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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

OYSTER BAY ASSOCIATES LIMITED PARTNERSHIP and MOUNTAIN VENTURES OYSTERBAY ONE LLC,

Petitioners-Plaintiffs,

- against -

THE TOWN OF OYSTER BAY, THE TOWN BOARD OF THE TOWN OF OYSTER BAY, JOHN VENDITTO, as Supervisor of the Town of Oyster Bay and Member of the Town of Oyster Bay, JOSEPH D. MUSCARELLA, ANTHONY D. MACAGNONE, CHRIS J. COSCHIGNANO, JOSEPH G. PINTO, and REBECCA ALESIA, as Councilmembers and all of whom constitute the Town Board of the Town of Oyster Bay, and OYSTER BAY REALTY LLC,

Respondents-Defendants.

By: Asher, J.S.C.
Dated: October 9, 2013

Index No. 13-16015
Mot. Seq. # 001 - MD; CDISPSUBJ

Return Date: 7/12/13
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In this hybrid CPLR article 78 proceeding and action for declaratory relief the petitioners seek a judgment reversing, annulling and setting aside Resolution No. 373-2013 of the Town Board of the

Town of Oyster Bay (Town or Town Board)[1] dated May 21, 2013, which authorized the Town Supervisor of the Town of Oyster Bay to sign a contract of sale for a parcel of municipal real property located at 150 Miller Place, Syosset, New York (Premises) based on the Town's determination that the property was "surplus and the Town has no future use for same." The petitioners allege, among other things, that the Town's resolution should be rendered null and void because its adoption violated Town Law 64 (2), the New York State Environmental Quality Review Act ("SEQRA") and its implementing regulations at 6 NYCRR 617, and Public Officers Law 105.

This matter arises in the context of a lengthy dispute over the efforts of the petitioners to build a shopping mall on property located adjacent to the Premises. The petitioners are owned by The Taubman Realty Group Limited Partnership (Taubman) which is known for developing shopping malls throughout the United States. Since the mid-1990's, Taubman has, through the efforts of the petitioners, owned or controlled the property adjacent to the Premises, and it has been attempting to obtain a special use permit from the Town to build "an upscale shopping mall." Taubman has not been able to obtain said permit to date, and its efforts have resulted in more than a decade of litigation with the Town. The Simon Property Group, one of the largest developers of mall properties in the United States and Taubman's competitor, is one of three entities which make up the respondent Oyster Bay Realty LLC (Simon). The Town adopted the subject resolution in an effort to sell the Premises to Simon for a price of $32.5 million, and to close a gap in its 2013 operating budget. It is undisputed that the agreed price is well above the value set forth in an appraisal of the Premises commissioned by the Town.

The Premises consist of approximately 54 acres, 39 acres of which cannot be developed as they are a capped "Superfund" site pursuant to a consent decree with the United States Environmental Protection Agency. The remaining 15 acres house various Town departments and divisions, including the Department of Public Works, the Animal Shelter, and the Highway Department. It is undisputed that Taubman approached the Town in the Spring of 2012 with the idea of purchasing the Premises in an effort to increase the likelihood of obtaining approval of its application for a special use permit to construct its proposed shopping mall. It is also undisputed that Taubman entered into serious negotiations with the Town for the purchase of the Premises, and that Taubman spent a good deal of time and money in that regard. Thereafter, Simon learned of the Town's plans to sell the Premises and entered into successful negotiations for its purchase. The proposed contract provides, among other things, that the Town is not obligated to close title to, and it may continue to use, the Premises for a minimum of five years, with an option to extend the closing for another three years.

