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Date: 03/22/2022

Fresh Air for the Eastside, Inc.

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Town of Perinton
Town of Perinton Zoning Board of Appeals
Waste Management of New York, L.L.C.

State Fee Index Number	$165.00
County Fee Index Number	$26.00
Total Fees Paid:	$191.00

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State of New York

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SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Petitioner,

vs.

TOWN OF PERINTON,
TOWN OF PERINTON ZONING BOARD OF APPEALS,
and WASTE MANAGEMENT OF NEW YORK, L.L.C.,

Respondents.

Index No. E2021008617

PETITIONER'S MEMORANDUM OF LAW
IN FURTHER SUPPORT OF VERIFIED AMENDED PETITION
AND IN OPPOSITION TO MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

Petitioner Fresh Air for the Eastside, Inc. ("FAFE" or "Petitioner") submits this Memorandum of Law (1) in further support of its Amended Verified Petition ("Petition" or "Pet.") seeking an Order and Judgment vacating, annulling, or declaring illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void the decision and approval (the "Approval") (Pet. Exhibit "A" (Dkt. No. 2)) by the Town of Perinton ("Town") Zoning Board of Appeals ("ZBA" and collectively with the Town the "Town Respondents") of the permit application ("Application") submitted by Respondent Waste Management of New York, L.L.C. ("WMNY") for a Solid Waste Facility Permit, pursuant to the Town Code § 208-21 ("Landfill Permit"), for the High Acres Landfill & Recycling Center (the "Landfill"), located at 425 Perinton Parkway, Perinton, New York and (2) in opposition to the Motions to Dismiss (the "Motions") of the Town Respondents and WMNY.

As detailed below, the Motions should be denied in their entirety. The State Environmental Quality Review Act ("SEQRA") determination of the Respondent ZBA that issuance of the subject Landfill Permit was a Type II action was arbitrary and capricious. Even if the Landfill Permit was properly classified as a renewal, the material changes at the Landfill mandate environmental review under SEQRA. Furthermore, the Host Community Agreement approved by the Town Board was improperly segmented from review of the Permit. Though Respondents point to a standing agreement with Monroe County as excuse for failure to refer the Permit to the County Planning Department, this agreement is limited in scope and nothing in the record establishes that the present Application fits within that scope. Petitioner's Constitutional claims have also been sufficiently pleaded and no basis for their pre-Answer dismissal exists. Finally, no Summons was necessary in this proceeding, but if one was it would be basis for conversion, not dismissal.

LEGAL ARGUMENT

LEGAL STANDARD

On a Motion to Dismiss, the Court must accept the facts alleged in a complaint or petition as true and interpret them in the light most favorable to the plaintiff. *See Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept.*, 116 A.D.2d 939(3d Dep't 1986). On such a motion, the Court's inquiry is not whether there is evidentiary support for the allegations contained in the Complaint. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). When determining a motion to dismiss in an article 78 proceeding where no answer or reply has been filed, the court may not look beyond the petition. *See Lugo v. Goord*, 306 A.D.2d 717, 718 (3rd Dep't 2003). *See also Matter of Scott v. Commissioner of Correctional Servs.*, 194 A.D.2d 1042, 1043 (3d Dep't 1993); *Matter of Mattioli v. Casscles*, 50 A.D.2d 1013, 1013 (3d Dep't 1975).

POINT ONE

PETITIONER'S SEQRA CAUSES OF ACTION SHOULD NOT BE DISMISSED

A. Classification of the Application as a Type II Action Was Arbitrary and Capricious in Light of Material Changes at the Landfill.

As Petitioner argued in its opening Memorandum of Law, a permit renewal is only considered a Type II action "where there will be no material change in permit conditions or the scope of the permitted activities." 6 N.Y.C.R.R. § 617.5(c)(32). This exemption is not applicable when, as here, there have been material changes to permit conditions and the scope of the permitted activities. 6 N.Y.C.R.R. § 617.5(c)(32). As Petitioner pointed out, the Landfill has undergone a litany of material changes since the granting of the 2016 Landfill Permit, not least among those changes being the active and repeated failures of the Landfill gas emission system and its monitoring and maintenance.

