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Fresh Air for the Eastside, Inc.

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

Total Fees Paid: \$0.00

Employee: ARC

State of New York

MONROE COUNTY CLERK'S OFFICE
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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,

vs.

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

Respondents.

**AMENDED
VERIFIED PETITION**

Index No. E2021008617

Petitioner (“Petitioner”) Fresh Air for the Eastside, Inc. (“FAFE”) for its Amended Verified Petition (“Amended Petition”), by its attorneys, Knauf Shaw LLP, alleges as follows:

INTRODUCTION

1. Petitioner brings this proceeding against the Town of Perinton Zoning Board of Appeals (“ZBA”) and the Town of Perinton Town Board (“Town Board”) pursuant to *inter alia*, CPLR Article 78, CPLR §3001, the Town Code (“Town Code”), the State Environmental Quality Review Act (“SEQRA”) (Environmental Conservation Law (“ECL”) Article 8), the Open Meetings Law (“OML”) (Public Officers Law Article 7), General Municipal Law (“GML”) §239-m, the United States and New York Constitutions, and/or otherwise, for an Order and Judgment vacating, annulling, and/or declaring illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void: (1) the decision and approval (the “ZBA Approval”), annexed as **Exhibit A**, by the ZBA of the 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 extended operation, modification and expansion (the “Landfill Activities”) of the High Acres Landfill & Recycling Center (“Landfill”) in the Town; (2) the

determination made by the ZBA that the Approval was a Type II action and not subject to environmental review under SEQRA; (3) the approval (the “Town Board Approval”) by the Town Board of a new Host Community Agreement (“HCA”) for the Landfill; (4) the Negative Declaration made under SEQRA by the Town Board; directing that an EIS be prepared on the Landfill Activities; enjoining further operation of the Landfill in the Town; and further granting such other further relief as this Court deems just and proper, including Petitioner’s costs, reasonable attorney’s fees, and disbursements.

PARTIES

2. Respondent WMNY is a Delaware limited liability company authorized to do business in New York, with offices located at 425 Perinton Parkway, Perinton, New York.

3. WMNY is the owner and operator of the Landfill, which is located at 425 Perinton Parkway, Perinton, New York, is the applicant for the Landfill Permit, and party to the HCA.

4. Petitioner is a New York not-for-profit corporation with offices located in Monroe County in the State of New York. Petitioner was organized exclusively to carry on the activities of a charitable or educational organization as specified in Section 501(c)(3) of the Internal Revenue Code.

5. Petitioner was formally formed in 2018 to, among other things, preserve and protect the environment for the benefit of residents living in proximity to the Landfill by performing activities such as working with elected officials and the public on environmental issues related to the Landfill and ensuring compliance of the Landfill with land use, solid waste management, and air pollution permits, zoning laws, and environmental laws, codes, and regulations.

6. Petitioner has more than 200 members who own property or reside in close proximity to the Landfill whose lives and properties have been and continue to be adversely

impacted by persistent, noxious, and offensive odors of garbage (“Odors”) and landfill gas emitted from the Landfill over at least the past five years. Landfill gas consists of volatile organic compounds, hazardous air pollutants, and reduced sulfur compounds, as well as potent greenhouse gases like methane. Petitioner’s members are forced to breath unclear air caused by the Landfill.

7. Members of Petitioner are uniquely injured by the operations of the Landfill in numerous ways including adverse impacts related to aesthetics, property values, environmental harm, noise, dust, fumes, odors, traffic, air pollution, vectors, tremors caused when the gas plant malfunctions, etc. (“Impacts”).

8. The Impacts are experienced differently between FAFE members, and are unique from the public at large, for example, the Odors and Impacts interfere with the use and quiet enjoyment of the individual member’s properties.

9. Specific members of Petitioner impacted by the Landfill include Justin and Kaitlyn Foley, residing at 24 Tea Olive Lane, Fairport, NY 14502, Gary and Jennifer McNeil, residing at 11 Golden Bell Court, Fairport, NY 14450, and Michael and Heather Merlo, residing at 7 Tea Olive Lane Fairport NY 14450.

10. Heather and Michael Merlo reside about 0.6 miles north of the Landfill, and regularly experience adverse Impacts caused by the Odors and Landfill. Due to the Odors and other Impacts, the Merlos limit use of their yard, and routinely check weather reports and wind direction and speed before planning any outdoor activities for themselves or their children. The Odors and Impacts have unduly interfered with the quiet enjoyment of their property.

11. Gary and Jennifer McNeil reside about 0.8 miles north of the Landfill, and regularly experience adverse Impacts caused by the Odors and Landfill. Due to the Odors and other Impacts, the McNeils have refrained from making property improvements and have seriously considered

selling their home. Due to Odors, the McNeils' children were not able to play outside on numerous occasions. The Odors and Impacts have unduly interfered with the quiet enjoyment of their property.

12. Justin and Kaitlyn Foley reside approximately 0.8 miles north of the Landfill, and regularly experience adverse Impacts caused by the Odors and Landfill. Due to the Odors and other Impacts, the Foleys have refrained from holding any large events at their home in fear that their guests would experience the Odors. They often refrain from using their backyard when Odors are present and constantly keep their windows closed in fear that the Odors will enter their home. The Foleys' daily activities are often interrupted by Odors. The Odors and Impacts have unduly interfered with the quiet enjoyment of their property.

13. Petitioner's members are concerned that the emissions from the Landfill are contributing to unclean air, an unhealthful environment, global warming, an increase in extreme weather conditions and unusual meteorological and atmospheric conditions, and will forever alter the manner in which they normally interact with the natural environment.

14. Both SEQRA, and Chapter 208 of the Town Code, were enacted to protect citizens from the type of adverse environmental impacts being experienced by the Members. By granting the ZBA Approval and the Town Board Approval (together the "Approvals") in a manner inconsistent with applicable law, including the requirements of the Town Code and SEQRA, the Town is continuing to permit the Landfill to operate in a manner that adversely impacts the members of Petitioner without imposing proper mitigation measures to eliminate or mitigate these Impacts.

15. Respondent Town is a municipal corporation with offices at 1350 Turk Hill Road, Fairport, New York 14450 in Monroe County which is governed by its Town Board.

16. Respondent ZBA is a zoning board of appeals existing pursuant to Town Law § 267, with offices located at 1350 Turk Hill Road, Fairport, New York 14450 in Monroe County.

THE TOWN CODE

17. Chapter 208 of the Town Code governs “Zoning” in the Town.

18. Town Code § 208-21 regulates the filling of land and dumping of waste material in the Town, and specifically prohibits any dumping of waste, except as expressly provided for in that Section.

19. Town Code § 208-21(C) permits the dumping of waste in the Town only in an Industrial Zone, and then only if a Landfill Permit is issued by the ZBA following a public hearing.

20. Town Code § 208-21(C) requires that a Landfill Permit applicant submit a copy of its Landfill Permit application to the Town of Perinton Conservation Board (“Conservation Board”) for comment.

21. Town Code § 208-21(C) requires that a Landfill Permit applicant secure the appropriate permits and permission from the New York State Department of Environmental Conservation (“NYSDEC”) to operate a solid waste facility in the Town.

22. Town Code § 208-21(D)(1) requires that a Landfill Permit applicant set forth “the waste materials which shall be dumped on the site.”

