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

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Petitioner,

vs.

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

Respondents.

Index No. E2021008617

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Dated: February 22, 2022
Rochester, New York

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PRELIMINARY STATEMENT

Respondents Town of Perinton (the "Town") and Town of Perinton Zoning Board of Appeals ("ZBA") (collectively, the "Town Respondents") respectfully submit this Memorandum of Law in support of their motion to dismiss the Amended Verified Petition in this proceeding pursuant to CPLR 3211(a)(1), (3), (7), and (8) and § 7804(f). Concurrently with the filing of this motion, Respondent Waste Management of New York, LLC ("Waste Management") is filing a motion to dismiss. Included among Waste Management's motion papers is the Affirmation of Steven P. Nonkes, Esq. dated February 22, 2022 ("Nonkes Aff.") and a Memorandum of Law. The Town Respondents hereby join in Waste Management's dismissal motion and incorporate by reference herein Waste Management's motion papers.

The Amended Petition of Petitioner Fresh Air for the Eastside, Inc. ("Petitioner") asserts seven Causes of Action. The Second, Fourth, Fifth, Sixth and Seventh Causes of Action should be dismissed as a matter of law. As herein set forth and in Waste Management's accompanying motion to dismiss, these claims either fail to state a cognizable cause of action or are refuted by conclusive documentary evidence.

AMENDED PETITION AND DOCUMENTARY EVIDENCE

As this motion is a pre-answer motion to dismiss, the following summary of facts is provided by reference to the Amended Petition ("Am. Pet."), the exhibits attached thereto and the documentary evidence being submitted in support of this motion. This proceeding relates to the High Acres Landfill and Recycling Center ("High Acres") owned and operated by Waste Management and located in part within the Town. On or about May 27, 2021, Waste Management submitted an application to the ZBA for renewal of a special use permit for the

Western Expansion and Parkway Expansion Phases I, II and III of High Acres (the "SUP") which was scheduled to expire on August 22, 2021. Am. Pet. ¶ 84. The application was not forwarded to the Monroe County Planning Department because the Town and the County of Monroe in 1994 entered into an agreement pursuant to which applications for permit renewal such as the SUP are not required to be referred to the County for review and recommendation. *See* LaFay Aff., ¶4-8, Ex. A.

The ZBA held a public hearing with respect to the application on July 26, 2021, and at that time deferred a decision on the application and referred the application to the Perinton Conservation Board ("PCB"). Am. Pet. ¶ 95. The PCB held a public meeting on August 3, 2021 with respect to the application and on August 17, 2021, issued a thorough recommendation to the ZBA that the application be granted with conditions. *Id.* ¶ 101, Exs. A, E. p. 449-50. On August 19, 2021, the ZBA designated Waste Management's application as a Type 2 action under SEQRA, given that it was an application for permit renewal. *Id.,* Ex. E, p. 462. The ZBA then unanimously adopted the recommendations of the Town of Perinton Conservation Board ("PCB") and approved the renewal of the SUP. *Id*., Ex. E, p. 462-64.

The PCB's recommendations, as adopted by the ZBA, included a condition that before January 1, 2022, the Town and Waste Management enter into a new Host Community Agreement ("HCA") relating to the operation of High Acres. *Id*., Ex. A. The HCA was to replace the then existing Benefits Agreement between the Town and Waste Management. The Town published an initial draft HCA for public comment in April 2021. *Id*. ¶ 122. The Town prepared and submitted a Full Environmental Assessment Form in connection with the renewal of the HCA. The Town Board on December 22, 2021, as lead agency designated the matter as a Type 1 action under SEQRA and approved a Negative Declaration finding that the action would

not have a significant effect on the environment. *Id.,* Ex. I; Nonkes Aff., Ex. A. The Town Board then passed a motion to approve the HCA. Am. Pet., Ex. I.

The HCA provides significant benefits to the Town, including but not limited to limitations on certain types of disposal, monitoring by Waste Management, a local hotline for citizen notifications, payment by Waste Management of a recycling fee and host community benefit payments, and a Property Value Protection Program ("PVPP"). *Id*., Ex. G. The PVPP provides a mechanism by which Town residents who own property in proximity to High Acres may obtain compensation from Waste Management if they are unable to sell their property for the Established Fair Market Value, as defined in the PVPP. *Id*.

