STATE OF NEW YORK
SUPREME COURT : COUNTY OF MONROE

In the Matter of the Application of

CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC,

Petitioner-Plaintiff,

--against --

M&F, LLC

DANIELE SPC, LLC

MUCCA MUCCA LLC

MARDANTH ENTERPRISES, INC.,

M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES

TOWN OF BRIGHTON, NEW YORK

TOWN BOARD OF THE TOWN OF BRIGHTON, NEW YORK, comprised of Supervisor William Moehle and members Jason S. DiPonzio, James R. Vogel, Christopher K. Werner and Robin R. Wilt, in their capacities as members of that body

NMS ALLENS CREEK INC.

ROCHESTER GAS AND ELECTRIC CORPORATION

and any persons or entities found to have an interest in the property subject to this action but not yet named.

For a Judgment Pursuant to New York CPLR Article 78, for a Declaratory Judgment pursuant to New York CPLR § 3001, and for a judgment to quiet title pursuant to Real Property Actions and Proceedings Law Article 15

Respondents-Defendants.

VERIFIED PETITION/COMPLAINT

Index No._____

Petitioner-Plaintiff, CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC, as and for its Verified Petition and Complaint against Respondents-Defendants, alleges upon information and belief as follows:

I. Parties

1. Petitioner-Plaintiff Clover/Allen's Creek Neighborhood Association LLC is a limited liability corporation organized and existing under the laws of the State of Delaware and is authorized to do business in New York, and has an address of 104 Shoreham Dr., Rochester, New York 14618. It is comprised of residential neighbors in the Clover Street and Allens Creek Road area in and around the Town of Brighton, New York (the "***Association***").

2. The Association was formed for the purposes of, among other things, protecting, maintaining and promoting the property interests of its members; ensuring that development in the neighborhood complies with applicable zoning regulations; protecting the recreational trails in the area; and otherwise providing for the health, safety and welfare of the residents in the neighborhood.

3. The Association's members reside within the area that would be directly and adversely affected by the matters addressed in this Complaint, and regularly use the subject segment of a certain recreational trail known as the historic Auburn Trail Park ("***Auburn Trail***") which segment runs between Allens Creek Road and Clover Street in the Town of Brighton, New York (or did use until such time as access thereto was blocked by one or more of the Respondents-Defendants and with the acquiescence of one or more of the remaining Respondents-Defendants) for a variety of recreational purposes such as walking, jogging, biking and cross-country skiing, and derive physical and mental health benefits from such activities, and as members of the public and nearby residents, have a property interest in the Recreational Easement at issue herein.

4. The interests sought to be protected by the Association are germane to its purposes.

5. Neither the relief requested, nor the claims asserted require participation of the Association's individual members.

6. Respondent-Defendant M&F, LLC ("***M&F***") is a foreign limited liability company organized and existing under the laws of the State of Nevada, authorized to do business in the state of New York with a principal place of business at 2851 Monroe Avenue, Rochester, New York.

7. Respondent-Defendant Daniele SPC, LLC ("***Daniele SPC***") is a domestic limited liability company organized and existing under the laws of the State of New York with a principal place of business at 2851 Monroe Avenue, Rochester, New York.

8. Respondent-Defendant Mucca Mucca LLC ("***Mucca Mucca***") is a domestic limited liability company organized and existing under the laws of the State of New York with a principal place of business at 2851 Monroe Avenue, Rochester, New York.

9. Respondent/Defendant Mardanth Enterprises, Inc. ("***Mardanth***") is a domestic business corporation organized and existing under the laws of the State of New York with a principal place of business at 2851 Monroe Avenue, Rochester, New York.

10. Respondents-Defendants M&F, Daniele SPC, Mucca Mucca, and Mardanth are all under common ownership and control and, individually and/or collectively are the owners/developers (collectively, the "***Developer***") of certain real property known as 2740/2750/2800 Monroe Avenue, Tax Map No. 137.19-2-70.32 ("***Parcel A***"); Tax Map No. 137.19-1-81 ("***Parcel B***"); Tax Map No. 150-07-2-8.11 ("***Parcel C***") and Tax Map No. 150.07-2-7.1 ("***Parcel D***")[1] (collectively, the "***Developer's Parcels***"). For convenience, a map is attached as Exhibit A identifying and depicting the parcel locations.

11. Upon information and belief, at some or all of the relevant times herein, Respondents-Defendants M&F, Daniele SPC, Mucca Mucca, and Mardanth have, individually and/or collectively, been doing business as the "Daniele Family Companies."

[1] While Exhibit A indicates that Parcel D is owned by "Mamasan Monroe LLC", upon information and belief, it is now owned by Respondent-Defendant Mucca Mucca.

12. Respondent-Defendant Town of Brighton, New York ("***Brighton***" or "***Town***") is a municipal corporation organized and existing under the laws of the State of New York. It maintains an office at 2300 Elmwood Avenue, Rochester, New York 14618.

