PRELIMINARY STATEMENT

Intervenors/respondents/defendants Dixie Lemmon and Concerned Citizens of Seneca County, Inc. ("Intervenors") respectfully submit this memorandum of law in support of their motion to dismiss the verified petition/complaint of Seneca Meadows, Inc. ("SMI") pursuant to a) CPLR Rule 3211(a)(5) because SMI's Article 78 procedural claims are barred by the four-month statute of limitations; b) pursuant to CPLR Rule 3211(a)(1) on the ground that a defense is founded upon documentary evidence; and c) pursuant to CPLR Rule 3211(a)(7) on the ground that SMI's due process claim fails to state a cause of action. As argued herein, SMI's procedural and substantive claims should be dismissed in their entirety.

STATEMENT OF FACTS

In or about 2006, SMI "the largest landfill in New York State, with most of its waste coming from within New York State and other fractions from Massachusetts, Connecticut, and other states" applied to and ultimately obtained approval from the New York State Department of Environmental Conservation ("NYSDEC") for "a 178-acre expansion of this landfill operation that would provide approximately 14 years of additional landfill capacity" when SMI's state solid waste management facility permit would have otherwise expired in 2009 (see "NYSDEC Issues Ruling, Summary Report and Order of Disposition", June 6, 2007 at https://www.dec.ny.gov/hearings/35003.html).

In 2007, SMI voluntarily entered into a "Host Community Agreement" with the Town of Seneca Falls (the "Town") which provides that SMI:

> shall not operate a solid waste management facility at the site or within the Town of Seneca Falls or seek lateral or vertical expansion of its Facility to treat, store dispose or transport solid waste after the year 2025 unless and until a new or

> amended host community agreement is entered into between the Town of Seneca Falls and Seneca Meadows (see Affirmation of Douglas H. Zamelis, affirmed January 6, 2020, Exhibit "F").

Through 2014, 2015, 2016 and continuing into 2017, SMI reported to and filed with NYSDEC and the Town hundreds of odor complaints SMI had verified at local schools, homes, and businesses in and around the Town resulting from SMI's waste disposal activities and facility (see Aff. of Zamelis, Exh. "C"). At public hearings on May 3 and November 30, 2016, and at various other public meetings including a public forum on September 28, 2016, the Seneca Falls Town Board (the "Town Board") received extensive testimony from members of the public complaining of persistent, pervasive and pernicious odors emanating from SMI's waste disposal facility (see Affirmation of Scott M. Turner affirmed November 22, 2019, Exhibits "B", "C", and "E"). The minutes of the regular meeting of the Town Board held May 3, 2016 confirm SMI Manager Kyle Black conceded "controlling odors is our top priority" and acknowledged that "they understand they need to fix it" (see Aff. of Turner, Exh. "C"). The minutes of the public hearing of the Town Board held November 30, 2016 indicate SMI Manager Kyle Black "acknowledged there is an odor issue" (see Aff. of Turner, Exh. "E").

Local Law #3 of 2016 ("Local Law #3") was adopted by the Town Board on November 6, 2016 and was filed by the New York State Department of State ("NYSDOS") on December 30, 2016 (see Aff. of Zamelis, Exh. "B"). Local Law #3 at Section VII entitled "Coordination with State Law" provides, among other things:

> A. All relevant sections of Article 27 of the ECL and 6 NYCRR Parts 360 to 364 and 617, are deemed to be included within and part of this Local Law, and any violation thereof shall be considered to constitute a violation of this Local Law.

> B. The provisions of this Local law shall be interpreted in such a manner as being consistent with state law, except that the more stringent requirements of this Local Law shall apply (see Aff. of Zamelis, Exh. "B", p. 7).