Petitioner then filed the Amended Petition, asserting seven Causes of Action. In this motion, Respondents seek the dismissal of the Second, Fourth, Fifth, Sixth and Seventh Causes of Action. The Second and Fifth Causes of Action allege a failure to comply with SEQRA, and are fully addressed in Waste Management's Memorandum of Law.

In the Fourth Cause of Action, Petitioner alleges that the Town violated General Municipal Law § 239-m by failing to refer the application for renewal of the SUP to the Monroe County Planning Department for review and recommendation. As set forth below, this claim is subject to dismissal in light of the agreement between the Town and the County in which the parties agreed that applications for permit renewal need not be referred for review by the County.

In the Sixth Cause of Action, Petitioner asserts that the Town Board's approval of the HCA violates no less than five provisions of the United States and New York Constitutions. Petitioner has offered only conclusory allegations in support of these claims and for all of the reasons set forth below, the claims fail to state a cognizable cause of action. Notably, Petitioner has asserted a claim under the recently approved Article I § 19 of the New York Constitution,

also known as New York's environmental rights amendment, which did not become part of the Constitution until after the HCA was approved. The Sixth Cause of Action purports to seek declaratory relief, but a Summons has not been served. Finally, in the Seventh Cause of Action, Petitioner asserts a catch-all claim in an attempt to assert hypothetical future claims without any factual support. Such a claim should be dismissed for failure to state a cause of action.

ARGUMENT

I. The Second and Fifth Causes Of Action Should Be Dismissed

The Town Respondents join in Waste Management's motion to dismiss the Second and Fifth Causes of Action for the reasons set forth in Waste Management's Memorandum of Law and accompanying motion papers, which are incorporated herein by reference.

II. The Fourth Cause of Action Should Be Dismissed

In the Fourth Cause of Action, Petitioner alleges that the ZBA's approval of the SUP should be annulled pursuant to General Municipal Law § 239-m because the Town did not refer the proposed action to the Monroe County Planning Department. *See* Am. Pet. ¶¶ 192-200. Petitioner alleges that General Municipal Law § 239-m(3)(b) mandated that Waste Management's application for the SUP be referred to the Monroe County Planning Department because it applied to real property located within 500 feet of the boundary of the Town. *Id.* ¶ 198. Even assuming the truth of Petitioner's allegations regarding the location of the subject real property, for the reasons set forth below, this claim is barred as a matter of law because documentary evidence conclusively establishes that a referral to the Monroe County Planning Department was not necessary. *See Griffin v. Anslow*, 17 A.D.3d 889, 891-92 (3d Dep't 2005) ("where the [plaintiffs'] legal conclusions and factual allegations are flatly contradicted by

documentary evidence, they are not presumed to be true or accorded every favorable inference, and the criterion becomes whether the proponent of the pleading has a cause of action, not whether he has stated one.") (internal quotation marks and citations omitted); *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002).

Even if the SUP approval related to real property located within 500 feet of the boundary of the Town, a referral to the Monroe County Planning Department was not necessary by operation of General Municipal Law § 239-m(3)(c), which provides as follows:

> The county planning agency or regional planning council may enter into an agreement with the referring body of a city, town or village to provide that certain proposed actions set forth in this subdivision are of local, rather than inter-community or county-wide concern, and not subject to referral under this section.

The Town and Monroe County entered into an Agreement contemplated by General Municipal Law § 239-m(3)(c) effective January 26, 1994 (the "Agreement"). *See* LaFay Affirmation, Ex. A. The Agreement was in full force and effect at the time of the SUP approval. *Id.* ¶ 3. As set forth in the Agreement, Section 1, the Town and Monroe County agreed that all matters listed in Schedule A of the Agreement were not required to be referred to the Monroe County Planning Department for review and recommendation. Schedule A of the Agreement, at number 23, provides that permit renewals are exempt from the County review process, unless such renewal is contrary to a prior recommendation or condition by a County or State agency. *Id*. ¶ 6, Ex. A. It is not disputed that Waste Management's application for the SUP was a permit renewal. *See* Am. Pet., Ex. E, p. 464. Further, renewal of the SUP was not contrary to a prior recommendation or condition by a County or State agency, and therefore falls squarely within this exemption. LaFay Aff. ¶ 8. As such, pursuant to the Agreement, Waste Management's application for the SUP was not required to be submitted to the Monroe County Department of

Planning for review and recommendation. *See Michaels v. Walter*, 2014 N.Y. Misc. LEXIS 4551, at *7-8 (Sup. Ct. Suffolk Co. Oct. 3, 2014) (dismissing claim under Gen. Mun. Law 239-m where agreement between the municipality and the County provided that area variance applications were not subject to the County review process).

