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VIA EMAIL & HAND DELIVERY

Hon. Mayor Neil S. Dwyer and
Hon. Members of the Village Board of Trustees
7 Stage Road
Monroe, NY 10950

***Re: 208 Business Center, LLC – Public Comment
Proposed Introductory Local Law Moratorium on Development Approvals***

Dear Hon. Mayor Dwyer and Hon. Members of the Village Board of Trustees:

Our office represents 208 Business Center, LLC (“208 Business Center” or “Applicant”), who has interest in property located at 401 and 403 State Route 208 and 23 Gilbert Street in the Village of Monroe, New York (collectively SBL: 201-3-3, 201-3-4, 201-3-7, 201-3-8) (the “Project Site”). On or about November 28, 2018 the Applicant submitted a site plan application to the Village of Monroe Planning Board (“Planning Board”) to construct an approximately 47,500 SF commercial building on the Project Site with related off-street parking and infrastructure (the “Project”). See **Exhibit A** [2018 Site Plan Application]. The Project will include approximately 72,500 SF of floor area devoted to commercial and retail uses. See **Exhibit B** [Project Site Plans]. The Project Site is in the Village’s General Business “GB” zoning district, which proposed commercial and retail building is permitted with site plan approval from the Planning Board without any area variances.

The proposed Introductory Local Law Moratorium on Development Approvals (the “Moratorium”) prohibits a vast majority of new development applications from being considered by the Village. See Moratorium, Section (2). The Moratorium also prohibits the Planning Board from “approving” any pending “complete” application. See Moratorium, Section (3)(D). Such language is a clear attempt to ensure that pending “complete” projects before the Planning Board will not be approved until the Village amends its Comprehensive Plan (again) and the Village of Monroe Zoning Code (“Zoning Code”) to limit or outright prohibit certain development (e.g. the Project). As discussed below, the Moratorium must be

revised to exempt the Project and/or be rejected outright to comply with New York law.

The Moratorium completely lacks a rational basis and is without any documented evidence that it is in response to an identified genuine crisis or emergency condition. Instead, considering that the ultra-orthodox Jewish community owns a substantial portion of the remaining vacant land in the Village, the Moratorium is simply the Village's latest attempt to block development applications from the ultra-orthodox Jewish community.

Although Planning Board meeting minutes are not publicly available on the Village's website, we understand that the Planning Board discussed the Moratorium at a recent meeting. We also understand that the Planning Board members expressed opposition to the Moratorium and noted that the Project should be exempt due to the significant review process that has been completed. In fact, the Planning Board has gone through an extensive review of the Project pursuant to the New York State Environmental Quality Review Act ("SEQRA") and the Applicant has invested significant money in furtherance of that review. Stopping the Planning Board's review now can only be viewed as a targeted attempt to block the Project, notwithstanding that it is specifically permitted under the Village's Zoning Code with site plan approval.

To better understand the basis of the Moratorium, our office has recently submitted a comprehensive Freedom of Information Law ("FOIL") request to better understand the origins of the Moratorium and related comments from the Planning Board. As such, we request that the public hearing be adjourned until a response to our FOIL request is obtained to allow the Applicant the ability to comment on the same prior to its property rights being divested by the Moratorium and future zoning changes, which will subject the Applicant to significant financial loss. This letter shall also serve as notice to Village Board members that they must preserve all documents and communications, including but not limited to emails (whether on Village or personal emails), text messages, social media, and other electronic correspondences, related to the Moratorium, Project Site, Project, and/or the Applicant and its members and representatives.

I. The Project

The Project has gone through several years of permitting before the Planning Board, which included multiple Planning Board meetings and resulted in substantial investments by the Applicant. At the direction of the Planning Board, the Applicant has expended approximately \$600,000 on the Project's review and related studies pursuant to SEQRA.

