SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

INCORPORATED VILLAGE OF HEAD OF THE HARBOR, ST. JAMES – HEAD OF THE HARBOR NEIGHBORHOOD PRESERVATION COALITION, INC., JUDITH OGDEN, GEORGE L. FITZPATRICK, KAREN P. FITZPATRICK, MARA MATKOVIC, NICHOLAS STARK, DAVID KELEMEN, ALYSON HOPE SVATEK, THOMAS JAMES SVATEK, TRISTAN COLE SVATEK, GERALD DUFF, LEONNA DUFF, DAVE KASSAY, LAURAINE KASSAY, HARRY POOLE, SCOT VELLA, KATHY VELLA, MICHAEL SASSONE, LOUISE SASSONE, ROSE NAPOLITANO, CHARLES SHUTKA, MARGARET SHUTKA, COLLETTE PORCIELLO and BENJAMIN ROBINSON,

Petitioners,

-against-

TOWN OF SMITHTOWN, TOWN OF SMITHTOWN PLANNING BOARD, BARBARA DESORBE, in her official capacity as Chairperson of the Town of Smithtown Planning Board, WILLIAM MARCHESI, in his official capacity as a member of the Town of Smithtown Planning Board, DESMOND RYAN, in his official capacity as a member of the Town of Smithtown Planning Board, THOMAS UNVERZAGT, in his official capacity as a member of the Town of Smithtown Planning Board, RICK LANESE, in his official capacity as a member of the Town of Smithtown Planning Board, GYRODYNE, LLC and GYRODYNE COMPANY OF AMERICA, INC.,

Respondents.

Index No.: 608051/2022

Assigned Justice:
Hon. Martha Luft, J.S.C.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF OBJECTIONS IN POINT OF LAW AND MOTION TO DISMISS OF RESPONDENTS GYRODYNE, LLC AND GYRODYNE COMPANY OF AMERICA, INC.

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PRELIMINARY STATEMENT

Respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc. (collectively, "Gyrodyne") submit this reply memorandum in further support of their objections in point of law against and motion to dismiss ("Motion"), pursuant to CPLR 7804(f) and 3211(a)(1) and (7), the Verified Petition ("Petition")[1] of Petitioners Inc. Village of Head of the Harbor ("HOH"), St. James – Head of the Harbor Neighborhood Preservation Coalition, Inc. ("Coalition"), and the named individual petitioners (collectively, "Individual Petitioners"), (HOH, Coalition and Individual Petitioners, collectively, "Petitioners"). The Court should dismiss the Petition because Petitioners lack standing and, assuming any Petitioner has standing, the Petition's claims are refuted by documentary evidence and the Petition fails to state a cause of action.

Petitioners' opposition[2] fails to meet their burden of proving the elements of standing. Petitioners' cited authorities are largely inapposite and mostly concern negative declarations (i.e. no environmental review) and changes of zone or amendments to zoning districts (i.e. permitting new uses), none of which happened here. Petitioners also claim Gyrodyne's attempt to argue the merits of the Petition is premature. Gyrodyne, however, is not arguing the merits of the Petition. Gyrodyne's moving papers[3] include the relevant environmental impact studies and analyses, and establish the Petition is refuted by the documentary evidence and fails to state claim.

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[1] The Petition, dated and verified April 25, 2022, is filed as NYSCEF Doc. No. 1.

[2] Petitioners' opposition includes NYSCEF Doc. Nos. 76 (memorandum of law in opposition, dated July 5, 2022 ("Opp. Memo.")), 69 (Affidavit in Opposition to Motions to Dismiss of Judith Ogden, sworn to June 30, 2022 ("Ogden Aff.")), and 72 (Affirmation in Opposition to Motions to Dismiss of E. Christopher Murray, affirmed July 5, 2022 ("Murray Aff.")).

[3] Gyrodyne's moving papers include NYSCEF Doc. Nos. 45, 46, 47 and 48 (Draft Environmental Impact Statement, prepared by Cameron Engineering & Associates, LLP, dated November 2019 ("DEIS")), 49, 50, 51 and 52 (Final Environmental Impact Statement, prepared by Cameron Engineering & Associates, LLP dated December 2020 ("FEIS")), and 60 (Gyrodyne's Memorandum of Law in Support of Objections in Point of Law and Motion to Dismiss, dated June 14, 2022 ("Moving Memo.")).