23. Town Code § 208-21(D)(2) further states that:

Before issuing a solid waste facility permit thereunder, the Zoning Board of Appeals shall find the following facts based on the evidence produced at the public hearing or submitted to the Board or upon personal observation by the members of said Board that:

- (a) The granting of such permit is in the public interest to establish environmentally sound facilities to dispose of and treat solid waste.
- (b) Adequate plans have been presented to show that the solid waste facility does not create a public hazard; that the solid waste facility

does not unduly interfere with the quiet enjoyment of adjacent properties; and that sufficient precautions are to be taken to prevent fires or the creation and spread of smoke, odor, dust, fumes or noises liable to become a nuisance; and that when the operation is completed, the fill material or disturbed area will be covered with at least six inches of clean nondeleterious topsoil within a reasonable time thereafter and seeded with a permanent pasture mixture or other fast-growing surface vegetation and that such reseeding is continued until growth has been established.

(c) Any excavation permitted under this section shall not occur unless all required Department of Environmental Conservation (DEC) permits or other DEC authorizations have been obtained, all operations are in compliance with all DEC regulations, the requirements of § 122-13 are satisfied and a bond is posted to ensure compliance with § 122-13. The standards for restoration set forth in § 122-13 of the Excavation Law of the Town of Perinton, as may be amended from time to time, are incorporated herein by reference and shall apply to all properties under the jurisdiction of this section.

[Internal citations omitted].

24. Town Code § 208-21(D)(3) states that the ZBA shall require an applicant to file a surety company bond with the Town as a condition to any Landfill Permit, to ensure compliance with Town Code § 208-21.

25. Town Code § 208-21(D)(4) states that any Landfill Permit shall expire no later than the fifth anniversary date following the issuance.

26. Town Code § 208-21(D)(4) further states that any application for a Landfill Permit “may be renewed under the same procedures required for the original permit.”

27. Town Code § 208-21(D)(5) requires that an applicant “enter into a contract with the Town Board for the operation of a solid waste facility” prior to the issuance of a Landfill Permit. This contract is referred to as a “Host Community Agreement,” and is further detailed below.

28. Town Code § 208-21(D)(6) permits the Town to revoke the Landfill Permit should

any condition in § 208-21 not be complied with.

29. Town Code § 208-21(D)(7) requires all uses permitted under a Landfill Permit to “conform to bulk and setback restrictions as prescribed by the Zoning Board of Appeals, but in no event shall such restrictions be less restrictive than those described in § 208-40A(4).”

30. Town Code § 208-40(A)(4) allows for a solid waste facility to operate in an Industrial District upon obtaining a Landfill Permit from the ZBA provided that the following criteria are met:

- (a) The parcel is greater than 100 acres in size.
- (b) The facility and related improvements are set back greater than 100 feet from any property line.
- (c) Appropriate measures are taken to minimize the visual impact of any operational activities and equipment, and dropoff facilities are provided along adjacent public roads.

THE LANDFILL HISTORY

- 31. The Landfill is located in the Industrial Zoning District.
- 32. The Landfill is governed by numerous permits.

State Solid Waste Management Facility Permit

33. The Landfill is currently operating under a Solid Waste Management Facility Permit issued by NYSDEC, Permit Number 8-9908-00162/00032 (“State Permit”), which allows WMNY to construct and operate a municipal solid waste (“MSW”) Landfill with an approved design capacity of 3,500 tons per day pursuant to ECL Article 27, Title 7 and 6 N.Y.C.R.R. Part 360.

- 34. The State Permit was last modified on October 4, 2013 and expires on July 8, 2023.
- 35. Upon information and belief, operations at the original Landfill commenced around 1972 under permits issued by the Town of Perinton and the Monroe County Health Department.

36. Upon information and belief, the original Landfill, occupying 72 acres, was closed in 1995.

37. In 1993, the Landfill was issued its first State Permit by NYSDEC in conjunction with the approval of the Western Expansion of the Landfill (“WEX”), which consists of Cells 1 through 9.

38. An environmental impact statement (“EIS”) was prepared for the approval of the State Permit for the WEX pursuant to SEQRA in 1993.

39. In 2001, the State Permit was modified to include the Parkway Expansion Phase I (“Phase I Expansion”), which consists of Cells 6V-Olm 7V-OL and 8V/9V-OL.

40. A Supplemental EIS was prepared for the approval of the State Permit for the Phase I Expansion pursuant to SEQRA in 2001.

41. In 2003, the State Permit was modified to include the Parkway Phase II Expansion (“Phase II Expansion”), which consists of Cells 10 and 11.

42. A Supplemental EIS was prepared for the approval of the State Permit for the Phase II Expansion pursuant to SEQRA in 2003.

43. The WEX, Phase I Expansion, and Phase II Expansion are all located in Perinton.

44. In 2008, NYSDEC approved a modification to State Permit, to include the Parkway Expansion Phase III and Vertical Expansion. The Phase III Expansion area includes Cells 12, 13, 13-OL, 14, 15, 16 and 17.

45. A Supplemental EIS was prepared for the approval of the State Permit for the Phase III Expansion and Vertical Expansion pursuant to SEQRA in 2008.

46. In 2011, the State Permit was further modified pursuant to *Preserve Scenic Perinton Alliance, Inc. v. Porter*, 32 Misc.3d 1216(A), 934 N.Y.S.2d 36 (Sup. Ct. Monroe Co. 2010, Hon.

John J. Ark, J.S.C.), which required the Landfill to eliminate a 100-foot vertical expansion in the Town of Perinton since the NYSDEC illegally permitted this vertical expansion many years into the future beyond their ten-year permit authority.

47. In 2013, the State Permit was modified to allow WMNY to construct and operate a rail siding to bring waste to the Landfill via intermodal rail from New York City (“NYC”). WMNY and NYC entered into a \$3.3 billion contract to transport NYC waste (“NYC Garbage”) to the Landfill.

48. In 2015, large amounts of MSW, including NYC Garbage, began arriving at the Landfill via intermodal rail, which is significantly more odorous than other waste streams.

49. In 2016, in conjunction with the modification of the Title V Clean Air Act Permit (the “Air Permit”) for the Landfill for the Phase III Expansion, another Supplemental EIS was prepared for the Landfill.

Town Landfill Permit

50. According to the Application, and upon information and belief, WMNY received a Landfill Permit from the Town for WEX and Phase I Expansion in 2001.

51. Upon information and belief, Landfill Permits have been issued to WMNY for the WEX, Phase, Phase II, and Phase III at various times.

52. WMNY was issued a Town Landfill Permit for the entire Landfill on July 25, 2016, which expired on August 22, 2021 (the “2016 Landfill Permit”).

53. Upon information and belief, WMNY did not prepare an EIS or Supplemental EIS in conjunction with issuance of the 2016 Landfill Permit received from the Town.

THE LANDFILL IS A CONTINUING NUISANCE

54. The Landfill is causing a nuisance in the community.

55. WMNY's operation of the Landfill results in the Odors and other Impacts which invade the community including public places, like schools, baseball fields, etc., and the private properties and homes of Town residents, including members of Petitioner.

56. WMNY's State Permit, Air Permit, and the Town Code require that odors from the Landfill be controlled so that they do not constitute a nuisance, regardless of the existence of specific air quality standards or emission limits.

57. In addition, NYSDEC's regulations require that WMNY "must ensure that odors are effectively controlled so that they do not constitute a nuisance as determined by [NYSDEC] [6 N.Y.C.R.R. § 360.19(i)]." The odors must be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property. *See* 6 N.Y.C.R.R. § 360-1.14(m).

58. The nuisance Odors have been well-documented since late 2017, subsequent to the approval of the 2016 Landfill Permit, when numerous residents complained of the Odors to the Town and NYSDEC.