These failures were the result of the improper removal of horizontal collectors. *See* Pet. Ex. B at Page 8 ("WM's District Manager Jeffrey Richardson admitted at the public meeting on January 16, 2018 that WMNY did not install the Horizontal Gas Collectors in Cell 11 despite the fact that these collectors were listed as the primary means of odor control in its system."). To make matters worse, while this change occurred WMNY started to accept significantly more and garbage from New York City by rail. See *Id* at Page 8 (chart detailing the increased percentage of NYC garbage being delivered to the landfill).

The various changed conditions at the Landfill were enough to require the modification of the Permit by including an extensive list of additional conditions to be imposed on WMNY. Pet. ¶¶ 102, 105. If those modifications were warranted, it stands to reason that the underlying site conditions which made them necessary should be subject to environmental review. Further, at no point has the modification of the Landfill to being primarily a disposal facility for NYC Garbage received via rail been reviewed under SEQRA. Additionally, the conditions which caused the Odor events of 2017 and 2018 have never been reviewed under SEQRA.

WMNY cites *Scenic Hudson, Inc. v Jorling*, 183 A.D.2d 258 (3d Dep't 1992) for the premise that Respondents lawfully treated the Permit as a Type II action. *See* WMNY Mem. at 10. However, *Scenic Hudson* actually highlights the error in Respondents' reasoning. The Third Department in *Scenic Hudson* specifically observed that "what constitutes a material change in permit conditions **requires evaluation of factual data** within DEC's expertise." *Id* at 262 [emphasis added]. The court there only upheld a Type II designation because the lead agency set forth its reasoning in detail as to why the changes were not "material." *Id*. In the instant case however, the ZBA resolution included no reasoning or findings explaining the Type II designation. *See* Pet. Ex. E at 462.

Though WMNY attempts to confuse this issue by citation to a memorandum from the Town Department of Public Works, which WMNY claims is a statement of the "ZBA," in reality the ZBA was entirely silent on this issue. A ZBA cannot delegate its authority as ZBA jurisdiction is exclusive and cannot be exercised by other administrative officers of the municipality. *In re Kalen*, 248 A.D. 777 (2d Dep't 1936); *Ober v. Metropolitan Life Ins. Co.*, 157 Misc. 869 (N.Y. City Ct. 1935); *113 Hillside Ave. Corp. v. Village of Westbury*, 27 A.D.2d 858 (2d Dep't 1967). As a result, WMNY's citation to the opinions of non-deciding bodies is entirely irrelevant to answering the question of what the ZBA analyzed and determined. The failure of the ZBA to issue findings on this issue is grounds for reversal in and of itself. *See e.g. Barry v O'Connell*, 303 N.Y. 46 (1951) (holding that the basis upon which a determination purports to rest "must be set forth with such clarity as to be understandable," and failing that, should be annulled by a reviewing court).

WMNY additionally cites *Fletcher Gravel Co. v. Jorling*, 179 A.D.2d 286, 290 (4th Dep't 1992), purportedly in support of its SEQRA Type II argument. WMNY Mem. at 10. However, review of that case reveals that it has no relevance to the instant question. The Fourth Department in *Fletcher Gravel Co.* determined that a quarry was not subject to SEQRA at all because it was "undertaken or approved prior to the effective date" of SEQRA." *Id* at 290. The case did not discuss Type II designation at all, and no valid basis exists to extend its holding beyond that context. Because the ZBA failed to make any findings as to the materiality of the changes to the Landfill conditions, the Type II designation was arbitrary and capricious as a matter of law and must be annulled. But even if it had, it would have been arbitrary and capricious to classify the Application as a Type II action due to the material changes.

