

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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X  
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; LAURAINÉ KASSAY; HARRY POOLE; SCOT VELLA; KATHY VELLA; MICHAEL SASSONE; LOUISE SASSONE; ROSE NAPAOLITANO; CHARLES SHUTKA; MARGARET SHUTKA; COLLETTE PORCIELLO; and BENJAMIN ROBINSON,

Index No. 608051/2022  
(Luft, J.)

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.

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TOWN RESPONDENTS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS PETITION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of the respondents, Town of Smithtown, the Smithtown Planning Board and its board members, Barbara DeSorbe, William Marchesi, Desmond Ryan, Thomas Unverzagt and Rick Lanese (referred to collectively as “the Town” or “Town Respondents”). The Planning Board members were sued in their official capacity as appointed public officials.

The Town moves for an order of dismissal pursuant to CPLR 3211 (a)(1), (2) and (3) and 7804 because 1) the individual petitioners lack standing; 2) the Coalition lacks standing; 3) the Village of Head of the Harbor is not authorized to be a party to the proceeding; and 4) Village Trustee Judith Ogden, named in the caption as an individual petitioner, has a conflict of interest that mandates disqualification as a litigant before this court.

The Town’s motion to dismiss was made before the service an answer to the verified petition.

This is an Article 78 proceeding that seeks to challenge the Planning Board’s granting of a preliminary subdivision application involving private land owned by the respondents, Gyrodyne, LLC and Gyrodyne Company of America, Inc. (hereinafter referred to collectively as “the Gyrodyne respondents”). A copy of the petitioner is annexed to the Town’s moving papers as Town Exh. 1. The Gyrodyne property is located wholly within the Town of Smithtown and most of it has been zoned for light industrial use since approximately 1960. There are no specific site plan approvals before the court.

The Gyrodyne property is situated between the Long Island Railroad tracks and State Route 25A and is flanked on its entire southeast border across the railroad tracks with property owned by the State University of New York at Stony Brook where SUNY’s Research and

Development Park is located. SUNY's Research and Development Park will soon be home to SUNY's newest 70,000 square foot construction project – the Stony Brook University Institute for Discovery and Innovation in Medicine and Engineering. The Village of Head of the Harbor is separated from the northern boundary of the Gyrodyne property by State Route 25A. The Gyrodyne property's northern boundary is adjacent to the eastbound lane of State Route 25A and is protected by a 200 foot-wide, open space border that is a deeded restriction running with the land in perpetuity.

Currently there are four (4) industrial buildings on the Gyrodyne property previously used for helicopter manufacturing and currently leased for commercial purposes. There is also a large catering facility that will remain whether or not the subdivision receives final approval.

The subdivision approval does not involve any plans relating to a specific development project or use. Conceptual uses such as hotel, office space and assisted living depicted on the plan and in the SEQRA analysis provided benchmarks for analytical purposes only. The uses helped to establish the basic land use parameters relating to water use, waste water treatment, parking, building height, setbacks, traffic control measures and the like that will control development in the future in the event all of the individual lots are developed. Such uses require site plan approval. There are no pending site plan applications for any of these uses.

It is clear from the petitioners' allegations and documentary evidence that that the aim of this proceeding is to dissuade any further development on the Gyrodyne property and allow the petitioners time to convince private and government actors to acquire the open space area so it can be kept as open space in perpetuity. To date, that has not happened. Gyrodyne has the right to pursue the subdivision of its land provided it is done in accordance with all applicable laws and regulations.

However, the issue of whether the preliminary subdivision approval was obtained lawfully can only be raised by parties with standing. As detailed below, none of the petitioners named in this proceeding has standing to ask this court to annul and vacate the preliminary subdivision approval. In addition, the Village lacks capacity by reason of its failure to act in accordance with a duly authorized Board of Trustees resolution and for allowing itself to be unlawfully represented by the interests of the individual petitioners; at least one of which - Judith Ogden has a conflict of interest as described below.

Accordingly, the Town respectfully requests an Order dismissing the verified petition in its entirety against the Town Respondents.

## ARGUMENT

### POINT I.

#### THE ALLEGATIONS OF PROXIMITY DO NOT SUFFICE TO CONFER STANDING ON ANY OF THE PETITIONERS.

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1)(documentary evidence), (a)(2) (court lacks subject matter jurisdiction), and (a)(3)(party lacks capacity)the allegations of the pleadings are deemed true, unless there is incontrovertible evidence otherwise. O'Hara v. The Board of Education, Yonkers City School District, 198 A.D.3d 896, 156 N.Y.S.3d 311 (2d Dept. 2021); Levy v. SUNY Stony Brook et al., 185 A.D.3d 689, 127 N.Y.S.3d 504(2d Dept. 2020)(citing Matter of Palmore v. Board of Educ. Of Hempstead Union Free School Dist., 145 A.D.3d 1072, 44 N.Y.S.3d 509 (2d Dept. 2016). However, these rules must yield when it is demonstrated that a material fact as claimed by the pleader is not a fact and it can be said that there is no significant dispute over the fact. O'Hara, supra (citing Matter of Clavin v. Mitchell, 131 A.D.3d 612, 15 N.Y.S.3d 211 (2d Dept. 2015). Each of the petitioners bases individual

standing on the proximity of their residence to the Gyrodyne property. However, each of them (with the exception of petitioner Napolitano) fails to measure the applicable distance properly and has severely understated their proximity. In support of the Town's contention, the court is referred to Town Exh. 2 which is an aerial image of the area including the locations of each petitioners' lot and its distance to the development area on the Gyrodyne property.

