SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---------- X

CAMILLO M. SANTOMERO and
DENISE C.R. SANTOMERO,

Plaintiffs/Petitioners,

-against-

TOWN OF BEDFORD and THE TOWN
BOARD OF THE TOWN OF BEDFORD,

Defendants/Respondents.
---------- X

Index No.: 62222/2017

Assigned Judge:

Hon. Anne Minihan

DEFENDANTS/RESPONDENTS MEMORANDUM OF LAW IN OPPOSITION TO THE COMPLAINT/PETITION AND IN SUPPORT OF MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

In this omnibus litigation, Plaintiffs/Petitioners, Camillo Santomero and Denise C.R. Santomero (hereinafter "Plaintiffs/Petitioners") filed a Complaint/Petition challenging Defendant/Respondent, the Town of Bedford Town Board's (the "Town Board") adoption of Local Law No. 1-2017, which is codified in Chapter 71, Article 3 of the Codes of the Town of Bedford as the "Historic Building Preservation Law" ("Local Law No. 1-2017" or the "HBPL"). Specifically, Plaintiffs/Petitioners challenge (i) the constitutionality of the HBPL; (ii) whether the Town Board properly determined that each of the properties listed in a survey of historic buildings adopted by the Town Board (the "Survey") met the criteria for a historic building; and (iii) whether the Town Board complied with the requirements of the New York State Environmental Quality Review Act ("SEQRA"). Plaintiffs/Petitioners also challenge whether the building they own meets the qualifications of a "Tier 1" historic building as set forth in Local Law No. 1-2017. For the reasons set forth herein,

Plaintiffs/Petitioners' claims are without merit and accordingly, the litigation should be dismissed in its entirety.

The Town Board adopted the HBPL in compliance with various New York State statutes which provide municipalities in New York State with the authority to designate historic buildings and landmarks. These statutes include General Municipal Law ("GML") § 96-a, GML §§ 119-aa through 119-dd and Town Law § 64(17-a). As discussed in more detail below, these statutes expressly authorize municipalities in the State of New York to, among other things, create historic building preservation commissions, conduct surveys of properties to locate historic buildings and designate such buildings as historic landmarks in order to preserve these valuable and important resources.

The Town Board adopted the original version of the HBPL in 2003 in response to directives set forth in Section 9 of the Town Comprehensive Plan enacted in 2002. The Comprehensive Plan concluded that the Town of Bedford (the "Town") should enact legislation to preserve buildings or structures of historic, architectural, and cultural significance because they were invaluable Town resources that could not be replaced once destroyed. The version of the HBPL adopted in 2003 (the "2003 HBPL") created certain regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of buildings having special character, historical or other aesthetic interests. Pursuant to the 2003 HBPL, in or about 2004 the Town Board created a Historic Building Preservation Commission ("HBPC") to administer the HBPL and create a survey of historic buildings and structures in the Town.

This litigation concerns the adoption of Local Law No. 1-2017 on April 18, 2017, which amended the 2003 HBPL. As set forth in Section 71-24.A of both the 2003 HBPL and Local Law No. 1-2017, the HBPC's powers include maintaining the historic character of the areas of the Town within its jurisdiction, adopting criteria to identify significant historical, architectural, archeological or cultural buildings, and approving or disapproving applications for permits relating to alterations to, or demolition of, historic buildings. The HBPC's decisions are subject to review by the Town Board. Section 71-24.A also obligates the HBPC "to create, maintain, and update a Survey to be adopted by the Town Board."

At the direction of the Town Board, from 2013 to 2017, the HBPC and two consulting firms with expertise in historic preservation, spent hundreds of hours conducting investigations, researching properties and analyzing what amendments to the HBPL would be appropriate to improve the Town's landmark designation process. This process included reviewing a prior survey of buildings that the HBPC had prepared previously and revising it as appropriate based on the results of the expert consultants' and the HBPC's investigation.

During this process, the HBPC and the Town Board held numerous public meetings to keep the public apprised of the HBPC's work and the proposed changes to the HBPL which were meant to reduce the burdens imposed on owners of historic buildings in the Town. Most importantly, all property owners whose buildings were to be included in the revised survey were notified on multiple occasions regarding the proposed historic designations of their buildings and given opportunities to contest such designations.

Plaintiffs/Petitioners have brought the instant action notwithstanding HBPC's almost four year extensive review and analysis, the multiple public work sessions and

information sessions both the HBPC and the Town Board have held and the Town Board's consideration of the HBPC's recommendations. Plaintiffs specifically assert the following claims:

a. The First Cause of Action alleges that Local Law No. 1-2017 is unconstitutional because it is overbroad, vague and was adopted in violation of due process protections.

b. The Second Cause of Action alleges that the Town Board's adoption of the Survey of historic buildings was arbitrary, capricious and contrary to law because the Town Board did not properly review the historical significance of each building listed on the survey, specifically the Town Board adopted the Survey and designated multiple buildings "without a separate public hearing" for each individual historic building (Complaint/Petition, ¶ 95).

c. The Third Cause of Action alleges that the determination of the Town Board to designate the building on Plaintiffs/Petitioners' Property as a "Tier 1" historic building was arbitrary, capricious and contrary to law.

d. The Fourth Cause of Action alleges that the Town Board failed to comply with the requirements of SEQRA because it failed to take a hard look at all environmental impacts resulting from the adoption of Local Law No. 1-2017.

Each of these claims is unsupported and has no merit. Therefore, the Complaint/Petition should be dismissed in its entirety.

II. FACTS

The salient facts in this litigation are set forth in the accompanying Answer with Affirmative Defenses, dated March 26, 2018 (the "Answer"), the Affidavit of John Stockbridge, the Chairman of the Town HBPC, sworn to on March 23, 2018 (the "Stockbridge Affidavit")[1] and the Affidavit of Chris Burdick, the elected Town Supervisor of the Town of Bedford, sworn to on March 26, 2018 (the "Burdick Affidavit"). The Court's attention is respectfully referred to the Answer, the Stockbridge Affidavit and the Burdick Affidavit, for the true and full factual background relating to the claims in this action and proceeding.

III. ARGUMENT

POINT I

THE TOWN BOARD WAS AUTHORIZED TO ADOPT LOCAL LAW NO. 1-2017 TO PROTECT HISTORIC BUILDINGS IN THE TOWN

GML § 96-a, entitled "Protection of Historical Places, Buildings and Works of Art", states as follows:

> In addition to any power or authority of a municipal corporation to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing board or local legislative body of any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical

[1] John Stockbridge was the Chair of the Town of HBPC when it was created in or around 2003 and currently holds the same position today.

> or aesthetic interest or value. Such regulations, special conditions and restrictions may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes.

