

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

In the Matter of the Application of

ELISABETH FEDYNA and WILLIAM FEDYNA,

Petitioners,

For a Judgment and Order pursuant to Article 78 of the CPLR,

-against-

THE HARBOR & COASTAL ZONE MANAGEMENT  
COMMISSION OF THE VILLAGE OF MAMARONECK and  
THE VILLAGE OF MAMARONECK,

Respondents.

**NOTICE OF PETITION**

Index No. \_\_\_\_\_

**S I R S:**

**PLEASE TAKE NOTICE** that upon the annexed Verified Petition of Petitioners ELISABETH FEDYNA and WILLIAM FEDYNA (“Petitioners”), duly verified on the 19th day of August, 2021, and the exhibits annexed thereto, and upon all of the pleadings and proceedings heretofore had herein, Petitioners will respectfully move this Court at an IAS Part of the Supreme Court of the State of New York, County of Westchester, at the Westchester County Courthouse, located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, on the 8th day of October, 2021, at 9:30 A.M. in the forenoon of that day or as soon thereafter as counsel for the respective parties may be heard, for an Order and Judgment pursuant to Article 78 of the CPLR of the State of New York, as follows:

1. Reversing, vacating, setting aside and/or annulling the arbitrary, capricious and legally erroneous determination (the “Consistency Review Determination”) of Respondents Harbor & Coastal Zone Management Commission of the Village of Mamaroneck and The Village of Mamaroneck (“Respondents”), which, by Resolution dated July 21, 2021, determined that the

application (the “Application”) of Petitioners to replace an uninhabitable single-family home with a zoning-compliant new single-family home and related on-site wastewater treatment system (“Project”) on property located at 1165 Greacen Point Road in the Village of Mamaroneck New York (“Property”), is “inconsistent” with the policies set forth in the Village of Mamaroneck’s Local Waterfront Revitalization Program (“LWRP”) and will substantially hinder the achievement of certain of said policies;

2. Finding that the Project is consistent with the LWRP and its policies and does not hinder achievement of same, such that Petitioners shall be entitled to proceed before the Planning Board of the Village of Mamaroneck for continued review of site plan and wetlands permit; and

3. Granting to Petitioners such other, further and different relief as to the Court may seem just and proper, including but not limited to Petitioners’ legal fees, costs and disbursements incurred herein.

**PLEASE TAKE FURTHER NOTICE** that pursuant to CPLR 7804(c) demand is hereby made that all submissions in opposition to the within Notice of Petition and Verified Petition must be served so as to be received by the undersigned attorneys for Petitioners, at least five (5) days prior to the return date stated hereinabove of this Article 78 Proceeding.

Dated: White Plains, New York  
August 19, 2021

**CUDDY & FEDER LLP**  
Attorneys for Petitioners

By: /s/ Joshua E. Kimerling  
Joshua E. Kimerling  
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(914) 761-1300

**Respondents' Address for Service of Process:**

Harbor & Coastal Zone Management Commission of the Village of Mamaroneck  
169 Mount Pleasant Avenue  
Mamaroneck, NY 10543

The Village of Mamaroneck  
123 Mamaroneck Avenue  
Mamaroneck, NY 10543



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**VERIFIED ARTICLE  
78 PETITION**

Index No. \_\_\_\_\_

Petitioners, ELISABETH FEDYNA and WILLIAM FEDYNA (“Petitioners”), by their attorneys, Cuddy & Feder LLP, as and for their Verified Petition against Respondents THE HARBOR & COASTAL ZONE MANAGEMENT COMMISSION OF THE VILLAGE OF MAMARONECK (the “HCZMC” or the “Commission”) and THE VILLAGE OF MAMARONECK (together with the HCZMC, collectively “Respondent”), respectfully allege as follows:

**PARTIES**

1. Petitioners are the owners of property located at 1165 Greacen Point Road, Village of Mamaroneck, County of Westchester, and State of New York, Parcel I.D. #9-65-75 (the “Property”).



2. Upon information and belief, the Commission is a duly constituted body created and vested with statutory powers granted by Chapter 240 (the "Management of Coastal Zone, Harbor and Vessels") of the Village of Mamaroneck Code (the "Village Code").

3. Upon information and belief, pursuant to Section 240-29 of the Village Code, the Commission is delegated with the authority to review and determine whether certain "actions," as defined thereunder, are "consistent, to the maximum extent practicable, with the policies of the Village of Mamaroneck Local Waterfront Revitalization Program" (the "LWRP"). Alternatively, Section 240-29 of the Village Code permits the Commission to determine that although a certain "action" will substantially hinder the achievement of a policy, the action is still consistent, to the maximum extent practicable, with the policies and purposes of the LWRP in the event that no feasible alternatives exist that would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy, the action will minimize all adverse effects on such policies to the maximum extent practicable, the action will advance one or more of the other coastal policies and the action will result in an overriding public benefit.

4. Upon information and belief, the Village of Mamaroneck is a municipal corporation formed and existing under the laws of the State of New York.