ARGUMENT

POINT I

THE COURT SHOULD DISMISS THE PETITION BECAUSE PETITIONERS FAILED TO DEMONSTRATE STANDING

Petitioners bear the burden of proving every element of standing (Moving Memo., p. 7). Except for HOH, *none* of Petitioners commented on the DEIS and *none* of Individual Petitioners participated in the SEQRA process, and so they defaulted in the administrative proceeding before the Town of Smithtown ("Smithtown") Planning Board ("Planning Board") (Moving Memo., p. 8). HOH and the Coalition failed to demonstrate municipal and organizational standing (Moving Memo., pp. 13-14). Petitioners failed to demonstrate an injury-in-fact that is different-in-kind from the public-at-large. Although four Individual Petitioners might be considered "proximate," proximity alone cannot, and does not, confer standing.

A. HOH Failed to Demonstrate Standing

In addition to injury, kind, and scope, HOH must also demonstrate harm to a specific municipal interest, including (i) being an involved agency with oversight, (ii) peculiar impacts, or (iii) property ownership (Moving Memo., p. 13). Petitioners only alleged HOH is "directly north of the Flowerfield Fairgrounds" (Opp. Memo., p. 4), which cannot confer municipal standing. Petitioners' reliance on *Chestnut Ridge*, 45 AD3d 74 [2d Dept 2007], and *Town of Amsterdam v Amsterdam Indus. Dev. Agency*, 95 AD3d 1539 [3d Dept 2012], (Opp. Memo., pp. 2, 5-6), is misplaced.

In *Chestnut Ridge*, the adjacent villages challenged the town's zoning amendment to permit adult student living facilities ***within*** residential zones along the town-village boundaries (45 AD3d at 76). Here, Smithtown did not amend its ordinance to permit new uses. *Chestnut Ridge* also

expressly prohibited finding municipal standing based on proximity or based on constituents' rights (45 AD3d at 91-92).

In *Amsterdam*, the Third Department held the town had standing because the town held a property interest in land adjacent to the subject site (95 AD3d at 1541 [emphasizing a municipality must demonstrate how its property rights will be directly affected]). Here, HOH has *no* property interest in adjacent property, which Petitioners concede.

Therefore, Petitioners failed to demonstrate HOH has standing.

B. Petitioners, Except for HOH, Lack Standing Because They Defaulted in the Process

Individual Petitioners and the Coalition failed to avail themselves of the administrative proceedings before the Planning Board to comment on the DEIS and, thus, are "parties in default" and lack standing (Moving Memo., p. 8). Petitioners' opposition mistakenly claims Individual Petitioners and the Coalition availed themselves of the administrative proceeding.

Specifically, Petitioners claim Judith Ogden, non-party John Pavacic, and others, "including a number of petitioners" (conspicuously not specifying whom) attended the Planning Board hearing on March 30, 2022, during which the Planning Board adopted the Findings Statement ("Findings Statement"),[4] and commented on SEQRA review (Murray Aff., ¶¶ 2, 5; Ogden Aff., ¶ 5). Notably, Petitioners concede Steven Schneider did not participate.

However, the comments were made *after* the Planning Board *already adopted* the Findings Statement.[5] Gyrodyne demonstrates, and Petitioners admit, Individual Petitioners failed to appear in the administrative SEQRA proceedings at all. Mr. Pavacic's and Mr. Schneider's

[4] The Findings Statement is filed as NYSCEF Doc. No. 57.
[5] A copy of the transcript of the Planning Board's hearing on March 30, 2022, is annexed to the Affidavit of J. Timothy Shea, Jr., Esq., affirmed July 12, 2022, as Exhibit "A."

comments/materials, submitted in support the Petition, are *dehors* the record cannot be considered because these comments/materials were never before the Planning Board during SEQRA review and post-date the challenged determinations (Moving Memo., pp. 15-16).