Similarly, GML § 119-dd states that:

> In addition to existing powers and authorities for local historic preservation programs including existing powers and authorities to regulate by planning or zoning laws and regulations or by local laws and regulations for preservation of historic landmarks and districts and use of techniques including transfer of development rights, the legislative body of any county, city, town or village is hereby empowered to:
>
> 1. Provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art and other objects having a special character or special historical, cultural or aesthetic interest or value. Such regulations, special conditions and restrictions may include appropriate and reasonable control of the use or appearance of neighboring private property within the public view, or both.
>
> 2. Establish a landmark or historical preservation board or commission with such powers as are necessary to carry out all or any of the authority possessed by the municipality for a historic preservation program, as the local legislative body deems appropriate.
>
> 3. After due notice and public hearing, by purchase, gift, grant, bequest, devise, lease or otherwise, acquire the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this article, to historical or cultural property within its jurisdiction.

> After acquisition of any such interest pursuant to this subdivision, the effect of the acquisition on the valuation placed on any remaining private interest in such property for purposes of real estate taxation shall be taken into account.
>
> 4. Designate, purchase, restore, operate, lease and sell historic buildings or structures. Sales of such buildings and structures shall be upon such terms and conditions as the local legislative body deems appropriate to insure the maintenance of the historic quality of the buildings and structures, after public notice is appropriately given at least thirty days prior to the anticipated date of availability and shall be for fair and adequate consideration of such buildings and structures which in no event shall be less than the expenses incurred by the municipality with respect to such buildings and structures for acquisition, restoration, improvement and interest charges.
>
> 5. Provide for transfer of development rights for purposes consistent with the purposes of this article.

N.Y. Town Law § 64(17-a), entitled "Historic places" also authorizes the designation of historic buildings to preserve the special character and aesthetic value of such resources:

> The town board may provide for the preservation and protection of places, buildings, works of art and other objects having a special character or aesthetic interest or value and also may provide for appropriate and reasonable control of the use or appearance of neighborhood private property within public view. Any such measures, if adopted in the exercise of police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property, shall provide for due compensation, which may include the limitation or remission of taxes.

In or about 2002, the Town Board prepared and adopted a Comprehensive Plan which included an entire chapter devoted to Community Appearance and Historic Preservation. (A copy of Chapter 9.0 of the Town Comprehensive Plan is attached to the

Stockbridge Affidavit as Exhibit "B"). The Comprehensive Plan's discussion with respect to Landmarks Designation recommends as follows:

> Bedford should consider designating individual structures or buildings as local landmarks. This would be based on the town-wide survey of buildings or structures of historic, architectural, or cultural significance, and the creation of local landmark designation process. The Town Board members could create a local landmarks board or commission to issue certificates of appropriateness for alterations and demolition. A property owner's proposed changes to the exterior appearance of such a building could be reviewed to ensure that changes are architecturally appropriate. Local landmark designation would offer the community greater protection of its historic assets as it guides individual property owners towards proper exterior alterations of their buildings.

(Stockbridge Affidavit, Exhibit "B", p. 128). Thus, the Town's legislative body determined that landmark designation was essential to protect the Town's historic resources.

The Comprehensive Plan also includes a section entitled "Overall Recommendations on Historic Character" which states that "[historic] preservation programs have four basic components: 1) a survey of historic resources, 2) historic preservation legislation, 3) public education, and 4) coordination of preservation with other community planning policies." (*Id.*) In 2003, as authorized by GML § 96-a, GML §§ 119-aa through 119-dd and Town Law § 64(17)(a), and pursuant to the Comprehensive Plan's directives, The Town Board enacted the initial version of Article III of Chapter 71 (the "2003 Local Law"). GML § 96-a, GML §§ 119-dd and Town Law § 64(17-a) authorized the adoption of the 2003 Local Law. The same statutes support the adoption of Local Law No. 1-2017 and the accompanying Survey of historic properties.

POINT II

LOCAL LAW NO. 1-2017 IS CONSTITUTIONAL

Plaintiffs/Petitioners First Cause of Action is a plenary claim which seeks to invalidate Local Law No. 1-2017 as unconstitutionally vague and overbroad and on the grounds that it violates procedural due process protections. (Complaint/Petition, ¶¶ 69-92).[2] Initially, such argument flies in the face of the New York State statutes mentioned above, as well as a leading case decided by the United States Supreme Court in 1978 entitled *Penn Central Transportation Co. v. City of New York*, 42 N.Y.S.2d 324, 397 N.Y.S.2d 914 *aff'd*, 438 U.S. 104, 98 S. Ct. 2646 (1978)("*Penn Central*"). *Penn Central* expressly authorizes historic building preservation laws similar to the HBPL, and holds they are a valid exercises of a municipal entity's police powers.

Prior to the *Penn Central* decision, most historic preservation laws throughout the United States were based upon the concept of designating a particular area or region of a municipality as a historic district. Owners of historic houses and other structures within historic districts were required to obtain permits or other approvals from a municipal board or commission before demolishing or substantially altering their historic house or structure. Common examples of these historic district laws are found in Savannah, Georgia, Charleston, South Carolina and New Orleans, Louisiana.

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[2] The First Cause of Action is asserted in the form of a plenary action. Therefore, Defendants/Respondents are filing a motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7), or alternatively, for summary judgment pursuant to CPLR § 3212, on the grounds that the First Cause of Action fails to state a claim and that the Certified Record and other documentary evidence conclusively establishes that the First Cause of Action has no merit and should be dismissed.

In 1974, the City of New York, acting pursuant to its police powers, created the New York City Landmark Commission (the "NYC Commission"). Among the NYC Commission's powers was that it could designate individual buildings as New York City landmarks if the buildings met certain criteria set forth in the law. Pursuant to the New York City Landmark's Preservation Law, if the NYC Commission designated a building as a "landmark", it could not be torn down or substantially altered without the NYC Commission's approval.

In 1975, the NYC Commission designated the Grand Central Station building located at 42nd Street and Fifth Avenue as a New York City landmark. Thereafter, the owner of the building, the Penn Central Transportation Corporation, sought to demolish a portion of the landmarked train station building in order to construct a 60 story office building above the Grand Central Station. The NYC Commission rejected the Penn Central Transportation Corporation's application and the owner challenged the underlying Landmark Preservation Law and the NYC Commission's authority to administer the law.

The owner's challenge wound its way through the New York State courts and eventually reached the United States Supreme Court. Although the Supreme Court did not directly rule upon the constitutionality of the New York City Landmark's Preservation Law, it indicated that the law was a valid exercise of the City's police power and that it was properly adopted to protect the public health, safety and welfare of the City. *Id.*, 438 U.S. at 137, 98 S.Ct. at 2666. Thus, the U.S. Supreme Court upheld the determination of the New York City Landmark's Commission not to allow the construction of a massive office building above Grand Central Station.

Even prior to the U.S. Supreme Court's decision in *Penn Central*, the New York State Legislature enacted GML § 96-a which authorized municipalities to take necessary action to protect historic places. Thereafter, GML §§119aa – dd and Town Law §66(17-a) were adopted granting additional authority to municipalities to designate historic properties. Thus, there is no dispute that landmark and historic building preservation laws, such as the HBPL, are a valid exercised of a town board's police powers where there is a demonstrated need to protect a municipality's historic resources.

