STATEMENT OF QUESTION PRESENTED

Q1: Would a Local Law entitled "A Local Law Amending the Land Use Regulations of the Town of Sterling to Enact a Wellhead Protection Overlay District" withstand judicial scrutiny?

A1: Yes.

STATEMENT OF FACTS

The Town of Sterling Town Board may consider adoption of "A Local Law Amending the Land Use Regulations of the Town of Sterling to Enact a Wellhead Protection Overlay District" (the "Wellhead Protection Law"). The Wellhead Protection Law could set forth, *inter alia*, that:

> The unconsolidated (sand and gravel) aquifer that supplies the public water supply of the Village of Fair Haven extends from the vicinity of New York State Route 104A southeastward towards Simmons Road in the Town of Sterling. This water supply and aquifer not only supplies residents and business in Fair Haven, but also approximately 80 Town residents within Water District No. 3, 114 residents in the Ingersoll Drive Service Area within the Town of Wolcott through the Wayne County Water and Sewer Authority, and the Fair Haven Beach State Park . . . ;
>
> The sand and gravel aquifer underlying the wellhead protection area is relatively shallow, in the range of 20 to 60 feet deep. In many areas, the highly permeable sand and gravel deposits are at or near the land surfaces. Chemical spills, discharges of toxic and hazardous materials, certain land uses, and high-volume water withdrawals can threaten the quality and quantity of water resources that are available to recharge the aquifer. Once a groundwater supply is depleted or contaminated, it

> is very expensive, and sometimes not feasible, to replace. The loss of these clean and ample groundwater resources would have grave and long-term consequences for the public health, environment, and economy of the Town;

and:

> The Wellhead Protection Overlay District (WHPOD) shall include areas within the Town of Sterling mapped as overlying the zone of contribution and the direct runoff zone detailed in a report entitled "Delineation of the Fair Haven Wellhead Protection Area" by Steven Winkley, P.G. of the New York Rural Water Association.

The legislative intent of the Wellhead Protection Law could state:

> The Town Board of the Town of Sterling has established this Local Law in the interest of the public health, safety, and general welfare, in order to protect and preserve the quality and quantity of the Town's groundwater resources. This Local Law has been formulated to protect groundwater resources that serve as the source of drinking water for residents in Sterling, including the Village of Fair Haven's public water supply source.

The Wellhead Protection Law, *inter alia*, could establish a "Wellhead Protection Overlay District", regulate or prohibit certain uses within the overlay district, limit impervious surfaces associated with new uses within the overlay district, and set forth additional requirements with respect to enhanced applications and administrative findings for proposed uses in the overlay district.

ARGUMENT

POINT I

ALL LOCAL LAWS ENJOY A PRESUMPTION OF CONSITITIONALITY WHICH CAN ONLY BE OVERCOME BY PROOF BEYOND A REASONABLE DOUBT

The Wellhead Protection Law, by its terms, would be "in the interest of the public health, safety, and general welfare, in order to protect and preserve the quality and quantity of the Town's groundwater resources" and would be "formulated to protect groundwater resources that serve as the source of drinking water for residents in Sterling, including the Village of Fair Haven's public water supply source".

In *Lighthouse Shores, Inc. v. Islip*, 41 N.Y.2d 7, 11-12 (1976) the Court of Appeals held:

> The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality.

In T*own of Delaware v Leifer*, 34 N.Y.3d 234, 239-240 (2019), the Court of Appeals recently recognized:

> . . . the broad power of municipalities to implement land use controls to meet the increasing encroachments of urbanization on the quality of life" (*Matter of Town of Islip v Caviglia*, 73 NY2d 544, 550, 540 NE2d 215, 542 NYS2d 139 [1989]). Zoning ordinances constitute an exercise

> of the government's police power to promote public health, safety and welfare and, as legislative enactments, are entitled to a strong presumption of constitutionality (*see id.* at 550-551; *see also Stringfellow's of N.Y. v City of New York*, 91 NY2d 382, 395-396, 694 NE2d 407, 671 NYS2d 406 [1998]). Thus, a party challenging a zoning ordinance generally carries a burden to prove its unconstitutionality beyond a reasonable doubt (*McMinn v Town of Oyster Bay*, 66 NY2d 544, 548, 488 NE2d 1240, 498 NYS2d 128 [1985]; *see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 500, 458 NE2d 809, 470 NYS2d 350 [1983]).