### **FACTUAL BACKGROUND**

#### **The Property and existing improvements**

5. The Property consists of approximately 1.09 acres and is located in the AE Tidal Flood Zone, with a Base Flood Elevation of 13.0 NAVD within the Village of Mamaroneck (the "Village"). **Exhibit 1.**

6. The Property is currently improved with an uninhabitable single-family home and a garage.

7. The Property is located on a private road and is not served by any public sewer.
8. The Property is not served by any existing private sewer line.
9. The Property has no legal right to connect to any private sewer line.
10. As such, the Property currently has an on-site wastewater treatment system (“OSWTS”) (i.e., septic system).
11. Upon information and belief, the Property has never had any connection to any public or private sewer and thus has for decades utilized an OSWTS for purposes of treating wastewater produced from the single-family home on the Property.
12. The OSWTS on the Property is in failing condition and must be replaced.
13. All existing improvements on the Property are located partially within the wetland buffer.

### The Project

14. Petitioners have sought approval for the replacement of the existing single-family home with a new single-family home modest in size, with a footprint of just 2,637 square feet (the “Application” or “Project”).
15. The proposed new home on the Property contains less square footage than any of the surrounding homes in the neighborhood, some as large as over 10,000 square feet.
16. The proposed new home on the Property is set back a greater distance from the highwater mark as compared to the surrounding homes and will have a smaller driveway than other homes in the neighborhood.
17. The proposed new home and garage on the Property are designed to be set back further from the wetland than the existing home.



18. The Building Department of the Village of Mamaroneck determined on November 17, 2020, that the Application is fully compliant with the Village Zoning Ordinance with respect to permitted use, lot area, lot frontage, building coverage, floor area ratio, height of building, building setbacks, off street parking, parking setbacks and flood elevations. **Exhibit 2.**

19. The proposed new home and improvements on the Property will cause no increase in impervious surface within the wetland or wetland buffer area from existing conditions.

20. The proposed improvements to the Property include a wetland and wetland buffer landscaping plan which will stabilize the shoreline and provide habitat for a variety of crustaceans, shore birds, insects and small mammals, and as such, will significantly improve the functional values of the wetlands by restoring portions of the high marsh and salt meadow that are currently maintained merely as lawn.

21. The proposed new home on the Property is designed to meet the Village of Mamaroneck Flood Damage Prevention Code (the "Flood Code") and Federal Emergency Management Agency ("FEMA") residential construction standards for a residential building within the AE Flood Zone, whereas the existing uninhabitable home does not do so.

22. The Project proposes that the failing OSWTS on the Property be replaced by a new OSWTS that fully conforms with the Westchester County Department of Health ("DOH") standards.

23. In fact, the proposed replacement OSWTS designed for the Property was approved by the DOH's Bureau of Environmental Quality (the "DOH Approval") on May 25, 2021, and Respondent was notified of the DOH's approval on June 3, 2021. **Exhibit 3.**



24. The siting, design and installation of on-site wastewater treatment systems is within the jurisdictional authority of the DOH pursuant to Sections 347 and 308 of the New York State Public Health Law and Section 873.720 of the Westchester County Sanitary Code.

25. Section 873.729 of the Westchester County Sanitary Code provides as follows:

Where a public sanitary sewer is not available and accessible, every habitable building hereafter constructed shall be properly plumbed and the building sewer shall be connected to an onsite wastewater treatment system complying with the provisions of this code, and no other means for the disposal of domestic sewage shall be employed.

26. Upon information and belief, on-site wastewater treatment systems/septic systems are prevalent throughout the area surrounding the Property. Exhibit 4.

#### The LWRP and the Commission's Review for Consistency

27. Petitioners' Application was submitted on April 30, 2020 to the Village of Mamaroneck Planning Board (the "Planning Board") for site plan review and wetlands permit review by the Planning Board.

28. Pursuant to Section 240-29 of the Village Code, the Commission is delegated with the authority to render a "consistency determination" with respect to various "actions," such as the Planning Board site plan and wetlands review, as follows:

Prior to an action or approval of an action by an agency of the Village, such action shall be determined to be consistent, to the maximum extent practicable, with the policies of the Village of Mamaroneck Local Waterfront Revitalization Program...["LWRP"]

Alternatively, Section 240-29 of the Village Code permits the Commission to determine that although a certain "action" will substantially hinder the achievement of a policy, the action is still consistent, to the maximum extent practicable, with the policies and purposes of the LWRP in the event that no feasible alternatives exist that would permit the action to be taken in a manner which would not

substantially hinder the achievement of such policy, the action will minimize all adverse effects on such policies to the maximum extent practicable, the action will advance one or more of the other coastal policies and the action will result in an overriding public benefit.

29. The LWRP sets forth various “policies” that are to be considered to determine consistency, including but not limited to, Policy Nos. 7, 11, 12, 18, 37, 38, and 44, as discussed further below.

30. Section 240-29D of the Village Code provides that the Commission “shall determine the consistency of the action,” as follows:

- (1) Whether the proposed action is consistent, to the maximum extent practicable, with the policies of the LWRP and, if so, whether it will advance one or more of said policies.
- (2) Whether the proposed action will substantially hinder the achievement of any policy of the LWRP or is otherwise not consistent with one or more of the policies of the LWRP.
- (3) If the question posed in Subsection D(2) is answered in the affirmative, the manner in which and the extent to which the hinderance or inconsistency is likely to result shall be specified.
- (4) If the question posed in Subsection D(2) is answered in the affirmative, the HCZMC shall state whether and how the requirements in § 240-29F are met.....

31. Section 240-29F of the Village Code provides that:

If the action will substantially hinder the achievement of any policy, the consistency determination may find that the following four requirements are satisfied and that as a result the action is consistent, to the maximum extent practicable, with the policies and purposes of the LWRP:

- 1) No feasible alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy.