13. Respondent-Defendant Town Board of the Town of Brighton, New York (the "***Town***" and/or the "***Town Board***") maintains an office at 2300 Elmwood Avenue, Rochester, New York 14618; is the governing board of the Town of Brighton, New York; and for the matters relevant herein, has voluntarily elected to accept and act upon a special application by Developer for a proposed strip mall project involving Parcels A-D (the "***Project***"), instead of requiring the project to comply with the standard zoning code size/use limits, and the standard zoning process, and is acting as "lead agency" under the New York State Environmental Quality Review Act ("***SEQRA***"), 8 E.C.L. § 0101 *et seq*. As part of the Project, the Developer proposes to alter, modify, relocate and/or eliminate portions of the Auburn Trail and the Recreation Easement (defined below).

14. Respondent-Defendant NMS Allens Creek, Inc. ("***NMS Allens Creek***") is a domestic corporation organized and existing under the laws of the State of New York with a principal place of business at 10 Pine Acres Drive, Rochester, New York. Upon information and belief, at all relevant times, it has a property interest in the Recreational Easement at issue herein.

15. By deed dated October 21, 2008, recorded in the Monroe County Clerk's Office recorded at Liber 10680 of Deeds at page 266, Respondent-Defendant NMS Allens Creek is the record owner of certain real property known as 95 Allens Creek Road, Tax Map Nos. 137.19-2-70.11 and 137.19-2-70.21 ("***Parcel E***") as depicted on Exhibit A hereto.

16. Upon information and belief, at all times relevant hereto, Respondent-Defendant ROCHESTER GAS AND ELECTRIC CORPORATION ("***RG&E***") of New York is a

corporation organized and existing under the laws of the State of New York, with a principal place of business at 89 East Avenue, Rochester, New York 14649. Petitioner-Plaintiff asserts no claims against this Respondent-Defendant and it is named solely as a potentially necessary party to these proceedings.

II. Ownership/Easement/Title Issues

17. Prior to 1997, RG&E owned a corridor of real property that ran behind all of the Developer's Parcels, which corridor had in the past historically served as part of a railroad line. (That corridor is depicted on Exhibit A.) In July 1997, RG&E conveyed the fee interest in the corridor to each of the property owners whose property abutted the west side of the corridor (to wit: Developer, other abutting owners, and/or their predecessors in interest).

18. RG&E has electrical poles and related equipment in this corridor and continues to need to service its equipment. It accordingly reserved for itself an easement (the "***Reserved Utility Easement***") over a portion of the conveyed corridor in order to use, maintain, repair, replace and upgrade RG&E's utility facilities and to construct additional utilities, although the location and precise extent and limits of those property rights are unclear. It has a current property interest in the property at issue herein.

19. RG&E and/or Developer's predecessors in interest also conveyed a recreational easement in this same corridor to the Town of Brighton and the public for the purpose of *"pedestrian use by [the Town] its licensees, and the public and to thereafter construct, reconstruct, extend, operate, inspect, maintain, repair and replace a pedestrian pathway which the [Town] shall require for public use across said land"* (the *"**Recreation Easement**"*).

20. Members of the Association regularly use the Recreation Easement for walking, biking, jogging and similar recreational purposes, which has been continuously open to the

public per the terms of the Recreation Easement, until the Developer unlawfully restricted such use.

21. The Recreation Easement that is subject to this action is approximately 1/3 mile long and is part of the larger Auburn Trail linear park, and connects the Auburn Trail at the north side of Allens Creek Road, all the way to the south side of Clover Street, thereby providing an uninterrupted connection for the greater Auburn Trail, which runs from the City of Rochester to the Erie Canal in Pittsford and beyond.[2]

22. The home of one of the closest members of the Association abuts the Auburn Trail, and this member lives directly across the road from the Allens Creek Road entrance to the Recreation Easement, and some or all of the members of the Association have an interest different from the public at large and have standing to sue.

23. Developer, without any permits, approvals or other legal right to do so, and without apparent objection or prohibition by the Town and/or Town Board and with its apparent acquiescence, has repeatedly misappropriated the Recreation Easement for its private use by, among other things, paving over the Recreation Easement and using it for vehicular ingress/egress to/from existing commercial development(s) on Developer's Parcels.

24. Developer has also, without any permits, approvals, or other legal authority, and without any apparent objection or prohibition by the Town and/or Town Board, and with its apparent acquiescence, converted a portion of the Recreation Easement in the vicinity of Parcel B into a parking lot.

25. Developer has also, without any legal right to do so, and with the apparent acquiescence of the Town and/or Town Board, prevented the public from using the Recreation Easement by gating and padlocking the southern end of the Recreation Easement.

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[2] Although the Recreation Easement is noted on Google Maps as part of the Pittsford Parks Trail System, this segment of the Auburn Trail is actually located across the municipal line in the Town of Brighton.

III. The Project

26. By application to the Town dated May 15, 2015, Developer proposed the Project, a 93,000 square foot commercial strip plaza, on Developer's Parcels that would be immediately appurtenant and adjacent to, and indeed invade by several acres, the adjacent residential zone, which includes the neighborhood served by the Association, and which Project would be built on, overlap, interfere with, obstruct or otherwise impinge on the real property rights of the Association, its members and the public in and to the Recreation Easement.

27. Developer has already not only paved over a portion of the Recreation Easement and converted it to private use for its own vehicular and commercial purposes, but the Developer now proposes as part of the Project to completely misappropriate the Auburn Trail/Recreation Easement as and where located, in violation of the real property rights of the Association and the public at large, and others having property interests therein.