For these reasons, the Fourth Cause of Action should be dismissed.

III. To The Extent The Sixth Cause Of Action Purports To Challenge The HCA Under CPLR Article 78, It Should Be Dismissed

Petitioner alleges that the Town Board's approval of the HCA was arbitrary and capricious and lacks a rational basis. Am. Pet. ¶ 218. However, this claim fails because the HCA approval was a legislative act that is not subject to review in an Article 78 proceeding. "The general rule is that an article 78 proceeding is unavailable to challenge the validity of a legislative act..." *Save the Pine Bush, Inc. v Albany*, 70 N.Y.2d 193, 202 (1987).

The Fourth Department previously rejected an Article 78 challenge to a town board's determination of whether to enter an agreement because the town board's decision was a legislative act. *See Matter of Riedman Acquisitions v Town Bd. of Mendon*, 194 A.D.3d 1444, 1450 (4th Dep't 2021) ("We further conclude that the Town Board's decision not to approve the 2018 Sewer Agreement was an exercise of its legislative power under Town Law § 64 (6), not an administrative decision."). In *Riedman*, the petitioner challenged a town board's determination not to renew an agreement. *Id*. at 1446-47. The Fourth Department rejected that argument, and held that the Town Board's decision to enter into an agreement is "an exercise of its legislative power under Town Law § 64(6), not an administrative decision." *Id*.

Here, the Town Board's approval of the HCA was similarly a legislative act pursuant to New York Town Law § 64(6), which provides that "the town board of every town . . . [m]ay award contracts for any of the purposes authorized by law." Here, the Perinton Town Code

authorizes the Town, under section 208-21(D)(5) of the Town Code, to "enter into a contract with the Town Board for the operation of the solid waste facility." Therefore, the Town Board's decision to approve and enter into the HCA was a legislative act, which is not reviewable under Article 78 as a matter of law. Accordingly, the portion of Petitioner's Sixth Cause of Action which challenges the Town Board Approval and the HCA as arbitrary and capricious should be dismissed.

IV. Any Constitutional Claims Within The Sixth Cause Of Action Should Be Dismissed

Petitioner's Sixth Cause of Action purports to assert a "laundry list" of alleged federal and state Constitutional violations. Am. Pet. ¶ 218-223. This includes conclusory allegations that the Town Board approval of the HCA violated Equal Protection and Due Process rights, the Right to Free Speech and to Petition for Redress, as well as the recently approved New York Constitution, Article I Section 19, also known as New York's environmental rights amendment ("ERA"). The entire Sixth Cause of Action should be dismissed pursuant to CPLR 3211(a)(7). While a pleading may be given a liberal construction when assessing a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "[t]he allegations of the pleading cannot be vague and conclusory but must contain sufficiently particularized allegations from which a cognizable cause of action reasonably could be found." *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 723 (2d Dep't 2013) (citations omitted). Petitioner fails to explain in the Amended Petition how one action, the Town Board's approval of the HCA, could give rise to cognizable causes of action under five different Constitutional provisions. Despite its laundry list of claims, the Sixth Cause of Action fails to allege any particular element of a Constitutional

violation. Absent any sufficiently particularized allegations of a cognizable Constitutional violation, the Sixth Cause of Action should be dismissed in its entirety.

Moreover, the Sixth Cause of Action should be dismissed for all of the reasons stated below.

