SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs/Petitioners,

- against -

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

Defendants/Respondents.

Index No.: 62222/2017

Assigned Judge:
Hon. Anne E. Minihan, A.J.S.C.

MEMORANDUM OF LAW OF PLAINTIFFS/PETITIONERS IN OPPOSITION TO TOWN'S MOTIONS AND IN REPLY TO TOWN'S ANSWER

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PRELIMINARY STATEMENT

Plaintiffs/Petitioners, CAMILLO M. SANTOMERO and DENISE C.R. SANTOMERO ("Plaintiffs/Petitioners") submit this Memorandum of Law in opposition to the motions made by Defendants/Respondents TOWN OF BEDFORD and THE TOWN BOARD OF THE TOWN OF BEDFORD ("Defendants/Respondents") seeking either dismissal or summary judgment, and in reply to Defendants/Respondents Answer, supporting Affidavits, and Memorandum of Law.

Plaintiffs/Petitioners commenced the instant hybrid declaratory judgment/Article 78 proceeding seeking relief from this Court and a judgment: (a) invalidating and setting aside Local Law No. 1 of 2017 (the "Local Law") as an overbroad and vague law enacted in violation of the due process clause of the Constitutions both of the United States and New York State; (b) annulling and setting aside as arbitrary and capricious and contrary to law the Town Board's adoption of the Survey of Historic Buildings ("the Survey") that designates as "historic" and subject to regulation under the Local Law a total of 595 properties located outside of two existing historic and specifically categorized and defined districts in the Town; (c) annulling and setting aside as arbitrary and capricious and contrary to law the Town Board's designation of Plaintiffs/Petitioners' real property as a historic building subject to regulation under the Local Law; (d) annulling and setting aside the Local Law as arbitrary and capricious and contrary to law for failure of the Town Board to conduct a "hard look" and complete environmental review in accordance with the State Environmental Quality Review Act ("SEQRA") prior to enactment of the Local Law; (e) granting to Plaintiffs/Petitioners their reasonable attorneys' fees and costs and disbursements of this action/proceeding; and (f) granting such other and further relief as this Court may deem necessary.

Defendants/Respondents now seek either dismissal of Plaintiffs' declaratory judgment cause of action (First Cause of Action) pursuant to CPLR §§3211(a)(1) and (7) or, alternatively, summary judgment with respect to those claims. Defendants/Respondents also claim that this Court should dismiss the remaining Causes of Action that fall under the rubric of Article 78 review.

Respectfully, the Record is clear that despite the Town's cosmetic attempts to justify its position, there is on its face a fundamental violation of due process principles in the way the Town Board denied a meaningful hearing to the property owners of the approximately 595 unique properties on the Survey prior to its adoption of the Local Law, in the way that the Town disregarded its obligation as to how to properly add each individual property to the Survey and instead shifted the burden to the property owners to be removed from the Survey, and in the way that the only option for removal of the property from the Survey was for the property owner to submit to a warrantless inspection of the property by the Town's Commission. Aside from the procedural faults, the Local Law itself is impermissibly vague as the Survey identified only historic properties meaning the land as well, not particular historic buildings or structures on those properties, thereby giving no proper notice to a property owner as to the application of the Law. The Town Board also skirted the SEQRA process without taking a "hard look" at the potential impacts of the Local Law and the adoption of the Survey, especially the socio-economic impacts in the inclusion of properties on the Survey. Finally, as applied, the Town Board failed to consider Plaintiffs/Petitioners' property in particular or identify specific buildings on said property as historic.

STATEMENT OF FACTS

The relevant facts are set forth in the Verified Complaint and Petition, dated August 11, 2017, and the annexed Affirmation of P. Daniel Hollis, III in Opposition to Defendants' Motions and in reply to Defendants' Answering Papers dated August 2, 2018 ("Hollis Affirmation"). This Court is respectfully referred to these documents as to a more comprehensive recitation of the facts, in lieu of a further recitation herein.

