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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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JAMIE ROMEO

MONROE COUNTY CLERK

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

Dated: March 29, 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 Reply Memorandum of Law in further 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 Reply Memorandum of Law in further support of its motion to dismiss. The Town Respondents hereby join in Waste Management's arguments and incorporate by reference herein Waste Management's Reply Memorandum of Law.

This motion to dismiss relates to the Second, Fourth, Fifth, Sixth and Seventh Causes of Action in the Amended Petition ("Am. Pet.") of Petitioner Fresh Air for the Eastside, Inc. ("Petitioner"). 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.

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 Reply Memorandum of Law, as well as any accompanying papers, all of which are incorporated herein by reference.

II. The Fourth Cause of Action Should Be Dismissed

With respect to the Fourth Cause of Action, alleging a violation of General Municipal Law § 239-m, it is not disputed that, pursuant to General Municipal Law § 239-m(3)(c), a municipality may enter into an agreement with a County that exempts certain proposed actions from any requirement to refer the action to the County planning agency.

The documentary evidence provided with the Town Respondents' motion establishes as a matter of law that (1) the Town and Monroe County entered into an Agreement contemplated by General Municipal Law § 239-m(3)(c) effective January 26, 1994 (the "Agreement"), (2) the Agreement was in full force and effect at the time of the SUP approval, (3) the Agreement 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, (4) renewal of the SUP was not contrary to a prior recommendation or condition by a County or State agency, and (5) Waste Management's application for the SUP was a permit renewal. *See* LaFay Aff., Ex. A; Am. Pet., Ex. E, p. 464.

Petitioner's sole argument in response to the motion to dismiss is a claim that the record does not establish that renewal of the SUP was not contrary to a prior recommendation or condition by a County or State agency.[1] Notably, however, the Amended Petition is devoid of any allegation that there was a contrary prior recommendation or condition by a County or State agency relating to the SUP renewal, and absent such an allegation the Amended Petition fails to state a claim for relief under General Municipal Law § 239-m. The Affidavit of the Town Attorney, Mr. LaFay, which is not contested, establishes that in fact, there was not any such prior

[1] Petitioner also claims that Respondents do not contest that the application for the SUP related to real property located within 500 feet of the boundary of the Town. Respondents have not conceded this issue. Rather, Respondents recognized that Petitioner's allegation regarding the location of the subject property (Am. Pet. ¶ 198) must be accepted as true for purposes of a motion to dismiss, and argued that even assuming the truth of such allegation, the claim should be dismissed in light of the Agreement.

recommendation or condition. LaFay Aff. ¶ 8; s*ee Griffin v. Anslow*, 17 A.D.3d 889, 891-92 (3d Dep't 2005) legal conclusions and factual allegations flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference).

Because the record before the Court establishes that a referral to the County planning agency was not necessary, the Fourth Cause of Action should be dismissed.

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

In two short paragraphs, the Amended Petition suggests a host of vaguely alleged constitutional violations. *See* Am. Pet. ¶¶ 219-220. Petitioner's Memorandum of Law in opposition to the motions to dismiss ("Opposition"), which similarly lumps together and conflates many of the constitutional arguments, does not salvage the inadequate pleading. To state a claim, Petitioner had the burden of alleging facts to sustain the elements of a constitutional violation. For all of the reasons stated in the Town Respondents' initial Memorandum of Law as well as below, Petitioner simply did not do so.

A. The Amended Petition Does No State a Claim For Violation of Equal Protection Rights

Petitioner concedes that, to state an Equal Protection violation, it must allege that it "has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *See* Opposition at 12 (quoting *Vill. of Willowbrook v Olech*, 528 U.S. 562, 564 (2000)). Contrary to Petitioner's repeated assertions regarding alleged issues of fact, Respondents' motion to dismiss focuses solely on the allegations of the Amended Petition and the documents attached thereto. The Amended Petition fails to state a cause of action for violation of Equal Protection.

