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MEMORANDUM
Privileged & Confidential

To: Friends for Responsible Vestal Zoning

Date: April 11, 2024

Re: Response to Legal Opinion of Town of Vestal Attorney

This memorandum reviews the opinion of the Town of Vestal Attorney as set forth in his Memo dated April 10, 2024. In short, it is my opinion that contrary to the Town Attorney's opinion, the supermajority requirement in Town Law § 265 does not apply to the repeal of Local Law 1 of 2022 (the "Bunn Hill PDD law") and while the PDD Applicant and property owner could bring a § 1983 claim for damages, the Town Attorney overstates the Town's exposure.

Briefly, before addressing the Town Attorney's opinions in relation to Town Law § 265 and 42 U.S.C. § 1983, I want to note that while the most recent litigation filed on behalf of Friends for Responsible Vestal Zoning was dismissed, that does not mean that the prior Town Board's actions were appropriate and in the best interests of the Town. Merely that they were not "arbitrary, capricious, or contrary to law." The Court did not rule that the Bunn Hill PDD is appropriate for Vestal or will not cause negative impacts. It is my understanding that while that litigation was pending, the desirability of the Bunn Hill PDD was an issue raised in the election that resulted in the replacement of the former Town Supervisor and two (2) Town Board members. The dismissal of the litigation, while disappointing, does not prevent the current Town Board from righting the prior wrong.

A Supermajority is not required to repeal the PDD.

As the Town Attorney correctly recognized, the Town Board has the authority to repeal the Bunn Hill PDD.[1] "The power to enact necessarily implies the power to repeal, and one legislature cannot be limited or bound by the actions of a previous one. Hence every legislature may modify or abolish its predecessor's acts, unless restricted by the Constitution."[2] Moreover, this authority can be premised on any of the myriad reasons that the Bunn Hill PDD was ill-conceived (e.g., the project's conflict with the community character, the lack of public

[1] *See Mitrus v. Nichols,* 171 Misc. 869, 874 (Broome Co. Sup. Ct. 1939); Town of Vestal Zoning Code § 24-36.
[2] *Farrington v. Pinckney,* 1 N.Y.2d 74, 82 (1956) (quoting McKinney's Consolidated Laws of New York, Statutes, § 2).

transportation, the lack of sidewalks, the adverse impact to traffic), the questionable procedures used to adopt the Local Law (e.g., the Planning Board being cut out of the process, the lack of a Comprehensive Plan), or, hypothetically, "for no reason at all."[3] However, the Town Attorney's conclusion that a repeal requires a supermajority (a vote of 4 of 5 board members) is not correct.

The Town Attorney's conclusion that a repeal of the Bunn Hill PDD law would be a "change" under Town Law § 265, fails to address the 1990 amendment of Town Law § 265 that removed references to repeals. Both the Town Law and MHRL refer to "amendments" and "repeals" as different actions.[4] Since every word of a statute is to be given effect, the removal of references to "repeal" indicates that Town law § 265 only applies to amendments and not repeals of previous amendments. That amendment postdates the non-binding opinion of the comptroller cited in the memo. The case cited in the memo, *Matter of Loudon House LLC v Town of Colonie*, 123 A.D.3d 1406, 1408 (3d Dept. 2014) (not London v. Town of Colonie, 123 AD2d 1400), addressed compliance with the town's code, not Town Law § 265.

More significantly, the Town Law is not applicable to local laws passed under the Municipal Home Rule Law ("MHRL"). New York applies the doctrine of legislative equivalency to the repeal of a prior legislative act, which "requires that existing legislation be amended or repealed by the same procedure as was used to enact it."[5] Local Law 1 of 2022 was adopted pursuant to the MHRL, not the Town Law, and, therefore, the repeal must also be adopted pursuant to the MHRL.[6] New York Courts have made clear that the MHRL provides an alternate procedure to the Town Law.[7] When a local law is adopted pursuant to the MHRL, it is not subject to the procedural requirements of the Town Law, including Town Law § 265.[8]

The cases that the Town Attorney cites do not support the conclusion that Town Law § 265 applies here. The question of whether Town Law § 265 applies to a local law adopted solely under the MHRL, like Local Law 1 of 2022, was not addressed in either case. The Town Attorney fails to recognize that the local law at issue in *Dodson v. Town of Rotterdam* explicitly provided it was "adopted pursuant to the authority provided by section 265 of the Town Law and section 10 of the Municipal Home Rule Law."[9] Therefore, since it was adopted pursuant to <u>both</u> the Town Law and the MHRL, the Town Law procedures apply. In *Eadie v. Town of North Greenbush,* the court

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[3] *See Collins v. Schenectady,* 256 A.D. 389, 390-91 (3d Dept. 1939).

[4] *See* Town Law § 130 and MHRL § 20.

[5] *Paradis v. Town of Schroeppel,* 289 A.D.2d 1027, 1028 (4th Dept. 2001). *See also Matter of Brunswick Smart Growth, Inv. v. Town Bd. Of Town of Brunswick,* 51 A.D.3d 1119, 1120 (3d Dept. 2008).

