SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

CITIZENS FOR THE PRESERVATION OF WAINSCOTT, INC., PAMELA MAHONEY, MICHAEL MAHONEY, ROSEMARIE ARNOLD, JOSÉ ARANDIA, OLGA ARANDIA, KENNETH HANDY, JANE HARRINGTON, MITCHELL SOLOMON, LISA SOLOMON, DUNE ALPIN FARM PROPERTY OWNERS ASSOCIATION INC., DUNE ALPIN FARM CORP., ANDREA BERGER, ROBERT BERGER, GUNILLA BERLIN, CINDY CIRLIN, AMY DEPAULO, ROSALIND DEVON, KATHERINE EPSTEIN, DAVID EPSTEIN, NEIL FABER, MARIANO GAUT, DANIEL GETTINGS, TERRY GOLDSTEIN, STEVEN ISRAEL, LYNN JEROME, LINDA KAYE, GEORGE LEE, SUSAN RIELAND, ANTHONY D. ROMERO, ALBERT RUBEN, GIL RUBENSTEIN, ARNOLD SCHILLER, and JUDITH WIT,

Petitioners-Plaintiffs,

– against –

TOWN BOARD OF THE TOWN OF EAST HAMPTON and PETER VAN SCOYOC in his capacities as Supervisor of the Town of East Hampton and Member of the Town Board of the Town of East Hampton,

Respondents-Defendants.

– and –

SOUTH FORK WIND, LLC f/k/a Deepwater Wind South Fork, LLC,

Nominal Respondent-Defendant.

Index No. 601847/2021

Civil Part 38
(Hon. William G. Ford)

(ORAL ARGUMENT REQUESTED)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-PLAINTIFFS' VERIFIED PETITION AND COMPLAINT

Date: February 26, 2021

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Petitioners submit this memorandum in support of their Verified Petition and Complaint in this hybrid Article 78 proceeding against the Board of the Town Van Scoyoc, the Town's Supervisor.[1]

PRELIMINARY STATEMENT

This action challenges the Board's decision to facilitate the proposed Project of South Fork to construct and install a 138,000-volt High-Voltage Cable under and through the streets and quiet residential areas of the hamlet of Wainscott, terminating at a New Substation proposed to be constructed immediately adjacent to the Neighborhood. South Fork wants to construct and install the High-Voltage Cable in connection with a Wind Farm that it hopes to construct at sea some 35 miles east of Montauk Point. This action does not challenge the Wind Farm per se but, rather, its Cable's landing site.

The Board previously formally resolved that there are "serious and substantial issues" concerning the Project that must be "addressed and mitigated" in the Article VII Proceeding before the PSC. [Ex. E] On January 21, 2021, however, without those *serious and substantial issues* having been resolved, and without the Board undertaking *any* independent environmental review of its own or even having the benefit of the PSC's environmental review, the Board approved the January 2021 Resolution authorizing Van Scoyoc to execute the Easement Agreement with South Fork "for construction, operation, maintenance, and repair" of the High-Voltage Cable. [Exs. A & C]

In addition to being contrary to Van Scoyoc's public assurances that the Board would not act until the PSC's environmental review is completed [¶ 53], the Board's January 2012 Resolution is illegal. The Board acted illegally by granting the Easement for this major Project –

[1] Capitalized terms not defined herein are as defined in the Petition. Citations to "[¶ __]" are to paragraphs of the Petition, including exhibits cited therein. Citations to "[Ex. __]" are to exhibits accompanying the Petition.

which will have substantial environmental impacts – *without conducting or obtaining an environmental review*. In addition, the Board's granting of the Easement violated Section 121(1) of the PSL, which provides that "[n]o person" shall "commence the preparation of the site for the construction of a major utility transmission facility," such as the Project, without the PSC first having issued an Article VII Certificate.