B. SEQRA Review of the HCA Was Impermissibly Segmented from Review of the Permit.

Respondents have also moved for dismissal of Petitioner's Fifth Cause of Action, which alleged that the SEQRA review of the HCA by the Town Board was unlawfully segmented from SEQRA review of the permit itself, contrary to the requirements of 6 N.Y.C.R.R. § 617.3(g). The SEQRA regulations recognize that "[a]ctions commonly consist of a set of activities or steps," and provide that "considering only a part of segment of an action is contrary to the intent of SEQR." 6 N.Y.C.R.R. § 617.3(g)(1). "Segmentation" refers to dividing environmental review of an action in such a way that the various segments thereof are addressed as though they were independent and unrelated activities. 6 N.Y.C.R.R. § 617.2(ag).

Segmentation is arbitrary and capricious conduct which is contrary to the intent of the SEQRA. *City of Buffalo v. New York State Dep't of Envtl. Conservation*, 184 Misc. 2d 243 (Sup. Ct. Erie Co. 2000). Segmentation is prohibited in order to prevent a project with potentially significant environmental effects from being split into smaller projects which may fall below the threshold for more comprehensive review. *United Refining Company of Pennsylvania v. Town of Amherst*, 173 A.D.3d 1810 (4th Dep't 2019). Where an authorization is given by an agency subject to SEQRA (such as the Town Board or the ZBA) that consists of impermissible segmentation, the authorization will be annulled by the courts. *Saratoga Springs Preservation Foundation v. Boff*, 110 A.D.3d 1326, 973 N.Y.S.2d 835 (3d Dep't 2013); *Sun Co., Inc. (R & M) v. City of Syracuse Indus. Development Agency*, 209 A.D.2d 34, 625 N.Y.S.2d 371 (4th Dep't 1995).

Here, segmenting the environmental review of the HCA from environmental review of the permit renewal itself is impermissible under SEQRA. *See e.g. MYC New York Marina, L.L.C. v. Town Bd. of Town of East Hampton*, 17 Misc. 3d 751 (Sup. Ct. Suffolk Co. 2007) (where town board did not consider related application pending before planning board, SEQRA review of just

the application before the town board involved unlawful segmentation and would be annulled). WMNY's response on this point relies entirely on its argument that the Permit renewal was a Type II action. *See* WMNY Mem. at 15. Once it is determined that the Type II designation was issued in error as discussed above, it necessarily follows that the Respondents engaged in impermissible segmentation.

WMNY's claim that Petitioner failed to explain how the action is a Type I action is perplexing. The Town Board itself made the Type I determination. *See* Exhibit A to the Affidavit of Steven Nonkes, sworn to February 22, 2022 (Dkt. No. 48). Once it is established that an action is Type I, coordinated SEQRA review is required. 6 N.Y.C.R.R. §617.6(b)(3). WMNY then again takes too narrow a view of the word "action" when advocating for the Negative Declaration and claiming that the ZBA and NYSDEC are not involved agencies. SEQRA reviews the environmental impact of "actions," not "decisions." The SEQR Handbook[1] addresses this question directly at Section B(7), where it answers the question: "Is there a distinction between "decisions" and "actions" in applying SEQR?" To that question the SEQR Handbook answers: "Yes. The action is the project or undertaking that is the subject of the agency's decision." Here, the "action" is the Landfill itself, and the various decisions of which it is the subject include: 1) the HCA adoption, 2) the Landfill Permit renewal, and 3) the Title V Air Permit renewal application for the Landfill currently under review by the NYSDEC. As it is undisputed that the Landfill cannot continue to operate without receiving each of these approvals, it necessarily follows that each of the Town Board, the ZBA, and NYSDEC were involved agencies. In fact, "special use permits" and "environmental permits issued by DEC" are both specifically listed by the SEQR Handbook at Section B(3) as discretionary **decisions** subject to SEQRA. Decisions are not actions.

[1] https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf

Therefore, once it is determined that the Type II designation was issued in error, it must then be determined that the Respondents needed to engage in coordinated SEQRA review, and the Town Board's Negative Declaration must be annulled as impermissible segmentation, and for arbitrarily limiting its scope to exclude the environmental impacts of the Landfill itself.