A. The Amended Petition Fails To State a Claim For Violation of Equal Protection Rights

Petitioner's allegation that the Town discriminated against its members in violation of Equal Protection—under the Fourteenth Amendment of the U.S. Constitution and/or Article I § 11 of the New York Constitution (*see* Am. Pet. ¶ 219)—fails to state a cause of action as a matter of law. Under both the New York State Constitution and the U.S. Constitution, "the constitutional guarantee of equal protection is 'that all persons similarly situated must be treated alike.'" *State of New York v Myron P.*, 20 N.Y.3d 206, 211 (2012). Petitioner does not allege within its Sixth Cause of Action any facts regarding how the Town supposedly "discriminat[ed] against members of Petitioner that brought a legal action regarding the Landfill," much less how any Town action violated any Equal Protection rights. Am. Pet. ¶ 219. Combing through the Petition reveals only one allegation that is presumably the basis of Petitioner's purported equal protection claim: that the Property Value Protection Plan ("PVPP") in the HCA allegedly "excludes eligible property owners from participating if they merely commenced a lawsuit against WMNY." Am. Pet. ¶ 137. First, this allegation is factually inaccurate. The HCA provision in question is entitled "Intent," and states in full as follows:

> It is the Intent of the Town that the Program not result in duplication of compensation to Owners. Consequently, 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 presents of the Facility will be disqualified from the Program.

(Am. Pet. Ex. G, p. 1 of PVPP). The entire purpose of the PVPP is to provide households with compensation for potential impacts on property values. The Intent provision merely prevents households which are already pursuing, or which in the future elect to pursue, other available remedies to recover for alleged property value diminution from receiving compensation for alleged property value diminution through the PVPP. Preventing duplication of compensation and creating an election of remedies does not implicate the Equal Protection clause.

The Amended Petition does not allege unlawful discrimination based on impermissible considerations such as race or religion; nor does it allege that the Town acted "with malevolent intent." *Darby Group Cos., Inc. v Rockville Ctr*., 43 A.D.3d 979, 980 (2d Dep't 2007), quoting *Bower Assocs. v Town of Pleasant Valley*, 2 NY3d 617, 631 (2004).

While the Equal Protection allegations are wholly conclusory, to the extent the claim is based upon an allegation of an "intent to inhibit or punish the exercise of constitutional rights," Petitioner appears to allege that its members have a constitutional right to pursue claims in court and that right has been infringed by the HCA. If this is the case, Petitioner must plead and prove that FAFE or its members were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v Olech*, 528 U.S. 562 (2000); *see also Sicoli v Town of Lewiston*, 112 A.D.3d 1342, 1343-44 (4th Dep't 2013) (dismissing Article 78 petition because "Petitioners adduced no evidence to support a finding that [they] have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment") (internal quotation marks and citation omitted); *see also Comiskey v Arlen*, 55 A.D.2d 304, 314 (2d Dep't 1976) ("[A]ccess to the courts for the resolution of other claims (involving rights not subject to special constitutional protection) may be denied if there is a rational basis therefor; no proof is required of any

compelling State interest or that the legislative choice of means of accomplishment was the least restrictive."), *citing Ortwein v Schwab*, 410 U.S. 656 (1973). Petitioner falls far short of pleading the elements of such a claim.

First, the PVPP does not infringe upon Petitioner's or its members' rights to access the courts. "In order to establish a violation of a right to access to the courts, the defendant must establish some 'actual injury.'" *Snuszki v Wright*, 193 Misc. 2d 490, 492 (Sup. Ct. Niagara Co. 2002). The right to access the courts was not infringed where "there are no restrictions that have been placed on the defendant by the statute that prohibits him from pursuing legal relief against any alleged wrong that is committed against him now or in the future." *Id.*; *citing Lewis v Casey*, 518 U.S. 343 (1996). Here, Petitioner and its members, like every other member of the host community, quite clearly retain their right to sue to pursue compensation for alleged diminution of their property values.

Second, the HCA's PVPP treats Petitioner's members exactly the same as every other similarly situated member of the community. When it comes to determining which households should receive the benefits extended under the PVPP—compensation for a decline in property values—those who sue, or otherwise receive compensation, for property value diminution are not similarly situated to property owners who have not. To avoid duplication of compensation, the PVPP Intent provision merely (a) extends the compensation benefit of the PVPP to households which are not pursuing, and have not otherwise received compensation, for diminution, and (b) creates an election of remedies, giving households a choice of either taking the benefit granted

under the PVPP or pursuing compensation for property diminution in some other way.[1] Petitioner appears to be arguing that its members should be able to do both and thereby potentially receive double payment.