59. In fact, Petitioner was created in direct response to Odors and as a result of the failure by the Town and NYSDEC to respond to the Odors and other Impacts from the Landfill.

60. The Odors continue to this day at nuisance levels.

61. WMNY fully admits and acknowledges in the Application that it causes nuisance Odors to infiltrate the community.

62. WMNY implemented several material operational changes in response to the nuisance Odors, and since the issuance of the 2016 Landfill Permit.

63. WMNY has publicly stated that it received approximately 100 complaints a year

from 1970-2017.

64. Since 2017, there have been numerous *days* when over 100 odor complaints were filed.

65. Below is a breakdown of odor complaints noted from November 2017 to June 15, 2021, through the FAFE on-line odor complaint application (the “FAFE App.”), which is trending to be the same as in 2021 as in 2020, when there were over 4600 complaints, **46 times more than a “normal” odor occurrence year according to WMNY.**

Row Labels	Count of 6/15/2021
2017	945
Qtr4	945
2018	10725
Qtr1	6838
Qtr2	1526
Qtr3	1428
Qtr4	933
2019	2942
Qtr1	514
Qtr2	442
Qtr3	946
Qtr4	1040
2020	4604
Qtr1	1017
Qtr2	568
Qtr3	1446
Qtr4	1573
2021	1778
Qtr1	1086
Qtr2	692
Grand Total	20994

66. The FAFE App is a publicly available electronic application that can be downloaded onto one’s phone or computer and provides a platform for real-time odor complaints. The FAFE App geocodes the address of the complainant based on their location at the time they are impacted by Odors, and allows the complainant to provide a description of the Odor Impacts,

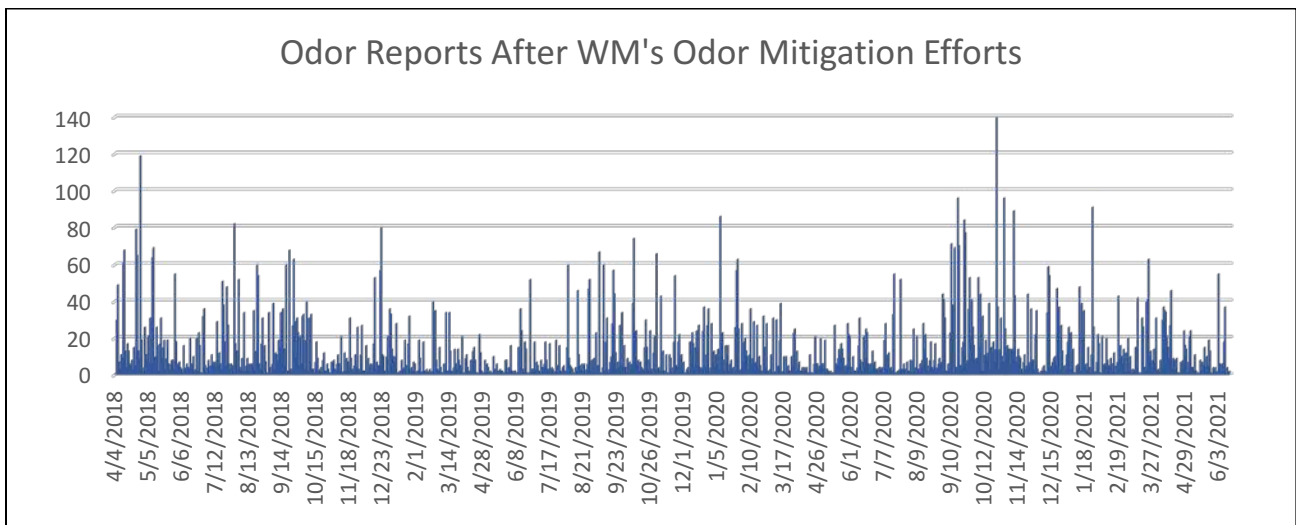
the intensity on a scale of 1 to 10, and any comments the complainants wishes to add, and automatically documents data like the wind direction and speed, weather conditions, barometric pressure.

67. Complainants have the option to send an email with their Odor report, which is immediately sent to various recipients, including government officials in the Town of Perinton, Town of Macedon, NYSDEC, and the State Assembly and Senate.

68. In its Application (page 4 of 6), WMNY fully admits that it caused a public nuisance from late 2017 through early 2018, which it referred to the public hearing as “the 2017/2018 Odor Event.”

69. WMNY claims it is of the opinion that it is no longer causing a nuisance in the community. WMNY publicly declared on May 3, 2018, that it had completed mitigation activities and that “[t]he mitigation efforts proposed by WMNY in the December 20, 2017 letter to NYSDEC as well as those required by [NYSDEC] in the [February 2018 Notice of Violation] have been completed and ongoing monitoring and maintenance activities are being performed.”

70. However, the nuisance Odors continue to this day. Below is a chart of the odor complaints received *per day* by the FAFE App just since May 3, 2018:



71. The Landfill is continuing to cause nuisance Odors on a regular basis. Petitioner maintains that WMNY's Odor problem should be referred to as the "Never-ending Odor Event."

72. Furthermore, WMNY admits that changes to weather conditions interferes with its ability to properly operate the Landfill and control the Odors emanating from the Landfill; weather conditions which will only increase with climate change; climate change that is being caused by greenhouse gas emitters like the Landfill.

**THE LANDFILL HAS CHANGED ITS OPERATIONS AND PERMITTED ACTIVITIES
AUTHORIZED BY ITS 2016 LANDFILL PERMIT**

73. There have been numerous material operational changes to the Landfill since the issuance of the 2016 Landfill Permit, and the EIS and Supplemental EISs were performed as described in this Amended Petition.

74. No environmental review has been performed pursuant to SEQRA to address the Odors experienced by the community since 2016, the substantial increase of NYC Garbage and resulting Odors, or the flawed design of Landfill Cells 10 and 11, which flawed design WMNY freely admits to.

75. Throughout the Application, WMNY notes numerous material operational changes including: "In late 2017 and early 2018, High Acres landfill experienced a first of its kind odor event associated with two disposal cells, 10 and 11. Cells 10 and 11 experienced a reduced capacity to collect landfill gas."

76. Since the issuance of the 2016 Landfill Permit, WMNY admits that it caused the "2017/2018 Odor Event."

77. As detailed in numerous public letters submitted by WMNY to NYSDEC or the Town, which the Town has been aware of or a recipient to, including a December 20, 2017 letter to NYSDEC, a February 16, 2018 letter to NYSDEC, a September 12, 2018 letter to the Town,

and an October 20, 2020 letter to NYSDEC, WMNY admits that it has made numerous major changes to the scope of the permitted activities of the Landfill Permit, and major operational changes at the Landfill since the issuance of the 2016 Landfill Permit (together the “Material Changes”), including:

- a) design, approval, and installation of an approximately 10,000 lineal feet of retroactively installed horizontal collection piping in cells 10 and 11;
- b) design, approval, and installation of additional 24 and 18-inch vacuum header from the flare/gas to energy plant in cell 11;
- c) identification, abandonment and replacement of an approximate 1100 lineal foot sub header in cell 11;
- d) design, approval and installation of 9 acres of exposed temporary geomembrane cover along the north and east slopes of cell 11;
- e) hiring additional, permanent staff to support the infrastructure construction, increase monitoring and maintenance of landfill gas collection and conveyance system;
- f) placement and compaction of additional daily and intermediate cover soils;
- g) evaluating the characteristics of soils types used for cover;
- h) limiting the acceptance of odorous materials;
- i) incorporating additional odor neutralizing distribution systems and products at the working face and at the facility perimeter;
- j) installed 60 mil HDPE liner in the drainage swale for swale for Cell 11;
- k) incorporating a daily odor patrol around the adjacent residential areas;
- l) sampling for hydrogen sulfide at the Landfill;
- m) installation and use of vibration prevention measures;
- n) installation of an enhanced permanent mist barrier system and an enhanced perimeter mist barrier system;
- o) replaced 8” and 12” sub-headers in cell 11 and installation of approximately 800 feet of sub-header in cell 5;
- p) upgraded the gas dewatering system to include over 100 wells focusing on cells 10/11 area;
- q) installed over 18 acres of geo-synthetic cover;
- r) committed to the placement of two-foot-thick interim soil cover on top of the plateau of cells 10 and 11;
- s) installed automated valves and well monitors to enhance monitoring and control of the gas collection system in various portions of the facility;

- t) installed automated flare reverberation control measures to monitor and control the facility gas blowers;
- u) use of a portable NCM odor control cannon and strategically placed “misting sticks” to control odors;
- v) use of the mobile misting system known as the Odor Boss Directional Vapor Canon system;
- w) employment of several permanent and mobile odor control systems at the Landfill as redundancies and backups in the event that the other odor controls are not operational;
- x) installation of a new landfill gas blower unit for the Zink flare;
- y) addition of vertical and horizontal wells to enhance the gas collection and control measures;
- z) installation of a dewatering compressor;
- aa) installation of nine (9) drainage pads around vertical slipform wells to assist with lateral collection of potential perched liquid within the landfill and the vertical wells that have drainage pads are hydraulically connected to the leachate collection system to further enhance landfill gas collection; etc.

78. Additionally, NYC Garbage, which is received by rail from waste transfer stations in NYC, became (and continues to be) the primary source of MSW disposed at the Landfill beginning in 2016 (*see* chart below, which is derived from WMNY’s annual reports to NYSDEC for the Landfill).

	2014	2015	2016	2017	2018	2019	2020
Rail NYC Garbage tons per year (“tpy”)	-	284,392	559,214	567,711	724,744	613,837	646,744
Total MSW (tpy)	211,317	475,316	750,084	796,065	838,850	686,848	717,891
Rail NYC Garbage as a percent of MSW	0%	60%	75%	71%	86%	89%	90%

79. WMNY closed and covered Landfill Cells 10 and 11 as a direct result of the Odors, and since the issuance of its 2016 Landfill Permit.

80. No environmental review pursuant to SEQRA has been completed for the reopening of those Cells, which WMNY, upon information and belief, plans to reopen within the five-year term of its Landfill Permit.

81. Other permitted activity and operational Material Changes are detailed in FAFE's comment letter objecting to the Application, which is incorporated by reference. *See Exhibit B*, Letter to ZBA, dated July 23, 2021.

82. None of these operational Material Changes, or the reasons these changes had to be made during the last five years, have been analyzed in an EIS in compliance with SEQRA.

83. Operational Material Changes WMNY must make to address the Odor issue continue to this day. As recently as August 25, 2021, NYSDEC required WMNY to undertake numerous operational Material Changes to the Landfill to address the Odors. *See Exhibit C*, Letter from NYSDEC, dated August 25, 2021.

WMNY'S LANDFILL PERMIT APPLICATION

84. On May 28, 2021, WMNY submitted its Application to the Town, less than three months before its 2016 Landfill Permit expired on August 22, 2021.

85. WMNY's deficient Application to operate the Landfill for another five years failed to comply with the application requirements of Town Code § 208-21 as follows:

- a. WMNY failed to submit a copy of its Application to the Conservation Board for comment, as required by Town Code § 208-21(C).
- b. WMNY's ability to secure all appropriate permits from NYSDEC to operate the Landfill for the duration of the Town Landfill Permit, as required by Town Code § 208-21(C).
- c. WMNY failed to provide a list of materials to be disposed of at the Landfill as required by Town Code § 208-21(D)(1).
- d. WMNY did not provide adequate plans describing how the Landfill does not "unduly interfere with the quiet enjoyment of adjacent properties," is not a "public hazard," and is in the "public interest," as required by Town Code § 208-21(D)(2).
- e. WMNY did not provide adequate plans documenting that the Landfill maintains proper cover as required by Town Code § 208-21(D)(2)(b).
- f. WMNY did not provide a surety bond as required by Town Code Section 208-21(D)(3).
- g. WMNY did not enter into a Host Community Agreement with the Town, as required by Town Code § 208-21(D)(5).
- h. WMNY did not demonstrate that it complied with, or obtained a variance from, Town Code § 208-40(A)(4), which requires that the Landfill "facility and related

improvements [must] be set back greater than 100 feet from any property line.”

86. The Application also contained a completed Long Environmental Assessment Form (“ZBA Approval EAF”). Part 1 of the EAF contained numerous errors and inaccurate responses to the various questions, claiming the Landfill causes no negative environmental impacts of any kind.

87. WMNY also completed draft Parts 2 and 3 of the ZBA Approval EAF. In Part 2 of the EAF, WMNY answered “NO” to every impact in the section despite obvious Impacts from the Landfill.

88. In Part 3 of the ZBA Approval EAF, WMNY inaccurately responded that there will be no significant adverse impacts on the environment and therefore, no EIS will be required.

THE ZBA APPROVAL

89. On July 23, 2021, Petitioner submitted detailed objections to the Application to the ZBA, which are annexed as **Exhibit B**.

90. The Application was heard by the ZBA on July 26, 2021. The ZBA did not make a decision or deliberate in any way on the Application at this public meeting, rather only accepted public comments.

91. The ZBA received more than fifteen letters and/or emails objecting to the Application. At the meeting, at least fifteen members of the community made comments in opposition to the Application.

92. Chairwomen Ezell noted that the comments that received from the community were “eye opening” in regard to the effects of the Landfill.

93. Upon information and belief, no letters/emails were submitted in support of the Application.

94. No public comments were made in support of the Application.
95. The ZBA referred the Application to the Conservation Board and deferred its decision on the Application until August 19, 2021.
96. The ZBA closed the public hearing at the conclusion of its July 26, 2021 meeting.
97. The Conservation Board held a public meeting on August 3, 2021. No public comments were accepted.
98. Petitioner submitted comments to the Conservation Board, by a letter dated August 3, 2021 and annexed as **Exhibit D**, further objecting to the Application.
99. Petitioner's objections included specific requests to the Conservation Board to include measures that would help address the Odors, such as covering the side slopes which are a major source of Odors according to FAFE's expert. *See Exhibit B.*
100. The Conservation Board requested more information from WMNY at the August 3, 2021 meeting, and upon information and belief, WMNY provided additional Application documents to the Conservation Board after that meeting.
101. On August 17, 2021, the Conservation Board submitted comments and recommendations to the ZBA, which failed to include any recommendations by FAFE.
102. Based on its review of the Application and its findings, the Conservation Board recommended that numerous conditions be placed on the Landfill Permit as part of any approval, including:
- (1) This renewed [Landfill Permit] renewal would be nullified if the draft Host Community Agreement (HCA) is not executed prior to January 1st, 2022.
 - (2) That the new draft HCA include, but not be limited to the following odor related monitoring requirements, protections and waste restrictions:
 - A. Continuous H₂S monitoring at the Northside/Dudley Elementary School as well as at locations on the perimeter of the property (north of the landfill, near NYS Rte 31F and at a

location south of the Landfill).