ARGUMENT

POINT I

THE TOWN'S MOTION TO DISMISS THE FIRST CAUSE OF ACTION MUST BE DENIED AS PLAINTIFFS/PETITIONERS HAVE PROPERLY STATED A CAUSE OF ACTION FOR VIOLATION OF CONSTITUTIONAL PROTECTIONS

It is established that, "[u]pon a motion to dismiss, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail." *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 606 N.Y.S.2d 243 (2d Dep't 1993).

Thus, "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005).

Here, contrary to the Town's arguments, Plaintiffs/Petitioners have properly plead and stated a cause of action for violation of Constitutional protections in the Town's adoption of the Local Law at issue in this action.

It is established that, while "[l]egislative enactments are entitled to an 'exceedingly strong presumption of constitutionality'…that presumption is rebuttable." *ATM One, LLC v. Inc. Vill. of Hempstead*, 91 A.D.3d 585, 936 N.Y.S.2d 263 (2d Dep't 2012); *Alcorn ex rel. Proas Partners, LLC v. Muhammad*, 58 Misc. 3d 350, 66 N.Y.S.3d 819 (Sup. Ct. 2017); *see also Sokolov v. Vill. of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981).

A. The Adoption of the Local Law and the Survey was in Violation of Procedural Due Process Protections

For the reasons set forth in the Complaint/Petition, the adoption of the Local Law violated the procedural due process protections guaranteed by the United State Constitution and the Constitution of New York State.

It is established that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests" but the level of protection in each case is different and "[d]ue process is a flexible concept which tailors procedural protections to particular facts." *Curiale v. Ardra Ins. Co.*, 88 N.Y.2d 268, 644 N.Y.S.2d 663 (1996). However, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319 (1976).

To clarify, contrary to the Town's papers, Plaintiffs/Petitioners are not alleging a "taking" nor are they claiming that landmark or historic preservation laws in general are unconstitutional. As such, much of the case law cited by the Town misses the mark.

In short, Plaintiffs/Petitioners' position is that due process protections were violated because the Town Board denied a meaningful hearing to the property owners of the approximately 595 unique properties on the Survey prior to the Survey's adoption as part of the Local Law, because the Town shifted the burden to the property owners to petition to be

removed from the Survey, and because the only option for removal of the property from the Survey was for the property owner to submit to a warrantless inspection of the property by the Town's Commission. *See, e.g., ATM One, LLC v. Inc. Vill. of Hempstead*, 91 A.D.3d 585, 936 N.Y.S.2d 263 (2d Dep't 2012) (finding unconstitutional a village code section requiring registration and site inspection rental dwelling units to obtain a rental permit); *Alcorn ex rel. Proas Partners, LLC v. Muhammad*, 58 Misc. 3d 350, 66 N.Y.S.3d 819 (Sup. Ct. 2017); *see also Sokolov v. Vill. of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981) (finding unconstitutional an ordinance requiring a warrantless inspection of residential rental property for the issuance of a permit). Clearly a property owner may expect privacy around their own home.

The Town claims in its motion papers that the shifting of the burden is not improper. However, the approach taken by the Town is tantamount to finding one guilty without a trial or hearing and then requiring submission of proof to establish innocence, or the Town taking private property and then requiring the property owner to prove entitlement to that property. *See e.g., Alexandre v. Cortes*, 140 F.3d 406 (2d Cir. 1998).

Significantly, the Law itself in Section 71-25 provides for a proper notice procedure to **add** properties to the Survey **in the future**, a procedure that the Town Board glaringly failed to follow when it adopted the revised Survey. In fact, this is the type of procedure that is also included in the local ordinances referenced by Mr. Stockbridge in his Affidavit. Furthermore, neither the Model Law, nor the ordinances mentioned by Mr. Stockbridge refer to a wholesale adoption of an entire list of over 500 properties at one time, following one Public Hearing. None of those ordinances require the submission of a "historic resource review request" as part of the evaluation of whether to designate a property as a landmark or historic building. The process

adopted by the Model Law and the other ordinances referenced by Mr. Stockbridge is a Public Hearing for an individual property before the appropriate governing body, with evidence and testimony presented. *See* Exhibits C and D to Stockbridge Affidavit.

