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Fresh Air for the Eastside, Inc.

The State of New York
New York State Department of Environmental Conservation
The City of New York
Waste Management of New York, L.L.C.

State Fee Index Number	$165.00
County Fee Index Number	$26.00
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STATE OF NEW YORK
SUPREME COURT MONROE COUNTY

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

v.

Index No.: E2022000699

Hon. John J. Ark

THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
THE CITY OF NEW YORK,
WASTE MANAGEMENT OF NEW YORK, L.L.C.,

Defendant

THE CITY OF NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Dated: May 6, 2022

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PRELIMINARY STATEMENT

Plaintiff commenced this action by filing its Complaint on January 20, 2022 [NYSCEF Doc. No. 2]. Plaintiff served defendant, City of New York, on or about February 9, 2022 [NYSCEF Doc. No. 3]. By Stipulation filed February 25, 2022, the parties stipulated that the date for Defendant to answer or otherwise respond to the Complaint was extended to April 8, 2022 [NYSCEF Doc. No. 8]. By Order filed May 5, 2022 [NYSCEF Doc. No. 18], the Court extended the date to answer or to otherwise respond to the Complaint to May 6, 2022. In its Complaint, plaintiff alleges that the City of New York is violating plaintiff's members' constitutional rights under Article I, §19 of the New York State Constitution.

This is the second action commenced by Plaintiff challenging the City of New York's arrangements with Waste Management of New York, LLC for disposal of municipal solid waste at the High Acres Landfill located in the Town of Perinton, Monroe County. In a separate action styled *Fresh Air for the Eastside, Inc., et al. v. Waste Management of New York, LLC and the City of New York*, Case No. 6:18-CV65888, pending in the United States District Court for the Western District of New York, plaintiff alleges, *inter alia*, that the City of New York, through its contract with Waste Management of New York, is violating the federal Resource Conservation and Recovery Act and contributing to an alleged public nuisance.

The City of New York now moves pursuant to section 3211 of the N.Y. Civil Practice Law and Rules ("CPLR") to dismiss Plaintiff's Complaint for failure to state a cause of action.

STATEMENT OF FACTS

For purposes of a pre-answer motion to dismiss a complaint for failure to state a cause of action, the moving party is constrained to abide by the principle that facts alleged in the complaint must be accepted as true and plaintiff accorded the benefit of every possible favorable inference; however, the Court must still determine "whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *see Hall v. McDonald's Corp.*, 159 A.D.3d 1591, 1592 [4th Dept. 2018]).

If required to answer the Complaint, the City of New York will reject many of plaintiff's allegations as untrue. Solely for purposes of this motion to dismiss, the City will not dispute plaintiff's allegations of fact, but submits that the allegations do not fit within any cognizable legal theory and that the Complaint must be dismissed.

Plaintiff alleges that the City of New York has contracted with co-defendant Waste Management of New York, LLC ("WMNY") to transport and dispose of municipal solid waste ("MSW") generated within the City of New York and collected by the City and that WMNY disposes of some portion of this MSW at its landfill in the Town of Perinton. The MSW is transported from the City of New York to the landfill by rail. Plaintiff alleges this arrangement is detrimental to its members because WMNY has not done an adequate job of controlling odors emanating from its operations, but plaintiff has not alleged that anything the City of New York has done is illegal or contrary to any law or regulation. The waste is simply MSW, which, except for the mode of transport to the landfill, is indistinguishable from the household waste generated by plaintiff's members. Plaintiff acknowledges that WMNY is authorized by duly issued permits to dispose of MSW at its landfill.