The purpose of Local Law No. 1-2017 is expressly stated in Section 71-20(A):

> The Town of Bedford determines that the historical, archeological, architectural and cultural heritage of the Town is among the most important assets of the Town and that it should be preserved. Historic preservation offers residents of the Town a sense of orientation and civic identity, is fundamental to localized concern for the quality of life, and produces numerous economic benefits to the Town. The existence of irreplaceable buildings of historical, archeological, architectural and cultural significance is threatened by the forces of change.

(Certified Record of Proceedings ["CR"], Exhibit "1", Section 71-20[A]). In order to promote and ensure the preservation of these important historic resources the Town Board made the following findings in support of Local Law No. 1-2017:

> The Town of Bedford was founded on December 23, 1680, when a group of New England Puritans from Stamford, Connecticut, purchased a three-square-mile tract of land known as the "Hopp Ground" from Chief Katonah and several other Native Americans. Bedford was originally part of Connecticut until King William of England issued a royal decree in 1700 declaring that Bedford was part of New York. The Town served as the wartime Westchester County seat during the

Revolutionary War after the Battle of White Plains until it was burned by the British on July 11, 1779. After the Revolution, Bedford became one of the two seats of county government, alternating with White Plains until 1870. Bedford is rich with historic places and buildings such as Bedford Green, the Bedford Court House built in 1787, the John Jay Homestead, Caramoor, the 1920 Bedford Hills Community House, the 1927 Town House, as well as other historic buildings situated throughout the hamlets of Katonah, Bedford Hills and Bedford Village. To foster the preservation of historical buildings located within the Town of Bedford which are not already included as part of the Bedford Village Historic District or the Katonah Historic District, the following findings are hereby made:

(1) A substantial number of residential, commercial and accessory buildings are of great historical significance to the Town by reason of:

(a) Historic events which have taken place within, on or near them;

(b) Their age or association with historic or famed personages; or

(c) The fact that they are illustrative of events in periods of history of the Town and surrounding areas;

(2) It is further found that a number of residential, commercial and accessory buildings are of historical significance to the Town for their architectural and aesthetic value due to their representation of a style or period of architectural design of buildings which is significant to the Town's identity and which forms an integral part of the Town's environment; and

(3) In consideration of the Town's history and character, and in the interests of preservation of those areas within the Town which are of historical, archeological, architectural or cultural importance, the Town of Bedford enacts the within article.

(CR, Exhibit "1", Section 71-20[B]).

There is no dispute that the Town Board adopted Local Law No. 1-2017 and the accompanying Survey of historic buildings to further the important public purpose of preserving the historic resources which are integral to the Town's identity and character. Thus, Plaintiffs/Petitioners bear a heavy burden to establish that Local Law No. 1-2017 is unconstitutional and that the extensive review procedures employed by the HBPC and the Town Board to designate historic buildings in the Town violated procedural due process requirements. It is submitted that Plaintiffs/Petitioners have failed to overcome this heavy burden and that the Town Board validly adopted Local Law No. 1-2017 and the Survey of historic buildings.

A. Local Law No. 1-2017 Is Not Void for Vagueness

Plaintiffs/Petitioners argue that Local Law No. 1-2017 is unconstitutionally overbroad and vague because the criteria used to determine if a building is considered historic does not provide adequate notice of the prohibited conduct or provide clear enforcement standards. (Complaint/Petition ¶¶ 69-81). A statute will withstand an attack for vagueness where it contains sufficient standards to afford a reasonable degree of certainty so that a person of ordinary intelligence is not forced to guess at its meaning, and to safeguard against arbitrary enforcement. *Salvatore v. City of Schenectady*, 139 A.D.2d 87, 89-91, 530 N.Y.S.2d 863, 865 (3d Dep't 1988). This requirement, however, must be viewed in light of the requirement that "[l]ocal ordinances, like statutes, enjoy an 'exceedingly strong presumption of constitutionality.'" *Cimato Bros. v Town of Pendleton*, 270 A.D.2d 879, 879, 705

N.Y.S.2d 468, 468 (4th Dep't 2000) (*quoting Lighthouse Shores v. Town of Islip*, 41 NY2d 7, 11, 390 N.Y.S.2d 827 (1976)).

In *Salvatore*, the zoning ordinance in question required that the Commissioner consider the historic, cultural or architectural value and significance of any proposed building or structure to ensure it was consistent with the historic value, architectural style and character of the buildings and structures in the surrounding area before designating it as a landmark. The Court held that the language in the zoning ordinance was sufficiently precise to give fair notice and provide minimal guidelines to safeguard against arbitrary or discriminatory enforcement, and was clearly consistent with the legitimate legislative purposes of historic district regulation. *Salvatore*, 139 A.D.2d at 90, 530 N.Y.S.2d at 865. The criteria set forth in the ordinance in *Salvatore* are similar to the criteria used in the HBPL.

The "Definitions" section of the HBPL sets forth the criteria to be applied to determine whether a building is considered historic. (CR, Exhibit "1", Section 71-22). These criteria are based upon the Model Landmarks Preservation Local Law for New York State Municipalities prepared by the Preservation League and the NYS Historic Preservation Office in 2014 (the "Model Law"). (Stockbridge Affidavit, ¶ 21). In this regard, Local Law No. 1-2017 is similar to other local historic preservation laws adopted by municipalities throughout the State of New York which apply similar definitions and criteria from the Model Law to designate properties as historic buildings or landmarks. (*Id.*, at ¶ 22). These criteria, having been based on the Model Law and employed in various other municipalities, have a presumption of validity.

The fact that certain criteria could be more specific or contain more exact definitions does not mean that the HBPL is unenforceable. *Russo v. Beckelman,* 204 A.D.2d 160, 162, 611 N.Y.S.2d 869, 871 (1st Dep't 1994). If landmark preservation was limited only to buildings with extraordinary distinction or with certain definite characteristics, much of what is rare and precious in the Town's architectural and historical heritage would soon disappear. Furthermore, vagueness challenges are addressed based on the facts of the case, not hypothetical scenarios. *State v. Dennin*, 17 A.D.3d 744, 747, 792, N.Y.S.2d, 682, 686 (3d Dep't 2005). Thus, the various hypothetical factual scenarios posed by Plaintiffs/Petitioners are not sufficient to support a claim for unconstitutional vagueness.

Finally, the mere fact that the Survey does not list exactly what buildings on a property are subject to the historic designation does not make it unconstitutionally vague. As stated above, there is no requirement that the historic designation be made with exact specificity. Rather, a statute will overcome a vagueness challenge if it provides a reasonable degree of certainty so that individuals of ordinary intelligence can conform to its conduct. *See Clements v. Village of Morristown*, 298 A.D.2d 777, 778, 750 N.Y.S.2d 137 (3d Dep't 2002); *Doe v. State,* 189 A.D.2d 199, 209–10, 595 N.Y.S.2d 592 (4th Dep't 1993) (statutes are not automatically invalidated on the grounds of vagueness simply because of a difficulty in determining whether certain marginal activities fall within the scope of the statutory regulations). In this case, a property owner who is notified that their property is listed on the Survey would only need to contact the HBPC or Town Planning Director to determine which building or buildings are subject to the historic designation before commencing any work subject to regulation under the HBPC.

