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.

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

CERTILMAN BALIN ADLER & HYMAN, LLP
Co-Attorneys for Respondents Gyrodyne,LLC and Gyrodyne Company of America, Inc.
100 Motor Parkway, Suite 560
Hauppauge, NY 11788
(631) 979-3000

Counsel:
John M. Wagner, Esq.
J. Timothy Shea, Jr., Esq.
John C. Stellakis, Esq.

ROBINSON & COLE LLP
Co-Attorneys for Respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc.
Chrysler East Building
666 Third Avenue, 20th Floor
New York, New York 10017
(212) 451-2900

Counsel:
Joseph L. Clasen, Esq.
Brian J. Wheelin, Esq.

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PRELIMINARY STATEMENT

Pursuant to CPLR 7804(f) and 3211(a)(1) and (7), Respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc. (collectively, "Gyrodyne") submit this memorandum in support of their objections in point of law against and motion to dismiss 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").

Petitioners ask the Court to annul the determinations of Respondent Town of Smithtown Planning Board ("Planning Board") (i) adopting a findings statement, pursuant to the State Environmental Quality Review Act ("SEQRA"), with respect to Gyrodyne's proposed subdivision, and (ii) approving Gyrodyne's subdivision application, on the grounds the Planning Board's determinations purportedly failed to comply with SEQRA.

The Court must dismiss the Petition for several reasons.

First, the Court must dismiss the Petition because Petitioners lack standing. Except for HOH, *none* of Petitioners commented on the draft environmental impact statement, so they cannot challenge the Planning Board's determinations based on claimed SEQRA deficiencies, which is the entire basis of their Petition. Petitioners failed to demonstrate an injury-in-fact that is different-in-kind from that of the public-at-large. Petitioners' allegations of supposed harm are perfunctory, conclusory, speculative, and belied by the record and documentary evidence. Only four of Petitioners might be considered "proximate," but proximity alone cannot establish standing.

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

Additionally, HOH, as a municipality, failed to demonstrate a specific municipal interest harmed by the Planning Board's determinations and it cannot rely on proximity. The Coalition failed to demonstrate organizational standing.

Second, assuming any of Petitioners has standing, the Court must dismiss the Petition because the claims are refuted by the documentary evidence (i.e. Petitioners' own exhibits and the administrative record), or are otherwise baseless, and the Petition fails to state a claim. Contrary to Petitioners' allegations, the Planning Board took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its determination.

Gyrodyne's proposed subdivision concerns approximately 75 acres of real property within the Town of Smithtown, more particularly described as District 800, Section 4, Block 2, Lots 13.3, 13.4, 14 and 15 ("Gyrodyne Property").[2] The Gyrodyne Property is situated on the east side of Mills Pond Road, between NYS Route 25-A on its northern boundary and the Long Island Railroad ("LIRR") right-of-way on its southern and eastern boundaries (DEIS, pp. 1-1, 2-1; FEIS, p. 1).

The environmental review process took five years and the Planning Board, as lead agency, held multiple public hearings and accepted, considered, and incorporated a litany of public comments. The environmental impact statements – alone – comprise over 4,100 pages, and the administrative record chronicles the Planning Board's and Gyrodyne's painstaking efforts to identify and consider potential environmental impacts, and to avoid or mitigate them to the extent

[2] Draft Environmental Impact Statement, prepared by Cameron Engineering & Associates, LLP, dated November 2019 ("DEIS"), pp. 1-1, 2-1, Petition, Exhibit 6, NYSCEF Doc. Nos. 8 and 9; the Final Environmental Impact Statement, prepared by Cameron Engineering & Associates, LLP, dated December 2020 ("FEIS"), pp. i, 1, Petition, Exhibit 7, NYSCEF Doc. Nos. 10 and 11. Copies of the DEIS and FEIS attached to the Petition contained pagination errors and/or missing pages; accordingly, true and correct copies of the DEIS and FEIS are attached to the Affirmation of J. Timothy Shea, Jr., Esq., affirmed June 1, 2022 ("Shea Aff."), as Exhibits "A" and "B," respectively.

feasible. The Planning Board imposed various conditions to avoid and mitigate potential impacts.

Petitioners' grievance is not with the Planning Board's determinations. Petitioners simply do not like the fact that the Gyrodyne Property largely is, and has historically been, zoned Light Industrial and used for industrial and commercial purposes, and is being considered for further development. Petitioners are trying to use the Planning Board's determinations as a foil to prevent *any* development of the Gyrodyne Property. SEQRA's purpose, though, is not to prevent development, and the Planning Board complied with SEQRA's procedural and substantive mandates.

For the reasons set forth herein, the Court must dismiss the Petition.

STATEMENT OF FACTS

Contrary to the Petition's allegations, the Planning Board extensively studied Gyrodyne's proposed subdivision for half-a-decade, engaged in comprehensive review of potential impacts, requested, accepted and incorporated public input, and established conditions to avoid or mitigate the potential impacts identified.

Prior to subdivision approval, the Gyrodyne Property has hosted, and continues to host, industrial and commercial uses along the western and southern portions, namely Flowerfield Celebrations catering hall (comprising 12.56 acres) and four industrial buildings and site improvements (comprising 18.20 acres) (DEIS, pp. 2-1, 12-1). Accordingly, approximately 41% of the Gyrodyne Property is already developed (DEIS, p. 2-3; *see also* DEIS, p. 12-1). Moreover, Gyrodyne's subdivision *does not* seek a change of zone, and proposes less density than would otherwise be allowed as-of-right – *without* the subdivision.

