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,
TOWN OF SENECA FALLS TOWN BOARD,
CONCERNED CITIZENS OF SENECA COUNTY, INC., and DIXIE D. LEMMON

Respondents-Defendants,

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

Hon. Daniel J. Doyle

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS-DEFENDANTS TOWN OF SENECA FALLS' AND TOWN OF SENECA FALLS TOWN BOARD'S MOTION TO DISMISS

Index No. 51652

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PRELIMINARY STATEMENT

Respondents-Defendants Town of Seneca Falls and Town of Seneca Falls Town Board (collectively, "Town" or "Respondents") submit this Memorandum of Law in support of their Motion to Dismiss the Verified Petition/Complaint ("Petition") of Seneca Meadows, Inc. ("SMI" or "Petitioner"), which seeks to annul and vacate Respondent Town Board's Local Law #3 of 2016 entitled "Waste Disposal Law" ("Local Law #3").

The underlying issue in this proceeding is the Town's lawful adoption of a local law, Local Law #3, pursuant to its police powers, which had the stated purpose and intent to, among other things, protect the health, safety, and welfare of Town residents from the severe ongoing and unmitigated effects of solid waste management activities in the Town, in particular, noxious and pervasive odors associated with such activities.

The Petition purportedly challenges the adoption of Local Law #3 but suffers from several fatal flaws and must be dismissed. Firstly, the Petition must be dismissed because it is barred by the statute of limitations. Alternatively, Petitioner's claims are barred by the documentary evidence and/or fail to state a claim for which relief can be granted: that Respondents failed to comply with the New York State Environmental Quality Review Act ("SEQRA") in the adoption of Local Law #3; that the adoption of Local Law #3 was void due to bias; or that Local Law #3 violates SMI's constitutional due process rights. [1]

For the foregoing reasons, as set forth fully below, Respondents' motion should be granted, and the Petition should be dismissed in its entirety.[2]

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[1] Petitioner argues the issue of state preemption of Local Law #3 in its Memorandum of Law. Pet. Mem. at 23, however, the Petition contains no such separate cause of action, nor is preemption alleged as part of Petitioner's Third Cause of Action challenging the constitutionality of Local Law #3. Accordingly, Respondents' motion does not address preemption but reserves the right to do so on the merits at a later time.

[2] Respondents also join in and incorporate by reference the arguments submitted by Respondents-Defendants Dixie Lemmon and Concerned Citizens of Seneca County in support of the motion to dismiss, to the extent they are consistent with those made herewith.

BACKGROUND AND PROCEDURAL HISTORY

I. The Town Considers a Local Law to Protect its Citizens From Continuous and Pervasive Noxious Odors and Other Adverse Effects of Solid Waste Management Operations.

Petitioner operates a solid waste management facility ("Seneca Meadows" or the "Landfill") that is located within the Town. Pet. ¶ 15. The Landfill was – and continues to be – a significant source of concern for many Town residents. On many occasions, and for many months prior to April 2016 and continuing through the present, Town residents have filed complaints about the Landfill. Many of these complaints centered on the noxious and pervasive odors that continue to emanate from the Landfill to this day. Hou Affirm., Exs. "A" through "H". In April 2016, in response to these complaints, and in order to protect the health, safety, and well-being of its citizens, the Town began to consider the first draft of a local law ("First Draft") under its police powers as permitted under the New York Municipal Home Rule Law and Town Law to restrict waste disposal operations within the Town. Pet. ¶¶ 18-19, Ex. 1.

The First Draft contained a Findings section in which the Town recognized that, among other things, the New York Environmental Conservation Law invites local governments to establish stricter standards as may be necessary to promote and protect the well-being, health, and safety of their citizens; that the existing solid waste management activities in the Town generate offensive and unreasonable odors which affect substantial portions of the Town, resulting in regular and numerous complaints; and that the health, safety and welfare of Town residents would be better served by restricting the operation of solid waste management facilities within the Town. *Id.* The First Draft exempted existing solid waste management facilities that were operated under any pre-existing Department of Environmental Conservation ("DEC") permit. *Id.* Petitioner's DEC permit for the Landfill was set to expire on October 1, 2017; Petitioner had previously

indicated to the DEC that the Landfill had a projected site life until 2024, based on existing conditions. Hou Affirm., Ex. "K".