On February 23, 2021, the Planning Board adopted a "positive declaration" pursuant to the SEQRA requiring the preparation of a Draft Environmental Impact Statement ("DEIS"). On May 25, 2021, the Planning Board adopted a Final Scoping Document after receiving comments from interested and involved agencies (including the Village Board) and members of the public. Based on the Final Scoping Document, the Applicant submitted a DEIS to the Planning Board on or about April 13, 2022, which is expected to be reviewed at an upcoming Planning Board meeting. *See Exhibit C [DEIS].*¹ The DEIS is a comprehensive review of

¹ The DEIS submitted herein is without the related appendices. The DEIS with appendices is on file with the Village Planning Board and shall be incorporated by reference herein

the Project's potential environmental impacts and related mitigation to ensure that any potential environmental impact will be properly mitigated.

Putting aside the fact that the Moratorium should be rejected as inconsistent with New York law, as set forth below, the DEIS demonstrates that the Project will not result in any of the perceived impacts that are the stated reason for the Moratorium. As such, the Village Board has no rational basis for prohibiting the Project under the Moratorium, other than an intent to purely target the Project and/or the Applicant.

II. The Village Board Must Exempt the Project From the Moratorium

The Applicant has invested approximately \$600,000 in furtherance of the Village's land use and permitting process. The Moratorium and subsequent unidentified zoning changes are likely aimed at prohibiting the Project and/or limiting the proposed development in a manner whereby a reasonable return on investment cannot be achieved. The Planning Board's review of the Project has been ongoing since 2018. After three (3) years from the time the Project was submitted to the Planning Board, the Planning Board adopted a positive declaration requiring the preparation of a very costly DEIS, which is contrary to the expedient review process mandated by SEQRA.

The SEQRA regulations require that "[a]s early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for funding or for approval of an action, it must [] make a preliminary classification of an action as Type I or Unlisted[.]. 6 NYCRR 617.6(a)(1)(iv). However, here, such a determination was made over a year from the Project's initial submission. The SEQRA regulations further state that the Village "must determine the significance of the action as early as possible in the design or formulation of the action." 6 NYCRR 617.6(a)(1)(i). Yet, the Planning Board's determination of significance (the positive declaration) was adopted more than three (3) years after the Project was submitted to the Planning Board. Acting in accordance with the Planning Board's positive declaration, the Applicant prepared the DEIS and fully evaluated all potential environmental impacts, which was submitted to the Planning Board on or about April 14, 2022.

Although being aware of the Project as an involved/interested agency under SEQRA, the Village Board awaited until the costly DEIS was prepared and submitted to introduce the Moratorium. The timing of the DEIS submission and the Village Board's proposed Moratorium makes it apparent that the Moratorium is unlawfully in direct response to the Project. It is well settled in New York that a Moratorium cannot be adopted, in bad faith, to only prohibit a specific Project, which would otherwise be permitted. *See Hamptons, LLC v. Rickenbach*, 98 A.D.3d 736 (2d Dep't 2012) (holding that a local law adopted in bad faith to only prohibit the proposed project, which would otherwise be permitted, is inapplicable and would vest the developer's rights at that moment.). As such, the Moratorium must exempt the Project to avoid any liability on behalf of the Village.

The Moratorium states that a "complete" development application that is pending before the Village may continue *only* for purposes of SEQRA review. *See* Moratorium, Section (3)(D). However, such continued review "shall be undertaken at the property owner's risk." *See*

Moratorium, Section (3)(D). Thus, the Village is inviting the Applicant to continue the review of the Project and expend additional monies full well knowing that the Planning Board cannot approve the Project at the conclusion of the SEQRA process. This provision of the Moratorium is meaningless because it does not protect pending complete applications where significant investments have been made from subsequent zoning changes. In fact, the Planning Board is only permitted to deny the Project. *See* Moratorium, Section (3)(F).

Further, the continued SEQRA review of a complete application without the ability of the Planning Board to approve the same is inconsistent with the Moratorium's stated purpose of avoiding a "race of diligence by those seeking to obtain approvals." It cannot be said that an applicant or project that has been before the Planning Board for several years and has completed significant environmental studies in furtherance of development approvals is in a "race of diligence." Here, the Applicant has complied with all SEQRA requirements and directives of the Planning Board well before the Village Board introduced the Moratorium. Thus, a concern over a "race of diligence" is inapplicable to the Project.