As a result, Plaintiffs/Petitioners' claim that Local Law No. 1-2017 is unconstitutionally vague should be dismissed.

B. Local Law No. 1-2017 Complies With Procedural Due Process

Plaintiffs/Petitioners next assert that the property owners whose buildings were ultimately included in the revised Survey of history buildings were not given the opportunity for "a separate and formal hearing before the Town Board as to the basis for the inclusion of each property on the revised Survey". (Plaintiffs/Petitioners' Memorandum of Law at p. 7). Plaintiffs/Petitioners further argue that Local Law No. 1-2017 "impermissibly shifts the burden to the property owner to challenge the designation only after the Survey has been adopted" and that the Town Board failed to follow the "notice procedure to add properties to the [revised] Survey in the future...when it adopted the revised Survey." (Complaint/Petition, ¶¶ 89-90). None of these claims have merit or support a finding that the adoption of Local Law No. 1-2017 violated Plaintiffs/Petitioners', or anyone else's, procedural due process rights.

"[T]o succeed on a claim of procedural due process deprivation, that is, a lack of notice and opportunity to be heard, a plaintiff must establish that state action deprived him [or her] of a protected property interest." *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir.1997); *see also Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976). More specifically, a plaintiff or petitioner must "first identify a property right, second show that the state has deprived him (or her) of that right, and third, show that the deprivation was effected without due process." *Local 342, Long Island Pub. Serv. Employees v.*

Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994) (*quoting Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir.1990) (*per curiam*)).

In this case, Plaintiffs/Petitioners fail to describe which particular property rights they were deprived of without due process by the adoption of Local Law No. 1-2017. While the HBPL requires a property owner to apply for and obtain a permit pursuant to HBPL § 71-26, before performing certain types of significant construction on the exterior of a historic building located on their property for the purpose of protecting the Town's historic character and resources, such action does not constitute a taking or deprive the property owner of any constitutionally protected right without appropriate due process of law. *See Headley v. City of Rochester*, 272 N.Y. 197, 209 (1936) ("Solicitude for the protection of the rights of private property against encroachment by government for a supposed public benefit does not justify the courts in declaring invalid a public law which serves a public purpose."). In addition, Local Law No. 1-2017 in no way interferes with Plaintiffs/Petitioners' right to use their property as a residence. Thus, no deprivation of any right to use property could occur until after the property owner applies for a permit to perform construction pursuant to § 71-26 of the HBPL and such permit is denied. Even then, a property owner has the right to appeal the denial of any such permit to the Town Board and then to the courts. (CR, Exhibit "1", §§ 71-27 and 28). Thus, to the extent the permit requirements in the HBPL deprive Plaintiffs/Petitioners of a property right, the law already incorporates significant due process protections with respect to such deprivation.

Section 71-25.D of Local Law No. 1-2017 also includes an administrative process whereby property owners seeking to remove a building from the Survey may file a Historic

Resource Review Request ("HRRR") with the HBPC. (CR, Exhibit "1", § 71-25.D). Thereafter, if the property owner is not satisfied with the HBPC's recommendation, they have the right to appeal to the Town Board and file an Article 78 proceeding to challenge the Town Board's determination. (CR, Exhibit "1", § 71-27). As a result, Plaintiffs/Petitioners cannot assert that they have been denied any constitutionally protected property right without due process of law.

Even if Plaintiffs/Petitioners were able to establish that the alleged restrictions on their property development rights included in Local Law No. 1-2017 constitute an improper deprivation of a constitutionally protect right, the facts conclusively demonstrate that the HBPL was enacted without due process. To determine whether an alleged deprivation of a constitutional right was effected without due process, the Court must inquire as to what process is due. Generally, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 588, 479 N.Y.S.2d 181 (1984) citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972)). Under many circumstances "something less than a full evidentiary hearing is sufficient prior to adverse administrative action." *Daniel P. Malley v. Farley,* 32 Misc.3d 819, 826, 927 N.Y.S.2d 757 (S.Ct. Nassau Cty. 2011)*; see Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971)).

In determining whether due process standards have been met,

> we look to the three distinct factors that form the balancing test enunciated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903. 'First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures

> used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.'

Morgenthau v. Citisource, Inc., 68 N.Y.2d 211, 221, 508 N.Y.S.2d 152 (1986). In reviewing these standards, given the lack of any evidence that Local Law No. 1-2017 will substantively affect the value of Plaintiffs/Petitioners' property or any other property interest[3], the Town's legitimate interest in protecting the historic character of the Town, and the significant due process that was provided before Local Law No. 1-2017 was adopted, it is clear that Plaintiffs/Petitioners' procedural due process rights have not been violated.

As set forth in detail in ¶¶ 24 - 64 of the Stockbridge Affidavit, ¶¶ 17 – 37 of the Burdick Affidavit and ¶¶ 121 - 133 of Answer, the HBPC, in consultation with two experts and the Town Board, engaged in an extensive, almost four year review process, to develop and approve the revised Survey of historic buildings and to amend the HBPL to determine how buildings in the Town should be designated as historic. This process included holding multiple public information and work sessions wherein each and every property owner that potentially had a building on the Survey was notified about the Survey and the proposed changes to the HBPL. In fact, property owners were expressly advised on several occasions that they had the right to question the inclusion of a building they owned on the Survey. (CR, Exhibit "13"; Stockbridge Affidavit, ¶¶ 41-48 and Exhibit "F" attached thereto). In

[3] Although Plaintiffs/Petitioners, by their counsel, submitted a letter dated March 20, 2017, and other property owners submitted written oppositions to Local Law No. 1-2017 (*See* CR, Exhibit "5"), no evidence was submitted in the form of real estate appraisals or other expert opinion, that the Local Law No. 1-2017 actually impacts the value of their properties.

addition, a public hearing was held on April 18, 2017, at which various property owners, including Plaintiffs/Petitioners, were given the opportunity to contest the inclusion of a building on the Survey.[4]

Local Law No. 1-2017 is constitutional on its face and Plaintiffs/Petitioners had notice and a full and fair opportunity to be heard before their building was included on the Survey. As a result, Plaintiffs/Petitioners' procedural due process rights were not violated, Local Law No. 1-2017 is constitutional and the First Cause of Action should be dismissed.

POINT III

THE ADOPTION OF THE SURVEY FOLLOWED THE PROCEDURES SET FORTH IN THE HBPL FOR THE DESIGNATION OF HISTORIC BUILDINGS

The Second Cause of Action asserts a claim pursuant Article 78 of the CPLR and alleges that the Survey should be annulled and set aside since it was done "without proper vetting and in an arbitrary and capricious manner." (Complaint/Petition, ¶ 94). Given the extensive analysis and review process described in the Answer, the Stockbridge Affidavit and Burdick Affidavit that was employed to develop the revised Survey, Plaintiffs/Petitioners' claim is baseless and should be rejected.

