SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
SUSAN SIEGEL

Petitioner

Index No. 3306-16

For a judgment pursuant to Article 78 and Section 3001 of the Civil Practice law and Rules

Verified Petition

Against

The TOWN BOARD OF THE TOWN OF YORKTOWN

Respondent

Petitioner, Susan Siegel, acting pro se in this verified petition for judgment pursuant to Article 78 of the New York Civil Practice law and Rules ("CPLR") and seeking a declaratory judgment pursuant to section 3001 *et seq.* of CPLR alleges as follows:

PRELIMINARY STATEMENT

1. Petitioner is challenging the legality of Local Law #21 of 2016 (hereafter referred to as the "local law") adopted by the Town Board of the Town of Yorktown (hereafter referred to as "Respondent") on September 20, 2016 shortly after closing a public hearing held that same evening, under CPLR §7801 and §7806 on the grounds that the local law violates General Municipal Home Rule Law, Town Law, the Public Officers Law and the State Environmental Quality Review Act and contains errors of law and is arbitrary and capricious.
2. Respondent violated §20 (4) of Municipal Home Rule Law when, after closing the public hearing, it added three substantial and unwritten amendments to the proposed local law and then proceeded to vote to adopt the local law that same evening.
3. Respondent violated §20 (3) of Municipal Home Rule Law when, after deciding to add three substantial amendments to the proposed local law, it failed to prepare a revised version of the

proposed local law, publish a new public notice and hold a new public hearing on the revised proposed local law.

4. The local law is affected by an error of law in that it contains internal inconsistencies and contradictions relating to the review of Planning Board tree permit decisions.
5. The local law is affected by errors of law and Respondent acted arbitrarily and capriciously when it granted the Town Board an illegal appellate role to review Planning Board tree permit decisions that are incorporated into Planning Board site plan approval decisions.
6. The local law is affected by errors of law and Respondent acted arbitrarily and capriciously when it granted the Town Board an illegal appellate role to review Planning Board tree permit decisions that are incorporated into Planning Board plat approval decisions.
7. Respondent violated 6 NYCRR Part 617.7 of the State Environmental Quality Review Act (SEQRA) when it failed to take the requisite "hard look" before adopting a Negative Declaration; acted in an arbitrary and capricious manner when adopting a flawed Negative Declaration; and committed an error of law when adopting the Negative Declaration.
8. Respondent violated §20 (3) of Municipal Home Rule Law and acted in an arbitrary and capricious manner when, both before and during the September 20, 2016 public hearing, it failed to make known to the public that it was considering a different version of the proposed local law than the one that had been advertised for the public hearing.
9. Respondent violated §103 (a) of the Public Officers Law, aka the Open Meetings Law, and acted in an arbitrary and capricious manner when it failed to discuss revisions to the proposed local law in an open meeting.
10. Accordingly, through this action, Petitioner seeks relief under CPLR §7801 et seq. declaring the entirety of the local law to be in violation of lawful procedures, affected by errors of law and arbitrary and capricious.

JURISDICTION AND VENUE

11. Pursuant to CPLR §505(a) and §506(b), Petitioner commences this action in Westchester County because the Respondent, the Town of Yorktown, is located in Westchester County.
12. This court has jurisdiction pursuant to CPLR §7803(1-3) because Respondent's actions in voting to approve the local law constituted errors of law, were violations of lawful procedure, and were arbitrary and capricious.
13. CPLR §7803(3) authorizes a special proceeding to be brought against a body or officer whose determination was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."
14. Petitioner's allegations involve real and actual actions taken by Respondent that have injured Petitioner and from which Petitioner has no other remedy at law. Petitioner is not requesting an advisory opinion, but rather requests that the court declare that the Respondent's actions complained of herein violate §274-a (11) and §282 of New York State Town Law, §20 (3) and §20 (4) of New York State Municipal Home Rule Law, §103(a) of New York State Public Officers Law, and 6 NYCRR Part 617.7 of New York State Environmental Conservation Law.

THE PARTIES

15. The Petitioner, Susan Siegel, residing at 419 Granite Springs Road, Yorktown Heights, NY 10598, is a 46 year resident of the Town of Yorktown, a former Town Supervisor (2010-2011) and a former Town Councilwoman (2014-2015).
16. Since January, 2008, and with the exception of 2010-2011 when she was Town Supervisor, the Plaintiff has hosted the web site, Citizens for an Informed Yorktown, www.ciyinfo.org, on which she posts summaries of Town Board and Planning Board meetings. The goal of the site

is to inform residents about what is happening in Yorktown and increase the level of resident participation in town affairs.

17. From 2008-2009, and from 2012 to the present, Plaintiff has attended virtually every Town Board meeting and virtually every Planning Board meeting from 2012 to the present.

18. The Plaintiff was present at all open meetings of the Town Board and Planning Board referenced below with the exception of the September 20, 2016 meeting, the date of her husband's death.

19. Plaintiff's allegations as set forth herein regarding the September 20, 2016 Town Board meeting are based on viewing the official video of the meeting that is available on the Town's web site, www.yorktownny.org. A true and correct copy of the official DVD of the September 20, 2016 Town Board meeting is annexed hereto as Exhibit A and incorporated herein by reference.

20. The Respondent is the Town Board of the Town of Yorktown.

FACTUAL BACKGROUND

21. On December 12, 2010, the Town Board adopted Local Law No. 16-2010, Chapter 270, "Trees." A true and correct copy of the law is annexed hereto as Exhibit B and incorporated herein in its entirety by reference.

22. Local Law No. 16-2010 regulated the removal of trees on private and public property, including property owned by the Town of Yorktown, and required, under certain circumstances, property owners to obtain a tree permit prior to removing trees.

23. On April 26, 2016, in an untelevised work session meeting, Respondent discussed its intention to repeal Chapter 270 in its entirety and replace it with a new Chapter 270 (herein referred to as "local law"). Respondent then proceeded to review a draft of the proposed new local law dated

4/26/2016. A true and correct copy of the 4/26/2016 draft is annexed hereto as Exhibit C and incorporated herein in its entirety by reference.

24. Upon information and belief, although an earlier draft of the proposed local law dated 4/22/2016 exists, that draft was never discussed in an open meeting of the Town Board and there was no discussion at the April 26, 2016 Town Board meeting of why changes were made to the 4/22/2016 draft.

25. § 270-6, Approving Authority, of the 4/26/2016 draft designated three approval authorities with the power to issue tree permits:

    a) "The Planning Board shall be the approval authority with respect to an application that requires the issuance of another permit or approval from the Planning Board or the Zoning Board of Appeals. Such permit shall be included in the approving resolution of the appropriate board."

    b) "The Town Board shall be the approval authority with respect to an application under this chapter that requires the issuance of another permit or approval from the Town Board."

    c) "The Town Engineer shall be the approval authority with respect to all other regulated activities under this chapter and for all administrative permits."

26. Members of the Tree Conservation Advisory Commission (herein referred to as TCAC) were present at the April 26, 2016 Town Board meeting and participated in Respondent's discussion of the 4/26/2016 draft proposed local law, having received an agenda for the meeting via the town's public notice email subscription service. TCAC members had not, however, received a copy of the 4/26/2016 draft local law.

27. Resolution #190, approved by Respondent at its April 26, 2016 meeting, authorized the Town Attorney to refer out the 4/26/2016 draft local law *only* to the TCAC and the Advisory Committee on Open Space (herein referred to as ACOS). A true and correct copy of

Resolution # 190 is annexed hereto as Exhibit D and incorporated herein in its entirety by reference.