[6] The Vestal Code requires that amendment or repeal of the zoning code must be "in accordance with the applicable provisions of the Municipal Home Rule Law." Vestal Code § 24-36.

[7] *Matter of Vil. Of Chestnut Ridge v. Town of Ramapo,* 45 A.D.3d 74, 84 (2d Dept. 2007); *Pete Drown Inc. v. Town Bd.,* 229 A.D.2d 877, 878 (3d Dept. 1996); *North Bay Assoc. v. Hope,* 116 A.D.2d 704, 706 (2d Dept. 1986).

[8] *Pete Drown Inc.,* 229 A.D.2d at 878 (citing *Savona v. Soles,* 84 A.D.2d 683, 684 (4th Dept. 1981); *Yoga Soc. of New York, Inc. v. Monroe,* 56 A.D.2d 842 (2d Dept. 1977)). *See also Dalrymple Gravel & Contr. Co. v. Town of Erwin,* 305 A.D.2d 1036, 1037 (4th Dept. 2003) (citing *Kamhi v. Town of Yorktown,* 74 N.Y.2d 423, 433-34 (1989).

[9] Local Law 7 of 2018, *available at* https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20180730060046/Content/0902134380206d8a.pdf.

concluded that Town Law § 265 did not apply to the local law in that case for different reasons, without addressing the issue of adoption under the MHRL. Therefore, neither case supports the conclusion that Town Law § 265 applies to repeal of Local Law 1 of 2022.

Unlike Town Law § 265, the Municipal Home Rule Law only requires a simple majority to adopt or repeal a local law. Therefore, since the adoption of the Bunn Hill PDD followed the procedures of the MHRL, the procedures of the Town Law, specifically the requirement for a supermajority vote (4 of 5 members), do not apply. A simple majority vote of the Town Board should be sufficient to repeal the Bunn Hill PDD.

The Town's potential liability is not substantial.

The Town Attorney's conclusion "that there is substantial exposure to the town" if the Bunn Hill PDD is repealed, is overstated. To assert a claim for damages under § 1983, the individual must demonstrate that they have vested rights[10] and that the action was "so outrageously arbitrary as to constitute a gross abuse of governmental authority."[11]

The Town Attorney simply assumes that the applicant can establish vested rights without discussing what is required to vest rights and the current status of the project. "[P]ersons who own property in a particular zone enjoy no eternal vested right to that classification if the public interest demands otherwise and a [municipality] may amend its basic zoning ordinance in such a way as reasonably to promote the general welfare."[12] "Neither the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish such a vested right."[13] Both are required. Of significance here, no actual construction has occurred, and county permits appear to be outstanding. Therefore, neither the property owner nor the Applicant can establish a vested right to the Bunn Hill PDD at this time and no claim for damages under § 1983 can be made.[14]

The Town Attorney also fails to explain that merely having vested rights is not sufficient to support a § 1983 claim for damages. Notably, while concluding that the Town is potentially exposed to significant liability under section 1983, the Town Attorney failed to address the holding in *Matter of Loudon House LLC v Town of Colonie*, a case he cited, denying § 1983 damages following the repeal of a zoning law. The Court there concluded:

> Petitioners allege, and we will assume, that Loudon House has a vested property interest that was impacted by Local Law No. 5. That being said, the petition/complaint does not allege, and nothing in the record suggests, that the actions of the Town Board rose to the level of a constitutional violation, i.e., that they were "so outrageously arbitrary as to constitute a

[10] *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 52 (1996).
[11] *Matter of Loudon House LLC v Town of Colonie*, 123 A.D.3d 1406, 1409 (3d Dept. 2014).
[12] *Rodgers v Village of Tarrytown*, 302 N.Y. 115, 121 (1951).
[13] *Magee,* 88 N.Y.2d at 47 (internal citations omitted).
[14] If the property owner or applicant take steps to vest their rights, the Bunn Hill PDD would potentially gain nonconforming use status and might be permitted to continue, despite repeal, eliminating damages altogether.

> gross abuse of governmental authority." Accordingly, the Town Board did not engage in the type of "egregious conduct" that would support a claim under 42 USC § 1983.[15]

A § 1983 claim requires a showing of outrageous conduct by the Town. "Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."[16] "Zoning ordinances are susceptible to constitutional challenge only if 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"[17] "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."[18]

Based upon the numerous rational grounds for repealing the Bunn Hill PDD, repeal would not rise to the level of constitutional arbitrariness sufficient to support a claim under § 1983.[19]

[15] *Matter of Loudon House LLC*, 123 A.D.3d at 1409.
[16] *Asian Americans for Equity v Koch,* 72 N.Y.2d 121, 131(1988) (citing *Matter of Town of Bedford v Village of Mount Kisco*, 33 N.Y.2d 178, 186 (1973)).
[17] *Berenson v. New Castle*, 38 N.Y.2d 102, 107 (1975) (*quoting Euclid v Ambler Co.*, 272 US 365, 395 (1926)).
[18] *Id.* at 628.
[19] While the Town may incur fees in defending its action, that is not a reasonable basis to refuse to undertake action in the best interests of the Town, especially in light of the fees incurred in defending the questionable PDD adoption.