In this hybrid proceeding, Taubman sets forth seven causes of action. In summary, in the first five causes of action Taubman seeks, pursuant to CPLR article 78, to annul the Town's resolution to sell the Premises on the grounds that 1) the Town entered into a sham transaction with Simon and did not

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[1] The respondents The Town of Oyster Bay, the Town Board of the Town of Oyster Bay, John Venditto, as Supervisor of the Town of Oyster Bay and Member of the Town Board of the Town of Oyster Bay, Joseph D. Muscarella, Anthony D. Macagnone, Chris J. Coschignano, Joseph G. Pinto, and Rebecca Alesia, and Michele Johnson as Councilmembers and all of whom constitute the Town Board of the Town of Oyster Bay are united in interest and appear by joint counsel. To make matters simple, the Court deems it sufficient to refer to the enumerated respondents as the Town or Town Board.

use a method which ensured that the best price for the sale of the Premises would be obtained; 2) the Premises cannot be sold as it is not surplus real property pursuant to Town Law 64 [2]; 3) the Town improperly delegated its authority to negotiate and enter into the contract with Simon to the Town Attorney; 4) the Town failed to comply with SEQRA when it issued a negative declaration in its review of the proposed sale; and 5) the Town failed to consider the environmental impact of relocating the divisions and departments currently occupying the Premises, resulting in improper segmentation pursuant to SEQRA. In its sixth cause of action, Taubman seeks judgment declaring the subject resolution void as it was enacted in violation of Public Officers Law 105, also known as the Open Meetings Law. In its seventh cause of action, Taubman seeks to enjoin the Town from selling the Premises on the grounds that it is a unique parcel which has "particular value to Petitioners."

As to Taubman's claims for relief, it first must be determined if any of the objections in point of law asserted by the respondents require a dismissal as a matter of law. In its answer, the Town sets forth ten objections in point of law. In its answer, Simon sets forth eighteen objections in point of law, some of which are duplicative or merely re-wordings of the same issue, and all of which are contained within the ten objections in point of law in the Town's answer. Thus, the Court disposes of the issues raised by Simon in its determination of the Town's assertions. The Town's first objection in point of law is that the petition/complaint fails to state a cause of action. Pursuant to CPLR 3211(a) (7), a court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). The pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to petitioners/plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Here, it is determined that the petition/complaint states cognizable causes of action under CPLR article 78, and for declaratory judgment/injunctive relief.

The Town's second objection in point of law is that Taubman lacks standing to bring this hybrid proceeding. "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (***Hoston v New York State Dept. of Health***, 203 AD2d 826, 611 NYS2d 61 [3d Dept 1994], *citing* ***Society of Plastics Indus., Inc. v County of Suffolk***, 77 NY2d 761, 570 NYS2d 778 [1991]; ***New York State Nurses Assn. v Axelrod***, 152 AD2d 888, 544 NYS2d 236 [3d Dept 1989]). A party challenging an administrative action, for standing purposes, must show (1) that the party would suffer direct harm, injury that is in some way different from that of the public at large, and (2) that the in-fact injury of which the party complains (its aggrievement, or the adverse effect upon it) falls within the "zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted (*see* ***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*; *see also* ***Gernatt Asphalt Products, Inc. v Town of Sardinia***, 87 NY2d 668, 642 NYS2d 164 [1996]; ***Brown v County of Erie,*** 60 AD3d 1442, 876 NYS2d 801 [4th Dept 2009]).

Here, whether Taubman has standing to challenge the subject Town resolution must be determined based on two separate standards. One standard governs Taubman's first and second causes of action which challenge respectively whether the method chosen by the Town to market the Premises ensured that it would receive the best price, and whether the Premises was surplus real property. The second standard governs Taubman's fourth and fifth causes of action which allege that the Town violated SEQRA. A determination regarding standing rests, in part, on policy considerations, that a

party should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (*see* ***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*). Regarding Taubman's first and second causes of action involving the sale of the premises, the interests of justice requires recognition of Taubman's standing. Taubman is a tax-paying resident of the Town. It is clear that the public interest would be subverted if no one were found to have standing to challenge the planned sale of municipal real property (*see eg.* ***Committee to Preserve Brighton Beach v Planning Commission of the City of New York***, 259 AD2d 26 [1st Dept 1999]; ***State Communities Aid Assn. v Regan***, 112 AD2d 681, 492 NYS2d 497 [3d Dept 1985]; ***Albert Elia Bldg. Co. v New York State Urban Dev. Corp.***, 54 AD2d 337, 388 NYS2d 462 [4th Dept 1976]; ***Roosevelt Island Residents Assn. v Roosevelt Island Operating Corp.***, 7 Misc 3d 1029[A], 801 NYS2d 242 [Sup Ct, New York County 2005]). Under the totality of the circumstances, even if the petitioners may not have established direct harm different from that of the public at large, they have properly pled standing herein .

