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

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JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.

Petitioner,

-against-

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

Respondents.

Index No. E2021008617

WASTE MANAGEMENT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondent Waste Management of New York L.L.C. ("Waste Management") submits this reply memorandum of law in further support of its motion to dismiss pursuant to CPLR §§ 3211 and 7804(f) the Second, Fourth, Fifth, Sixth, and Seventh Causes of Action in the Amended Petition.

Petitioner's memorandum of law in opposition to Respondents' dispositive motions (NYSCEF Doc. No. 56) ("Opp'n") makes clear that Petitioner, apparently hoping to find a claim that will stick, asserted a hodgepodge of claims, including constitutional claims, largely in conclusory and disorganized fashion, and without alleging facts to support each element of those claims. As explained in Respondents' opening motion papers, many of the claims fail to state a cause of action or otherwise fail as a matter of law. Waste Management respectfully requests that this Court streamline this action by dismissing Petitioner's legally insufficient claims.

ARGUMENT

I. PETITIONER'S OPPOSITION DOES NOT PROVIDE ANY BASIS FOR OVERTURNING THE ZBA'S DETERMINATION, CONFIRMED BY NYSDEC, THAT THE SUP RENEWAL WAS A TYPE II ACTION.

As a matter of law, the SUP Renewal was properly deemed a Type II action exempt from SEQRA review. In fact, as admitted in the Amended Petition, NYSDEC the New York State regulatory body governing SEQRA reviews, confirmed that "the action that was pending before the ZBA was a renewal and renewals are Type II actions, which means that they are not subject to further review under SEQR" (Am. Pet. Ex. C at 3). Petitioner does not dispute that the SUP Renewal was, in fact, the renewal of an existing permit, instead arguing in conclusory fashion that immaterial changes to operations at the landfill or the imposition of additional operational

conditions constituted "material changes" to the permit (Opp'n at 2-3).[1] Even accepting the allegations in the Amended Petition as true, Petitioner has not alleged that any of the operational changes constitute a material change in the permit conditions or the scope of the permitted activity. Even in its Opposition to this motion, Petitioner does not even attempt to explain any reason why the supposed changes are "material."

Petitioner erroneously argues that "the ZBA resolution included no reasoning or findings explaining the Type II designation," citing only a single page of the transcript of that ZBA meeting (Opp'n at 3 [citing Am. Pet. Ex. E at 462]). Had Petitioner kept reading, it would have noticed that the next two pages of the transcript contain the supposedly missing reasoning and findings (Am. Pet. Ex. E at 463-64). Exhibit A to the Amended Petition also sets out the basis for the ZBA's determination—with added paragraph numbers.

At its meeting on August 19, 2021, the ZBA determined that the SUP Renewal was a Type II action and "that no further agency review under the SEQR regulations are required for this renewal" (Am. Pet. Ex. A at 1; *see also* Am. Pet. Ex. E at 462:1-12). The ZBA incorporated the recommendations and findings of the Perinton Conservation Board ("PCB"), which are at pages 291-300 of Exhibit E and included in Exhibit A, based on the ZBA's own findings (set out at pages 463-464 of Exhibit E, and in numbered paragraphs on the second page of Exhibit A), including:

> "2. Waste Management has a current Benefits Agreement with the Town, which was entered into on December 31, 2013.
>
> […]
>
> 6. ***Adequate plans have been presented to show that the landfill does not create a public hazard and that the landfill does not unduly interfere with the quiet enjoyment of adjacent properties; and the sufficient precautions have been taken to prevent fires or the creation and spread of smoke, odor, dust, fumes or noises***

[1] Petitioner's Opposition refers to "its opening Memorandum of Law" (Opp'n at 2). Petitioner never before filed a memorandum of law in support of the Amended Petition.

> ***liable to become a nuisance. Temporary cover is provided at the end of each day and revegetation has been appropriately provided.***
>
> 7. Building & Codes Department and the DPW have no concerns.
>
> 8. ***There have been no changes in the operating conditions, hours of operation or the footprint.***
>
> 9. High Acres Landfill & Recycling Center has all necessary enforceable permits in place."