In light of the Town's expressly stated rational basis of avoiding duplicative compensation, there is no plausible argument that the PVPP violates Equal Protection. *Cf. Tomassi v City of Buffalo*, 173 A.D.3d 1610, 1610 (4th Dep't 2019) ("'It is fundamental that a court, in interpreting the statute, should attempt to effectuate the intent of the Legislature'"); quoting *Patrolmen's Benevolent Ass'n of City of N.Y. v City of N.Y.*, 41 N.Y.2d 205, 208 (1976). Because the Amended Petition does not allege that Petitioner's members have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," any claim of violation of Equal Protection rights under the United States or New York Constitution should be dismissed. *Tomassi*, 173 A.D.3d at 1611 (internal quotation marks and citation omitted).

B. The Amended Petition Fails to State a Claim for Violation of the "Right to Free Speech and Petition"

Other than using the words "First … Amendment[]," "Right to Free Speech and to Petition for Redress" (Am. Pet. ¶ 219), the Amended Petition does not contain any allegations to support a claim for violations of the First Amendment of the United States Constitution, or of Sections 8 or 9 of Article I of the New York State Constitution. N.Y. Const. art. I, § 8 ("[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the

[1] Offering an election of remedies to individuals claiming to be aggrieved is nothing new; to the contrary, it is a rational way of according individuals multiple avenues for pursuing relief without duplicating proceedings and benefits. *See Arizona Employers' Liability. Cases*, 250 U.S. 400, 431 (1919) ("election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.")

liberty of speech"]; N.Y. Const. art. I, § 9 ("[n]o law shall be passed abridging the rights of the people peaceably to assemble and to petition the government"); *see also* U.S. Const. amend I.

A claim under the First Amendment must be based upon government action with the intent to retaliate against, obstruct, or chill a plaintiff's First Amendment rights. To state a First Amendment retaliation claim, the plaintiff must allege that: "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [plaintiff's] exercise of that right; and (3) the defendant's actions caused him some injury." *Gonzalez v City of NY*, 377 F.Supp.3d 273, 293 (S.D.N.Y. 2019), quoting *Smith v Campbell*, 782 F.3d 93, 100 (2d Cir. 2015).

The Amended Petition fails to allege any facts in this regard. It does not allege that anyone exercised a protected right, let alone that the Town Board adopted the HCA in response thereto. Further, the Amended Petition does not identify any injury suffered as a result the adoption of the HCA. Not only does the Amended Petition fail to state a ripe First Amendment claim, but Petitioner has not articulated any plausible theory for how the Town Board's approval of the HCA has deprived (or could deprive) anyone of the right to free speech or to petition for redress.

Petitioner references the PVPP provision to avoid duplicative compensation for those property owners who have sued for or otherwise received compensation for a decline in property values. But this section does not infringe on speech or petition rights. It merely ensures that property owners who have pursued, are pursuing, or have otherwise received compensation for alleged property diminution: (a) cannot receive duplicative compensation through the PVPP, and (b) will be bound by any determination rendered in an alternate forum concerning their allegations concerning property value diminution. Indeed, the Intent provision of the PVPP

expressly states that its purpose is to prevent "duplication of compensation." Simply put, the Amended Petition contains no allegation that any provision of the HCA or PVPP infringes upon a First Amendment right or was motivated by the Petitioner's exercise of any First Amendment right, much less that Petitioner has suffered any injury as a result of the approval of the HCA.

Based on the foregoing, the Sixth Cause of Action should be dismissed to the extent it alleges violations of the right to free speech or the right to petition.

C. The Amended Petition Fails to State a Claim for Violation of Procedural Due Process

The Amended Petition asserts in conclusory fashion that Petitioner's due process rights have been violated, without clarifying whether Petitioner is making a procedural or substantive due process claim. To the extent Petitioner attempts to assert a procedural due process claim, the Amended Petition fails to state a cause of action. The Fourteenth Amendment forbids states from depriving any person of property or liberty without due process of law (*see* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law….").[2] "Procedural due process refers to the minimal requirements of notice and a hearing guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments when the deprivation of a significant life, liberty or property interest may occur." *Seymour's Boatyard, Inc. v Town of Huntington*, 2009 US Dist LEXIS 45450, at *14 (E.D.N.Y. June 1, 2009). To state a procedural due process claim, a plaintiff must first identify a property or liberty interest that is entitled to due process protection. *Cleveland Bd. of Educ. v Loudermill*,