28. Upon information and belief, William Kellner, TCAC chairman, received a copy of the 4/26/2016 sometime around May 10, 2016.
29. Upon information and belief, Walter Daniels, a member of ACOS, received an email from the Town Attorney with a copy of a draft of the local law dated 5/9/2016.
30. Upon information and belief, neither the Conservation Board (herein referred to as CB) the town's primary environmental advisory group, or the Planning Board, one of the major Approval Authorities in the proposed local law, received a copy of the 4/26/2106 draft local law from either the Town Attorney or the Town Clerk with a request for comment.
31. On June 7, 2016, an article by town resident Linda Miller appeared in the "Northern Westchester Examiner," a local weekly newspaper, alerting the community to Respondent's intent to repeal the existing Chapter 270 and replace it with a new Chapter 270. A true and correct copy of this article is annexed hereto as Exhibit E and incorporated herein in its entirety by reference.
32. Upon information and belief, after reading Ms. Miller's article in the June 7, 2016 issue of the "Northern Westchester Examiner," Robyn Steinberg, a planner in the Town's Planning Department, contacted the Town Clerk's office inquiring about the draft new law and asked for a copy so that the Planning Board could review the draft local law at its upcoming June 13, 2016 meeting. The Town Clerk's office sent a copy to Ms. Steinberg.
33. Upon information and belief, on June 13, 2016 the Planning Board had an initial discussion of the 4/26/2016 draft local law. No decision was made. The board subsequently discussed the same draft again on June 27, 2016 and July 11, 2016.

34. On July 12, 2016, the Planning Board sent a memo to the Town Board with its comments on the 4/26/2016 draft local law. Item #2 in the memo was a reference to § 270-7-F (1), "Appeal and review," in the 4/26/2016 draft local law that read:

> "Any decision or order of the Planning Board or Town Engineer or any officer or employee thereof made pursuant to or within the scope of this chapter may be reviewed by the Town Board at the request of any interested party, provided that such review is commenced by the filing of a notice of review with the Town Board within 30 days after service of such order or filing of such decision with the Town Clerk."

Item #2 of the Planning Board's memo read:

> "The appeal provision of the ordinance should be removed, or at the least, be exempted from tree permits that are part of development applications. Appeals of these types of approvals should be executed under Article 78 appeals as provided in state law."

A true and correct copy of the memo is annexed hereto as Exhibit F and incorporated herein in its entirety by reference.

35. In a CB memo to the Planning Board dated May 19, 2016, (Note: based on the content of the memo and the date of the CB meeting in question, it is apparent that the memo should have been dated June 19, 2016, instead of May 19, 2016), the CB was critical of many provisions of the 4/26/2016 draft local law, including the removal of many definitions that appeared in the 2010 Tree Law. A true and correct copy of the memo is annexed hereto as Exhibit G and incorporated herein in its entirety by reference.

36. Upon information and belief, sometime on or about June 21, 2016 the TCAC sent a marked up copy of the 4/26/2016 draft local law to Respondent indicating suggested additions, deletions and other comments.

37. On July 26, 2016, at the untelevised Town Board work session meeting, Bruce Barber, the Town's Environmental Consultant, walked Respondent through a red line version of the

4/26/2016 draft local law that he said incorporated the comments from the Planning Board, CB and TCAC. When the Planning Board's comment on § 270-7-F (1), the provision that granted the Town Board an appellate role to review Planning Board tree permit decisions, was raised, Town Supervisor Michael Grace stated that the law required a local appeal process. He did not specify what "law" he was referring to. Based on the meeting's discussion, Mr. Barber said he would prepare a revised version of the proposed new local law.

38. On August 9, 2016, in an untelevised work session meeting, Respondent reviewed a revised version of the proposed new local law dated 8/5/2016 and verbally agreed to revise §270-15-A of the 8/5/2016 draft, Recognition of Arbor Day, so that Arbor Day would be celebrated the last Friday of every April instead of the first Friday of every May, the language that appeared in the 8/5/2016 draft.

39. While the August 9, 2016 Town Board discussion touched on other sections of the proposed local law, the official minutes of the meeting, as well as the Plaintiff's personal notes of the meeting, indicate that there was no clear verbal or written consensus of the Board as to what other sections of the 8/5/2106 version were to be changed and/or what those changes should be. A true and correct copy of the portion of the official minutes of the August 9, 2016 dealing with the Tree Law discussion is annexed hereto as Exhibit H and incorporated herein by reference.

40. At the conclusion of the August 9, 2016 Town Board discussion, Mr. Barber was directed to prepare a revised version of the proposed local law.

41. At the August 9, 2016 Town Board meeting, when the subject of the Town Board's legal authority to review Planning Board tree permit decisions was raised, both the Town Supervisor and Town Attorney restated their opinion that a local appeal was required by law.

42. At the August 9, 2016 meeting, Respondent approved Resolution #365 to advertise a public hearing on the proposed local law for September 20, 2016. At the meeting, Town Board

members did not have a written version of the proposed local law on their desk or in their hands as it was clear from the meeting that a revised local law had to be prepared. (See ¶40 above.)

43. The next version of the proposed local law dated 8/17/2016 included the Arbor Day change agreed to at the August 9, 2016 meeting but also included four (4) additional substantial changes that were not based on a consensus reached at the August 9, 2016 Town Board meeting. (See ¶39 above and Exhibit H, the official minutes of the meeting.) A true and correct copy of the 8/17/2016 draft is annexed hereto as Exhibit I. The differences between the 8/4/2016 and 8/17/2016 versions are underlined in Chart A, a copy of which is annexed hereto as Exhibit J and incorporated in its entirety herein by reference.

44. The Public Notice advertising the September 20, 2016 public hearing was published in the September 1, 2016 edition of the "Yorktown News." The Notice stated that a copy of the proposed local law was on file in the office of the Town Clerk and could also be viewed on the Town web site, www.yorktownny.org. A true and correct copy of the Public Notice is annexed hereto as Exhibit K and incorporated in its entirety herein by reference.

45. Upon information and belief, sometime after the publication of the 8/17/2016 version of the proposed local law on the Town's web site, a newer version of the draft proposed local law dated 8/30/16 was prepared although the existence of this new version did not become public until September 21, 2016, the day *after* the September 20, 2016 public hearing. A true and correct copy of the 8/30/2016 version of the proposed local law is annexed hereto as Exhibit L and incorporated in its entirety herein by reference.

46. The undisclosed 8/30/2016 version differed from the advertised 8/17/16 version in at least four (4) substantial provisions and one minor tweak. The substantial revisions involved,

    a) how invasive species were to be identified;

    b) the elimination of a possible mitigation measure;

c) restoration requirements in the event the terms of a tree permit were violated; and

d) the role of the TCAC.

The minor tweak involved the date for the Town's celebration of Arbor Day. Chart A, (Exhibit J) compares key provisions in the 8/5/2016 version, the advertised 8/17/2016 version, and the undisclosed 8/30/2016 version.

47. As detailed in the official listing of Town Board meetings, there were no Town Board meetings between August 10, 2016 and September 6, 2016. A true and correct copy of the Town Board's meeting schedule from August 9, 2016 through September 6, 2016 is annexed hereto as Exhibit M and incorporated in its entirety herein by reference.

48. Upon information and belief, there is no record to indicate when, why and how the four (4) substantial revisions and the single tweak made their way into the undisclosed 8/30/2016 version of the proposed local law.

49. Upon information and belief, copies of the undisclosed 8/30/2016 version were in the possession of the members of the Town Board when Respondent opened the September 20, 2016 public hearing on the advertised and posted 8/17/2106 version of the proposed local law.

50. Upon information and belief, despite the fact that the undisclosed 8/30/2016 version of the proposed local law contained four (4) substantial changes to the advertised 8/17/2016 version of the proposed local law, plus one tweak, Respondent did not pass a resolution to advertise a new Public Notice scheduling a new public hearing on the revised 8/30/2016 version of the proposed local law.

51. Upon information and belief, at no time did the Town replace the 8/17/2016 version of the proposed local law with the newer 8/30/2106 version on the Town web site, www.yorktownny.org; the 8/17/2016 version of the proposed local law remained on the Town's web site until at least October 7, 2016, more than two weeks after Respondent had adopted a different version of the local law.