28. Developer also seeks to expand its rights in and to the area around and/or under the Recreation Easement by, among other things, allowing vehicular traffic to cross or use the Recreation Easement from parcels not originally included in the reservation of rights in Parcel A.

29. In connection with the Project, the Town Board voluntarily accepted an "Incentive Zoning" application by Developer, in which the Town indicates a willingness to convey the Recreation Easement to Developer so the Developer can henceforth use it for commercial purposes to the exclusion of the public's rights in and to the Recreation Easement as and where currently located, in violation of Plaintiff's rights and in violation of the Public Trust Doctrine.

30. Developer's current and proposed uses are contrary to the rights granted to the public in the Recreation Easement, and are in excess of Developer's rights.

31. Such a proposal, if accepted by the Town Board as proposed, would violate the Public Trust Doctrine and would constitute an abrogation of the Town's duties and authority, unless, among other things, first approved by the New York State Legislature.

32. The Town has failed to enforce the Association's and the public's rights and has failed to enforce the Town Code and/or penalize Developer for allowing the Auburn Trail/Recreation Easement to be used for non-park purposes, and allowing the misappropriation of same by Developer.

IV. Action to Quiet Title

33. The Developer has taken actions with respect to blocking the Recreation Easement for pedestrian/recreational use, including placing a padlocked gate at the Clover Street entrance and posting a sign indicating that the trail is closed.

34. These, and other actions referred to above, indicate an apparent belief by the Developer that it has a real property right to exclude the rights of the Association members and the public in and to the Recreation Easement.

35. The Association disputes that the Developer has any such real property (or other) rights in the Recreation Easement sufficient to prevent the public from using it, or to use it for vehicular use as Developer has in the past, and as Developer proposes to do upon completion of the Project.

36. The Town has not responded to The Association's November 28, 2017 and other written requests to clarify the Town's position as to the Association's and the public's title/rights in and to the Recreation Easement, and to protect the Association's and the public's rights thereto.

37. Proper identification and delineation of the Parties' respective rights in and to the Recreation Easement is central to one of the Association's primary concerns, is a critical

component of the proposed Project, and must be determined prior to approving or implementing any proposed modification or relocation of the Recreation Easement, and as such the Association seeks judicial declaration pursuant to Real Property Actions and Proceedings Law, Article 15, to determine the respective rights of all the involved parties to the Recreation Easement and to otherwise "quiet title" and resolve these outstanding title issues.

38. A controversy currently exists as to the rights and obligations of the parties hereto with respect to the Auburn Trail/Recreation Easement that must be resolved prior to any further activity relative to the Project.

V. Parkland/Public Trust Doctrine

39. The Auburn Trail as a whole, including but not limited to, the Recreation Easement section of the Auburn Trail which is central to this lawsuit, constitutes "parkland" for purposes of the Public Trust Doctrine, and is held in public trust for the Association members, the residents of the Town of Brighton, users of the Auburn Trail, and the public at large.

40. In New York, parkland is subject to a public trust for the benefit of the public at large. [Handbook on the Alienation and Conversion of Municipal Parkland in New York ("Handbook"), 2012, p. 7.]

41. New York State recognizes that parkland and open space, such as the Auburn Trail at issue, are non-renewable resources that should be carefully preserved in all communities. [Handbook p. 4.]

42. The New York State Office of Parks, Recreation and Historic Preservation encourages a "no net loss of parkland" policy in New York State. [Handbook, p. 4.]

43. Such a determination requires a careful evaluation of the proposed change and the impacts expected from such change. *Id.*

44. Governmental decision-makers, such as the Town herein, must ensure compliance with the legal requirements applicable to proposed changes in parkland, such as the Auburn Trail. *Id.*

45. In order to use parkland for any purpose other than parkland, an act of the New York State Legislature is required. Once land is used for recreational or park purposes, *"it cannot be diverted for uses other than recreation, in whole or in part, temporarily or permanently, even for another public purpose, without [New York State] legislative approval."* United States v. City of New York, 96 F.Supp.2d 195, 202 (E.D.N.Y. 2000) (citing Williams v. Gallatin, 229 N.Y. 248, 253 (1920)).

46. Requests from the Association's attorneys to discuss the Town's compliance with the Public Trust Doctrine have gone unanswered, and neither the Developer nor the Town has indicated any intention to comply with the applicable law (i.e., Public Trust Doctrine). Therefore, the Association seeks a judicial declaration that this is a necessary element for the Project to proceed any further and seeks to enjoin the Project until such time as the necessary legislative approval is obtained.

47. The Town's election to move forward with the Project, despite its awareness that it is acting in contravention of applicable law, is on its face arbitrary and capricious and constitutes an abuse of its discretion, and is not supported by substantial, or indeed any, evidence.

48. The Town has failed to perform a duty enjoined upon it by law by failing to comply with the requirements of the Public Trust Doctrine, nullifying any action taken in contravention thereof.

49. A controversy currently exists as to the rights and obligations of the parties hereto with respect to the Auburn Trail/Recreation Easement and the Public Trust Doctrine that must be resolved prior to any further activity relative to the Project.

VI. Open Meetings Law

50. The Project is located on a New York State Highway, Monroe Avenue, Route 31.

51. The Project requires approvals from the NYSDOT, including a Highway Work Permit for work in the Monroe Avenue right-of-way and for the construction of new permanent driveway installations.