In December 2017, Gyrodyne submitted to Respondent Town of Smithtown

("Smithtown") an Environmental Assessment Form, dated December 1, 2017 ("EAF"), proposing to subdivide the Gyrodyne Property into nine (9) lots, which would retain existing uses, provide land-banked parking, introduce new uses (e.g. hotel with amenities; assisted living facility), and include a common area with roads and a new wastewater treatment plant.[3] The EAF identified several potential environmental concerns (*see generally* EAF).

On May 9, 2018, the Planning Board issued a SEQRA Positive Declaration and Notice of Scoping ("Positive Declaration").[4] The Positive Declaration classified Gyrodyne's proposed subdivision as a "Type I Action," determined it may have a significant effect on the environment, and required preparation of an environmental impact statement (Positive Declaration, p. A-3).

The Positive Declaration identified various environmental concerns, including visual and community character, wastewater-related impacts, traffic, growth-inducing impacts, and conformance with the draft comprehensive plan (Positive Declaration, pp. A-4 – A-5). The Positive Declaration determined a formal scoping of the DEIS would be conducted, and the Planning Board conducted the public scoping process with a 45-day comment period (Positive Declaration, p. A-3; FEIS, p. 11).

On July 7, 2018, the Planning Board issued the Final Scope for the DEIS ("Final Scope").[5] The 20-page Final Scope discussed the proposed uses, discussed potential impacts and provided instructions for preparing the DEIS (*see generally* Final Scope).

On November 9, 2019, Gyrodyne submitted the DEIS to the Planning Board (FEIS, p. 11). The DEIS constitutes a comprehensive guide to future development potential of the Gyrodyne

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[3] *See generally* EAF, a copy of which is attached to Shea Aff. as Exhibit "C."
[4] A copy of the Positive Declaration and Scoping is attached to the Shea Aff., as Exhibit "D."
[5] *See generally* Final Scope, a copy of which is attached to the Shea Aff., as Exhibit "E."

Property (DEIS, p. 1-2), and ensures the site is developed in a responsible and sustainable manner by establishing environmental and infrastructure-related regulatory controls (DEIS, p. 2-1).

The DEIS comprises almost 3,000 pages and extensively reviewed, studied, and proposed mitigation for potential impacts of one possible configuration for the subdivision, including visual impacts and neighborhood characteristics, traffic, water, the cumulative and growth-inducing impacts at and near the Gyrodyne Property, historic considerations, open space, and native plants (*see generally* DEIS). The DEIS considered and analyzed the following configuration:

Lot 1:	Existing light industrial uses to remain
Lot 2:	Existing Flowerfield Celebrations catering hall to remain
Lot 3:	Land-banked parking
Lot 4:	New hotel with 150 units, conference space, restaurant, and spa
Lots 5 and 6:	New office space comprising 130,000 square feet
Lots 7 and 8:	New assisted living facility with 220 units
Lot 9:	Commonly owned and operated area comprising 24 acres of open space, internal roads, drainage, and a new sewage treatment plant

(DEIS, p. 2-2; *see also* DEIS p. 2-4 [configuration includes 36 acres of landscaped and natural open space]). The DEIS also analyzed 10 alternative configurations and a scenario where no action is taken (*see generally* DEIS).

The DEIS established impact thresholds for traffic and sanitary flow (FEIS, p. 3 [traffic generation ±538 or fewer trips during weekday PM peak hours; sanitary generation 100,000 gallons per day]), and concluded the mitigation proposed for the potential configuration would similarly mitigate the alternatives or any modified configuration with impacts at/below these thresholds (FEIS, p. 3).

On December 11, 2019, the Planning Board issued a Notice of Acceptance of DEIS and Public Hearing, scheduled a public hearing for January 8, 2020, and kept open the public comment

period through January 24, 2020 (FEIS, p. 11). The Planning Board accepted comments for an additional two weeks (FEIS, p. 11). Except for HOH, *none* of Petitioners commented on the DEIS.

In December 2020, Gyrodyne submitted the FEIS to the Planning Board (*see generally* FEIS). The FEIS comprises 1,200 pages and addressed 100 comments.[6] The FEIS considered modifications to the subdivision configuration – namely, decreasing the number of new lots from nine to eight, increasing the proposed floor area for office use, reducing the number of hotel rooms by 25 units, removing the hotel restaurant, day spa and conference center, adding a small multipurpose room to the hotel, and adding 30 assisted living units (FEIS, p. 4).

The FEIS notes the DEIS demonstrated different subdivision configurations result in similar impacts, and the mitigation measures proposed for the original configuration similarly mitigate potential impacts from a different configuration which does not exceed the traffic and sanitary thresholds (FEIS, p. 3).

The Planning Board accepted the FEIS on March 10, 2021, and held open a public comment period through March 31, 2021. On September 16, 2021, the Smithtown Environmental Protection Director ("EPD") issued a memorandum ("EPD Memorandum"), to the Director of Planning recommending SEQRA findings and conditions in full consideration of the FEIS, DEIS, and all comments.[7]

On March 30, 2022, by Resolution No. 14-2022, the Planning Board resolved to adopt the

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[6] FEIS, pp. 1, 11-109, Appendix A (DEIS Comments by Agencies and Elected Officials), pp. A-1 – A-35, Appendix B (DEIS Comments by the Public), pp. B1 – B119, Appendix C (Public Hearing Transcript), pp. C1 – C177, Appendix D (Conservation Board Hearing Transcript), pp. D1 – 49, and Appendix E (Municipal Comments from 2017 and 2018), pp. E1 – E23.