- 2) The action taken will minimize all adverse effects on such policies to the maximum extent practicable.
- 3) The action will advance one or more of the other coastal policies.
- 4) The action will result in an overriding public benefit.

32. The Planning Board referred the Application to the Commission for its review of whether the Application is consistent, to the maximum extent practicable, with the LWRP Policies.

33. On April 30, 2020, Petitioners submitted an application to the Commission requesting that the Commission review the Project to determine the Project's consistency with the LWRP, pursuant to Village Code Section 240-29.

#### **The proceedings before the Commission**

34. Over the course of the next 15 months from April 2020 through July 2021, Petitioners and their consultants submitted extensive materials, detailed memoranda, expert reports and analyses, and thorough studies demonstrating that the Project was consistent, to the maximum extent practicable, with the LWRP Policies and would not substantially hinder the achievement of the Policies.

35. The submissions filed on behalf of Petitioners included, *inter alia*, the following:

- a. April 30, 2020 covering letter together with multiple submissions therewith; **Exhibit 5**;
- b. July 1, 2020 covering letter together with multiple submissions therewith; **Exhibit 6**;
- c. September 2, 2020 covering letter together with multiple submissions therewith; **Exhibit 7**;



- d. November 4, 2020 covering letter together with multiple submissions therewith;  
**Exhibit 8**;
  - e. December 30, 2020 covering letter together with multiple submission therewith;  
**Exhibit 9**;
  - f. February 24, 2021 covering letter responding to a February 9, 2021 memorandum prepared by Commission consultant Maser Consulting (the “Maser Memo”) **Exhibit 10**, together with multiple submissions therewith;
  - g. April 28, 2021 covering letter together with minor revisions of the site plan reflecting amendments made in response to the Village Engineering Consultant’s November 16, 2020 comment memorandum **Exhibit 11**;
  - h. June 3, 2021 covering letter enclosing DOH approval for the OSWTS proposed for the Property (**Exhibit 3**, *supra.*); and
  - i. July 1, 2021 memorandum responding to comments from the Commission at the June 16, 2021 public hearing **Exhibit 12**.
36. The Application was presented to the Commission at more than a dozen meetings and hearings.
37. Throughout 15 months of proceedings, the Commission discussed numerous LWRP Policies and Petitioners provided prompt and comprehensive responses to comments and concerns regarding each LWRP policy the Commission raised.
38. Never did the Commission indicate or suggest that it believed that the Project could be considered categorically inconsistent with LWRP policies related to the location of the proposed home, coastal habitat, economic, social and environmental interests, nonpoint discharges of excess

nutrients and organics, the quality of surface water and groundwater and the preservation and protection of wetlands.

39. At the close of the June 16, 2021 public hearing (the last public hearing before the Commission rendered a decision), the Commission advised Petitioners that Policy 11, which related to property damage and endangerment of human life due to flooding, was the only remaining Policy that the Commission had concerns about.

40. Throughout the review process, the Commission held monthly work sessions prior to each public hearing, which the Petitioners attended. The purpose of the work sessions was to review the status of pending applications and materials submitted, and to communicate to applicants whether additional information was needed for the Commission to make a consistency determination. Applicants are then able to address this feedback at the monthly public hearing.

41. The Commission canceled its scheduled July 13, 2021 work session before the July 21, 2021 public meeting.

42. Notwithstanding that the Property is on a private road and not served by public sewer and is not benefited by any legal right to unilaterally connect to any existing private sewer line or install a new private sewer line, the Commission required Petitioners to consider the purported 'alternative' of bringing a public or private sewer line to the Property in lieu of the fully compliant (and ultimately approved) OSWTS proposed to replace the existing failing OSWTS.

43. The Commission required Petitioners to consider the purported 'alternative' of bringing a private sewer line to the Property in lieu of the fully compliant (and ultimately approved) OSTWS, despite that Section 873.729 of the Westchester County Sanitary Code provides that where a public sewer is not available, a habitable building must be connected to an OSWTS.



44. The Commission did so despite that several properties in the immediate vicinity of the Property have existing OSWTS (rather than connections to private or public sewer lines), the Property itself has such a system (albeit in need of replacement), and the proposed OSWTS is fully compliant with all applicable regulations.

45. In the submissions to the Commission on December 30, 2020 (Exhibit 9, *supra*.), Petitioners detailed their years-long exhaustive consideration and investigation of sewer connection ‘alternatives’. The submissions were supported by detailed analysis and study by Petitioners’ planning consultants, itemized timelines of what would likely be faced in engaging in a further pursuit of public or private sewer connections, and relevant instruments regarding easement rights and prior correspondence with the Village regarding efforts regarding public and private sewer for the Property.