52. The Project also requires approval for the erection of additional traffic signals.

53. These are discretionary approvals, which the NYSDOT has acknowledged, and which require compliance with SEQRA.[3]

54. Traffic safety and congestion has been a critical issue with this Project from the very beginning.

55. As far back as July 18, 2016, the Association's traffic engineers, McFarland Johnson Engineers, identified very serious flaws in the Developer's traffic analysis, and the Association asked that these issues be reviewed, analyzed and considered, as required by SEQRA, and as would be standard for a project of this size and impact. The Town and NYSDOT have never fully responded to many of the critical issues that would normally be examined in a project of this nature. (See July 18, 2016 McFarland Johnson Engineers Traffic Safety Report attached at Exhibit B.)

56. At multiple public hearings and meetings, the Association and the general Brighton community repeatedly expressed grave concerns with the traffic safety and congestion problems that will be caused by this oversized Project, and all times the Town has been extremely well aware of these public concerns and the public's desire to be fully informed about the Project generally, and traffic specifically.

[3] https://www.dot.ny.gov/divisions/operating/oom/transportation-systems/traffic-operations-section/highway-permits/commercial/seqra.

57. NYSDOT has indicated it has concerns with traffic impacts from the Project and has noted that these impacts directly correlate with the size of the project. *See* Exhibit C, letter from NYSDOT dated July 25, 2016.

58. Specifically, NYSDOT noted that "[o]ther mitigation measures should also be considered, including providing alternative access and/or reducing the intensity of the development." See Exhibit C.

59. Despite the fact that NYSDOT has expressed substantial concerns regarding traffic safety and congestion on a State highway, issues that are unquestionably within the NYSDOT's area of expertise and jurisdiction, and has recommended a reduction in the size and scope of the Project, the Town has pressed forward with the Project and indeed, has attempted to frustrate public participation and avoid compliance with applicable law.

60. Recently, New York State Assembly Majority Leader Morelle expressed similar concerns about the size of the Project and its traffic impacts on a State Highway and have urged NYSDOT to review the mitigation of impacts through reduction in the size of the development. (Copy of the November 30, 2017 Morelle letter is attached as Exhibit D).

61. Similarly, New York State Senator Robach (who is also chair of the Transportation Committee) recently expressed his concerns to NYSDOT and the Town, and requested further information and investigation, and by letter dated January 15, 2018 sent NYSDOT, with a copy to the Town, a package of materials that included specific requests for information and requested responses. (Copy of the January 15, 2018 Robach letter is attached as Exhibit E.)

62. The New York state legislature has declared:

§100. Legislative declaration.

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.

New York Public Officers Law § 100 ("Open Meetings Law").

63. In 2012, the State Legislature amended the Open Meetings Law ("***OML***") by adding Public Officers Law ("***POL***") § 103(e). The Legislature added this section to ensure that "those interested in the work of public bodies . . . have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings **prior** to the meetings." *See* N.Y. Comm. on Open Gov. (https://www.dos.ny.gov/coog/RecordsDiscussedatMeetings.html) (emphasis added).

64. POL § 103(e) provides that "if the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records [including proposed resolutions] shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting" (emphasis added).

65. The Town of Brighton maintains one of the most sophisticated municipal websites in the State. The Town's website is "regularly and routinely updated" and the Town utilizes a high speed connection (https://www.townofbrighton.org). The Town is very technologically savvy, and even livestreams its Board meetings on YouTube.

66. The Association has relied on the website, as well as the New York Freedom of Information Law ("***FOIL***"), in an attempt to obtain information on the Project, to stay informed, and to meaningfully participate in the Project review, despite clear attempts by Supervisor Moehle and the Town to thwart proper public participation.

67. The Town did not wait for a response from NYSDOT to such concerns, as well as those expressed by others, including Petitioner-Plaintiff. Instead, Supervisor Moehle and the

Town have thwarted public participation and have undertaken a course of action to expedite approval of the Project.

68. Supervisor Moehle has also been facing increasing community criticism (including from Assembly Majority Leader Morelle and Senator Robach) over his decision to allow this Project to proceed pursuant to a special deal he reached with the Developer under a process known as "Incentive Zoning," rather than require the Project to comply with the otherwise applicable standard zoning process and standard zoning limits.

69. Indeed, a poll of registered Brighton voters by a qualified independent polling agency demonstrated that 78% of Brighton residents were highly critical of Supervisor Moehle's decision to grant the Developer a "special deal" outside of the normal zoning process, which special deal allows the Developer to bypass up to 22 approvals and permits which would, as a practical matter, otherwise prevent this Project from being built in such gross excess of standard zoning size/density limits. (A copy of the poll and its results is attached as Exhibit F.)

70. Not long after the Morelle and Robach letters were sent, and due to the public's increasing awareness of, and education about this "special deal," Supervisor Moehle became more blatant about his approach to limit transparency in this case and indeed has succeeded in very directly frustrating public participation.

71. As applicable law provides, the Association wanted to ensure that if the Project was to be discussed at a Town meeting, or if documents were to be reviewed in furtherance of the Project, that it and the public would have the opportunity to participate fully, with the assistance of counsel, consultants, and engineers, and perhaps persuade the Town Board that critical information was missing and that, *inter alia*, the Project's new Traffic Impact Statement should not yet be "accepted" or deemed "complete."