B. Application of the ASTM standard E-544-10 for charactering odor intensity utilizing N-Butanol, the deployment of certified responders to verify frequency and duration of odor complaints, and the reporting of actionable odor event causes.

C. Quarterly Landfill Surface Scanning & Monitoring with variances and mitigation measures reported for fugitive methane emissions at an actionable threshold of 200 ppm.

D. Conduct gas well monitoring & complete necessary follow-on well tuning 2-times per month (twice the regulatory standard).

E. That MSW waste received at HALRC by rail from the NYC five (5) Boroughs must not be greater than seven (7) days aged (as defined from a transfer station to the working face at High Acres). Any rail MSW from the NYC five (5) Boroughs that is older than seven (7) days will not be accepted at the facility. WMNY shall provide an “exception” Deferred Waste Report, which is to be sent to the Town of Perinton on a monthly basis.

- (3) That a separate engineering study & plan, received and approved by the Town of Perinton, independent of NYSDEC operating permit requirements or approvals be completed and prepared prior to the removal of the enhanced cover systems on top of Cells 10 & 11 and prior to the placement of additional waste in these cells.
- (4) That WMNY modify the facilities current Operation and Maintenance Plan to include, but not be limited to H2S monitoring requirements & protocols, surface scanning requirements & protocols, gas tuning well requirements, and waste characterization.
- (5) All previous [Landfill Permit] Conditions remain in effect and include the following:
 - A. Annual updates to PCB that including Monitoring variances, emissions, acoustical, regulatory compliance update
 - B. Summary of Odor complaints
 - C. Projecting filling sequence update
 - D. Wetland monitoring reports for HANA
 - E. Vehicular storage impinging on site view measures
 - F. Public outreach/education
 - G. Closure / post-closure estimates
 - H. Phase II closure cover specifications

103. On August 19, 2021, the ZBA held another meeting regarding the Application, and reviewed new information submitted by WMNY, and recommendations from other Town boards

and departments, like the Conservation Board. No public comments were accepted.

104. The ZBA concluded it was reviewing a SEQRA Type II Action, which was exempt from SEQRA review.

105. The ZBA approved the Application on a unanimous vote, and adopted the Conservation Board's recommendations.

106. The minutes of the August 19, 2021 ZBA meeting are attached as **Exhibit E**.

107. Upon information and belief, the ZBA rushed to issue its Approval and did not require a complete Application from WMNY in accordance with the Town Code because the existing Landfill Permit was expiring, and WMNY provides financial benefits to the Town and the nature of the relationship causes financial and political pressures the Town.

THE HOST COMMUNITY AGREEMENT

108. Landfill operators across the country typically enter into an agreement with the community that hosts the landfill. These agreements are typically referred to as a "host community agreement."

A. The 2013 HCA.

109. WMNY and the Town entered into a Host Community Agreement, which was approved by the Town Board, on December 30, 2013 ("2013 HCA").

110. The 2013 HCA expired on December 31, 2018, but by its terms, continued on a "month-to-month basis until the parties enter into a new agreement."

111. The 2013 HCA lacked any property value protection measures for the citizens of the Town, to protect the market value of their properties from the negative impacts the Landfill can cause, despite this being a standard provision in host community agreements across the country.

112. Town Code § 208-21(D)(5) requires that an applicant “enter into a contract with the Town Board for the operation of a solid waste facility” prior to the issuance of a Landfill Permit. This did not occur.

113. The Town Board’s position is that the 2013 HCA is the “contract” required for the issuance of the Landfill Permit, pursuant to Town Code § 208-21(D)(5).

114. However, this position is inconsistent with the Town Code because the 2013 HCA will not be the active HCA during the five-year term of WMNY’s newly issued Landfill Permit because it expired in 2018, and a new HCA was being negotiated to take its place and thus, the 2013 HCA cannot serve to satisfy the requirements of Town Code § 208-21(D)(5).

115. The intent of the Town Code clearly is for the HCA and the Landfill Permit to be issued and executed in unison so that the review of the Landfill Permit application can assess the enforcement mechanisms in the HCA.

116. In a Town-hosted public presentation in April of 2021, the Town stated, regarding the HCA and Landfill Permit “[t]ogether, these two essential documents **compliment each other** by allowing the landfill to operate as a business while also securing protections and benefits for residents in the Town of Perinton.” [emphasis in the original].

117. Despite the importance of adopting this HCA *before* issuing the Landfill Permit, the Town deferred issuance of this required contract until *after* the issuance of the Landfill Permit, and thus lost all leverage to negotiate a better agreement.

B. The 2021 HCA.

118. After the issuance of the Landfill Permit, WMNY and the Town finally negotiated a new HCA.

119. The Town published an initial draft on the Town’s website with the stated intent to

solicit comments from the community (“Draft HCA”), a copy of which is annexed as **Exhibit F**. This Draft HCA is dated April 2021, so the Town and WMNY started negotiating long after the expiration of the 2013 HCA, and only months before the expiration of the 2016 Landfill Permit.

120. The Draft HCA was devoid of all substantive and key provisions, such that it was impossible for the community to provide meaningful comments and fully understand what the Town was negotiating on their behalf.

121. Petitioner submitted numerous comments objecting to and suggesting improvements to the provisions contained in the Draft HCA, a copy of which is annexed as **Exhibit B, Ex. D**.

122. Nevertheless, Public comments were accepted on the Draft HCA until 5:00 p.m. on May 3, 2021. The Town received approximately 148 comments on the draft agreement, which can be found at: <https://perinton.org/wp-content/uploads/148-Comments-on-Draft-HCA.pdf>.

123. The comments related to several key issues raised by residents in the Draft HCA, including, but not limited to, the percentage of waste permitted from NYC, the notification management system, the on-site and off-site monitoring and investigation activities, limitations on aged waste, and the Town coverage and terms of the Property Value Protection Plan (“PVPP”).

124. As stated above, on August 19, 2021, the ZBA issued the Landfill Permit without a proper HCA in place, over three months after the comment period ended.

125. The ZBA, however, did accept the Conservation Board’s recommendations that the Landfill Permit “would be nullified if the draft Host Community Agreement (HCA) is not executed prior to January 1st, 2022.”

126. Upon information and belief, the HCA was not finalized until just before the Town Board meeting on December 22, 2021, almost eight months after the initial draft had been posted

on the Town's website, and seven months after the comment period ended. A copy of the HCA approved by the Town Board on December 22, 2021 is annexed as **Exhibit G**. A signed HCA is not available on the Town's website.

127. The Town failed to exercise the substantial authority it maintains through its Code, and the New York State Environmental Conservation Law, and through the HCA, relinquished a large amount of power to WMNY and NYSDEC.

128. The HCA terminates when and if the Perinton side of the Landfill is no longer being landfilled, so Town residents will not be able to take advantage of it while they are still being impacted by legacy impacts of the Landfill.

129. The HCA included several exhibits, including the PVPP, (HCA Ex. C) and a Full Environmental Assessment Form ("HCA EAF"), which along with the HCA were arbitrary and capricious as discussed below. *See Exhibit G*, HCA.

C. The PVPP.

130. The PVPP was included as part of the HCA to provide compensation to a small group of Town residents whose "residences suffer a decline in value at the time of the sale of the property as a result of the [Landfill]."

131. The PVPP provides steps an eligible property owners must take to receive compensation at the time of sale if the value of their property is diminished by the Landfill.

132. The Town of Perinton lacked a PVPP, even though it is an industry standard for a community hosting a Landfill, and more importantly, the neighboring Town of Macedon has had one in place with WMNY for years, as does the Town of Riga at the Mill Sear Landfill in Riga New York, operated by WMNY.