A public hearing was scheduled on the First Draft for June 7, 2016, but the public hearing was adjourned at Petitioner's request to allow it additional time to prepare and submit comments. Pet. ¶¶ 20-21. The public hearing on the First Draft was subsequently rescheduled to September 28, 2016. *Id.* ¶¶ 21-22. Petitioner then requested that the public hearing be further adjourned to mid-October to allow it additional time to prepare and submit comments. *Id.* ¶ 23.

II. The Local Law is Amended, Reviewed Under SEQRA, and Adopted.

On November 10, 2016, a revised draft of the local law was distributed to the Town Board members and a public hearing was scheduled for the proposed revised local law for November 30, 2016. *Id.* ¶¶ 27–28. The draft local law had been amended to include, among other things, additional findings regarding odors, as well as a clarification that existing solid waste management facilities were exempt so long as the facilities continued to abide by the terms of any valid DEC permit and any applicable Host Community Agreement, but in any event such operations could not extend beyond December 31, 2025. *Id.* Ex. 3. Other than allowing existing solid waste management facilities to extend operations until December 31, 2025 at the latest, the amended local law did not otherwise change the purpose, intent, implementation, or enforcement of the local law as it was originally proposed. *Id.* Exs. 1, 3.

On November 30, 2016, the Town held the public hearing on Local Law #3, at which time many residents spoke in favor of it, and Petitioner and others also spoke against it. *Id.* ¶¶ 32-33. At the conclusion of the public hearing, the Town Board conducted an environmental review pursuant to SEQRA by considering Parts I and II of the Environmental Assessment Form ("EAF"). Hou Affirm. Exs. "H", "I". The Town Board reviewed, discussed, and answered each question of

the EAF in turn, and upon guidance from the Town Attorney. *Id.* The Town Board adopted a resolution to adopt Parts I and II of the EAF, designated itself as lead agency, and then approved a resolution to adopt a Negative Declaration of environmental significance for the Local Law. *Id.* On December 6, 2016, the Town Board passed a resolution to adopt Local Law #3. *Id.* Ex. "J".

III. Petitioner Voluntarily Discontinues its Original Proceeding.

On or about February 3, 2017, Petitioner commenced a CPLR Article 78 proceeding and declaratory judgment action challenging Local Law #3 (the "Original Proceeding"). *Id.* Ex. "N". On May 5, 2017, while the Original Proceeding was pending, the Town adopted Local Law #2 of 2017 ("Local Law #2") which repealed Local Law #3. Pet. ¶ 4. **However, on June 7, 2017, Waterloo Contractors, Inc. commenced an Article 78 proceeding challenging the adoption of Local Law #2 (the "Waterloo Action"). Despite knowing full well of the possibility that the Waterloo Action may invalidate Local Law #2 and thereby reinstate Local Law #3, Petitioner voluntarily discontinued the Original Proceeding on June 14, 2017. *Id.* ¶ 5.** On September 13, 2017, Hon. William F. Kocher, Acting Supreme Court Justice, issued a decision annulling Local Law #2; Justice Kocher issued an Order on October 16, 2017 implementing this decision. *Id.* ¶¶ 7-8.

LEGAL ARGUMENT

I. Standards Under CPLR Rule 3211.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a)(7), the Court must "accept[] as true the facts set forth in the complaint and accord[] plaintiff the benefit of all favorable inferences arising therefrom." *Nowlin v. Schiano*, 170 A.D.3d 1635, 1635 (4th Dep't 2019). The central inquiry is "whether the facts as alleged fit within any cognizable legal theory." *Medical Care of Western New York v. Allstate Ins. Co.*, 175 A.D. 878,

879 (4th Dep't 2019); *see also Gilewicz v. Buffalo Gen. Psychiatric (SIC) Unit*, 118 A.D.3d 1298, 1299 (4th Dep't 2014).