In the context of Taubman's fourth and fifth causes of action challenging the Town's compliance with SEQRA, in addition to the two aforementioned requirements, Taubman must demonstrate that it will suffer an environmental injury in fact (*see* ***Society of Plastics Industry, Inc. v County of Suffolk***, *supra*). Moreover, the injury must be more than mere speculation or conjecture (*see* ***New York State Assn of Nurse Anesthetists v Novello,*** 2 NY3d 207, 778 NYS2d 123 [2004]; *see also* ***Schaivoni v Village of Sag Harbor***, 201 AD2d 716, 608 NYS2d 322 [2d Dept 1994]), and it must be based upon more than solely economic concerns (***Society of Plastics Industry, Inc. v County of Suffolk***, *supra* at 774). Taubman fails to allege any environmental injury in its petition/complaint, as well as in its submissions in support of its pleading and in reply to the respondents' opposition. Instead, Taubman contends that it has standing to challenge the Town's review pursuant to SEQRA on the ground that its property is adjacent to the Premises, giving it "prima facie" standing (***Matter of Long Is. Contractors' Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]; ***Matter of John John, LLC v Planning Bd. of Town of Brookhaven***, 15 AD3d 486, 790 NYS2d 500 [2d Dept 2005]). Taubman further contends that even if a party's property is only in "close proximity" to the property at issue, "that party may be presumed to be adversely affected by a SEQRA violation and need not allege specific harm" (***Matter of Stephens v Gordon***, 202 AD2d 437, 610 NYS2d 531 [2d Dept 1994]; *see also* ***Matter of Bloodgood v Town of Huntington***, 58 AD3d 619, 871 NYS2d 644 [2d Dept 2009]; ***Matter of Barrett v Dutchess County Legislature***, 38 AD3d 651, 831 NYS2d 540 [2d Dept 2007]).

Under the facts of this case, Taubman does not have standing with regard to its fourth and fifth causes of action under SEQRA despite the fact that its property is adjacent to the Premises. It is undisputed that the Town's decision to sell the Premises does not involve a change in zoning or a change in use. Taubman's conclusory and generalized allegation that some future development of the Premises by Simon will affect its property does not establish that its interests are clearly "in some way different from that of the public at large" (***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*). While it has been held that close proximity to the premises that is the subject of a challenged zoning determination grants a party standing without the need to show actual injury or special damage to establish the first prong of the standing test (***Cremosa Food Co., LLC v Petrone***, 304 AD2d 606, 758 NYS2d 146 [2d Dept 2003]; ***Long Island Pine Barrens Soc., Inc. v Planning Bd. of Town of Brookhaven***, 213 AD2d 484, 623 NYS2d 613 [2d Dept 1995]), this is not a matter in which Taubman challenges a zoning decision. Even if it were, Taubman would still need to satisfy the second prong of

the standing test by demonstrating that its alleged concerns fall within the "zone of interests" covered by the zoning laws or SEQRA (***Cremosa Food Co., LLC v Petrone***, *supra* at 607; ***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals***, 69 NY2d 406, 410, 413-414, 515 NYS2d 418 [1987]). Here, Taubman has asserted economic injury only, and it has alleged no environmental impact to its property even if the sale of the Premises occurred immediately. Therefore, any SEQRA challenge cannot be sustained (***Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency***, 76 NY2d 428, 559 NYS2d 947 [1990]). Accordingly, the fourth and fifth causes of action in the petition/complaint are dismissed.

The Town's third, fourth and eighth objections in point of law respectively contend that the Town acted properly and was permitted to sell the Premises pursuant to Town Law 64 [2]; that it properly determined the Premises to be surplus real property; and that Taubman is estopped from challenging the method that the Town used to market the sale of the Premises because Taubman never made an offer to purchase the property. Said contentions go to the ultimate findings of the Court in this hybrid special proceeding, and do not establish the respondents' entitlement as a matter of law to a determination in their favor regarding any of the claims raised in the petition/complaint.