"On February 3, 2017, SMI timely filed a CPLR Article 78 proceeding and declaratory judgment action challenging the Local Law [#3] (the "Original Proceeding")" (see Aff. of Turner, Exh. "A", p. 1, ¶ 3). SMI commenced the instant hybrid Article 78 proceeding and declaratory judgment action on November 16, 2019 (see Aff. of Zamelis, Exh. "G"). On May 5, 2017, the Town Board adopted Local Law #2 of 2017 ("Local Law #2") which rescinded Local Law #3 (see Aff. of Turner, Exh. "7" to Exh. "H"). On June 7, 2017, Waterloo Contractors, Inc. filed and commenced an Article 78 proceeding in Seneca County Supreme Court against the Town Board challenging the adoption of Local Law #2 (see Aff. of Turner, Exh. "A", p. 2, ¶ 6). One week after Waterloo Contractors, Inc. had filed its Article 78 proceeding challenging the adoption of Local Law #2, SMI on its own volition "filed a voluntary discontinuance without prejudice on June 14, 2019" (see Aff. of Turner, Exh. "A", p. 2, ¶ 5).

The invalidation and annulment of Local Law #2 of 2017 ("Local Law #2") by this Court was reported in the press on September 19, 2017 (see *Matter of Waterloo Contrs., Inc. v Town of Seneca Falls Town Bd.*, 2017 N.Y. Misc. LEXIS 3540, 2017 NY Slip Op 31977(U) (Sup. Ct. Seneca Co.); see also https://www.fltimes.com/news/judge-annuls-local-law-for-seqra-violation/article_2021e34b-aac6-5ab2-83d1-7aad84c98f23.html; see also Aff. of Zamelis, Exh. "D"). On October 31, 2017, NYSDEC issued a renewal Part 360 Solid Waste Management Facility Permit ("Part 360 Permit") to SMI for only 8 additional years of operation instead of the 10 year renewal permit SMI had applied for and sought (see

http://www.senecameadows.com/pdfs/NYCRRPart360FacilityPermit-20251231.pdf; see also Aff. of Zamelis, Exh. "E").

ARGUMENT

POINT I

SMI'S PROCEDURAL CLAIMS ARE TIME BARRED

SMI's claims pertaining to the procedures by which Local Law #3 was adopted are untimely and should be dismissed, however Intervenors reserve their rights, if necessary, to further argue how and why SMI's procedural claims lack merit.

"It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(5), the defendant bears the burden of establishing by prima facie proof that the Statute of Limitations has elapsed" and "[o]nce the defendant has met this threshold requirement, 'the burden shifts to the [plaintiff] to aver evidentiary facts establishing that the case at hand falls within [an exception to the statutory period].'" *Siegel v. Wank*, 183 A.D.2d 158, 159 (3rd Dept. 1992), citing *Hoosac Val. Farmers Exch. v AG Assets,* 168 AD2d 822, 823 (3rd Dept. 1990). There is no "obligation on the moving party's part to negate any or all exceptions that might apply to the statutory period." *Hoosac Val. Farmers Exch*., *supra* at 823.

"When the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an article 78 proceeding." *Save the Pine Bush, Inc. v. Albany*, 70 N.Y.2d 193, 202 (1987) citing *Voelckers v. Guelli*, 58 N.Y.2d 170 (1983). CPLR Section 217(1) provides in pertinent part "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding . . .".

"Where the issue is not the 'wisdom or merit' of the legislative act, relief may be had in a CPLR article 78 proceeding and the four-month statute of limitations is, therefore, controlling." *P & N Tiffany Props., Inc. v. Village of Tuckahoe*, 33 A.D.3d 61, 64 (2nd Dept. 2006).

Here, Local Law #3 became effective and the statute of limitations commenced running on December 30, 2016 when it was filed by NYSDOS. The four-month limitation period prescribed by CPLR Section 217(1) therefore expired on April 30, 2017. The instant proceeding was commenced on November 16, 2017, more than half a year after the applicable limitation period had expired. SMI's first, second and fourth causes of action pertain to procedures utilized by the Town Board in adopting Local Law #2[1], they can and have been asserted as Article 78 claims, they were interposed long after CPLR Section 217(1)'s four-month limitation period had expired, and they must be dismissed as untimely.