Whether a party has standing in New York requires a court to determine if a litigant has a sufficient interest related to the matter or a stake in the outcome to justify the exercise of judicial authority in granting or denying relief. Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778 (1991). The party challenging an agency's action has the burden of demonstrating that they are suffering or are threatened with an injury-in-fact which differs from that suffered by the general public. Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 304, 890 N.Y.S.2d 405 (2009); Matter of Sun-Brite Car Wash v. Board of Zoning Appeals, 69 N.Y.2d 406, 515 N.Y.S.2d 418 (1987); Matter of Dairylea Coop. v. Walkely, 38 N.Y.2d 6, 377 N.Y.S.2d 451 (1975); 159-MP Corp. v. CAP Bedford, LLC, 181 A.D.3d 758 (2d Dept. 2020); and Matter of Vasser v. City of New Rochelle, 180 A.D.3d 691, 118 N.Y.S.3d 717 (2d Dept. 2020);

Potential general harm does not constitute direct harm. Matter of Save the Pine Bush, 13 N.Y.3d at 306. In land use and environmental cases that allege a threat to a natural resource, an individual must show that he or she uses and enjoys a natural resource more than the general public in order to show standing. Id. at 301.

Speculative scenarios of development as opposed to specific proposed plans do not support an Article 78 challenge. As stated in Rudder v. Pataki, 93 N.Y.2d 273, 279, 689 N.Y.S.2d 701 (1999), tenuous or ephemeral harm is insufficient to trigger judicial intervention. *See*

*also* Matter of Brunswick Smart Growth, Inc. v. Town of Brunswick, 73 A.D.3d 1267, 901 N.Y.S.2d 387 (3d Dept 2010)(petitioner lacked standing where the challenge was not against a specific development project, but on an alleged failure to comply with a town's comprehensive plan and petitioner failed to show specific harm). Similar to Brunswick, the approval in Gyrodyne's case is not for any particular proposed development plan and there is no injury-in-fact.

Moreover, allegations of close proximity do not automatically justify a finding of standing necessary for judicial review. Instead, the relevant distance is the distance between a petitioner's property and the actual structure or development itself. Matter of Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo, 112 A.D.3d 726, 728, 977 N.Y.S.2d 272 (2d Dept. 2013), affirming Matter of Tuxedo Land Trust, Inc. v. Town Bd of Town of Tuxedo, 34 Misc.3d 1235A, 950 N.Y.S.2d 611, 2012 N.Y. Slip Op. 50377(U)(Sup. Ct. Orange Co. 2012)(presumptive standing undermined by existence of buffers between petitioner's property and the site to be developed). *See also* Matter of Barrett v. Dutchess Co. Leg., 38 A.D.3d 651, 831 N.Y.S.2d 540 (2d Dept. 2007) (less than one half mile from proposed project held to be insufficient to confer standing). Nonetheless, a distance of four hundred (400') feet from a petitioner's property and the location of a water tower was sufficient to confer standing. Cade v. Stapf, 91 A.D.3d 1229, 937 N.Y.S.2d 673 (3d Dept. 2012).

The petitioners allege that they will suffer harm from the loss of open space, increased traffic and change of community character as a result of the proximity of their properties to the Gyrodyne property. These conclusory allegations do not allege direct harm different in nature or degree from that of the general public. *See* Veteri v. Zoning Board of Appeals of Town of Kent, 202 A.D.3d 965, 163 N.Y.S.3d 231 (2d Dept 2022)(alleged injuries by concrete

manufacturing to privately owned lake, interference with activities on the lake, impacts to petitioner's property from dust and pollutants were different from those suffered by the general public). Unlike the petitioners in Veteri, the petitioners at bar fail to allege any facts showing a direct impact to themselves or their property.

The relevant allegations of the verified petition are contained in paragraphs 7 through 25. See Town Exhibit 1. Paragraph 7 of the petition alleges that the Village is a municipal corporation located immediately north of Gyrodyne's property. As stated above, there is a state highway between the Village and the Gyrodyne property. State Route 25A measures between 40-60 feet in width including travel lanes and shoulder/bike lanes.