The Town's fifth objection in point of law is that Taubman's third cause of action is without merit, and should be dismissed. In summary, Taubman's third cause of action alleges that the Town improperly delegated its authority when it authorized the Town Attorney to review and approve the contract of sale to Simon. The issue is academic as counsel for Taubman withdrew the third cause of action on the record on July 12, 2013.[2] Accordingly, the petitioners' third cause of action is dismissed.

The Town's sixth and seventh objections in point of law respectively contend that its issuance of a negative declaration regarding the sale of the Premises was not arbitrary or capricious, and that its SEQRA review was appropriate and did not involve improper segmentation under that statute and its implementing regulations. Said contentions have been rendered academic by the finding that the petitioners do not have standing to challenge the Town's environmental review. In any event, the contentions would go to the ultimate findings of the Court in this hybrid special proceeding, and would not establish the respondents' entitlement as a matter of law to a determination in their favor regarding any of the claims raised in the petition/complaint.

The Town's ninth objection in point of law is that it did not violate the Open Meetings Law when it went into executive session during the meeting of the Town Board on May 21, 2013. That meeting was scheduled to consider whether to approve the sale to Simon. It is undisputed that counsel for Taubman vigorously opposed the putative sale of the Premises to Simon. By letter dated May 20, 2013, counsel for Taubman indicated that "if the Board acts tomorrow it will leave Taubman will (*sic*) little choice but to take legal action in order to protect its interests ..." At the Town Board meeting, co-counsel for Taubman read the aforementioned letter into the record, and indicated that "I will just add to that ... in my humble opinion ... it could also raise the issue of the town and its members being liable for civil rights violation damages." Shortly thereafter, the Town Board voted to go into executive session.

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[2] See the transcript of oral argument in this matter, page 73.

The Open Meetings Law, Public Officers Law 103 (a), provides that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat." Public Officers Law 105 (1) states in part that "[u]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion ... a public body may conduct an executive session for ... discussions regarding proposed, pending or current litigation." Here, it is undisputed that counsel for Taubman raised the issue of potential litigation regarding the Town's consideration of the proposed sale of the premises. The Town appropriately conducted an executive session to discuss the issue of litigation without revealing its strategy to a potential adversary (POL 105 [1] [d]; ***Matter of Jefferson Val. Mall (Concerned Citizens to Review) v Town Bd. of Town of Yorktown***, 83 AD2d 612, 441 NYS2d 292 [2d Dept 1981]). Accordingly, the petitioner's are not entitled to a declaratory judgment on their sixth cause of action that the Town's adoption of the subject resolution was violative of the Open Meetings Law.

The Town's tenth objection in point of law is that the petition/complaint is untimely or barred by laches. In both instances, the respondents have failed to assert any facts to support their contentions or otherwise establish that such a defense exists.

Turning to the first and second causes of action wherein Taubman seeks to annul the Town's resolution to sell the Premises pursuant to CPLR article 78 on the grounds that 1) the Town entered into a sham transaction with Simon and did not use a method which ensured that the best price for the sale of the Premises would be obtained; and 2) the Premises cannot be sold as it is not surplus real property pursuant to Town Law 64 [2]. In considering these two causes of action, it is appropriate to set forth some additional information which provides a background to the dispute. It is undisputed that the Town faced a budget deficit in 2013 and that it considered, among other things, selling the Premises in order to raise revenue. Although there is some dispute as to the details, it is also undisputed that Taubman entered into negotiations with the Town in the Spring of 2102 to purchase the Premises, that negotiations continued through April 2013, and that various term sheets were presented to the Town. In January 2013, Taubman sent a proposed contract to the Town. It appears that none of the term sheets or the proposed contract included a price term regarding the purchase, and that all of Taubman's offers were expressly contingent upon the Town granting approval for construction of the proposed mall. In April 2013, purportedly at the Town's request, Taubman provided the Town with an economic analysis of, among other things, the number of jobs created, the tax revenues generated, and the employee compensation which would be paid, should it receive approval to construct a mall on its property. In October 2012, Simon became aware of the Town's interest in selling the Premises, and entered into negotiations with the Town, which conducted concurrent negotiations with both parties. Taubman alleges that the Town did not reveal that it had entered into negotiations with Simon, that the Town never revealed any of the terms, including the purchase price, of the offer made by Simon which resulted in a proposed contract of sale, and that the Town never gave it the opportunity to "beat any other offer received by the Town."

