STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of
BRIGHTON RESIDENTS AGAINST VIOLENCE TO EVERYONE, INC., ROC LOVE, INC., CAROL N. CROSSED, ELLEN DUNCAN, and WILLIAM MCGINN,

Plaintiffs-Petitioners,

vs.

PLANNING BOARD OF THE TOWN OF BRIGHTON, And KENNETH W. GORDON, in his capacity as TOWN ATTORNEY FOR THE TOWN OF BRIGHTON, and WESTFALL MEDICAL REALTY, LLC

Defendants-Respondents,

For Relief Pursuant to CPLR Article 78 and for Declaratory Judgment Relief Pursuant to CPLR 3001

FIRST AMENDED VERIFIED COMPLAINT-PETITION

Plaintiffs-Petitioners BRIGHTON RESIDENTS AGAINST VIOLENCE TO EVERYONE, INC., ROC LOVE, INC, Carol N. Crossed, Ellen Duncan, and William McGinn, (collectively, the "Plaintiffs-Petitioners"), by and through their attorneys MANDEL CLEMENTE, P.C, as and for a First Amended Verified Complaint-Petition, complain of Defendants-Respondents, and also petition this Court for relief, and allege as follows:

INTRODUCTION AND BACKGROUND

1. In or about May of 2021, an application as submitted by Defendant-Respondent Westfall Medical Realty, LLC ("Westfall") to the Defendant-Respondent Planning Board of the Town of Brighton ("Planning Board") seeking site plan approval for the demolition of an existing 6,015 square foot medical office building (previously and most recently used as a physical therapy office) and reconstruction of a larger 6,425 square foot building at the

address of 2233 South Clinton Street in the Town of Brighton ("the Project"). The application represented that the new building would be used as "medical office space with similar utility uses and demands as previously existed", i.e. similar utility use and demands as the physical therapy office which was previously at the location. No information about the proposed tenant or specific medical office use was provided in the application, or in the Notice of Public Hearing on the application.

2. Petitioners, through word of mouth and investigation, determined that the planned facility was to be owned or operated by Planned Parenthood, and that the facilities were not going to be limited to the type of outpatient medical office visits, but rather would include abortive surgeries, possibly even through the second and third trimesters of gestation.

3. For petitioners, this change in use from the prior physical therapy office to one in which abortions, including medical/chemical and surgical abortions, were now be occurring was one which required consideration by the Planning Board, both as to the question of whether such use is permitted under the Town Code definition of medical office and also whether, even if permitted by the zoning, does the specific site plan/use as an abortion facility pose distinct and unique adverse environmental impacts to traffic, wastewater treatment systems, waste disposal systems, police resources, and incompatibility with the neighboring uses that it should be denied under SEQR and the Town of Brighton Code, Article III, Section 217-8 which vests the Planning Board with the duty to weigh all site plan uses against existing neighboring uses in particular.

4. Petitioners and many other concerned Brighton residents sought to attend the June and July Planning Board meetings and public hearings to raise these issues, but occupancy was limited due to alleged Covid precautions. As a result, many persons were not able to speak to the entire crowd, or were not able to attend and hear others who were speaking.

5. In addition, letters submitted by those opposed to the Project were incorrectly listed in the agenda given to Planning Board members as being in support of the project. Given the closely divided number of letters, this misstatement erroneously gave Planning Board members the impression that the "pro" letter outnumbered the "anti" letters, something that just wasn't true and which had the potential to impact the votes of the Planning Board members.

6. The most significant impact to due process and the lawful procedure which should have been followed, however, occurred at the start of the June 2021 public hearing and reoccurred throughout the public hearings and Planning Board consideration of the application. Respondent Gordon advised the Planning Board members that they could not consider the use of the building in rendering a determination on SEQR and the final issue of site plan approval.

7. That advice was not proper, and was an *ultra vires* act by Respondent Gordon that usurped the role of the Planning Board as the agency charged with determining the compatibility of proposed uses within site plan review and approval, inappropriately limited the role of the Planning Board as lead agency under SEQR, and prevented the

Planning Board from fulfilling its statutory duties under Section 217 of the Town Code of the Town of Brighton.