As for the Coalition, paragraph 8 of the petition alleges that it is a not-for-profit corporation consisting of members of the community residing directly adjacent to or nearby the Gyrodyne property. There are no allegations or certified corporate documents appended to the petition to substantiate the corporation's purpose. The corporation's lack of standing is discussed at Point II of this memorandum of law.

All of the individual petitioners allege they live a certain distance from the Gyrodyne property. However, they each fail to allege the distance of from their property to the area that is intended to be developed. Hence all of the distances alleged by the petitioners and cited below are inaccurate and far shorter than what they will be if the lots are ever developed. Each petitioner actually resides further from the proposed development area than they allege. The court is respectfully referred to Town Exh. 2 to see the relevant distances.

Petitioner Ogden asserts she lives 600 feet from the Gyrodyne property and is the President of the Coalition. (Par. 9 of the petition). In actuality, the property where Ms. Ogden resides is 950 feet from the proposed development area. Moreover, Ms. Ogden is not the owner

of the property that she relies upon to demonstrate standing. The address where she resides, 654 North Country Road, St. James, New York, is owned by Ogden's Design & Planting. See Town Exh. 4 containing a certified copy of the Town tax bill which is addressed to the owner of the property. Only a property owner can assert standing.

Petitioners, George L. Fitzpatrick and Karen P. Fitzpatrick, assert they live 1,250 feet from the Gyrodyne property and are members of the Coalition. (Par. 10 of the petition). Their property is approximately 1450 feet from the development area.

Petitioners Mara Matkovic and Nicholas Stark allege they live 1.5 miles from the Gyrodyne property. (Par. 11 of the petition). They do not allege they are members of the Coalition.

Petitioner David Kelemen alleges he lives at 171 [sic] Mills Pond Road, St. James, New York, adjacent to the Gyrodyne property. (Par. 12 of the petition). Keleman does not allege he is a member of the Coalition. The Town's property tax records indicate Mr. Kelemen lives at 161 Mills Pond Road, St. James, New York. See Town Exh. 5. While Mr. Kelemen's property may be adjacent to one of the tax lots owned by Gyrodyne, it is nonetheless, approximately 1,300 feet from the development area.

Petitioners, Alyson Hope Svatek, Thomas James Svatek and Tristan Cole Svatek, allege they live 1.1 miles from the Gyrodyne property. (Par. 13 of the petition). They do not allege they are members of the Coalition.

Petitioners Gerald and Leonna Duff allege they live .25 miles from the Gyrodyne property. (Par. 14 of the petition). They do not allege they are members of the Coalition.

Petitioners Dave and Lauraine Kassay allege they live at 151 Mills Road, St. James, New York, adjacent to the Gyrodyne property. (Par. 15 of the petition). Their property is

approximately 1,800 feet from the development area. The Kassays do not allege they are members of the Coalition.

Petitioner Harry Poole alleges he lives 1,400 feet from the Gyrodyne property. (Par. 16 of the petition). His property is approximately 2,700 feet from the development area and is separated from it by railroad tracks. He does not allege to be a member of the Coalition.

Petitioners Scot and Kathy Vella also allege they live 1,400 feet from the Gyrodyne property. (Par. 17 of the petition). Their property is approximately 2,500 feet from the development area and is separated from it by railroad tracks. They do not allege they are members of the Coalition.

Petitioner Michael Sassone alleges he lives 1,100 feet from the Gyrodyne property. (Par. 18 of the petition). His property is approximately 2,400 feet from the development area and is separated from it by railroad tracks. He does not allege he is a member of the Coalition.

Petitioner Louise Sassone alleges she lives .36 miles from the Gyrodyne property. (Par. 19 of the petition). Her property is approximately 2,950 feet from the development area and is separated from it by railroad tracks. She does not allege she is a member of the Coalition.

Petitioner Rose Napolitano alleges she lives at 1280 North Country Road, St. James, New York, adjacent to the Gyrodyne property. (Par. 20 of the petition). She does not allege she is a member of the Coalition. Petitioner Napolitano's property shares a border with the Gyrodyne property that is approximately 150 feet in length and a 150 feet from the area of the proposed sewage treatment plant.

Petitioners Charles and Margaret Shutka allege they live .7 miles from the Gyrodyne property. (Par. 21 of the petition). They do not allege to be members of the Coalition.

Petitioner Collette Porciello alleges she lives 1,250 feet from the Gyrodyne property. (Par. 22 of the petition). Her property is approximately 1,450 feet from the development area. She does not allege to be a member of the Coalition.

Petitioner Benjamin Robinson alleges he lives .64 miles from the Gyrodyne property. (Par. 23 of the petition). He does not allege to be a member of the Coalition.

As to allegations of injury to the individuals, par. 24 of the petition states as follows,

“[e]ach of the individual petitioners reside directly adjacent to or in close proximity to the Gyrodyne property and suffer special damages as a result. The petitioners will be adversely impacted by heavy congestion of the roads where they live, and suffer harm from the lack of open space and the change in the character of their community. As a result of the close proximity to the Gyrodyne property these damages are different and more severe than the harm to the general population.”