Petitioners' opposition states the Coalition submitted a letter, dated March 31, 2021 ("Coalition Letter"), to the Planning Board (Murray Aff., ¶ 3, Ex. 1). The Coalition Letter was submitted on the final day for comments on the FEIS – 14 months *after* the DEIS was already finalized and the comment period closed (Moving Memo., pp. 5-6). Thus, the Coalition failed to participate in the DEIS process.

Petitioners incorrectly claim (i) the prohibition of materials *dehors* the record and (ii) the requirement a petitioner avail himself or herself of the administrative proceedings prior to litigation, supposedly do not apply here because SEQRA review is somehow not an administrative proceeding (Opp. Memo., pp. 13-14; Ogden Aff., ¶¶ 5-6; *see* Murray Aff., ¶ 6).

First, Petitioners cite no authority in support of this proposition. Second, it is well settled the SEQRA process is administrative, rather than adjudicative, and Petitioners rely on authorities to this effect (Opp. Memo., pp. 13-14 [citing *Youngewirth v Town of Ramapo Town Bd.*, 98 AD3d 678 [2d Dept 2012] [classifying SEQRA review as an administrative proceeding]). The question presented on review pursuant to CPLR 7804(3) (i.e. arbitrary and capricious standard) applies only to *administrative* proceedings (*Halperin v City of New Rochelle*, 24 AD3d 768, 769-70 [2d Dept 2005] [noting "[m]unicipal land use agencies are quasi-legislative, quasi-administrative bodies"]; *Scott v City of Buffalo*, 20 Misc 3d 1135(A), *3 [Sup Ct, Erie County 2008] [holding review in an Article 78 proceeding challenging SEQRA process is limited to the materials adduced before the agency when the determination was made]).

Accordingly, the Planning Board's SEQRA review was an administrative proceeding, subject to the principles prohibiting materials *dehors* the record and requiring a petitioner to avail himself or herself of the administrative proceedings prior to litigation.

Petitioners' reliance on *Youngewirth*, 98 AD3d 678, and *Shepherd v Maddaloni*, 103 AD3d 901 [2d Dept 2013], is misplaced, and these authorities support dismissal. In *Youngewirth*, the Second Department only denied the motion to dismiss because the court record was insufficient to determine whether the petitioner participated in the administrative proceeding (98 AD3d at 681).

Here, Gyrodyne submitted the FEIS, which contains all written comments and the public hearing transcripts, and identifies all commentators, concerning the DEIS (FEIS, p. iii, 13, Appxs. "A", "B," "C," and "D"), and which confirms neither the Coalition nor any of Individual Petitioners participated in the environmental review processes related to the DEIS. Petitioners also admit Individual Petitioners failed to participate in the SEQRA process, and the Coalition failed to comment on the DEIS.

In *Shepherd*, the Court held the petitioners established their standing to challenge the approval by demonstrating direct harm and injury that is different-in-kind from the public-at-large (103 AD3d at 905). Here, as discussed herein and in Gyrodyne's moving papers, Petitioners failed to demonstrate direct harm to confer standing.

C. <u>The Coalition Failed to Demonstrate Standing</u>

Even had the Coalition appeared before the Planning Board on the DEIS, which it did not, the Coalition still lacks standing. In addition to injury, kind, and scope, an organizational petitioner must also establish (i) its members have standing, (ii) the interests it asserts are germane to its purposes, and (iii) the participation of its members is unnecessary (Moving Memo., pp. 13-14).

The interests asserted in a SEQRA challenge are environmental, and so the organization's purpose must be to protect the environment (*e.g. Soc'y of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 775-76 [1991]).

The Coalition failed to demonstrate standing, generally, or organizational standing (Moving Memo., pp. 13-14). Petitioners' opposition tries to argue the Coalition has standing because one or more of its members has standing (i.e. Judith Ogden and George and Karen Fitzpatrick) and because the Coalition was formed to raise concerns regarding the planning and development of Gyrodyne's site (Opp. Memo., pp. 3, 14-15).

First, it must be noted the Coalition was formed in late February 2021 – merely one month before the FEIS was finalized and accepted, and after years of comprehensive environmental review (Ogden Aff., Ex. 1). This demonstrates the Coalition was *not* formed as an environmentalist organization, but rather as an instrument for litigation.