52. As documented in the DVD of the September 20, 2016 public hearing (see Exhibit A), at no time during the hearing did any member of the Town Board, the Town Attorney or the Town Clerk advise the public of the existence of the newer 8/30/2016 version.

53. One person who did speak at the public hearing and who was shown a copy of the undisclosed 8/30/2016 version of the proposed local law *the day after the hearing*, wrote in an email to the Plaintiff: "I was going to comment on this [§270-12 (A) 2] but good thing I didn't because it was no longer in the version under consideration." (Note: In an earlier email the same day, the person wrote that when she checked the town web site prior to the public hearing, the version on the web site was dated 8/17/2016.) True and correct copies of both emails are annexed hereto as Exhibit N and incorporated in their entirety herein by reference.

54. All three (3) versions of the proposed local law, 8/5/2016, 8/17/2016 and 8/30/2016 contained the exact same text for §270-7 (F), the "Appeal and review" section:

> (1) "Any decision or order of the Planning Board or Town Engineer or any officer or employee thereof made pursuant to or within the scope of this chapter may be reviewed by the Town Board at the request of any interested party, provided that such review is commenced by the filing of a notice of review with the Town Board within 30 days after filing or such order or decision with the Town Clerk."
>
> (2) "Judicial review. Any final determination, decision or order of the Approving Authority may be judicially reviewed pursuant to Article 78 of the CPLR in the Supreme Court for Westchester County."

55. During the public hearing, and in response to comments relating to §270-7 (F) (1), the provision that gave the Town Board an appellate role to review Planning Board tree permit decisions, Town Supervisor Michael Grace stated:

> "Any law to be constitutional even on a local regulation has to have a local appeal process…It's a requirement of law … If you [Planning Board] approve a site plan that has an appeal through the Supreme Court through an Article 78, but you have determinations made within the application for a site plan or subdivision which are local [like the wetlands

ordinance or something like the tree ordinance] … if you don't have that [a local appeal process] than the regulation is *void ab initio*."

After the hearing had been closed, the Town Supervisor Grace said:

"What I kind of resent the implication that the Town Board is now taking over approval authority from other boards and that's just a complete misreading of what the law says...The boards that have approval authority over particular applications…the applicability of the tree ordinance remains with that approval authority during the process of the application over which it has jurisdiction in the first place. But you need a local appeals board for any sub board's, advisory board's, decision on the local level in order to satisfy the requirements of constitutional due process. You either provide with a local board of appeals or you just defer to an Article 78 proceeding. We opted as in this law as in the old law for that appeals process to be before the Town Board."

(See Exhibit A, meeting DVD, at 1:08 minutes and again at 2:46 minutes. See also a true and correct copy of the Minutes of September 20, 2016 public hearing annexed hereto as Exhibit O and incorporated herein by reference.)

56. During the September 20, 2016 public hearing, and in response to comments relating to §270-7 (F) (1), Town Supervisor Michael Grace stated that a similar provision granting the Town Board an appellate role to review Planning Board tree permit decisions was present in the Tree Law adopted in 2010. (See Exhibit A meeting DVD at 2:21 minutes.)

57. *After the public hearing was closed*, Town Supervisor Michael Grace verbally stated Respondent's intention to make three substantial amendments in the text of the proposed local law without any explanation of which version of the proposed local law it was amending, the 8/17/2016 version that had been advertised and was on the town's web site or the undisclosed 8/30/2016 draft. (See Exhibit A, meeting DVD at 2:41 minutes when the hearing was closed and at 2:47 minutes when the subject of amendments was raised for the first time.)

58. None of the three proposed substantial amendments were in written form or on the desk of the Town Board members prior to their voting on a motion to "adopt the law as amended."

59. The first substantial amendment to § 270-4-A of the proposed local law added the underlined words, "<u>In a period of 18 consecutive months</u> removal of 10 Protected Trees or more in an area 10,000 square feet or more."

60. The second substantial amendment to § 270-4-F of the proposed local law added the underlined words, "In a period of 18 consecutive months removal of 10 Protected Trees in an area of 2,000 square feet or more which includes in total or in part a slope 15% or greater as determined by the Town of Yorktown topographic maps."

61. The third substantial amendment to § 270-5-E added the underlined words: "Removal of trees on a parcel that has an approved forest management or stewardship plan or as part of an agricultural activity." As documented in the meeting DVD (see Exhibit A), this substantial amendment was added without:

    a) any discussion of what constituted an "agricultural activity";

    b) any discussion of the need to add a definition of the term "agricultural activity" in § 270-3, Definitions, of the proposed local law; and

    c) how many acres might qualify for the "agricultural activity" exemption.

62. §270-4, Definitions, of the 2010 Tree Law that was repealed as part of the local law exempted "agricultural activity" from the requirements of the law and included the following definition of an "agricultural activity":

> "Activities traditionally associated with farming or appropriate to an agricultural district, such as is now defined, whether or not Westchester County continues its program or agricultural districts, and whether or not the agricultural activity is within an agricultural district. Such activities may include, without limitation, grazing and watering livestock, planting and harvesting crops, fruit, vegetable, flower or woody plant crops, or nurseries, and operating an orchard, including activities incidental thereto. The term 'agricultural activity' does not include the construction of new structures associated with agricultural activities." (See Exhibit B.)

63. Twelve (12) Yorktown properties, with a combined total of 648 acres, have been officially designated "agricultural districts" by Westchester County. All twelve properties are in the Croton Watershed, the drinking water source for nine (9) million New York City residents. A true and correct copy of a listing of the twelve (12) official "agricultural districts" is annexed hereto as Exhibit Q and incorporated in its entirety herein by reference.

64. Because Respondent announced its intention to add the three (3) substantial amendments to the proposed local law *after the public hearing was closed*, the public did not have an opportunity to comment on any of the proposed amendments. (See ¶57 above.)

65. On September 20, 2016, Respondent voted to close the public hearing and proceeded to vote on a motion to adopt the proposed local law as verbally amended. There was no discussion of whether Respondent was voting on the advertised 8/17/2016 version or the undisclosed 8/30/2016 version of the proposed local law. The local law was adopted by a 4-1 vote. (See Exhibit A, meeting DVD at 2:50 minutes.)

66. § 270-5-H of the local law, Activities Where a Permit is Not Required, specifically exempts town owned property from the requirements of the law: "Any removal of trees to be done by or on behalf of the Town of Yorktown."

67. Upon information and belief, the Town of Yorktown owns approximately 4,000 acres of open space, most of which is forested and which constitutes a substantial percentage of the town's remaining undeveloped lands. Approximately 25% of the town's holdings are located in the environmentally sensitive Croton Watershed, the drinking water source for nine (9) million New York City residents.

68. Upon information and belief, because town owned land was exempt from the provisions of the local law, the SEQRA Short Form Environmental Assessment Form (EAF) did not review or assess the potential adverse environmental impacts of removing trees on approximately 4,000 acres of town owned open space. A true and correct copy of the EAF is annexed hereto as Exhibit R and incorporated in its entirety herein by reference.

69. The EAF was signed by the Town Supervisor on September 1, 2016, *19 days before* Respondent amended the proposed local law to exempt land that constituted an "agricultural activity."

70. Upon information and belief, because town owned land was exempt from the provisions of the local law, the Findings in the Negative Declaration adopted by Respondent on September 20, 2016 do not reflect a review or assessment of the potential adverse environmental impacts of removing trees on approximately 4,000 acres of town owned open space. A true and correct copy of the Negative Declaration is annexed hereto as Exhibit S and incorporated in its entirety herein by reference.

71. Upon information and belief, the text of the Negative Declaration adopted by Respondent on September 20, 2016 was *exactly the same* as the text of the Negative Declaration that was included in the printed agenda for the September 20, 2016 meeting that was prepared *prior to* the commencement of the meeting and *prior to* the addition of the "agricultural activity" amendment to the proposed local law.