46. Without limitation, the evidence submitted on behalf of Petitioners demonstrated the following with respect to public or private sewer for the Property:

#### **Public Sewer**

- a. Before proposing replacement of the existing septic system, Petitioners spent nearly 2 years evaluating the feasibility of installing a sanitary sewer line and organizing neighborhood interest to install a public sewer, without success;
- b. There are 11 privately-owned sewer lines below the private Greacen Point Road (the “Road”). If a public sewer line is installed, all 11 private sewer lines would need to be abandoned and the properties served by said lines would need to connect to the public sewer line (*see* Village of Mamaroneck Sewer Code (“Sewer Code”) Section 282-1 (“Every owner of property abutting on any street or avenue containing a sanitary sewer shall connect all plumbing in said premises to said sanitary sewer.”));



- Westchester County Health Code Section 873.727 (similar requirements). These Village and County Code provisions require all property owners on the Road to connect to a public sewer line, if one becomes available. As such, if Petitioners are required to install a public sewer line, the Village would be tasked with attempting to coordinate with each individual property owner on the Road served by a private line or a septic system to abandon its private property and connect to the new sewer;
- c. The portion of the Road adjacent to the Property is privately owned by the Greacen Point Road Corporation (“GPRC” or the “Corporation”) and is not a public road. In order for Petitioners to install a sewer line, the GPRC must grant approval for the work and ultimately provide the Village with an easement for maintenance and repairs. The ability to install a sewer line is thus not Petitioners’ decision to make, is not within their control and would require the cooperation of third-party GPRC;
  - d. Petitioners presented during a GPRC meeting about the possibility of pursuing a public sanitary line, but based on feedback received at that meeting, as well as other discussions with GPRC members, the idea of a public sewer line was not agreed to;
  - e. Petitioners and their consultants contacted the Village Manager and affiliated Village Staff members on several occasions to inquire about the Village’s interest in constructing a public sewer line on the Road and to date, no member of Village Staff has responded to these repeated inquiries;
  - f. Pursuant to the DOH Sanitary Code and Chapter 30 of the 10 State Standards for Wastewater Facilities, the Village would be responsible for maintenance and operation of the public sewer after accepting dedication of the line, something which no Village official has expressed an interest in; and

- g. The speculative process of exploring, without any guaranty or likelihood, obtaining rights to a public sewer line would likely last upwards of three years even before beginning construction, necessitate the involvement of numerous interested parties over whom Petitioners have no control, and force Petitioners to retain numerous consultants and contractors and incur excessive costs.

#### Private Sewer

- h. There are 11 private sewer lines currently underneath the private Road, along with public utilities such as water, stormwater and gas lines. The 11 sewer lines are privately-owned and therefore Petitioners do not have the legal right to connect to this existing infrastructure;
- i. Petitioners previously sought approval from the Village Engineer, Village Manager, and Department of Public Works on February 11, 2019 to connect to an existing private sewer line, but on February 20, 2019, were rejected and advised by the Village Engineer in written correspondence that

[T]he only proper method of connection would be to connect . . . to a publicly owned collection system.

Therefore, any assertion by the Commission that connecting to an existing private sewer line or installing a new sewer line, is a feasible alternative to installing an OSWTS, is contrary to the February 20, 2019 determination by the Village Engineer that such an action is impermissible (**Exhibit 9**, *supra*);

- j. Petitioners had numerous discussions with GPRC officers and members about the possibility of pursuing the installation of an additional private sanitary line, but based



on feedback received during those discussions, the idea of installing an additional private sewer line was not agreed to;

- k. Obtaining a legal right to install a private sewer line underneath the Road presents potentially significant environmental and safety concerns and is not a practical alternative to the replacement of the existing failing OSWTS; given the 11 private sewer lines as well as existing water, stormwater and gas lines, there is limited space underneath the road and installation of a new private line (assuming a legal right existed) would limit the amount of space available to public utilities, drainage infrastructure or other future installations; a multitude of private sewer lines in close proximity to utility lines increases the risk of accidental damage resulting in a sewer leak that could threaten natural resources in adjacent Long Island Sound and nearby Critical Environmental Areas; and
- l. The speculative process of exploring, without any guaranty or likelihood, obtaining rights to a private sewer line would last upwards of two years even before beginning construction, necessitate the involvement of numerous interested parties over whom Petitioners have no control, and force Petitioners to retain numerous consultants and contractors and incur excessive costs.

47. The evidence before the Commission demonstrated that Petitioners have no legal right to any public or private sewer line and, even if an unrealistic pursuit of such rights were engaged in, the notion of connecting to public or private sewer would (i) be uncertain at best (having previously been either outright rejected and/or opposed by the interested parties who would have to be involved), (ii) require years of investment, and (iii) be exceedingly complex and onerous and



exorbitant as to cost. There would also be no material benefit in terms of the LWRP Policies as compared to the Property having an OSWTS as approved by the DOH.

48. In the face of this evidence, the Commission obtained the Maser Memo, which was premised upon the unsupported conclusion that connection to a private sewer line is the *only* satisfactory option for consistency with the LWRP, and without which the Project would not be consistent with the LWRP. **Exhibit 13.**

49. The Maser Memo, rather than provide a technical evaluation of the Application and its consistency with the LWRP, was comprised of conclusory statements and founded upon an arbitrary and capricious opinion that the only acceptable option for the new home on the Property was a sewer line (rather than replacing the existing OSWTS with a fully compliant new OSWTS), despite the fact that there is no viable option for a public or private sewer line for the Property. By extension, the Maser Memo recommended an outright prohibition on any proposed OSWTS, or repair of an existing OSWTS, within the Village of Mamaroneck and the entire state of New York, for that matter. **Exhibit 13.**

50. The entire premise of the Maser Memo was a singular preference for the Property to be connected to a private sewer line to which Petitioners have no right, despite that the Maser Memo never once credibly challenged the exhaustive unsuccessful and futile efforts engaged in by Petitioners to pursue a private sewer line and despite that, as Maser's expert testified at the June 16, 2021 hearing, Maser was not familiar with the full details of the Petitioners' proposal, including the calculations relating to the net fill.