72. Specifically, the Association's members and its counsel asked the Town, in writing, on multiple occasions, for status updates and advance notice of meeting dates at which the Project or any aspect thereof (i.e. new Traffic Impact Statement/SEQRA/Final Environmental Impact Statement ["FEIS"]) would be considered.

73. For example, on November 14, 2017, the Association's counsel sent an e-mail to the Town Planner Ramsey Boehner asking:

> *". . . what the timeline might be; whether the Developer's information is in and if so when can the public/its consultants review, and will there be reasonable/adequate time provided to do so along with a public hearing on the new information . . . Supervisor Moehle said again and again that no decision has been made, that there would be transparency, that there would be time for more public comment, etc. – but a lot of folks feel this is already a done deal and was finished behind the scenes between Daniele [Developer] and the Supervisor – and that an approval is imminent in first quarter [2018]."*

(A copy of the November 14, 2017 e-mail is attached as Exhibit G.)

74. The Town never responded.

75. Similarly, on November 29, 2017, the Association President wrote to Supervisor Moehle in which he again complained to the Town about transparency and the concern that the Town/Mr. Moehle were frustrating public participation:

> *"Many people believe that a special deal has been worked out behind the scenes to fast-track this development for first quarter approval, as well as avoid full public involvement . . . It is also disturbing that our attorney's e-*

mails to the Town attempting to learn more about the process/dates have gone unanswered."

(A copy of the November 29, 2017 correspondence is attached as Exhibit H (emphasis added).)

76. The Town never responded.

77. Concerned it would get blindsided, the Association's counsel sent another e-mail, on January 9, 2018, stating that:

"There is a lot of concern that the Whole Foods matter will be on a Town Board agenda soon without the public getting adequate notice. Could you or someone else at the Town please provide me some information on the Town's proposed schedule? A previous request for this information on November 14, 2017 has gone unanswered. We want to make sure that the public has adequate notice of when this is going to be on an agenda – instead of just being surprised a day or two before the meeting without adequate time to prepare and meaningfully participate in the process . . . We also understand that an FEIS might have been submitted. Can you please provide an update as to the status of the FEIS and how I can get a copy if one in fact has been submitted."

(A copy of the January 9, 2018 e-mail is attached as Exhibit I.)

78. The Town never responded.

79. During this same time period, the Association's counsel left at least two telephone messages with the Town Planner, Ramsey Boehner, asking for a return call to discuss basic procedural questions about hearing dates and availability of any new information but, uncharacteristically, Mr. Boehner did not return the calls because, upon information and belief, Supervisor Moehle apparently directed him not to do so.

80. Upon information and belief, the Town was, during this time, reviewing the FEIS prepared by/for the Developer, but withheld this and other requested information from the public. The Association's request for a copy of the FEIS likewise received no response.

81. In an attempt to not be blindsided, the Association routinely checked the Town's website, including the days before each of the Town Board's twice monthly meetings. On January 24, 2018, the date of a regularly scheduled meeting, when no agenda was posted by late morning, the Association's counsel became suspicious and sent an e-mail at 11:08 a.m. inquiring whether the Project was on the agenda for that night but, once again, never received a response from the Town. (A copy of the January 24, 2018 e-mail is attached as Exhibit J.)

82. Sometime later, just hours before the Town Board meeting, the Town posted the agenda for that evening's meeting that showed that the Project was in fact scheduled to be addressed.

83. Also posted was a 78 page Traffic Impact Statement, which contained significant amounts of new technical data, as part of the larger 511 page FEIS. A review of the late-filed Traffic Impact Statement reveals that a number of significant and critical traffic issues remains unanswered by NYSDOT and the Town. Despite this, the new Traffic Impact Statement was accepted by the Town as complete that same day.

84. Upon information and belief, the Town received the Traffic Impact Statement (and any other new FEIS materials) from the Developer well before January 24, 2018 and indeed, the Developer and its engineers made a presentation as to the Town Board at the January 24, 2018 meeting.

85. The Town also posted a resolution it proposed to adopt that evening to accept the FEIS, including the Traffic Impact Statement as complete.

86. When the Association learned that despite all of its efforts to obtain notice from the Town, Supervisor Moehle nevertheless planned to blindside the public at the January 24, 2018 meeting, and in a last ditch effort to obtain meaningful public participation, the Association president immediately sent an e-mail to Supervisor Moehle at 5:08 p.m. (two hours before the meeting) and again requested that the Board:

> *". . . not approve the FDEIS and instead give us 30 days to review the [new materials] and provide comments . . . If you are serious about incorporating the feedback of residents, you will go this route."*

(A copy of the January 24, 2018 e-mail is attached as Exhibit K.)

87. Supervisor Moehle never responded.

88. The Project was addressed by the Town at its January 24, 2018 meeting despite the fact that NYSDOT had not yet (and still has not) responded to Senator Robach's January 15, 2018 request for additional information.

89. At its January 24, 2018 the Town Board, without providing adequate advance notice to the public in violation of the OML and further in violation of its obligations under SEQRA, accepted the Final EIS for the Project despite the lack of requisite review by NYSDOT and adequate traffic analysis.