Although a plaintiff's complaint must be liberally construed in this context, this lenient standard is not without limits. Indeed, "it is well-settled that bare legal conclusions and factual claims that are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." *Gerrish v. State University of New York at Buffalo*, 129 A.D. 3d 1611, 1612 (4th Dep't 2015) (quoting *Olszewski v. Waters of Orchard Park*, 303 A.D.2d 995, 995 (4th Dep't 2003). Only well-pleaded facts are accepted as true as "assumptions, opinion, speculation or conclusions of law" are not entitled to the "presumption of truth normally afforded to the allegations of a complaint." *Spock v. Pocket Books, Inc.*, 48 Misc. 2d 812, 813 (Sup. Ct. N.Y. Cty. 1965); *see also Fleyshman v. Suckle & Schlesinger, PLLC,* 91 A.D.3d 591, 592-93 (2d Dep't 2012); *Medical Care of Western New York,* 175 A.D. at 879 ("The allegations in a complaint . . . cannot be vague and conclusory, and bare legal conclusions will not suffice.") (internal alterations omitted).

On a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the motion must be granted if the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims." *See Divito v. Meegan*, 156 A.D.3d 1408, 1410 (4th Dep't 2017), *lv. denied*, 31 N.Y.3d 904 (2018).

II. The Petition Must be Dismissed as it is Barred by the Statute of Limitations.

Petitioner's First, Second, and Fourth Causes of Action, insofar as they allege causes of action under CPLR Article 78, are untimely and must be dismissed. It is undisputed that this matter is subject to the four-month statute of limitations provided in CPLR 217, which governs actions challenging procedural aspects of legislative acts. *See Young v. Board of Trustees of Village of*

Blasdell, 221 A.D.2d 975, 977 (4th Dep't 1995) ("The four-month period of limitations for CPLR article 78 proceedings governs challenges to agency actions based on a failure to comply with SEQRA."). *See also Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 202-203 (1987) (holding that where the challenges "involve the City's failure to follow SEQRA . . . . those causes of action were maintainable in an article 78 proceeding and should have been commenced within four months . . . ."); *Schiener v. Town of Sardinia*, 48 A.D.3d 1253, 125 (4th Dep't 2008) (dismissing challenges to procedures followed in enactment of local law as untimely).

Here, the Town adopted Local Law #3 on December 6, 2016 and Local Law #3 was filed by the New York Department of State on December 30, 2016. Therefore, the time to challenge the local law for failure to comply with SEQRA expired at the end of April of 2017. Although Petitioner's Original Proceeding challenging the validity of Local Law #3 was commenced within the appropriate time period, this does not change the unavoidable conclusion that Petitioner's *instant* action is untimely.

Local Law #2 was adopted on May 5, 2017, and immediately repealed Local Law #3. Subsequently, while Petitioner's Original Proceeding was still pending, Waterloo Contractors, Inc. commenced the Waterloo Action, a separate Article 78 proceeding challenging the validity of Local Law #2. One week later, Petitioner voluntarily discontinued its Original Proceeding challenging Local Law #3, presumably on the basis that the Waterloo Action challenging Local Law #2 would not be successful. Unfortunately for Petitioner, Local Law #2 was overturned, effectively reinstating Local Law #3. Petitioner therefore terminated its Original Proceeding challenging Local Law #3 with full knowledge that Local Law #2 may be annulled and Local Law #3 reinstated. Without considering any stipulation to otherwise preserve its rights, Petitioners

simply opted to voluntarily discontinue the Original Proceeding "without prejudice" on June 14, 2017.

The present Petition is identical to the Petition in the Original Proceeding: the Petition challenges the Town's process under SEQRA, the alleged bias of a Town Board member, and alleges that the Town's actions were arbitrary and capricious. These claims, properly asserted in an Article 78 proceeding, are subject to the four-month statute of limitations period, which had expired long before Petitioner's present proceeding was commenced on November 15, 2017. *See Save the Pine Bush*, 70 N.Y.2d at 202-03; *ADM, LLC v. Village of Macedon*, 101 A.D.3d 1717, 1718 (4th Dep't 2012).