Among many customers of WMNY, plaintiff singles out the City of New York in this action because it asserts that the majority of MSW currently disposed at the landfill emanates from

the City of New York. Strikingly, plaintiff does not, and cannot, assert that reducing or eliminating the flow of MSW from the City of New York will reduce the volume of MSW disposed at the landfill as WMNY could simply market its services and disposal capacity to other potential customers.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS AGAINST THE CITY OF NEW YORK DO NOT REST ON ANY COGNIZABLE LEGAL THEORY AND MUST BE DISMISSED

On November 2, 2021, voters in New York approved and adopted an amendment to the New York State Constitution:

> Each person shall have a right to clean air and water, and to a healthful environment.

The amendment was added to the Constitution as Section 19 of Article I and took effect on January 1, 2022. Within four weeks plaintiff commenced this action, claiming that the City of New York and others are violating the newly declared rights of its members.

Assuming, for purposes of argument, that the language and intent of the amendment impose a legal duty on municipalities not to take any action that will deny a person's right to clean air, clean water and a healthful environment, plaintiff must still allege facts which fit within a cognizable legal theory, *i.e.* facts which link the alleged injury to a violation of a constitutional duty by the City of New York (*see*, *Walton v. New York State Department of Correctional Services,* 13 N.Y.3d 475, 484 [2009]).

Plaintiff's constitutional claim against the City of New York has two prongs: First, that the City's contract with WMNY gives the City power to require WMNY to abate odors or other

adverse effects allegedly caused by WMNY's operational practices, which the City has a constitutional duty to enforce (Complaint ¶131); and, second, that the City of New York generates too much waste and violates the rights of plaintiff's members by arranging for the disposal of excessive quantities of waste generated as a result of waste management practices within the City of New York at landfills located, among other places, in Central and Western New York. (Complaint ¶¶132-134).

A. Plaintiff Has No Legal Rights Regarding the City's Contract with WMNY

Although this motion cannot contest the Plaintiff's allegations of fact and must, therefore, assume that the City has authority under its contract which it is not exercising (which the City will deny if required to answer the Complaint), plaintiff's construct that the City of New York has a constitutional duty to use its alleged contractual authority for its benefit is fatally flawed and has no basis in New York constitutional law. First and foremost, any constitutional duty the City of New York might owe to plaintiff's members must come from the amendment itself and cannot arise solely from the contract.

A "legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract" and must be "independent of the contract itself" (*Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389 [1987] ["It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated [citations omitted]. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract"]).

Thus, the scope of any constitutional duty owed to preserve a clean and healthful environment must be determined distinct from the City of New York's contractual powers and obligations (*see, Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 [1992]; *North Shore Bottling Co. v. Schmidt & Sons,* 22 N.Y.2d 171, 179 [1968]; *see, also, Bristol-Myers Squibb, Indus.*

v. Delta Star, Inc., 206 A.D.2d 177 [4th Dept. 1994]). This principle applies with even greater force here where the City of New York is not alleged to have breached the contract or committed any direct act that is causing the alleged problems underlying plaintiff's claims.

Plaintiff has failed to allege that the City of New York did anything under its contract or committed any direct act at the landfill to cause the air or water to be less clean or unhealthful; rather, the gist of plaintiff's constitutional allegations is that the City of New York should be using its contractual authority to control how WMNY operates the landfill. In essence, this is a claim based on contract and seeks to insinuate plaintiff and its members as third-party beneficiaries of the contract between the City of New York and WMNY. Plaintiff seeks to imply from the contract an independent constitutional obligation on the part of the City of New York to require specific performance by WMNY. Plaintiff cannot do this directly in an action under the contract as it has no plausible claim to be considered a third-party beneficiary (*see Dormitory Auth. of N.Y. v. Samson Constr. Co.*, 30 N.Y.3d 704, 710 [2018] and cases cited therein, including *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38, 45 [1985]). A non-party to a contract may sue for breach of contract only if it is an intended, and not a mere incidental beneficiary, "and even then . . . the parties' intent to benefit the third party must be apparent from the face of the contract (*LaSalle Bank v. Ernst & Young, LLP*, 285 A.D.2d 101, 108 [1st Dept. 2001]).