Second, none of the Coalition's individual members warrants an inference of harm or has standing (Moving Memo., pp. 8-14). Proximity does not apply to SEQRA petitioners (Moving Memo,. p. 10), but, assuming it does, Courts routinely deny standing based on proximity where a petitioner lives more than 500 feet from a proposed project (Moving Memo., pp. 10-11).

Judith Ogden allegedly resides at 654 N. Country Road, St. James (Petition, ¶ 9), which, according to Suffolk County Real Property Tax Services Agency records, is more than 700 feet away (as the crow flies). George and Karen Fitzpatrick allegedly reside at 15 Ashleigh Drive, St. James, which Petitioners admit is more than 1,250 feet away (Petition, ¶ 10). Thus, none of these Individual Petitioners is proximate. Even if an inference were warranted, proximate petitioners must still demonstrate how the purported harm directly impacts them and how their harm is

different from the public-at-large (Moving Memo, pp. 10-11), which they failed to do.

Third, environmental concerns *are not* germane to the Coalition's purpose, which is:

> [T]o promote public awareness through information, community outreach, and other related activities intended to protect the unique rural-suburban character of the St. James community, and to advocate for responsible actions by involved local governments to enact and administer appropriate land use policies and decisions consistent with its goals and objectives

(Ogden Aff., Ex. 1). The Coalition is a land use lobbying group – *not* an environmentalist organization. Importantly, the Coalition is not challenging a change of zone, amendment to the zoning ordinance, or community development plan, which might be germane. Instead, here, the Coalition attempts to assert environmental interests under SEQRA, which are not germane.

Petitioners' reliance on *Save the Pine Bush v Common Council of City of Albany*, 13 NY3d 297 [2009], and *Schlemme v Planning Bd. of City of Poughkeepsie*, 118 AD3d 893 [2d Dept 2014], does not salvage their standing and supports dismissal. In *Save the Pine Bush*, the Court of Appeals held an organization dedicated to the protection of an endangered species, and whose members frequented the site for purpose of studying the species, could assert a SEQRA challenge (13 NY3d at 921-22). In *Schlemme*, the Second Department held a historical society could assert a SEQRA challenge in connection with a proposed development adjacent to a historic district where the lead agency bypassed the city's historic preservation commission and issued a negative declaration – avoiding environmental review all together (118 AD3d at 894-95).

Unlike the organizations and facts in *Save the Pine Bush* and *Schlemme*, the environmental protections of SEQRA are not germane to the Coalition's purpose and the Planning Board engaged in extensive environmental review.

Therefore, the Coalition has no standing because none of its members has standing,

environmental concerns are not germane to its purpose, and it failed to comment on the DEIS.

D. Petitioners Concede Almost None of Individual Petitioners Is Proximate

Proximity cannot confer standing (Moving Memo., pp. 10-13), and, assuming proximity could warrant an inference, a petitioner still must establish causation and demonstrate different, particularized injury (Moving Memo, pp. 10-13). Petitioners' opposition ignores well-settled authority and concedes almost none of Individual Petitioners is proximate.

As noted above, an inference of harm based on proximity is generally limited to 500 feet. Petitioners admit Judith Ogden is farther than 500 feet from the Gyrodyne site, admit Gerald and Leonna Duff live 0.25 miles (1,320 feet) away, and admit Louise Sassone lives 0.36 miles (1,900 feet) away (Opp. Memo., pp. 4, 7). None of these Individual Petitioners is within 500 feet, and they are separated from the Gyrodyne site by structures, roadways, and other improvements.

Petitioners repeat their false claim that Dave and Lauraine Kassay's home is adjacent to the Gyrodyne site (Opp. Memo, pp. 4, 7). The Kassays are not adjacent because their triangular lot is bounded by the LIRR, Mills Pond Road, and 155 Mills Pond Road (Moving Memo., p. 12).