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[4] Any argument that Plaintiffs/Petitioners did not have notice that the Survey was going to be adopted with Local Law No. 1-2017 on April 18, 2017, is rebutted by the fact that their own counsel submitted a letter in opposition to the HBPL and Survey on March 20, 2017 (*See* CR, Exhibit "5") and spoke in opposition to the adoption of Local Law No. 1-2017, including the Survey, at the April 18, 2017 public hearing. *Zartman v. Reisem*, 59 A.D.2d 237, 242, 399 N.Y.S.2d 506 (4th Dep't 1977) (Having had the opportunity to be fully heard on the merits, plaintiffs are in no position to complain about the inadequacy of the notice).

A. Standard of Review

Whether the Town Board properly designated a building included in the Survey as historic is subject to review under the arbitrary and capricious standard set forth in Article 78 of the CPLR. *Teachers Ins. & Annuity Ass'n of Am. v. City of New York*, 82 N.Y.2d 35, 41, 603 N.Y.S.2d 399 (1993) ("A landmark designation is an administrative determination, ordinarily reviewable under article 78, that must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious"). In determining whether the Town Board's adoption of the Survey was arbitrary and capricious, the reviewing court must look only to whether the determination lacks a rational basis, i.e., whether it is without sound basis in reason and without regard to the facts. *See Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974); *Matter of Medical Malpractice Ins. Assn. v. Superintendent of Ins.*, 72 N.Y.2d 753, 763, 537 N.Y.S.2d 1, *cert denied* 490 U.S. 1080, 109 S. Ct. 2100 (1989)("It is axiomatic that a court reviewing the determination of an agency may not substitute its judgment for that of the agency and must confine itself to resolving whether the determination was rationally based."). Thus, even assuming differing "conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency where the agency's determination is supported by the record." *Cohen v. State*, 2 A.D.3d 522, 525, 770 N.Y.S.2d 361, 363 (2d Dep't 2003).

B. The Town Board's Adoption of the Survey Was Rational and Reasonable

The Survey is defined in § 71-22 of the Local Law No. 1-2017 as follows:

> A written inventory of all dwellings, commercial buildings, and accessory buildings located within the Town of Bedford

> proposed by the Commission and designated by the Town Board as historic buildings in the "Survey of Historic Buildings," as adopted on April 18, 2017, and amended from time to time pursuant to § 71-25 of this article. The April 18, 2017, inventory adopted by the Town Board as part of this article is attached hereto and made a part hereof.

(CR, Exhibit "1", ¶ 71-22). Contrary to Plaintiffs/Petitioners' argument, the Town Board's designation of historic buildings through the development and adoption of the Survey complied with the HBPL and was not arbitrary or capricious, or contrary to law.

An essential element of the Town's amendment of the HBPL and development of the Survey was to make sure the public was aware of the impact of the proposed revisions to the HBPL, including the new categories of significance, and to ensure that all property owners with buildings that were to be assigned either Tier 1 or Tier 2 historic designations were aware of this fact and given a full and fair opportunity to participate in the process. Once again, a complete description of the process employed by the HBPC to prepare the revised Survey is set forth in detail in the Stockbridge Affidavit at ¶¶ 24- 64, and the Town Board's role in approving the Survey is set forth in the Burdick Affidavit at ¶¶ 13-30. The detailed process used to prepare the Survey and the review and notice procedures employed prior to the Town Board's final adoption of the Survey confirm that the claim that the "Town Board chose to forego a proper review of the historic significance of each property" (Complaint/Petition, ¶ 96), is not supported by the extensive Record in this matter.

That the Town Board relied upon the HBPC's recommendations when determining whether to approve the Survey does not make such determination arbitrary and capricious. In this case, the designation of buildings on the Survey was made after almost four years of

analysis and review by the HBPC in conjunction with expert consultants and the Town Board, during which time the Town Board participated in work and information sessions with the HBPC to consider the buildings that would ultimately be included on the Survey. (Burdick Affidavit, ¶¶ 20-26 and 39-42).

Plaintiffs/Petitioners' claim that the Town Board's adoption of the Survey is arbitrary and capricious because it failed to follow the procedures in Local Law No. 1-2017 by holding a separate public hearing for each property, is also misplaced. Nothing in Local Law No. 1-2017 requires a separate hearing be held for the buildings that were ultimately included on the revised Survey. Nor does any state law require separate hearings. To the contrary, the designation of multiple properties is the same procedure that municipalities, including the Town, follow when approving a historic district which includes multiple buildings and structures, as was done in the Town for Bedford Village and the Katonah Historic District. (*See* Stockbridge Affidavit, ¶¶ 4-6 and Exhibit "A" attached thereto). In this case, the Town Board merely made historic designations for a group of properties located in different locations.

Local Law No. 1-2017 §§ 71-25.A-C, only requires a separate public hearing for properties that are to be <u>added</u> to the Survey following its adoption:

> A. The Commission may, from time to time, recommend additional historic buildings to the Town Board for inclusion on the Survey. The Commission shall identify each proposed addition as a Tier 1, Tier 2, or unregulated historic building, and each proposed addition shall be accompanied by a report from an independent consultant describing the historic, architectural, archeological or cultural importance of the individual property.

B. The Town Board shall fix a reasonable time to hold a public hearing on any proposed historic buildings to be added to the Survey. Notice of the public hearing shall be published at least 10 days prior to the hearing in an official newspaper of the Town and shall be mailed at least 10 days prior to the hearing to all owners of subject properties.

C. Within 62 days after the close of the public hearing, the Town Board shall by resolution approve or disapprove the proposed historic building additions to the Survey. A copy of said resolution shall be mailed to the owners of the subject properties and filed with the Building Department and Town Clerk.

(CR, Exhibit "1", § 71-25). As a result, the procedures the Town Board employed to approve the Survey and designate the historic buildings included on the revised Survey were not arbitrary and capricious nor contrary to law.

Plaintiffs/Petitioners also disregard the inclusion in the law of a procedure for a property owner to challenge the inclusion of a building on the Survey "at any time" by submitting a HRRR to the HBPC. (CR, Exhibit "1", § 71-25.D). The existence of this provision directly rebuts the contention that the Town's actions "contradict the newly adopted procedures set forth in the Local Law itself." (Complaint/Petition, ¶ 97). Nor does this procedure wrongfully shift the burden to property owners challenging the historic designation. (*Id.*, ¶ 89). Local Law No. 1-2017 does not set forth different burdens or standards for designating buildings as historic or determining if the designation should be modified. To the contrary, the same standard for designating a building as historic is applicable whether or not the Town Board is considering the addition of a new building to

the Survey, or, whether it is reviewing a recommendation by the HBPC following the filing of an HRRR.