To claim this status, plaintiff "must plead facts sufficient, if proved, to establish that plaintiffs were intended beneficiaries of the contract." *Id.*

The Complaint here fails to plead any facts to satisfy these basic requirements, and, to the extent plaintiff's cause of action rests on the contract, must be dismissed.

B. Plaintiff Lacks Standing to Challenge the City's Management of Solid Waste

The second prong of plaintiff's claim alleges that the City of New York is violating the rights of its members because the City is not doing enough to reduce the volume of MSW generated

by its residents and has a contract for the disposal of that waste at landfills located in Central and Western New York. (Complaint ¶¶132-34; 160-61). Plaintiff does not request any specific relief from the City of New York for these alleged violations of its members' constitutional rights.

The environmental amendment does not abrogate the requirement of standing. Standing is, and remains, a threshold requirement for a party seeking to challenge governmental action (*New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]; *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769 [1991]; *Scheive v. Holley Volunteer Fire Company, Inc.*, 170 A.D.3d 1589, 1590 [4th Dept. 2019]; *compare, Harkenrider v. Hochul*, ___ N.Y.3d ___, Slip Op No. 60 [April 27, 2022]). In *Harkenrider*, the Court of Appeals rejected a challenge to petitioners' assertion of statewide standing, but only because the constitutional provision at issue (Art. III, Section 5) expressly confers statewide standing. *Id.*, slip op at 11.

As concisely expressed by the Court of Appeals in *Novello*:

> The two-part test determining standing is a familiar one. First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.

Id, at 212.

Plaintiff has not shown an injury-in-fact caused by the City of New York that is based on more than conjecture; therefore, its challenge to the City of New York's waste management practices must be dismissed.

The core of plaintiff's assertion of injury-in-fact is that the City of New York's solid waste management system results in the unnecessary generation of MSW because the City allegedly does not recycle enough of its MSW or use it to generate energy, and that some of the alleged excess

MSW is disposed at High Acres Landfill. Plaintiff asserts that this disposal contributes to the conditions that its members experience and infringes their constitutional rights. (Complaint ¶133).

Plaintiff's argument that its members are injured by the City's waste management programs rests on two layers of speculation – that reducing the volume of MSW the City generates will reduce or eliminate the City's need to dispose of any waste at this landfill and that WMNY, which is allowed to dispose of specified volumes of MSW pursuant to its state-issued permit, will not market its services to new customers to replace a reduced volume of waste from the City of New York.

Changes in the City's waste management programs might, or might not, actually affect the volume of MSW disposed at High Acres Landfill. Thus, there is no certainty whatsoever that any of plaintiff's members have been injured as a result of the City's waste management programs, or that future injury will be prevented if the programs are changed.

"[S]tanding requires a showing of "cognizable harm," meaning that an individual member of Plaintiff … "has been or will be injured; 'tenuous' and 'ephemeral' harm … is insufficient to trigger judicial intervention" (*Novello*, *supra* at 214). Plaintiff has not met its threshold burden to assert a cognizable injury-in-fact and its claims must be dismissed for lack of standing.

As plaintiff has failed to show an injury-in-fact arising from the City of New York's waste collection and management practices that is "more than conjectural," it has also failed to show that those practices are within the zone of interests or concerns that it can assert on behalf of its members, all of whom are alleged to reside near the landfill and hundreds of miles from the City of New York. "The zone of interest test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative acts" (*Society of Plastics Indus. v. County of Suffolk*, *supra* at 773). Plaintiff has failed to show that the alleged infringement of its members constitutional rights is tied to the zone of interest which applies to

waste collection and handling within the City of New York. Thus, plaintiff lacks standing under both parts of the test and its Complaint fails to state a cognizable cause of action based on these allegations.