51. The Maser Memo never once challenged the extended timelines, obvious uncertainties, likely significant costs, and legal obstacles that would be faced by the unrealistic prospect of pursuing rights to private or public sewer lines for the Property.

52. Nonetheless, the Maser Memo predicated many if not all of its conclusions on the false presupposition that non-existent and unattainable sewer lines are attainable, as follows:

- a. "...The Applicant is relying on a septic tank and leach fields to handle their sanitary sewer versus constructing a private sanitary force main to connect to the Village system..."
- b. "The Applicant only states that the new septic would 'minimize' this discharge, not eliminate it completely, as would occur should the Applicant install a new private force main to the Village system..."
- c. "...There was no evidence provided by the Applicant to indicate that there had been problems with either the installation or maintenance of [other nearby properties' private sanitary sewer] lines or evidence that there have been any leaks or breaks in these private sewer lines";
- d. "...There is no record of any issues with any of the existing private sanitary sewer lines serving the lines on Greacen Point Road";
- e. "All of this additional fill and site disturbance would not be required if the Applicant were to install a private sewer line";
- f. "The proper construction on a sanitary sewer force main will have no impact to ground water or surface water unless disturbed by an outside source..."; and
- g. "A sanitary sewer also requires little or no maintenance, if installed properly."

53. The Maser Memo's rejection of septic systems in favor of private sewer lines to which property owners have no legal rights is without basis and directly contrary to the evidence in the record.

54. The Maser Memo's conclusions are tantamount to supporting an outright prohibition of any proposed septic system, or repair of an existing septic system, within the Village and/or in the areas surrounding the Property.

55. The Maser Memo was responded to by submissions to the Commission on February 24, 2021 (**Exhibit 10**, *supra*), in which each Maser Memo comment was addressed. It was specifically noted, again, that the record inarguably demonstrated that:



- a. There is no public sewer available to the Property and further pursuit of a public sewer connection was not viable, practicable or realistic (a fact that was confirmed by Maser on page 4 of the Maser Memo);
- b. In instances where, as here, there is no public sewer available, the DOH permits on-site sanitary sewage disposal systems, which are prevalent in the area surrounding the Property;
- c. Petitioners have no right to unilaterally connect to the private sewer force mains in the vicinity of the Property running in the private Road, nor do they have a right to unilaterally install a new private sewer line in the private Road;
- d. Petitioners spent exhaustive time and effort exploring the unrealistic possibility of connecting to a private or public sewer line, and installing a new private sewer line, but concluded they were unable to do so; and
- e. There are no relevant environmental concerns related to existing septic systems or other properties in the area surrounding the Property.

56. Petitioners responded specifically to each comment of the Maser Memo, including

by noting with respect to the following Comments:

- a. Despite Comment 1 of the Maser Memo admitting that the placement of fill will not affect the inflow/outflow of tidal waters from the Long Island Sound, the Memo nonetheless speculated as to unidentified and non-existent "environmental concerns with the proposed septic system" (which the DOH has approved);
- b. Whereas Comment 3 of the Maser Memo noted that the installation of a new private force main would eliminate discharge of excess nutrients and organics into coastal waters and a new septic would only "minimize" such discharge, the response explained that there is no right to connect to an existing public or private sewer system and, regardless, the proposed septic system has been designed in accordance with DOH and Westchester County Department of Health regulations. In fact, at the June 16, 2021 public hearing before the Commission, the Petitioners offered to voluntarily impose a binding covenant on the Property obligating the owner of the Property to pump the OSWTS more frequently than required by the Westchester County Sanitary Code to further address any concerns regarding the discharge of excess nutrients and organics;
- c. Whereas Comments 4, 5 and 6 of the Maser Memo reiterated Maser's unyielding insistence that the only option is to connect a private sanitary line, and alleged without support that an OSWTS will "eventually" discharge nutrients into the ground which may result in "discharge of sewage into wetlands and coastal waters," the response explained that Petitioners have no control over private lines or legal right to connect to them, the leach field proposed as part of the OSWTS is not located in the wetlands, wetlands buffer



or coastal waterway, and the DOH (which ultimately approved the OSWTS) “would not entertain an application” which posed a risk as to sewerage into the environment;

- d. Whereas Comment 7 of the Maser Memo opined on the specifications of the OSWTS, the response highlighted that the DOH, which has full jurisdiction over the design details for the septic system, was reviewing the septic system (and ultimately approved it); and
- e. Whereas Comment 8 of the Maser Memo commented upon the location of the OSWTS in relation to the underground stormwater detention system, the response correctly noted that the underground stormwater detention system is designed in accordance with the New York State Department of Environmental Conservation requirements and the Town Code, and the overall design complies with the DOH requirements for separation between the storm system and a septic system.

57. Following a public hearing before the Commission on June 16, 2021, Petitioners’ consultants submitted a memorandum dated July 1, 2021 addressing the comments and demonstrating consistency with LWRP Policy #11, which based on the discussion from the Commissioners at the June meeting, was the only remaining Policy which the Commission had any comments about. With respect to LWRP Policy 11, the July 1, 2021 memo highlighted that the Project “proposes stormwater management infrastructure, wetland buffer plantings and elevating the proposed building to reduce erosion, improve water quality and eliminate flood damage,” and thus, consistency with LWRP Policy 11 “has been sited to minimize damage to property and the endangering of human lives caused by flooding and erosion.”