As to allegations of direct injury to the Village of Head of the Harbor, par. 25 of the petitioner states as follows,

“The Village of Head of the Harbor suffers special damages because of its close proximity to the Gyrodyne property including the change in character of the village because of the development.”

The foregoing allegations of injury-in-fact are conclusory and fail to demonstrate they are different from those of the general public. This deficiency bars the court from hearing the petitioners’ challenge to the preliminary subdivision approval.

## POINT II.

THE COALITION HAS NO STANDING  
BECAUSE THERE IS NO MEMBER THAT  
CAN ESTABLISH INDIVIDUAL STANDING

In order for an organization to have standing, the law in New York requires that it have at least one member with individual standing to sue. Society of Plastics, supra at 775; Matter of Dental Soc’y of State of New York v. Carey, 61 N.Y.2d 330, 474 N.Y.S.2d 262 (1984); Riverhead Neighborhood Preservation Coalition, Inc. v. Town of Riverhead Town Board, 112 A.D.3d 944, 977 N.Y.S.2d 382 (2d Dept. 2013).

There is no alleged purpose of the Coalition for the court to assess whether the allegations relate to the organization’s purpose. Matter of Defreestville Area Neighborhood Assn v. Planning Bd. of Town of N. Greenbush, 16 A.D.3d 715, 790 N.Y.S.2d 737 (3d Dept. 2005) .

Of the twenty-three (23) individual petitioners, only Judith Ogden and George and Karen Fitzpatrick are alleged to be members of the Coalition. However, neither Ms. Ogden, nor the Fitzpatricks can establish the requisite proximity because their properties are too distant from the delineated development area. In Ms. Ogden’s case, there already exists a two lane road called Mill Pond Road and a 34,625 square foot catering facility and parking areas situated between the Ogden property and the development area. In the Fitzpatricks’ case, their property is separated from the development area by State Route 25A which ranges between 40-60 feet wide including road shoulders/bike lanes and 6 residentially developed lots as well as a 200 foot buffer before reaching the proposed development area. Hence, they are approximately 1450 feet from the development area.

The distances of the Ogden and Fitzpatrick properties are too far to confer individual standing on either Ms. Ogden or the Fitzpatricks. Moreover, neither Judith Ogden, nor the Fitzpatricks allege any facts demonstrating that any development within the proposed area would cause them to suffer an environmental injury different from that of the general public. Therefore, the Coalition does not have standing.

POINT III.

PETITIONERS FAIL TO ALLEGE  
ANY SPECIFIC HARM

Petitioners allege nothing more than general harm which is insufficient to establish standing. The allegations of harm are speculative and hypothetical and as such they are insufficient to confer standing. Brunswick Smart Growth, Inc. v. Town of Brunswick, 73 A.D.3d 1267, 1269 (3d Dept. 2010). Hypothetical or contingent possibilities of harm are insufficient to demonstrate the required injury-in-fact justifying judicial intervention. Clean Water Advocates of N.Y., Inc. v. New York State Dept. of Env. Conserv., 103 A.D.3d 1006, 1008, 962 N.Y.S.390 (3d Dept. 2013).

Other than the proximate distances, which as demonstrated above, are legally insufficient to confer standing, there are no other factual allegations to substantiate the conclusory allegations at par. 24 of the petition that the petitioners “suffer special damages”. The petitioners fail to demonstrate how they will suffer harmful impacts from traffic, lack of open space or change in community character and that these damages will be different than that imposed upon the general public.

With respect to alleged traffic issues, the petitioners failed to demonstrate any direct injuries that are different in kind or degree from the public at large.

Furthermore, the petitioners' attempt to undermine the traffic findings by comparing them to traffic findings made during a 2010 condemnation proceeding brought by the State of New York against Gyrodyne falls flat and fails to advance their argument that they having standing. *See* paragraphs 59 – 60 of the verified petition referring to Gyrodyne's expert testimony in 2010 that the highest and best use of Gyrodyne's property was residential and that commercial development would increase traffic by more than 3000%. The condemnation proceeding involved no part of the property that is before this court. Hence, the findings in that matter bear no relevance to the case at bar. That proceeding involved a 245-acre tract of Gyrodyne's land condemned by the State of New York for its use as part of the SUNY Stony Brook campus' new Research and Development Park.

Gyrodyne's subdivision approval involves a tract of land that is less than one third the size of the condemned property. Gyrodyne's proposed subdivision is not bordered by Stony Brook Road as wrongfully claimed at par. 33 of the verified petition. Stony Brook Road is approximately 2000 feet from the Gyrodyne property. There is no proposed access to Stony Brook Road in the subdivision approval before this court. The property condemned by the state is bordered by Stony Brook Road a busy feeder road that is located entirely in the Town of Brookhaven and provides the entrance to the University's Research and Development Park.