[7] A copy of the EPD Memorandum is attached to the Shea Aff. as Exhibit "F."

EPD Memorandum and issued a Findings Statement ("SEQRA Findings"),[8] which concluded Gyrodyne's subdivision (subject to mitigation conditions) minimizes or avoids adverse environmental impacts to the maximum extent practical (SEQRA Findings, p. 2). Also on March 30, 2022, by Resolution No. 15-2022, the Planning Board resolved to approve Gyrodyne's proposed subdivision as described in the FEIS, with the modified configuration, subject to the SEQRA Findings and conditions ("Subdivision Approval").[9]

On April 26, 2022, Petitioners commenced this proceeding.

ARGUMENT

POINT I

THE COURT MUST DISMISS THE PETITION BECAUSE PETITIONERS LACK STANDING

"Standing requirements are not mere pleading requirements but rather an indispensable part of the [petitioners'] case and therefore each element must be supported in the same way as any other matter on which the [petitioner] bears the burden of proof" (*Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]); *see also New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004] ["Standing, of course, is a threshold requirement"]).

Except for HOH, *none* of Petitioners commented on the DEIS. Individual Petitioners failed to demonstrate an injury-in-fact that is different-in-kind from that of the public-at-large. Although four Individual Petitioners might be considered "proximate," proximity alone cannot confer

[8] Copies of the Planning Board Resolution No. 14-2022 and SEQRA Findings are attached to the Shea Aff. as Exhibit "G."
[9] A copy of Planning Board Resolution No. 15-2022 is attached to the Shea Aff. as Exhibit "H."

standing. HOH and the Coalition failed to demonstrate municipal and organizational standing, respectively.

A. <u>Petitioners, Except for HOH, Lack Standing Because They Defaulted in the Process</u>

Petitioners lack standing to bring a proceeding to challenge municipal determinations, including SEQRA decisions, where the petitioners never appeared before the administrative body (*Denton v Town of Oyster Bay*, Sup Ct, Nassau County 2015, Index No. 5290/2015, Dec. 15, 2015, *aff'd* 2016 NY Slip Op 63515(U) [2d Dept 2016]; *see also O'Brien v Barnes Bldg. Co., Inc.*, 85 Misc 2d 424, 442 [Sup Ct, Suffolk County 1974], *aff'd* 48 AD2d 1018 [2d Dept 1975], [holding petitioners lacked standing where they did not appear or afford themselves the opportunity to be heard prior to litigation]; *Application of Jonas*, 155 NYS2d 506, 508 [Sup Ct, Westchester County 1956], *aff'd* 3 AD2d 668 [2d Dept 1957], [holding petitioners were "parties in default" because they never appeared before the board]).

Here, Individual Petitioners and the Coalition failed to appear before the Planning Board to comment on the DEIS and, thus, are "parties in default," and lack standing.

B. <u>Individual Petitioners Failed to Demonstrate Real and Different Injury</u>

Even had Individual Petitioners appeared before the Planning Board on the DEIS, the Individual Petitioners still lack standing. A petitioner bears the burden of proof and must show (i) an injury-in-fact, (ii) different from that of the public-at-large, and (iii) within the zone of interests protected by the statute (*e.g. Vasser v City of New Rochelle*, 180 AD3d 691, 692 [2d Dept 2020]). Municipal and organizational petitioners must meet additional thresholds for standing.

Injury-in-fact means actual harm suffered by a petitioner as a direct result of administrative action, and cannot be conjectural (*Novello*, 2 NY3d 207, 211 [2004]). Perfunctory allegations of

harm are insufficient to meet a petitioner's burden of proof (*Save the Pine Bush*, 13 NY3d at 306 [Petitioners must prove their injury is real and different]). "Allegations of harm must not be conclusory or speculative" (*Vasser*, 180 AD3d at 692; *see also Tuxedo Land Trust Inc. v Town of Tuxedo*, 34 Misc 3d 1235(A), *8 [Sup Ct, Orange County 2012], *aff'd* 112 AD3d 726 [2d Dept 2013], [holding allegations which are speculative, conclusory, and lack evidentiary support will not establish SEQRA standing]).

"Petitioners must have more than generalized environmental concerns to satisfy that burden" (*Hohman v Town of Poestenkill*, 179 AD3d 1172, 1173-74 [3d Dept 2020] [affirming dismissal of SEQRA challenge where petitioners failed to assert unique and distinct injury]; *see also Save the Pine Bush*, 13 NY3d at 413 [Pigott, J., concurring] ["The concerns of petitioners amount to the same general concerns of the community . . . . [B]ecause petitioners fail to specify any direct injury that is different from the general public, they lack standing under our precedent."]

Here, Individual Petitioners fail to demonstrate an injury-in-fact that is different-in-kind from that of the public because they merely proffer potential impacts to the general community. Petitioners complain of purported impacts to neighborhood characteristics, traffic, water, business displacement, historic and cultural areas, open space, and native plants, and cumulative impacts throughout the general area (Petition ¶¶ 4, 5, 49-94). Petitioners fail to show how any of these alleged impacts emanate directly from the Planning Board's determinations and actually harm them. Moreover, Petitioners failed to show how any of these alleged impacts are different from what most members of the public would face.