POINT TWO

PETITIONER'S ENVIRONMENTAL RIGHTS AMENDMENT CLAIM SHOULD NOT BE DISMISSED

A. The Environmental Rights Amendment Generally.

The Environmental Rights Amendment ("ERA") passed via general voter referendum on November 2, 2021 and took effect on January 1, 2022 through Article XIX, § 1 of the New York State Constitution. The legislative purpose of the bill was "to protect public health and the environment by ensuring clean air and water." S.5287, 2017; *see also* S. 2072, 2019 (2022). The stated justification for the ERA was at least in part recent issues related to water contamination and ongoing concerns about air quality. *Id.*

The floor debate indicated the ERA was designed to ensure "that part of the fundamental rights of being a citizen of this great State should be that one of those rights…is a right to have a healthy environment." Assemb. No. 6279, Rep. 62, at 30 (2017). Indeed, placement of the ERA in the New York Bill of Rights shows an intent that it be considered a fundamental right, just like freedom of the press and speech. *See Hernandez v. State*, 173 A.D.3d 105, 114 (3d Dep't 2019). This design was further clarified by one of the ERA's sponsors, Assemblymember Steve Englebright, who commented that the nature of the ERA is to "reinforce the premise that all of our citizens have the right to grow up and reside in this State free from contamination, free from fear that their families will be injured by water that is not pure, air that is not clean enough to breathe." Assemb. No. 6279, Rep. 62, at 49 (2017).

B. The ERA Provides for a Private Right of Action

Respondents contend because the text of the ERA does not explicitly discuss a private right to action, one does not exist. This argument is notably unsupported by authority and contrary to precedent. To start, the right-remedy principle embodied in *Marbury* dictates that where there is a right, there is a remedy. *Marbury v. Madison,* 5 U.S. 137, 163 (1803). Further, the Supreme Court in *Bivens* held a private right of action existed for damages against federal officials who violated the search and seizure provisions of the Fourth Amendment. *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999).

The underlying rationale of *Bivens* is that constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for unconstitutional acts. *Brown v. State*, 89 N.Y.2d 172, 187-89 (1996). Implicit in this reasoning is the premise that the Constitution is a source of positive law, not merely a set of limitations on government. *Id.* In *Brown*, the Court of Appeals held that "In New York, constitutional provisions are presumptively self-executing." 89 N.Y.2d at 186. It went on to apply *Bivens* to determine that a private right of action was available to enforce Due Process and Equal Protection rights guaranteed by the New York Bill of Rights. This applies even more forcefully here, where the ERA is invoked specifically to review the constitutionality of government action.

The Legislature of New York and its citizens have, through careful deliberation and consideration, chosen to enact the ERA, place it within the Bill of Rights, and vest the State with the affirmative duty to ensure, "each person shall have a right to clean air and water, and a healthful environment." New York Constitution Art. 1 §19. *See also New York's Constitutional Right to the Environment*, Nicholas A. Robinson, The Westchester Lawyer, Jan. 2022 (observing "With

environmental security increasingly at risk, New York's new "Green Amendment" can offset that risk…. Individuals can go to court to secure the protections promised by environmental statues." It is now the Court's obligation per *Bivens* and *Brown* to ensure each citizen receives an adequate remedy for their rights under Article 1 §19.

C. The ERA Applies to the HCA.

Initially, the Town's propositions that the HCA is both a legislative act (Town Mem. at 6) and also not subject to the ERA due to it having been approved prior to the effective date of the ERA (Town Mem. at 18) are entirely contradictory. Even if the ERA was prospective only, that would not mean that legislation which runs afoul of the ERA may still stand. The Constitution provides a limit on legislative authority. On the adoption or amendment of a constitution, legislation inconsistent with the new constitution or amendment become unconstitutional. *Charles W. Sommer & Bro. v. Albert Lorsch & Co.*, 254 N.Y. 146 (1930). A constitutional amendment necessarily nullifies every statutory provision that is inconsistent therewith, and the Legislature's failure to repeal such provisions has no controlling significance. *People ex rel. Clark v. Adel*, 129 Misc. 82, 220 N.Y.S. 696 (Sup. Ct. Kings Co. 1927). As Respondents admit the HCA was a legislative act, their retroactivity argument has no bearing on this case.