Contrary to the petitioners' contention, Gyrodyne is not required to build out its property for "highest and best use". In fact, Gyrodyne declined to seek approval for a maximum build out concept under the current Light Industry zoning in an effort to mitigate the potential impacts of development. The decision and findings related to traffic in the condemnation proceeding

alluded to in the petition are wholly irrelevant to the matter before this court and fail to demonstrate individual standing.

There are no allegations that petitioners have a genuine interest in the alleged natural resources (open space) within the Gyrodyne property or that they have been granted special access to the Gyrodyne property such that the potential loss of such access would create a special harm to them as opposed to the general public. Of course, such an argument is unsupportable under any circumstance since the Gyrodyne property is private land to which the general public has no right of access. In this respect, the interests of all of the petitioners is identical to that of the general public and as such no differentiation can be made to confer standing on the petitioners.

For the same reasons related to proximity, Petitioners, Mara Matkovic, Nicholas Stark, Alysosn Hope Svatek, Thomas James Svatek, Tristan Cole Svatek, Gerald Duff, Leonna Duff, Harry Poole, Scot Vella, Kathy Vella, Michael Sassone, Louise Sassone, Charles Shutka, Margaret Shutka, Collette Porciello and Benjamin Robinson, also cannot establish standing to proceed as litigants in this matter. Each of these petitioners lives too far from the Gyrodyne property to support the allegation that they will suffer special damages relating to traffic, open space or community character caused by the subdivision of the Gyrodyne property.

That leaves the petitioners who allege they live adjacent to the Gyrodyne property – David Kelemen alleged to reside at 171[sic] Mills Pond Road, St. James, New York (Town Exhibit 1 at par. 12); the Kassays alleged to live at 151 Mills Pond Road, St. James, New York (Town Exhibit 1 at par.15) and Rose Napolitano alleged to reside at 1280 North Country Road, Stony Brook, New York (Town Exhibit 1 at par. 20). However, as seen in the aerial in Town Exhibit 2 only the Kelemen lot (161 Mills Pond Rd.) and the Napolitano lot (1280 North Country

Rd.) are immediately adjacent to the Gyrodyne property. As can be seen from the aerial the Kassays 'property line is approximately 1,800 feet from the development area and in any event it is not immediately adjacent to any portion of the Gyrodyne property as wrongfully alleged in the petition.

The Kelemen property is 1,300 feet from the development area which is too far to confer standing based on proximity.

Petitioner Napolitano's property is bisected diagonally by the town line separating the Town of Smithown and the Town of Brookhaven. A border of approximately 350 feet is shared by Napolitano and the Gyrodyne property. Of this length, 200 feet of the border is protected open space buffer on the Gyrodyne side and approximately 150 feet abuts the development area where a sewage treatment plant may be placed. However, if a sewage treatment plant is to be located in this area, it will be setback 150 feet from the Napolitano's property and will be separated from it by a new access road used solely for the sewage treatment plant and not for public use.

Even if the court considers petitioner Napolitano as a neighbor who has standing, she does not have standing yet. For the same reasons the other petitioners do not have standing (that their claims of traffic impact, loss of open space and loss of community character are speculative), Petitioner Napolitano's claims are also speculative. The subdivision approved by the Town is not a specific building or development plan. The sewage treatment plant area depicted as being adjacent to a part of her property may never be built, or it may be proposed for another location and will have no impact on her. As such, she does not have standing at this time.

In short, the neighbors' contentions of standing and direct harm must await specific site plans.

POINT IV.

PETITIONER OGDEN HAS AN  
UNWAIVABLE CONFLICT OF INTEREST  
BECAUSE SHE IS A VILLAGE TRUSTEE  
AND THE VILLAGE RESOLUTION  
SHE VOTED ON IS DEFECTIVE  
AS A MATTER OF LAW.

Under New York General Municipal Law (GML) §801 et seq., conflicts of interest of municipal officers are prohibited. No municipal officer shall have an interest in any contract with the municipality when such officer individually or as a member of a board has the power or duty to authorize the contract. GML §801. Any municipal officer who has, will have, or later acquires an interest in any actual or proposed contract or other agreement with the municipality of which he or she is an officer, shall publicly disclose the nature and extent of such interest in writing to the governing body as soon as he or she has knowledge of such actual or prospective interest. GML §803 (1). Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body. *Id.*

Any contract willfully entered into by or with a municipality in which there is an interest prohibited by Article 18 of the GML shall be null and void and unenforceable. GML § 804. Any municipal officer who willfully and knowingly violates the foregoing provisions of Article 18 of the GML subjects themselves to serious consequences. *See* GML §805.