90. These traffic issues are critical to ensuring proper traffic safety and congestion levels for the immediate neighborhood and the greater community, and cannot be reversed if the Project proceeds to construction without this review, analysis and consideration.

91. This last minute blindsiding meant to preclude public participation was successful, and the Association could not notify and assemble its members on such short notice; nor could counsel nor the Association's traffic engineer adequately review the new FEIS materials and provide comment, which might have led to a different vote that night.

92. The Developer, however, obviously had sufficient notice, as it appeared at the meeting with engineers, professionally prepared exhibits, and made a significant and lengthy presentation, a presentation the public was effectively prevented from observing and commenting on at the meeting and before the Town Board vote.

93. The Board then summarily and unanimously voted to accept the Traffic Impact Statement and the FEIS, over the Association's counsel's objections and his reasonable request for two weeks' time to review the lengthy new submission, and possibly provide arguments as to why additional traffic information was critical and the Town Board should not yet vote. [4]

94. Despite the Association's proactive efforts to guard against being blindsided by Mr. Moehle at the last minute, the Supervisor placed the Project on the agenda just hours before the January 24, 2018 meeting and afforded the public absolutely no meaningful notice, despite repeated written requests from the Association and its counsel for ten weeks leading up to that meeting.

95. The FEIS, a 511-page document in total, including the highly technical 78 page Traffic Impact Statement Supplement, was posted to the Town's website only hours before the January 24, 2018 meeting, along with a proposed resolution adopting same for the Town Board's consideration at the January 24 meeting.

96. Placing this significant material on the Town's website only hours before the Town's consideration of the FEIS and the proposed resolution, as well as ignoring the public's multiple requests for reasonable notice, violated POL § 103(e).

97. The Town was keenly aware of the Association's and the public's significant interest in the Project and its repeated written demands for prior notice of the meeting, and a

[4] Any claim addressed to the SEQRA process is not yet ripe, as that process is not yet complete.

reasonable opportunity to review any new traffic information prior to any Town Board votes/actions.

98. The Town was aware that the Association had retained counsel, consultants, and engineers and wanted these professionals to have adequate time to review new informationand provide meaningful comment to the Town Board before it took action on any item related to this Project.

99. As such, the Town violated both the spirit and letter of the OML.

100. The Town's actions outlined above were taken to deliberately stifle public input and the Association's ability to meaningfully participate in the January 24, 2018 meeting.

101. POL § 107(1) confers standing upon any aggrieved person to enforce the OML against a public body by commencing an Article 78 proceeding or an action for a declaratory judgment and injunction.

102. Under POL § 107(1), the Court has the power "to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part . . ."

103. The Court also has the power to "require members of the public body to participate in a training session concerning the obligations imposed by [the OML] . . ." POL § 107(1).

104. Moreover, "costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party." POL § 107(2).

105. The Town has failed to perform a duty enjoined upon it by law by failing to comply with the requirements of the Open Meetings Law, nullifying any action taken in contravention thereof.

106. The Town's acts and/or omissions were in contravention of applicable law, and are arbitrary and capricious and constitute an abuse of discretion, and are not supported by substantial, or indeed any, evidence.

107. Due to the conduct of the Town's and Supervisor Moehle's deliberate actions to place the Project on the agenda just a few hours before the scheduled meeting and to withhold access to documents that would otherwise be provided well in advance of such a meeting, the Court should (1) invalidate the actions taken at the January 24, 2018 meeting concerning the Project; (2) order the Town Board to participate in training regarding the OML; (3) award the Association costs and attorneys' fees for bringing this action; and (4) enjoin the Town from placing matters concerning the Project on the agenda without affording the Association adequate written notice of such action and without providing the Association the documents to be considered at least two weeks in advance.

VII. Irreparable Injury, Public Interest And Balance Of Hardships

108. As a result of the foregoing, Petitioner-Plaintiff has been, and will continue to be, damaged and irreparably harmed absent the relief requested herein. The harm caused by the Respondents-Defendants' unlawful actions includes, but is not limited to:

(i) a prohibition on the Association's and the public's ability to access and enjoy the Recreation Easement as and where located;

(ii) a deprivation of the Association's and the public's legal right to attempt to keep the Recreation Easement where it is currently located, at the boundary line between the commercial/residential districts, and thereby prevent the Project from encroaching into the residential zone;

(iii) violation of the Public Trust Doctrine;

(iv) prohibition of meaningful public participation due to lack of adequate notice before Town Board hearings on this matter;

(v) prohibition of meaningful public participation due to lack of adequate public access to materials to be considered/discussed by the Town Board at Town Board hearings on this matter;

(vi) effectively prohibiting the public – due to anticipated further inadequate lack of advance notice of the Town's actions on this Project (specifically, any action to convey the trail to the Developer) – from exercising its rights under New York Town Law to subject to a permissive referendum the Town Board's decision to convey municipal property (the Recreation Easement) to a private developer;

(vii) frustrating the public's right to build a proper legal record on which a potential legal action may be based to challenge the "special deal" Supervisor Moehle is granting to the Developer under Incentive Zoning, when that action becomes ripe;

(viii) harm resulting from critical adverse traffic safety and traffic congestion impacts post-approval/construction because NYSDOT and the Town refused to review, analyze and otherwise address the reasonable and typical traffic safety issues raised by the Association, public at large, McFarland Johnson, Assembly Majority Leader Morelle, Senator Robach (Chair of Senate Transportation Committee), which impacts will not be able to be remedied post-construction.