Accordingly, Individual Petitioners lack standing (*see Riverhead Neigh. Preserv. Coalition, Inc. v Town of Riverhead Town Bd.*, 112 AD3d 944, 945 [2d Dept 2013] [affirming

dismissal where petitioners complained about the effects of constructing a regional shopping mall across the street from their homes]; *Harris v Town Bd. of Town of Riverhead*, 73 AD3d 922, 924 [2d Dept 2010] [reversing motion court and dismissing petition, holding alleged harm of increased traffic congestion and negative impacts on local businesses were not different-in-kind]; *Powers v de Groodt*, 43 AD3d 509, 512 [3d Dept 2007] [holding claims of increased traffic and traffic safety concerns, as well as other general environmental damages, are not different in kind from that of the public-at-large]; *Gallahan v Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003] [holding concerns of traffic, noise and air quality are not different from the public-at-large]).

C. Proximity Cannot Confer Individual Petitioners with Standing

"Close proximity alone is insufficient to confer standing where there are no zoning issues involved and general environmental concerns will not suffice" (*Shapiro v Torres*, 153 AD3d 835, 836 [2d Dept 2017] [affirming dismissal of SEQRA claims]). "[U]unlike cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge based on a party's close proximity alone" (*Hohman*, 179 AD3d at 1174 [affirming dismissal and holding adjacent landowners lacked standing]).

Assuming proximity might provide a presumption of harm for a petitioner, "the status of neighbor does not automatically provide the entitlement, or admission ticket, to review in every instance" (*Sun-Brite Car Wash, Inc. v Bd. of Zoning and Appeals of Town of N. Hempstead*, 69 NY2d 406, 414 [1987]).

A proximate petitioner still must establish causation between the purported harm emanating from the challenged decisions, as well as demonstrate the injury is different-in-kind (*id.* at 414 [holding even where petitioner are close, an *ad hoc* determination is required]; *see also*

CPD N.Y. Energy Corp. v Town of Poughkeepsie Planning Bd., 139 AD3d 942, 943-44 [2d Dept 2016] [holding proximate petitioner failed to demonstrate any connection between the challenged decision and the purported harm]; *Hoxsie v Zoning Bd. of Appeals of City of Saratoga Springs*, 129 Misc 2d 493, 497 [Sup Ct, Saratoga County 1985] [dismissing petition for lack of standing where petitioner lived 100 feet away but failed to assert competent allegations of injury-in-fact]).

The distance should account for improvements in-between and the actual route traveled, rather than the "crow's fly," (*Gallahan*, 307 AD2d at 685 [measuring an additional driving distance and intervening structures]), and should be measured to the proposed structure, rather than the boundary (*Tuxedo Land Trust*, 112 AD at 728).

Courts routinely deny standing based on proximity where a petitioner lives more than 500 feet from a subject site (*Save the Pine Bush*, 13 NY3d at 309 [Pigott, J., concurring]; *see also Vasser*, 180 AD3d at 692 [affirming dismissal where petitioners resided 1,200 feet away]; *Green Earth Farms Rockland, LLC v Town of Haverstraw Planning Bd.*, 153 AD3d 823, 826-27 [2d Dept 2017] [finding petitioners 2,000 feet away did not have standing]; *Barrett v Dutchess County Legis*, 38 AD3d 651, 653 [2d Dept 2007] [dismissing petition and finding no inference of harm for petitioners at principal intersection providing access to the site]; *Gallahan*, 307 AD2d at 685 [dismissing petitioner living 700 feet away]; *Oates v Vil. of Watkins Glen*, 290 AD2d 758, 760 [3d Dept 2002], *superseded by statute on other grounds*, [dismissing petitioner situated 530 feet away]; *Buerger v Town of Grafton*, 235 AD2d 984, 984 [3d Dept 1997] [affirming dismissal where petitioner's property was within 600 feet]; *Concerned Citizens for Open Space, Inc. v City of White Plains*, 2003 NY Slip Op 51288(U), *2 [Sup Ct, Westchester County 2003] [dismissing petitioners residing 800 feet away and finding no inference of harm]).

Here, 19 of the 23 Individual Petitioners are not sufficiently proximate to warrant an inference of harm (Petition ¶¶ 9-11, 13-14, 16-19, 21-23). Specifically, Ogden, the Fitzpatricks, Matkovic, Stark, Kelemen, the Svateks, the Duffs, Poole, the Vellas, the Sassones, the Shutkas, Porciello and Robinson all reside farther than 500 feet from the Gyrodyne Property – some of them live more than one mile away, and many of them live more than a quarter-mile away (Petition ¶¶ 9-11, 13-14, 16-19, 21-23).

Contrary to their allegations, the Kassays *do not* reside "immediately adjacent" to the Gyrodyne Property (Petition ¶ 15); the Kassay's residence is bounded by the LIRR, Mills Pond Road, and 155 Mills Pond Road.

While Kelemen and Napolitano are adjacent (Petition ¶¶ 12, 20) and the Kassays reside within several hundred feet (Petition ¶ 15) (measured to the boundary, not the actual future improvements), such proximity – alone – does not confer standing. The Kassays and Kelemen reside on Mills Pond Road, along the already developed western boundary of the Gyrodyne Property, which separates the Kassays and Kelemen from any future development (*see Tuxedo Land Trust*, 112 AD3d at 728 [affirming dismissal]).

Moreover, Kelemen, Napolitano and the Kassays failed to establish causation between any purported inferred harm and the SEQRA Findings and Subdivision Approval, or how any such injury is different-in-kind from that of the public. Kelemen's, Napolitano's and the Kassays' conclusory allegations that their proximity gives them special damages (Petition ¶ 24) cannot establish standing.

