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.

DECISION and ORDER
Index No. E2021008617

KNAUF SHAW LLP Linda R. Shaw, Esq., Dwight Kanyuck, Esq., and Melissa Valle, Esq., of Counsel Attorneys for Petitioner

WOODS OVIATT GILMAN LLP John C. Nutter, Esq. Jerry A. Goldman, Esq. of Counsel Attorneys for Respondents, Town of Perinton and Town of Perinton Zoning Board of Appeals

HARRIS BEACH PLLC, Kelly S. Foss, Esq. Steven P. Nonkes, Esq. Frank C. Pavia, Esq. of Counsel Attorneys for Respondent Waste Management of New York, LLC

ARK, J.

The Amended Petition.

On March 10, 2022, Petitioner Fresh Air for the Eastside, Inc. ("FAFE" or "Petitioner") by an Amended Petition of a Petition originally returnable October 21, 2021), ("Petition") pursuant to inter alia, CPLR Article 78, CPLR §3001, the Town of Perinton ("Town") Code, the State Environmental Quality Review Act ("SEQRA"), the Open Meetings Law, General Municipal Law §239-m, the United States and New York Constitutions, seeks an Order vacating, annulling, and/or declaring illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void the decision and approval (the "Approval") by the Town of Perinton ("Town") Zoning Board of Appeals ("ZBA" and collectively with the Town the "Town Respondents") of the permit application ("Application") submitted by Respondent Waste Management of New York, L.L.C. ("WMNY" or "Waste Management") for a Solid Waste Facility Permit, pursuant to the Town Code § 208-21 ("Landfill Permit"), for the High Acres Landfill & Recycling Center (the "High Acres Landfill or"Landfill"), located at 425 Perinton Parkway, Perinton, New York.

This lawsuit, claiming an infringement of their quality of life, started as a fairly typical CPLR Article 78 challenge by neighbors to a municipal land use determination i.e. Landfill

Permit. Since the commencement of this matter on October 21, 2021, the voters of New York State approved Section 19 of Article I of the New York Constitution (the "Green Amendment") which guarantees , as of January 1, 2022,"[e]ach person shall have a right to clean air and water, and a healthful environment."

The "Members" of FAFE are residents in the Town of Perinton, New York, who claim their recently acquired constitutional "right[s] to clean air and water and a healthful environment" have been and are being violated as a result of the actions or inactions on the part of the Defendants regarding the Landfill in the adjacent Towns of Perinton and Macedon, New York.[1] More specifically FAFE challenges:

(1) the decision and approval by Respondent Town of Perinton ZBA of the application submitted by Respondent WMNY for a Solid Waste Facility Permit, pursuant to the Town Code § 208-21 for the extended operation, modification and expansion ("Landfill Activities") of the Landfill in the Town of Perinton;

(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 by the Town Board of Respondent Town of Perinton of a new Host Community Agreement ("HCA") for the Landfill;

(4) the Negative Declaration made under SEQRA by the Town Board; directing that an Environmental Impact Statement 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.

Respondents' Reply.

The Town Respondents and Respondent WMNY separately[2] moved pursuant to CPLR §§ 3211(a)(1), (3), (7) and/or (8) and 7804(f) for an Order dismissing the Second, Fourth, Fifth

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[1]This lawsuit does not include the extensive portion of the landfill in the Town of Macedon, which would presumably continue to operate if the Perinton portion was closed.

[2]This Decision and Order addresses collectively the separate motions brought by the individual Respondents.

and Seventh Causes of Action set forth in the Amended Verified Petition. To the extent the Sixth Cause of Action purports to challenge the HCA under CPLR Article 78, it should be dismissed. Any constitutional claims within the Sixth Cause Of Action should be dismissed, to wit:

A. The Amended Petition fails To state a claim for violation of Equal Protection Rights;

B. The Amended Petition fails to state a claim for violation of the "Right to Free Speech and Petition";

C. The Amended Petition fails to state a claim for violation of procedural due process;

D. The Amended Petition fails to state a claim for deprivation of substantive due process; and

E. Petitioner's claim under The Green Amendment.

Finally, Respondents request such other and further relief as to the Court may seem just and proper.