In any event, Respondents' claim that the ERA post-dates the adoption of the HCA is not actually supported by the record. Respondents point to the approval of the HCA draft as occurring on December 22, 2021 (Town Mem. at 20) and the effective date of the ERA as January 1, 2022 (Town Mem. at 19). However, with no party having served the administrative record, Respondents have not shown that the HCA was fully executed prior to January 1, 2022.[2] If the HCA was signed

[2] In response to a recent FOIL request to the Town, on February 24, 2022, Knauf Shaw received a copy of the executed HCA. The signatures, in different colored ink, are not notarized and not dated next to either signature. The document was purportedly signed by both signatories "the day and year first written above," which is recited at the top of the document to be "**as of** this 28 day of Dec, 2021" [emphasis added]. However, the scan of the document we received

on or after January 1, 2022, Respondents' arguments involving retroactivity are entirely irrelevant. As Respondents have elected to file pre-Answer Motions to Dismiss, this question of fact must be decided in Petitioner's favor.

POINT THREE

PETITIONER'S CONSTITUTIONAL CLAIMS SHOULD NOT BE DISMISSED

A. Petitioner Has Stated a Claim for First Amendment Retaliation

Respondents' Motion to Dismiss should be denied as it relates to Petitioner's claim for First Amendment Retaliation. To sustain a First Amendment retaliation claim, a plaintiff must demonstrate "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004). The plaintiff does not need to show that the conduct actually chilled their speech. *Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005). Whether an adverse action was motivated by retaliatory intent is an issue of fact inappropriate for summary judgment. *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 557-58 (2d Cir. 2001).

The HCA states explicitly: "Any property for which Owner has commenced or participated in a legal action for or has obtained compensation or damages by another remedy for devaluation due to the presence of the Facility will be disqualified from the [Property Value Protection Plan]." Pet. Ex. G. This is textbook First Amendment Retaliation, as the Town has directly admitted that there is a causal connection between the protected speech and the adverse action. It is black letter law that a party exercises its First Amendment rights by seeking redress of their grievances through

was created on January 5, 2022. *See* Exhibits A and B to the Affirmation of Julia O'Sullivan dated March 22, 2022. Thus, it is not clear when the agreement was fully executed.

the courts. *See e.g. Dougherty v. N. Hempstead ZBA*, 282 F.3d 83, 91 (2d Cir.2002) (The rights to complain to public officials and to seek administrative and judicial relief from their actions are protected by the First Amendment). *See also White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir.1993) (right to petition governed by same analysis as free speech claims).

Here, members of Petitioner are parties to a lawsuit related to the Landfill. Solely by virtue of their having filed that lawsuit, Petitioner's members have been singled out and excluded from the Property Value Protection Plan ("PVPP"). Where a government entity singles out a party for adverse action as a result of that party exercising its First Amendment rights by filing a lawsuit, that government entity violates the First Amendment. *Safepath Sys. LLC v. New York City Dep't of Educ.*, 563 F. App'x 851, 857 (2d Cir. 2014).

Exclusion from the PVPP is plainly an adverse action, and the Town openly admits in the HCA that the exclusion from the PVPP is directly a result of an individual having filed a lawsuit. Though Respondents claim that the intent of this provision is to avoid double recovery, the plain language of the provision does not accomplish this goal. Rather than limit PVPP participation by specifically limiting receipt of funds to individuals who have successfully obtained damages in a lawsuit in excess of what the PVPP would have provided, the HCA outright bans anyone who has even filed a lawsuit from receiving any payment whatsoever. This is plainly an overbroad attempt to accomplish the PVPP's stated goal of avoiding double recovery, so the HCA should be annulled as unconstitutional. *See e.g. People v. Barton*, 8 N.Y.3d 70, 75 (2006). Further, Respondents fail to explain how a property owner who is compensated for their diminished property value through the PVPP could recover that loss a second time in a lawsuit. At the very least Petitioner has stated a claim for First Amendment Retaliation and the Motions to Dismiss should be denied. *See Safepath Sys. LLC*, 563 F. App'x at 857.