[2] "In the absence of a clear ruling that a different standard is to be applied, New York courts generally interpret the due-process guarantees of the New York Constitution and the United States Constitution as coextensive." *Spring v Allegany-Limestone Cent. Sch. Dist*., 138 F Supp 3d 282, 296 (W.D.N.Y. 2015), *aff'd in relevant part*, 655 Fed. Appx. 25 (2d Cir 2016); *see also Oneida Indian Nation v Madison Cty*., 665 F3d 408, 427 n.13 (2d Cir 2011) ("With some exceptions, New York courts have interpreted the due-process guarantees of the New York Constitution and the United States Constitution to be coextensive . . .").

470 U.S. 532, 538-39 (1985). Second, it must show that the State has deprived it of that interest. Third, a plaintiff must allege facts showing that the deprivation was effected without due process. *Mehta v Surles*, 905 F.2d 595, 598 (2d Cir 1990) (per curiam).

The standard for determining the existence of a property right is that "a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim or entitlement to it." *Board of Regents v Roth*, 408 U.S. 564, 577 (1972). "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v Gonzales*, 545 U.S. 748, 756 (2005).

Any procedural due process claim fails to state a cause of action, first and foremost, because the Amended Petition fails to identify a cognizable life, liberty, or property interest that has been diminished by the adoption of the HCA. The theories advanced in the Sixth Cause of Action referencing the due process clause are that the Town Board "discriminat[ed] against members of Petitioner that brought a legal action regarding the landfill" (Am. Pet. ¶ 219), and "allowed the Impacts, Odors and a Public Nuisance to continue to be imposed upon members of the Petitioner." Am. Pet. ¶ 220. None of these alleged interests qualifies for protection under due process.

Petitioner's conclusory allegations of discrimination do not raise a life, liberty, or property interest, and instead appear aimed at Petitioner's equal protection argument. To the extent that Petitioner alleges its members have a protected liberty interest to "clean air and healthful environment" and/or not to be exposed to "Impacts, Odors and a Public Nuisance" relating to the landfill, those allegations have nothing to do with the Town's decision to approve and enter into the HCA. *See Town of Castle Rock*, 545 US at 755 (due process does not

"'requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors'"). To the extent Petitioner intends to proceed on the theory that certain of its members are not eligible to receive payments under the PVPP, such a claim fails to state a cause of action because a right to payment under a contract with a municipality does not qualify as a constitutionally protected property interest. *See Martz v Inc. Village of Valley Stream*, 22 F.3d 26, 31 (2d Cir 1994) ("The right to payment on [an ordinary contract with a municipality] does not rise to the level of a constitutionally protected property interest."); *Local 342, Long Is. Pub. Serv. Empls. v Town Bd.*, 31 F.3d 1191, 1196 (2d Cir. 1994) (holding that union did not enjoy any "constitutionally protected entitlement to . . . payments by the Town" for the funding of health benefits due under the terms of a collective bargaining agreement because "state-law contractual rights, without more, are [not] worthy of substantive due process protection").

In addition, the Amended Petition fails to establish standing on the part of FAFE to pursue claims for constitutional due process violations, in that there is no allegation that any FAFE member has suffered any cognizable injury in fact as a result of the approval of the HCA and the PVPP.

Even assuming Petitioner had standing to assert a due process claim and alleged facts suggesting that the Town's decision to approve and enter into the HCA harmed a constitutionally protected interest belonging to its members, Petitioner still has not pled any deprivation of due process of law. *Conrad v Cnty. of Onondaga Examining Bd. for Plumbers*, 758 F.Supp 824, 829 (N.D.N.Y. 1991) ("[T]he deprivation by state action of a constitutionally protected interest in life, liberty or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*") (emphasis in original) (internal quotation marks and citation omitted). To the extent Petitioner's members believe their property values have

been diminished as a result of the landfill, they can either seek compensation through judicial remedies, or they can pursue relief under the terms of the PVPP. Indeed, Petitioner acknowledges that "[t]he PVPP provides steps an eligible property owners [sic] must take to receive compensation at the time of the sale if the value of their property is diminished by the landfill." Am. Pet. ¶ 131. Nothing in the PVPP deprives any FAFE member of any procedural rights—including the right to seek compensation for alleged diminished property values through litigation.