Petitioners' reply.

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

Standard for Dismissal Pursuant to CPLR 3211(a)(7)

When determining a motion to dismiss under CPLR 3211(a)(7), a court must afford the pleading a liberal construction, accept the facts alleged in the complaint accepted as true, and accord the benefit of every possible favorable inference. See *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). "However, while the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration."

Salvatore v. Kumar, 45 A.D.3d 560, 563 (2d Dept. 2007) (internal quotation omitted); see also *Robert Fernicola et al* v. *State Ins. Fund,* 293 A.D.2d 844 (3d Dept. 2002) ("In determining a motion [to dismiss], a court must: liberally construe the pleadings in plaintiff's favor, accept the alleged as true, and determine whether the facts alleged fit within any cognizable theory. However, [even with this broad standard,] a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence.")

DECISION

I. Does Petitioner's second cause of action fail as a matter of law because renewal of the landfill permit was a Type II action not subject to SEQRA?

In its Second Cause of Action, Petitioner challenges the Town of Perinton ZBA determination to approve Waste Management's application to renew the Special Use Permit ("SUP") for the Landfill established in 1971. Respondents posit that Petitioner's allegations that the SUP Renewal was not a Type II action under SEQRA are contrary to the regulations promulgated by the New York State Department of Environmental Conservation ("NYSDEC"), and are not supported by factual allegations in the Amended Petition. As a matter of law, under the NYSDEC regulations, permit renewals are Type II actions that do not require review under SEQRA. Indeed, NYSDEC itself confirmed that the SUP Renewal that is the subject of this proceeding was in fact a Type II action.

Petitioner counters that the Landfill has undergone a series of material changes since the granting of the 2016 Landfill Permit, not least among those changes being the active and repeated failures of the Landfill gas emission system and its monitoring and maintenance. Because the ZBA failed to make any findings as to the materiality of the changes to the Landfill conditions, the Type II designation was arbitrary and capricious as a matter of law and must be annulled. But even if it had, it would have been arbitrary and capricious to classify the Application as a Type II action due to the material changes.

In a pre-Answer Motion to Dismiss in the absence of the full Record, no basis for dismissal of Petitioner's Second Cause of Action claim has been provided at this initial stage in this litigation. Accordingly, **the Motion to Dismiss the Second Cause of Action is denied.**

II. Should Petitioner's fourth cause of action 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?

In its Fourth Cause of Action, Petitioner alleges that the ZBA violated General Municipal Law § 239-m. In 1994, however, pursuant to General Municipal Law § 239-m (3)(c), the Town and the County of Monroe entered into an intermunicipal agreement under which the parties agreed that permit renewals are local concerns. Based upon this documentary evidence, referral of the Application to Renew the Landfill Permit to Monroe County under General Municipal Law § 239-m was not required as a matter of law.

Petitioner counters that despite relying on this provision, nothing in the record establishes that the Landfill was previously reviewed by the County or that the Application is not contrary to a prior recommendation or condition. The only argument offered on this point is the unsubstantiated allegation of the Town's attorney that the renewal is not contradictory to either of those items.

In a pre-Answer Motion to Dismiss in the absence of the full Record, no basis for dismissal of Petitioner's GML § 239-m claim has been provided at this initial stage in this litigation. Accordingly, **the Motion to Dismiss the Fourth Cause of Action is denied.**

III. Should Petitioner's fifth cause of action be dismissed because its SEQRA challenges fail as a matter of law?

Petitioner's Fifth Cause of Action presents several allegations concerning the Perinton Town Board's approval of a Host Community Agreement ("HCA") with WMNY. Respondents assert that none of the allegations states a valid cause of action.

First, there was no improper segmentation of the SEQRA review. As noted, SEQRA review was not required for the SUP Renewal, much less with the new HCA.