POINT II

PLAINTIFF IS SEEKING RELIEF IN THE NATURE OF MANDAMUS TO COMPEL AND HAS FAILED TO STATE A CAUSE OF ACTION

Although plaintiff's complaint is couched in declaratory judgment language, the demand for declaratory relief is secondary to plaintiff's request for positive relief that this Court "issue an injunction directing the immediate proper closure of the landfill" (Complaint. ¶167) or, alternatively, "that this court should enjoin Defendants to immediately abate the Odors and Fugitive Emissions in the Community." (Complaint. ¶168).

Plaintiff's characterization of its claim as one for declaratory judgment is not controlling. Rather, it is incumbent on the Court to examine the true nature of the dispute. This inquiry requires the Court to "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Matter of Save the Pine Bush, Inc. v. City of Albany,* 70 N.Y.2d 193, 202 [1987]). Plaintiff seeks to compel the City of New York to take action to close the landfill or to require WMNY to abate the conditions causing the alleged constitutional violation. Accordingly, although plaintiff's cause of action is represented as a declaratory judgment action, it can be distilled, with respect to the City of New York, as presenting a demand for relief in the nature of mandamus to compel. Since the prayer for relief seeks to force the City of New York to perform actions, it falls within the purview of a CPLR Article 78 proceeding (*See* CPLR 7803[1]).

This Court can convert the claim to its proper form (*See* CPLR 103[c]). However, when the nature of the claim is properly understood as a proceeding in the nature of mandamus to

compel, it is clear that plaintiff has failed to state a claim and that the action must be dismissed as to the City of New York.

First, mandamus will not lie with respect to plaintiff's demand that the City of New York be ordered to close the landfill. The City of New York does not own the landfill or control its operating permits; it has no jurisdiction over the landfill and no authority to compel or oversee its closure. An order directing the City of New York to close the landfill would be a nullity.

Second, the alternative relief requested by plaintiff that the City of New York be required to abate the conditions allegedly causing odors and fugitive emissions is beyond the scope of mandamus as the City of New York's alleged authority arises solely under its contract with WMNY.

Section 7803(1) of the CPLR limits mandamus to compel to cases where a body or officer has "failed to perform a duty enjoined on it by law." Accordingly, "[i]t is well settled that the remedy of mandamus is available to compel a governmental officer or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v. Braun,* 84 N.Y.2d 674, 679 [1994]; *see Shippens v. Bd. Of Educ. of City of Buffalo,* ___A.D.3d___ [4th Dept. Apr. 29, 2022]). The Court of Appeals has

> repeatedly stated that mandamus is an "extraordinary remedy" that is "available only in limited circumstances" (citation omitted). "Mandamus is used to enforce an administrative act positively required to be done by a provision of law" (citation omitted). It is considered extraordinary because the judiciary is loathe to interfere with the executive department's exercise of its official duties, unless the department has failed to perform a specific act.

(County of Chemung v. Shah, 28 N.Y.3d 244, 266 [2016]; *see Klosterman v. Cuomo,* 61 N.Y.2d 525, 541 [1984] ["[T]he courts must be careful to avoid . . . the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the

policy-making and discretionary decisions that are reserved to the legislative and executive branches"]).

Mandamus to compel the City of New York to take discretionary action under its contract with WMNY does not lie. The interpretation and enforcement of contracts are beyond the scope of mandamus and "must be resolved through the application of traditional rules of contract law" (*City of Buffalo City School District v. LBCiminelli, Inc.*, 159 A.D.3d 1468, 1475-76 [4th Dept. 2018], *quoting Steve's Star Serv. v. County of Rockland,* 278 A.D.2d 498, 499 [2d Dept. 2000], *quoting Abiele Contr. v. New York City Sch. Constr. Auth.,* 91 N.Y.2d 1, 8 [1997]). Plaintiff's relief, if any, is through a direct action on the contract, not through mandamus.

"Moreover, a declaratory judgment action is also not a proper vehicle to resolve the contractual rights herein because 'a full and adequate remedy is already provided by another well-known form of action,'" *i.e.* "an action for specific performance" (*Id. , quoting Automated Ticket Sys. v. Quinn,* 90 A.D.2d 738, 739 [1st Dept. 1982], *affd.* 58 N.Y.2d 949 [1983]).