Moreover, the Board acted arbitrarily and capriciously in granting the Easement, including in the following ways: ***1.*** Rather than focusing on the best available landing site, the Board leveraged South Fork's desired low-cost route to maximize payments to the Town while minimizing political cost, given the relatively few number of voters in Wainscott. ***2.*** The Board's bad faith was compounded when it used the grant of the Easement to squash a movement to incorporate the hamlet of Wainscott that arose in response to the Board's actions. ***3.*** Van Scoyoc justified the grant by misrepresentations such as likening the Project to the installation of a water main. ***4.*** The Board's desire for a symbolic act to "do something" to remedy climate change by granting the Easement was irrational, because granting the Easement now will not get the Wind Farm online a moment sooner than had the Easement awaited the PSC's review. ***5.*** The Board's grant of the Easement left "to be determined" many material provisions and plans. ***6.*** The Board granted the Easement without demanding that South Fork not seek waivers of safety codes. ***7.*** The Board granted the Easement for South Fork's preferred route without adequate consideration of alternative routes that are less impactful to the environment and to Petitioners. ***8.*** The Board granted the Easement despite South Fork's inadequate knowledge concerning harmful PFAS, and how they will be dealt with and contained during construction. ***9.*** The Board proceeded to act without responding to the public's comments.

THE HIGH-VOLTAGE CABLE PROJECT

Contrary to Van Scoyoc's reductive and dismissive comments [¶¶ 68, 84], the installation of the High-Voltage Cable is a major infrastructure project, the impacts and burdens of which will be shouldered disproportionally by Petitioners, and (as acknowledged by the Board itself) is fraught with "serious and substantial issues." [Ex. E]

The Project will Cause Massive Disruption in Wainscott [¶¶ 60, 67-85, 95-102, 128]

The Project will entail thousands of feet of directional drilling, high-decibel noise, diesel fumes, miles of trenching for installation of a concrete encased duct bank system, splice boxes and manholes, cable pulling into the duct system, splicing together of cable segments, complex logistics and methods, and environmental and safety hazards.

The route permitted by the Easement will enable the High-Voltage Cable, carrying 138,000 volts of electricity, to snake its way through the narrow lanes and quiet residential neighborhoods of Wainscott and create risks of electrical fires, electric short circuits, violent energy releases in manholes, water contamination, and electromagnetic fields. The Easement contemplates that South Fork will use and store Hazardous Materials, and acknowledges the potential for spills of petroleum and other hazardous chemicals during the course of the Project.[2]

The landing of the High-Voltage Cable from the ocean will involve drilling under the beach and sensitive dunes of Wainscott Beach at the foot of Beach Lane. A 600 to 800-foot stretch of Beach Lane near its southern end will be occupied by the sea-to-shore transition work zone for all or most of a 7-month construction window, and possibly over more than one construction season. This work zone will include burial of the sea-to-shore transition vault, which measures 35 feet long, 8 feet wide, and 10 feet in depth. A drilling rig will be situated

[2] Not surprisingly, South Fork's parent Ørsted has never landed a major offshore wind sea-to-shore power cable in a residential neighborhood in its home country Denmark. [¶ 65 n.18]

within the Beach Lane roadway, surrounded by 12-foot-high noise walls. Other materials and equipment will be staged within the work zone, including mud pumps, generators, a slurry plant, de-silter, backhoe, boom truck, and crane, along with areas for parking and storing other equipment, facilities, and materials necessary to support cable installation.

Aside from the sea-to-shore transition at the foot of Beach Lane, the trenching required for the High-Voltage Cable will be 8 feet deep. At various locations along the route, excavations for the High-Voltage Cable will be 10 feet wide to accommodate subsurface concrete splice vaults that are 29 feet long, comparable to the size of shipping containers. These vaults will be buried beneath the road at intervals of 1,200-1,500 feet and (according to South Fork's Article VII application filed with the PSC) there will be thirteen of these concrete vaults installed beneath the streets of Wainscott.

The trenching for the High-Voltage Cable on Wainscott Northwest Road will be adjacent to the Gravel Pit, and just south of the East Hampton Airport, which are both contaminated with harmful PFAS. Installation of the High-Voltage Cable in this area will entail excavating within the PFAS contaminant plume that is known (including by the Board [Ex. III]) to be present in shallow groundwater in this area. Excavation for the High-Voltage Cable therefore could become a pathway for movement of PFAS-contaminated groundwater, causing areas – including residential water wells – to be contaminated or further contaminated.