As was provided in the application form to the Commission, by requesting review of a property's inclusion on the Survey, the property owner allows the Commission to have access to the property that it would otherwise not have, which is an invasion of the owner's privacy and effectively opens up the property to an administrative search without a warrant. In fact, a copy of the form provided as part of the Certified Record, Exhibit 38, contains the following statement "Please note that a request for a change of classification will likely require a site visit by the Commission."

It is also significant that the 2003 Law and the resulting Survey of historic properties, which was used as a basis for the development of the new Survey, did not provide an opportunity to affected property owners for a Public Hearing as to the reasons for the inclusion of their properties on the Survey. Furthermore, the Survey was not readily available to the public, and the basis for inclusion on the Survey was not stated.

It is also indisputable that the Public Hearing held on April 18, 2017 did not include a discussion and/or analysis of each of the properties to be included on the Survey, nor did it provide for an opportunity for affected property owners to give and receive evidence relative to inclusion of their properties on the Survey. Even more significant is that the April 4th Public Notice of the hearing did not refer specifically to adoption of the Survey, stating only that the hearing would be on Local Law #1-2017, "to consider revisions to Chapter 71, Article III concerning Historic Building Preservation." There was no indication that the hearing was

intended to allow the affected property owners an opportunity to challenge the historic designation of their respective properties on the Survey.

While there were informal information sessions held by the Commission and the Town regarding the revised Survey and revised Law, and letters were sent to property owners advising them of their property's designation under the revised Law, there was no opportunity for a separate formal Public Hearing before the Town Board as to the inclusion of each property on the revised Survey.

Thus, despite all of the time and consideration taken in drafting the Law, the Town Board's failure to hold individual sessions for each property prior to adding it to a Survey to be adopted by the Town Board renders the adoption of the Local Law unconstitutional. The Record is also clear that the Town Board relied entirely on the presentation and recommendation of the Commission, and most particularly Mr. Stockbridge, as to the selection of properties on the Survey and did not conduct its own review and/or analysis prior to adopting the Survey.

The Town also argues that Plaintiffs/Petitioners have not established that the Local Law will "substantively affect the value" of their Property or other property interest, and that without such evidence Plaintiffs/Petitioners cannot prove violation of procedural due process.

Contrary to these arguments, Plaintiffs/Petitioners are alleging that the adoption of the Local Law and Survey was unconstitutional on its face, not just as applied to the Property of Plaintiffs/Petitioners, which is unquestionably impacted since it is in fact on the Survey as a Tier 1 property and subject to the Local Law. In any event, there is no question that the inclusion of the Property on the Survey as Tier 1 directly impacts Plaintiffs/Petitioners' property right to freely make changes to their property since the Local Law limits what the alterations and

demolitions of a structures and buildings on the properties listed on the Survey. Even if proof of diminution in value is required, such proof would be offered at trial, not on a motion to dismiss.

Furthermore, the other elements of a due process violation were pled as there is clearly a "risk of erroneous deprivation" of property interest when a property is added to a Survey that may not actually meet the criteria for designation, and furthermore there were "additional or substitute procedural safeguard" available to the Town Board in adopting the Survey and the Law itself. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

Thus, the Town's motions must be denied as there is sufficient basis in the Record to conclude that the adoptions of the Local Law failed to ensure the protection of the property rights of all those property owners whose properties were included on the Survey without due process of law.

B. The Local Law Violates Substantive Due Process

A local law is deemed unreasonable and constitutes a deprivation of property without due process of law under the New York State and United States Constitution when (1) it is not enacted in furtherance of a legitimate governmental purpose; or (2) there is no "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end." *See e.g. McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 498 N.Y.S.2d 128 (1985).

The first prong of the test is not in dispute since the adoption of regulations for the purpose of landmark and historic preservation has long been accepted practice in New York State. *See, e.g., Soc'y for Ethical Culture in City of N.Y. v. Spatt*, 51 N.Y.2d 449, 434 N.Y.S.2d 932 (1980) ("a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community").