B. Petitioner Has Stated a Claim for Violation of its Right to Equal Protection.

The government "denies equal protection when it treats persons similarly situated differently under the law." *Matter of Abrams v. Bronstein*, 33 N.Y.2d 488, 492 (1974); *Wilson v. Crosson,* 222 A.D.2d 1085, 1086 (4th Dep't 1995); *Foss v. City of Rochester*, 65 N.Y.2d 247, 254 (1985). In the landmark case of *Village of Willowbrook v. Olech*, the U.S. Supreme Court held that an equal protection claim may be lodged "by a 'class of one,' where the plaintiff alleges [it] has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." 528 U.S. 562, 564 (2000). Thus, in *Willowbrook*, where the village demanded a wider easement from respondent than other landowners in exchange for connection to the municipal water supply, the Court found that a claim for violation of equal protection had been stated. *Id*. at 565. Similarly, in *Collichio v. Town of Webster*, 01-CV-6265 (W.D.N.Y. 2002), *Daily Record* 6/27/02, the Western District of New York preserved a claim that a restaurant owner "was singled out for selective enforcement of the Town zoning laws, [and] that the selective enforcement was arbitrary and capricious."

In *Weaver v. Town of Rush*, 1 A.D.3d 920 (4th Dep't 2003), the Fourth Department allowed an equal protection claim to proceed where the plaintiff alleged that "similarly situated property owners are not subjected to such treatment and that defendants lacked a rational basis for their disparate treatment of plaintiff." The court held:

> The basic guarantee of the Equal Protection Clause is that government will act evenhandedly in allocating the benefits and burdens prescribed by law and will not, without at least a rational basis, treat similarly situated persons differently or disparately. Indeed, the purpose of the Equal Protection Clause 'is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" of the government. An equal protection claim may be "brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Weaver v. Town of Rush, 1 A.D.3d 920 (4th Dep't 2003) (internal citations omitted).

Members of Petitioner have been treated differently from other landowners in the Town by the unequal application of the PVPP. As the complete exclusion of any individuals who have filed suit from the PVPP regardless of whether or not those individuals have received any funds or whether those funds exceed what is available under the PVPP renders the subject provision wildly overbroad when considering its stated (but illogical) goal of preventing double recovery. As a result, it should not survive even the rational basis test.

"Treat[ing] persons similarly situated differently under the law" is an unconstitutional deprivation of equal protection. *Village of Willowbrook*, 528 U.S. at 565. Whether parties are "similarly situated" is an issue of fact inappropriate for resolution on a Motion to Dismiss. *See e.g. Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) ("Whether two employees are similarly situated ordinarily presents a question of fact for the jury."); *Kirschner v. Zoning Bd. of Appeals of Valley Stream*, 924 F.Supp. 385, 394 (E.D.N.Y. 1996) (holding that issue of whether two shops are similarly situated is "classic" issue of fact precluding summary judgment).

The Town itself highlights how inappropriate these claims are for a pre-Answer Motion to Dismiss at page 9 of its Memorandum of Law, where it cites *Sicoli v. Town of Lewiston*, 112 A.D.3d 1342 (4th Dep't 2013) for the statement: "Petitioners have adduced no evidence to support that they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." In a pre-Answer Motion to Dismiss filed before even the production of the Administrative Record, Petitioner has had no opportunity to adduce *any* evidence from Respondents whatsoever. Therefore, Respondents' Motions should be denied.