Second, though the Amended[3] Petition alleges in conclusory fashion that NYSDEC and

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

"In this particular case, there is no change in scope to permitted activities associated

the ZBA should have been involved agencies for purposes of a SEQRA review, it provides no factual allegations to support that conclusion. Rather, the Amended Petition itself conclusively shows that neither NYSDEC nor the ZBA had any reason to be involved.

Third, the Town Board's Negative Declaration, which is incorporated by reference in the Amended Petition, presents a sufficient written elaboration of its reasoning for determining that the new HCA had significant benefits and was no less protective of the environment than the previous 2013 HCA, which remained in effect until the new HCA was approved. As a matter of law, therefore, even accepting Petitioner's factual allegations as true, the Fifth Cause of Action fails to state a claim.

Petitioner replies that the "action" is the Landfill itself, and the various decisions of which it is the subject include: 1) the HCA adoption; 2) the Landfill Permit renewal; and 3) the Title V Air Permit renewal application for the Landfill currently under review by NYSDEC. As it is undisputed that the Landfill cannot continue to operate without receiving each of these approvals, it necessarily follows that each of the Town Board, the ZBA, and NYSDEC were involved agencies. In fact, "special use permits" and "environmental permits issued by DEC" are both specifically listed by the SEQR Handbook at Section B(3) as discretionary decisions subject to SEQRA. Decisions are not actions. Therefore, once it is determined that the Type II designation was issued in error, it must then be determined that the Respondents needed to engage in coordinated SEQRA review. Accordingly, the Town Board's Negative Declaration must be annulled as impermissible segmentation and for arbitrarily limiting its scope to exclude the environmental impacts of the Landfill itself.

Accordingly, **the Motion to Dismiss the Fifth Cause of Action is denied.**

IV. Does Petitioner's Sixth Cause of Action fail to state any claim under the New York State or federal Constitutions?

Respondents posit that the Petitioner presents a host of vague constitutional claims in its Sixth Cause of Action, none of which states a cause of action. Most of these constitutional claims

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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."

appear to be based upon Petitioner's challenge to the Property Value Protection Program ("PVPP") contained within the HCA.

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

The PVPP as set out in the HCA is essentially an acknowledgment that there is an air quality nuisance at High Acres Landfill. The PVPP at most only mitigates the effects of the nuisance. But the nuisance and violations still exist. The limitations, monitoring, hotline and PVPP are not "benefits", but are derivative of the negative consequences of Perinton "hosting" the High Acres landfill. The only stated "significant benefits to the Town" are payment by Waste Management of a recycling fee and host community benefit payments. Whether these payments justify the nuisance created by the Landfill is questionable, most certainly not to the neighbors affected by the Landfill.

The PVPP provides certain residents located in close proximity to the Landfill the opportunity to receive compensation if application of a particular formula upon the sale of their homes proves diminished property values. It rationally contains a term that prevents otherwise eligible residents from potentially obtaining duplicative compensation. More specifically it excludes from participation anyone who has sued, or otherwise already been compensated, for alleged property value diminution. If a household has already been paid for property diminution, there is no loss to compensate through the PVPP. If a household has sued for alleged property diminution, the litigation will necessarily resolve such factual questions and provide a mechanism for recovery of compensation if warranted. Participation in the PVPP is strictly voluntary. Non-participation by a homeowner results in no untoward results. Interestingly, if a homeowner can prove a diminution of proprty value, there is the possibility of a plenary action for damages or an

inverse condemnation claim against the Town for its actions.