The CPLR provides for certain limited circumstances in which a plaintiff may bring the same action twice, and specifically recognizes that statute of limitations issues may be implicated in a plaintiff's subsequent action:

> If an action is timely commenced and is terminated *in any other manner than by a voluntary discontinuance*, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

N.Y. CPLR § 205(a) (McKinney's 2019) (emphasis added). Under this section, however, plaintiffs are expressly prohibited from using the relation-back provision if the original action was terminated by a voluntary discontinuance. *See* N.Y. CPLR § 3217, Commentary C3217:3 (McKinney's 2019) ("The discontinuance of actions, *when made without prejudice*, permits the plaintiff to commence a later action against the same defendant for the same cause or causes of action. *In such instances, the later action must be timely based upon the original accrual date of*

the claim, and the plaintiff does not get the benefit of a six-month extension of the statute of limitations under CPLR 205(a).") (emphasis added); *see also EB Brands Holdings, Inc. v. McGladrey, LLP*, 154 A.D.3d 646, 647–48 (2d Dep't 2017) ("[T]he time extension provisions of CPLR 205(a) are inapplicable when, as here, a prior, timely commenced action was terminated by voluntary discontinuance.").

Here, Petitioner terminated the Original Proceeding by a voluntary discontinuance, and thus, the plain language of CPLR 205(a) prohibits its application to the present case. Additionally, Petitioner terminated its timely action without any attempt to negotiate an agreement pertaining to the statute of limitations. *See, e.g., Gorowitz v. Blumenstein,* 184 Misc. 111, 113 (N.Y. Sup. Ct. N.Y. Cty. 1944) (holding that an agreement to waive the statute of limitations defense between parties is enforceable if executed after the inception of liability).

Nor is there any factual or legal basis for tolling the applicable statute of limitations. *See, e.g., Davis v. Peterson*, 254 A.D.2d 287, (2d Dep't 1998) (dismissing claim as time-barred where there was no allegation or proof that the Town deceived, induced, or lulled petitioner into inactivity to allow the limitations period to expire); *Brooklyn Historic Railway Ass'n v. City of New York,* 126 A.D.3d 837 (2d Dep't 2015) ("[E]quitable estoppel is inapplicable to bar the statute of limitations defense as the plaintiff did not allege any separate and subsequent act of wrongdoing that prevented them from timely bring suit.") .

In sum, Petitioner's untimely Article 78 claims are barred by the statute of limitations and must be dismissed.

III. Petitioner's First Cause of Action Regarding the Town's SEQRA Review of Local Law #3 Must be Dismissed.

The First Cause of Action purports to challenge the Town's SEQRA review procedures in reaching a Negative Declaration for Local Law #3. Petitioner alleges that the timing of the Town

Board's receipt of SEQRA documents and the fact that the Town Board reviewed the EAF for Local Law #3 for the first time and at the same meeting as the public hearing show that the Town failed to take the requisite "hard look" at environmental impacts. Such conclusory allegations, however, fail to state a claim, and must therefore be dismissed.

It is well-settled that a lead agency's substantive review obligations under SEQRA must be viewed "in light of a rule of reason," and "the degree of detail with which environmental factors must be discussed will necessarily vary and depend on the nature of the action under consideration." *See Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996) (citing *Matter of Jackson v. New York State Urban Dev. Corp.* 67 N.Y.2d 400, 417 (1986)).

New York courts have repeatedly held mere allegations that a Town's SEQRA review was "done too quickly" does not necessarily state a claim for SEQRA violation. *See Gernatt Asphalt*, 87 N.Y.2d at 679. The mere fact that the Town Board reviewed the EAF and answered its questions in the negative and did so quickly and at a single meeting does not amount to an actionable claim. *See, e.g., Byer v. Town of Poestenkill*, 232 A.D.2d 851, 855 (4th Dep't 1996), *as amended on reargument* (4th Dep't 1997) (citing *Gernatt Asphalt*, 87 N.Y.2d at 689)).