72. Respondent adopted the Negative Declaration *after it had adopted the proposed local law.* (See Exhibit A, meeting DVD at 2:50:58 minutes and Exhibit O Minutes of September 20, 2016 Town Board meeting.)

73. An official copy of Local Law #21 of 2016, entitled "Tree Ordinance," was filed with the New York State Department of State on September 22, 2016. (See Exhibit P)

FIRST CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent violated §20 (4) of Municipal Home Rule Law and was arbitrary and capricious when it added three (3) substantial and unwritten amendments to the proposed local law after closing the public hearing and before voting to adopt the local law the same evening.

74. Petitioner repeats and re-alleges the allegations contained in ¶¶ 1–73 above, and incorporates such allegations by reference as if set forth herein.

75. §20 (4) of Municipal Home Rule Law states that no local law may be passed:

"until it shall have been in its final form and either (a) upon the desks or tables of the members at least seven calendar days, exclusive of Sunday, prior to its final passage, or (b) mailed to each of them in postpaid properly addressed and securely closed envelopes or wrappers in a post box or post office of the United States post office department within the local government at least ten calendar days, exclusive of Sunday, prior to its final passage, or (c) e-mailed to the e-mail in-box of each of them in the Portable Document Format (PDF) at least ten calendar days, exclusive of Sunday, prior to its final passage."

76. The courts have consistently held that "Only a departure in substance from the formula prescribed by statute will invalidate a municipal enactment" *Quick v Town of Owego*, 8 N.Y.2d 1144, affg 11 A.D.2d 285, 287. See also *Alscot Investing Corp. v Laibach*, 65 N.Y.2d 1042, 1044 (N.Y. 1985); *Matter of London v Wagner,* 22 Misc.2d 360 (N.Y. Misc. 1959); *Commission of Public Charities v Wortman,* 279 N.Y. 711, *affg* 255 App. Div. 241, 245*; Village of Mill Neck v. Nolan,* 259 NY 596 (1932)*; 1978 Op. Atty. Gen.* 243; *Burchetta v Town Board of Town of Carmel,* 140 Misc.2d 1050,1058 (N.Y. Misc. 1988); *Merritt v. Village of Portchester,* 71 N.Y. 309.

77. The step by step procedure for enacting local laws is clearly set forth in "Adopting Local Laws in New York State, James A. Coon Local Government Technical Series," page 13, New York State Department of State, 2015: If as a result of the public hearing process, the Town Board decides to amend the proposed local law, the law

"… should be rewritten, reproduced in its amended form and given the same introductory number but a new print number. It would then be subject to the requirements of Municipal Home Rule Law, §20 (4), concerning being on the desks or table of the members for at least seven calendar days (exclusive of Sundays) or having been mailed to the members at least ten calendar days (exclusive of Sundays) before the local legislative body may act on it."

78. As detailed in ¶¶57-58 above, Respondent unmistakably violated §20 (4) of Municipal Home Rule Law when, after closing the September 20, 2016 public hearing, the Town Supervisor announced his intention to add three (3) last minute unwritten substantial amendments to the proposed local law before voting to adopt the law that same evening. The Supervisor then proceeded to verbally explain what the amendments would be.

79. All three (3) amendments were substantial in that they:

a) contradicted and negated the stated purposes of the proposed local law;

b) added new restrictions on the rights of property owners to use their own property; and

c) created the potential for significant adverse environmental impacts

80. Given their substantial impacts on property rights and the environment, the three (3) amendments could not, under any reasonable and generally accepted circumstances, be considered "minor tweaks," "mere oversights," "inconsequential" or *de minimus.*

81. The first substantial amendment to § 270-4-A, Activities Where a Permit is Required, of the proposed local law added the underlined words, "In a period of 18 consecutive months removal of 10 Protected Trees or more in an area 10,000 square feet or more" to the text of the proposed law that had been advertised and was the subject of the public hearing. This addition substantially changed the meaning of the provision: Whereas, neither the advertised 8/17/2016 version or the undisclosed 8/30/2016 version contained restrictions on how many tree permits a property owner could apply for in any given time period., e.g., one, five, or ten months, with the addition of the words, 'In a period of 18 consecutive months," the amendment placed a *substantial new restriction* on the rights of property owners to use their property as they wished without any interference or regulation by the town government.

82. The second substantial amendment to § 270-4-F, Activities Where a Permit is Required, of the proposed local law added the underlined words, "In a period of 18 consecutive months removal of 10 Protected Trees in an area of 2,000 square feet or more which includes in total or in part a slope 15% or greater as determined by the Town of Yorktown topographic maps" to the text of the proposed law that had been advertised and was the subject of the public hearing. This addition substantially changed the meaning of the provision: Whereas, neither the advertised 8/17/2016 version or the undisclosed 8/30/2016 version contained restrictions on how many tree permits a property owner could apply for in any given time period, e.g., one, five, or ten months, with the addition of the words, 'In a period of 18 consecutive months," the amendment

placed a *substantial new restriction* on the rights of property owners to use their property as they wished without any interference or regulation by the town government.

83. By placing stringent new time restrictions on how often property owners could remove trees on their property, both the first and second amendments limited the ability of property owners to use their own property as they wished and substantially restricted their constitutionally protected property rights without benefit of due process.

84. By placing stringent new time restrictions on when and how often property owners could remove trees on their property, both the first and second amendments substantially contradicted and negated one of the major purposes of the proposed local law, as set forth in §270-1 (B):

> "It is the further purpose of this chapter to preserve the rights of property owners in the Town consistent with the purposes enumerated above."

85. As all three of the consecutive versions of the proposed local law that were reviewed by Respondent prior to the public hearing, 8/5/2016, 8/17/2016 and 8/30/2016, omitted any reference to a time frame for tree permits, it is both reasonable and logical to assume that it was Respondent's clear intention *not* to include a time frame in §270-4-A and § 270-4-F. Consequently, the last minute decision to substantially amend both sections of the proposed local law *after more than 30 days had elapsed* between the posting of the 8/17/2016 version of the proposed local law and the September 20, 2016 hearing could in no way be considered a "mere tweak," "careless oversight," "inconsequential" or *de minimus*.

86. The third last minute unwritten amendment to § 270-5-E, Activities Where a Permit is Not Required, of the advertised proposed local law added the phrase "agricultural activity" to the list of properties exempt from the requirements of the law by adding the underlined words: "Removal of trees on a parcel that has an approved forest management or stewardship plan <u>or as part of an agricultural activity</u>."

87. The third last minute unwritten amendment had the potential to significantly and substantially contradict the second purpose of the proposed local law, as set forth in §270-1 (A) Purpose, which was to:

> "Preserve, protect, conserve and regulate the forests, woodlands and trees and the benefits derived therefrom; prevent uncontrolled widespread cutting of trees; prevent soil erosion, and protect wetlands, water bodies and watercourses, air quality, vegetation, wildlife and fragile natural resources."

88. In addition to violating §20 (4) of Municipal Home Rule Law, Respondent acted in an arbitrary and capricious manner in that prior to the vote to adopt the proposed local law, as amended to exempt agricultural activities from the requirements of the law, Respondent made absolutely no effort to review, analyze or discuss whether or how the amendment could lead to adverse environmental impacts that would contradict and negate the purpose of the proposed local law. For example, Respondent never considered:

a) What constituted an "agricultural activity," e.g., was a small backyard vegetable or flower garden an "agricultural activity," or

b) Was the term "agricultural activity" meant only to apply to commercial agricultural operations, or officially designated "agricultural districts," or properties that had a special permit to operate a farm in accord with the provisions of §300-45 of the Zoning Code of the Town of Yorktown?

c) How many acres was the amendment exempting from the law? At a minimum, the amendment automatically exempted the 12 Yorktown properties with a combined 648 acres that have been officially designated "agricultural districts" by Westchester County. (See ¶63 above.)