Accordingly, the Sixth Cause of Action claiming a violation of equal protection rights; a violation of the "right to free speech and petition"; a violation of procedural due process; and/or a deprivation of substantive due process fails to state a cause of action. **The Motion to Dismiss the Sixth Cause of Action is granted in part as to those claims.**

V. Should Petitioner's claim under the Green Amendment be dismissed?

The Sixth Cause of Action also alleges that the HCA Approval violates the new Environmental Rights ("Green")Amendment in Article I, Section 19 of the New York State Constitution. Until the Green Amendment on January 1, 2022, a person's recourse against air quality nuisance at High Acres Landfill was either to challenge the various, including local, permitting process or to complain, mainly to NYSDEC. The Perinton land use boards' determinations, which through their approval processes are to consider and balance community concerns and permit appropriateness, stand unless arbitrary, capricious or violative of law. However, whether a governmental action was arbitrary and capricious may not be the standard for adjudicating constitutional rights. The standard for review of agency statutory actions `which impact individual rights, being arbitrary and capricious, puts the burden of proof on the complainant. Only if the challenged statutory government action is arbitrary and capricious .does the individual have a remedy. However, constitutional inquiries of governmental action are more rigorous. For example, the prosecution must establish "beyond a reasonable doubt" that a criminal defendant's statement was lawfully obtained (see, *People v. Rosa,* 65 N.Y. 2d 380 [1985]). The standard is not whether the police action was "arbitrary and capricious or an abuse of discretion", but whether it can be established beyond a reasonable doubt that the police action did not violate the defendant's constitutional rights.

In adjudicating and applying the Green Amendment, it may be necessary to have a two prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional "right to clean air and water, and a healthful environment" ? This new Green Amendment paradigm was alluded to at the January 2022 Annual

Meeting of the New York State Bar Association *Environment and Energy Law Section.* [4]

Auditing How Government Respects Environmental Rights:

"These self-executing rights are to be observed and respected by all branches of New York State government, including local governments, public authorities. Now that the amendment has become a fundamental right, it is incumbent on all government entities to determine if they are respecting this right. They should be proactive, and not ignore their obligations. Governmental entities should assess if their on-going programs or activities respect these rights, and where short-comings may be found, they can provide remedial measures to ensure that the environmental rights are not abridged.

Protecting Environmental Rights Now Guides All Governmental Environmental Duties.

1. All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person's environmental rights will be respected. Interpretation of statutes and regulations will now apply these environmental norms. The fundamental rights serve as a guide to agencies in interpreting their duties.

2. Where a person's rights to clean air and clean water and a healthful environment are compromised by action that had previously been permitted by a state agency or a local government, the fact that the conduct had been deemed "legal" will not insulate it from judicial scrutiny and appropriate remedial orders by a court to give the environmental rights effect and ensure that the individual's rights are respected. There is no 'grandfathering' of actions previously permitted by government."

The Green Amendment, however, did not become part of the New York Constitution until January 1, 2022, and does not apply retroactively to the HCA Approval on December 22, 2021. However, the Amended Petition was filed on March 10, 2022 which would make the Green Amendment applicable to events occurring after Januaary 1, 2022. Accordingly, **the Motion to Dismiss this aspect of the Sixth Cause of Action is denied.**

VI. Should Petitioner's declaratory judgment causes of action be dismissed for lack of jurisdiction (CPLR § 3211 (a) (8)) due to Petitioner's failure to serve a summons for those portions of the Amended Petition which seek a declaratory judgment?

Respondents argue that Petitioner not filing or serving a summons in this case is a jurisdictional defect and the Court must therefore dismiss those portions of the Amended Petition seeking declaratory judgment, particularly, the Sixth Cause of Action. Petitioner counters that no

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[4]"The Impact of the Green Amendment *A New Era of Environmental Jurisprudence"* was presented by Prof. Nicholas A. Robinson of the Elisabeth Haub School of Law at Pace University.

Summons was required in this case, since it was commenced as a Special Proceeding by filing the Petition, and personal jurisdiction over Respondents was obtained by service of the Notice of Petition and Petition upon Respondents. See CPLR § 304(a) ("a Special Proceeding is commenced by filing a petition"). In light of the foregoing, **the Court denies Respondents' request to dismiss the Petition.**

VII. Is Petitioner's seventh cause of action an improper catch-all claim which fails to state a cause of action?

Petitioner's Seventh Cause of Action is an improper catch-all claim that fails to state a cause of action and **is dismissed.**

Summary.