133. Although the HCA is "applicable town wide," the PVPP only applies to owners

with “lands within the hatched area of Schedule A” of the PVPP. Roughly 100 members of FAFE reside outside this “hatched area” but are negatively impacted by the Landfill and its Impacts to the community and environment on a continuous basis.

134. No “hatched area” was included in the HCA or the PVPP, but after submitting a FOIL request, Petitioner was provided the hatched area, attached as **Exhibit H**.

135. The eligible property owners are listed on Schedule A, *see* **Exhibit G**. The PVPP fails to state the justification for the hatched area map or which Town residents were chosen to be included in Schedule A.

136. However, the PVPP, in a section entitled “Intent” arbitrarily excludes a class of eligible property owners if they have “commenced or participated in a legal action for or has obtained compensation or damages by another remedy for devaluation[.]” This exclusion applies to about 102 members of Petitioner FAFE, who are listed as eligible owners on Schedule A.

137. The PVPP fails on its face to properly protect all affected residents of the Town from the Impacts on their homes caused by the Landfill,, arbitrarily limited eligibility to a small group of Town residents, and arbitrarily excludes eligible property owners from participating if they merely commenced a lawsuit against WMNY, which violates resident’s and FAFE member’s constitutional rights.

138. Further the PVPP arbitrarily divides Schedule A into five lists, or “Phases,” of when eligible property owners are eligible for the PVPP. Some eligible owners and FAFE members are not able to utilize the PVPP until 2026, despite the continuous Impacts from the Landfill occurring now and the current diminution of their property values.

D. The HCA EAF.

139. As discussed above, an EAF was submitted for the ZBA Approval, but the Town

also prepared the HCA EAF for the renewal of the HCA, only.

140. The HCA EAF contains numerous errors and inaccurate responses to the various questions and indicates that the HCA will not have a significant adverse impact on the environment.

141. In Part 2 of the HCA EAF, every question about impacts was answered in the negative, despite obvious Impacts of continued operation of the Landfill, including the Impacts and Odors from disposal of NYC Garbage at the Landfill.

142. On December 22, 2021, the Town Board, acting as lead agency, approved a Negative Declaration for the HCA, and approved the HCA. A copy of the minutes of that meeting is annexed as **Exhibit I**.

PROCEDURAL ISSUES

143. Petitioner has exhausted its administrative remedies.

144. Petitioner is a Plaintiff in an action pending in the United States District Court for the Western District of New York, entitled *Fresh Air for The Eastside, Inc., et al., Plaintiffs, v. Waste Management of New York, L.L.C. and The City of New York, Defendants*, Civil Action No. 6:18-cv-06588, but seek different relief in this proceeding.

145. Petitioner has no adequate remedy at law.

**AS AND FOR A FIRST CAUSE OF ACTION FOR ARBITRARY,
CAPRICIOUS, AND ILLEGAL ACTION IN VIOLATION OF
THE TOWN OF PERINTON TOWN CODE,
PETITIONER ALLEGES AS FOLLOWS:**

146. Petitioner repeats and realleges the allegations of paragraphs “1” through “145” of this Amended Petition, as if set forth in this paragraph at length.

147. The Application failed to comply with the requirements embodied Town Code § 208-21 and was deficient on its face. Specifically, WMNY failed to comply with the following provisions contained in Town Code § 208-21:

- a) § 208-21(C) because WMNY did not submit a copy of its Application to the Conservation Board;
- b) § 208-21(C) because some of the permits issued to WMNY by NYSDEC expire during within the next five years, for example, the Air Permit expires December 1, 2021, and the State Permit expires on July 8, 2023. There is no guarantee these permits will be renewed;
- c) § 208-21(D)(1) because WMNY failed to provide a list of the materials to be disposed of at the Landfill and obviated the ZBA’s opportunity to analyze whether the Landfill would create or continue a public hazard;
- d) § 208-21(D)(2) because WMNY cannot show that the Landfill operations do not interfere with its neighbors and is not creating a public nuisance. WMNY’s Application fails to address the continuing nuisance Odors, which are well-documented. The ZBA failed to consider the evidence submitted by FAFE in opposition to the Application, as detailed in this Petition;
- e) § 208-21(D)(2) because WMNY failed to show that the Landfill Permit is in the public interest and the Landfill is environmental sound. The public is not benefitting

from nuisance Odors. The Landfill has shown it is not environmentally sound by causing continuous nuisance Odors and the “2017/2018 Odor Event” and provided no mitigation measures or a contingency plan that another Odor Event will not occur in the future;

f) § 208-21(D)(2) because the “2017/2018 Odor Event” alone demonstrates the WMNY cannot operate its Landfill without creating a public hazard. The continuous nuisance Odors means WMNY is creating a public hazard to this day;

g) § 208-21(D)(2)(b) because the Landfill is not properly covered, especially the side slopes, and the improper cover is causing Odors, meaning WMNY cannot satisfy the requirement that “the solid waste facility does not create a public hazard, the solid waste facility does not unduly interfere with the quiet enjoyment of adjacent properties; and that sufficient precautions are to be taken to prevent fires or the creation and spread of smoke, odor, dust, fumes or noises liable to become a nuisance”;

h) § 208-21(D)(3) because WMNY’s Application is completely devoid of any evidence that the required surety bond exists with the Town;

i) § 208-21(D)(3) because the HCA was not finalized with the Town prior to the ZBA Approval. The 2013 HCA expired in 2018, and is only operating on a month-to-month basis until the new HCA is finalized. The HCA is required to be executed prior to granting the Application and issuing the ZBA Approval; and

j) § 208-40(A)(4) because WMNY’s Landfill and its accessory structures are not set back greater than 100 feet from any property line and a variance was not requested.

148. Thus, WMNY’s Application is so devoid of sufficient detail that the ZBA could not reasonably issue a Landfill Permit based upon it.

149. The ZBA also failed to comply with the procedural requirements embodied in

Town Code § 208-21.

150. Town Code § 208-21(D)(2) requires that the ZBA make findings of fact based on evidence produced “at a public hearing.” The ZBA’s decision to close the public hearing on July 26, 2021, but then review additional evidence and information submitted by WMNY and other Town departments after that date, at its meeting on August 19, 2021, was arbitrary and capricious.

151. The ZBA Approval was arbitrary and capricious, lacked legal justification, and was motivated by political and/or financial pressures.

152. The ZBA Approval was based on WMNY’s woefully deficient Application and the deficient procedures, and thus the ZBA Approval and the Landfill Permit were illegal, arbitrary and capricious, and must be annulled and voided.

**AS AND FOR A SECOND CAUSE OF ACTION FOR ARBITRARY,
CAPRICIOUS, AND ILLEGAL ACTION BY THE ZBA
IN VIOLATION OF SEQRA,
PETITIONER ALLEGES AS FOLLOWS:**

153. Petitioner repeats and realleges the allegations of paragraphs “1” through “152” of this Amended Petition, as if set forth in this paragraph at length.

154. Under SEQRA, a lead agency is required to review an EAF and make a determination of significance, pursuant to 6 N.Y.C.R.R. § 617.7, and require an EIS if an “action” might have at least one significant adverse impact to the environment, prior to granting any approvals. *See* 6 N.Y.C.R.R. § 617.3.

155. If there is one potentially significant adverse environmental impact arising from the action, then an EIS must be prepared. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.7(a)(1).

156. If there is *no* potential for a significant adverse environmental impact from the action, the lead agency must make a negative declaration, declaring that the action will not have a significant adverse environmental impact. 6 N.Y.C.R.R. §617.7(b)(2).