**The Commission’s Resolution is as conclusory, arbitrary and contrary to evidence in the record as the Maser Memo upon which it exclusively relies**

58. Despite the Commission’s indication at the June 16, 2021 public hearing that the only outstanding concern after 14-months of review was related to property damage and endangerment of human lives due to flooding, the Commission, after canceling the regularly scheduled July 13, 2021 work session, commenced the July 21, 2021 meeting with a pre-drafted 17-



page resolution Exhibit 14 (the “Resolution”), comprised of reasons and purported concerns that it had *never* raised during the entire year-plus review period in an effort to justify the determination “that the project is INCONSISTENT with policies set forth in the LWRP and will substantially hinder the achievement of any of the below policies [Policies 5, 7, 11, 12, 17, 18, 37, 38 and 44].”

59. The Commission’s Resolution was predicated almost entirely upon the conclusory Maser Memo and its erroneous premise that the Project was inconsistent with various LWRP Policies *solely* because Maser favored a connection to private sewer lines (to which the Property has no right) and rejected the fully compliant OSWTS. This, despite the fact that Maser’s expert conceded on the record at the June 16, 2021 meeting that Maser was not familiar with the complete details of Petitioners’ proposal. For example, the actual resolutions contained within the Resolution itself, refer exclusively to the Maser Memo as providing the purported support for the Commission’s conclusions. *See* Resolution, p. 8, ¶1 (“the Maser Memo determined...”); Resolution, p. 9, ¶2 (“the Maser Memo concludes...”); Resolution, p. 10, ¶3 (“the Maser Memo finds...” and “as found in the Maser Memo...”); Resolution, p. 11, ¶4 (“the Maser Memo concludes....”); Resolution, p. 11, ¶4 (“the Maser Memo concludes....”); Resolution, p. 12, ¶5 (“the Maser Memo finds...”); Resolution, p. 12, ¶6 (“the Maser Memo finds...” and “the Maser Memo states...”); Resolution, p. 13, ¶7 (“the Maser Memo has found ...”); Resolution, p. 13, ¶8 (“the Maser Memo has found ...” and p. 14, ¶8 (“the Maser Memo indicates ...”); and Resolution, p. 14, ¶9 (“the Maser Memo has found ...”).

60. Moreover, with respect to each and every determination of LWRP Policy consistency, the Commission arbitrarily and capriciously based its conclusion on (i) its preference for the impracticable, unavailable, and not viable notion of installing a new private sewer line or connecting to an existing private sewer line, to which the Property has no legal right and (ii) its

rejection of the OSWTS and disregard of the fact that the OSWTS was approved by the DOH acting within its lawful jurisdiction. See Resolution, p. 9 (referring to LWRP Policy #5 and concluding that “the Commission finds that a private sewer line is a feasible alternative to the proposed septic system in lieu of public infrastructure”); Resolution, p. 9 (referring to LWRP Policy #7 and concluding that there can be “the installation of a private sewer line”); Resolution, p. 10 (referring to LWRP Policy #11 and concluding that “the proposed net fill required for the installation of the septic system can be avoided by the installation of a private sewer line”); Resolution, p. 11 (referring to LWRP Policy #12 and pointing to the non-existent right of “the installation of a private sewer line”); Resolution, p. 12 (referring to LWRP Policy #17 and concluding that “the private sewer line connection” “remains a possible alternative”); Resolution, p. 12-13 (referring to LWRP Policy #18 and concluding that “the private sewer line connection” “remains a possible alternative”); Resolution, p. 13 (referring to LWRP Policy #37 and concluding that a “private sewer line connection” “remains a possible alternative”); Resolution, p. 13-14 (referring to LWRP Policy #38 and again referencing that the “private sewer line connection” “remains a possible alternative”); Resolution, p. 14 (referring to LWRP Policy #44 and again finding that the “private sewer line is a feasible alternative and would mitigate these wetland impacts”).

61. The Commission’s determination that the Project is inconsistent with LWRP Policy #5 (“Encourage the location of development in areas where public services and facilities essential to such development are adequate”) is arbitrary and capricious because, *inter alia*, the Policy has no relevance to the Application. In fact, at no time during the 15-month review process was Policy #5 ever discussed on the record. The Petitioners are proposing to reconstruct a single-family home on a buildable lot that is zoned to permit single-family residences and is currently improved with a single-family house. The Petitioners cannot relocate this lot or the single-family home to a different



location. Further, even if Policy #5 were pertinent, the Commission's conclusion that "the Applicant has failed to demonstrate that the proposed septic system and related net fill will appropriately mitigate the concerns of a septic system where no such public infrastructure is available" and that a "private sewer line is a feasible alternative," is without basis in law or fact and contrary to the evidence in the record.

62. The Commission's determination that the Project is inconsistent with LWRP Policy #7 ("Significant coastal fish and wildlife habitats ... shall be projected, preserved and where practical, restored, so as to maintain their viability as habitats") and LWRP Policy #44 ("Preserve and protect tidal and freshwater wetlands and preserve the benefits derived from these areas") is arbitrary and capricious to the extent predicated upon the viability of a private sewer line and, because *inter alia*, (i) the leach field proposed as part of the OSWTS is not located in the wetlands, wetlands buffer or coastal waterway, (ii) the DOH approved the OSWTS, thereby confirming the absence of any risk as to sewerage into the environment, and (iii) the Project has proposed several measures that will actually improve existing wetland and wetland buffer conditions.