Even assuming Individual Petitioners alleged an injury-in-fact and any of them are sufficiently proximate to warrant an inference of harm, Individual Petitioners failed to demonstrate

how any supposed injury emanates from the Planning Board's determinations, actually harms them, and is different from that of the public.

D. <u>HOH Does Not Have Municipal Standing and Cannot Rely on Individual Interests or Proximity</u>

In addition to injury, kind, and scope, a municipal petitioner must also demonstrate harm to a specific municipal interest (*Vil. of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 91 [2d Dept 2007]). Municipal interests include (i) being an involved agency with some approval authority, (ii) impacts peculiar to a municipality (e.g. impacts on a school from an adjacent landfill), and (iii) owning property impacted by a project (*id.* at 91-92). A municipality "cannot be presumed to have suffered environmental injury by reason of its proximity to the source of the impacts" and "is not permitted to assert the collective individual rights of its residents (*id.*).

HOH failed to demonstrate a specific municipal interest, cannot rely on proximity, cannot assert individual rights, and, like Individual Petitioners, failed to demonstrate a real and different injury. HOH's allegation regarding "the change in the village because of the development" (Petition ¶ 25) is disingenuous and unfounded. First, the Gyrodyne Property is situated *entirely* outside HOH. Second, even HOH admits it is "an all residential village" (Petition ¶ 36). Accordingly, the Planning Board's determinations do not affect property within HOH or create any changes in HOH.

E. <u>The Coalition Does Not Have Organizational Standing and Cannot Rely on Proximity</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) one or more of its members would have individual standing, (ii) the interests it asserts are germane to its purposes, and (iii) neither the claim asserted nor the appropriate relief

requires the participation of its members (*Novello*, 2 NY3d at 211; *see also Real Estate Bd. of New York, Inc. v City of New York*, 165 AD3d 1, 5 [1st Dept 2018] ["Other rules of standing applicable to individuals apply with equal force to organizations."]).

The Coalition fails to demonstrate a real and different injury or a proximate property interest (*Tuxedo Land Trust*, 34 Misc 3d 1235(A), *5, *aff'd* 112 NY3d 726, [dismissing organization without property interests]). The Coalition also fails to demonstrate it has organizational standing because it fails to demonstrate its members have standing, the interests asserted (i.e. environmental) are germane to its purpose, and participation of its individual members is unnecessary.

Therefore, Petitioners lack standing and the Court must dismiss the Petition.

POINT II

THE COURT MUST 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 must 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.

A CPLR 3211(a)(1) motion to dismiss based on documentary evidence may be granted where the evidence refutes the factual allegations pled (*Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 790 [2d Dept 2021]; *see also Owens Rd. Assoc., LLC v Town Bd. of Town of Goshen*, 50 AD3d 908, 908 [2d Dept 2008] [dismissing Article 78 petition where documentary evidence refuted allegations regarding deficiencies in the town's decision-making processes]). Allegations flatly contradicted by documentary evidence are neither presumed to be true nor accorded any

favorable inference (*Marcus v Bd. of Trustees of Vil. of Wesley Hills*, 62 AD3d 799, 782 [2d Dept 2009]).

With respect to CPLR 3211(a)(7), where a petitioner's own evidentiary submissions conclusively establish the petitioner has no cause of action, then the Court must dismiss its petition (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 [2009]; *see also Madden v Vil. of Tuxedo Park*, 192 AD3d 802, 804 [2d Dept 2021] [noting an Article 78 petition fails to state a claim where it does not present a question of fact]).

Under SEQRA, the lead agency must identify potential environmental impacts of a proposed action, balance the impacts with other relevant social and economic considerations, minimize adverse impacts to the extent practicable, and articulate the bases for its decision (*Friends of P.S. 163, Inc. v Jewish Home Lifecare*, 30 NY3d 416, 425 [2017]). Judicial review is deferential and an agency's SEQRA obligations are reviewed in light of the rule of reason (*id.* at 430 ["Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the requirements of SEQRA."]).

Courts only ensure the lead agency "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination," and do not substitute their judgments for those of local officials (*e.g. id.* a 430).

In addition, materials *dehors* the record cannot be considered upon Article 78 certiorari to review (*Celestial Food Corp of Coram, Inc. v New York State Liquor Auth.*, 99 AD2d 25, 26-27 [2d Dept 1984] [disregarding items not adduced before the body that made the challenged determination as *dehors* the record]; *see also Scott v City of Buffalo*, 20 Misc 3d 1135(A), at *3 [Sup Ct, Erie Co 2008], citing *Kelly v Safir*, 96 NY2d 32, 39 [2001], [judicial review is limited to

the record adduced before the body; courts cannot consider substantive information not before the decisionmaker when the determination was made]).

Here, the Petition is refuted by Petitioners' own evidentiary submissions and the administrative record. It must be noted at the outset that the Petition *does not* describe the action approved by the Planning Board; rather, the Petition describes the initial configuration in the DEIS, not the revised configuration in the FEIS, which is the subject of the SEQRA Findings and Subdivision Approval (Petition ¶¶ 38-43 [describing outdated configuration]).

It must also be noted at the outset that Petitioners improperly attempt to introduce extraneous materials that were never presented to the Planning Board in connection with the DEIS. Specifically, Petitioners submit the Affidavit of John W. Pavacic, sworn to April 25, 2022 ("Pavacic Affidavit"),[10] and correspondence from Schneider Engineering, PLLC, dated April 21, 2022 ("Schneider Report").[11]

Both the Pavacic Affidavit and Schneider Report post-date the DEIS comment period, as well as the SEQRA Findings Statement and the Subdivision Approval. Nowhere in the Pavacic Affidavit or Schneider Report does the author state he attended, spoke at the DEIS hearing or submitted materials with respect to the DEIS. Therefore, these documents are *dehors* the record and cannot be considered. In any event, the content of the Pavacic Affidavit and the Schneider Report is refuted.