However, the means that the Town Board has chosen to achieve the goal of preservation are not reasonable and do not achieve a legitimate governmental purpose. In other words, just because a building may have some historic association, or is aesthetically pleasing, does not mean that there is a reason to impose greater restrictions on changes that the property owner can make to that building than would be imposed on a building not on the Survey and subject to the Local Law.

Thus, despite the Commission's efforts to refine the criteria for identifying Tier 1 and Tier 2 historic buildings, the Local Law remains impermissibly overbroad and over-inclusive in that it regulates a vast number of properties using vague criteria, much more than necessary to advance the purpose of historic preservation.

Initially, while there are clear guidelines within the Local Law for a Tier 1 historic building, such as the property being constructed prior to 1900, or a property listed on the National Register of Historic Places, or one that is associated with the relocation of old Katonah, there are other criteria that are so broad that it is difficult to imagine any building within the Town, other than perhaps brand-new construction, that would not fall under the statutory rubric.

For example, one stand-alone criterion for inclusion is that a building is "identified with persons or events significant in local, state or national history." There is no time frame specified for "history" and so, conceivably, a property could be found to be Tier 1 because it was a dwelling of a presently famous person or celebrity, of which there are many in the Town, that otherwise has no architectural significance or value. Also, perhaps simply hiring a famous architect to work on an otherwise exempt property could result in a finding of significance.

Another stand-alone criterion for inclusion as Tier 1 is that the building "embodies the distinguishing characteristics of a type, period or method of construction or design style or is representative of the work of a known designer, architect or builder." Again, with this broad description and without an applicable time frame, many non-historic buildings would fall into this category, even ones that are newly constructed but emulate a particular historic style. In fact, Plaintiff/Petitioners submit that many of the properties on the Survey include properties that have only a tenuous connection to history at best, along with those with only minor aesthetic or cultural significance.

For these reasons, the Local Law must be invalidated as unconstitutionally overbroad, and thus unable to achieve the legitimate purpose of preservation. *See, e.g., People v. Golb*, 23 N.Y.3d 455, 991 N.Y.S.2d 792 (2014). The fact that the Model Law uses similar criteria for designation of landmarks does not mean that the Local Law at issue must be constitutional or that it is beyond Court review.

With respect to the Survey in particular, it was generated by the consultants as an initial list of resources following a mostly visual review of the properties in the Town, as well as a review of the existing Survey, and substantial input from the Commission itself and most particularly Mr. Stockbridge. However, the list was subsequently revised by the Commission to fit arguably the vague criteria under the Law.

In fact, the Town admits in its papers that following adoption of the Law there were appeals by eighteen different property owners, some of which resulted in elimination of certain properties from the Survey, or revisions to the historic designations. *See* Town's Memorandum of Law, p. 29. Such an outcome so soon after adoption of the Survey by the Town Board begs

the question as to the validity of the Survey designations in the first place and the validity of the subjective criteria in the Local Law.

C. The Local Law is Void for Vagueness

As alleged in the Complaint/Petition, both the Local Law and the Survey itself fail to pass the void for vagueness test and are, therefore, unconstitutional. The Town's papers fail to establish how the Local Law may be applied and enforced without further clarification from the Commission.

It is established that to avoid a finding of vagueness, the statute in question must give adequate notice as to the conduct that is prohibited and must provide for clear enforcement standards. *See, e.g., Turner v. Municipal Code Violations Bureau of City of Rochester*, 122 A.D.3d 1376, 997 N.Y.S.2d 876 (4th Dep't 2014); *see also People v. Mazzochetti*, 181 Misc. 2d 701, 696 N.Y.S.2d 618 (Just. Ct. 1998). In other words, "[t]here must be an objective standard by which an enforcement officer can make a determination that an individual is in violation of a particular ordinance. On the other hand, a citizen must be in a position to reasonably determine exactly what activity is prohibited. Without those conditions in place, enforcement of such an ordinance would violate a defendant's right to substantive due process, which is guaranteed by Section One of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution." *People v. Pethick*, 21 Misc. 3d 787, 864 N.Y.S.2d 901 (Just. Ct. 2008).