The Village Board should amend the proposed Moratorium to exempt all "complete" applications that are currently pending before the Planning Board. This would avoid the Applicant from completely losing its entire substantial investment in the Project and protect the Village against unnecessary litigation.

Importantly, such an exemption would ensure that the Moratorium was not proposed to specifically target and prohibit the Project. Exempting the Project would not have any impact on stated basis for the Moratorium. The stated generic and alleged land use concerns within the Moratorium include "maintain[ing] the land use status quo while it amends its comprehensive plan and land use regulations to provide for controlled growth that will not unduly impact the public welfare, community services, schools and infrastructure, to preserve open space, protect historic buildings and scenic features important to the Village's character, and to plan for a proper mix of residential and commercial development." Moratorium, Section (1). The DEIS submitted to the Planning Board and annexed hereto as **Exhibit C** demonstrates that the Project will not have an adverse impact on the Village and will not exacerbate any of the stated "concerns" noted in the Moratorium. As such, the Village has no rational basis to apply the Moratorium to the Project.

For instance, the DEIS addresses the need for the commercial Project, growth within the community, consistency with the character of the community, consistency with the Village's Comprehensive Plan, impacts to community services, schools and infrastructure, open space, historic and archeological impacts, stormwater, habitats and wetlands, noise, visual resources, transportation, etc. *See* **Exhibit C** [DEIS]. Importantly, the Project is entirely consistent with the Village's 2017 Comprehensive Plan, which stated goals include but are not limited to:

- Transform the Route 17M strip-commercial corridor to better address the evolving commercial market and to provide a sustainable balance of uses.
- Transform Monroe's struggling heavy commercial and industrial areas.

Village of Monroe, 2017 Comprehensive Plan at 22. The Village Comprehensive Plan also includes various traffic recommendations including the potential for extending Gilbert Street. Village of Monroe, 2017 Comprehensive Plan at 63. Another specific goal identified in the discussion of retail opportunities is high demand for a large Kosher food store. Village of Monroe, 2017 Comprehensive Plan at 77. Here, the Project would accomplish the stated goals in the Comprehensive Plan, including the potential for 35,000 SF food store within the proposed commercial building.

Accordingly, the Project, due to its commercial nature, location in a commercial zoning district and compliance with the current Village Comprehensive Plan and zoning regulations, will not result in any of the Village Board's purported "concerns" that require the Moratorium to be adopted. Thus, the Project should be exempt from the Moratorium. If not, it will become glaringly evident that the Moratorium is designed to specifically target the Project.

III. The Moratorium Violates New York Law and Must Be Rejected

Under settled and binding decisional law of the New York Court of Appeals, the Appellate Division, Second Department, and the United States and New York Constitutions, the only legitimate basis for adoption of a moratorium is in response to an emergency or crisis while a local law amending a locality's comprehensive plan or land use laws has been proposed for adoption. *See Charles v. Diamond*, 41 N.Y.2d 318 (1977); *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507 (1974) ("While we have consistently recognized the right of a municipality pursuant to its police powers to prevent conditions dangerous to public health and welfare ... we have also insisted that any such restrictions or limitations must be kept 'within the limits of necessity'" (citations omitted); *Cellular Tel. Co. v. Vill. of Tarrytown*, 209 A.D.2d 57, 66 (2d Dept 1995); *Matter of MHC Greenwood Vil. NY, LLC v. County of Suffolk*, 58 A.D.3d 735 (2d Dept 2009). No emergency is referenced in the Moratorium and none exists. Speculative and unfounded reasons for a moratorium are not enough to support the adoption of a moratorium. *See Cellular Tel. Co.*, 209 A.D.2d at 66-67.