The Court has reviewed all of the Pleadings, Memoranda, Exhibits, Documents and Letters filed in this proceeding as set forth in attached COURT EXHIBIT 1. Accordingly, for the reasons set forth above, the Court Decides and Orders as follows:

1. The Respondents' Motions to Dismiss the Second, Fourth and Fifth Causes of Action are denied.

2. The Respondents' Motions to Dismiss the Sixth Cause of Action which claims a violation of equal protection rights; a violation of the "right to free speech and petition"; a violation of procedural due process; and/or a deprivation of substantive due is granted. The Respondents' Motions to dismiss the Green Amendment aspect of the Sixth Cause of Action is denied.

3. The Respondents' Motions to Dismiss the Seventh Cause of Action is granted.

4. The Respondents' Motion to Dismiss Petitioner's declaratory judgment causes of action for lack of jurisdiction under CPLR § 3211 (a) (8) is denied.

5. The Petitioner's request that the Court grant the Amended Petition on the merits rather than provide for subsequent briefing and submissions is denied.

6. A schedule for the remainder of this proceeding, including the date by which Respondents are to file answers to the remaining causes of action in the Amended Petition, will be set at a virtual conference on December 12, 2022 at 1:00 p.m.

SO ORDERED.

Dated: December 8, 2022
Rochester, New York

John J. Ark, J.S.C.

COURT EXHIBIT 1

Pleadings, Memoranda, Exhibits, Documents and Letters reviewed by the Court:

Doc #

1PETITION
2 EXHIBIT(S) - A ZBA Decision
3 EXHIBIT(S) - B Letter dated 7.23.21
4 EXHIBIT(S) - C Letter dated 8.25.21
5 EXHIBIT(S) - D Letter dated 8.3.21
6 NOTICE OF PETITION (Motion #1)
13 MEMORANDUM OF LAW IN SUPPORT of Petition (Motion #1)
28 NOTICE OF PETITION (AMENDED) (Motion #1) *Corrected*
29 PETITION (Motion #1) *Corrected*
30 EXHIBIT(S) - A (Motion #1) ZBA Decision
31 EXHIBIT(S) - B (Motion #1) Letter to ZBA
32 EXHIBIT(S) - C (Motion #1) DEC Response
33 EXHIBIT(S) - D (Motion #1) Letter to CB
34 EXHIBIT(S) - E (Motion #1) ZBA minutes
35 EXHIBIT(S) - F (Motion #1) Draft HCA
36 EXHIBIT(S) - G (Motion #1) HCA
37 EXHIBIT(S) - H (Motion #1) Hatched area
38 EXHIBIT(S) - I (Motion #1) Minutes
40 AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION (Motion #2)
41 EXHIBIT(S) - A (Motion #2) Concurrent resolutions and sponsor memos
42 EXHIBIT(S) - B (Motion #2) Perinton Town Code Section 208-21
43 AFFIDAVIT IN SUPPORT OF MOTION (Motion #2) Joseph L. LaFay, Esq.
44 EXHIBIT(S) - A (Motion #2) Agreement effective January 26, 1994
45 MEMORANDUM OF LAW IN SUPPORT (Motion #2)
46 NOTICE OF MOTION (Motion #3) Notice of Motion to Dismiss
47 AFFIRMATION (Motion #3) S. Nonkes Affirmation
48 EXHIBIT(S) - D (Motion #3) HCA-SEQR
49 MEMORANDUM OF LAW IN SUPPORT (Motion #3)
52 AFFIRMATION (Motion #2)
53 AFFIRMATION (Motion #2)
54 EXHIBIT(S) - A (Motion #2) Ex A - HCA version received via FOIL
55 EXHIBIT(S) - B (Motion #2) Ex B - HCA Document Properties

56 MEMORANDUM OF LAW (Motion #2)
57 MEMO. OF LAW IN REPLY (Motion #2) in Further Support of Motion to Dismiss
58 MEMORANDUM OF LAW IN REPLY (Motion #3)