Here, the Survey does not differentiate between and/or among the various buildings on each designated type of property, nor does it identify the reasons why each property is designated

as Tier 1 or Tier 2. Instead, the Survey simply identifies the property as a whole and lists its designation and thus includes the property and every building thereon.

As a result, the property owner does not have any way to distinguish which portion of the property may be demolished until an application is made for a permit and has no way of knowing why the property was included on the Survey in the first place until an application is made for review to the Commission. Similarly, the Building Inspector or code enforcement officer has no way to know whether an alteration or demolition has occurred in violation of the Law.

In fact, the Town's opposition papers recognize that a property owner would not be able to identify the historic building from the Survey alone and would need to reach out to the Commission to determine whether a specific building or structure is in fact covered by the historic designation. *See* Town's Memorandum of Law, p. 15 ("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…")

In this way, the subject Local Law is quite different from the Model Law or the ordinances referenced by Mr. Stockbridge in his Affidavit in that it designates as historic the entire property and not a specific building. *See* Exhibits C and D to Stockbridge Affidavit. This vagueness also then leaves the door open and gives the Commission and Mr. Stockbridge the ability to inspect a property further whenever any application is made to the Building Department.

This situation is also quite different from the case of *Salvatore v. City of Schenectady*, 139 A.D.2d 87, 530 N.Y.S.2d 863 (1988) on which the Town relies in its Memorandum.

Initially, that case involved an existing historic district, not the process for individual property's landmark designation. Furthermore, the challenge to the law in that case was to the criteria to be used by the historic review commission in determining the "compatibility of any new construction or alteration with existing structures of historic or architectural value," not the criteria for designating a building as a landmark in the first place. Here, for all of the aforementioned reasons, the Local Law and the Survey simply do not "afford a reasonable degree of certainty" and in fact requires a Tier 1 or Tier 2 property owner to guess at the applicability of the Law to the various structures on its property.

On the basis of the foregoing, the Local Law should be annulled and set aside as an enactment not reasonably or substantially related to the purpose it seeks to achieve.

POINT II

THE TOWN'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED AS THERE ARE QUESTIONS OF MATERIAL FACT

Respectfully, the Town's motion in the alternative for pre-discovery summary dismissal of Plaintiffs/Petitioners' First Cause of Action must be denied as there are material questions of fact requiring discovery.

It is established that summary judgment is a drastic remedy that "should be granted only if there are no triable issues of fact." *Pearson v. Dix McBride, LLC*, 63 A.D.3d 895, 883 N.Y.S.2d 53 (2d Dep't 2009). Further, "in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant." *Id.; Derise v. Jaak* 773, Inc., 127 A.D.3d 1011, 7 N.Y.S.3d 475 (2d Dep't 2015). Finally, "the court must accept as true the evidence presented by the nonmoving party, and the motion must be denied if there is any

significant doubt as to the existence of a triable issue, or if there is even arguably such an issue." *Hourigan v. McGarry*, 106 A.D.2d 845, 484 N.Y.S.2d 243 (3d Dep't 1984); see *also Baker v. Briarcliff School Dist.*, 205 A.D.2d 652, 613 N.Y.S.2d 660 (2d Dep't 1994).

Accordingly, to succeed on a summary judgment motion, the movant bears the burden of establishing that the court is warranted in directing judgment in its favor as a matter of law. *See e.g., Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Mondello v. DiStefano*, 16A.D.3d 637, 638, 792 N.Y.S.2d 177, 178 (2d Dep't 2005). Summary judgment must be denied where the moving party fails to meet its burden, "regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). Only if the moving party submits sufficient proof to establish entitlement to judgment as a matter of law, does the burden then shift to the party opposing the motion.

In fact, even where there are allegations of unconstitutionality of an enactment, summary judgment in favor of a municipality is inappropriate where there are material questions of fact. *See, e.g., Penn Advert., Inc. v. City of Buffalo*, 204 A.D.2d 1012, 613 N.Y.S.2d 84 (1994).