89. After deciding to amend the proposed local law to exempt "agricultural activity," Respondent acted in an arbitrary and capricious manner when it failed to define the critical term "agricultural activity." Its failure is particularly egregious given the fact that a definition of the

phrase "agricultural activity" already existed in the repealed 2010 version of the Tree Law. (See ¶62 above)

90. Respondent acted in an arbitrary and capricious manner when, after exempting 648 acres in official agricultural districts from the local law, it failed to amend Item #7 in the prepared Findings in the Negative Declaration that stated:

> "The proposed action will not create a substantial change in the use or intensity of use, of land including *agricultural*, (emphasis added), open space or recreational resources, or in its capacity to support existing uses." (See ¶71 above)

91. Accordingly, Petitioner is entitled to a judgment annulling Local Law #21 of 2016 on the grounds that it was enacted in violation of the lawful procedures set forth in §20 (4) of Municipal Home Rule Law and was enacted in an arbitrary and capricious manner.

SECOND CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent violated §20 (3) of Municipal Home Rule Law when, after deciding to amend the proposed local law, it failed to have published a new Notice of a new public hearing.

92. Petitioner repeats and re-alleges the allegations contained in ¶¶ 1-91 above, and incorporates such allegations by reference as if set forth herein.

93. §20 (3) of Municipal Home Rule Law prescribes the procedure for the adoption of local laws by a legislative body, stating in part:

> "For purposes of this chapter, a local law relating to codification or recodification of ordinances or local laws into a municipal code shall be deemed to embrace only one subject. As used herein codification or recodification shall include amendments, deletions, repeals, alterations or new provisions in the municipal code; provided, however, that the notice of public hearing required by this section shall briefly describe the codification or recodification."

94. In *Vizzi v Town of Islip*, 71 Misc.2d 483, 485, (1972) the court held that the requirements in §20 (3) of Municipal Home Rule Law for public notice and public hearing are safeguards designed to insure that both the legislative body and the public are fully and reasonably

informed about the impacts of a proposed local law before it is enacted into law. The court stated further that,

> "The published notice is the fundamental vehicle for communicating to the public any local legislative changes which affect residential interests. It may be the only informational source that warns local property owners of zoning changes affecting their land's use and value, either adversely or beneficially, directly or indirectly. The viability of the statutory scheme of public hearing in relation to zoning changes is dependent upon proper advance notice."

95. In *Matter of Village of Chestnut Ridge, et al., v Town of Ramapo,* 225 A.D.2d 217, 220, 650 N.Y.S.2d 839, the court, citing *Martin v Flynn,* 19 A.D.2d 653, 654, held*:*

> "The purpose of these (§20) requirements is to ensure that when a town exercises the police power that has been granted to it, it does so in a manner that provides 'a reasonable opportunity…for the presentation to and condition by the [town's board or] council of complete data and arguments for and against the proposed local law.'"

96. Upholding the importance of proper notice, the courts have held that "noncompliance at bar goes to the substance of those [§20 notice] provisions and thwarts their legislative purpose." *Kew Gardens Rd. Assoc. v Tyburski*, 124 A.D.2d 553, 507 N.Y.S.2d 698. See also *Alscot Investing Corp. v. Laibach, supra*; *Quick v Town of Owego, supra*; *Coutant v. Town of Poughkeepsie*, 69 A.D. 2d 506 (1979); *Albright v Town of Manlius*, 34 A.D.2d 419 (N.Y. App. Div. 1970); *Keeney v Village of LeRoy,* 22 A.D.2d 159, 163; *Avelli v Town of Babylon*, 54 Misc.2d 662 (1967).

97. Further, "When substantial changes are made in a proposed zoning regulation subsequent to notice and public hearing, the courts have held that a second public hearing is required." *Village of Mill Neck v Nolan,* 259 N.Y. 596 (1932); *1978 Op. Atty. Gen.* 243. (See First Cause of Action regarding the substantial changes made to the proposed local law prior to adoption.)

98. The courts have also held that if a public hearing before a legislative body is to have any meaning or substance, the hearing must be held *prior to the adoption* of the Local Law. In *Callahan v Kambour*, 49 Misc.2d 280 (1965), court held:

> "There is considerably more solemnity to a local law than there is to a mere resolution. A resolution by the board can be passed after the board has adequately studied and discussed a matter. A local law can be passed only after giving proper and timely notice to the public and

conducting a hearing. *This procedure gives the public in general an opportunity to express its views pro and con on any proposed legislation*." (emphasis added)

99. Respondent unmistakably and knowingly violated §20 (3) of Municipal Home Rule Law and was arbitrary and capricious when, as detailed in ¶57 above, it announced its intention to add three (3) substantial amendments to the proposed local law *after it had voted to close the public hearing* but failed to vote to advertise a new public notice announcing a new public hearing on an amended proposed local law that would have included the three (3) substantial amendments to the 8/17/2016 version of the proposed local law that was the subject of the September 20, 2016 hearing.

100. Respondent unmistakably and knowingly violated §20 (3) of Municipal Home Rule Law and was arbitrary and capricious when, as detailed in¶57 and ¶64 above, it denied members of the public their due process right to comment on the three (3) last minute substantial amendments at a public hearing because the amendments were added to the proposed local law *after* Respondent voted to close the public hearing.

101. Accordingly, Petitioner is entitled to a judgment annulling Local Law #21 of 2016 on the grounds that it violated §20 (3) of Municipal Home Rule Law and was enacted in an arbitrary and capricious manner.

THIRD CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent committed an error of law when it adopted a local law that contains internal inconsistencies and contradictions relating to the review of Planning Board tree permit decisions.

102. Petitioner repeats and re-alleges the allegations contained in ¶1–101 above, and incorporates such allegations by reference as if set forth herein.

103. §270-6 (B) of the local law designates the Planning Board as the Approving Authority for tree permits for "an application, permit, or approval for which the Planning Board has authority pursuant to the local laws and ordinances of the Town."

104. Two provisions of the local law regarding reviews of Planning Board tree permit decisions are inconsistent and contradict each other in that they establish two different appellate review procedures: Whereas §270-12 (A) (2) states, "Any order issued by the Approving Authority pursuant to this subsection shall be reviewable in a proceeding pursuant to Article 78 of the State CPLR," §270-7 (F) (1) states, "Any decision or order of the Planning Board or Town Engineer or any officer or employee thereof made pursuant to or within the scope of this chapter may be reviewed by the Town Board at the request of any interested party, provided that such review is commenced by the filing of a notice of review with the Town Board within 30 days after filing or such order or decision with the Town Clerk."

105. The same two inconsistent and contradictory provisions appeared in the 8/5/2016, 8/17/2016 and 8/30/2016 versions of the proposed local law.

106. In addition to containing two inconsistent and contradictory provisions, the local law provides no guidance as to which provision of the local law an aggrieved party could or should cite if and when the party seeks a review of the Planning Board's tree permit decision.

107. Notwithstanding the internal inconsistency and contradictory text of §270-12 (A) (2) and §270-7 (F) (1), as detailed below in the Fourth Cause of Action below, §270-7 (F) (1) of the local law constitutes an error of law as it is inconsistent with §274-a (11) and §282 of Town Law.

108. Accordingly, Petitioner is entitled to a judgment annulling Local Law #21 of 2016 on the grounds that pursuant to §7803 of CPLR, the local law contains errors of law.

FOURTH CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent committed an error of law and was arbitrary and capricious when it granted the Town Board an illegal appellate role to review Planning Board tree permit decisions that are incorporated into Planning Board site plan approval decisions.

109. Petitioner repeats and re-alleges the allegations contained in ¶¶1–108 above, and incorporates such allegations by reference as if set forth herein.

110. By local law No. 10-1995, the Town Board authorized the Planning Board to "Review and approve, approve with modifications or disapprove site plans or parking plans where any provisions of the Code of the Town of Yorktown requires site plan or parking plan approval by the Planning Board and subject to the limitations therein contained."