63. In fact, on November 18, 2020, the New York Department of Environmental Conservation ("NYS DEC"), which has jurisdiction over regulated activities occurring within State tidal wetlands, issued a tidal wetland permit for construction of the Project as proposed with an OSWTS, finding no negative environmental impacts would result to natural resources within the tidal wetlands or wetlands buffer areas. **Exhibit 15**

64. Further, on July 13, 2020, the Village's Environmental Consultant, Sven Hoeger (Ecologist, Dolph Rotfeld Engineering, P.C.), submitted a review memorandum opining that the Project will not result in any negative impacts to natural resources and will actually significantly

improve the functional values of the wetlands by restoring portions of the high marsh and salt meadow that are currently maintained as lawn. Exhibit 16

65. The Commission's determination that the Project is inconsistent with LWRP Policy #11 ("Buildings and other structures will be sited in the coastal area so as to minimize damage to property and the endangering of human lives caused by flooding and erosion.") is arbitrary and capricious to the extent predicated upon the viability of a private sewer line and because, *inter alia*, the Project (i) will not create new uses or bring persons to the Property beyond the occupation of a single-family home, (ii) involves a residential redevelopment (replace a single-family home with a single-family home) fully compliant with floodplain development standards on property situated on Delancey Cove entirely within an AE Zone and not within a high hazard flood area and not within a NYS DEC-designated Coastal Erosion Hazard Zone ("CEHA"), (iii) proposes stormwater management infrastructure, wetland buffer plantings and measures to reduce erosion, improve water quality, eliminate flood damage and restore habitat, (iv) will not result in an increase in Base Flood Elevation, which is the tidal flood elevation of the Long Island Sound, during a 100-year event, (v) will not adversely impact flooding conditions on neighboring properties, and (vi) will certainly not endanger human lives.

66. The Commission's determination that the Project is inconsistent with LWRP Policy #12 ("Activities or development in the coastal area will be undertaken so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features") is arbitrary and capricious to the extent predicated upon the viability of the "installation of a private sewer line" and to the extent it found that the Maser Memo "concludes that by the very design of the septic system, the leach field will...have environmental impacts" (Resolution, at p. 11). The Maser Memo makes no such finding of "environmental impacts" (Maser Memo, p.3, ¶6), let alone



such findings that would be supportable. Moreover, the record is incontrovertible that the Project will restore and protect natural protective features on the Property by a Landscaping Plan, both the Village's environmental consultant and Petitioners' wetland and environmental expert opined that the Project will not result in any negative impacts to natural resources and will improve the functional values of the wetland, and the NYS DEC granted a tidal wetland permit for the Project, finding the activities will not adversely impact the natural resources within the wetlands and wetlands buffer area.

67. The Commission's determination that the Project is inconsistent with LWRP Policy #17 ("Whenever possible, use nonstructural measures to minimize damage to natural resources and property from flooding and erosion") is arbitrary and capricious to the extent predicated upon the viability of "a private sewer line" and because, *inter alia*, (i) the Property does not currently have any structural measures to prevent erosion or flooding and no seawall or other structural measures are proposed, (ii) the Project proposes non-structural measures (stormwater management and wetland and wetland buffer plantings) to minimize erosion and flooding, (iii) the proposed stormwater management system will markedly improve filtration and reduce runoff, since the Property currently does not have any stormwater management measures and (iv) there will be no increase to the impervious surface and thus no increase in stormwater runoff.

68. The Commission's determinations that the Project is inconsistent with LWRP Policy #18 ("...safeguard the vital economic, social and environmental interests ...in the coastal area... [and] give full consideration to those interests..."), Policy #37 ("Best Management Practices will be utilized to minimize the nonpoint discharge of excess nutrients, organics and eroded soils into coastal waters"), and Policy #38 ("the quality and quantity of surface water and groundwater supplies will be conserved and protected..."), are arbitrary and capricious to the extent predicated

upon the viability of “a private sewer line” and to the extent based on the conclusory opinion of the Maser Memo – devoid of any data, scientific study, technical report, or specific analysis *and* contrary to the DOH approval of the OSWTS – that “we believe that the installation of the proposed septic system will have a negative impact on the surface water and groundwater.....” In fact, the incontrovertible evidence in the record, including the NYS DEC tidal wetlands permit issued for the Project as proposed, demonstrates that the Project will remove a failing septic system located partially within the wetland buffer (which could leak raw sewage into the wetlands and coastal waters) and replace it with an approved and code-compliant system which will protect and conserve the quality of surface water and minimizes the discharge of excess nutrients and organics into coastal waters.



**AS AND FOR PETITIONERS' FIRST CAUSE OF ACTION**  
(For Relief Under Article 78 of the CPLR)

69. Petitioners repeat and reallege each and every allegation set forth above as if set forth fully and verbatim herein.

70. The Commission's Consistency Review Determination is arbitrary, capricious and irrational as it ignored substantial evidence in the Record.

71. The Commission's Consistency Review Determination is arbitrary, capricious and in excess of its authority because it disregards and attempts to usurp the authority of the DOH, which properly approved the OSWTS for the Property upon exercising its lawful jurisdiction to review on-site wastewater treatment systems.