Here, while it is undisputed that landmark laws are indeed valid exercises of police power, there are real questions as to the enactment of the Local Law in this instance, both substantively and procedurally. Thus, the Town has failed to meet its burden and summary judgment must be denied.

For example, the Town has failed to establish that the Survey of 595 properties was an appropriate landmark designation measure and why the Town Board could not have afforded appropriate due process by holding a Public Hearing for each of the properties on the Survey, or

some subset thereof. There is no statement in any of the Affidavits why that due process procedure would have been prohibitive, especially when balanced against the burden placed upon the property owner to have a property removed from the Survey.

The Town has also failed to address in its papers why it shifted the burden to property owners to provide additional historical information and to allow the Commission onto its property, all to be removed from the Survey. The historic designation or landmarking must be based on available information and public hearing, not on intrusion onto private property.

The Town Board has also failed to establish how it reviewed the properties on the Survey and determined that the criteria of the Local Law were met for each one.

It is also axiomatic that "[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *Amico v. Melville Volunteer Fire Co.*, 39 A.D.3d 784, 785, 832 N.Y.S.2d 813 (2d Dep't 2007). "It is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." *Baron v. Inc. Vill. of Freeport*, 143 A.D.2d 792, 533 N.Y.S.2d 143 (2d Dep't1988)(internal citations omitted.)

In this case, despite the Certified Record and the self-serving Affidavits of Mr. Stockbridge and Mr. Burdick produced by the Town in opposition to the Complaint/Petition, there has been no opportunity to question or to cross-examine Town officials or the members of the Commission or the consultants involved in the compilation of the Survey to understand better the instructions given to the Town's consultants, the process for adding properties to the Survey,

and the process of appealing of the Survey designations. The materials provided in the Certified Record are simply insufficient to establish how the Survey was developed and the extent of any review by Commission members or their decision-making process for the inclusion and classification of properties on the Survey.

Furthermore, Plaintiffs/Petitioners have made extensive demands to the Town pursuant to the Freedom of Information Law to get a head start on discovery with respect to material issues, only to be provided with heavily redacted documents that are virtually impossible to understand and rendered meaningless. Counsel for the Town has claimed that the communications requested are protected as "inter-agency" or "intra-agency" materials. Copies of letters from Keane & Beane in response to the FOIL demands are attached as **Exhibit C** to the Hollis Affirmation.

As such, the Town remains in possession of the evidence pertaining to the decision-making involving the properties on the Survey, while at the same time asking this Court to determine that there are no material questions of fact.

On the basis of the foregoing, summary judgment on the constitutional claims raised by Plaintiffs/Petitioners is inappropriate and premature.

In the alternative, should this Court conclude that there are no material issues of fact, Plaintiffs/Petitioners request that at a minimum this Court remand the matter to the Town Board for full hearings on inclusion of each of the properties on the Survey.

POINT III

THERE IS NO BASIS FOR DISMISSAL OF PLAINTIFFS/PETITIONERS' REMAINING CLAIMS AGAINST THE TOWN BOARD

In addition to its Motion to Dismiss and/or for Summary Judgment with respect to Plaintiffs/Petitioners' First Cause of Action, the Town argues that the remaining causes of action that fall within the rubric of an Article 78 proceeding should be dismissed.

For the reasons set forth in Plaintiffs/Petitioners Memorandum of Law in Support of the Complaint/Petition and herein, this Court should grant the relief requested by Plaintiffs/Petitioners.

A. Town Board's Adoption of the Local Law was Arbitrary and Capricious

As set forth in the Complaint/Petition, to the extent that the adoption of the Survey by the Town Board was administrative action rather than a legislative enactment, Plaintiffs/Petitioners submit that it should be annulled and set aside since it was done without proper vetting and in an arbitrary and capricious manner.

Here, rather than hold a Public Hearing on each purportedly individual historic building, the Town Board adopted the entire revised inventory of properties "en masse," without a separate Public Hearing or an opportunity for the affected property owner and/or the public to review evidence in support or against the designation.