Thus, only 4 of the 23 Individual Petitioners (i.e. Napolitano, Kelemen, and the Kassays) are either adjacent or within 500 feet. Notably, the Kassays and Kelemen reside on Mills Pond Road, along the already developed western portion of the Gyrodyne site which separates the Kassays and Kelemen from any future development. Petitioners' opposition does not argue any other Individual Petitioners are proximate, so Petitioners concede no other Individual Petitioner is proximate.[6]

[6] Notably, the other Individual Petitioners allegedly reside between approximately 1,100 feet and 7,920 feet (1.5 miles) from the Gyrodyne site (Petition, ¶¶ 11, 13, 16-18, 21-23).

Even still, proximate petitioners must establish causation between harm and municipal action, and demonstrate the injury is different-in-kind from the public-at-large, which Petitioners failed to do. Additionally, as noted above, none of these four Individual Petitioners participated in the administrative process as required.

Petitioners misrepresent *Sun-Brite Car Wash v Bd. of Zoning and Appeals of Town of N. Hempstead*, 69 NY2d 406 [1987], and erroneously claim, "the Court of Appeals held that the allegation that the Petitioners owned property in the immediate vicinity of a project subject to a proposed action is sufficient to confer standing" (Opp. Memo., pp. 2, 8). The Court, though, held otherwise:

> [A]n allegation of close proximity alone ***may*** give rise to an ***inference*** of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury.
>
> ***The status of neighbor does not, however, automatically provide the entitlement, or admission ticket, to judicial review in every instance***. . . [E]ven where petitioner's premises are physically close to the subject property, ***an ad hoc determination may be required*** as to whether a particular petitioner itself has a legally protectable interest so as to confer standing

(69 NY2d at 414 [noting impacts may be no different than those experienced by the public] [emphasis added]). *Sun-Brite*, and its progeny, support dismissing the Petition.

Petitioners also purport to rely on *Shapiro v Town of Ramapo*, 98 AD3d 675 [2d Dept 2012], *Chestnut Ridge*, 45 AD3d 74, *Golden v Steam Heat, Inc.*, 216 AD2d 440 [2d Dept 1995], and *Marasco v Luney*, 99 AD2d 492 [2d Dept 1984], (Opp. Memo., pp. 10-11). In *Shapiro*, the Second Department held the petitioners had standing where they lived across the street from the proposed development site and challenged the town's SEQRA review in connection with modifying the comprehensive plan and changing the zone (from single-family to multifamily) for

new uses (98 AD3d at 676). Unlike *Shapiro*, here, there was no change of zone and no amendment to the comprehensive plan.

As discussed above, *supra* Point I.A., *Chestnut Ridge* is off-point. In *Golden*, the Second Department addressed "standing to raise a violation of a zoning ordinance" (216 AD3d at 441), which is inapposite, and did not involve SEQRA. Similarly, *Marasco* did not involve SEQRA (99 AD2d at 493).

Therefore, proximity cannot confer standing to any Individual Petitioners.

E. Individual Petitioners Failed to Demonstrate Standing

Even had Individual Petitioners participated in the SEQRA process, the Individual Petitioners still lack standing because they only proffer generalized community concerns (Moving Memo., pp. 8-10). In opposition, Petitioners mistakenly rely on *Sierra Club v Vil. of Painted Post*, 26 NY3d 301 [2015]), and *Napolitano v Town Bd. of Southeast*, 51 Misc 3d 206 [Sup Ct, Putnam County 2015], which do not support Petitioners' standing and warrant dismissal.

In *Sierra Club*, the Court of Appeals addressed SEQRA challenges where the village did not engage in environmental review and issued a negative declaration in connection with construction and operation of a water transloading rail facility (26 NY3d at 306-07). All-but-one petitioner lacked standing; the surviving petitioner lived less than a block from the site, could see the tracks and facility from his front porch, and was adversely affected by the transport trains that ran frequently, kept him awake, and negatively impacted his quality of life and home value (*id.* at 308-12). The Court emphasized the petitioner did not allege indirect, collateral effects, but rather a "particularized harm" real and different from the injury most of the public faced, and sufficient for standing (*id.* at 311).

In *Napolitano*, the Supreme Court addressed the petitioners' challenge to the town rezoning property from rural commercial to hybridized highway commercial to facilitate a developer's plan (51 Misc 3d at 207). The petitioners alleged direct and particularized harm different from the public-at-large, including noise pollution impacting sleep and quiet enjoyment, and impacts to views from their homes (*id.* at 209). The Court held the petitioners alleged particularized environmental and visual concerns that impacted them directly (*id.* at 209-10).