The space needed for construction of the High-Voltage Cable is very wide. The Easement Agreement grants South Fork "a 20-foot-wide corridor" for the purposes of construction – and for the southernmost 1,000 feet of Beach Lane the Easement will cover the entire width of Beach Lane. In addition to this 20-foot construction corridor, the Easement grants South Fork a "temporary easement" alongside the construction corridor to place and maintain field offices,

equipment, pipes, valves, meters, and the like; and to park vehicles. This "temporary" easement would exist from the moment South Fork breaks ground until the High-Voltage Cable goes into commercial operation (i.e., late 2023 at the earliest).

Accordingly, while the High-Voltage Cable is being constructed and installed, the affected roads – which are narrow already (for instance, the paved part of Beach Lane is just 19 feet wide) – will be significantly constricted, impeding traffic and emergency vehicles (particularly perilous on dead-end Beach Lane), and increasing hazards to pedestrians. South Fork has said that (notwithstanding the narrowness of the lanes, the 20-foot construction corridor, and the temporary construction easement) a 10-foot access lane will be maintained, to be shared by vehicles and pedestrians – but such constricted access will significantly impact residents and beach visitors and will introduce safety risks that have so far gone unaddressed by South Fork. The Easement Agreement contemplates that at times during construction a complete lack of access to a road may be "temporarily unavoidable."

Although a key premise for selecting Wainscott was that South Fork could complete installation of its High-Voltage Cable in a single fall-to-spring season, the Easement Agreement now grants South Fork 30 months to complete the Project. And while the Town assured Wainscott residents that work would be done off-season (e.g., November 1 through March 31), the Town has now given South Fork the right to be able to perform its 30 months of work from October 1 through April 30 over the span of at least two years. But South Fork would have the right to continue through May 15 if needed to complete the most disruptive construction, the HDD – and South Fork can punch through even the May 15 deadline if it pays the Town only $250,000. In addition, HDD activities would be allowed to continue "24x7" if necessary to complete the sea-to-shore transition of the High-Voltage Cable. And in connection with the

Project, South Fork will not be able to comply with – and necessarily will need to seek waivers of – multiple New York State fire and building safety code provisions.

The disruption caused by the Cable will not cease once it is installed because beach erosion from storms will necessitate sand replenishment operations in order to maintain the minimum 30-foot cable burial depth beneath Wainscott Beach. And at the end of 25 years there will be massive disruption when the High-Voltage Cable is decommissioned and ripped out of the streets of Wainscott.

The Project Will Compound Dangers Suffered by the Neighborhood [¶¶ 86-94]

The route the Easement will permit the High-Voltage Cable to follow will also bring the Cable into the New Substation to be built within 100 feet of the Neighborhood, creating significant environmental impacts for its residents. The Neighborhood is already burdened with electric-related infrastructure consisting of the existing East Hampton 69kV Substation; electric generator peaker plants, used during the summer and powered by oil; portable electric generators, used during the summer and powered by natural gas; a compressed gas loading area with gas being delivered often via large trucks; a large fuel storage tank; and a battery energy storage system. Building the New Substation will effectively eliminate the wooded buffer acreage between the existing substation and nearby homes, and add to the potential dangers and concerns the residents of the Neighborhood already have, including fires or explosions; water contamination; air pollution; noise pollution; and exposure to electromagnetic fields.

ARGUMENT

I. STANDARD OF ARTICLE 78 REVIEW

Judicial review of administrative determinations that, as here, were not made after a quasi-judicial hearing, "is limited to whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of

discretion." *Heritage Mech. Servs., Inc. v. Suffolk Cty. Dep't of Pub. Works*, 165 A.D.3d 667, 669, 86 N.Y.S.3d 87, 89 (2d Dep't 2018).