Local Law #3 was adopted pursuant to the Town's police power authority under the Municipal Home Rule Law and Sections 130 and 136 of the Town Law with the stated purpose of taking action to address persistent and pervasive noxious odors and other adverse environmental impacts caused by solid waste management activities. Pet. Ex. 3. As such, there is no dispute that Local Law #3 would have a beneficial environmental impact. *See Gernatt Asphalt*, 87 N.Y.2d at 689-90.

Even if Petitioner had sufficiently alleged its SEQRA claim, any allegations of insufficient SEQRA review are entirely refuted by the documentary evidence. Accepting the allegations in the

Petition as true, as the Court must on a motion to dismiss, the minutes of the November 30, 2016 meeting and the EAF establish that the Town Board, when presented with the EAF, went through, answered, and discussed all of its questions and therefore properly considered the environmental impacts of Local Law #3. Hou Affirm. Exs. "H" and "I".

The remainder of Petitioner's allegations on this cause of action are conclusory and based on speculation, despite the passage of nearly a year between the adoption of Local Law #3 and the commencement of this proceeding: "upon information and belief, there may be other deficiencies in the SEQR process that will be revealed . . . ." Pet. ¶ 75. Given the nature of the proposed action, the Town's review was adequate as a matter of law. *See Gernatt Asphalt Prod.*, 87 N.Y.2d at 689-90. As such, Petitioner's First Cause of Action must be dismissed.

IV. The Petition Fails to State a Claim Based on the Alleged Bias of a Town Board Member.

Notwithstanding the foregoing, the Petition's Second Cause of Action must be dismissed as a matter of law. It is well-settled that Town Board members, as elected public officials, are entitled as a matter of public policy to be able to express their personal opinions on matters of public concern. *See Pittsford Canalside Properties, LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1568 (4th Dep't 2016), *lv. dismissed*, 27 N.Y.3d 1080 (2016) ("Indeed, we agree with respondents that the expression of opinion . . . on matters of public concern 'is to be encouraged, not penalized.'" (citations omitted)); *Eadie v. Town Bd. of Town of N. Greenbush*, 47 A.D.3d 1021, 1024 (3d Dep't 2008).

The public policy reasons for this rule are obvious. *See Byer v. Town of Poestenkill*, 232 A.D.2d 851, 853 (3d Dep't 1996), *as amended on reargument* (3rd Dep't 1997) ("Indeed, any other conclusion would necessarily have a chilling effect upon a candidate's ability to express an

opinion on important issues during an election campaign or to advocate changes in the law once elected. Certainly, the disclosure by candidates for public office of their opinions on controversial topics is to be encouraged, not penalized.").

In *Troy Sand & Gravel Co. v. Fleming*, 156 A.D.3d 1295, 1304 (3d Dep't 2017), *lv denied*, 31 N.Y.3d 913 (2018), for example, the petitioner asserted that there was an improper bias or conflict of interest that invalidated a municipal decision because the board member in question owned property near the site of a proposed quarry. The court rejected the petitioner's argument that the board member's ownership of nearby property disqualified the board member from participating in any decisions regarding the quarry. *Id.* at 1304 ("The location of the real property . . . is an interest that Fleming has in common with many other citizens of the Town . . . [N]othing in the record clearly demonstrates that he stood to gain any financial or other proprietary benefit from the Town's [decision]."). Additionally, the court reasoned, opposition to a particular project could not disqualify board members as a practical matter. *Id.* at 1308 ("Opposition to the project, without more, cannot constitute bias or a conflict of interest inasmuch as a contrary determination 'would effectively make all but a handful of [the Town's] citizens ineligible to sit on the [Town] Board.'") (citations omitted); *see also Iskalo 5000 Main LLC v. Town of Amherst Indus. Dev. Agency*, 147 A.D.3d 1414, 1416 (4th Dep't 2017), *lv denied*, 29 N.Y.3d 919 (2017).

The Petition alleges only that Town Board member Annette Lutz acted and expressed personal opinions consistent with her support of Local Law #3 and her opposition to the Landfill. Pet. ¶¶ 43-56. Petitioner argues vaguely that it is "beyond dispute" that Ms. Lutz used her time as a Town Board member "to secure privileges for herself and her company." Pet.'s Mem. in Opp. at 17. These conclusory allegations, without more, fail to state a viable claim.