As explained in Point I, *supra*, plaintiff has neither the right to enforce the contract nor to compel the City of New York to do so as neither plaintiff nor its members are third-party beneficiaries of the contract. Thus, plaintiff is foreclosed from obtaining relief through the traditional rules of contract law and also precluded from using mandamus as a means to bypass its lack of standing to obtain relief through an action on the contract.

Here, the environmental amendment recognizes a right to clean water and air and a healthful environment but does not provide plaintiff an alternative procedure to mandamus to obtain equitable relief. Article 78 is the appropriate avenue for enforcing governmental duties arising under the constitution (*see Walton v. New York State Department of Corrections,* 8 N.Y.3d 186, 194 [2007]; *see, also*, *Kern v. Joyce,* 857 Fed. Appx. 691[2d Cir. 2021] [unpublished opinion applying New York law]). It is well established that constitutional challenges to the non-legislative

acts and decisions of administrative agencies, both state and municipal, can and must be adjudicated in an article 78 proceeding in the nature of mandamus (*Walton, supra; see also, New York City Health & Hosps. Corp. v. McBarnette,* 84 N.Y.2d 194, 200-201 [1994]; *Solnick v. Whalen,* 49 N.Y.2d 224, 229-30 [1980]).

Plaintiff has failed to state either an independent cause of action under the City of New York's contract with WMNY or to plead a basis for relief in the nature of mandamus; therefore, the complaint should be dismissed for failure to state a cause of action.

POINT III

PLAINTIFF'S ACTION FOR DECLARATORY JUDGMENT SHOULD BE DISMISSED

Plaintiff's demand for a declaration that the City of New York is "violating Plaintiff's constitutional rights under the Green Amendment . . . by causing the Odors and Fugitive Emissions" (Complaint, p. 29), should be dismissed as a misuse of the declaratory judgment action.

Plaintiff does not challenge the constitutionality of any statutes or regulations and, if it had a cause of action, would have an adequate remedy by way of a CPLR Article 78 proceeding or an action on the contract (*see, Witryol v. CWM Chem. Services, LLC,* 174 A.D.3d 1449, 1450-51 [4th Dept. 2019]; *Custom Topsoil, Inc. v. City of Buffalo,* 81 A.D.3d 1363, 1364 [4th Dept. 2011]). "By contrast, a declaratory judgment action generally is limited to the resolution of questions of law and the parties' legal obligations" (*Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.,* 85 A.D.3d 83, 90 [2d Dept. 2011]). A "declaratory judgment is generally appropriate only where a conventional form of remedy is not available and a declaratory judgment will serve some practical and useful purpose" (*Automated Ticket Sys., Ltd., v. Quinn, supra* at 739). "It is usually unnecessary where a full and adequate remedy is already provided by another well-known form of

action" and should not be employed where it is not necessary (*James v. Alderton Dock Yards,* 256 N.Y. 298, 305 [1931]).

Specifically, as to the City of New York, declaratory judgment is not a proper vehicle to litigate or resolve plaintiff's demand for enforcement of the City's contract with WMNY (*Town Bd. Of Town of Brighton v. W. Brighton Fire Dept., Inc.,* 128 A.D.3d 1433, 1435 [4th Dept. 2015]). This is not a proper case for declaratory judgment and the procedure has been invoked simply to distract the Court from a substantive analysis of the true nature of plaintiff's claims as demands for positive, injunctive relief. The appropriate remedies are an Article 78 proceeding in the nature of mandamus to compel and/or an action on the contract as a third-party beneficiary, both of which are fatally deficient and should be dismissed. The declaratory judgment action serves no useful or practical purpose as a claim separate and distinct from these remedies and should be dismissed.