111. Pursuant to §274-a (2) of Town Law, once a Town Board delegates to the Planning Board the authority to approve, approve with modifications or disapprove site plans, "… the Town Board no longer has jurisdiction to perform any of the functions which are assigned to a Planning Board by State statute even though without the creation of the Planning Board the Town Board itself might have had authority to act in that field." *1979 Op. Atty. Gen. 147.*

112. "A town board may not restrain, overrule or make the decisions of a planning board subject to town board approval." *1979 Op. Atty. Gen. 147. (*See also *1971 Op. Atty. Gen. 151*.) Further, *"*A Town Board may not review a Planning Board's denial of site plan approval." (See also *Matter of Boxer v Town Board of the Town of Cortlandt*, 60 A.D.2d, 913 (1978); *Walton v Town of Brookhaven*, 41 Misc. 2d, 798 (1964).

113. §274-a (11) of Town Law states that a person aggrieved by a Planning Board site plan decision may apply to the Supreme Court for review by a proceeding under Article 78 of CPLR:

> "Any person aggrieved by a decision of the authorized board or any officer, department, board or bureau of the town may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board

in the office of the town clerk. The court may take evidence or appoint a referee to take such evidence as it may direct, and report the same, with findings of fact and conclusions of law, if it shall appear that testimony is necessary for the proper disposition of the matter. The court shall itself dispose of the matter on the merits, determining all questions which may be presented for determination."

114. Since §274-a (11) of Town Law clearly grants to the Supreme Court the power to review Planning Board site plan decisions, §270-7 (F) (1), Appeal and review of the local law unmistakably constitutes a grievous and clear error of law when it contradicts and conflicts with §274-a (11) of Town Law by granting the Town Board appellate jurisdiction over Planning Board site plan decisions when it states:

"Any decision or order of the *Planning Board* (emphasis added) or Town Engineer or any officer or employee thereof made pursuant to or within the scope of this chapter may be reviewed by the Town Board at the request of any interested party, provided that such review is commenced by the filing of a notice of review with the Town Board within 30 days after filing of such order or decision with the Town Clerk."

115. When enacting a local law regulating the removal of trees, Respondent recognized and accepted the fact that tree permits might be needed as an integral part of the site plan approval process. Therefore, Respondent included in the proposed local law, the provision in §270-6 (B) that designated the Planning Board as the Approving Authority for tree permits for "an application, permit, or approval for which the Planning Board has authority pursuant to the local laws and ordinances of the Town."

116. The courts have consistently held that site plan approvals, whether from a Planning Board or a Town Board, may include provisions and conditions relating to "parking, means of access, screening, signs, *landscaping*, architectural features, location and dimensions of buildings, adjacent land uses and *physical features meant to protect adjacent land uses as well as any additional elements* specified by the town board in such zoning ordinance or local law." (emphasis added) *Moriarty v. Planning Board of Sloatsburg*, 119, A.D. 2d 188, 506 (1986). See also *Holmes v Planning Board of Town of New Castle*, 78 A.D.2d 1 (1980); *St. Onge v Donovan*, 71 N.Y.2d 507 (1988). After taking into consideration the physical conditions of a

site, a Planning Board approved site plan may therefore dictate the location of structures and parking areas in such a way as to preserve certain trees. Similarly, tree permit conditions that are incorporated into the site plan approval may identify which existing trees on the site are to be removed, which are to be kept, and, if appropriate, what on site mitigation measures are required to address the adverse environmental impacts of tree removal.

117. As detailed in ¶¶37, 41 and 55 above, Respondent acted in an arbitrary and capricious manner when, on three occasions, it attempted to defend the legality of §270-7 (F) (1) by flagrantly ignoring §274-a (11) of Town Law and erroneously stating that some unspecified "law" required Town Board appellate review of Planning Board tree permit decisions.

118. As detailed in ¶56 above, Town Supervisor Michael Grace acted in an arbitrary and capricious manner when he falsely and erroneously stated during the September 20, 2016 public hearing that the 2010 Tree Law also included a provision granting the Town Board appellate review over Planning Board tree permit decisions. No such provision exists in the 2010 Law. To the contrary, the 2010 Tree Law (see Exhibit B) specifically provides for Article 78 review of Planning Board tree permit decisions, to wit: §270-11 (A) and (B) of the 2010 Tree Law states:

> A. "A determination by the Town Engineer to deny an administrative permit may be appealed to the Town Board, in which case the Town Board shall become the approving authority for such applications…"
>
> B. "A determination by the approval authority other than the Town Engineer to grant or deny a tree removal permit may be reviewed by the commencement of an action by the applicant or any other aggrieved person pursuant to the provisions of Article 78 of the Civil Practice Law and Rules (hereafter referred to as CPLR) within 30 days of the filing of such determination with the Town Clerk."

119. Respondent committed an error of law and acted in an arbitrary and capricious manner when it failed to consider that the illegal grant to the Town Board of appellate review power over Planning Board site plan approvals in §270-7 (F) (1) of the proposed local law conflicted with and was inconsistent with the provisions of Chapter 195, Land Development Regulations, of

the Code of the Town of Yorktown, that authorizes and empowers the Planning Board to approve site plans, parking plans and plats.

120. Respondent committed an error of law and acted in an arbitrary and capricious manner when it failed to consider that §270-7 (F) (1) of the proposed local law conflicted with and was inconsistent with the provisions of §274-a (11) of Town Law on procedural grounds, to wit: If an interested party invoked the 30 day "appeal and review" provision in §270-7 (F) (1) of the local law, the party would be incapable of meeting the 30 day time frame set forth in §274-a (11) of Town Law.

121. Accordingly, Petitioner is entitled to a judgment annulling the Local Law #21 of 2016 on the grounds that, pursuant to §7803 of CPLR, the law contains errors of law and is arbitrary and capricious.

FIFTH CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent committed an error of law and was arbitrary and capricious when it granted the Town Board an illegal appellate role to review Planning Board tree permit decisions that are incorporated into Planning Board plat approval decisions.

122. Petitioner repeats and re-alleges the allegations contained in ¶¶ 1–121 above, and incorporates such allegations by reference as if set forth herein.

123. §195-1 (A) of Chapter 195, Land Development Regulations of the Town Code of the Town of Yorktown, authorizes and empowers the Planning Board to approve or disapprove plats.

124. Pursuant to §276 of Town Law, a Town Board may authorize and empower the Planning Board to review and approve preliminary and final plats of subdivisions.

125. "A town board may not restrain, overrule or make the decisions of a planning board subject to town board approval." *1971 Op. Atty. Gen. 151; 1979 Op. Atty. Gen. 147*. Further, "A Town Board may not review a Planning Board's denial of site plan approval." (*Matter of Boxer v Town Board of the Town of Cortlandt, supra; Walton v Town of Brookhaven, supra.*

126. §282 of Town Law states that a person aggrieved by a Planning Board decision involving a plat may apply to the Supreme Court for review by a proceeding under Article 78 of CPLR.

> "Any person or persons, jointly or severally aggrieved by any decision of the planning board concerning such plat or the changing of the zoning regulations of such land, or any officer, department, board or bureau of the town, may have the decision reviewed by a special term of the supreme court in the manner provided by article seventy-eight of the civil practice law and rules provided the proceeding is commenced within thirty days after the filing of the decision in the office of the town clerk…. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings."

127. §282 of Town Law applies to both preliminary plat approvals and final plat approvals. (*Long Island Pine Barrens v. Planning Board of the Town of Brookhaven,* 78 N.Y.2d 608, 585 N.E.2d 778, 578 N.Y.S.2d 466 (1991).

128. As §282 of Town Law clearly grants to the Supreme Court the power to review Planning Board plat decisions, §270-7 (F) (1), Appeal and review, of the local law clearly constitutes a grievous error of law when it contradicts and conflicts with §282 of Town Law by granting the Town Board appellate jurisdiction over Planning Board plat decisions when it states.