Petitioner Judith Ogden has a conflict of interest because she has taken actions that affect the Village's rights in both her official capacity as an elected Trustee of the village and as an individual residing in St. James, New York and as a corporate officer of the Coalition. The

Village's website contains links to the provisions of the GML Article 18 (Conflicts of Interest of Municipal Officers and Employees) and the Village's ethics provisions. (Ch. 24 of Village code). Ms. Ogden admits at par. 9 of the petition that she is the President of the Coalition and that she resides at 654 North Country Road, St. James, New York.

The approved public minutes of the Board of Trustees of the Village of the Head of the Harbor are annexed to the Town's moving papers as Town Exh. 3. The minutes of April 20, 2022 at page 3 reflect that Petitioner Ogden was congratulated, in her capacity as an elected trustee, for organizing an unnamed coalition to oppose the Gyrodyne proposal which is referred to in the minutes as "the proposed Gyrodyne Development at Flowerfield". For the court's reference, "Flowerfield" is a term of endearment used by the community to refer to the Gyrodyne property despite its decades of industrial use as a helicopter manufacturing facility. Prior to Gyrodyne's use, the property was owned by a Dutch flower grower and was used to grow flowers for many decades.

The minutes go on to state that Ms. Ogden worked tirelessly for years on the project and "has recently proposed a compromise plan that has been accepted" ... [and that the] plan will result in additional open space at Flowerfield for the benefit of the entire community."

There is no evidence in the aforementioned minutes, or upon information and belief, other public records, of a compromise plan; that such a plan has been accepted or that a compromise plan will result in open space for the community. More importantly, there is no evidence in the minutes that the Board of Trustees is aware of the details of the alleged compromise plan or that such a plan has been disclosed to the public for its input. The details appear to be confidential information known only to the individual petitioners.

In a printed flyer distributed in the community, there is mention of a compromise plan but no details. The flyer appears to have been published by or on behalf of the Coalition in its efforts to raise money. A copy of the flyer is annexed to the Town's moving papers as Town Exh. 6.

At page 5 of the minutes of April 20, 2022, petitioner Ogden's actions as a Trustee relative to a discussion regarding the Gyrodyne application in Smithtown is noted with minimal detail. However, the minutes specifically reflect that at least two individuals – a person named Philip Butler, described as “Counsel” and Anthony Guardino, who upon information and belief, serves as the attorney for the Village Board of Trustees – recused himself or did not make comments for the record due to potential conflicts of interest or previously disclosed conflicts of interest. The minutes state that “[m]uch discussion ensued” and that “[B]oard and public discussion continued” after Mr. Guardino's arrival. The minutes reflect that the Deputy Mayor, Daniel White, made a motion to move to executive session but the motion failed on a vote of 3-2. One of the votes against going into executive sessions was made by Judith Ogden.

Thereafter, Resolution #022-22, which purports to authorize the commencement of this proceeding, was adopted by a vote of the Board of Trustees. The Resolution is defective as a matter of law. Without a proper resolution and without an allegation in the petition that the village is acting pursuant to a duly adopted resolution, the village does not have legal capacity to participate in this matter. Pelham Council of Governing Boards v. City of Mount Vernon et al., 186 Misc.2d 301, 717 N.Y.S.2d 866 (Sup.Ct. Westchester Co.2000)(in accordance with Village Law §4-400(1)(d), village does not have capacity to institute a legal proceeding unless it properly adopts a resolution of its board of trustees). As a result, the Board of Trustees has no capacity to be a party to this lawsuit and all claims alleged by the village should be dismissed

pursuant to CPLR 3211(a)(1)(documentary evidence), (2) lack of subject matter jurisdiction and (3) for lack of capacity and the village should be struck from the caption.

In addition, the vote that was taken approving Resolution #022-22 is itself defective because Trustee Judith Ogden should have abstained given her role as the President of the Coalition and the Coalition's role in controlling the funding of the petitioners' legal representation. Judith Ogden in her capacity as Trustee voted to adopt Resolution #022-22, entitled, "RESOLUTION REGARDING PARTICIPATION IN LITIGATION TO PROTECT THE INTERESTS OF THE VILLAGE CONSISTENT WITH SECTION 165 OF THE HEAD OF THE HARBOR VILLAGE CODE". Petitioner Ogden's vote to approve Resolution #022-22 was a violation of GML §801 which bars an official from exercising his or her power to negotiate, prepare, authorize or approve a contract where the official has an interest in the contract that can affect the rights and interests of the Village of which she is an elected officer.

It is reasonable to assume that the Village is party to a retainer agreement with the firm of Ruskin Moscou Faltischek, PLLC, (hereinafter "Ruskin Moscou"). If it is not, that would be an egregious failure of duty of the Board of Trustees to manage the affairs of the Village including its finances and evidence of its abdication of its duties to persons and an entity over whom the Board has no control.