Given the *prima facie* evidence that SMI's Article 78 claims were asserted many months after the applicable four-month limitation period expired, the burden shifts to SMI to demonstrate that the limitation period was for some reason tolled, which, upon information and belief, it cannot do. It can't be overlooked that SMI concedes it initially commenced a timely proceeding challenging Local Law #3, but *voluntarily discontinued* the "Original Proceeding", as SMI refers to it, following the adoption of Local Law #2. Having previously filed the Original Proceeding within four months of the filing of Local Law #3, SMI, a large, closely counseled and sophisticated business corporation doing millions of dollars of business each year, knew or

[1] SMI's third cause of action alleges a denial of its due process rights which is a substantive claim, and its fourth cause of action is a vague and unspecified "John Doe" procedural claim which is not properly pled and should be disregarded.

should have known that Local Law #2 was potentially subject to challenge within four months of its filing with NYSDOS. Instead of prudently waiting out the four-month limitation period following the adoption and filing of Local Law #2 before discontinuing the Original Proceeding, SMI *voluntarily discontinued* its Original Proceeding before the limitation period to challenge Local Law #2 had elapsed. SMI concedes that one week after Waterloo Contractors, Inc. had filed an Article 78 proceeding challenging the adoption of Local Law #2, it "filed a voluntary discontinuance without prejudice on June 14, 2019" (see Aff. of Turner, Exh. "A", p. 2, ¶ 5).[2] The Court need not, and should not, create a brand-new exception to the statute of limitations doctrine to now resurrect stale claims which were voluntarily but prematurely discontinued by a sophisticated and closely counseled business entity.

Even if SMI's procedural claims had been timely interposed, which they weren't, they should nevertheless be dismissed based on documentary evidence and/or failure to state a cause of action. With respect to SMI's erroneous allegation that the Town Board failed to comply with SEQRA in the adoption of Local Law #3, the record would confirm and Intervenors reserve their right to argue that the Town Board completed and accepted Parts 1 and 2 of the Environmental Assessment Form, and that the full text of the resolution adopting the Negative Declaration was read aloud prior to being voted on and adopted by the Town Board. As such, the Town Board documented that it reasonably identified the relevant areas of environmental concern in connection with the proposed adoption of Local Law #3, took the required "hard look", and provided a written, reasoned elaboration as to the basis of its determination, all as required by 6

[2] Having filed *a voluntary discontinuance* of its "Original Proceeding", CPLR Section 205(a) can't now resuscitate SMI's now expired claims.

NYCRR Section 617.7(b) and *H.O.M.E.S. v. New York State Urban Dev. Corp*., 69 A.D.2d 222, 232 (4th Dept. 1979). With regard to SMI's specious claims that Town Board Member Lutz was improperly biased, it is indisputable that Ms. Lutz was a member of the legislative Town Board. The expression of opinion by elected officials "on matters of public concern is to be encouraged, not penalized" *Matter of Pittsford Canalside Props., LLC v Village of Pittsford*, 137 A.D.3d 1566, 1568 (4th Dept. 2016), citing *Matter of Byer v Town of Poestenkill*, 232 A.D.2d 851, 853 (3rd Dept. 1996) and *Webster Assocs. v Town of Webster*, 59 N.Y.2d 220, 227 (1983). Further, as established by the Affidavit of William C. Lutz sworn to December 20, 2019, Ms. Lutz, now deceased, was not an owner of Waterloo Contractors, Inc. during the relevant period, and SMI makes no allegation that she stood any material or pecuniary gain relative to the adoption of Local Law #3.

SMI's ill-considered decision to voluntarily discontinue its "Original Proceeding" after a timely challenge to Local Law #2 had been filed was its undoing, and now SMI has nobody but itself to blame for relegating all its procedural challenges to Local Law #3 to the proverbial trash heap.

POINT II

SMI'S BURDEN OF PROOF ON ITS SUBSTANTIVE CLAIMS IS INSURMOUNTABLE

The Court of Appeals held in *Lighthouse Shores, Inc. v. Islip*, 41 N.Y.2d 7, 11-12 (1976):

> The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality. The ordinance may not be arbitrary. It must be reasonably related to some manifest evil which, however, need only be reasonably apprehended. It is also presumed that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability

> of the ordinance, and, if any state of facts known or to be assumed, justifies the disputed measure, this court's power of inquiry ends. Thus, as to reasonableness, plaintiffs in order to succeed have the burden of showing that "no reasonable basis at all" existed for the challenged portions of the ordinance.