Finally, Plaintiffs/Petitioners' reliance on *Paloma Homes, Inc. v. Petrone*, 10 A.D.3d 612, 781 N.Y.S.2d 675 (2d Dep't 2004), is misplaced. In *Paloma Homes*, the Court determined that the Town Board of the Town of Huntington had not complied with the Huntington Town Code which required an analysis the criteria in the Town Code required to designate a new historic landmark. *Id.* at 10 A.D.3d at 614, 781 N.YS.2d at 677. In this case, the Record confirms that an extensive and exhaustive process was used to analyze which buildings were to be included on the revised Survey. The Record includes over 4,000 pages of forms showing the analysis performed by the two expert consultants (CR, Exhibit "7"), a description of the scope of review of the various properties considered for inclusion on the revised Survey (CR, Exhibit "8"), along with multiple other documents referenced on the Town's Historic Building Preservation Commission web page (CR, Exhibit "9")[5], all of which confirm that the criteria used to determine whether the buildings located on the Survey met the qualifications as historic buildings had been appropriately considered.[6]

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[5] A link to the Historic Building Preservation Commission web page which includes documents considered by the HBPC and Town Board prior to the adoption of the Survey can be found at http://www.bedfordny.gov/town-government/boards-commissions-committees/commissions/historic-building-preservation-commission/.

[6] The HBPC also engaged in hundreds of hours of discussions and prepared multiple versions of the Survey based on their research, investigations and analysis. Copies of the multiple drafts of the Survey, photographs and other documents considered by the HBPC during its investigation can be found at the Dropbox links referenced in the Stockbridge Affidavit at ¶ 38.

POINT IV

THE TOWN BOARD CORRECTLY DETERMINED THAT PLAINTIFFS/PETITIONERS' PROPERTY SHOULD BE DESIGNATED AS A TIER 1 BUILDING

The Third Cause of Action alleges that the Town Board's designation of the building on Plaintiffs/Petitioners' property located at 391-399 Guard Hill Road ("Plaintiffs/Petitioners' Property") was improper and arbitrary and capricious. This claim is barred based upon Plaintiffs/Petitioners' failure to exhaust their administrative remedies. Moreover, even if the claim is not procedurally barred, the Town Board's decision to designate the building on Plaintiffs/Petitioners' Property as a Tier 1 historic building was not arbitrary and capricious nor contrary to law.

A. The Third Cause of Action Is Barred By Plaintiffs/Petitioners' Failure to Exhaust Administrative Remedies

As set forth in § 71-25.D of Local Law No. 1-2017 "any property owner wishing to appeal the inclusion or assigned category of a historic building on the Survey, may appeal such inclusion or assigned category at any time by submitting a Historic Resource Review Request [HRRR] to the Commission specifying the grounds for seeking review". (CR, Exhibit "1"). In this case, Plaintiffs/Petitioners failed and refused to file a HRRR with the HBPC after Local Law No. 1-2017 was adopted, even though they were specifically advised that they needed to do so to appeal the inclusion of the building on their property on the revised Survey. (CR, Exhibits "36" and "38"). Therefore, the Third Cause of Action should be dismissed based on the Plaintiffs/Petitioners failure to exhaust administrative remedies.

It is "hornbook law," that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (citation omitted)." *Watergate II Apts. v. Buffalo Sewer Auth.* 46 N.Y.2d 52, 57, 412 N.Y.S.2d 821, 824 (1978); *see also*, *LaRocca v. Department of Planning, Environment, and Development of Town of Brookhaven*, 125 A.D.3d 659, 3 N.Y.S.2d 98 (2d Dep't 2015); *Henderson v. Zoning Bd. of Appeals*, 72 A.D.3d 684, 897 N.Y.S.2d 518 (2d Dep't 2010) (Because it was undisputed that the Plaintiff failed to pursue an available remedy pursuant to the Village Code which authorizes an appeal to the zoning board from the issuance of a building permit, the court properly upheld dismissal for failure to exhaust administrative remedies). The doctrine of exhaustion of administrative remedies requires "litigants to address their complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts." *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375, 372 N.Y.S.2d 633 (1975) (citations omitted).

The Court of Appeals reasoned in *Watergate II Apts*, that:

> The purpose behind the doctrine is to further the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency (citation omitted), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its "expertise and judgment" (citations omitted).

Watergate II Apts., 46 N.Y.2d at 57, 412 N.Y.S.2d at 824; *see 67 Vestry Tenants Ass'n v. Raab*, 172 Misc. 2d 214, 219, 658 N.Y.S.2d 804, 808 (Sup. Ct. N.Y. Cty. 1997) Applying

exhaustion rule in case involving failure to follow administrative procedures under NYC Landmarks Preservation Law even though the petitioners claimed that the Landmarks Preservation Commission had exceeded its grant of power).

Where a right of administrative review is required, the failure to avail oneself of such right constitutes a failure to exhaust administrative remedies which precludes judicial review of such determination under Article 78. *See Brunjes v. Nocella,* 40 A.D.3d 1088, 837 N.Y.S.2d 226 (2d Dep't 2007) (building owner failed to exhaust his administrative remedies by seeking review by town board of appeals of determination of town buildings department's chief building plan examiner to revoke his building permit as required to commence proceeding for judicial review under Article 78).

Plaintiffs/Petitioners acknowledge that they refused to comply with the HBPL's administrative requirement of filing a HRRR with the HBPC, because doing so would supposedly be futile. (Complaint/Petition, ¶ 102 and Plaintiffs/Petitioners' Memorandum of Law, p.11). This argument should be rejected. A finding of futility "should be the exception rather than the rule, occurring only when necessary to avoid irreparable harm (citation omitted)." *Martin v. Ambach,* 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dep't. 1981). For example, in *Mobil Oil Corp. v. Milton*, 72 Misc. 2d 505, 339 N.Y.S.2d 704 (S. Ct. Monroe Cty. 1972), the Petitioner argued that its remedy before the zoning board of appeals, in view of its prior adverse ruling on the application, would be cumbersome, repetitive and perhaps futile. Nevertheless, the Court found that the Petitioner must still take the required administrative steps before seeking relief from the court, since it cannot be anticipated that an official body will not act in good faith. *Id; Pfaff v. Columbia-Greene Cmty. Coll.,* 99 A.D.2d

887, 887, 472 N.Y.S.2d 480, 481 (3d Dep't 1984) (administrative remedies are not futile even through petitioner has reason to doubt that an administrative appeal would be successful because the official body did not indicate an unwillingness to consider and weigh the facts).

In this case, Plaintiffs/Petitioners argue that it would be futile to file an HRRR and seek review of the historic designation by the HBPC because the HBPC was responsible for preparing the revised Survey. However, based on the case law set forth above, this argument is not sufficient to rise to the level of futility.

The lack of futility from filing the HRRR is further demonstrated by the fact that following the adoption of Local Law No. 1-2017, eighteen different property owners filed HRRRs with the HBPC. These HRRR's resulted in the HBPC recommending certain changes in historic building classifications, or the elimination of certain properties from the Survey. (Stockbridge Affidavit, ¶¶ 65-66). Specifically, the HBPC recommended that seven properties have their Tier designation reduced, nine properties retain their Tier designation and at least one property be removed from the Survey. (*Id*, ¶ 67). In addition, one property owner filed an appeal of the HBPC's designation with the Town Board pursuant Section 71-27 of Local Law No. 1-2017, which the Town Board duly considered. (*Id.*, at ¶ 68; Burdick Affidavit, ¶ 53). Therefore, the administrative review process included in Local Law No 1-2017 for reviewing the classification of a historic building is not futile and Plaintiffs/Petitioners failure to follow this process requires dismissal of the Third Cause of Action.