Unlike the petitioners and the facts in *Sierra Club* and *Napolitano*, here, Petitioners failed to allege any "particularized harm" directly impacting them and, instead, proffer generalized community concerns insufficient to confer standing.

POINT II

THE COURT SHOULD DISMISS THE PETITION BECAUSE PETITIONERS' ALLEGATIONS ARE REFUTED BY THE DOCUMENTARY EVIDENCE AND PETITIONERS FAIL TO STATE A CLAIM

Even if any of Petitioners has standing, the Court should dismiss the Petition because Petitioners' claims and allegations are refuted by documentary evidence or are otherwise baseless, and the Petition fails to state a claim (Moving Memo., pp. 14-25). Petitioners complain the certified return has yet to be filed, and so they cannot meet their burden or demonstrate their case (Opp. Memo., pp. 2, 3, 13, 15, 19, 20). The SEQRA materials are, and have been, publicly available. Petitioners could have easily utilized the record in support of the Petition, but chose not to either because they cannot overcome dismissal or because they seek to delay this ligation.

Petitioners try to rely on *Shapiro* and *Shepherd* (Opp. Memo., p. 16), but these authorities support dismissal. In these cases, the Second Department held it was in error for the Supreme Court to reach the merits prior to joined pleadings and filing of the return *where* the facts were not so

fully presented in the motion papers (*Shepherd*, 103 AD3 at 906; *Shapiro*, 98 AD3d at 677-78). Here, Gyrodyne filed the relevant SEQRA documents, and so the record is sufficiently complete for the Court to dispose of the Petition.

Petitioners claim the Planning Board did not address impacts on the character of the surrounding community (Opp. Memo., pp. 1-4, 8, 12, 16-20). However, as Gyrodyne's moving papers fully document, the DEIS, FEIS and Findings Statements addressed these concerns and require the Gyrodyne site to be preserved and remain compatible with the area (Moving Memo., pp. 17-19).

Petitioners cite to *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359 [1986], *Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767 [4th Dept 2016], and *Chestnut Ridge*, in trying to argue the Planning Board should have considered impacts on HOH and other areas of Smithtown (Opp. Memo., pp. 1, 16-18), but this argument misconstrues the authorities.

In *Chinese Staff*, the city issued a negative declaration for a luxury condominium within the Special Manhattan Bridge District ("SMBD"), a special zoning district created to preserve residential character, rehabilitate housing stock, and protect the scale of the district (68 NY2d at 362). The SMBD contained at least seven sites for new development and the subject condominium was part of the larger plan to redevelop the SMBD (*id.* at 367). The petitioners alleged the city failed to consider how introducing luxury housing into the SMBD would accelerate the displacement of low-income residents and business (*id.* a 363).

The Court noted consideration of potential displacement must be considered "in determining whether the requirement for an EIS is triggered" (*id.* at 366-67), and "shall be deemed

to include other contemporaneous or subsequent actions which are included in any long-range comprehensive integrated plan of action" (*id.* at 367). The Court's holding is expressly limited to a determination that the city's regulations (adopted pursuant to SEQRA) require consideration of long-term secondary displacement of residents and businesses in determining whether to prepare an EIS (*id.* at 368).

Unlike *Chinese Staff*, here, the Planning Board issued a positive declaration and undertook years of environmental review. No part of HOH or other parts of Smithtown are included as part of Gyrodyne's subdivision or overall development plan. Gyrodyne's subdivision does not include residential development that might impact population concentrations. Moreover, the SEQRA review addressed Gyrodyne's potential impact on nearby businesses (Moving Memo., p. 24).

Wellsville is a Fourth Department case that addressed a challenge to the town's negative declaration concerning a proposed Wal-Mart Supercenter (140 AD3d at 1767). The Court held an agency should consider business displacement impacts in an adjacent village where a big box development is proposed (*id.* at 1770). Unlike *Wellsville*, here, the Planning Board issued a positive declaration and engaged in comprehensive environmental review, the HOH is an entirely residential village (i.e. HOH cannot suffer business displacement), and the Planning Board addressed Gyrodyne's potential impact on nearby businesses (Moving Memo., p. 24).