The stated generic land use concerns within the Moratorium include "maintain[ing] the land use status quo while it amends its comprehensive plan and land use regulations to provide for controlled growth that will not unduly impact the public welfare, community services, schools and infrastructure, to preserve open space, protect historic buildings and scenic features important to the Village's character, and to plan for a proper mix of residential and commercial development." Moratorium, Section (1). Putting aside that these concerns are completely inconsistent with the list of exempted projects that may impact the above, the stated purpose completely lacks any basis of an emergent crisis within the Village. In fact, the Village just amended its Comprehensive Plan only five years ago, and absolutely no evidence is provided concerning how land use conditions have changed in the Village over the past five years to such a substantial extent that amending the Comprehensive Plan again is some kind of emergency condition. If the Village wishes to again to study and change its land use goals, it certainly may do so, but absent any actual emergency change in land uses since 2017, there is no rational basis to once again halt all development in the Village in the meantime. And to the extent that such evidence does exist, the Village has not provided it publicly, and must do so to permit the public to examine and comment on such evidence prior

to the Village Board taking any final action on the Moratorium.

The Moratorium specifically states that the Village Board will be considering amendments to its comprehensive plan and zoning regulations to address these baseless assertions of genuine crisis or dire necessity. In fact, Section 2(C) of the Moratorium states that “the Village shall *endeavor* to adopt an amended comprehensive plan and planning and zoning regulations.” Accordingly, the newly proposed Moratorium is not interim or “stop-gap” zoning to address a specific identified concern. Instead, the Moratorium prohibits projects that are actively being reviewed by the Planning Board while the Village “endeavors” retroactively find a basis for the Moratorium.

Further, although the Moratorium claims that it prevents a “race of diligence” by those seeking to obtain approvals before the new comprehensive plan and regulations are in place, the only projects it prevents are those that already comply with the Comprehensive Plan and zoning revisions that the Village adopted merely five years ago. Further, it cannot be said that projects currently pending before the Planning Board for years and which comply with recent zoning amendments in 2017 are in a “race of diligence”.

The Village also cannot argue that the Moratorium is to preserve the status quo while additional zoning changes are being considered. The Village has created a pattern of stopping development to address the same issues over and over again. Since 2016, the Village has consistently sought to adopt moratoriums to place a hold on development applications that are consistent with the Zoning Code and Comprehensive Plan. The Village adopted a moratorium in 2016 “to complete its comprehensive zoning review, including the adoption of zoning regulations consistent with the Village’s recently adopted Comprehensive Plan, and any amendments deemed necessary to that Comprehensive Plan.” Local Law No. 3 of 2016, § 1. That moratorium was repeatedly extended, and prohibited development for more than a year. The 2016 moratorium resulted in a new Comprehensive Plan dated June 13, 2017 and related zoning amendments that address the same issues identified in the currently proposed Moratorium. *See Exhibit D* [Recent Local Laws].

The local laws passed in 2017 are directly related to and address the stated reasons for the Moratorium (Local Laws 3, 4, 5, and 6, of 2017). *Exhibit D* [Recent Local Laws]. For example, Local Law 3 of 2017 states in its findings that “[t]he analysis and study included, but was not limited to, studies concerning traffic, the opportunity for affordable housing, and the propriety of certain types of development in various zones. Having adopted a revised Comprehensive Plan, and proposing to adopt a compatible Zoning Code and an updated Zoning Map, the Board of Trustees is providing for the planned orderly growth and development of the Village, which protested its natural and historic character.” *See Exhibit D* [Local Law 3 of 2017]. It is evident from the 2017 Comprehensive Plan and related local laws that the exact stated reasons for the Moratorium have been addressed previously by the Village. This begs the question, what is the purpose of the Moratorium other than to block projects that comply with the 2017 Comprehensive Plan and subsequent zoning amendments (e.g the Project)?