C. Petitioner Has Stated a Claim for Violation of its Right to Due Process.

Protection for certain fundamental rights is implicit within the due process clause. *Walton v. State Dept. of Correctional Services*, 57 A.D.3d 1180 (3d Dep't 2008), *aff'd* 13 N.Y.3d 475, (2009). As discussed in Point II(A) above, the ERA has established in the New York State Constitution a fundamental right to clean water, clean air, and a healthful environment. *See e.g. Hernandez v. State*, 173 A.D.3d 105, 114 (3d Dep't 2019) (placement of amendment in Bill of Rights shows intent that it be considered a fundamental right). A law that impinges upon a fundamental right is subject to strict scrutiny. *Id.* Where a fundamental right is implicated, government action infringing on that right is unconstitutional where it is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. *People v. Lingle*, 16 N.Y.3d 621 (2011).

Whether particular executive action shocks the conscience is highly context-specific (*Bolmer v. Oliveira*, 594 F.3d 134, 143 (2d Cir. 2010)) and a question of fact. *Rubino v. Saddlemire*, 2007 WL 685183, at *10 (D.Conn. 2007); *JG & PG ex rel. JGIII v. Card*, 2009 WL 2986640, at *5 (S.D.N.Y. 2009). Thus, it would be inappropriate to grant even a Motion for Summary Judgment dismissing this claim (*see e.g. Defore v. Premore*, 1992 WL 88043, at *5 (N.D.N.Y. 1992)), much less a pre-answer Motion to Dismiss. Respondents' wanton disregard for Petitioner's fundamental right to a healthful environment violates Petitioner's Due Process rights. Further, to the extent that residents of the Town were to be entitled to payments under the PVPP, members of Petitioner are also entitled to those payments, and their exclusion from the PVPP constitutes deprivation of a property right without Due Process. *See Brady v. Town of Colchester*, 863 F.2d 205, 211-12 (2d Cir. 1988). Regardless, in no event would this claim be appropriate for pre-Answer dismissal.

POINT FOUR

PETITIONER'S GENERAL MUNICIPAL LAW § 239-m CLAIM SHOULD NOT BE DISMISSED

As Petitioner argued in its opening Memorandum of Law, approvals of special permits such as the Landfill Permit must be referred to the county planning agency before the ZBA may take final action. General Municipal Law ("GML") § 239-m(2) states:

> In any city, town or village which is located in a county which has a county planning agency…, each referring body shall, before taking final action on proposed actions included in subdivision three of this section, refer the same to such county planning agency or regional planning council.

The Town of Perinton is located in the County of Monroe, which has a county planning agency. General Municipal Law § 239-m(3)(iii) lists "issuance of special use permits" as an action subject to this requirement if the proposed action is within 500 feet of the boundary of any town. Respondents do not contest that the Landfill is located within 500 feet of the boundary of a town. Rather, Respondents argue that the Application was not subject to GML § 239-m review by virtue of a standing agreement between the Town and Monroe County. The agreement provides that referral is not necessary for "permit renewals, unless such renewal is contrary to a prior recommendation or condition by a County or State agency." *See* Exhibit A to the Affirmation of Joseph H. LaFay, Esq., sworn to February 22, 2022 ("LaFay Aff.").

However, despite relying on this provision, nothing in the record establishes that the Landfill was previously reviewed by the County or that the Application is not contrary to a prior recommendation or condition. The only argument offered on this point is the unsubstantiated allegation of the Town's attorney that the renewal is not contradictory to either of those items. *See* LaFay Aff. at ¶ 8. As this is obviously inappropriate in a pre-Answer Motion to Dismiss in the absence of the full Record, no basis for dismissal of Petitioner's GML § 239-m has been provided.