B. The Town Board Correctly Determined That the Building on Plaintiffs/Petitioners' Property Was Classified As a Tier 1 Property

Should the Court determine that Plaintiffs/Petitioners' Third Cause of Action is not procedurally barred, the claim should be rejected on its merits because the Record includes information confirming that the building on Plaintiffs/Petitioners Property qualifies as a Tier 1 historic building. First, Plaintiffs/Petitioners do not deny that the building in question meets the Tier 1 criteria included in § 22 of Local Law No. 1-2017. Instead, they argue that the building had "fallen into great disrepair prior to Plaintiffs/Petitioners purchasing it in 2006, and would not have been salvageable but for Plaintiffs/Petitioners efforts." (Complaint/Petition, ¶ 106). The mere fact that Plaintiffs/Petitioners renovated the building in question and restored it to its earlier form does not disqualify it as a historic building. This is especially true since the HBPC concluded, based on their review, that "modifications to the main part of the house on Plaintiffs/Petitioners' Property were limited or minimal." (Stockbridge Affidavit, ¶ 88). Thus, by Plaintiffs/Petitioners' own admissions, the building was and is properly classified as a Tier 1 historic building.

Second, the Record includes evidence establishing that the Town Board correctly designated the building in question as a Tier 1 historic building. Section 7-22 of Local Law No. 1-2017 sets forth the criteria for a Tier 1 historic building. (CR, Exhibit "1", § 71-22). The building on Plaintiffs/Petitioners' Property clearly qualifies as a Tier 1 historic building based on two specific criteria included in the definition of a Tier 1 historic building.

First, the definition of a Tier 1 historic building in § 7-22(1)(e) includes a building that "embodies the distinguishing characteristics of a type, period or ... is representative of the

work of a known designer, architect, or builder." (CR, Exhibit "1", § 71-22[1][e]). The building on Plaintiffs/Petitioners' Property was designed by the noted architect, Mott B. Schmidt and was constructed in 1926 as his personal residence. (CR, Exhibit "7", pp. 1689-1692 [listing the building as being constructed by Mott Schmidt]), CR, Exhibit "28" at page 8 of 18 on the Survey of Tier 1 Historic Buildings [recommending the building in question as candidate for local historic significance "as an intact example of the style. It is a contributing feature of the historic scenic Guard-Hill-Clark-Baldwin Road"]).

As stated in the Stockbridge Affidavit, numerous articles and several books have been written about Mr. Schmidt's work, including a monograph The Architecture of Mott Schmidt, which was authored by Mark Alan Hewitt and published by Rizzolli Books in 1991. (Stockbridge Affidavit, ¶ 81). Mr. Hewitt is a highly respected architect and architectural historian who has written extensively on American architecture, authoring such books as The Architect and The American Country House (Yale University Press, 1990) and Gustav Stickley's Craftsman Farms: The Quest for an Arts & Crafts Utopia (Syracuse University Press, 2001). (*Id.*, at ¶ 82).

The Plaintiffs/Petitioners' Property, referenced as Pook's Hill, is a featured property in Mr. Hewitt's book. A brief description of the contents of this book appears on the jacket summary of the work:

> Mott B. Schmidt, one of the last masters of traditional domestic architecture, practiced in New York from 1912 to the 1970s. In his long and distinguished career, he created many sumptuous residences in his trademark American Georgian style for the city's society and business elite. The architect of the Susan B. Wagner Wing of Gracie Mansion, Sutton Place, and numerous

> townhouses for the Vanderbilts, the Astors, the Morgans, the Rockefellers, and others, Schmidt brought refined elegance and grace to each of his works. This is the first book to document Schmidt's life work. One chapter is devoted to each of his major projects and is illustrated with detailed photographs. A sixteen-page color portfolio of new pictures specifically made for this book is also included.

(A copy of relevant excerpt from The Architecture of Mott Schmidt, is attached to the Stockbridge Affidavit as Exhibit "I"). The HBPC was also aware that the building on Plaintiffs/Petitioners' Property was featured on www.mottschmidt.com, a website devoted to the architecture of Mott Schmidt, where it is described as the "culmination" of Schmidt's creative watershed in the mid-1920s. The link to this website it "http://www.mottschmidt.com/buildings/view/types/country-houses/pooks-hill-mr-mrs-mott-b-schmidt-country-house". (Stockbridge Affidavit, ¶ 83).

Second, the building on Plaintiffs/Petitioners' Property also qualified as a Tier 1 historic building as set forth in § 7-22(1)(f) because it "represents an established and familiar feature of the community by virtue of its unique location…" (CR, Exhibit "1", § 71-22[1][f]). The Record confirms that Plaintiffs/Petitioners' Property is located on Guard Hill Road, one of the oldest roads in Bedford, dating back prior to the Revolutionary War, which is noted as a historic road in the Survey. (*See* Listing of Historic Roads and Neighborhoods, CR, Exhibit "13"). Aerial photographs of the property which are included in the Record (CR, Exhibit "7", p. 1692) and other photographs which can be viewed on the website www.mottschmidt.com, confirm that the formal historic estate property, including the main house and outbuildings, are largely intact.

(http://www.mottschmidt.com/buildings/view/types/country-houses/pooks-hill-mr-mrs-mott-b-schmidt-country-house-/gallery/2). (Stockbridge Affidavit, ¶¶ 86-87).

Furthermore, as stated above, Plaintiffs/Petitioners' claim that they did extensive renovations to restore the building does not mean that the building does not qualify as a historic structure because the HBPC determined that the renovations did not impact the historic elements and significant historic nature of the building. Modifications to the main part of the house on Plaintiffs/Petitioners' Property are limited or minimal. This emphasizes the importance of the estate as a surviving collective ensemble, and therefore further supports that the Petitioners' Property was properly determined to be a Tier 1 historic building based upon it being an intact example of the style of Mott Schmidt. (Stockbridge Affidavit, ¶ 88).

As a result, the Town Board acted rationally and reasonably by approving the HBPC's recommendation to designate the building on Plaintiffs/Petitioners' Property as a Tier 1 historic building and the Third Cause of Action should be rejected for this reason as well.

POINT V

THE TOWN BOARD SATISFIED ITS OBLIGATIONS AS LEAD AGENCY UNDER SEQRA

The Fourth Cause of Action alleges that the Town Board, as the Lead Agency under SEQRA, failed to conduct a full review and consider all potential impacts resulting from the adoption of the HBPL and the designation of various historic buildings on the Survey. This claim should be rejected because the Town Board took a hard look at all the potential

environmental impacts and rationally determined that the adoption of the HBPL and designation of the buildings listed on the Survey as historic buildings would not result in any substantial adverse environmental impacts.

