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development.'" *Id.* (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47 (1996)). Although "[n]either the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right," where the landowner has made a "substantial" investment such that "the municipal action results in serious loss rendering the improvements essentially

valueless," a vested property interest exists. *Id.* (quoting *Town of Orangetown*, 88 N.Y.2d at 47-48). When one "acquire[s] a cognizable property interest, due process assures the [ ] right to be free from arbitrary or irrational municipal actions destructive of this interest." *Town of Orangetown,* 88 N.Y.2d at 53.

For instance, in *Jones v. Town of Carroll*, the Court of Appeals found that a landfill operator had a vested property interest in the continued operation of its property as a landfill in spite of a newly enacted zoning ordinance prohibiting landfill expansion in the Town of Carroll. 15 N.Y.3d 139, 142 (2010). In so holding, the Court deemed "the use of property as a landfill . . . unique because it necessarily envisions the land itself is a resource that will be consumed over time." *Id.* at 144 (internal quotation marks and citations omitted). The Court also found that the existence of a DEC permit "is not determinative" of the landowner's vested right. *Id.* at 145. Indeed, the relevant "factors to examine are whether the operation of a . . . landfill was a lawful use on the property prior to the enactment of the . . . law and whether [the landowner's] activities before that time manifested an intent to utilize all of their property in a manner consistent with that purpose." *Id.* Moreover, this same analysis has been cited with approval in assessing a vested property interest where the infringing law is a health and safety regulation rather than a zoning ordinance, as is the case here. *See Jones v. Town of Carroll*, 122 A.D.3d 1234, 1239 (4th Dept. 2014).

There can be no question that SMI manifested an intent, long before the Local Law was ever contemplated, to use its property as a solid waste management facility and that it made significant changes to the property and incurred significant expense and invested tens of millions of dollars into the property in furtherance of that intent. It is also unquestionably the case that the Local Law, which would require SMI to shut down its operations, would render SMI's

investments in the property and the significant improvements it has made thereto valueless and would cause significant loss to SMI.

SMI has spent hundreds of thousands of dollars acquiring the necessary DEC and Town permits to site its solid waste management facility in the Town. (*Id.*) SMI has been operating a solid waste management facility at the property for decades pursuant to those lawfully obtained permits, giving SMI a measure of security that it would be able to use the property for its intended purpose so long as SMI continued to comply with Town and DEC regulations. (Black Aff. ¶ 7.)

Additionally, SMI clearly and unequivocally manifested an intent to use its property as a solid waste management facility through the substantial investments it made into the property itself. SMI invested tens of millions of dollars to design a highly-engineered, state-of-the-art waste management facility on its property, including by building the necessary office buildings, processing facilities, and roads, and acquiring safety equipment for the property to meet SMI's lawful and intended purpose and DEC requirements. (*Id.* at ¶ 34.) All of these improvements would be rendered valueless if SMI was forced to shutter its operations. (*Id.* at ¶ 36.) SMI also invested significant sums to purchase heavy equipment such as bulldozers, backhoes, excavators, loaders, and dump trucks necessary to operate a solid waste management facility and has directly or indirectly employed hundreds of people over the years (including over 100 current individuals) in furtherance of that purpose. (*Id.* at ¶ 35.) The vast majority of these investments, again, would be rendered valueless to SMI should it be forced to cease operations under the Local Law. (*Id.* at ¶ 36.)

SMI's significant investment in its property in furtherance of its intended purpose under its DEC and Town permits gave rise to a vested right to operate its solid waste management

facility in the Town. *See Jones,* 15 N.Y.3d at 139. The Town Board was not free to extinguish this right.