Upon information and belief, the Coalition, of which Ogden is admittedly the President and/or its members, or others who are not parties to the proceeding, have retained Ruskin Moscou to prosecute this proceeding on behalf of all the petitioners including the Village. Petitioner Ogden's vote to approve the litigation necessarily implicates her interest as a party to the retainer agreement in either her personal or corporate capacity. Whether the Village is or is not paying the firm's legal fees or litigation costs is irrelevant. It is Ogden's corporate and/or

personal interest in the retainer agreement or other third parties who have agreed to retain Ruskin Moscou and her willful vote to proceed with litigation on the Village's behalf with the firm's representation that demonstrates her conflict of interest.

Upon information and belief, Ogden further violated GML Article 18 by failing to publicly disclose the nature and extent of her interest in the Coalition in writing to the Board of Trustees as soon as she had knowledge of it and she failed to make the written disclosure part of the public record as required under GML §803. The result of Ms. Ogden's violations of Article 18 is that the retainer agreement with Ruskin Moscou is null, void and wholly unenforceable. GML § 804.

The Town takes no pleasure in pointing out Judith Ogden's personal and public predicament. She had an opportunity to be counseled by the Village's attorney in the executive session that was proposed by Deputy Mayor White. She could have abstained from the vote. She could have declined to participate in the discussions at the public meetings of the Board. She failed to do any of these things to avoid the conflict of interest to protect the public which she swore to do as an elected official. At the very least, Judith Ogden should not be permitted to act as a petitioner in this proceeding and her name should be struck from the caption.

As to the specific defects in Resolution #022-22, the following facts are relevant and dispositive on the issue of the Village's lack of capacity. The eighth Whereas clause states in part, "it may be necessary for the Village to assert the interests of the Village and its residents through litigation..." The ninth Whereas clause states that the residents of the village made financial contributions to a fund created to ensure that "any such litigation shall not be a financial burden or expense to the Village, based on representations by [unnamed] Village officials that the Village would become a petitioner in litigation to overturn an approval of the Gyrodyne

subdivision application as long as the Village is not financially responsible for the cost of the litigation.”

Thereafter, the first Resolved paragraph states, “that the Board of Trustees acknowledges the financial support of Village residents who have contributed to a fund created to ensure that any litigation entered into by the Village to protect the rural character of the Village is not an expense or financial burden to the Village...”

The second Resolved paragraph states, “that the Board of Trustees does [ ] authorize the Village to be a named petitioner in any litigation that may become necessary to challenge the ... subdivision application by Gyrodyne, so long as the Village is not financially responsible for the cost of litigation.”

Resolution #022-22 does not properly authorize the Village of Head of the Harbor to be a named party to the instant proceeding or to commence this proceeding. The relevant provisions of Village Law are §§4-400(1)(d) and 412(1)(a). The powers of the Village Board of Trustees are provided for in Village Law §4-412(1)(a) which states as follows:

1. General powers of the board of trustees. a. In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said office, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating

or administering the board of trustees duties and functions.

*(McKinney's Village L. §4-412 current through L.2022, chs. 1-202).*

The powers and duties of the Village Mayor is set forth in Village Law §4-400(1)(d) as follows:

It shall be the responsibility of the mayor: (d) to institute, at the direction of the board of trustees, all civil actions in the corporate name of the village.

*(McKinney's Village L. §4-400 current through L.2022, chs. 1-202).*

While the grant of authority under Village Law to boards of trustees is broad, it nonetheless does require certain parameters be met in order to protect the interests of village residents and it expressly does not authorize private persons or entities to represent the Village's interests. In approving a defective resolution and allowing the Coalition to institute the proceeding, Ogden and the Coalition clearly violated Village Law. First, there is no direction in the Board of Trustees' Resolution #022-22 directing the Mayor Dahlgard, to institute a lawsuit concerning the Gyrodyne property and clearly Mayor Dahlgard did not commence this proceeding. This is a blatant violation of Vil. L. §4-400(1)(d). In fact, there is no direction in Resolution #022-22 directing that this lawsuit be commenced. Resolution #022-22 merely resolves in general terms that, "financial support of Village residents ... contributed to a fund created to ensure that any litigation entered into by the Village... is not an expense or financial burden to the Village". The second resolved provision also fails to comport with the law. It merely authorizes the Village "to be a named petitioner in any litigation that may become necessary" to challenge the Gyrodyne subdivision.

Instead of complying with the law, Village Trustee, Judith Ogden, acting in her individual capacity and as a private corporate officer executed the verification for the petition.

There is no statutory authority for an individual in his or her private capacity as a resident or an officer of a private entity to verify a pleading and assert claims on behalf of a village in a legal proceeding.