POINT IV

THE AMENDMENT DID NOT REPLACE THE STATE'S EXPANSIVE REGULATORY ENVIRONMENTAL PROTECTION SYSTEM WHICH PERMITS LANDFILLS

In alleging that defendants are "violating" its members' rights under the amendment (Complaint at ¶166), plaintiff implicitly assumes that the amendment provides a cause of action independent of the considerable body of law and regulation which has been developed over the course of decades in this State regarding solid waste and air quality. The judiciary should not interject a new legal framework based on the amendment where the underlying facts show that the landfill in question is operated under the required New York State Department of Environmental Conservation (NYSDEC) permits. The language of the amendment is broad, but the legislative debate demonstrates that activity in compliance with applicable state regulatory permits is not subject to independent, collateral review under the amendment. As the activities of the City of

New York are not alleged to violate the NYSDEC permits, or any law or regulation, there is no right of action here under the amendment against the City of New York. The interpretation and application of the amendment's terms, such as "clean" and "healthful," is not obvious and will involve knowledge and understanding of underlying science, technology and operational practices. In these circumstances courts defer to the expertise of the governmental agencies charged with creating standards, promulgating regulations and administering permits (*see, e.g., Lysander v. Hafner,* 96 N.Y.2d 558 [2001]).

The constitutional right to clean water and air and a healthful environment was not intended to obliterate the statutory authority of the New York State Environmental Conservation Law (ECL) or the standards promulgated under the ECL's related State regulations. This conclusion is supported by the legislative history.[1] Indeed, it is not clear that a claim can be asserted directly under the amendment at this juncture; given the lack of legislative or executive guidance on what constitutes a clean and healthful environment, such a claim might raise separation of powers or political question concerns (*see, Brown v. State of New York,* 89 N.Y.2d 172, 190 [1996] [In regard to section 11 of Article I [protection of "civil rights"] the Court observed that "[i]t is implicit in the language of the provision, and clear from a reading of the constitutional debates, that this part of the section was not intended to create a duty without enabling legislation but only to state a general principle recognizing other provisions in the Constitution, the existing Civil Rights Law or statutes to be later enacted"]). The environmental amendment raises the same concern.

[1] Bills to place this language before the voters were considered four times in the New York State Assembly and twice in the Senate. There was no relevant discussion or debate in the Senate; however, there was extensive and relevant debate and discussion in the Assembly on each of the four occasions the amendment came to the floor: April 24, 2017; April 24, 2018; April 30, 2019; and February 8, 2021. Transcripts of these debates are attached to the Affirmation of Kelly S. Foss, dated May 6, 2022 as Exhibits 5, 7, 9 and 13, respectively. The proposed amendment passed the Assembly in 2017 and 2018 but was not approved by the Senate. A new effort to put the measure before the voters was initiated in 2019.

It is a well-settled and basic tenet of constitutional and statutory interpretation that the clearest and "most compelling" indications of the drafters' intent is the language itself, (*Hernandez v. State*, 173 A.D.3d 105, 111 [3d Dept. 2019]), which must be given its full effect "if plain and precise" (*Harkenrider v. Hochul, supra,* slip op at 15). However, where, as here, the natural and ordinary meanings of the terms describing the rights recognized in the amendment provide no clear standard a court can use to differentiate what conduct should be curtailed or prohibited, the legislative history must be studied. What is clear from the legislative history is that the framers of the amendment never intended for it to affect the State's administrative permitting system, and for sound reasons. If permittees cannot rely on existing authorizations to continue lawful activities in the State, but are instead subject to collateral proceedings, the economic consequences are obvious, far reaching, and potentially devastating. Even if this were the only case brought to challenge an existing permit, a chilling effect is inevitable if permits are perceived to be vulnerable to collateral lawsuits unconstrained by State environmental law and regulation.