The Amended Petition does not allege that FAFE members are treated differently than others who are similarly situated. It does not allege that FAFE members who pursue litigation alleging diminished property value are treated any differently than non-members who do the same. Am. Pet. ¶ 219. It also does not allege that FAFE members who forgo litigation are treated any differently than non-members who forgo litigation. *Id.*

Moreover, the Amended Petition does not (and cannot) allege that one who seeks compensation through litigation or through settlement is similarly situated to someone who has not done so. Anyone who sues for an allegedly diminished property value will either receive compensation or be determined by a court to not have suffered a diminished property value. Such a property owner is not similarly situated to a homeowner who has not elected to pursue claims of property value diminution through litigation. Petitioner's Opposition wholly fails to address this distinction.

Even if Petitioner had adequately alleged differential treatment, the Amended Petition fails to allege that "'there is no rational basis for the difference in treatment.'" *Sicoli v Town of Lewiston*, 112 A.D.3d 1342, 1344 (4th Dep't 2013). In fact, Petitioner fails to explain how preventing double recovery to some property owners is "illogical" (Opp. at 13), while the PVPP itself expressly sets forth its rational basis: to avoid duplicative compensation to those who pursue other remedies. Property owners who elect to pursue litigation will either obtain relief through the courts independently of the PVPP, or be subject to a ruling by a court that the property owner is not entitled to compensation for diminution of property value. In either event, said property owners who elected to pursue a remedy in the court system are rationally excluded from receiving benefits under the PVPP, and Petitioner fails to provide any reason why such

property owners should be eligible for the PVPP if they are already seeking compensation through judicial means.

The cases cited by Petitioner are irrelevant and not controlling, in that they largely involve claims of selective enforcement of zoning laws. By way of example, in *Weaver v. Town of Rush*, 1 A.D.3d 920 (4th Dep't 2003), the Fourth Department found that plaintiff had adequately stated an equal protection claim where she alleged, among other things, that the municipality sought to enforce inapplicable code requirements against her, subjected her to groundless prosecutions, and confiscated her personal property. The court held that that these allegations fairly implied that similarly situated property owners were not subjected to such treatment and that the municipality lacked a rational basis for its actions. By contrast, here Petitioner fails to allege that FAFE members are treated differently from anyone similarly situated, and did not articulate how the adoption of the HCA and/or the PVPP allegedly lacks a rational basis. In light of the clear deficiencies in Petitioner's pleading, this claim is appropriate for determination on a motion to dismiss.

Because the Amended Petition falls short of alleging an Equal Protection violation, the Court should dismiss the Equal Protection claim as a matter of law.

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

Petitioner has not alleged a First Amendment violation, and fails to even respond to the vast majority of the arguments contained within Respondent's motion on this topic. Petitioner instead argues in its Opposition that it has alleged a First Amendment "retaliation" claim. However, the Amended Petition does not allege, and Petitioner's Opposition does not explain, any way in which exclusion from the PVPP qualifies as an "adverse action" for purposes of such a claim. As held by the Second Circuit, a private citizen claiming retaliation under the First

Amendment must as a general matter allege a chilling effect on First Amendment rights, even if they allege a concrete harm. *See Zherka v. Amicone*, 634 F.3d 642, 644 (2d Cir. 2011).

Here, the Amended Petition does not allege a chilling effect on First Amendment rights or concrete harm. As noted above, only those who have commenced or participated in a lawsuit seeking compensation or otherwise obtained compensation elsewhere for devaluation due to the presence of the facility are excluded from the PVPP. For those who have sued (or settled), either: 1) they will obtain a judgment or settlement, in which case they will be paid in connection with their claims seeking damages for diminution in property value; or 2) a Court will determine that they have no property value diminution, in which case they have no basis to obtain compensation for property value diminution. In either event, the property owner will have no need to participate in the PVPP. Petitioner's Opposition completely misses this point, and it fails to identify any way in which Petitioner's members who elected to sue for a devaluation remedy have suffered any concrete harm or chilling of First Amendment rights.