8. By stating that the use itself could not be considered by the Planning Board, Respondent Gordon committed an error of law which permeated and affected the proceedings to the point that no meaningful site plan review was conducted. This is a significant error of law, and procedural error, which permeated the entire site plan approval and SEQR processes.

9. Upon information and belief, even though a state has occupied a field of regulation with respect to a particular use, a local municipality maintains its right to adopt zoning that eliminates or prohibits certain uses, to limit the secondary effects of certain uses by prescribing areas within the town in which certain uses may not be sited if churches or schools are within a certain proximity to a proposed use, and to apply laws of general applicability to said use and any particular attributes of that use.

10. Because of Respondent Gordon's advice and admonishment, though, Respondent Planning Board did not engage in a meaningful discussion of the impacts arising from the proposed use of the facility as an abortion clinic, nor did the Planning Board consider whether the fact that surgeries would be conducted at the facility might render the proposed facility outside of the Town's definition of a medical office.

11. That particular issue was one raised by a prior court considering the very same provisions of the Town of Brighton Code at issue in this proceeding, and has never been resolved by the Town or any other court.

12. It should have been an issue considered by the Planning Board pursuant to the provisions of the Town Code, but instead the project was determined and announced as a permitted use within the Zone by Respondent Gordon, who lacks the authority to make such determination. Although as Town Attorney, Respondent Gordon may advise the Board, he may not make decisions for the Board. Because he crossed that line, the entire procedure is affected by errors of law which require nullification of the SEQR and site plan determinations.

13. The site plan approval became a "rubber stamp" pro forma meeting in which the underlying environmental issues of traffic, public safety, and disposal of medical waste and fetal remains were not given the appropriate "hard look" by the Planning Board. A representation was made by the applicant that waste removal would be the same as that of the prior use. However, the waste generated by a physical therapy office is clearly different than that generated by an abortion facility engaging in surgical procedures and which results in fetal remains which have to be properly disposed of. No analysis of these differences was made by the Planning Board, even through that issue was drawn to their attention by letter from Petitioner McGinn.

14. The wastes generated and deposited into the wastewater system of the Town of Brighton as a result of the administration of "abortion pill" which results in the termination of a pregnancy and expulsion of the human fetus, often into the toilet at the suggestion of Planned Parenthood who openly advocates sitting on the toilet at home during the hours-long chemical abortion process, were not considered by the Planning Board or anyone else reviewing the site plan application on behalf of the Town.

15. Nothing in the record at the Town reveals consideration of that significant environmental concern by any other administrative or regulatory body either. As lead agency, the Planning Board had the responsibility to take a hard look at such an important environmental issue, and yet it failed to do so.

16. Even when it was determined that, contrary to the statement of the applicant's representative that no new area of excavation would be required, the site plan would, in fact, require some new excavation for utility connections, the Planning Board *still* did not pin down that issue or take the requisite "hard look" at what that might mean, given the EAF's acknowledgement that the site was in an archaeologically sensitive areal that the site and/or adjacent areas contained wetlands, and that the wetlands data for that area was known to be "incomplete." A true and copy of the EAF submitted by Westfall to the Planning Board is annexed hereto as Exhibit "A".

17. Similarly, the site plan approval process itself became a second "rubber stamp" event in which few questions were asked of the applicant, and many issues which should have been discussed in detail, were punted to persons other than the Planning Board members through the imposition of 28 conditions to the approval, some of which generically require that the site plan "conform to all applicable requirements of the Town Code" without providing information as to which items of the code are meant.

18. Given that the Planning Board meeting occurs in the open, as required by the Open Meetings Law, but the delegated later approval and working out of details of the site approval per the 28 conditions occurs in secret, out of the public eye, Petitioners who attended the public hearings in the hopes of participating and hearing an open debate and consideration of these very issues were deprived of that opportunity.

19. No discussion was had, or questions asked of the applicant, about whether future construction of protective measures, such as the berm installed by the other abortion clinic in the same neighborhood, would be made.

20. No consideration was given by the Planning Board of the fact that there are located, within the immediate vicinity of the Project, a children's playground, a pediatrician's office, a Muslim mosque, and a Catholic boy's school, all of which are sensitive uses which would, at least, arguably suffer the deleterious secondary effects associated with such abortion facilities, including, but not limited to, lewd and obnoxious behavior by sex

traffickers who bring their workers to the clinic and loiter outside the building and the constant police presence to govern interactions between these persons and those "sidewalk advocates" like Plaintiffs-Petitioners Ellen Duncan and her goup, ROC LOVE, Inc., who peacefully seek to persuade those entering the clinic to consider other options for them and their unborn child.