"That a legislative enactment will be presumed constitutional is an elementary but significant principle of law. The strength of this presumption, sometimes underestimated, has been repeatedly underscored by the courts of this State". *Marcus Assocs., Inc. v. Huntington*, 45 N.Y.2d 501, 506-507 (1978). "In scrutinizing a particular piece of legislation, courts must pay heed to their limited role, and scrupulously avoid entering into the legislative realm under the guise of constitutional interpretation, (see *South Carolina Highway Dept. v Barnwell Bros*., 303 U.S. 177, 191)." *Id*. In order to prevail on its substantive due process claim, SMI must show, among other things, that Local Law #3 bears no rational relation to a valid local objective. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978).

In *Wiggins v. Somers*, 4 N.Y.2d 215, 221 (1954) the Court of Appeals recognized that a) "Garbage is a deleterious substance (*City of Rochester* v. *Gutberlett*, 211 N.Y. 309, 318), and garbage dumps emit obnoxious fumes (6 McQuillin on Municipal Corporations, § 24.58, p. 571)"; b) that "the fact that such an operation is subject to sanitation regulations does not alter the inescapable fact that garbage dumps, no matter how carefully controlled, present some hazard to a community"; and c) "[t]he town was not required to defer enactment of the ordinance until it was faced with a serious nuisance or health problem . . . but it was entitled to act upon apprehension of danger . . . " (citations omitted).

The Court of Appeals has also held "Legitimate governmental goals are those which in some way promote the public health, safety, morals, or general welfare." *Marcus Assocs., Inc.*, *supra* at 506. In adopting Town Law Section 130(6), the legislature specifically authorized towns

to adopt ordinances "[p]rohibiting and/or regulating the use of any lands within the town as a dump or a dumping ground." Additionally, as argued below, Environmental Conservation Law ("ECL") Section 27-0711 specifically disclaims any intent to supersede local regulation of solid waste, and it allows local governments to regulate solid waste so long as such regulations aren't inconsistent with the state statute.

A "complete prohibition" of solid waste management facilities by a town "is not per se unreasonable; the ordinance must be scrutinized to determine whether it is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *La Grange v. Giovenetti Enterprises, Inc*., 123 A.D.2d 688, 689 (2nd Dept. 1986) quoting *Berenson v Town of New Castle*, 38 N.Y.2d 102, 107 (1975). A town's "interest in limiting the number of acres in the Town which are used for sanitary landfills cannot be characterized as insubstantial". *Al Turi Landfill, Inc. v. Goshen*, 556 F. Supp. 231, 238 (SDNY 1982).

Drawing on federal precedents, the Court of Appeals has established a two-part test for substantive due process violations in the land use context: "[f]irst, claimants must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction'"; and "[s]econd, claimants must show that the governmental action was wholly without legal justification." *Bowers Assocs. v. Town of Pleasant Valley,* 2 N.Y.3d 617, 627 (2004), citing *Town of Orangetown v Magee* 88 N.Y.2d 41, 52-53 (1996). In *Bowers Assocs.* at p. 628 the Court of Appeals explained:

> Federal courts elaborating on the first element of the test have noted that it should be applied "with considerable rigor" (*RRI Realty Corp. v Inc. Vil. of Southampton*, 870 F.2d 911, 918 [2d Cir 1989]). Even if "objective observers would estimate that the probability of [obtaining the relief sought] was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest" (*id.*). Beyond a vested property right arising from substantial expenditures pursuant to a lawful permit (as in *Magee*), a legitimate claim of entitlement to a permit can exist only where there is either a "certainty or a very strong likelihood" that an application for approval would have been granted (*Harlen Assoc. v Inc. Vil. of Mineola*, 273 F.3d 494, 504 [2d Cir 2001]). Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion "is so narrowly circumscribed that approval of a proper application is virtually assured" (*Villager Pond, Inc. v Town of Darien*, 56 F.3d 375, 378 [2d Cir 1995]; *see also Natale v Town of Ridgefield*, 170 F.3d 258, 263 [2d Cir 1999]; *Walz v Town of Smithtown*, 46 F.3d 162, 168 [2d Cir 1995]).