B. The Local Law is Wholly Without Legal Justification, and Instead was Passed for Purely Political Reasons.

"Substantive due process protects the individual 'against arbitrary action[s] of government.'" *U.S. v. Certain Real Prop. and Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 33 (2d Cir. 1992) (citation omitted). "[A] decision regulating a landowner's use of its property offends due process when the government acts with no legitimate reason for its decision." *Town of Orangetown*, 88 N.Y.2d at 53; *see also Russell v. Town of Pittsford*, 94 A.D.2d 410, 412 (4th Dept. 1983) ("[S]ubstantive principles of due process require that [an] ordinance have a reasonable relation to a proper governmental purpose so as not to constitute an arbitrary exercise of governmental power." (internal quotation marks and citation omitted)).

A town's action is arbitrary and capricious so as to offend due process where it is "motivated entirely by political concerns." *Town of Orangetown*, 88 N.Y.2d at 53. A recent decision out of the Supreme Court, Chautauqua County provides a relevant example of the skepticism with which courts in New York view laws passed with improper motivations. *Town of Ellery v. Dep't of Envtl. Conservation*, 54 Misc. 3d 482, 491 (Sup. Ct. Chautauqua Cty. 2016), *aff'd*, 159 A.D.3d 1516 (4th Dept. 2018). There, the town's arbitrary law, prohibiting the operation of landfills, was found to be null and void. *Id.* In so holding, the court criticized the "markedly less scientific but nonetheless revealing political process" employed to pass a law that relied upon the "so-called 'findings' of a five-member town board" that "environmental science is presently inadequate to satisfactorily evaluate and control pollution from solid and liquid waste disposal facilities." *Id.* at 486, 492. The court contrasted those findings with the findings

of an agency—i.e., DEC.—"whose raison d'être is to enforce laws and regulations designed to protect the environment," and annulled the law. *Id.* at 492.

Here, the Local Law was politically motivated and wholly without legal justification because the "Findings" and "Purpose" for which it was allegedly passed are not factually or scientifically supported or accurate. As addressed above, the Town Board relied entirely on submissions (including the Local Law itself) by a conflicted board member and her company's attorney. The Town Board took no action to assess the truth and accuracy of *any* statement made in the Local Law. It did not even consider the tainted submissions themselves for more than a few minutes prior to voting to enact the Local Law. The process through which the Local Law was passed reveals that its sole purpose had nothing to do with the health, safety, or welfare of the people of the Town, but rather was meant to satisfy the personal and financial motivations of a lame-duck board member—Ms. Lutz.

The illegal and improper motivations are evident throughout the Local Law. Specifically, the Local Law contains no explanation of the factual bases for the purported "Findings," such as actual studies or evaluations. (*See generally,* Pet. Ex. 2.) The Town Board ignored SMI's comments on the Local Law, (*see* Pet. Ex. 5), which lay bare the reality that substantial evidence exists that contradicts the Findings. The Local Law is redundant of the existing ability of the Town to impose conditions on a solid waste management facility's operation to protect "public health, safety, welfare or the environment" under Town Code Chapter 185. (*See* Turner Aff. Ex. J.) The Local Law directly targets SMI, because SMI operates the only landfill currently existing in the Town and the Local Law seeks to disrupt SMI's operations through vague provisions potentially allowing the Town to shut down the landfill upon a finding of minor violations (or alleged violations) of other laws applicable to SMI. (Pet. Ex. 3.)

In short, the Town Board—due to the personal and financial motivations of Ms. Lutz—enacted the Local Law in a hurried, purely political process immediately prior to the end of Ms. Lutz's term without any legitimate basis. The Town Board's unscientific, arbitrary, and capricious ban on landfills substitutes the so-called "findings" of Ms. Lutz and her company's attorney for that of DEC, "whose raison d'être is to enforce laws and regulations designed to protect the environment." *Town of Ellery*, 54 Misc. 3d at 492. Accordingly, the Local Law has no legal justification, was based on illegal and improper motivations, and unconstitutionally violates SMI's substantive due process rights. It should, therefore, be found null and void.