> "Any decision or order of the Planning Board or Town Engineer or any officer or employee thereof made pursuant to or within the scope of this chapter may be reviewed by the Town Board at the request of any interested party, provided that such review is commenced by the filing of a notice of review with the Town Board within 30 days after filing of such order or decision with the Town Clerk."

129. §195-25 A of Chapter 195, Land Development Regulations of the Town Code of the Town of Yorktown requires that the following documents be submitted to the Director of Planning prior to the submission of any application for subdivision:

> "A plan on a topographic map which shall show the proposed layout of streets, lots, marshland, watercourses, ponds, beaches, *groves of trees and/or single trees with diameters in excess of eight inches, regulated buffer zones as defined by § 270-4 of Chapter 270 on all*

existing and proposed lot lines, and within those buffers all trees with a diameter at breast height of six inches or more and a minimum height of 25 feet (emphasis added). *(*Note: As of the filing date of this Article 78 proceeding, the Town Board has not amended this section of Chapter 195 to reflect the newly enacted Chapter 270.)

130. When enacting the local law regulating the removal of trees, Respondent recognized and accepted the fact that tree permits might be needed as an integral part of the subdivision approval process. Therefore, Respondent included in the proposed local law §270-6 (B) that designated the Planning Board as the Approving Authority for tree permits for "an application, permit, or approval for which the Planning Board has authority pursuant to the local laws and ordinances of the Town." After taking into consideration the physical conditions of a site, a Planning Board approved plat may dictate the layout of the subdivision in such a way as to preserve certain trees. Similarly, tree permit conditions that are incorporated into the approved plat may identify which existing trees on the site are to be removed, which are to be kept, and, if appropriate, what on site mitigation measures are needed to address the adverse environmental impact of tree removal.

131. The courts have consistently held that Planning Boards are vested with the authority to weigh the evidence and exercise their discretion in approving or denying approval of a subdivision plat. *Matter of Heller v Kabcenell*, 126 A.D.2d 728 (N.Y. App. Div. 1987) ; *M & M Partnership v. Sweenor*, 210 A.D.2d 575, 619 N.Y.S.2d 802, 803 (3d Dep't 1994); *Currier v. Planning Bd. of Town of Huntington*, 74 A.D.2d 872, 426 N.Y.S.2d 35, 36 (2d Dep't), *aff'd*, 52 N.Y.2d 722, 436 N.Y.S.2d 274, 417 N.E.2d 568 (1980). See also *Thomas v. Brookins*, 175 A.D.2d 619, 572 N.Y.S.2d 557, 557 (4th Dep't 1991); *Van Euclid Co. v. Sargent*, 97 A.D.2d 913, 470 N.Y.S.2d 750, 753 (3d Dep't 1983); *Parmadale Dev., Inc. v. Planning Board of Town of Parma*, 35 A.D.2d 904, 316 N.Y.S.2d 842, 843 (4th Dep't 1970).

132. As detailed in ¶¶37, 41 and 55 above, Respondent acted in an arbitrary and capricious manner when, on three occasions, it attempted to defend the legality of §270-7 (F) (1) by

flagrantly ignoring §282 of Town Law and falsely stating that the "law" required Town Board appellate review of Planning Board tree permit decisions.

133. As detailed in ¶56 above, Town Supervisor Michael Grace acted in an arbitrary and capricious manner when he falsely and erroneously stated during the September 20, 2016 public hearing that the 2010 Tree Law also included a provision granting the Town Board appellate review over Planning Board tree permit decisions. No such provision exists in the 2010 Law. To the contrary, the 2010 Tree Law specifically provides for Article 78 review of Planning Board tree permit decisions. (See ¶118 above for the text of the 2010 law.)

134. Respondent committed an error of law and acted in an arbitrary and capricious manner when it failed to consider that the illegal grant to the Town Board of appellate review power over Planning Board plat approvals in §270-7 (F) (1) of the proposed local law conflicted with and was inconsistent with the provisions of Chapter 195, Land Development Regulations, of the Code of the Town of Yorktown, that authorizes and empowers the Planning Board to approve plats.

135. Respondent committed an error of law and acted in an arbitrary and capricious manner when it failed to consider that §270-7 (F) (1) of the proposed local law conflicted with and was inconsistent with the provisions of §282 of Town Law on procedural grounds, to wit: If an interested party invoked the 30 day "appeal and review" provision in §270-7 (F) (1) of the local law, the party would be incapable of meeting the 30 day time frame set forth in §282 of Town Law.

140. Accordingly, Petitioner is entitled to a judgment nullifying Local Law #21 of 2016 on the grounds that pursuant to §7803 of CPLR, the law contains errors of law and is arbitrary and capricious.

SIXTH CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent violated 6 NYCRR Part 617.7 of the State Environmental Quality Review Act (SEQRA) when it failed to take the requisite "hard look" before adopting an EAF and Negative Declaration; acted in an arbitrary and capricious manner when adopting a flawed Negative Declaration; and committed an error of law when adopting the Negative Declaration.

141. Petitioner repeats and re-alleges the allegations contained in ¶ ¶1–140 above, and incorporates such allegations by reference as if set forth herein.

142. 6 NYCRR Part 617.7 requires that before taking action to vote on a Type 1 unlisted action such as legislation regulating land use, the lead agency must issue a Negative Declaration attesting to the fact that the proposed action will not create any significant adverse environmental impacts.

143. The courts have consistently held that in order for a Negative Declaration to be upheld, the record must show that the lead agency took a "hard look" that identified relevant areas of environmental concern, thoroughly analyzed them for significant adverse impact and supported its determination with reasoned elaboration. *H.O.M.E.S. v. UDC,* 69 A.D.2d 222 (4th Dept. 1979); *E.F.S. Ventures v Foster,* 71, A.D. 2d, 359 (1988); *Chinese Staff & Workers Assn. v City of New York,* 68 N.Y.2d 359, 368-369; *Matter of Jackson v New York State Urban Dev. Corp.,* 67 A.D.2d 400, 417; *Matter of Tri-County Taxpayers Assn. v Town Board,* 55 N.Y.2d 41, 43, *modfg* 79 A.D.2d 337); *Scenic Hudson, Inc. v Town of Fishkill Town Board,* 258 A.D. 2d, 654, 657 [2d Dept. 1999].

144. The courts have further consistently held that when complying with SEQRA, the law calls for "strict" compliance, and that complying with the "spirit" of the act does not constitute adherence to its policies to the fullest extent possible and that anything less will result in annulment of the lead agency's determination of significance. *Town Assn. v Town of Rye,* 82 A.D.2d 474 (N.Y. App. Div. 1981); *Matter of King v Saratoga County Board of Supervisors,*

89 NY2d 341, 347; *Matter of Tupper v City of Syracuse*, 46 A.D.3d 1343, (2007); *Matter of Badura v Guelli*, 94 A.D.2d 972 (1983); (See also *Chinese Staff & Workers Ass'n v City of New York*, supra.)

145. 6 NYCRR 617.7 (b) (4) requires that, in making the determination of significance, the lead agency — in this case the Town Board — must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." See *Dawley v. Whitetail*, 130 A.D.3d 1570 (2015), 14 N.Y.S.3d 854).

146. Given the local law's automatic exemption of town owned land, (see ¶¶67-68 and 70 above), in both the EAF and the Negative Declaration, Respondent failed to take the requisite "hard look" at the local law's potential significant adverse environmental impacts of removing an unknown quantity of trees over an unknown period of time on approximately 4,000 acres of undeveloped land, including but not limited to, disturbances to wetlands, disturbances to wildlife habitats and corridors, flooding, soil erosion, neighborhood character, etc. , and without regard to the fact that a considerable amount of the undeveloped land is located within the environmentally sensitive Croton Watershed, the drinking water source for nine (9) million New York City residents.