A. Standard of Review

Judicial review of a SEQRA determination is limited, and reviewing courts must grant considerable deference and latitude to the determining agency. A negative declaration adopted by a lead agency can be annulled "only if arbitrary, capacious or unsupported by substantial evidence." *Merson v. McNally*, 90 N.Y.2d 742, 752, 665 N.Y.S.2d 605 (1997); *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 688, 642 N.Y.S.2d 164 (1996). The reviewing court must look only to whether the determination lacks a rational basis, i.e., whether it is without sound basis in reason and without regard to the facts. *See Pell,* 34 N.Y.2d at 231. The limited issue before this Court is whether the Town Board "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." *See Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 9 N.Y.3d 219, 231-32, 851 N.Y.S.2d 76 (2007) (internal quotations and citations omitted); *Jackson v. New York State Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).

Review of a lead agency's determination to issue a negative declaration is limited in two important respects. First, the lead agency's compliance with SEQRA "must be viewed in light of a rule of reason." *Eadie v. Town Bd. of Town of North Greenbush*, 7 N.Y.3d 306, 318, 821 N.Y.S.2d 142 (2006); *Jackson*, 67 N.Y.2d at 417. This applies not only to "an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation." *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13

N.Y.3d 297, 308, 890 N.Y.S.2d 405, 411 (2009). Not every "conceivable environmental impact, mitigation measure or alternative need be addressed in order to meet the agency's responsibility." *Hells Kitchen Neighborhood Assn. v. City of New York,* 81 A.D.3d 460, 462, 915 N.Y.S.2d 565 (1st Dep't 2011) (quoting *Neville v. Koch,* 79 N.Y.2d 416, 425, 583 N.Y.S.2d 802 (1992)).

Second, reviewing courts "may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *C/S 12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 7, 815 N.Y.S.2d 516 (1st Dep't 2006) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16 (1990). The lead agency has "considerable latitude in evaluating environmental effects" (*see Eadie*, 7 N.Y.3d at 319) and has reasonable discretion to decide whether an EIS is required (*see Spitzer v. Farrell*, 100 N.Y.2d 186, 190, 761 N.Y.S.2d 137 (2003)). "Where the record establishes that the determination to issue a negative declaration and forego the need for an EIS was neither arbitrary and capricious nor irrational, that determination will not be disturbed." *Forman v. Trustees of State Univ. of N.Y.*, 303 A.D.2d 1019, 757 N.Y.S.2d 180 (4th Dep't 2003) (internal quotation marks and citation omitted).

B. The Town Board Properly Issued a Negative Declaration Under SEQRA

Here, the Certified Record demonstrates the Town Board took the necessary "hard look" at the potential environmental impacts that may result from the adoption of Local Law No. 1-2017 and the designation of historic buildings on the Survey. First, Local Law No. 1-2017 revised a prior version of the HBPL which had been in effect since 2003. The

changes implemented by the revision to the HBPL actually reduced the alleged impacts on properties with buildings that are designated as historic. Thus, the claim that the adoption of Local Law No. 1-2017 results in substantial adverse environmental impacts is incorrect.

Second, a full EAF was prepared and reviewed by the Town Board. (CR, Exhibit "32"). The Town Board then issued its environmental determination that the adoption of Local Law No. 1-2017 would not result in any substantial adverse environmental impacts after having considered each of the questions in the full EAF. (CR, Exhibit "32" at Part 3 of the full EAF).

Third, while Plaintiffs/Petitioners assert in a conclusory fashion that the Town Board failed to examine all potential significant adverse environmental impacts resulting from the adoption of Local Law No. 1-2017, they fail to explain what impacts the adoption of Local Law No. 1-2017 and the designation of certain buildings will have on the environment. The Complaint/Petition merely alleges that "[t]here was no discussion of potential impacts on community character during the SEQRA review, or any discussion of socio-economic considerations or aesthetics contained within the EAF" and that the "Town Board failed to consider how this Local Law limits development beyond applicable zoning, or that it may prevent the full and best use of the affected property." (Complaint/Petition, ¶¶ 113-114). However, it is Plaintiffs/Petitioners that have failed to specify or present any evidence as to how the adoption of the HBPL adversely impacted community character or what socio-economic impacts would require the issuance of a positive declaration under SEQRA.

Plaintiffs/Petitioners contention with respect to the alleged socio-economic impacts also ignores the well-established principal that "[e]conomic injury is not by itself within

SEQRA's zone of interests." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 777, 570 N.Y.S.2d 778 (1991). Thus, merely because Local Law No. 1-2017 may limit the type of development and result in some alleged unknown and unproven impact on property values, this is not a basis for concluding that Local Law No. 1-2017 will have a potential significant adverse socio-economic impact requiring a positive declaration and full Environmental Impact Statement. [7]

In addition, 6 NYCRR § 617.5(32), which sets forth the actions that should be considered Type II and are not subject to further review under SEQRA include "designation of local landmarks or their inclusion within historic districts". Thus, to the extent Plaintiffs/Petitioners contend that the inclusion of the building located on their property (or any other building) on the Survey was not properly reviewed under SEQRA, this argument should be rejected. Furthermore, the term "Environment" in 6 NYCRR § 617.2 " means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health. (Emphasis added). Thus, a specific goal under SEQRA is the protection of historic or aesthetic resources, which is exactly what the HBPL seeks to accomplish.

[7] At no time did Plaintiffs/Petitioners or anyone else present evidence that property values are impacted adversely by a historic designation. To the contrary, the HBPC actually determined that a historic designation "[e]nhances property values and attracts investment". (*See* third slide in PowerPoint presentation, CR, Exhibit "13").

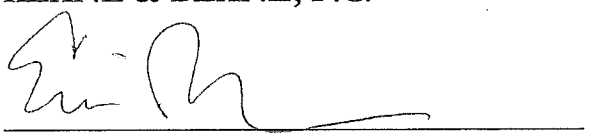
As the Town Board correctly recognized, the proposed amendments set forth in Local Law No. 1-2017 actually reduce potential environmental impacts with respect to development and serve to enhance and protect significant historical and aesthetic resources in the Town. (CR, Exhibit "1", ¶ 71-20). As a result, the Town Board's issuance of the Negative Declaration was neither arbitrary nor capricious, was more than reasonably supported by substantial evidence in the record, and was not an abuse of discretion and this Court should sustain the Negative Declaration. *See Gordon v. Rush*, 100 N.Y.2d 236, 244-45, 762 N.Y.S. 2d 18 (2003) holding that where decision "to issue the negative declaration was not irrational, an abuse of discretion, or arbitrary and capricious it should not be disturbed").

IV. CONCLUSION

For the foregoing reasons, Defendants/Respondents respectfully assert that the Complaint/Petition must be dismissed in its entirety, and that the Defendants/Respondents should be granted such other and further relief as the Court deems proper.

Dated: White Plains, New York
March 27, 2018

KEANE & BEANE, P.C.

By: 

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