21. Petitioner BRAVE, Petitioner ROC LOVE, and the individual Petitioners were aggrieved by the wrongful conduct of Respondent Gordon and the Planning Board and seek relief from this Court pursuant to CPLR Article 78 and CPLR 3001.

PARTIES

22. Plaintiff-Petitioner Brighton Residents Against Violence to Everyone, Inc., ("BRAVE") is a not-for-profit corporation duly organized and existing under the laws of New York State, with a mailing address of PO Box 18696, Rochester, NY 14618. The main offices of BRAVE are located within the Town of Brighton. BRAVE represents the interests of Brighton taxpayers and residents and persons employed in Brighton in their efforts to preserve and protect the environment and neighborhoods in the Town of Brighton from development and activity that threatens children, born and unborn, including the environmental disamenities which accompany the sighting of abortion facilities within communities in terms of impacts to traffic, emergency services, community character, property values, and other negative environmental or neighborhood impacts. As part of its mission, BRAVE promotes, organizes and conducts activities and events intended to minimize violence to children, born and unborn, in the Town of Brighton in the County

of Monroe, and to heighten community awareness of the negative impacts of abortion upon the community and the lives of individuals and families, and to encourage alternative options for people facing abortion decisions. BRAVE is concerned about the wellbeing of all within the community and especially within the Town of Brighton and surrounding area.

23. Plaintiff-Petitioner Roc Love, Inc. ("ROC Love"), is a not-for-profit corporation duly organized and existing under the laws of New York State, which operates within the Town of Brighton and the greater Rochester area. ROC Love promotes, organizes and conducts activities and events intended to encourage alternative options for people facing abortion decisions. ROC Love is concerned about the wellbeing of all within the community and especially within the Town of Brighton and surrounding Rochester area.

24. Plaintiff-Petitioner Carol N. Crossed is a member of BRAVE and a Brighton town resident and property owner, as well as the grandmother of a minor child who attends the McQuaid Jesuit Preparatory School located within the vicinity of the Project.

25. Plaintiff-Petitioner Ellen Duncan is a resident, taxpayer, and property owner within the Town of Brighton, a member of BRAVE and also a member of ROC Love, Inc. She is a Sidewalk Advocate for ROC Love, and frequently stands in public spaces outside of abortion clinics to encourage potential mothers to talk to them, to learn about other options, and, on the occasions, when they change their minds and elect not to engage in abortion, provide resources, clothing and support for the expectant and new mothers and

fathers, and support for pregnant women, so that they make informed decisions and often choose not to abort their babies. As a sidewalk advocate for life, Ellen is uniquely impacted by the approval of a Project in an area which does not possess public sidewalks near the entrance to the abortion clinic because she will not be able to reach her intended audience at the time that these women are most in need of hearing the options available to them.

26. Plaintiff-Petitioner William McGinn is a resident, taxpayer, and property owner within the Town of Brighton, and an individual who submitted comments to the Planning Board that were not considered by the Planning Board, and which were subjects about which Respondent Town Attorney Gordon wrongly advised the Board that they could not consider.

27. Defendant-Respondent Planning Board is a municipal body within the Town of Brighton charged with the duty to review and consider site plan applications consistent with the stated goal contained within the Town of Brighton Code: The purpose of site plan approval is to determine compliance with the objectives of this article in zoning districts where inappropriate development may cause a conflict between uses in the same or adjoining zoning district by creating unhealthful and unsafe conditions and thereby adversely affect the public health, safety and general welfare.

28. Upon information and belief, Defendant-Respondent Kenneth Gordon is the duly appointed Town Attorney for the Town of Brighton.

29. Upon information and belief, Defendant-Respondent Westfall is the applicant who submitted the site plan application to the Respondent Planning Board, and has an office at 160 Linden Oaks, Rochester, NY 14625.