157. SEQRA requires literal, rather than substantial, compliance with its requirements.

158. “No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR[A].” 6 N.Y.C.R.R. §617.3(a).

159. “Action” does not refer to individual procedural mechanisms, but rather, an “action” is defined as the “project or physical activity, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure.” 6 N.Y.C.R.R. 617.2(b)(1).

160. Here, the “action” is the “physical activity” at or resulting from the Landfill Activities, including the Material Changes, pursuant to which the Landfill would be operated for the next five years.

161. While the ZBA found that “the proposed action be advanced as Type II action,” it was not a Type II action as the ZBA concluded.

162. Type II actions are limited to “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.” *See* 6 N.Y.C.R.R. § 617.5(c)(32).

163. However, there have been both Material Changes in the Landfill Permit conditions, and the scope of the permitted activities.

164. The Conservation Board recommended numerous new material conditions on the Landfill Permit, as detailed above, which were accepted by the ZBA, and thus, the action before the ZBA was improperly designated as a Type II action.

165. The action before the ZBA was the Landfill Activities, which was actually a Type I action pursuant to SEQRA, because it is a non-residential project that involves the physical alteration of more than 10 acres. *See* 6 N.Y.C.R.R. § 617.4(b)(6).

166. Type I actions “are more likely to require the preparation of an EIS” than other actions, 6 N.Y.C.R.R. §617.4(a), and are presumed to require an EIS.

167. As a Type I action, a coordinated SEQRA review with all involved agencies was required to be conducted before any actions were taken, including the designation of a lead agency and a determination of significance after submission of an EAF. *See* 6 N.Y.C.R.R. § 617.6.

168. In fact, when the Town Board later reviewed the Landfill Activities through the HCA approval process, it determined that the action it was reviewing was a Type I action.

169. Even if the Application could have been considered an unlisted action pursuant to SEQRA, an EAF was required to list all involved agencies, and a determination of significance was required. *See* 6 N.Y.C.R.R. § 617.6.

170. Because the Landfill Activities are not a Type II Action, the ZBA was required to take the necessary “hard look.”

171. The ZBA could not complete a proper environmental review when the Application failed to comply with the Town Code § 208-21 requirements, and lacked vital information to enable the ZBA to make a rational decision.

172. WMNY submitted its Application less than three months before the expiration of its 2016 Landfill Permit, which was an insufficient amount of time for the ZBA to complete its required review, and to require an EIS, which it should have required due to all of the Material Changes that had taken place and to determine if these Material Changes were sufficient to mitigate the numerous impacts caused by the Landfill Activities.

173. WMNY should have listed NYSDEC as an involved agency because Town Code §208-21(C) requires an applicant to secure all permits with NYSDEC as a condition precedent to issuing and Landfill Permit. WMNY’s State Air Permit will expire at the end of 2021 and will

need to be renewed within the five-year Landfill Permit period, as well as its State Permit, set to expire on July 8, 2023. At a minimum, the Town's Landfill Permit should have been contingent upon WMNY securing its required State permits during its five-year duration.

174. The Town or its Town Board should also have been included as an involved agency because Town Code § 208-21(D)(5) requires an HCA prior to the issuance of a Landfill Permit, which was required to be approved by the Town Board.

175. The SEQRA review should have considered all potential environmental impacts of the Landfill Activities, including but not limited to impacts related to aesthetics, property values, environmental harm, noise, dust, fumes, odors, traffic, air pollution, vectors, tremors caused when the gas plant malfunctions, etc.

176. The SEQRA review must also consider cumulative impacts of climate related impacts of methane generation from the Landfill. *See* 6 N.Y.C.R.R. §§ 617.9(b)(5)(iii)(i), 617.7(c)(2). The SEQRA regulations were updated after the issuance of the 2016 Landfill Permit to require review of climate related impacts, and these new climate change impacts were not evaluated.

177. The SEQRA review should have also considered that the Landfill is contrary to the Solid Waste Hierarchy set forth at ECL § 27-0105, pursuant to which land disposal is the least favored strategy, and the cumulative impacts of landfilling, pursuant to 6 N.Y.C.R.R. § 617.7(c)(2).

178. Because a compliant SEQRA review of the Landfill Activities would have identified at least one significant adverse impact on the environment resulting from this action, an EIS should have been required to have been prepared prior to the decision whether to issue the Landfill Permit. *See* 6 N.Y.C.R.R. § 617.4(a).

179. Accordingly, because the Landfill Activities should not have been designated a Type II Action, and the necessary SEQRA review was not conducted, this Court should annul and void the ZBA Approval and the Landfill Permit due to the failure to comply with SEQRA.

**AS AND FOR A THIRD CAUSE OF ACTION FOR
ARBITRARY, CAPRICIOUS, AND ILLEGAL ACTION IN
VIOLATION OF THE OPEN MEETINGS LAW,
PETITIONER ALLEGES AS FOLLOWS:**

180. Petitioner repeats and realleges the allegations of paragraphs “1” though “179” of this Amended Petition, as if set forth in this paragraph at length.

181. OML § 103(e) states that “Agency records available to the public pursuant to [the Freedom of Information Law], as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed.”

182. Petitioner’s attorneys submitted a Freedom of Information Law request to the Town on August 12, 2021, seeking the documents pertaining to the Application, scheduled to be discussed on August 19, 2021. Petitioner still has not received all documents it requested, and thus, the Town violated the OML.

183. OML § 103(e) further requires agency records available to the public through the Freedom of Information Law that are “scheduled to be the subject of discussion by a public body during an open meeting,” to “be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting,” if the “agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection.”

184. The Town utilizes a high-speed internet connection and maintains a website, which

can be accessed here: <https://perinton.org/>. The internet connection has been utilized by the Town to host various public meetings, including the meeting on July 26, 2021, August 3, 2021, and August 19, 2021. The Town also regularly updates its website with information about the Landfill, like monitoring reports. In addition, the website is regularly updated with meeting information and agendas.

185. However, the Town failed to post the Application on its website prior to the ZBA public hearing on July 26, 2021. The Town also failed to post additional Application materials submitted by WMNY after the July 26, 2021 meeting, and any recommendations by the Conservation Board and other Town departments.

186. The Town long delayed posting the meeting minutes from the Conservation Board's meeting on August 3, 2021, and the ZBA's meeting on August 19, 2021.

187. There is no reason that posting the Application or other materials considered by the ZBA when issuing its Approval was not practicable.

188. Additionally, it was improper for the ZBA to close the public hearing prior to obtaining the recommendations by the Conservation Board and prior to receiving additional Application materials from WMNY.

189. The ZBA deprived the public an opportunity to comment on the full Application before it made its Approval.

190. However, Town Code § 208-21 required the ZBA to hold a public hearing on the Application.

191. Thus, the ZBA violated the OML, and this Court should, upon the good cause demonstrated, annul and declare void the ZBA Approval and the Landfill Permit, and award attorneys' fees to Petitioner, pursuant to Public Officers Law § 107.

**AS AND FOR A FOURTH CAUSE OF ACTION FOR
ARBITRARY, CAPRICIOUS, AND ILLEGAL ACTION
IN VIOLATION OF GENERAL MUNICIPAL LAW § 239-M,
PETITIONER ALLEGES AS FOLLOWS:**

192. Petitioner repeats and realleges the allegations of paragraphs “1” though “191” of this Amended Petition, as if set forth in this paragraph at length.

193. Pursuant to GML § 239-m(3)(a), the issuance of a special use permit requires a referral to the county planning agency.