C. The Amended Petition Does Not Allege a Violation of the ERA

The Amended Petition alleges, in paragraph 221, that "[b]y approving the HCA and allowing the Landfill Activities, the Town has violated the right of members of Petitioner" under the ERA. Am. Pet. ¶ 221. As alleged in the Amended Petition, the HCA was approved on December 22, 2021. Am. Pet. ¶¶ 126, 142. Petitioner concedes that the ERA did not become effective until January 1, 2022 (Opposition at 7), so it instead resorts to arguing that "with no party having served the administrative record, Respondents have not shown that the HCA was fully executed prior to January 1, 2022" *Id*. Aside from being a baseless allegation, Petitioner's contention is simply irrelevant for purposes of this motion to dismiss. The Amended Petition does not challenge the ***execution*** of the HCA; it challenges the Town's ***approval*** of the HCA, an

action which the Amended Petition alleges—twice—occurred on December 22, 2021. Am. Pet. ¶¶ 126, 142; *see also id.* ¶ 1 ["the approval (the 'Town Board Approval') by the Town Board of a new Host Community Agreement ('HCA')"]; *id.* ¶ 221 ["By approving the HCA and allowing the Landfill Activities, the Town has violated the right of members of Petitioner to a "clean air and a healthful environment' …."]).

Attempting to creatively circumvent its retroactivity problem, Petitioner argues that the HCA itself qualifies as "legislation" which should allegedly be stricken down as unconstitutional regardless of when the Town Board approved that contract (Opposition at 9). This argument falls flat because the HCA is not legislation; it is a contract between Waste Management and the Town *See* Am. Pet. Ex. G. Petitioner argues that because the Town Board's *decision* under Town Law § 64(6) regarding the awarding of the contract qualifies as a "legislative act" (rather than an administrative act subject to review under Article 78), the contract subsequently entered into by the Town Supervisor *is* "legislation" (Opposition at 9). Petitioner improperly conflates these two issues. It should go without saying that a binding contract is different than general legislation, and Respondents are not aware of any case law wherein a contract is deemed legislation.[2] Legislation, unlike a contract, is subject to repeal by the political body that enacted it. *See* Municipal Home Rule Law § 10 (granting "every local government . . . the power to adopt and amend local laws" on particular topics); *Rozler v Franger*, 61 A.D.2d 46, 56 (4th Dep't 1978) (noting that such power includes the power to repeal local laws). By contrast, once a contract is entered into by a town supervisor pursuant to Town Law § 64 (6), that contract is binding on the town, is not subject to unilateral repeal by the town board, and is instead governed

[2] *See People ex rel. Cunningham v Roper*, 35 N.Y. 629, 633 (1866) ("It is never to be assumed . . . that the State has . . . fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation.").

by contract law. *See Matter of Sonbyrne Sales, Inc. v Town Bd. of Town of Onondaga*, 98 A.D.3d 1297 (4th Dep't 2012) (town board recission of contract held to be arbitrary and capricious). In short, there is no legal authority to support treating the Town's contract with Waste Management as a piece of legislation, thereby skirting the fact that the ERA simply did not apply to the Town Board's approval of the HCA.