It is well settled that in a special proceeding seeking judicial review of administrative action, the court must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (*see* ***Flacke v Onondaga Landfill Sys.,*** 69 NY2d 355, 514 NYS2d 689 [1987]; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, 53 NY2d 186, 440 NYS2d 875 [1981]). In

reviewing an administrative action a court may not substitute its judgment for that of the agency responsible for making the determination (*see* ***Flacke v Onondaga Landfill Sys.***, *supra*; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, *supra*). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (***Matter of Pell v Board of Education,*** 34 NY2d 222, 356 NYS2d 833 [1974]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

First Cause of Action - The Town's Obligations Regarding the Marketing of the Property.

Town Law 64, entitled "General powers of town boards" provides, in pertinent part:

> Subject to law and the provisions of this chapter, the town board of every town:
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> * * *
>
> 2. Acquisition and conveyance of real property. May acquire by lease, purchase, in the manner provided by law, or by acquisition in the manner provided by the eminent domain procedure law, any lands or rights therein, either within or outside the town boundaries, required for any public purpose, and may, upon the adoption of a resolution, convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum.

It has been held that "[p]ublic officials are ... 'temporary trustees' of public property ... and 'It is mandatory upon trustees, with discretionary power of sale, to dispose of trust property upon the most beneficial terms which it is possible for them to secure'" (***Matter of Ross v Wilson***, 308 NY 605 [1955]). In addition, it is well settled that price is not the only consideration in determining whether a particular offer to purchase public property should be accepted (*see* ***Matter of Yeshiva of Spring Val. v Board of Educ. of E. Ramapo Cent. School Dist.***, 132 AD2d 27, 521 NYS2d 253 [2d Dept 1987]; ***Matter of New City Jewish Ctr. v Flagg***, 111 AD2d 814, 490 NYS2d 560 *affd* 66 NY2d 980, 499 NYS2d 395; [2d Dept 1985]; ***Creole Enters. v Giuliani***, 236 AD2d 272, 653 NYS2d 576 [1st Dept 1997]). Thus, Taubman's contention that it should have been afforded an opportunity to "beat any offer" with a higher price is without merit.

Similarly, Taubman's contention that the Town had an obligation to advertise the sale of the Premises, to retain a real estate broker, to issue a request for proposals and/or to conduct an open bidding process is unavailing. It is undisputed that Simon has offered to pay approximately 25% more than the appraised value for the purchase of the Premises. Taubman acknowledges that it was prepared to pay in excess of the property's actual value under the circumstances. In addition, Taubman concedes that Town Law 64 (2) "does not require a public hearing prior to the sale of real property and does not require competitive bidding." In light of the surrounding circumstances, including the obvious fact that it is unlikely that anyone but Simon or Taubman would agree to pay in excess of $30 million for property

which includes a "Superfund" site, the Town acted appropriately in marketing the Premises as it did.

Moreover, the Town's determination to accept the Simon offer was not arbitrary and capricious. Initially, this is true because it appears that Taubman never made an offer at a price in excess of that offered by Simon or on better terms. Accepting for the sake of argument Taubman's assertions that it was told by the Town to leave price out of its term sheets, and that it did not know how much Simon was willing to pay until the Town Board Meeting, it remains the fact that Taubman has never made an offer at a higher price, nor one which would permit the Town to close the shortfall in its 2013 budget.

In addition, Taubman does not dispute that all of its offers to purchase the Premises were conditioned on the Town's issuance of a special use permit to construct its proposed mall. That condition necessarily includes a series of determinations, some outside of the Town's purview, which must all result in a decision in favor of Taubman to enable the Town to issue said permit. If any of these determinations happened to go against Taubman, the Town would find itself without a purchaser for the Premises, and without the revenue that it needs to close the 2013 budget gap. This fact does not take into account that, even if everything went in Taubman's favor, it is unclear whether this condition could be met within the Town's 2013 fiscal year.

Finally, it is noted that all of the term sheets delivered to the Town by Taubman are marked "Confidential - Prepared in connection with settlement discussions." Considering the long history of litigation between the parties, and the Town's right to control that litigation and/or settle it on terms that it considered favorable, Taubman cannot be heard to complain that the Town did not reveal all of its strategy in negotiating for the sale of the Premises.