Petitioner's allegation that Ms. Lutz was a co-owner of Waterloo Container, Pet. ¶ 45, even if true, similarly fails to support a claim for impermissible bias. The law is clear that prohibition against conflicts of interest in the General Municipal Law is concerned with "pecuniary and material interest rather than personal opinion." *See Webster Associates v. Town of Webster*, 59 N.Y.2d 220 (1983); *see Troy Sand & Gravel*, 156 A.D.3d at 1304 (finding ownership of adjacent property insufficient to be a conflict of interest); *Eadie*, 47 A.D.3d 1024 ("Furthermore, in our view, nothing in the record clearly demonstrates that either individual stood to gain any financial or other proprietary benefit.").

Here, any purported association between Ms. Lutz and Waterloo Container (if one did in fact exist) does not establish an impermissible bias because there is no purported financial or pecuniary interest in the proceedings separate from the public at large that would invalidate her vote. To the contrary, Petitioner has failed to provide any factual allegations of any specific financial or pecuniary benefits that would result to Ms. Lutz as a result of Local Law #3. Because of Petitioner's failure to sufficiently allege an impermissible bias, Petitioner's Second Cause of Action must be dismissed.

V. Petitioner's Third Cause of Action Fails to State a Constitutional Cause of Action and Must be Dismissed.

Petitioner's Third Cause of Action purports to allege a violation of substantive due process protected by the Fifth and Fourteenth Amendments to the United States Constitution. Pet. ¶ 94. As the Court of Appeals emphasized in *Bower Associates v. Town of Pleasant Val.*, a substantive due process claim "is not simply an additional vehicle for judicial review of land-use determinations." 2 N.Y.3d 617, 627 (2004). Rather, a claim alleging the violation of substantive due process must establish (1) the "deprivation of a vested property interest" and (2) "that the challenged governmental action was 'wholly without legal justification.'" *Jones v. Town of*

Carroll, 122 A.D.3d 1234, 1239 (4th Dep't 2014), quoting *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 136 (2010).

First and foremost, Petitioner fails to establish a vested property interest of which it has been deprived by operation of Local Law #3. A vested property interest in this context is "more than a mere expectation or hope to retain [a] permit and continue [] improvements." *Schlossin v. Town of Marilla*, 48 A.D.3d 1118, 1120 (4th Dep't 2008) (citing *Bower*, 2 N.Y.3d at 617). However, "[n]either the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right." *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996). The plaintiff's "actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless." *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 136 (2010).

Petitioner alleges only that it operates a solid waste management facility in the Town, Pet. ¶ 15, and that, in conclusory fashion, "SMI has a vested property interest to continue its operations in the Town." Pet. ¶ 84. Notably, the Landfill operates pursuant to a DEC permit issued on November 28, 2008, and that as of December 6, 2016 when Local Law #3 was passed, the DEC permit was set to expire on October 10, 2017. Hou Affirm. Ex. "K". In its permit renewal application to the DEC on March 21, 2016, Petitioner acknowledged that the useful site life was projected to 2024. *Id.* On or about October 31, 2017, which is, importantly and not coincidentally, after Justice Kocher's September 13, 2017 decision which annulled Local Law 2 (and reinstated Local Law #3), the DEC granted SMI's Part 360 permit renewal. *Id.* Ex. "L". However, instead of the renewal being for a typical term of ten years, the permit was only renewed for eight years, to 2025. *Id.* Moreover, Petitioner's Host Community Agreement with the Town runs only to 2025. *Id.* Ex. "M".

Local Law #3 takes no action against existing solid waste management facilities under any existing permits or renewals through December 31, 2025. Pet. Ex. 3. Given the circumstances – the fact that the existing permit runs only until 2025, a date that is by no coincidence consistent with both the Host Community Agreement and Local Law #3, and that Petitioner has previously stated that the site life is project until 2024, Petitioner has failed to demonstrate a vested interest. The prospect of a future permit issuance or renewal is not a vested interest.