(Am. Pet. Ex. A at 1-2; *see also* Am. Pet. Ex. E at 463-464). Thus contrary to Petitioner's assertion, the ZBA provided substantive reasoning and findings supporting its Type II determination.

Petitioner correctly points out that the ZBA solicited input from the Town Department of Public Works ("DPW") (Opp'n at 4), but soliciting input does not constitute impermissible delegation. Indeed, the SEQRA regulations expressly advise agencies to "seek the advice and assistance of other agencies, groups and persons on SEQR matters" (6 NYCRR 617.14 [c]). For example, NYSDEC's SEQR Handbook explains: "A board may be assisted in its review by other agencies and staff with expertise on environmental issues. An example is where a planning board is assisted in its review of a subdivision by a municipal planner or a conservation advisory council" (NYSDEC SEQR Handbook 172 [4th ed. 2020]). That is precisely what the ZBA did here. The PCB and the DPW staff each explained their rationale to the ZBA, which then properly determined to treat the SUP renewal as a Type II action:

> "The SUP application before the ZBA is a renewal of an existing permit. As such, New York Conservation Environmental Law Part 617.5(c)(32) states that "license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities" are considered Type II Actions where no further environmental review is warranted.
>
> Guidance from the NYSDEC SEQR Handbook provides examples of a "material change". For example, allowing a permit holder to change the allowable depth or height of a mine facility or resign access pints to a shopping mall so that shoppers would enter a

> highway ta different location is considered material changes to a previously approved project. In our particular case, and as described by the applicant, ***there is no change to the type of waste being accepted, the volume of waste being accepted, method by which waste is being delivered to the facility, the method by which the waste is being landfilled, or the size/footprint of the landfill being proposed as part of this application***. Therefore, it is our intent to treat this application as a SEQR Type II Action."

(Am. Pet. Exhibit E at 303 [emphasis added]).

The Perinton Conservation Board, whose recommendations and findings the ZBA reviewed and incorporated as part of making its own determination, similarly advised:

> "The proposed SUP application before the ZBA is a renewal of an existing permit. Additionally, guidance from the NYSDEC SEQR Handbook provides examples of a "material change" For example, allowing a permit holder to change the allowable depth or height of a mine facility or resign access points to a shopping mall so that shoppers would enter a highway to a different location is considered material changes to a previously approved project. In this particular case, ***there is no change in scope to permitted activities associated with this application; including the type of waste being accepted, the permitted volume of waste being accepted, method by which waste is being delivered to the facility, the method by which the waste is being landfilled, or the size/footprint of the landfill***."

(Am. Pet. Ex. E at 293 [emphasis added]).

Petitioner also completely misses (or evades) *Fletcher Gravel Co. v Jorling*, 179 AD2d 286 (4th Dept 1992). The issue in *Fletcher Gravel* was whether a permit renewal for a quarry entailed "material changes in its operation" sufficient to allow NYSDEC to treat the renewal application "as a new application, subject to the requirements" of SEQRA (*id.* at 288-89). The Fourth Department held that the permit renewal for a grandfathered quarry was exempt under from SEQRA; only if there had there been "material changes" to the permit conditions would the SEQRA exemption not have applied (*id.* at 290).[2] Here, the ZBA, based on its own findings (Am.

[2] Petitioner's Opposition wholly failed to address, let alone rebut, Waste Management's explanation in its opening brief that "More stringent permit conditions, which are more protective

Pet. Ex. A at 1-2; *see also* Am. Pet. Ex. E at 463-64), as well as upon its review and agreement with the PCB findings (Am. Pet. Ex. A; *see also* Am. Pet. Ex. E at 462), determined that the SUP Renewal qualified as a Type II action exempt from SEQRA review.