In seeking to avoid the costs of litigation being incurred by the Village, and allowing persons or an entity with no authority to speak on behalf of the Village, the Village has unlawfully relinquished its statutory power to manage the affairs of the Village as required by Vil. L. §4-412(1)(a). The potential for abuse, ill-conceived and unauthorized decisions, and breach of the Village's attorney client privilege should be a paramount concern for the residents of the Village. Evidence of Judith Ogden's willful actions made without authority is already present in the Village's official record. Not only did she improperly vote in favor of Resolution #022-22, but she failed to disclose her interests in the Coalition in writing and have the writing made part of the public record. Near the bottom of page 2 of the minutes of April 20, 2022, there is a note that "Trustee Judith Ogden" was congratulated for her work opposing the Gyrodyne proposal, that she "organized a coalition of support" and "proposed a compromise plan that has been accepted" and that "[s]uch plan will result in additional open space at Flowerfield for the benefit of the entire community." There is no evidence in the minutes of the compromise plan, who was involved in making the plan, who supports the plan, how it has been "accepted" and how it amounts to a benefit for the community. Ogden has willfully and knowingly taken actions in her official capacity that are improper and prejudice the Village.

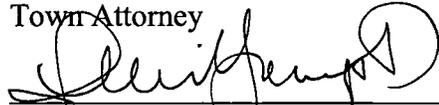
There is no accountability to the Village Board of Trustees or the residents as to the costs being incurred by the Coalition or the decisions being made that will impact the Village. Given the fact that only two or three property owners are alleged in the petition to be members of the Coalition, and the fact that there is no evidence of how many members belong to the Coalition or

the Coalition's purpose, there is no reliable evidence from which the court can discern that the Coalition truly represents the interests of Village residents. As such, it is possible that the Coalition represents the individual interests of a very small minority. Under the circumstances alleged, it is improper for the Village to be a party because governmental subdivisions lack capacity to commence legal actions in pursuit of individual interests. Incorporated Vil. Of Northport v. Town of Huntington, 199 A.D.2d 242, 604 N.Y.S.2d 587 (2d Dept. 1993).

#### CONCLUSION

For all of the foregoing reasons, the Town requests an order dismissing the verified petition pursuant to CPLR 3211(a)(1),(2) and 3) and 7804, together with such other and further relief as the court deems just and proper.

Dated: June 1, 2022

Matthew V. Jakubowski  
Town Attorney  
By:   
Jennifer A. Juengst  
Assistant Town Attorney

**CERTIFICATE OF WORD COUNT**

Index No. 608051/2022

Case: Village of Head of the Harbor et al v. Town of Smithtown et al.

Document title: Town Respondent's Memorandum of Law in Support of Motion to Dismiss  
Petition

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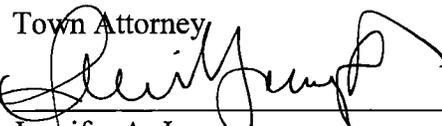
Pursuant to Rule §202.8-b(c) of the Uniform Rules for the Trial Courts, I certify that the accompanying Town Respondent's Memorandum of Law in Support of Motion to Dismiss Petition which was prepared using Times New Roman 12-point typeface, contains 6907 words, excluding the parts of the documents that are exempted by Rule §202.8-b(b). This certificate was prepared in reliance on the word count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: June 1, 2022

Matthew V. Jakubowski  
Town Attorney

By:



---

Jennifer A. Juengst

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NYSCEF DOC. NO. 46  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

RECEIVED NYSCEF: 06/09/2022

INCORPORATED VILLAGE OF  
HEAD OF THE HARBOR, ET AL.,

Petitioners,

Index No. 608051/2022  
(Luft, J.)

-against-

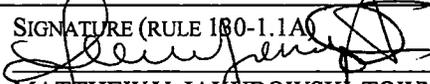
TOWN OF SMITHTOWN, ET AL.,

Respondents.

**TOWN RESPONDENTS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS PETITION**

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To:  
RUSKIN MOSCOU FALTISCEK, P.C.  
CERTILMAN BALIN ADLER & HYMAN, LLP  
ROBINSON & COLE LLP

SIGNATURE (RULE 130-1.1A)  
  
MATTHEW V. JAKUBOWSKI, TOWN ATTORNEY  
By: JENNIFER A. JUENGST, ASSISTANT TOWN ATTORNEY

ATTORNEYS FOR:

SERVICE OF A COPY OF THE  
WITHIN IS HEREBY ADMITTED:

DATED: \_\_\_\_\_

PLEASE TAKE NOTICE:

NOTICE OF ENTRY

THAT THE WITHIN IS A (CERTIFIED) TRUE COPY OF  
A DULY ENTERED IN THE OFFICE OF THE CLERK OF  
THE WITHIN NAMED COURT ON

NOTICE OF SETTLEMENT

THAT AN ORDER \_\_\_\_\_ OF WHICH THE WITHIN IS A TRUE COPY, WILL BE PRESENTED FOR SETTLEMENT TO THE  
HON. \_\_\_\_\_, ONE OF THE JUDGES OF THE WITHIN NAMED COURT, AT \_\_\_\_\_, ON \_\_\_\_\_ AT \_\_\_\_\_ M.

DATED: SMITHTOWN, NEW YORK  
2019

YOURS, ETC.

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