Petitioners' allegations that the Planning Board "utterly fail[ed]" to comply with SEQRA (Petition ¶ 3), issued the Subdivision Approval "without debate" (Petition ¶ 3), and "pushed

[10] The Pavacic Affidavit is attached to the Petition as Exhibit 9 and filed as NYSCEF Doc. No. 13.
[11] The Schneider Report is attached to the Petition as Exhibit 10 and filed as NYSCEF Doc. No. 14.

through the approval of the subdivision without any discussion whatsoever" (Petition ¶ 6), are refuted. As noted above, the Planning Board studied Gyrodyne's proposed subdivision for half-a-decade and considered robust public comment.

Petitioners' other allegations concerning impacts to neighborhood characteristics, traffic, water, business displacement, historic and cultural areas, open space, and native plants, and cumulative impacts throughout the general area, are similarly refuted and fail to state a claim.

A. Neighborhood Characteristics

Petitioners' allegations that the Planning Board did not consider the impact of Gyrodyne's subdivision on community character (Petition ¶¶ 4, 49-55) and the project's impact on the character of the historic, undeveloped, and residential nature of the community (Petition ¶ 51), are refuted. The DEIS notes the proposal is sensitive to the community and historic corridor, and satisfies applicable zoning and existing covenants and buffers (DEIS, pp. 1-3, 1-4, 2-1).

The site design is compatible with the surrounding area and preserves the existing landscape character, enhancing the buffer along Route 25A and the residential parcels and providing a pedestrian gateway throughout the site (DEIS, p. 2-20). The proposal preserves half of the Gyrodyne Property as landscaped and natural open space (DEIS, pp. 1-10, 2-4, 2-20). The subdivision is designed with minimal disturbance and visual change to the entire road frontage of Route 25A and Mills Pond Road (DEIS, pp. 1-11, 15-1). Existing trees will be preserved and new plantings will be added (DEIS, p. 1-12 [Appendix K contains numerous visual simulations illustrating the preservation efforts]; *see also* DEIS, p. 2-4; *see also* DEIS, p. 2-20 [detailing reinforcement of buffer]).

The Institute of Long Island Archeology conducted several extensive archaeological

studies of the Gyrodyne Property and its only finding was a stairway that might lead to intact cellar deposits (DEIS, p. 1-12). This area is within the 200-foot buffer along Route 25A and will be left in its natural state (DEIS, p. 1-12).

Petitioners allege the Planning Board did not consider the Town of Brookhaven's 2017 "Route 25A – Three Village Area Visioning Report for the Hamlets of Stony Brook, Setauket, and East Setauket (Petition ¶ 52). However, the DEIS discusses the visioning report, including reducing congestion and improving traffic safety for motorists and cyclists on Route 25A, and making the corridor more friendly for bicycles (DEIS pp. 12-5 – 12-8). Gyrodyne proposes dedicated, striped bicycle lanes along its interior roads with direct connectivity to Route 25A and Mills Pond Road (DEIS, pp. 2-5, 2-21, 2-22, 2-26, 9-5 – 9-6, 15-3), and the DEIS contemplated coordinating bicycle routes and parking with the University (DEIS, p. F-53).

Traffic (*infra* Point II.B) was extensively studied, including 17 intersections adjacent to, near, and distant from the Gyrodyne Property, and the SEQRA Findings require mitigation measures for several intersections.

Petitioners' allegations that Gyrodyne's proposal is inconsistent with Smithtown's comprehensive plan (Petition ¶ 53) are refuted. The uses contemplated in the subdivision's potential configuration are all permitted under existing zoning and the configuration conforms to Smithtown's Draft Comprehensive Plan, dated December 15, 2020 ("Smithtown Plan").[12] On September 21, 2016, the Planning Board adopted a resolution[13] concerning an updated comprehensive plan, noting there should be flexibility for development of the Gyrodyne Property,

[12] The Smithtown Plan is filed as NYSCEF Doc. Nos. 21, 22 and 23.
[13] A copy of the Planning Board's letter dated September 22, 2016, describing the resolution dated September 21, 2016 ("2016 Smithtown Plan Resolution"), is attached to the Shea Aff. as Exhibit "I."

a buffer should maintain the natural/historic corridor, and density should be limited to less than an as-of-right build (2016 Smithtown Plan Resolution, p. 2).

The Smithtown Plan emphasizes the need for a range of housing opportunities, including housing for the increasing senior population (Smithtown Plan, pp. 12, 14, 20-22, 43, 151, 160). The Smithtown Plan also describes Gyrodyne's subdivision as a major investment in the hamlet of St. James that will contribute to the local economy (Smithtown Plan, p. 232), and recommends Smithtown keep the Gyrodyne Property within the Light Industrial District and preserve the buffer area (Smithtown Plan, p. 245).

Because Gyrodyne's subdivision and configuration conform with applicable zoning and the Smithtown Plan and recommendations (SEQRA Findings, p. 7), it is consistent with the surrounding land use and the current and future zoning scheme.