72. The Commission's Consistency Review Determination was rendered in an arbitrary and capricious manner and without basis in law or fact.

73. The administrative record is devoid of any facts or evidence supporting the Commission's Consistency Review Determination that the Project is inconsistent with LWRP Policies.

74. Although the Commission's Consistency Review Determination "resolved" that the "Applicant has not demonstrated that a private or public sewer line is an impossible alternative," no such requirement is imposed upon the Applicant by law or otherwise, and thus the Consistency Review Determination is arbitrary, capricious and without basis in law or fact.

75. The Commission's Consistency Review Determination was arbitrary and capricious and failed to follow its precedent and treatment of other materially similar projects by finding the

Project inconsistent with the LWRP because it included an OSWTS, rather than a connection to a sewer.

76. Notably, in the Commission's 2019 approval of the project at 1248 Greacen Point Road, page 3 of the Commission's resolution notes that "the applicants have elected to utilize [and make repairs to] the existing septic system located on the premises while they continue discussions regarding the possible installation of a sanitary force main sewer", this while also noting the applicants had not yet received DOH approval for the proposed repairs of the OSWTS (page 3).

**Exhibit 17**

77. The Resolution's attempt on page 16 to distinguish the Commission's treatment of 1248 Greacen Point Road and other properties from Petitioners' application is arbitrary and without foundation in the Record. For example, the purported distinction that "prior applications are not on the Project site" is a distinction without any meaning whatsoever, and the fact that prior applications do not abut Delancey Cove is similarly meaningless because those other applications (1248 Greacen Point Road and 1 Shore Road), directly abut other portions of the same body of water, the Long Island Sound.

78. In fact, the property at 1 Shore Road, cited on page 16 of the Resolution which the Commission attempts to distinguish, is more sensitive to flooding and coastal erosion than the Property, given its partial classifications within the VE (High Hazard) Flood Zone and the NYS DEC-designated CEHA, meaning it is at significant risk for coastal erosion. **Exhibit 18.**

79. Whereas paragraph 2 on page 16 of the Resolution attempts to make a distinction by referring to the Property as being "within the low areas of the AE-10 [sic] Tidal Flood Zone", the mere elevation of a property is not a meaningful distinction when determining flooding and erosion risk, as evidenced by the fact that 1 Shore Road is partially classified within the VE High Hazard



Flood Zone and the NYS DEC CEHA, and the subject Property is not, although it is at a lower property elevation. **Exhibit 18.**

80. Further, the Commission's Resolution attempts to distinguish the recent approval for the project on property at 1 Shore Road by noting a portion of the approved work was "an emergency in-kind repair." The Resolution, however, fails to note that in the case of 1 Shore Road, the emergency order was issued for in-kind repair of the seawall, while the other portion of the project that the Commission approved was for replacement of an existing failing septic system in a flood zone and wetland buffer area, where net fill was brought onsite. **Exhibit 18.**

81. The Commission neither adhered to its prior precedent nor provided a valid or legitimate reason for reaching a different result for the Project.

82. The Commission's Consistency Review Determination was arbitrary, capricious and irrational because it failed to follow its precedent and treatment of materially similar projects in the neighborhood of the Property which were permitted to have net-fill.

83. Accordingly, the Commission's Consistency Review Determination should be overturned, vacated and annulled and the Commission should be directed to refer the Application back to the Planning Board for its site plan and wetlands review of the application.

84. Under Village Code, the Commission's finding of inconsistency on the Project precludes the Planning Board from considering Petitioners' site plan and wetlands permit applications.

85. No prior application for the relief requested herein has been sought to this or any other court.

WHEREFORE, Petitioners request judgment as follows:

1. An order and judgment annulling, reversing and setting aside the Commission's Consistency Review Determination, and finding that the project is consistent with the

LWRP, such that the Petitioners shall be entitled to proceed before the Planning Board for continued review of the site plan and wetlands permit review; and

2. Granting Petitioners such other and further relief as this Court may deem just and proper, including but not limited to costs, disbursements and attorneys fees incurred herein.

Dated: White Plains, New York  
August 19, 2021

CUDDY & FEDER LLP  
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White Plains, New York 10601  
Tel: (914) 761-1300

By: /s/ Joshua E. Kimerling  
Joshua E. Kimerling  
Kristen Motel



VERIFICATION

ELISABETH FEDYNA, being duly sworn, deposes and says:

I am the Petitioner herein. I have read the annexed Verified Petition, know the contents thereof and the same are true to my knowledge, except as to those matters stated to be on information and belief, and as to those matters, I believe the same to be true based upon my review of the record of proceedings before the Commission and books and records of the Village of Mamaroneck and/or its boards.

  
ELISABETH FEDYNA

Sworn to before me  
this 19 day of August, 2021

\_\_\_\_\_  
Notary Public



VERIFICATION

WILLIAM FEDYNA, being duly sworn, deposes and says:

I am the Petitioner herein. I have read the annexed Verified Petition, know the contents thereof and the same are true to my knowledge, except as to those matters stated to be on information and belief, and as to those matters, I believe the same to be true based upon my review of the record of proceedings before the Commission and books and records of the Village of Mamaroneck and/or its boards.

William E Fedyna  
WILLIAM FEDYNA

Sworn to before me  
this 19 day of August, 2021

Notary Public