In the absence of clarity in the amendment's language, the legislative history of the amendment is instructive (*Kolb v. Holling*, 285 N.Y. 104,112-113 [1941] ["Great deference is certainly due to a legislative exposition of a constitution's provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy, and modes of reasoning among the framers of the instrument propounded"]; s*ee also New York Ambassador, Inc. v. Board of Standards and Appeals of City of New York,* 114 N.Y.S.2d 901, *revd. on other grounds*, 281 App. Div. 342 [1st Dept.], *affd*, 305 N.Y.791 [1953]).

The extrinsic evidence of the legislative debate is necessary here for the Court to find meaning as to whether the amendment is meant to supersede the permits granted to the operator of the landfill, as asserted by plaintiff. The clear understanding by Assemblyman Englebright, the

main sponsor of the bill, was explained when the Assembly debated the proposed amendment on April 30, 2019.

Questioned whether the amendment would "mean that a business or industry that's complying with all of our current statutory regulatory provisions could still be subjected to lawsuits from somebody claiming that even though they're complying in every respect, they are creating air or water that's not 'clean,'" Mr. Englebright, the Chair of the Assembly Environmental Conservation Committee, responded that there was nothing in the amendment to change standing or to add or foreclose causes of action – "This doesn't change any of that" – and he characterized the amendment as a "context setting initiative," but nothing more.[2]

Similarly, the final time the Assembly debated the amendment, on February 8, 2021, Mr. Englebright was asked "…in any way does this [amendment] affect any of the laws of New York State in the environmental area- which you look after? What does it do to those laws that are in effect today?" Mr. Englebright responded "It doesn't change any other law… ."[3] Further in that debate, Mr. Englebright stated to an opponent of the measure, "You're asking whether or not this is an initiative that would completely reform and redirect the energy of environmental protection. It does not do that."[4]

Given the stated intent that the established environmental laws would not be changed by this amendment, and that the existing framework would continue to control regulated environmental activities in the State, it is clear the amendment was not intended to unravel the universe of well-developed environmental statutes and regulations—including solid waste and clean air regulations—in New York State. Based upon the specific debate on this question,

[2] Transcript of April 30, 2019 Assembly session at 32-33 (Foss Aff. Ex. 9).
[3] Transcript of Feb. 8, 2021 Assembly session at 34 (Foss Aff. Ex. 13).
[4] *Id.* at 35-36

compliance with a permit issued by DEC constitutes compliance with the State's environmental laws, which is all that was expected by the Legislature insofar as the amendment's debate indicates.

The court should give deference to the "reasoning among the framers of the instrument propounded" (*Kolb v. Holling*, *supra).* As intended by the State Legislature, the court should find that compliance with a duly issued DEC permit satisfies the requirements of the amendment. There is, therefore, no cause of action before the court and the matter must be dismissed.

CONCLUSION

The environmental rights amendment is now part of the State's Bill of Rights, but, as set forth in the amendment, the framework for analysis established by longstanding precedent, the language of the amendment, and the amendment's legislative history, whatever the amendment's language means, it was not intended to destroy the environmental permitting process long-established under the State environmental laws. As a threshold issue, the Court should dismiss the complaint as plaintiff lacks standing to adjudicate its claim against the City of New York for its management of its solid waste or enforcement of the contract with WMNY.

For all of the above foregoing reasons, the Complaint should be dismissed for failure to state a cause of action against the City of New York.

Dated: May 6, 2022
Rochester, New York

Respectfully submitted,

HEISMAN NUNES & HULL LLP

/s/Ronald G. Hull

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WORD COUNT CERTIFICATION

I, Ronald G. Hull, of counsel to the City of New York, certify in accordance with Section 202.8-b of the Uniform Civil Rules that the total number of words in this Memorandum of Law in support of the City of New York's motion to dismiss is 5,406 words based on the Microsoft Word word-processing system used to prepare this document, and that this document complies with the word count limit set forth under this Rule.

Dated: Rochester, New York
May 6, 2022

s/ Ronald G. Hull
Ronald G. Hull