For the reasons stated above, *supra* Point I.A., *Chestnut Ridge* cannot help Petitioners.

Petitioners falsely claim Gyrodyne's condemned property is *the same* as the subject site (Opp. Memo., p. 19). Petitioners' opposition admit the condemned property was adjacent to the subject site (so, not the same) and split between Smithtown and the Town of Brookhaven (whereas the subject site is entirely within Smithtown) (Opp. Memo., p. 19). Notably, the condemned parcel

was situated on the *other side* of the LIRR tracks and next to Stony Brook University, for which it was ultimately condemned, was over 300% larger, and was condemned more than 15 years ago (Moving Memo., p. 21).

Petitioners try to argue the traffic analysis is "flawed" and "outdated" (Opp. Memo., p. 19; *see also* Opp. Memo., pp. 2-3, 4, 8, 12 [discussing traffic]), and try to rely on extraneous materials *dehors* the record (Opp. Memo., p. 20). To the contrary, the DEIS and FEIS used updated traffic data with industry standard growth modeling (Moving Memo., pp. 19-20). Moreover, the Smithtown Traffic Safety Department and Town of Brookhaven Division of Traffic Safety determined the traffic study met applicable standards and requirements, and the SEQRA Findings impose trip generation thresholds for mitigation (Moving Memo., p. 20).

Petitioners claim the St. James Business District sewer connection should have been considered (Opp. Memo., p. 20). However, the DEIS and FEIS specifically addressed this concept as an alternative development plan (DEIS, p. 1-14, 7-21, 7-27 – 7-28, 17-1, 19-2, 19-10 – 19-12; FEIS, pp. 22-23, 44, 52, 53, 95-96).

Petitioners claim SEQRA review did not determine if the sewage treatment plant will frustrate the effort to reduce nitrogen in Stony Brook Harbor (Opp. Memo., p. 20). The DEIS notes, though, the proposed plant will utilize better technology than conventional systems resulting in a substantial reduction of nitrogen loading into Stony Brook Harbor compared with the current conditions (i.e. no action) and an as-of-right build-out, and the area proposed for the plant is within the 10-25 year travel time; the SEQRA Findings require the leaching fields be located outside of the 5-10 year travel area (Moving Memo., p. 21-22).

Lastly, Petitioners claim various other purported deficiencies concerning SEQRA review

as alleged in the Petition, and that Gyrodyne's "recitation of conclusory statements" fails to constitute a defense (Opp. Memo., p. 20). The DEIS and FEIS comprise more than 7,000 pages. Practical constraints and word limitations did not permit Gyrodyne to fully repeat the content therein. Gyrodyne summarized and incorporated the same by reference for the Court's convenience.

CONCLUSION

Based on the foregoing, the Court should dismiss the Petition because Petitioners lack standing. Even if any Petitioners had standing, which they do not, Petitioners' allegations are refuted by the documentary evidence and fail to state a claim.

Dated: July 12, 2022
Hauppauge, New York

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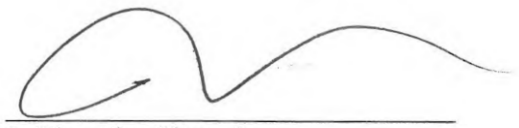
22 NYCRR § 202.8 CERTIFICATION

I, J. Timothy Shea, Jr., an attorney duly admitted to practice law before the Courts of the State of New York, respectfully certify the following:

I am a Partner with Certilman Balin Adler & Hyman, LLP, attorneys for Respondents Gyrodyne, LLC and Gyrodyne Company of American, Inc., and respectfully submit this Certification pursuant to 22 NYCRR § 202.8-b in relation to the annexed document.

The word-processing system used to prepare the annexed document indicates that, exclusive of the caption, table of contents, table of authorities, and signature block, it contains 4,189 words. The number of words in the annexed document complies with the word count limit set forth in 22 NYCRR § 202.8-b.

Dated: July 12, 2022
Hauppauge, New York



J. Timothy Shea, Jr.