Petitioner's Opposition relies on its mistaken claim that "the ZBA failed to make any findings as to the materiality of the changes to the Landfill conditions" (Opp'n at 4), completely ignoring the findings (set forth above) that are recorded in the exhibits to Petitioner's own Amended Petition. This Court should therefore reject Petitioner's claim that "the ZBA was entirely silent on this issue" (Opp'n at 4) .

In conclusion, the ZBA, based on its findings, properly determined that the SUP Renewal was a Type II action (Am. Pet. Ex. A at 1-2; Am. Pet. Ex. E at 462-64), and NYSDEC confirmed that this determination was correct (Am. Pet. Ex. C at 3). Accordingly, the Second Cause of Action should be dismissed in its entirety.

II. PETITIONER'S FOURTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE GENERAL MUNICIPAL LAW SECTION 239-M DID NOT REQUIRE THE TOWN TO REFER THE APPLICATION TO RENEW THE LANDFILL PERMIT TO THE MONROE COUNTY DEPARTMENT OF PLANNING.

Waste Management joins the Town in moving to dismiss Petitioner's Fourth Cause of Action—the claim that the Town violated GML § 239-m. Waste Management incorporates by reference the arguments set forth by the Town in its opening papers and its reply.

III. PETITIONER'S FIFTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE IT HAS FAILED TO ALLEGE IMPROPER SEGMENTATION AS A MATTER OF LAW.

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of the environment, are logically not material changes and do not preclude treatment of a permit renewal as a Type II action. For example, in *Fletcher Gravel*, the 'determination to require permits for [air emissions sources] that did not previously require permits . . . [did] not constitute a material change in permit conditions' for the subject mining permit" (NYSCEF Doc. No. 49 at 10-11 [quoting *Fletcher Gravel*, 179 AD2d at 290]).

Petitioner argues that the SEQRA review of the HCA was impermissibly segmented from the review of the SUP Renewal. This argument is fundamentally flawed for two critical reasons.

First, segmentation does not apply when one of the "actions" is properly classified as a Type II action (*see Matter of Rodgers v City of N. Tonawanda*, 60 AD3d 1379 [4th Dept 2009] [holding that the storm sewer outlet replacement project was a Type II action that was properly segmented from the Gateway Point Park Project]; *Settco, LLC v NY State Urban Dev. Corp.*, 305 AD2d 1026 [4th Dept 2003] [conveying title to a property for redevelopment was a Type II action that was properly segmented from the casino project]). The applicable regulations make clear that segmentation of the assessment of potential adverse environmental impacts is permissible in certain circumstances pursuant to SEQRA (*see* 6 NYCRR § 617.3 [g][1]). Petitioner does not dispute or distinguish this applicable law. Because the SUP Renewal was properly a Type II action (*see* Point I), there was no improper segmentation as a matter of law and the Court need not look any further.

MYC New York Marina LLC v Town Bd. of Town of East Hampton, 17 Misc3d 751 (Sup Ct, Suffolk County 2017), relied upon by Petitioner (*see* Opp'n at 5), is legally and factually irrelevant to this proceeding. If anything, it provides a helpful contrast, and illustrates that the Town's SEQRA review here was proper. In *MYC New York Marina LLC*, the town amended its zoning ordinance as part of an update to its comprehensive zoning plan (17 Misc3d at 754). The rezoning, however, negated the town's prior decision (which had been assessed for purposes of SEQRA) to approve construction of, among other things, a sewage treatment plant (*id.* at 753, 754). Although it was "clear that the Town Board recognized the need for a sewage treatment facility" (*id.* at 759), through rezoning the town effectively cancelled the approved sewage treatment plant without providing "any quantitative or qualitative analysis or evidence on the

environmental impacts" of doing so (*id.* at 759-60). The court additionally found that, by not considering the cancellation of the sewage treatment plant as part of its SEQRA review of the rezoning, the town had improperly segmented the environmental review (*id.*).