Petitioners allege the SEQRA Findings are silent as to the impact of the development on the character of the surrounding neighborhood (Petition ¶ 54). However, the SEQRA Findings note the Gyrodyne Property will comply with existing covenants and restrictions limiting the locations of improvements and uses, and expressly address and impose conditions to preserve the character of the neighborhood (SEQRA Findings, pp. 4-7, 13-15).

B. <u>Traffic</u>

Petitioners' allegations that the Planning Board failed to consider traffic impacts (Petition ¶¶ 5, 56-63), are refuted. Petitioners allege the DEIS and FEIS use outdated 2017 traffic data (Petition ¶¶ 5, 56). First, the DEIS and FEIS use traffic data from 2017 and 2018 (DEIS, p. 9-3), and the DEIS incorporates road improvement updates from August 2019 (DEIS, p. 9-14). Second, the DEIS and FEIS account for three additional years of growth through 2020 under both "no

build" and "build" scenarios, in conformance with industry standards (DEIS, p. 9-3).

Significantly, the Court of Appeals has held "[t]he EIS process *necessarily ages data*" and that constant updating, followed by review and comment, would render the process never-ending and subvert SEQRA's legitimate objectives (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986] [holding the data was sufficiently reliable to support the determination]). The Gyrodyne traffic study accounted for growth through 2020, when the FEIS was completed.

Petitioners allege the traffic study asserts the increase in traffic caused by the future development can be cured by the proposed mitigation measures "without any elaboration" (Petitioner ¶ 58). However, the DEIS studied 17 intersections, concluded 10 intersections would not be significantly impacted, and proposed specific mitigation measures for 6 intersections (the outstanding intersection is a driveway) (DEIS, pp. 1-7 – 1-9, 9-12 – 15, Appendix F). Mitigation measures include signalization, striping and restriping, shifting lanes, adding turn lanes, and retiming signals (DEIS, pp. 1-8 – 1-9, 9-12 – 15, Appendix F). The actual traffic study at Appendix F contains over 350 pages of data and analysis, including impacts in level of service and trip generation. Notably, additional trip generation resulting from Gyrodyne's proposal is significantly less than what could result from an as-of-right build.

Both the Smithtown Traffic Safety Department and Town of Brookhaven Division of Traffic Safety determined the traffic study meets applicable standards and requirements (SEQRA Findings, pp. 9-10). The SEQRA Findings impose thresholds for trip generation and require implementation of the mitigation measures identified in the DEIS and FEIS (SEQRA Findings, pp. 11, 14).

Petitioners' allegations concerning the 2010 condemnation proceeding (Petition ¶¶ 59, 60) are inapposite because, among other reasons, the condemnation involved entirely different property, which was 330% larger and situated in a different location, and took-place more than 15 years ago.

C. Water

Petitioners' allegations that the Planning Board failed to adequately consider the potential impact on water resources, namely wastewater (Petition ¶¶ 5, 64-70), are refuted. Petitioners' discussion of the St. James Business District (Petition ¶¶ 64, 68, 70), is a red-herring. As the DEIS and SEQRA Findings note, the idea of including a hook-up to the Business District was included as an alternative plan at Smithtown's request so as to provide full disclosure to the public regarding the possibility (SEQRA Findings, p. 9; DEIS, p. 19-10 – 19-12).

Petitioners allege the DEIS and FEIS do not consider the 2020 Suffolk County Subwatersheds Wastewater Plan ("SWP") (Petition ¶¶ 65, 66). However, the DEIS, FEIS and SEQRA Findings do consider the SWP. Although the DEIS was issued in November 2019, it anticipated the SWP by considering preliminary documents and reserving an expansion area (DEIS, p. 7-21). The FEIS addressed the SWP (FEIS, p. 51). The SEQRA Findings also addressed the SWP by requiring the relocation of the wastewater discharge pools to the east side of the treatment plant parcel so as to avoid travel times of less than 10 years (SEQRA Findings, p. 14).

Petitioners allege impacts are compounded because the treatment plant is located in a "rapid transit watershed" and the gyre in Smithtown Bay inhibits flushing of the bay (Petition ¶ 67). First, the term "rapid transit watershed" is not defined anywhere. Groundwater travel times range from 0-2 years, 2-5 years, 5-10 years, 10-25 years, and 25-50 years (DEIS, p. 7-6). The area

proposed for the treatment plant is within the 10-25 year travel time range (DEIS, pp. 7-5, 7-6), which is the second *longest* travel time of the five ranges. Second, the SEQRA Findings require the leaching fields for the treatment plant to be located outside of the 5-10 year travel area (SEQRA Findings, p. 14).

With respect to the gyre in Smithtown Bay, this is a physical process that cannot be improved or affected by site development (DEIS, p. 7-7). 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 (DEIS, p. 7-13; FEIS, p. 55; SEQRA Findings, p. 8).

Petitioners allege the DEIS and FEIS do not address how to mitigate the amount of pharmaceuticals from the assisted living facility's "sanitary effluent" (Petition ¶ 68). However, the DEIS specifically addressed pharmaceutical waste and noted the treatment process will utilize an activated sludge process and the waste product will be removed and processed off-site (DEIS, p. 7-23). Additionally, the subdivision includes a 100% expansion area for the treatment plant, which could incorporate additional treatment for pharmaceuticals if and when new technologies become available (DEIS, p. 7-23).

Petitioners allege monitoring and enforcement mechanisms were not considered (Petition ¶ 69). However, Smithtown and the Suffolk County Department of Health Services will enforce the effluent limitations through the approval, permitting and monitoring process.