> The Court of Appeals defined the "arbitrary and capricious" standard in *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321, characterizing the standard as "relat[ing] to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact" (*id.* at 231, 356 N.Y.S.2d 833, 313 N.E.2d 321). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts ... [T]he proper test is whether there is a rational basis for the administrative orders" (*id.* at 231, 356 N.Y.S.2d 833, 313 N.E.2d 321). Relying on its holding in *Matter of Weber v. Town of Cheektowaga*, 284 N.Y. 377, 380, 31 N.E.2d 495, the Court of Appeals further defined rationality as being "supported by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination" (*Matter of Pell*, *supra* at 231, 356 N.Y.S.2d 833, 313 N.E.2d 321; *see Matter of Weber v. Town of Cheektowaga*, 284 N.Y. at 380, 31 N.E.2d 495, *supra*).

Ador Realty, LLC v. Div. of Hous. & Cmty. Renewal, 25 A.D.3d 128, 139-40, 802 N.Y.S.2d 190, 199 (2d Dep't 2005).

II. THE BOARD ACTED ILLEGALLY IN GRANTING THE EASEMENT WITHOUT CONDUCTING OR HAVING THE BENEFIT OF AN ENVIRONMENTAL REVIEW

The Board acted illegally by approving the Easement without conducting or having the benefit of an environmental review. SEQRA requires agencies, including town boards, to conduct an environmental review to confront and resolve environmental concerns before the agencies take any action that may have a significant effect on the environment. *See* ECL § 8-0109(2). The New York State Legislature enacted SEQRA to make "environmental protection a concern of every agency," *Jackson v. NY State Urban Dev. Corp.*, 67 N.Y.2d 400, 414, 503 N.Y.S.2d 298, 303 (1986), and to "inject[] environmental considerations into governmental decisionmaking," *New York City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348, 763 N.Y.S.2d 530, 535 (2003). This policy "is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations. . . . Anything less than strict compliance . . . offers an incentive to cut corners and then cure defects

only after protracted litigation, all at the ultimate expense of the environment." *Vallone*, 100 N.Y.2d at 348, 763 N.Y.S.2d at 535-36 (internal citations and quotations omitted).

Because the High-Voltage Cable is a "major electric transmission facility," however, the requisite environmental review is being conducted by the PSC in the Article VII Proceeding. *See* ECL § 8-0111(5)(b). Specifically, the PSC must review South Fork's proposed High-Voltage Cable, and if the PSC concludes that South Fork's plans minimize any significant adverse environmental impact and properly fulfill public needs, then the PSC will issue an Article VII Certificate. *See* PSL § 126(1). But the mere fact that in this instance the environmental review is to be performed by another governmental entity, does not give the Board *carte blanche* to go ahead and take action with respect to the High-Voltage Cable in the absence of that environmental review. Otherwise, the State's overriding policy interest of making environmental protection a concern at every level of governmental decision making would be thwarted.

The Board's January 2021 Resolution granting the Easement was a transparent end-run around the legal environmental protections of this State. In it the Board (a) acknowledged that "the Project constitutes a 'major utility transmission facility,' which requires a 'certificate of environmental compatibility and public need' pursuant to Article VII of the Public Service Law," (b) asserted that the Easement Agreement, is an "integral component[] of the overall Project," and (c) recognized that "full environmental review of the Project and its various components is being undertaken as part of the Public Service Commission's review of the Project for issuance of a certificate of environmental compatibility and public need." [Ex. C] With that foundation, *and* in light of the Board's earlier acknowledgement that the Project raises "serious and substantial issues" that must be "addressed and mitigated" in the Article VII Proceeding, *and* given the norm established by SEQRA that environmental review must precede governmental

action, the Board's clear course was to wait to grant the Easement until the PSC performed its full environmental review. Instead, the Board in a 4-1 vote proceeded to grant the Easement and place its imprimatur on what the Board says is an "integral component" of the Project which is still under review by the PSC.[3] The dissenter on the Board raised many of the same concerns with respect to hurrying the grant of the Easement that are set forth in the Petition herein, and urged the Board to wait for the PSC's determinations. [¶ 115][4]