109. The harm that Petitioner-Plaintiff and the public have suffered and will continue to suffer is not reasonably susceptible to accurate calculation, and cannot be fully and adequately addressed through an award of damages.

110. Moreover, the public interest in preserving parkland and holding the Town/Town Board to comply with the applicable law will continue to be irreparably harmed by Respondents'-Defendants' unlawful actions.

111. Land is a unique resource, especially where, as here, the Recreation Easement forms the border between the commercial district and the Association's residential district, and is a critical link in the greater Auburn Trail. If the Developer is permitted to move forward before title is quieted, and before the actual and specific rights of the parties are determined, Petitioner-Plaintiff and the public will be irreparably harmed.

112. In contrast to the immediate and irreparable injury being suffered by Petitioner-Plaintiff, and the public interest, the Developer and the Municipal Respondents-Defendants will suffer no significant injury if the Court compels them to comply with the applicable law and proceed in accordance with established rules and requirements, including requiring reasonable notice of the Board's actions instead of continued attempts to hide its action and preclude meaningful public participation. A party should not be rewarded for its failure to comply with the law by claiming harm for having to do so.

FIRST CAUSE OF ACTION – QUIET TITLE

113. Petitioner-Plaintiff repeats and realleges Paragraphs 1 through 112 above as if fully set forth herein.

114. Pursuant to New York Real Property Actions and Proceedings Law Article 15, a Judgment accurately settling and determining where the Recreation Easement is located, who has rights to use it and in what manner, and the breadth and limits of those rights, and to otherwise define, enumerate and settle the respective rights of affected parties in and to the Recreation Easement.

115. To the best of Petitioner-Plaintiff's knowledge, the Respondents-Defendants are known, and are not infants, under mental impairment or otherwise incompetent.

116. No judgment granted herein will or may affect a person or persons not in being or ascertained at the commencement of this action, and all persons or entities that would be entitled to an estate or interest in the Recreation Easement/affected portion of the Auburn Trail are named as a party hereto.

117. No personal claim is made against any party other than Respondents-Defendants who claim an estate adverse to Petitioner-Plaintiff.

118. Accordingly, Respondents-Defendants should be barred from all claim to an estate or interest in the Recreation Easement adverse to Petitioner-Plaintiff and the public as enumerated in the Recreation Easement, and possession should be awarded to Petitioner-Plaintiff and the public.

SECOND CAUSE OF ACTION – PUBLIC TRUST DOCTRINE

119. Petitioner-Plaintiff repeats and realleges Paragraphs 1 through 118 above as if fully set forth herein.

120. Petitioner-Plaintiff is entitled to a Declaratory Judgment that the Recreation Easement is subject to the requirements of the Public Trust Doctrine and that the Town cannot convey the Recreation Easement to the Developer unless and until it obtains consent from the New York State Legislature, as required by applicable law.

121. Any action by the Town/Town Board to convey the Auburn Trail/Recreation Easement to Respondents-Defendants or others must be approved by an act of the New York State legislature, and is further subject to the public's right to petition for a permissive referendum, neither of which has occurred.

122. Accordingly, the action of the Town in progressing the Project absent compliance with the Public Trust Doctrine is in contravention of applicable law, is arbitrary and capricious and constitutes an abuse of discretion, and further constitutes a failure to perform duties enjoined upon it by law, nullifying any action taken in contravention thereof.

123. Based on the foregoing, and due to the past, present and future (anticipated) alienation of public parkland in violation of the Doctrine of Public Trust, Petitioner-Plaintiff is entitled to a judgment enjoining Respondents-Defendants from infringing upon, alienating, altering or modifying the Recreation Easement/Auburn Trail; enjoining Respondent-Defendant Town from issuing any final approvals or building permits allowing the same unless/until the Developer has obtained New York State Legislative approval in compliance with New York's Public Trust Doctrine; declaring any determination to date regarding the Project null and void as a matter of law; directing the Town to re-open and properly process the matter in accordance with all applicable law and issue a decision consistent with applicable law, in writing and supported by substantial evidence.

THIRD CAUSE OF ACTION – VIOLATION OF OPEN MEETINGS LAW

124. Petitioner-Plaintiff repeats and realleges Paragraphs 1 through 123 above as if fully set forth herein.

125. As set forth above, Respondent-Defendant Town/Town Board violated the OML by failing to post the new Traffic Impact Statement, other new information, the proposed resolution, and the date of the hearing on the Town's website sufficiently and meaningfully in advance of its meeting on January 24, 2018, as was fully practicable.

126. Such violation was willful, and when brought to the attention of the Town Board, it was summarily dismissed outright by the Town Board.

127. Accordingly, the action of the Town in progressing the Project absent compliance with the Open Meetings Law is in contravention of applicable law, is arbitrary and capricious and constitutes an abuse of discretion, and further constitutes a failure to perform duties enjoined upon it by law, nullifying any action taken in contravention thereof.