The Court of Appeals in *Bowers Assocs*. continued at pp. 628-629:

> As for the second element of the test, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense" (*City of Cuyahoga Falls, Ohio v Buckeye Community Hope Found.*, 538 U.S. 188, 198, 155 L. Ed. 2d 349, 123 S. Ct. 1389 [2003] [internal quotation marks omitted]; *see also Harlen*, 273 F.3d at 501 [board action based on community opposition is not unconstitutionally arbitrary "if the opposition is based on legitimate state interests such as, *inter alia*, traffic, safety, crime, community pride, or noise" (internal quotation marks omitted)]; *Natale*, 170 F.3d at 263 ["(s)ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority"]; *Lisa's Party City, Inc. v Town of Henrietta*, 185 F.3d 12, 17 [2d Cir 1999] [where town acted in accordance with a legitimate concern, it cannot be said to have acted "in an outrageously arbitrary manner so as to violate (plaintiff's) substantive due process rights"]).
>
> The two-part test strikes an appropriate balance between the role of local governments in regulatory matters affecting the health, welfare and safety of their citizens, and the protection of constitutional rights "at the very outer margins of municipal behavior. It represents an acknowledgment that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government" (*Zahra v Town of Southold*, 48 F.3d 674, 680 [2d Cir 1995]).

Here, SMI cannot possibly overcome Local Law #3's very strong presumption of constitutionality given the Town's broad statutory authority and the overwhelming record of impacts and problems from SMI's facility, particularly nuisance odors and truck traffic, in the years leading up to the adoption of the local law. Even if SMI's claims of vested rights didn't rest on very shaky ground, which as argued below they certainly do, SMI's own papers establish its manager Kyle Black conceded before the Town Board that SMI was responsible for nuisance odors -- a pervasive evil. Voluminous written reports show that SMI verified hundreds of odor complaints around its facility in 2014, 2015, 2016, and 2017, and the Town Board heard extensive public hearing testimony concerning odors, traffic and other adverse impacts from SMI's facility. Local Law #3 therefore represents the Town Board's reasonable effort to use its broad legislative police powers to abate the evil that SMI's persistent, pervasive and pernicious odors had created in and around the Town. Indeed, this Court's Decision and Order striking down Local Law #2 focused on, among other things, the Town Board's failure to take a "hard look" at impacts from repealing Local Law #3, including odor. As such, SMI fails to state a cause of action, and its due process claims can be dismissed on documentary evidence included in SMI's own papers.

Application of the well-established two-part test for due process claims in the land use context to the facts of this case leaves no doubt that SMI's due process claim must fail. The Court could proceed directly to the second prong of the test and simply find that Local Law #3 is an authorized, rational and reasonable legislative act to address the persistent, pervasive and pernicious odors from SMI's facility. However, even a cursory examination reveals that SMI's

alleged vested rights are illusory, as not only is there no assurance that SMI will receive permits to operate beyond 2025, it's downright doubtful.

The Host Community Agreement with the Town voluntarily entered into by SMI in 2007 included at Section 4(E) the following restriction:

> Seneca Meadows will not operate a solid waste management facility at the site or within the Town of Seneca Falls or seek vertical or lateral expansion of its Facility to treat, store, dispose, or transport solid waste after the year 2025 unless and until a new or amended host community agreement is entered into between the Town and Seneca Meadows.

SMI is authorized to operate its waste disposal facility in accordance with a permit from NYSDEC pursuant to 6 NYCRR Part 360. In its most recent application to renew its Part 360 Permit, SMI applied to NYSDEC for authorization to operate for a ten-year period, i.e. until 2027. However, in 2017 NYSDEC renewed SMI's Part 360 Permit for only eight years instead of ten, thereby allowing SMI to operate under its current Part 360 Permit only until 2025. NYSDEC's determination to renew SMI's Part 360 permit for only eight years instead of ten was actually issued on October 31, 2017, a month and a half after news of this Court's decision striking down Local Law #2 was reported in the *Finger Lakes Times* on September 19, 2017. Upon information and belief, SMI did not seek an administrative hearing before NYSDEC to challenge the agency's decision to renew the Part 360 Permit for eight years instead of ten, and the time to do has long since passed.