Article VII itself recognizes and deals with those who might seek to "jump the gun" in advance of the PSC's determination. Accordingly, Section 121(1) of the Public Service Law provides that "*[n]o person* shall . . . commence the preparation of the site" of any proposed major utility transmission facility unless and until the PSC issues an Article VII Certificate. *See* PSL § 121(1) (emphasis added). Significantly, Section 121(1) does not just forbid anyone from *commencing construction* before the grant of a Certificate – it broadly forbids anyone from so much as *commencing the preparation* of a site before a Certificate is granted. Under the plain reading of the statute, the Board's granting of the Easement for the construction and installation of the High-Voltage Cable violates Section 121(1) because, at a minimum, it clearly constitutes "commencement of the preparation" of the site for the High-Voltage Cable. To "prepare" means to make ready beforehand for some purpose; to provide with necessary means.[5]

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[3] To be clear, the propriety of the Easement is *not* before the PSC, and is properly reviewable by this Court. *See Petition of New York Regional Interconnect Inc.*, PSC Case No. 07-T-1492, Order Dismissing Petition at p. 15 (Feb. 15, 2008) ("Article VII authorizes the Commission to determine whether a proposed facility is necessary and is in the public interest, and which route or location best suits the need and the public interest, consistent with environmental considerations, but does not authorize the Commission to adjudicate property rights. Processes for property rights adjudication are addressed in statutes other than the PSL in other fora.").

[4] For having the courage to raise these issues, the dissenter was retaliated against and purged from the party ballot. *Democrats Dump Dissent in East Hampton: Bragman, Drew Both Dropped By Party After Wind Farm Objections*, THE EAST HAMPTON PRESS (Feb. 17, 2021), *available at* https://www.27east.com/east-hampton-press/update-democrats-dump-dissent-in-east-hampton-bragman-drew-both-dropped-by-party-after-wind-farm-objections-1757110/

[5] *See, e.g.*, *Nat'l Amusement Co. v. Wisconsin Dep't of Taxation*, 41 Wis. 2d 261, 271, 163 N.W.2d 625, 630 (1969); *Brennan v. N. Elec. Co.*, 72 Mont. 35, 231 P. 388, 389 (1924); *People v. Pippin*, 316 Mich. 191, 195, 25

The conditioning of the Easement upon the grant of an Article VII Certificate does not cure the illegality of the grant. Again, Section 121(1) of the PSL forbids commencing preparation unless an Article VII Certificate is granted.[6] In addition, the law is clear that the Board may not take any action here in connection with the Easement before completion of the environmental review. *See Benvenuto v. Village of Millerton*, 10 Misc. 3d 770, 773, 804 N.Y.S.2d 676, 678-79 (Sup. Ct. Dutchess Cnty. 2005) ("[b]y granting an easement prior to SEQRA review and without specific conditions as to the manner of construction and maintenance, the [town] board has improperly circumvented the legislative mandate [of SEQRA]."[7]

III. THE BOARD'S ACT WAS ARBITRARY AND CAPRICIOUS

a. The Board's acting for improper purposes was arbitrary and capricious.

When a governmental agency acts for an improper purpose, it constitutes an abuse of discretion, and is thus arbitrary and capricious. *See Anonymous v. Comm'r of Health*, 21 A.D.3d 841, 843, 801 N.Y.S.2d 302, 304-05 (1st Dep't 2005). Here, the Board acted for at least two improper purposes. First, the Board acted in the absence of an environmental review and

N.W.2d 164, 165 (1946); *People v. Superior Court (Decker)*, 41 Cal. 4th 1, 8, 157 P.3d 1017, 1021-22 (2007); *State v. Garner*, 237 Kan. 227, 239, 699 P.2d 468, 477 (1985).

[6] *Cf. City of New York v. TransGas Energy Servs. Corp.*, 34 A.D.3d 466, 471, 824 N.Y.S.2d 138, 142 (2d Dep't 2006) (condemnation proceedings could not be commenced to obtain land for major electric generating facility unless and until certificate of environmental compatibility and public need were granted under PSL Article X).