Unlike in *MYC New York Marina LLC*, here, the Town's challenged action (in approving the HCA) did not reneg or contradict another action taken by that same agency. It merely involved approval of a private contract, leaving all of the existing permits in place. The ZBA in the present matter exercised its independent zoning authority when it considered the SUP Renewal as a Type II action pursuant to SEQRA[3], while the Town Board properly and separately exercised its legislative authority in reviewing and approving the HCA. Irrespective of whether the ZBA determined that the SUP Renewal was a Type II action, the Town Board properly conducted its independent review of the approval of the HCA as a contract pursuant to SEQRA. Hence, there was no requirement that the Town Board and ZBA coordinate a SEQRA review. Even though not required to do so, the Town conducted a SEQRA review in connection with its approval of its contract with Waste Management; and the Town appropriately avoided duplicating the SEQRA review that NYSDEC had already completed for the landfill in connection with permitting (*see Concerned Citizens of Cattaraugus County, Inc. v. Town Bd. of Town of Farmersville*, 221 AD2d 1010, 1011 [4th Dept 1995] [rejecting a challenge to a contract between a town and a landfill operator because "[t]he contract did not constitute an action subject to review under [SEQRA] and, in any event, the DEC's efforts in conducting the SEQRA review of the landfill need not be duplicated"], citing 6 NYCRR 617.2 [b] and ECL 8-0107).

[3] There is no requirement pursuant to SEQRA that a Type II action needs an individual determination of significance, and thus, there is no attempt to evade environmental review (6 NYCRR § 617.3[f] ["No SEQR determination of significance, EIS or findings statement is required for actions which are Type II."]; *see also Matter of Rodgers*, 60 AD3d 1379 [4th Dept 2009]; *Settco, LLC*, 305 AD2d 1026 [4th Dept 2003]).

The second critical flaw in Petitioner's argument is that the Town Board does not have authority to approve the zoning determinations or actions of the ZBA, and the ZBA likewise has no approval authority over the Town Board's decision to enter into contracts like the HCA (Town Law § 64 [6]). This important distinction further undermines Petitioner's argument that a coordinated review was required. With respect to the SEQRA review of the Town Board's approval of the HCA, an involved agency is "an agency that has jurisdiction by law to fund, approve or directly undertake an action" (6 NYCRR § 617.2 [t]). Neither the ZBA nor NYSDEC has jurisdiction to fund, approve, or authorize the execution of the HCA, and therefore could not have been involved agencies pursuant to SEQRA[4] (*see* Town Law § 64[6]; *see*, *e.g.*, *Concerned Citizens of Cattaraugus County v. Town Bd. of Town of Farmersville*, 221 AD2d 1010 [4th Dept 1995] [a town board's approval of an agreement under Town Law § 64 [6] with a private entity operating a landfill is not subject to a SEQRA review]). Petitioner again does not dispute or distinguish this applicable law.

Petitioner also mischaracterizes Waste Management's argument. In its motion papers, Waste Management highlighted Petitioner's failure to specify which action (approval of the HCA or the SUP Renewal) Petitioner was classifying as a Type I action in its Petition (*see* WM's Memorandum of Law at 16). Waste Management explained that, to the extent Petitioner was asserting that a coordinated review of the approval of the HCA was required, such argument fails because the Town Board's approval of the HCA (a contract between the Town Board and Waste

[4] For the same reason, NYSDEC flatly rejected Petitioner's suggestion that NYSDEC should have been an involved agency when the ZBA approved the SUP Renewal (Am. Pet. Ex. C (NYSCEF Doc. No. 32 at 3 ["The Department could not have been an involved agency because WM did not request a modification of its Part 360 or Title V permit. Accordingly, DEC did not have discretionary permitting jurisdiction with regard to the renewal of the Special Use Permit and without such jurisdiction DEC could not have been an involved or lead agency"]).

Management) does not involve any agency other than the Town Board as a matter of law (*see* Town Law § 64[6]).