Without any understanding or assessment of the basis of the Moratorium, the Village

Board should understand that the Moratorium and related comprehensive plan and/or zoning amendments cannot be sought to disproportionately impact a specific group or class of people. The only possible justification here appears to be an impermissible one: to unlawfully block and indefinitely delay certain projects that the Village opposes. *See Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg, N.Y.*, 111 F. Supp. 3d 459, 488 (S.D.N.Y. 2015). The largest portion of the Village's vacant land is owned by members of the ultra-orthodox Jewish community. Much like the Applicant, such members of the ultra-orthodox Jewish community have pending applications before the Village for development and/or have future plans to develop property in accordance with the Zoning Code. The Village Board should be cognizant of the fact that the Moratorium and any resulting changes to the Comprehensive Plan or the Zoning Code would disproportionately impact this group of Village residents and likely run afoul to New York and Federal law. The Village Board cannot adopt the Moratorium without an assessment of its disproportionate impact.

IV. The Village Board is Acting in Secret and Violating New York Law

It should never be the case that a property owner within the Village needs to submit a comprehensive FOIL request to get an understanding of the basis for proposed legislation. It is New York law that "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." New York Public Officers Law § 95. Further, that all meetings related to proposed legislation, including conferences and/or agendas and related documents, are required to be public under New York's Open Meetings Law. *See Orange County Publications, Division of Ottaway Newspapers, Inc. v. Council of City of Newburgh*, 60 A.D.2d 409, 416, 401 N.Y.S.2d 84, 90 (2d Dept. 1978). Without allowing the public to observe and participate in the formulation of policy "it permits the crystallization of secret decisions to a point just short of ceremonial acceptance." *Id.*

Here, the Moratorium appeared to be introduced without any discussion from the Village Board members at a public meeting in violation of New York law. It is hard to imagine that such a comprehensive Moratorium was simply drafted out of thin air by the Village Board members and/or its consultants without any communications or meetings, which are required to take place in the public forum under New York's Open Meetings Law. The Moratorium appears to be the product of thoughtful actions by the Village Board designed to stop specific projects and also disproportionately impact the ultra-orthodox Jewish community. However, it seems that the thought process behind the Moratorium remains a secret. Further, available records should include any request for proposals related to the retention of Village consultants and related correspondences. Without being able to review documents that were used in formulating the Moratorium and the related process, the public is imply left in the dark waiting for their property rights to be taken away.

While we hope that our FOIL request will shed light on the rational for the Moratorium, it is incumbent on the Village Board to comply with New York's Open Meeting Law make public any meetings/communications that occurred in private relating to the Moratorium.

Conclusion

The Village Board should withdraw the Moratorium as it fails to comply with New York or Federal Law as set forth above. The Village has failed to demonstrate that an emergency circumstance exists and/or that a dire necessity exists to issue yet another pause on development. If the Village Board elects to continue with the unlawful Moratorium, which may disproportionately impact the ultra-orthodox Jewish community, the Board should exempt the Project from the Moratorium because the Project's environmental impacts have been thoroughly reviewed and will not exacerbate any of the alleged concerns noted in the Moratorium.

If not, and if the zoning is amended to reduce or prohibit the Project, the Applicant will not be able to make a reasonable return on its investment, an investment that was completely made in reliance on existing zoning coupled with the Planning Board entertaining the review of the Project since 2018 and not acting in compliance with SEQRA's mandates. Unless the Moratorium is withdrawn, the Village should notify its insurance carrier of the circumstances surrounding this proposed legislation and any potential liability that may result.

In support of this request, we have provided hard copies of this letter and the following exhibits:

- Exhibit A:** Project Planning Board Application;
- Exhibit B:** Project Site Plans;
- Exhibit C:** Draft Environmental Impact Statement (without appendices); and
- Exhibit D:** Recent Local Laws.

We urge the Village Board to carefully consider every impact of the Moratorium, and exempt the Project from the Moratorium to ensure that our client need not pursue additional legal avenues and remedies in the courts. Please do not hesitate to contact my office with any questions.

Very Truly Yours,

/s/ Charles J. Gottlieb

Charles J. Gottlieb

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