194. The proposed action must be referred to the county planning agency prior to the local entity taking final action on the proposed action.

195. Pursuant to GML § 239-m(3)(b), any proposed action within a county located within five hundred feet of the boundary of any city, village, or town is subject to referral requirements created under § 239-m.

196. The Landfill Permit is effectively a special use permit subject to GML § 239-m.

197. WMNY concedes it is a special use permit in its Application, as did the ZBA in its Approval.

198. The Landfill Permit is for property located within 500 feet of Wayne County and the Town of Macedon.

199. Upon information and belief, the Town failed to refer to the proposed action to the Monroe County Planning Department.

200. Thus, the ZBA violated GML § 239-m, and the ZBA Approval should be annulled and voided.

**AS AND FOR A FIFTH CAUSE OF ACTION FOR ARBITRARY,
CAPRICIOUS AND ILLEGAL ACTION BY THE TOWN BOARD
IN VIOLATION OF SEQRA,
PETITIONERS ALLEGE AS FOLLOWS:**

201. Petitioner repeats and realleges the allegations of paragraphs “1” through “200” of this Amended Petition, as if set forth in this paragraph at length.

202. The SEQRA review conducted by the Town Board in approving the HCA did not include a SEQRA review of the Landfill Activities or, as mentioned above, granting of the Landfill Permit.

203. The SEQRA regulations recognize “[a]ctions commonly consist of a set of activities or steps.” 6 N.Y.C.R.R. § 617.3(3). Therefore, “[c]onsidering only part or segment of an action is contrary to the intent of SEQR[A].” 6 N.Y.C.R.R. § 617.3(g)(1).

204. SEQRA generally prohibits “segmentation,” which is defined as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.” 6 N.Y.C.R.R. § 617.2(ah).

205. By conducting separate SEQRA analysis for the ZBA Approval and the HCA, the ZBA and the Town Board illegally segmented the SEQRA review, contrary to the requirements of 6 N.Y.C.R.R. § 617.3(g).

206. Rather, one SEQRA review should have been conducted for all of the Landfill Activities before either the ZBA approved the Landfill Permit or the Town Board approved the HCA.

207. SEQRA review of the Landfill Activities prior to consideration of the HCA needed to review all the potential environmental impacts of the Landfill Activities, including but not limited to impacts related to aesthetics, community character, traffic and noise, as well as impacts

of potential future phases of development at the Landfill.

208. The SEQRA review prior to approval of the HCA did not include those considerations, and illegally segmented review of the HCA from the actual Landfill Activities .

209. As a Type I action, a coordinated SEQRA review with all involved agencies, including DEC and the ZBA, was required to be conducted before any actions were taken, including the designation of a lead agency and a determination of significance after submission of an EAF. *See* 6 N.Y.C.R.R. §617.6.

210. As a Type I action, the action before the Town Board was “are more likely to require the preparation of an EIS” than other actions, 6 N.Y.C.R.R. § 617.4(a), and are presumed to require an EIS.

211. Because a compliant SEQRA review of the Landfill Activities would have identified at least one potentially significant adverse impact on the environment resulting from this action, a Negative Declaration should not have been approved, and an EIS should have been required to have been prepared prior to the decision whether to grant any Approval, including the Town Board Approval of the HCA. *See* 6 N.Y.C.R.R. § 617.4(a).

212. In making its Negative Declaration, the Town Board failed to take a hard look at the Landfill Activities, and failed to make an adequate reasoned elaboration, in violation of 6 N.Y.C.R.R. §617.7(b).

213. The Negative Declaration was therefore illegal, arbitrary and capricious, and should be annulled.

214. “No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR[A].” 6 N.Y.C.R.R. § 617.3(a).

215. The Town Board was therefore without authority to approve the HCA because it

was not proceeded by proper SEQRA review.

216. Therefore, the HCA was illegal due to failure to comply with SEQRA and should be annulled.

**AS AND FOR A SIXTH CAUSE OF ACTION
FOR ARBITRARY, CAPRICIOUS, ILLEGAL, AND
UNCONSTITUTIONAL ACTION,
PETITIONER ALLEGES AS FOLLOWS:**

217. Petitioner repeats and realleges the allegations of paragraphs “1” through “216” of this Petition, as if set forth in this paragraph at length.

218. The Town Board Approval and the HCA were illegal, arbitrary, capricious and/or unconstitutional, and both lacked a rational basis, and did not serve an important or compelling government purpose.

219. By discriminating against members of Petitioner that brought a legal action regarding the Landfill, the Town has denied Equal Protection, Due Process and the Right to Free Speech and to Petition for Redress, in violation of the First, Fifth and Fourteenth Amendments and the Sections 6, 8, 9 and 11 of Article I of the New York Constitution.

220. By granting the Town Board Approval, the Town allowed the Impacts, Odors and a Public Nuisance to continue to be imposed upon members of Petitioner, in violation of the Right to Due Process, in violation of the First, Fifth and Fourteenth Amendments and Sections 6, 9 and 11 of Article I of the New York Constitution.

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,” as guaranteed by Section 19 of Article I of the New York Constitution, including by allowing the continued Odors and other air emissions from the Landfill, by approving the least favored option under the Solid Waste Hierarchy, and by authorizing continued greenhouse gas emissions like methane to

contribute toward global climate change without mandating any new mitigation measures to curb such emissions.

222. WMNY admits that changes to weather conditions interferes with its ability to properly operate the Landfill and control the Odors emanating from the Landfill; weather conditions which will only increase with climate change; climate change that is being caused by greenhouse gas emitters like the Landfill.

223. Therefore, this Court should annul and void, and declare unconstitutional, the Town Board Approval and the HCA.

**AS AND FOR A SEVENTH CAUSE OF ACTION
 FOR ARBITRARY, CAPRICIOUS, AND ILLEGAL ACTION,
 PETITIONER ALLEGES AS FOLLOWS:**

224. Petitioner repeats and realleges the allegations of paragraphs “1” through “223” of this Petition, as set forth in this paragraph at length.

225. 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.

WHEREFORE, Petitioner respectfully requests that this Court grant an Order and Judgment, pursuant to CPLR Article 78, the Town Code, SEQRA, the OML, GML, the United States and New York Constitutions, and/or otherwise, vacating, annulling, or declaring illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void: (1) the ZBA Approval of the Landfill Permit, pursuant to the Town Code § 208-21, and the Landfill Permit; (2) the determination under SEQRA made by the ZBA that its Approval was a Type II action; (3) the Town Board Approval of the Host Community Agreement; and (4) the Negative Declaration made under SEQRA by the Town Board; directing that an EIS be prepared on the Landfill Activities;

enjoining further operation of the Landfill in the Town; and 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
January 20, 2022

/s/ Melissa M. Valle
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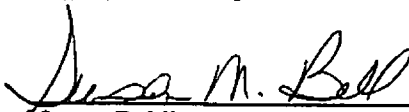
VERIFICATION

**STATE OF NEW YORK)
COUNTY OF MONROE) s.s.:**

GARY MCNEIL, being duly sworn, deposes and says that I am the President of the Board of Petitioner/Plaintiff Fresh Air for the Eastside, Inc., and have read the annexed Amended Petition, and knows its contents. It is true to my own knowledge, except as to the matters stated to be alleged upon information and belief, and as to such matters I believe them to be true.


GARY MCNEIL

Sworn to before me this
20th day of January, 2022


Notary Public

SUSAN M. BELL
Notary Public, State of New York
No. 4916506
Qualified in Monroe County
Commission Expires 12/28/2025