The Fourth Department's decision in *Jones v. Town of Carroll*, 122 A.D.3d 1234, 1239 (4th Dep't 2014) emphasizes the distinction between health and safety regulations and retroactive zoning ordinances. *Id.* at 1238. The local laws being compared both effectively prohibited the plaintiff's operation but were completely different legislative acts. The court explains:

> Unlike the 2005 Law, the 2007 Law does not 'regulate the location of certain facilities within particular zoning districts' but, rather, it 'generally regulat[es] the operation of [solid waste management] facilities in the interest of public safety and welfare.' It is well established that 'a municipality has the authority, pursuant to its police powers, to impose conditions of operation ... upon preexisting nonconforming uses to protect public safety and welfare' and 'may even eliminate [a] nonconforming use provided that termination is accomplished in a reasonable fashion.'

Id. at 1238. The court determined that "even assuming, arguendo, that the 2007 Law impaired their vested property rights based upon the analysis in *Jones I,*" the petitioners there had *still* not stated a claim for substantive due process because there were insufficient allegations to support the second element – that the Town's conduct was wholly without legal justification. *Id.* at 1239. Petitioners have not, and cannot, establish a vested property interest sufficient to state a substantive due process violation in the context of an ordinance enacted for health and safety.

Even if Petitioner has sufficiently alleged a vested property interest, its substantive due process cause of action still fails to sufficiently allege the second element of the claim – that the

government action was "wholly without legal justification." With respect to this element, courts have repeatedly held that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 628. A petitioner does not state a claim for a substantive due process by simply alleging that a municipality's actions were arbitrary, capricious, and an abuse of discretion in an Article 78 sense. *Bower,* at 629—30. This argument was addressed by the Court of Appeals in *Bower*:

> In neither case was the challenged conduct constitutionally arbitrary. While the lower courts concluded that the municipalities' actions in both cases were arbitrary, capricious and without rational basis in an article 78 sense, what is lacking is the egregious conduct that implicates federal constitutional law . . . Thus, we agree with the Appellate Division in each case that appellant has failed to state a cause of action for a due process violation.

Id. at 630.

The New York Court of Appeals in *Bower* affirmed the dismissal of a due process claim for failing to establish the type of arbitrary conduct that rose to the level of a constitutional violation. 2 N.Y.3d at 629. In its reasoning, the Court cited the few cases in which this element has been properly established through the allegation of clearly egregious facts. In one, the governmental entity refused to permit water and utility service to a homeowner's property unless the homeowner conveyed part of the property to the entity. *Id.* at 630 (citing *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995)). In another, the petitioner alleged that the governmental entity issued a moratorium on permits specifically to limit rental housing to minorities. *Id.* at 630 (citing *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir., 1983)).

Here, any allegations that Local Law #3 is without legal justification not only fails to describe the type of conduct necessary to state a substantive due process claim but are also completely refuted by the documentary evidence. The minutes of the public meetings in which

the local law was discussed clearly establish and justify the Town's actions. Hou Affirm. Exs. "A" through "H". During the public hearing process for Local Law #3, although the Town received comments and submissions by all parties both in favor of and against Local Law #3, all of which were reflected in its Findings and Purpose sections, the minutes of the Town Board meetings demonstrate that an overwhelming number of comments and complaints clearly identified the public health and safety issues, particularly complaints regarding the Landfill's noxious odors, which clearly justified and warranted the Town Board's taking action. Petitioner's principal reliance on the allegation that Local Law #3 is not "factually or scientifically supported or accurate" (Pet. ¶ 86) is simply a criticism of the Town's legislative process (i.e. a claim under Article 78), and does not negate or delegitimize the circumstances under which the Town Board acted. More importantly, Petitioner's conclusory allegations falls far short of the type of egregious conduct that implicates constitutional due process. Petitioner's substantive due process claims must be dismissed for failing to state a claim as a matter of law.

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CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court grant Respondents' motion to dismiss the Verified Petition/Complaint in its entirety.

Dated: January 8, 2020

Respectfully submitted,

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