D. <u>Cumulative Impacts</u>

Petitioners allege the DEIS and FEIS failed to sufficiently analyze cumulative impacts because the DEIS and FEIS did not fully analyze the development potential of all adjacent and

proximate lots (Petition ¶¶ 71-76). However, an analysis of the future development potential for such parcels adjacent to or near a subject site is not required or feasible.

Cumulative analysis is only required where projects are part of a single overall plan – *not* where there is common geography (*Long Is. Pine Barrens Soc'y, Inc. v Planning Bd. of Town of Brookhaven*, 80 NY2d 500, 513-515 [1992] [discussing *Save the Pine Bush v City of Albany*, 70 NY2d 193 [1987], and *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359 [1986], rejecting any legislative intent to mandate cumulative impact review under SEQRA, and holding unrelated projects are not considered together]; *see also Vil. of Westbury v Dept. of Transp.*, 75 NY2d 62, 69 [1989] [holding cumulative impacts are only considered for complementary and interdependent projects]; *Save Harrison, Inc. v Town/Vil. of Harrison*, 168 AD3d 949, 952 [2d Dept 2019] [holding the board was not required to consider cumulative impacts of a proposed senior living facility situated near another developer's proposed senior living facility]; *N. Fork Envtl. Council, Inc. v Janoski*, 196 AD2d 590, 591 [2d Dept 1993] [holding decisive factor is existence of larger plan – not common geography]).

Furthermore, projects are not appropriate for cumulative analysis if they are not formally pending (*Open Space Council , Inc. v Town Board of Town of Brookhaven*, Sup Ct, Suffolk County, Index No. 34008/2011, Aug. 6, 2012 [denying claims the board failed to comply with SEQRA by not considering non-pending projects]).

Here, the only plan considered was Gyrodyne's subdivision, which has been extensively analyzed. There is no overall plan encompassing a larger geographical area or any other parcels as part of the subdivision. Petitioners allege the DEIS and FEIS failed to fully analyze cumulative impacts with respect to a senior living facility on a nearby parcel for which a developed

"approached" Smithtown (Petition ¶ 75). However, upon information and belief, no application for such a project was submitted (Shea Aff., ¶ 4).

E. Business Displacement

Petitioners allege the DEIS and FEIS failed to examine the impact of the predicted displacement of office tenants (Petition ¶¶ 77-79). The DEIS, though, considers and analyzes the subdivision as a location for new and relocated tenants (DEIS, p. 2-4), as well as its growth-inducing impacts and synergies with Stony Brook University (DEIS, p. 17-1).

F. Historic and Cultural Resources

Petitioners allege the DEIS and FEIS failed to plan for the maintenance and repair of historic structures or the integrity of the historic district (Petition ¶¶ 80-87). As noted above, the DEIS, FEIS and SEQRA Findings considered potential impacts on the historic corridor and imposed mitigative measures, existing covenants limit the location of structures to maintain the buffer, the portion of the Gyrodyne Property closest to Mills Pond Road is already developed, and the New York State Historic Preservation Office reviewed and approved historic preservation measures (SEQRA Findings, pp. 4-5).

G. Open Space

Petitioners take issue with how the "open space" is defined (Petition ¶ 88) and the enforcement of public access (Petition ¶ 89), and allege the project does not comply with the Smithtown Plan (Petition ¶ 90). As noted above, the configuration includes approximately 36 acres of landscaped and natural open space, which the Planning Board collectively defined as "open space" (DEIS, p. 2-4; FEIS, p. 90; SQRA Findings, p. 12). The subdivision includes miles of walking paths and bicycle lanes, and the SEQRA Findings note public access is required as

proposed by the DEIS (SEQRA Findings, p. 12). As also noted above, Gyrodyne's proposed subdivision conforms to the Smithtown Plan.

H. <u>Native Plants</u>

Petitioners allege the Town should require a sufficient minimum number of woody native tress and shrubs and a specific list of native species to be used (Petition ¶¶ 92-94). The SEQRA Findings require supplemental plantings in the buffer area consist solely of native plant species (SEQRA Findings, pp. 13), and the DEIS catalogues existing vegetation and proposes managing invasive species and planting native species (DEIS, pp. 6-1 - 6-29).

CONCLUSION

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

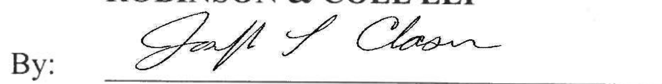
Dated: June 14, 2022
Hauppauge, New York

CERTILMAN BALIN ADLER & HYMAN, LLP

By: ______________________

John M. Wagner, Esq.
J. Timothy Shea, Jr., Esq.
John C. Stellakis, Esq.
Co-Attorneys for Respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc.
100 Motor Parkway, Suite 560
Hauppauge, NY 11788
(631) 979-3000

ROBINSON & COLE LLP



By: ______________________

Joseph L. Clasen, Esq.
Brian J. Wheelin, Esq.
Co-Attorneys for Respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc.
Chrysler East Building
666 Third Avenue, 20th Floor
New York, New York 10017
(212) 451-2900

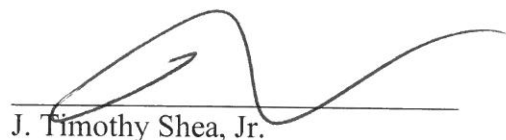
22 NYCRR § 202.8 CERTIFICATION

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 6,992 words. The number of words in the annexed document complies with the word count limit set forth in 22 NYCRR § 202.8-b.

Dated: June 14, 2022
Hauppauge, New York



J. Timothy Shea, Jr.