Petitioner further argues that decisions are not actions, and that somehow the "action" before either the ZBA and/or the Town Board is the landfill "itself" (*see* Opp'n at 6). This argument is both incongruous and irrelevant. Whereas the decision to approve the SUP Renewal application was a zoning determination made by the ZBA, the decision to approve and authorize execution of the HCA was a legislative determination made by the Town Board. The reviews of the SUP Renewal and the HCA did not require a review of the entire landfill "itself" as propounded by Petitioner (Opp'm at 6). A review of the landfill "itself" is properly an action undertaken by NYSDEC pursuant to its solid waste regulations set forth in 6 NYCRR Part 363 (formerly Part 360). That comprehensive review was already done—and the Amended Petition concedes that it was done (Am. Pet. ¶¶ 33, 37-38, 39-40, 41-42, 44-45, 49; *see also* Am. Pet. Ex. C (NYSCEF Doc. No. 32) at 3 [referring to Waste Management's Part 360 permit and Title V permit]). The SUP Renewal is merely a zoning action by the ZBA, based upon whether the landfill meets the Town's applicable zoning requirements, and the approval of the HCA by the Town Board involves whether the Town should enter into the HCA as a contract with Waste Management. The Town Board through the Town Code designates the ZBA with zoning authority to review and approve the issuance and renewal of SUPs, while it reserves to the Town Board the authority to review and approve contracts such as the HCA pursuant to Town Law § 64(6). Agencies applying SEQRA are supposed to avoid duplicative environmental reviews (*see* 6 NYCRR 617.3[h]). Thus, neither the ZBA nor the Town Board needed to duplicate NYSDEC's review of the landfill "itself", as suggested by Petitioner (*see Concerned Citizens of Cattaraugus County, Inc.*, 221 AD2d at 1011

["the DEC's efforts in conducting the SEQRA review of the landfill need not be duplicated"], citing ECL 8-0107).

Accordingly, Waste Management respectfully requests that this Court reject Petitioner's arguments, and dismiss the Fifth Cause of Action in its entirety.

IV. PETITIONER'S SIXTH CAUSE OF ACTION MUST BE DISMISSED BECAUSE IT FAILS TO STATE ANY CLAIM UNDER THE NEW YORK STATE OR FEDERAL CONSTITUTIONS.

Waste Management joins the Town in moving to dismiss Petitioner's Sixth Cause of Action, which presents vaguely-described claims under the federal and state constitutions. For the reasons explained by the Town, there has been no violation of Equal Protection, Due Process, free speech or the right to petition. Further, the Town could not have violated the ERA when it approved and entered into the HCA in December 2021 because, as Petitioner concedes, the ERA was not a part of the New York State Constitution at that time, and did not become part of the New York State Constitution until January 1, 2022. Waste Management incorporates by reference the arguments set forth by the Town in its opening papers and its reply.

V. PETITIONER DID NOT OPPOSE DISMISSAL OF ITS SEVENTH CAUSE OF ACTION, WHICH IS AN IMPROPER CATCH-ALL CLAIM.

Waste Management joins the Town in moving to dismiss Petitioner's Seventh Cause of Action, which presents an improper catch-all claim. Waste Management incorporates by reference the arguments set forth by the Town its opening papers and its reply.

VI. THE COURT SHOULD NOT PRECLUDE RESPONDENTS FROM ANSWERING THE PETITION FOLLOWING DECISION ON THE MOTION TO DISMISS.

Waste Management joins the Town in opposing Petitioner's request that the Court not permit Respondents to answer the petition. Waste Management incorporates by reference the

arguments set forth by the Town, and repeats its request from its original motion papers that this Court grant Respondents thirty (30) days following a decision on the motion to dismiss to answer the remaining claims in the Amended Petition / Complaint.

CONCLUSION

In light of the foregoing, Waste Management respectfully requests that the Court dismiss the Petition, set a schedule for the remainder of this Proceeding, and grant such other relief that this Court deems just and proper.

Dated: March 29, 2022
Pittsford, New York

Respectfully Submitted,

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