147. The deliberate omission of 4,000 acres of undeveloped land from the SEQRA review is of such a large magnitude that Respondent's action *not to assess the potential adverse environmental impacts* of the proposed local law in the EAF and Negative Declaration flies in the face of the court's finding in *Matter of Town of Henrietta v Department of Environmental Conservation of State of N. Y.*, 76 A.D.2d 215, (4th Dept 1980) that, "…[at] the heart, SEQRA, clearly is meant to be more than a simple disclosure statement … Rather, it is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."

148. Respondent committed an error of law and acted in an arbitrary and capricious manner when it failed to strictly comply with 6 NYCRR Part 617.7 in that the Negative Declaration failed to provide a through and factual basis for its findings with any reports, studies, documents or other evidence. *Dawley v. Whitetail, supra; Schenectady Chemicals v Flacke,* 83 A.D.2d 460 (1981). (See Negative Declaration, Exhibit S.)

149. As detailed in ¶71 above, Respondent committed an error of law and acted in an arbitrary and capricious manner when it decided, at the proverbial "eleventh hour" to add an amendment to the proposed local law exempting "agricultural activity" but

a) failed to take the requisite "hard look" at the significant short and long term adverse environmental impacts of exempting more than 648 acres of land from the law's protections; and

b) failed to modify the Negative Declaration, prepared *before* the exemption amendment was added to the proposed local law that included the statement,

> "The proposed action will not create a substantial change in the use or intensity of use, of land including *agricultural,* (emphasis added) open space or recreational resources, or in its capacity to support existing uses."

150. Respondent committed an error of law and acted in an arbitrary and capricious manner when it voted to adopt the proposed local law *before* it voted to adopt the Negative Declaration. (See ¶72 above.)

151. Respondent committed an error of law and acted in an arbitrary and capricious manner when it adopted a flawed Negative Declaration that identified the "Name of the Action" as: "Adoption of Local Law 248: Stormwater Management and Erosion and Sediment Control." (See Negative Declaration, Exhibit S.)

152. Accordingly, Petitioner is entitled to a judgment nullifying Local Law #21 of 2016 on the grounds that Respondent violated 6 NYCRR Part 617, acted in an arbitrary and capricious manner and that the local law contains an error of law.

SEVENTH CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent violated §20 (3) of Municipal Home Rule Law and acted in an arbitrary and capricious manner when it failed to issue a new public notice and schedule a new public hearing when a revised version of the proposed local law was prepared after an earlier version had been advertised for a public hearing.

153. Petitioner repeats and re-alleges the allegations contained in ¶¶1-152–above, and incorporates such allegations by reference as if set forth herein.

154. §20 (3) of Municipal Home Rule Law prescribes the procedure for the adoption of local laws by a legislative body, stating in part:

> "For purposes of this chapter, a local law relating to codification or recodification of ordinances or local laws into a municipal code shall be deemed to embrace only one subject. As used herein codification or recodification shall include amendments, deletions, repeals, alterations or new provisions in the municipal code; provided, however, that the notice of public hearing required by this section shall briefly describe the codification or recodification."

See *Burchetta v. Town of Carmel, supra; Coutant v. Town of Poughkeepsie, supra; Matter of Village of Chestnut Ridge, et al., v Town of Ramapo, supra; Albright v Town of Manlius, supra; Keeney v. Village of LeRoy, supra; 1978 Op. Atty. Gen. 243; Village of Mill Neck v. Nolan, supra.*

155. As set forth above (See ¶¶ 92-98, Petitioner's Second Cause of Action) the courts have consistently upheld the importance of the public notice and hearing requirement in §20 (3) of Municipal Home Rule Law.

156. As detailed in ¶¶ 45-52 above, Respondent violated §20 (3) of Municipal Home Rule Law when it failed to pass a resolution to publish a public notice announcing a new public hearing on the revised version of the proposed local law dated 8/30/2106 which contained four (4) substantial revisions, plus one tweak, of the advertised 8/17/2016 version. (See Exhibit J for a comparison of the 8/17/2016 and 8/30/2016 versions.)

157. As detailed in ¶52 above, Respondent acted in an arbitrary and capricious manner at the September 20, 2016 hearing when it failed to:

a) inform the public at the hearing of the existence of the newer undisclosed 8/30/2016 version;

b) explain how the undisclosed 8/30/2016 version differed from the posted 8/17/2106 version of the proposed local law; and

c) inform the public which version of the proposed local law Respondent was considering that evening.

158. As detailed in ¶53 above, Respondent committed an error of law and acted in an arbitrary and capricious manner when, by not informing the public about the existence of the 8/30/2016 version of the proposed local law, it denied the public its due process right to comment on the revised provisions of the proposed local law that were included in the undisclosed 8/30/2016 version of the proposed local law.

159. Accordingly, Petitioner is entitled to a judgment nullifying Local Law #21 of 2016 on the grounds that Respondent committed an error of law and acted in an arbitrary and capricious manner when it violated §20 (3) of Municipal Home Rule Law.

EIGHTH CAUSE OF ACTION
Pursuant to CPLR Article 78

Respondent violated §103(a) of the Public Officers Law, aka the Open Meetings Law, and acted in an arbitrary and capricious manner when it failed to discuss revisions to the proposed local law in an open meeting.

160. Petitioner repeats and re-alleges the allegations contained in ¶¶ 1-159 above, and incorporates such allegations by reference as if set forth herein.

161. "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and

decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it." *Public Officers Law, §95, Legislative Declaration.*

162. The clear intent of the Public Officers Law was succinctly affirmed by the court in *Orange Pub. v Newburgh*, 60 A.D.2d 409 (1978), to wit: "Public business is the people's business and the people have a right to know."

163. §103 (a) of the Public Officers Law states,

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred five of this article."

Furthermore, the list of the eight (8) topics identified in §105 Public Officers Law that can be discussed in closed executive sessions very clearly *does not* include discussions of proposed legislation.

164. In affirming the importance of legislative bodies conducting every step of the decision making process in the open and available to the public, the court, in *Orange Pub. v Newburgh, supra,* went on to state:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute."

165. As detailed in ¶¶45-46 above, sometime after the publication of the 8/17/2016 version of the proposed local law pursuant to the September 1, 2016 Public Notice, a revised version of the proposed local law dated 8/30/2016 that included four (4) substantial changes to the advertised

8/17/2016 version, plus one minor weak, was circulated to Town Board members but not to the public.

166. However, as detailed in ¶¶47-48 above, as there were no Town Board meetings between August 10, 2016, the day after the Town Board discussed revisions to the 8/5/2016 version of the proposed local law and August 30, 2016, the date on the revised 8/30/2016 version, the changes to the proposed legislation could not have been discussed or agreed to during an open meeting of the Town Board.

167. Consequently, absent any record of an open Town Board meeting at which time changes to the 8/17/2016 version of the proposed local law were discussed and agreed to, it is both reasonable and logical for the court to conclude that Respondent violated §103(a) of the Public Officers Law when it failed to discuss changing the 8/17/2016 version of the proposed local law during an open meeting of the Town Board as required by §103(a) of the Public Officers Law.

168. Accordingly, Petitioner is entitled to a judgment nullifying Local Law #21 of 2016 on the grounds that it violated §103 (a) of the Public Officers Law.

CONCLUSION

Wherefore, Petitioner respectfully requests the Court to render a judgment and order containing the following relief:

a) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates §20 (4) of Municipal Home Rule Law.

b) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates §20 (3) of Municipal Home Rule Law.

c) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates §274 (11) (a) of Town Law.

d) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates §282 of Town Law.

e) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates 6 NYCRR Part 617.7 of the State Environmental Quality Review Act (SEQRA).

f) Declaring Local Law #21 of 2016 of the Town of Yorktown null and void on the grounds that it violates §103 (a) of the Public Officers Law.

TABLE OF EXHIBITS