Finally, to the extent Petitioner's procedural due process claim is premised upon alleged "arbitrary" or "capricious" actions of the Town (which separately fails to state a claim because the HCA is a legislative act, *see supra*), it fails as a wholly conclusory allegation, with no factual support and no explanation as to how any federal or state due process rights are implicated, for all the reasons stated above. The Sixth Cause of Action should therefore be dismissed to the extent it purports to allege a violation of procedural due process.

D. The Amended Petition Fails to State a Claim for Deprivation of Substantive Due Process

To the extent the Amended Petition attempts to assert a claim of deprivation of substantive due process, it also fails as a matter of law.

First, the fact that Petitioner purports to assert claims under the Equal Protection clause and First Amendment preclude a substantive due process claim as a matter of law. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims'" *Albright v Oliver*, 510 U.S. 266, 273 (1994), quoting *Graham v Connor*, 490 U.S. 386, 395 (1989); *see also County of Sacramento v Lewis*, 523 U.S. 833, 842 (1998); *Stop the Beach Renourishment, Inc. v Fla. Dep't.*

of Envtl. Prot., 130 S.Ct. 2592, 2606 (2010); *Bryant v City of New York*, 404 F.3d 128, 135 (2d Cir. 2005); *Velez v Levy*, 401 F.3d 75, 94 (2d Cir 2005); *Kaluczky v City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). Because Petitioner attempts to assert claims pursuant to the Equal Protection clause and the First Amendment, any claim invoking amorphous substantive due process protection based upon the same facts is precluded.

Any substantive due process claims is also legally insufficient for other reasons. "Substantive due process is an outer limit on the legitimacy of governmental action." *Natale v Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir 1999). To make out such a claim, Petitioner must do more than assert a cognizable property or liberty interest; it must also establish that the governmental action depriving them of that interest was "wholly without legal justification" *(Bower Assocs. v Town of Pleasant Valley*, 2 N.Y.3d 617, 627 (2004)) or that the governmental conduct was "so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale*, 170 F.3d at 263 (even "[a]rbitrary conduct that might violate . . . regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive component of the Due Process Clause"); *see also Bower*, 2 N.Y.3d at 630 (only "egregious conduct . . . implicates federal constitutional law") (citation omitted). "A legitimate governmental purpose is . . . one which furthers the public health, safety, morals or general welfare." *Fred F. French Investing Co. v New York*, 39 N.Y.2d 587, 596 (1976).

Here, as explained above, Petitioner has not articulated a cognizable property or liberty interest entitled to due process protection. In any event, any substantive due process claim also fails because Petitioner has not articulated how the Town's adoption of the HCA was "wholly without legal justification." *Bower,* 2 NY3d at 627. The HCA, among other things, provides for

the proper operation and availability of disposal capacity for solid waste generated by the Town and its residents, and it provides for "host community benefit payments" to the Town. The PVPP term limiting eligibility in the program is expressly intended to avoid duplicative compensation, which is both reasonable and justified, as explained above. Thus, even if Petitioner had established a constitutionally protected interest (and it has not), the Amended Petition clearly fails to allege the elements of a claim of deprivation of substantive due process.

Based on the foregoing, the Sixth Cause of Action should also be dismissed to the extent it alleges a violation of substantive due process.

E. Petitioner's Claim Under The ERA Should Be Dismissed

Finally, Petitioner alleges within the Sixth Cause of Action that the Town violated the ERA by "approving the HCA and allowing the Landfill Activities" (Am. Pet. ¶ 221). On the basis of this allegation, Petitioner seeks an order annulling, voiding, and declaring unconstitutional the Town Board Approval and the HCA (Am. Pet. ¶ 223). This portion of Petitioner's Sixth Cause of Action—purportedly asserting a hybrid Article 78 and declaratory judgment claim under the ERA—must be dismissed as a matter of law. Even if Petitioner could establish that the ERA created a private right of action (which it did not), the Town's decision to approve and enter into the HCA could not have violated the ERA because the ERA was not part of the Constitution at that time.

As stated by the New York Court of Appeals, it is "[a] general rule of construction that statutes as well as constitutional provisions are to be construed as prospective only, unless a clear expression of intent to the contrary is found." *Mulligan v Murphy*, 14 N.Y.2d 223, 226 (1964), quoting *Ayman v Teachers' Retirement Bd.*, 9 N.Y.2d 119, 125 (1961) (internal quotation marks omitted). Here, there is no clear expression that the ERA was intended to have retroactive effect.