Here, considering the circumstances facing the Town, the outcome of the negotiations, and the unique opportunity presented to the Town to obtain a price in excess of the appraised value of the property, the Town acted appropriately. Accordingly, Taubman's first cause of action is dismissed.

Second Cause of Action - The Town's Determination That The Property Is Surplus.

As set forth above, a town board may sell real property at private sale pursuant to a resolution which is subject to a permissive referendum (Town Law 64 [2]). The Court takes judicial notice that a permissive referendum regarding the subject resolution was held on August 20, 2013, and that the town residents approved the sale of the Premises by a large margin. Other than the requirement that a resolution to sell real property is subject to a permissive referendum, the statute does not include any other limitation on a town board's authority to undertake such action.

Taubman contends that the Town cannot sell the Premises to Simon or anyone else because it is not surplus real property. In support of its contention, Taubman cites two opinions by the New York State Comptroller which state that a town may convey a parcel of land if the property is unneeded for town purposes and if the town receives fair and adequate consideration (1981 Ops St Comp No. 1981-5, 1981 WL 16578; 1992 Ops St Comp No. 1992-32, 1992 WL 437181). The sole basis for Taubman's contention that the property is not surplus is the fact that the proposed contract of sale delays the closing of title for five years during which time the Town will continue to use the Premises, and that the Town

can extend the time for closing an additional three years if it pays a fee based on the square footage of the buildings occupied on the property.

A review of the certified record and return submitted by the Town reveals that, in exploring its options regarding the subject sale, it retained an engineering consulting firm, Nassau Suffolk Engineering & Architecture, PLLC (NSEA) to inspect the Premises and the improvements thereon to determine its utility as municipal property. After being retained in October 2012, NSEA stated in its report dated May 17, 2013 that it had "analyzed the Complex with an eye toward future operations and the ability of the Complex to support the current level of operations, and serve the Town and the general public in an economical, efficient and sustainable manner." and that it "inspected each of the buildings to determine building condition, operational efficiency, life cycle and effectiveness of operations." Based on its inspection and analysis, NSEA found that it would cost $47,625,000 to undertake a complete modernization of the buildings located at the complex, and that "departmental operations [are] disjointed and inefficient owing to the age, condition and out-of-date design of the buildings." Based on its findings, NSEA recommended that, due to " the age and condition of the facilities, the functional obsolescence of the Complex, and the growing need for ever more and more expensive routine maintenance, NSEA recommends that the Town explore a new centralized facility which would be economically viable, environmentally sustainable, and provide for a more productive work environment - all of which would result in a more cost-efficient Complex for the Town."

The parties do not dispute that the Town Board is charged with determining whether the Town should sell the Premises. "Whether a particular parcel of village property is unneeded for village purposes is a question of fact ... [and] it would appear that a village board could have a rational basis for declaring a parcel to be unneeded if ... the village taxpayers would suffer no meaningful discontinuance of the availability of real property for a particular use" (1988 Ops St Comp No. 88-1, 1988 WL 405747). Here, the Town's determination that it had a unique opportunity to seek the best price for a sale of the Premises, to transition its particular uses of the property to other sites over an extended period without a "meaningful discontinuance" of the availability of any real property for those uses, and to close its 2013 budget gap in the public interest of its residents was made on a rational basis, and it was not arbitrary and capricious.

The Court will not substitute its judgment for that of the Town, which was responsible for making the determination to sell the premises as unneeded (*see* ***Flacke v Onondaga Landfill Sys.***, *supra*; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, *supra*). This is especially true where the residents of the Town have spoken so clearly on the issue. The Town's public land belongs to the people in their political capacity as a community, and it should be controlled, regulated, and disposed of by the people in their collective political capacity (*see eg.* ***Furey v Town of Gravesend***, 1885, 38 Hun 319, affd 104 NY 405 [1885]; *see also* ***People v Wood***, 59 Hun 616, 12 NYS 436 [1891]; ***Town of Verona v Peckham***, 66 Barb. 103 [1867]). Accordingly, Taubman's second cause of action is dismissed.