"That a legislative enactment will be presumed constitutional is an elementary but significant principle of law. The strength of this presumption, sometimes underestimated, has been repeatedly underscored by the courts of this State." *Marcus Assocs., Inc. v. Huntington*, 45 N.Y.2d 501, 506-507 (1978). "In scrutinizing a particular piece of legislation, courts must pay heed to their limited role, and scrupulously avoid entering into the legislative realm under the guise of constitutional interpretation, (see *South Carolina Highway Dept. v Barnwell Bros.*, 303 U.S. 177, 191)." *Id.*

Drawing on federal precedents, the Court of Appeals established a two-part test for substantive due process violations in the land use context: "[f]irst, claimants must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a

legitimate claim of entitlement to continue construction:" and "[s]econd, claimants must show that the governmental action was wholly without legal justification." *Bower Assocs. v. Town of Pleasant Valley,* 2 N.Y.3d 617, 627 (2004), citing *Town of Orangetown v Magee* 88 N.Y.2d 41, 52-53 (1996). In *Bower Assocs.* at p. 628 the Court of Appeals explained:

> Federal courts elaborating on the first element of the test have noted that it should be applied "with considerable rigor" (*RRI Realty Corp. v Inc. Vil. of Southampton*, 870 F.2d 911, 918 [2d Cir 1989]). Even if "objective observers would estimate that the probability of [obtaining the relief sought] was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest" (*id.*). Beyond a vested property right arising from substantial expenditures pursuant to a lawful permit (as in *Magee*), a legitimate claim of entitlement to a permit can exist only where there is either a "certainty or a very strong likelihood" that an application for approval would have been granted (*Harlen Assoc. v Inc. Vil. of Mineola*, 273 F.3d 494, 504 [2d Cir 2001]). Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion "is so narrowly circumscribed that approval of a proper application is virtually assured."

The *Bowers Assocs*. Court continued at pp. 628-629:

> As for the second element of the test, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense" (*City of Cuyahoga Falls, Ohio v Buckeye Community Hope Found.*, 538 U.S. 188, 198, 155 L. Ed. 2d 349, 123 S. Ct. 1389 [2003] [internal quotation marks omitted]; *see also Harlen*, 273 F.3d at 501 [board action based on community opposition is not unconstitutionally arbitrary "if the

> opposition is based on legitimate state interests such as, *inter alia*, traffic, safety, crime, community pride, or noise" (internal quotation marks omitted)]; *Natale*, 170 F.3d at 263 ["(s)ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority"]; *Lisa's Party City, Inc. v Town of Henrietta*, 185 F.3d 12, 17 [2d Cir 1999] [where town acted in accordance with a legitimate concern, it cannot be said to have acted "in an outrageously arbitrary manner so as to violate (plaintiff's) substantive due process rights"]).
>
> The two-part test strikes an appropriate balance between the role of local governments in regulatory matters affecting the health, welfare and safety of their citizens, and the protection of constitutional rights "at the very outer margins of municipal behavior. It represents an acknowledgment that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government" (*Zahra v Town of Southold*, 48 F.3d 674, 680 [2d Cir 1995]).

In order to prevail on a substantive due process claim, a challenger would have to establish beyond a reasonable doubt a cognizable property interest, and that a Wellhead Protection Law bears no rational relation to a valid local objective. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978). A challenger to a Wellhead Protection Law could not discharge that heavy burden.

The Wellhead Protection Law would only apply to new uses and must allow prior, lawful, nonconforming uses to reasonably continue. *City of New York v. Bilynn Realty Corp.* 118 A.D.2d 511 (1st Dept 1986). Therefore, no challenger could possibly establish beyond a reasonable doubt any entitlement to undertake any use

prohibited or regulated by a Wellhead Protection Law, or that "approval of a proper application is virtually assured." *Bower Assocs.* at p. 628. Thus, any challenger would be skewered by the first prong of the applicable substantive due process test.

But even if a challenger could establish it is entitled to and virtually assured of approval, which it could not, the challenge would fail on the second prong of the test, because a Wellhead Protection Law is clearly and obviously a legislative act intended to protect a very legitimate public health, safety and welfare concern – the quality and quantity of the community's drinking water supply, as contamination or depletion of the community's potable water supply could have disastrous public health as well as economic consequences (e.g., see article concerning displacement of people as a result of water supply contamination by the U.S. Navy at https://www.npr.org/2021/12/15/1064514935/water-contamination-hawaii). The reasonable exercise of local legislative authority to protect a community's existing water supply should not in any way be considered "conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Bowers Assocs.* at pp. 628-629, quoting *Lisa's Party City, Inc. v Town of Henrietta*, 185 F.3d 12, 17 (2nd Cir 1999).

CONCLUSION

By its very terms, a Wellhead Protection Law would be intended to safeguard the health, safety and welfare of the people of Town of Sterling and

Village of Fair Haven, and could do so in a reasonable manner by identifying a limited area affected and prohibiting certain land uses with the potential to deplete or contaminate the aquifer that serves as the community's existing water supply. The Wellhead Protection Law would only apply to proposed new uses and would allow existing uses to reasonably continue, therefore no landowner within the overlay district could demonstrate entitlement or that it is virtually assured of approval in the absence of a Wellhead Protection Law. Even if a challenger could overcome that heavy burden, a challenge would still fail because the protection of a community's existing potable water supply is a very legitimate public health, safety, and welfare concern, and the adoption of a Wellhead Protection Law and establishment of an overlay district would be a rational, reasonable exercise of local legislative power.

A Wellhead Protection Law would therefore easily withstand judicial scrutiny in a substantive due process challenge.

Dated: June 17, 2022
Springfield Center, New York

Respectfully submitted,

By: _____

Douglas H. Zamelis, Esq.
7629A State Highway 80
Cooperstown, NY 13326
T: (315) 858-6002
dzamelis@windstream.net