As noted, Petitioner now attempts to pivot away from seeking to annul the Town's legislative determination to approve the HCA, and toward challenging the HCA itself. What Petitioner is now requesting via its Opposition cannot be understood as anything other than a court order compelling the Town to terminate its binding contract with Waste Management. Such a request for mandamus relief, however, is not supported by any allegation in the Amended Complaint. "The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought." *Francois v Dolan*, 263 A.D.2d 483, 483 (2d Dep't 1999), *aff'd* 95 N.Y.2d 33 (2000), *citing Legal Aid Soc'y. of Sullivan County, Inc. v Scheinman*, 53 N.Y.2d 12, 16 (1981). "[I]t is well settled that [mandamus relief] will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion." *Alliance to End Chickens as Kaporos v N.Y. City Police Dept.*, 32 N.Y.3d 1091, 1093 (2018) (internal quotation marks omitted). Further, "mandamus may only issue to compel a public officer to execute a legal duty; it may not direct how [the officer] shall perform that duty." *Id*. (internal quotation marks omitted), *quoting Klostermann v Cuomo*, 61 N.Y.2d 525, 540 (1984). "If there is any reasonable doubt or controversy regarding the petitioner's entitlement to performance, the petition for mandamus to compel must be denied (see *Assn. of Surrogates & Supreme Ct. Reporters v Bartlett,* 40 N.Y.2d 571, 574 (1976))." *Johnstown Water Bd. v City of Johnstown*, 2021 NYLJ LEXIS 494, at *16 (Sup Ct Fulton Cty.,

April 26, 2021); (dismissing claim sounding in mandamus because city charter did not "bestow[] a ministerial, nondiscretionary duty upon the Treasurer" and holding that petitioner had not "presented a clear legal right, or a duty that the Court should compel the Treasurer to fulfill." *Id.* at *22). Here, the Amended Petition does not allege any clear legal duty on the part of the Town to terminate the HCA. Indeed, the HCA is a binding contract, which is terminable only in accordance with its own terms. *See* Am. Pet. Ex. G § V(A).

Finally, the Court should not reach Petitioner's argument that the ERA created a private right of action (Opposition, Point II(A)-(B)) because the ERA was not in effect when the Town Board approved the HCA (the only action challenged under the ERA in the Petition). Additionally, Respondents made clear in their moving papers that they were not moving to dismiss on this ground, and thus the issue is not currently before the Court. Respondents do not waive, and expressly reserve their rights to argue, should Respondents' motion asserting only the narrow retroactivity ground be denied, that the ERA did not create a private right of action, including without limitation on the basis of the legislative history which clearly demonstrates that the New York State Legislature (and Sponsor Steve Englebright) did not intend the ERA to create a private right of action.

D. The Amended Petition Does Not Allege a Violation of Due Process

Petitioner, in its Opposition, still does not specify whether it intended to pursue a claim based on procedural due process or substantive due process. Regardless, the Amended Petition fails to state a cause of action under either theory.

With respect to substantive due process, the Opposition references alleged "fundamental rights" under the ERA which Petitioner claims were violated (Opp. at 14). Such arguments fail as a matter of law for the reasons set forth above (*see* Point III(C)) because the ERA did not exist

at the time the Town approved the HCA. The only other basis Petitioner asserts for a substantive due process claim is an alleged "property right" under the PVPP (Opp. at 14). However, for the reasons set forth above (*see* Point III(A)), Petitioner has not articulated any right to participate in the PVPP, or alleged any cognizable property or liberty interest sufficient to state a substantive due process claim. Nor has Petitioner alleged any harm (*i.e.*, deprivation) resulting from the exclusion of those who elect to pursue compensation for property diminution through other means, much less articulated how the Town's adoption of the HCA was "wholly without legal justification." *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 627 (2004). Finally, Petitioner simply ignores the principle articulated by Respondents in their Memorandum of Law that a substantive due process claim is not available where the plaintiff asserts claims under express textual sources of constitutional protection. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994).

With respect to procedural due process, in the first instance, the Amended Petition fails to identify a cognizable life, liberty, or property interest that has been allegedly diminished by adoption of the HCA. *See Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 31 (2d Cir. 1994) (right to payment on an ordinary contract with a municipality does not rise to the level of a constitutionally protected property interest). Moreover, Petitioner does not identify any "process" that has been denied to those who fall within the scope of the PVPP exclusion. Only those who elect to pursue compensation through a legal process are excluded from participation. The litigation process that serves as the basis of the exclusion *is* due process.