SMI also operates pursuant to a permit from the Town issued pursuant to Chapter 185 of the Seneca Falls Town Code (the "Town Code"). The Town Code provides at Section 300-26(B) "No use within any district shall emit an odor that is unreasonably offensive as measured at the

property line of the use", and at Section 300-26(G) "No discharge beyond lot lines of any toxic or noxious matter in such quantity as to be detrimental to or endanger the public health, safety, comfort or welfare, or cause injury or damage to property or business, shall be permitted." SMI's own papers, public hearing testimony, and the hundreds of odor complaints verified by SMI itself establish beyond cavil that SMI has been operating in blatant violation of the Town Code, placing SMI's Chapter 185 permit from the Town in considerable jeopardy.

The HCA, Local Law #3 and SMI's current Part 360 Permit all converge at 2025[3], and since it is highly questionable whether NYSDEC or the Town will renew their respective authorizations under state and local law to allow SMI to operate beyond 2025, SMI's rights to operate after 2025 certainly can't be considered vested under the rigorous standard prescribed and applied by federal courts and the courts of this state.

More likely than not, discovery would show, among other things, that SMI has not only recouped its investments, but generated revenue in excess of costs and expenses after decades of operation. Considering SMI has been operating continuously in Seneca Falls for some three decades, the facts and circumstances of this proceeding are appreciably different than and easily distinguishable from those in *Town of Orangetown v. Magee*, *supra*, where the developer had expended substantial sums only to have its authorizations revoked before the developer had any chance to even begin to recoup its substantial investment. Further distinguishing this case is that Local Law #3 didn't immediately prohibit waste disposal on and after its effective date, it

[3] In 2007, SMI's Part 360 Permit was set to expire in 2009, and NYSDEC then authorized an expansion of SMI's waste disposal facility to allow for approximately 14 more years of operation at then current disposal rates, i.e. until approximately 2023.

allowed solid waste disposal in the Town for an additional nine years (now five), allowing SMI a rather reasonable period of time to amortize its investments and wrap-up its operations.

But even assuming just for the sake of argument that SMI can demonstrate a vested right, the second prong of the test which requires that SMI establish beyond a reasonable doubt that Local Law #3 is an arbitrary exercise of the Town Board's extensive police powers is simply a bridge too far in the face of SMI's own admissions concerning its odor problems, the extensive public hearing and meeting testimony concerning odors from SMI's facility, the hundreds of verified odor complaints reported to NYSDEC and the Town by SMI, and the very text of Local Law #3.

SMI admitted to the Town Board on multiple occasions it was causing nuisance odors, and that could probably end the Court's inquiry right there. Kyle Black, SMI's Manager conceded before the Town Board on May 3, 2016 that "controlling odors is our top priority" and that he knew "they need to fix it" (see Aff. of Turner, Exh. "C"). In an interview live streamed on May 19, 2016, Kyle Black actually apologized to the communities of Seneca Falls and Waterloo for odors caused by SMI (see https://www.youtube.com/watch?v=FnUjlqAHOvU at 13 min., 25 sec.). On November 30, 2016, Mr. Black told the Town Board that "he acknowledged there is an odor issue" (see Aff. of Turner, Exh. "E"). These statements by SMI's manager bear all the hallmarks of reliable admissions against interest, and SMI shouldn't now be heard to complain about the Town Board's reasonable legislative action to address the impacts from waste disposal activities, including the persistent, pervasive and pernicious odors in and around the Town of Seneca Falls.

Even if Mr. Black had not undermined SMI's present claims by his candid and forthright admissions, the extensive public hearing and meeting testimony in SMI's own papers, and the scads of odor complaints confirmed by none other than SMI itself provide ample documentation of the offensive odors emanating from SMI's facility in the years leading up to the adoption of Local Law #3. A review of the black and white minutes of the Town Board's public hearings and meetings gives a reader only a glimpse into the emotion, anguish and frustration expressed by members of the public, or the degree that impacts from waste disposal affect the residents of the Town and surrounding communities. The hundreds of verified and documented odor complaint reports compiled by SMI and filed with NYSDEC and the Town Board in 2014, 2015 and 2016 leading up to the adoption of Local Law #3 are, for lack of more descriptive words and without exaggeration, head-spinning. SMI confirmed and documented that its waste disposal facility was causing odors in schools, a retirement home, government buildings, several businesses including hotels, and in so many people's homes that they can't and shouldn't be listed here. Some people complained of odors repeatedly and had their complaints verified repeatedly, only to receive a boilerplate report from SMI indicating its response was to adjust its odor control equipment. The verified odor complaints, which are public records, are also admissions against SMI's interests and speak loudly for themselves, so Intervenors will resist the temptation to further detail them *ad nauseum* here.