30. Upon information and belief, Defendant-Respondent Westfall was duly served with the Summons and Notice of Petition and Verified Complaint-Petition on September 2, 2021 through service upon the NY Secretary of State, but Said Respondent has failed to appear or otherwise Answer or file responsive papers, and is therefore in default.

31. Respondent Planning Board and Respondent Gordon have both appeared through counsel, and have obtained an extension of time in which to file an Answer to the action-proceeding.

AS AND FOR A FIRST CAUSE OF ACTION
(SEQR)

32. Plaintiffs-Petitioners repeat and reallege each and every allegation set forth in paragraph 1 through 31 herein.

33. By failing to take a hard look at the environmental impacts of the proposed facility, the Planning Board failed to fulfill its duties under SEQR.

34. Despite the disclosure of several issues of environmental concern, including below grade excavation in areas known to have archaeological sensitive areas and wetlands, the Planning Board failed to take a hard look at the potentially significant environmental impacts of the demolition and construction Project.

35. Despite the identification of issues such as increased traffic in a corridor which the Town Master Plan has previously identified as an area of traffic concerns, evidence of increased police resource demands, issues concerning waste management and community character issues, the Planning Board failed to take the "hard look" required by SEQR and its implementing regulations.

36. As lead agency for the Project, the Planning Board had the duty to take the "hard look" and not seek to defer to any other agency or body or official to perform the SEQR analysis.

37. By merely adopting a negative declaration of environmental significance, without discussion or consideration of any of the issues raised in the public hearing, the EAF, and the application itself, the Planning Board failed to perform a duty enjoined upon it by law.

38. The negative declaration adopted by the Planning Board was made in violation of lawful procedure under SEQR in that the Planning Board failed to follow the steps prescribed by 6 NYCRR Part 617 for a determination of significance.

39. The negative declaration adopted by the Planning Board under SEQR was affected by an error of law in failing to assess the impact of the proposed Project upon general community character of the surrounding neighborhood and sensitive uses, as well as the potentially significant impact upon the traffic patterns in the immediate vicinity of the Project, and the potential impacts to the wastewater treatment system of the Town from the use of medical/chemical abortion bills to be provided by the Project.

40. The negative declaration adopted by the Planning Board under SEQR was arbitrary and capricious.

41. The Planning Board's negative declaration of significant environmental impacts must be annulled, and the Project remanded to the Planning Board for the required "hard look" at the potentially significant environmental impacts of the Project.

AS AND FOR A SECOND CAUSE OF ACTION
(ULTRA VIRES)

42. Plaintiffs-Petitioners repeat and reallege each and every allegation set forth in paragraph 1 through 31 herein.

43. By determining that the proposed use was a permitted use within the BE-1 zoning district, Respondent Gordon proceeded in excess of his jurisdiction.

44. Upon information and belief, Respondent Gordon is not vested with the authority to determine if a use is permitted within a zoning district, nor he is vested with the authority to determine if a use is compatible with surrounding uses within a zoning district, nor is he vested with the authority to determine a project's compliance with the SEQR regulations or environmental laws.

45. By usurping the role of the Planning Board in rendering such determinations, Respondent Gordon engaged in ultra vires actions, rendering the approval null and void.

46. Accordingly, the approval of the Project must be annulled and the Project remanded to the Planning Board for it to determine if the use is permitted within the zoning district, if it is compatible with the surrounding uses, and whether the project, notwithstanding any claimed Certificate of Need, is inconsistent with the community character such that it cannot be approved at that particular site, and whether the Project poses unique environmental impacts which must be, or cannot be, mitigated at that particular site.

AS AND FOR A THIRD CAUSE OF ACTION
(FAILURE TO PERFORM DUTY ENJOINED BY LAW)

47. Plaintiffs-Petitioners repeat and reallege each and every allegation set forth in paragraph 1 through 31 herein.

48. By failing to determine if the proposed use was a permitted use within the BE-1 zoning district, the Planning Board failed to perform duties enjoined upon it by law.

49. By failing to consider the negative environmental impacts of the Project, in terms of public safety, traffic, and disposal of waste, including the handling of fetal remains, and granting a site plan approval with 28 conditions to be addressed in secret by persons other than the Planning Board, the Planning Board failed to perform duties enjoined upon it by law and also violated the spirit and intent of the New York Town Law and Open Meetings Law.