POINT IV

THE LOCAL LAW IS UNCONSTITUTIONAL BECAUSE IT IS PREEMPTED BY STATE LAW

The Local Law is preempted by Title 7 of ECL Article 27 and, therefore, it must be annulled and declared invalid and ineffective both on its face and as applied to SMI.

In relevant part, ECL Article 27 states: "Any local laws, ordinances or regulations of any governing body of a county, city, town or village *which are not inconsistent with* this [Title 7 of ECL Article 27] or with any rule or regulation . . . shall not be superseded by [this title]." ECL § 27-0711 (emphasis added). In other words, per the terms of ECL Article 27, where, as here, a local law, ordinance, or regulation *is* inconsistent with the ECL, the local law *is* superseded by the ECL. *See id.*

The ECL is a general law of the State, and a municipal regulation is inconsistent with a general law when, as here, it prohibits what the general law permits or imposes a prerequisite on rights under state law. *See Consol. Edison Co. of N.Y., Inc. v. Town of Red Hook,* 60 N.Y.2d 99, 107 (1983); *see also Jewish Consumptives' Relief Soc. v. Town of Woodbury,* 230 A.D. 228, 235 (2d Dept. 1930), *aff'd* 256 N.Y. 619 (1931). Thus, by prohibiting local laws that are inconsistent

with the ECL's terms, ECL § 27-0711 acts as a "check against local laws which would contradict or would be incompatible or inharmonious with the general laws of the State." *Town of Clifton Park v. C.P. Enters.*, 45 A.D.2d 96, 98 (3d Dept. 1974).

For example, in *Jewish Consumptives' Relief Society v. Town of Woodbury,* the Court of Appeals found that a local law that prohibited tuberculosis institutions within the town was inconsistent with the provisions of the Public Health Law. 230 A.D. at 237. The court held that the town had "no right to exclude such institutions," but instead only had the power "to limit the places in which such institutions may be established. Because the local law prohibited such institutions from any part of the town, the court held that the local law was inconsistent with state law and was therefore unauthorized. *Id.*

Not only has the reasoning of *Jewish Consumptives'* been relied upon numerous times in the nearly ninety years since it was decided to annul local laws that prohibit that which a general state law permits, it is wholly applicable here. *See, e.g., Holy Sepulchre Cemetery v. Town of Greece,* 79 N.Y.S.2d 683 (Sup. Ct. Monroe Cty. 1947), *aff'd* 273 A.D. 942 (4th Dept. 1948); *Union Free Sch. Dist. No. 14 of Town of Hempstead v. Vill. of Hewlett Bay Park,* 279 A.D. 618 (2d Dept. 1951); *S.H. Kress & Co. v. Dep't of Health of City of N.Y.*, 283 N.Y. 55, 60 (1940); *Wholesale Laundry Bd. of Trade, Inc. v. City of N.Y.*, 17 A.D.2d 327, 329 (1st Dept. 1962), *aff'd* 12 N.Y.2d 998 (1963); *People v. Cook,* 34 N.Y.2d 100, 109 (1974); *Hanson v. Town Bd. of Town of Nassau,* 851 N.Y.S.2d 58 (Sup. Ct. Rensselaer Cty. 2007).

Here, despite the fact that the ECL permits the operation of solid waste management facilities and that DEC has permitted SMI's operations in the Town, the Local Law expressly prohibits the operation of solid waste management facilities in the Town after December 31, 2025. (Pet. Ex. 2.) As such, the Town has exceeded its authority under Article IX, Section 2(c)

of the New York Constitution; Municipal Home Rule Law § 10; and Town Law § 130 by banning that which state law, under the ECL, permits with a DEC permit, and thus, it cannot stand. The Local Law should, therefore, be annulled because it is preempted by the ECL.

CONCLUSION

For the foregoing reasons, SMI respectfully requests that the Court issue an Order and Judgment: (i) vacating, annulling, and declaring the Local Law null and void as a matter of law; (ii) awarding SMI its attorneys' fees, costs, and disbursements; and, (iii) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Rochester, New York

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