And if SMI's admissions, the public testimony, and the verified odor complaints weren't enough, the text of Local Law #3 should put the lid on SMI's meritless due process claim. Section 2 of Local Law #3 entitled "Findings" asserts, among other things, that "[p]resent solid waste management activities in the Town of Seneca Falls generate offensive and unreasonable

odors which affect substantial portions of the Town of Seneca Falls, resulting in regular and numerous complaints to the Town of Seneca Falls", "[p]resent solid waste management activities in the Town of Seneca Falls also generate substantial amounts of truck traffic which presents safety threats to motorists, pedestrians and others in and travelling through the Town of Seneca Falls", "an environment of odor, air pollution, traffic, noise and dust from solid waste management activities is incompatible with the Town of Seneca Falls' important position as the home of its residents, home of the Women's Rights Movement, and gateway to the Finger Lakes", and "[t]he health, safety and welfare of the residents of the Town of Seneca Falls is of paramount importance and concern, and would be better served by restricting the operation of solid waste management activities within the Town of Seneca Falls in order to promote a clean, wholesome and attractive environment for community and future generations".

Local Law #3 was closely modeled on the Town of Carroll's waste disposal law which withstood scrutiny at the Fourth Department and remains in effect, and Local law #3 rests on a factual and legal foundation as solid as bedrock. So even if SMI had vested rights, which Intervenors strongly contest, SMI's claims that Local Law #3 is not a reasonable or rational exercise of the Town Board's police powers are unpersuasive and can be promptly discarded and disposed of by the Court.

POINT III

LOCAL LAW #3 IS NEITHER PREEMPTED NOR SUPERSEDED

The last point in SMI's memorandum of law alleges that Local Law #3 is preempted by ECL Section 27-0711, even though no such allegation appears in SMI's petition/complaint (see Aff. of Turner, Exh. "A"). Not only is SMI arguing an allegation not actually alleged in its

petition/complaint, SMI has failed to bring to the Court's attention controlling statutory and judicial authority that ECL Section 27-0711 *certainly does not preempt or supersede local legislation* such as Local Law #3, but rather is intended to work in concert with local regulations which aren't inconsistent with the state law. Stated simply, if Local Law #3 allowed waste disposal in Seneca Falls in a manner otherwise prohibited by state law, Local Law #3 would be inconsistent with state law, but it doesn't. Local law #3 is consistent with state law because it prohibits solid waste disposal otherwise permitted by state law. SMI's failure to bring to the Court's attention the following controlling authority is an oversight at best, or an attempt to mislead the Court at worst.

Title 7 of Article 27 of the ECL is entitled "Solid Waste Management and Resource Recovery Facilities" and ECL Section 27-0711 entitled "Local Laws, Regulations and Ordinances" provides in relevant part:

> Any local laws, ordinances or regulations of any governing body of a county, city, town or village *which are not inconsistent with this title or with any rule or regulation which shall be promulgated pursuant to this title shall not be superseded by it*, and *nothing in this title or in any rule or regulation which shall be promulgated pursuant to this title shall preclude the right of any governing body of a county, city, town or village to adopt local laws, ordinances or regulations which are not inconsistent with this title or with any rule or regulation which shall be promulgated pursuant to this title . . .. Any local laws, ordinances or regulations of a county, city, town or village which comply with at least the minimum applicable requirements set forth in any rule or regulation promulgated pursuant to this title shall be deemed consistent with this title or with any such rule or regulation* (emphasis added).

As argued above, Town Law Section 130(6) also broadly authorizes towns to adopt regulations "[p]rohibiting and/or regulating the use of any lands within the town as a dump or dumping grounds".