Third, Fourth and Fifth Causes of Action.

As discussed above, Taubman has withdrawn its third cause of action, and it has been determined

that Taubman lacks standing to challenge the sale of the Premises in its fourth and fifth causes of action on the grounds that the Town's review of the proposed sale violates SEQRA. Accordingly, the third, fourth and fifth causes of action are dismissed.

Sixth Cause of Action - Declaratory Judgment.

As set forth above, in its sixth cause of action, Taubman seeks judgment declaring the subject resolution void as it was enacted in violation of Public Officers Law 105, also known as the Open Meetings Law. Because this is a hybrid action, this court should render a decision declaring whether the Town's actions with respect to the instant resolution was legal, valid and in full compliance with the requirements of POL 105 (*see* ***Holliswood Care Ctr. v Whalen***, 58 NY2d 1001, 461 NYS2d 1009 [1983]; ***Lanza v Wagner***, 11 NY2d 317, 229 NYS2d 380 [1962]). For the reasons stated above, Taubman is not entitled to a declaration that Resolution 343-2013 is void as violative of said law.

Seventh Cause of Action - Permanent Injunction.

With respect to the request for a permanent injunction, "[a] permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*see* ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, 873 NYS2d 148, 153 [2nd Dept 2009] quoting ***Icy Splash Food & Beverage, Inc. v Henckel***, 14 AD3d 595, 596, 789 NYS2d 505 [2nd Dept 2005]; *see also* ***Kane v Walsh***, 295 NY 198, 205-206, 66 NE2d 53 [1946]; ***Forest Close Assn., Inc. v Richards***, 45 AD3d 527, 529, 845 NYS2d 418 [2nd Dept 2007]). Taubman has failed to establish its right to any relief in its favor, let alone a finding that it will suffer any irreparable harm. Accordingly, its seventh cause of action is dismissed.

Additional Matters Including Taubman's Request For Additional Discovery

In its petition/complaint Taubman makes much of the alleged failure of the Town to properly respond to a Freedom of Information Act request for specific documents regarding the Town's determination to sell the Premises. The Town adequately complied with the request prior to the return date of the order to show cause which commenced this hybrid proceeding, albeit in a fashion that did not suit Taubman's time schedule. In correspondence received by the Court after said return date, Taubman sought additional discovery. Taubman's request for discovery pursuant to CPLR 408 is denied. Taubman chose to commence this proceeding pursuant to CPLR article 4. A special proceeding brought under CPLR article 4 is subject to the same standard of proof as a motion for summary judgment made in an action (***Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.]***, 18 NY2d 250, 273 NYS2d 337 [1966], *cert denied sub nom.* ***McInnes v Port of N.Y. Auth.***, 385 US 1006, 87 S Ct 712 [1967]; ***Matter of People v Applied Card Sys., Inc.***, 27 AD3d 104, 805 NYS2d 175 [3d Dept 2005]; ***Brusco v Braun***, 199 AD2d 27, 605 NYS2d 13 [1st Dept 1993]; ***People v D.B.M. Intl. Photo Corp.***, 135 AD2d 353, 521 NYS2d 246 [1987]). "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). Here, Taubman's contention that the discovery requested would be relevant and

necessary to the determination of this CPLR article 78 proceeding is without merit.

In addition, the Court notes that the affirmation of Leonard Genova dated July 11, 2013 has not been considered herein as it is deemed a sur-reply filed without leave of Court. Finally, the Court has considered certain correspondence received from the parties after the return date of the instant order to show cause and the oral argument before the Court on that date on a limited basis. Despite Taubman's contention that its correspondence was submitted in response to the Court's inquiries at oral argument regarding the Town's determination that the Premises are surplus, the Court did not request the submission of additional authority on the issue. Nonetheless, the Court has considered the arguments and authorities submitted in said correspondence in rendering its decision herein. However, the Court did not request at oral argument, and it does not now agree to permit, the parties to pursue new legal arguments after the matter has been submitted. Accordingly, the Court has not considered the legal arguments and issues raised in said correspondence which were not part of the record.

Accordingly, the petition is denied in its entirety.

Submit order and judgment (one paper).

W. Gerard Asher

J.S.C.