Nothing about the text of the ERA—"Each person shall have a right to clean air and water, and a healthful environment"— purports to be retroactive. Indeed, nothing in the text of the ERA purports to grant citizens a private right of action at all, much less one that allows them to reach back in time to challenge municipal determinations made and/or actions taken before the ERA even existed.

The ERA became part of the New York Constitution pursuant to the provisions of Article XIX, Section 1 of the New York Constitution, which governs amendments without a constitutional convention. Article XIX, Section 1 makes clear that such amendments become a part of the New York Constitution on January 1 following final approval and ratification. Specifically, it provides:

> Any amendment or amendments to this constitution may be proposed in the senate and assembly … [and] if the amendment or amendments shall be agreed to by a majority of the members elected to each of the two houses … referred to the next regular legislative session convening after the succeeding general election of members of the assembly …; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people …; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, ***such amendment or amendments shall become a part of the constitution on the first day of January next after such approval.***

N.Y. Const. art. XIX § 1 (emphasis added).

Here, the ERA was approved by the legislature in 2019 and again in 2021 (*see* Nutter Aff., Ex. A), and it was approved by voters on November 2, 2021 (*see* https://www.elections.ny.gov/NYSBOE/elections/2021/General/GE2021_BallotProp2.xlsx (last visited February 21, 2022)). Accordingly, the ERA did not become a part of the New York Constitution until January 1, 2022. As noted above, there is absolutely no indication in the text of the ERA

that it was intended to be retroactive and it cannot be reasonably disputed that the drafters of the ERA were aware that it would not become part of the Constitution until January 1 in the year following approval by the voters. The Town Board approved the HCA on December 22, 2021 (Am. Pet. Ex. I at 331, 337-39). The Petition only challenges Town action taken before the ERA became part of the New York Constitution. Accordingly, the portion of Petitioner's Sixth Cause of Action which asserts a challenge under the ERA must be dismissed as a matter of law.

Finally, the Town Respondents note that the Sixth Cause of Action includes a request for declaratory relief. However, a Summons has not been served, and service of a Summons is a requirement to commence an action asserting plenary claims.

V. The Seventh Cause Of Action Should Be Dismissed

Petitioner's Seventh Cause of Action states no facts upon which a claim for relief can be based. Instead, it seeks to act as a "place holder" for hypothetical other causes of action which Petitioner may wish to assert in the future based upon the prior actions of the Respondents by stating: "Upon information and belief, and/or as may be further determined upon filing of the record of proceedings, the Approvals may otherwise be in violation of other laws, regulations, and procedures." Am. Pet., ¶ 225.

Even when judged by the pleading standards of CPLR § 3026, the Seventh Cause of Action fails to state a claim upon which relief can be granted. It is black-letter law that a party cannot employ a catch-all provision in an attempt to preserve any and all potential claims or defenses for future use without providing notice of such claims to the opposing party. *See Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dep't 2015). If Petitioner later determines that it omitted some other potential claim or cause of action, its remedy would be to seek an amendment to the Amended Petition, not by inserting a "place holder" cause of action in

the existing pleading. As the Fourth Department has recognized, "although it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support;" moreover, "a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations." *Bratge v. Simons*, 167 A.D.3d 1458, 1461 (4th Dep't 2018); *see also Gorman v. Gorman*, 88 A.D.2d 677, 678 (3d Dep't 1982) (bare conclusory allegations not showing what plaintiff intends to prove are insufficient; essential material facts must appear on the face of the complaint). As pled, the Seventh Cause of Action clearly fails to give notice of the material elements of any claim, and contains mere bare conclusory statements. As the Seventh Cause of Action does not state any cognizable cause of action, it should be dismissed in its entirety.

CONCLUSION

Based upon the foregoing, the Town Respondents respectfully request that their motion to dismiss be granted in its entirety, together with such other and further relief as to the Court may seem just and proper.

Dated: February 22, 2022
Rochester, New York

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word count limit pursuant to 22 NYCRR 202.8-b(c) because it contains 6,765 words, excluding the parts of the document exempted by said Rule.

Dated: February 22, 2021

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