The Town Board chose to forego a proper review of the historic significance of each property and simply adopted a procedure to challenge the designation of the properties sought to be added in the future.

The Town's actions not only violate due process protections, but also contradict the newly adopted procedure set forth in the Local Law itself that ensures there is full vetting when adding properties to the Survey.

Further troubling is the fact that the original Survey under the 2003 Law was never publicly vetted, and that the revised Survey adopted along with the instant version of the Local Law again failed to provide for a Public Hearing to consider each affected property prior to that property's inclusion on the Survey going forward.

Thus, the Survey adopted by the Town Board must be annulled and set aside, and the Town Board be directed to follow the procedure set forth in the Local Law for historic designation.

B. The Town Board's Historic Designation of Plaintiffs/Petitioners' Property was Arbitrary and Capricious

As set forth in the Complaint/Petition, Plaintiffs/Petitioners are the owners of certain real property consisting of approximately 26-acres and the improvements thereon located at 393 Guard Hill Road, within the Town of Bedford, and identified on the Town of Bedford Tax Assessment Map as Section 83.8, Block 1, Lot 1 ("the Property"). The Property is listed on the Survey adopted by the Town Board as a Tier 1 historic building.

Contrary to the Town's arguments, review by this Court of the historic designation of the Property is appropriate

It is established that, while exhaustion of available administrative remedies is generally required, there are "recognized exceptions to the rule," which include instances when "[1] agency action is challenged as being either unconstitutional or wholly beyond its grant of power; [2] resort to an administrative remedy would be futile; and [3] its pursuit would cause irreparable

harm." *See Hudson Valley Fed. Credit Union v. New York State Dep't of Taxation & Fin.*, 28 Misc. 3d 1001, 1004, 906 N.Y.S.2d 680, 684 (Sup. Ct. 2010) citing W*atergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978); *see also Lehigh Portland Cement Company v. NYS Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 638 N.Y.S.2d 388 (1995).

The instant matter falls within both the first and second exceptions to the exhaustion rule. Initially, Plaintiffs/Petitioners challenge the Local Law and the adoption of the Survey as unconstitutional and the Town insists that they "exhaust" administrative remedies pursuant to the provisions of the challenged law. Such pre-requisite steps to relief are patently improper. Further, futility applies in this case as it clearly would be futile for Plaintiffs/Petitioners to seek review before the Commission immediately following designation and the adoption of the Survey by the Town Board. Here, the Commission concluded that the Property should be a Tier 1 Historic Building when it updated and revised the Survey, and the Town Board has refused to take action to review the designation without a formal appeal to the Commission.

In order to protect Plaintiffs/Petitioners' rights, counsel for Plaintiffs/Petitioners submitted a letter to the Town Board, dated May 3, 2017, appealing the Tier 1 designation pursuant to Section 71-26 of the Local Law. Notably, the letter was submitted within 30 days of April 18, 2017, the date that the Commission presented the Survey to the Town Board for adoption. *See* Exhibit Q to Complaint/Petition. Nevertheless, the Town Board refused to set a Public Hearing to consider the requested appeal of the designation.

There is no evidence in the record to support a Tier 1 designation of the Property.

The Town's opposition papers point to the Property being designed and built by Mott Schmidt, a respected, but more locally known, 20th century architect.

However, what is not mentioned by Mr. Stockbridge is that the Property had fallen into great disrepair prior to Plaintiffs/Petitioners purchasing it in 2006 and would not have been salvageable but for Plaintiffs/Petitioners' efforts. Now, after Plaintiffs/Petitioners have spent time and effort and resources demanded to rehabilitate their Property, the Property is considered "intact" by the Town and Plaintiffs/Petitioners find themselves restricted from undertaking certain other alterations absent review by the Commission.

Thus, Plaintiffs/Petitioners now also seek a determination from this Court that the Tier 1 designation of their Property is arbitrary and capricious, and either directing the Town Board to remove the Property from the Survey, or to hold a Public Hearing to consider the appropriateness of the designation.