POINT FIVE

NO SUMMONS IS NECESSARY, BUT IN ANY CASE THE LACK OF A SUMMONS DOES NOT PROVIDE A BASIS FOR DISMISSAL OF THE PETITION

WMNY also claims that the Sixth Cause of Action of the Amended Petition should be dismissed due to the lack of a Summons. WMNY Mem. at 19. However, no Summons was required in this case, since it was commenced as a Special Proceeding by filing the Petition, and personal jurisdiction over Respondents was obtained by service of the Notice of Petition and Petition upon Respondents. *See* CPLR § 304(a) ("a Special Proceeding is commenced by filing a petition"). WMNY does not dispute that it was served with a Notice of Petition and a Petition, and no motion on that basis has been made, so pursuant to CPLR 3211(e), any such claim has been waived. Later, Petitioner amended the Petition to add the Sixth Cause of Action, but that did not require Petitioner to serve process again.

WMNY apparently takes issue with the Sixth Cause of Action requesting that the Court "annul and void, and declare unconstitutional, the Town Board Approval and the HCA." Pet. ¶ 223. Initially, whether the Court annuls and voids the Town Board Approval due to its violation of the Constitution or declares the Town Board Approval unconstitutional is a distinction without difference, so WMNY's raising of this point is hypertechnical at best. But regardless, if Court action is required here it would not be dismissal of the Sixth Cause of Action, but conversion into a declaratory judgment action. This procedure was utilized in *Jones v. Town of Carroll*, 32 A.D.3d 1216, (4th Dep't 2006), where it was stated: "Thus, we deem the notice of petition to be a summons and the petition to be a complaint, and we denominate the parties plaintiffs and defendants" (*citing Matter of Bart-Rich Enters., Inc. v. Boyce–Canandaigua, Inc.*, 8 A.D.3d 1119 (4th Dep't 2004)). Accordingly, no basis for dismissal of the Sixth Cause of Action is provided.

POINT SIX

THE COURT MAY GRANT THE AMENDED PETITION

Although the Respondents elected to move to dismiss the Amended Petition rather than serve Answers, the Court should find that this matter is ready for decision on the merits. Like all special proceedings, Article 78 is governed by the procedures of Article 4 of the CPLR, except to the extent that inconsistent provisions may be found in Article 78. *See* Practice Commentaries on CPLR Article 4, at C401:1 CPLR § 404 states:

> The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court **may** permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the matter for hearing upon two days' notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days' notice.

By the plain language of the statute, the Court is empowered to find that the Respondents waived their opportunity to answer and may rule on the merits of the Petition. The Court of Appeals recognized this principle in *In re Dodge's Trust*, 25 N.Y.2d 273, 286 (1969) ("we note that there is no merit to settlor's contention that he should not have been denied the 'right' to interpose an answer after his objection in point of law to the petition was rejected by the court. His very characterization of his 'right' to do so ignores the express language of CPLR 404.").

As Petitioner demonstrated above, the Motions to Dismiss should be denied. Accordingly, the Court is afforded with the discretion to address the merits, and grant the Amended Petition as all parties were afforded the opportunity to address the merits of the case. Petitioner submits that the Court would be well within its discretion to grant the Amended Petition on the merits rather than provide for subsequent briefing and submissions.

CONCLUSION

Based upon the above, Petitioner respectfully requests that this Court deny the Motions to Dismiss and grant an Order and Judgment, pursuant to CPLR Article 78, the Town Code, SEQRA, the OML, GML, and/or otherwise: (1) vacating, annulling, or declaring illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void the Approval by the ZBA of WMNY's Application for a Landfill Permit; (2) vacating, annulling, or declaring illegal, unconstitutional, invalid, null and/or void the determination under SEQRA made by the ZBA that its Approval was a Type II action; and (3) granting such other further relief as this Court deems just and proper, including Petitioner's costs, reasonable attorney's fees, and disbursements.

Dated: Rochester, New York
March 22, 2022

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WORD COUNT CERTIFICATION

Pursuant to the Uniform Civil Rules for the Supreme Court & the County Court section 202.8-b(c), counsel hereby certifies that this document complies with the word count limit contained in section 202.8-b(a). The word count for this Memorandum of Law, inclusive of point headings and footnotes and exclusive of the caption, table of contents, and signature block is **5,776**.

Dated: Rochester, New York
March 22, 2022

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