50. The determination of the Planning Board granting conditional approval to the Project must be declared null and void.

51. The determination of the Planning Board granting conditional approval to the Project must be annulled, and the matter remanded for consideration of all of the foregoing issues, which are all duties enjoined by law to the Planning Board.

AS AND FOR A FOURTH CAUSE OF ACTION
(ARBITRARY AND CAPRICIOUS)

52. Plaintiffs-Petitioners repeat and reallege each and every allegation set forth in paragraph 1 through 31 herein.

53. By failing to consider the rights of the Petitioners and the language of the Envision Brighton Comprehensive Plan with respect to the needs of the Town of Brighton, and particular concerns about traffic in the corridor in which the Project was to be sited, and by its failure to diligently inquire and make known to the public the proposed tenant and use of the Project, the Planning Board determinations on SEQR and granting conditional

site plan approval, with 28 conditions, were arbitrary and capricious and/or an abuse of discretion and must be annulled with a remand to the Planning Board for a proper review of SEQR and the site plan requirements set forth in the Brighton Town Code.

AS AND FOR A FOURTH CAUSE OF ACTION
(DECLARATORY JUDGMENT)

54. Plaintiffs-Petitioners repeat and reallege each and every allegation set forth in paragraph 1 through 31 herein

55. The proposed use does not fit within the definition of the uses allowed in the BE 1 district.

Plaintiffs-Petitioners therefore seek declaratory judgment relief declaring that the Project is not a permitted use within the BE 1 district for the reasons set forth by the Judge Polito in Brighton Residents Against Violence to Children, Inc. v. Town of Brighton, 191 Misc.2d 261 (Monroe Co. 2001).

56. Declaratory judgment relief declaring the rights of Plaintiff-Petitioners under the New York State Constitution, as amended by Proposition #2, to clean water from a Town wastewater treatment system free from pathological human waste, such as will be generated by the chemically induced "abortion pills" provided by the Project, is also sought herein.

WHEREFORE, the Plaintiffs-Petitioners seek relief:

a) in the form of an Order granting the Petition pursuant to Article 78 and determining that the Respondent Planning Board failed to perform duties enjoined upon it by law; that the Respondent Town Attorney Gordon proceeded in excess of his jurisdiction; that the SEQR determination of negative significance issued by the Planning Board was affected by errors of law, was made in violation of lawful procedure, and was arbitrary and capricious and/or an abuse of discretion, and is therefore null and void;

b) An Order determining the Site Plan Approval issued by the Planning Board for the abortion facility to be sited at the property of Defendant-Respondent Westfall Medical Realty, LLC, 2233 South Clinton Avenue in the Town of Brighton, was affected by errors of law, was made in violation of lawful procedure, and was arbitrary and capricious and/or an abuse of discretion, and is therefore null and void;

c) For Declaratory Judgment pursuant to CPLR 3001 declaring the proposed use of the facility for an abortion/surgical clinic to be incompatible with, and not permitted by, the Town Code schedule of uses and definitions permitted within the BE 1 zoning district'

d) for Declaratory judgment relief declaring the rights of Plaintiffs-Petitioners' rights to clean water, and a wastewater treatment system free from pathological wastes generated by the chemically induced abortion pills to be provided at the Project;

e) awarding Petitioners' attorneys' fees, costs and disbursements incurred in the instant action-proceeding; and

f) granting such other and further relief as this Court may deem just and proper.

DATED: December 14, 2021

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VERIFICATION

STATE OF NEW YORK :
SS:
COUNTY OF RENSSELAER:

Linda A. Mandel Clemente, Esq., an attorney duly admitted to practice in the courts of New York, affirms, subject to penalties of perjury as follow:

She is an attorney at law and is a principal of the law firm MANDEL CLEMENTE, P.C., attorneys for the Plaintiffs-Petitioners in the foregoing action; that she has read the foregoing First Amended Verified Complaint-Petition dated December 14, 2021, and knows the contents thereof and that the same is true to her knowledge, except as to those matters therein alleged upon information and belief, and as to those matters, she believes them to be true.

The reason that this verification is made by Deponent and not by Plaintiffs-Petitioners is that they are not residents within the County of Rensselaer, which is the county in which Deponent has her offices.

DATED: December 14, 2021

Linda A. Mandel Clemente