IV. The Seventh Cause Of Action Should Be Dismissed

As set forth in the Town Respondent's initial Memorandum of Law, Petitioner's Seventh Cause of Action, which seeks to act as a "place holder" for hypothetical other causes of action

that Petitioner may wish to assert in the future, states no facts upon which a claim for relief can be based. A party may not 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). Petitioner does not address this Cause of Action in its opposition to the motions to dismiss and therefore has conceded that the claim should be dismissed.

V. Upon Disposition Of This Motion, Respondents Must Be Afforded The Opportunity To Answer And Oppose The Amended Petition

Petitioner's argument that the Court should deny the motions to dismiss and simply grant the Amended Petition on the merits on the current record before the Court (*see* Opp. Point Six), dispensing with the requirement that Respondents submit Answers to the Amended Petition and the Administrative Record, is meritless and clearly contrary to the requirements of the CPLR. In the Amended Petition, Petitioner asserts claims under CPLR Article 78 as well as a claim seeking declaratory relief under CPLR Article 30. Under CPLR § 7804(f) and 3211(f), a Respondent or Defendant has the right to file an answer if a pre-answer motion to dismiss does not dispose of all claims in the petition or complaint.

CPLR § 7804(f), which governs this proceeding, provides that if a motion to dismiss the petition is denied, the court "shall" permit the respondent to answer "upon such terms as may be just." This language does not afford any discretion to the court with respect to the respondent's right to answer upon the denial of a motion to dismiss. *See Matter of Bethelite Comm. Church, Great Tomorrows Elementary Sch. v. Dep't of Envt'l Protection of City of N.Y.,* 8 N.Y.3d 1001, 1002 (2007) (remanding to allow respondents to answer upon denial of motion to dismiss); *Scott v. Commissioner of Correctional Servs.*, 194 A.D.2d 1042, 1043 (3d Dep't 1993) (upon denial of respondents' motion to dismiss, respondents "must" be allowed to answer pursuant to CPLR

§ 7804(f)). That the court may impose "terms as may be just" references the court's authority to provide for a schedule for the submission of the responsive pleading.

Petitioner's citation to CPLR § 404, which provides that the court "may" permit the respondent to answer upon the denial of a motion to dismiss, is both misleading and irrelevant. As even Petitioner concedes in its Memorandum of Law, in a proceeding brought pursuant to CPLR Article 78, the text of Article 78 governs where there is an inconsistency with CPLR Article 4. *See Long Island Citizens Campaign, Inc. v. County of Nassau*, 165 A.D.2d 52, 55 (2d Dep't 1991). The Court of Appeals case cited by Petitioner, *In re Dodge's Trust*, 25 N.Y.2d 273, 286 (1969), is plainly not applicable here in that it involved a special proceeding brought pursuant to CPLR Article 4, not Article 78.

Similarly, CPLR 3211(f) provides that where a pre-answer motion to dismiss a plenary claim is filed, the time to serve an answer is extended until ten days after service of notice of entry of the order determining the motion to dismiss. Again, this right to answer upon the denial of a motion to dismiss is not subject to the discretion of the Court.

It is clear that Petitioner's argument ignores the well-settled law and procedure applicable to the claims that Petitioner itself filed. Upon the issuance of the Court's decision on the respondents' motions to dismiss, the Respondents must be afforded the opportunity to file an answer to any claims not disposed of by the motion to dismiss, as well as the administrative record and any other opposing papers. In this regard, the Town Respondents join in Waste Management's request that the Court grant Respondents thirty (30) days to file answers to any claims which may remain after the Court determines the motions.

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, including that the Court grant Respondents thirty (30) days to file answers to any claims which may remain after the Court determines the motions.

Dated: March 29, 2022
Rochester, New York

WOODS OVIATT GILMAN LLP

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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 3,952 words, excluding the parts of the document exempted by said Rule.

Dated: March 29, 2022

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