"Indeed, where local government is otherwise authorized to act, it will be prohibited from legislating on a subject only if the State pre-empts the field through legislation evidencing a State purpose to exclude the possibility of varying local legislation." *Monroe-Livingston Sanitary Landfill, Inc. v. Caledonia,* 51 N.Y.2d 679, 683 (1980), citing *People v Cook*, 34 N.Y.2d 100, 109 (1974). The Court of Appeals in *Monroe-Livingston Sanitary Landfill, Inc.* found that:

> In fact *the statute in express terms disclaims any State purpose to either supersede or preclude the enactment of local ordinances so long as they are consistent 'with at least the minimum applicable requirements' of those regulations promulgated by the statute* (ECL 27-0711) and speaks specifically, *not of the preclusion, but rather the inclusion of local government in the planning and control of problems endemic to waste management* (ECL 27-0101, subds 1, 2; 27-0703, subd 3; 27-0707, subds 3, 4)(emphasis added).

"Where there is no pre-emption by State law, a local law 'may [not] be said to be inconsistent with [the] State law [merely] because it prohibits something which the State law would consider acceptable'" *Niagara Recycling, Inc. v. Niagara,* 83 A.D.2d 316, 330 (4th Dept. 1981), *quoting Monroe-Livingston Sanitary Landfill*, *supra* at 683. The "State did not intend to preempt this field, and has explicitly delegated to municipalities broad powers to manage their own waste problems. Those sections of the Solid Waste Management Act absorbed into the Environmental Conservation Law offer no suggestion that they should so overtake the field as to preempt local legislation." *Town of Concord v. Duwe*, 4 N.Y.3d 870, 873 (2005). The Court of Appeals in *Town of Concord* at pp. 873-874 aptly noted:

> In 1988, eight years after our decision in *Monroe-Livingston*, the Legislature added the Solid Waste Management Act to the Environmental Conservation Law. Had the Legislature intended to preempt the local regulation of solid waste management, it could have done so in the 1988 Act. The Legislature's silence in this regard is continuing assurance that the State has not preempted local legislation of issues related to municipal solid waste management.

Section V(A) of Local Law #3 provides that "Unless provided below or the context otherwise requires, the terms and words used in the Local Law shall have the same meanings as those defined in Article 27 of the ECL and Title 6, Parts 360 to 364 and 617, of the Official Compilation of New York Codes, Rules and Regulations." Local Law #3 further confirms at Section VII entitled "Coordination with State Law" that:

> A. All relevant provisions of Article 27 of the ECL and 6 NYCRR, Parts 360 to 364 and 617, are deemed to be included within and as part of this Local Law and any violation thereof shall be considered a violation of this law.
> B. The provisions of this Local Law shall be interpreted in such a manner as being consistent with state law, except that the more stringent requirements of this Local Law shall apply.

As pointed out above, this Court's Decision and Order striking down Local Law #2 was reported in the Finger Lakes Times on September 19, 2019, and then several weeks later on October 31, NYSDEC renewed SMI's permit for a term of eight years instead of the ten years SMI had applied for, allowing SMI to operate until 2025. That SMI's current Part 360 Permit and Local Law #3 both provide for operations until 2025 is no coincidence.

Local Law #3 is therefore entirely consistent with ECL Section 27-0711 and Town Law Section 130(6). Local Law #3 is a valid legislative exercise of the Town Board's police powers in understandable response to a clear and obvious evil, including persistent, pervasive and pernicious odors and other adverse impacts from waste management activities, and is not preempted or superseded by state statute.

CONCLUSION

SMI's attempt to resurrect time-barred procedural claims concerning the adoption of Local Law #3 is an exercise in futility and must fail because this proceeding was commenced more than four months following the filing of the local law by NYSDOS. SMI's claim of vested rights rings hollow in light of the 2007 HCA (which SMI entered into voluntarily) and SMI's current Part 360 Permit, and when examined in the context of SMI's admissions, the extensive public testimony, and the staggering volume of odor complaints verified by SMI itself, the text of Local Law #3 regulating solid waste management activities in Seneca Falls reflects what is a reasonable and rational legislative exercise of the Town Board's broad police power in response to obvious and documented evils therefrom. Local Law #3, modeled closely on the Town of Carroll's waste disposal law, does not allow what the state law prohibits and is by no means preempted or superseded by state law because it is consistent and works in concert with applicable state law. For the foregoing reasons, it is respectfully requested that Intervenors' motion to dismiss be granted pursuant to CPLR Rule 3211(a)(1), (5) and (7).

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Respectfully submitted,

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