[7] *See also Tri-Cty. Taxpayers Ass'n, Inc. v. Town Bd. of Town of Queensbury*, 55 N.Y.2d 41, 46, 447 N.Y.S.2d 699, 701 (1982) (environmental impact statement should have been prepared and made available to members of town board and public *prior* to adoption of resolutions authorizing establishment and financing of sewer district); *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371, 526 N.Y.S.2d 56, 62 (1988) (because of danger of *subsequent* environmental review being merely a "rubber stamp," if statutory environmental review requirements of SEQRA are not met then governmental action is "void" and "unauthorized"); *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369, 509 N.Y.S.2d 499, 505 (1986) ("a disposition which would eliminate consideration of the required environmental effects by the town board at the time the action is initially authorized would relegate SEQRA's mandates for environmental protection to an afterthough[t] in contravention of the express legislative purposes").

otherwise cut corners for the low-cost Wainscott landing site because South Fork purchased its acquiescence with the promise of millions of dollars. [¶¶ 22, 138-40] The Board also acted for the improper and undemocratic purpose of quashing a current, home-rule movement by residents of Wainscott to incorporate as a village, and thus deny the new Village of Wainscott control over whether the Easement should be granted. Documentary evidence shows that the Board granted the Easement in order to "take the wind out of the sails" of Wainscott's incorporation movement. [¶¶ 141-53]

Prior to the incorporation movement, Van Scoyoc had stated: "I did not think we needed the Article [VII] process completed to sign" an easement agreement – "I'm no longer sure that's the way to go." – "We think that process will probably complete before we sign any agreement." [¶ 53] The Board's "about-face," and its proceeding to grant the Easement, only reinforces that the decision to grant the Easement was arbitrary and capricious. *Cf. Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520, 498 N.Y.S.2d 111, 115 (1985) (when agency alters prior stated course, it must set forth reasons for doing so; otherwise, reversal is required).

b. The Board's acting under the real or pretended belief that the Project is akin to installation of a water main was arbitrary and capricious.

Van Scoyoc justified the grant of the Easement through inaccurate and irrational comments about the Project, which either revealed his ignorance of the implications of the Project, or evinced an intent to mislead his fellow Board members and the public. The claims that the Project is akin to the mere installation of a water main [¶ 68], or that the only remaining effect once the Project is completed will be some manholes in Wainscott [¶ 84], are false. The grant of the Easement based on a real or pretended belief of these false premises was arbitrary and capricious.

c. To act under a belief that "there's been plenty of environmental review" was arbitrary and capricious.

The PSC has not yet opined on the Project, BOEM's Environmental Impact Statement is not final, the EM&CP does not yet exist, and the Town at no time has retained independent environmental experts to advise it. Van Scoyoc, however, has publicly stated: "From my standpoint there's been plenty of environmental review." Van Scoyoc either was attempting to create a false impression that environmental review of the Project has taken place, or was stating his opinion that *zero* environmental review is "plenty." [¶ 133]

d. To act under a belief that if the Easement were not granted *now* the Project would fail was arbitrary and capricious.

Moreover, the assertion that the Project will fail if the Easement were not granted now [¶ 134] is false. The Easement is not required to be in place for the state and federal approvals that South Fork needs for the Wind Farm and the High-Voltage Cable. [¶ 50] In fact, South Fork has been seeking those approvals without the Easement in hand. The Article VII Proceeding before the PSC is ongoing; as is BOEM's consideration of the Wind Farm. [¶ 20] The grant of the Easement based on a real or pretended belief of this false premise was arbitrary and capricious. *See Daubman v. Nassau Cty. Civil Serv. Comm'n*, 195 A.D.2d 602, 603, 601 N.Y.S.2d 14, 16 (2d Dep't 1993) (determination based on speculation is arbitrary and capricious).

e. To grant the Easement *now* due to a perceived urgent need to "do something" about climate change was arbitrary and capricious.

The Board's decision to grant the Easement *now* in order to "do something" about climate change [¶ 135] was irrational, and thus arbitrary and capricious. The grant of the Easement *now* will not get the South Fork Wind Farm online a minute sooner than had the Board waited for the PSC's determinations. [¶¶ 20, 135] The desire of some Board members to make a

symbolic gesture, and have bragging rights for being the first community in New York with offshore wind power, is no justification for not following the law. It is, however, the basis of an arbitrary and capricious decision.

f. Acting with material terms "to be determined" was arbitrary and capricious.