128. By reason of the foregoing, Petitioner-Plaintiff is entitled to a judgment: (1) invalidating the actions taken at the January 24, 2018 meeting concerning the Project, including the resolution accepting the FEIS; (2) ordering the Town Board to participate in training regarding the OML to ensure that these deliberate abuses do not occur in the future; (3) awarding the Association costs and attorneys' fees for bringing this cause of action; and (4) enjoining the Town from placing matters concerning the Project on the agenda without affording the Association proper and adequate written notice of such action and providing the Association with the relevant documents at least two weeks in advance; (5) declaring any determination to date regarding the Project null and void as a matter of law; (6) directing the Town to re-open and properly process the matter in accordance with all applicable law and issue a decision consistent with applicable law, in writing and supported by substantial evidence.

FOURTH CAUSE OF ACTION – EQUITABLE ESTOPPEL

129. Petitioner-Plaintiff repeats and realleges Paragraphs 1 through 129 above as if fully set forth herein.

130. Based on the foregoing and because Respondents-Defendants have had notice of Petitioner-Plaintiff's and the public's estate in the Recreation Easement/Auburn Trail for approximately 20 years, Respondents-Defendants should be equitably estopped, restrained and enjoined from any efforts to deny Petitioner-Plaintiff and the public their estate in the Recreation Easement/Auburn Trail and from asserting, alleging, relying on or enforcing any claim, right,

title or interest that would serve to deny Petitioner-Plaintiff and the public their estate in the Recreation Easement/Auburn Trail.

WHEREFORE, Petitioner-Plaintiff demands judgment against Respondents-Defendants as follows:

a) On its First Cause of Action ordering, directing and enjoining Respondents-Defendants, their agents and representative from undertaking any actions that would move the Project forward and from issuing any final approvals or building permits until such time as there is a determination accurately settling and determining where the Recreation Easement is located, who has rights to use it and in what manner, and the breadth and limits of those rights, and to otherwise define, enumerate and settle the respective rights of affected parties in and to the Recreation Easement/Auburn Trail;

b) On its Second Cause of Action, ordering, directing and enjoining the Town from (1) infringing upon, alienating, altering or modifying the Recreation Easement/Auburn Trail and from issuing any final approvals or building permits allowing the same unless/until the Developer has obtained New York State Legislative approval in compliance with New York's Public Trust Doctrine; and (2) directing the Town to provide Petitioner-Plaintiff and the public meaningful and sufficiently adequate public notice of any resolution to convey the Recreation Easement to Developer so that the Association has the opportunity to petition for a permissive referendum under New York Town Law § 90 et seq; (3) declaring that the acts and/or omissions of the Respondents/Defendants are arbitrary and capricious and constitute an abuse of discretion, and further constitute a failure to perform duties enjoined upon them by law, nullifying any action taken in contravention thereof.

c) On its Third Cause of Action, an order and judgment: (1) invalidating the actions taken at the January 24, 2018 meeting concerning the Project, including the resolution accepting

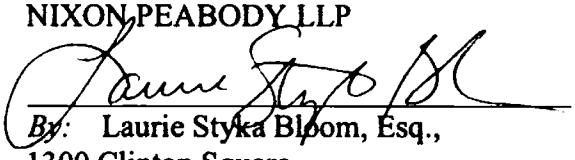
the FEIS and deeming the new Traffic Impact Statement as complete; (2) ordering the Town Board to participate in training regarding the OML to ensure that these deliberate abuses do not occur in the future; (3) awarding the Association costs and attorneys' fees for bringing this action; and (4) enjoining the Town from placing matters concerning the Project on the agenda for any meeting without affording the Association proper and adequate written notice of such action and providing the Association with the relevant documents at least two weeks in advance; (5) declaring that the acts and/or omissions of the Respondents/Defendants are arbitrary and capricious and constitute an abuse of discretion, and further constitute a failure to perform duties enjoined upon them by law, nullifying any action taken in contravention thereof.

d) On its Fourth Cause of Action, that, Respondents-Defendants be equitably estopped, restrained and enjoined from any efforts to deny Petitioner-Plaintiff and the public their estate in the Recreation Easement/Auburn Trail and from asserting, alleging, relying on or enforcing any claim, right, title or interest that would serve to deny Petitioner-Plaintiff and the public their estate in the Recreation Easement/Auburn Trail.

e) Such other and further relief as the Court deems just and proper.

Dated: Rochester, New York
February 15, 2018

NIXON PEABODY LLP



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ATTORNEYS FOR PETITIONER-PLAINTIFF CLOVER/ALLENS CREEK NEIGHBORHOOD ASSOCIATION LLC

CORPORATE VERIFICATION

Benjamin M. Werzinger, being duly sworn, says: I am the President of Petitioner-Plaintiff Clover/Allens Creek Neighborhood Association LLC in the action herein; I have read the annexed Petition/Complaint and know the contents thereof, and the same are true to my knowledge, except those matters which are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Benjamin M. Werzinger

STATE OF NEW YORK)
COUNTY OF Monroe) SS:

On the 15 day of February, 2018, before me, the undersigned, personally appeared Benjamin Werzinger, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose mane is subscribed to the within instrument and he acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, executed the instrument.

Notary Public

MELISSA K. VIMISLIK
Notary Public, State of New York
Registration #: 01VI4949929
Qualified in Monroe County
Certificate Filed in Monroe County
Commission Expires: 04/17/20[illegible]

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