C. The Town Board Failed to Comply with the Requirements of Environmental Review Pursuant to the State Environmental Quality Review Act

Contrary to the arguments in the Town's opposition papers, the Town Board did not in fact perform a sufficient analysis under the State Environmental Quality Review Act ("SEQRA") before it concluded that the proposed amendments would "not have a significant adverse impact on the environment" and issued its Negative Declaration.

The Town Board's determination was arbitrary and capricious and must be set aside as the SEQRA process employed by the Town Board failed to take a "hard look" at all of the environmental impacts of the Local Law. It is established that a negative declaration must be annulled where the agency fails to address or overlooks potential significant impacts on the environment. *W. Branch Conservation Ass'n, Inc. v. Planning Bd. of Town of Clarkstown*, 207

A.D.2d 837, 616 N.Y.S.2d 550 (2d Dep't 1994) (finding negative declaration to be arbitrary and capricious and unsupported by the record, and remitted matter for preparation of an Environmental Impact Statement).

In Part 2 of the EAF, the Town Board as Lead Agency simply checked off "No" for each and every feasible impact, including "consistency with community plans" and "consistency with community character." There was no further discussion or explanation contained within the EAF. In Part 3 of the EAF, the Town Board simply attached an overview of the proposed amendments. There 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.

The Town Board also failed to consider how this Local Law limits development beyond the applicable zoning, or that it may prevent the full and best use of the affected property. While the Town Board states in a conclusory fashion that there would be no impact on development or redevelopment of the properties, that is, in fact, misleading since under the Local Law the Commission is authorized to prohibit the issuance of a permit for demolition and/or substantial alteration of a designated historic building.

It is established that an agency must consider all of the potential environmental impacts of the action, not just the physical impacts. *See, e.g., Chinese Staff & Workers Ass'n v. City of N.Y.*, 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986). Furthermore, a SEQRA negative declaration must be annulled where the responses in an EAF are misleading and fail "to provide an adequate basis for the Board's adoption of a negative declaration." *Corrini v. Village of Scarsdale*, 1 Misc.3d 907, 781 N.Y.S.2d 623 (Sup. Ct. 2003). The fact that historic and aesthetic significance

are considerations of the environment does not mean that environmental review must ignore the socio-economic considerations. By failing to take a hard look at the potential impacts of the adoption of the Local Law, including impacts on each of the properties on the Survey, the Town Board acted in an arbitrary and capricious manner.

In its opposition, the Town also argues that landmark designation under SEQRA is a Type II action and that therefore a complete environmental review was not required in the first place, at least not with respect to Petitioners/Plaintiffs' Property in particular. See Town's Memorandum, p. 37. This is a misleading argument. While it is true that the "designation of local landmarks or their inclusion within historic districts" is a Type II action under SEQRA, the action of the Town Board here was not a simple designation. The Record is clear that the Town Board not only reformulated the entire historic building preservation law and applicable criteria for historic designation, but also designated as historic 595 individual properties pursuant to that new law. This is clearly not a "routine" type agency action or a simple "designation."

On the basis of the foregoing, the SEQRA review and conclusions of the Town Board must be reversed, annulled, and set aside, and the adoption of the Local Law on the basis of those faulty conclusions must be invalidated.

CONCLUSION

For the reason set forth herein, there is no basis for this Court to dismiss Plaintiffs/Petitioners' First Cause of Action and no basis for summary judgment. Thus, Plaintiffs/Petitioners respectfully request that this Court deny the Town's motions, allow discovery to proceed, and grant the relief sought in the Complaint/Petition.

In the event any portion of the First Cause of Action is dismissed or set aside, Petitioners/Plaintiffs request that this Court either remand the matter to the Town Board for further proceedings with a proper public hearing on the designation of each of the properties on the Survey, or at the very least hold a hearing pursuant to CPLR 7804(h) to allow for deposing each of the Town Board members as to their review of the Survey prior to adoption, members of the Commission, and of those whose properties were improperly added to the Survey.

Dated: Mount Kisco, New York
August 2, 2018

P. Daniel Hollis, III

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