The Board's grant of the Easement, while leaving "to be determined" many material provisions and plans, including those governing environmental issues (*e.g.*, a Hazardous Waste and Petroleum Work Plan) [¶¶ 121-27], was arbitrary and capricious. While the Town would not approve the building of a house without a construction plan, the Board granted the Easement without South Fork having submitted a construction plan for this massive Project. [¶ 125] The Easement "takes effect immediately" and "fixes the rights of the parties." [¶ 39] Thus, once the Easement Agreement is executed, the Town will be at South Fork's mercy to obtain effective terms to protect the environment. *See Benvenuto*, 10 Misc. 3d at 773, 804 N.Y.S.2d at 678-79 (town board improperly granted easement without specific conditions of manner of construction and maintenance in place).

g. Failing to ensure compliance with safety codes was arbitrary and capricious.

Because the Project will not be able to comply with applicable safety codes (*e.g.*, the State Fire Code requirement that on dead-end roads like Beach Lane there be sufficient area for fire trucks to turn around) [¶¶ 128-31], the Board's grant of the Easement, without demanding that South Fork not seek waivers of safety codes, or without full advance disclosure of any such waivers, was arbitrary and capricious.

h. Selecting the Beach Lane route while the PSC is considering less impactful alternatives was arbitrary and capricious.

CPW used its own resources to develop and present alternative routes for the High-Voltage Cable that would have significantly fewer environmental impacts than the Beach Lane

route (e.g., avoiding Town roads; few, if any, residential impacts; and elimination of the New Substation). [¶¶ 5, 103-10] The grant of the Easement for South Fork's preferred route without adequate consideration of the alternative routes, and without waiting to see what the PSC has to say about the alternatives, was arbitrary and capricious.

i. To act in the face of harmful PFAS was arbitrary and capricious.

The Town has acknowledged the serious problem of harmful PFAS in the ground and groundwater of Wainscott, including in the area where trenching for the Cable is permitted by the Easement. [Ex. III] The Board's granting the Easement in the face of South Fork's lack of information concerning harmful PFAS, and how they will be dealt with and contained during construction [¶¶ 95-102], was arbitrary and capricious.

j. Acting without addressing the public comments was arbitrary and capricious.

In advance of and during the Board's meetings on January 12, 2021 and January 19, 2021, numerous questions and comments from the public were submitted raising significant issues about the Project and the terms of the Easement Agreement. (CPW alone submitted a detailed, 25-page, single-spaced letter to the Board.) [¶¶ 111-12] Van Scoyoc stated that the Board would consider the many questions and concerns that had been raised, and would get back to the public with answers. [¶ 113] But at the Board's January 21, 2021 Board meeting, Van Scoyoc dismissively announced that he personally had not heard "anything new," and proceeded to have the Board vote on the Easement. [¶ 114] Acting without addressing the public comments was arbitrary and capricious.

IV. THE BOARD'S ACT SHOULD BE ENJOINED

For the reasons set forth in the Petition and discussed above, the Board's illegal granting of the Easement, heedless of the environmental impacts of the Project, constitutes a waste of Town property and/or imperils the public interest. Accordingly, pursuant to Section 51

of the General Municipal Law, the Board should be enjoined from taking any action with respect to the Easement unless and until the PSC awards South Fork an Article VII Certificate that is no longer subject to administrative appeal or litigation. *See Korn v. Gulotta*, 72 N.Y.2d 363, 372, 534 N.Y.S.2d 108, 112 (1988); *Stewart v. Scheinert*, 52 A.D.2d 636, 636, 382 N.Y.S.2d 558, 559 (2d Dep't 1976).

CONCLUSION

In light of the foregoing, the facts alleged in the Petition, and the evidence submitted by Petitioners, pursuant to Article 78 of the CPLR the Court should vacate and annul (a) the Board's January 2021 Resolution and/or (b) the Easement Agreement itself; and should enjoin the Board from taking further action on the Easement.

Dated: February 26, 2021

Respectfully submitted,

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SECTION 202.8-b CERTIFICATION OF COMPLIANCE

This memorandum of law contains 4,859 words (based on the Microsoft Word word-count function), excluding the parts of the memorandum of law exempted by Uniform Rule 202.8-b.

Dated: February 26, 2021

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