TO BE ARGUED BY:
STEVEN G. LEVENTHAL, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Second Department

LEXJAC, LLC and RICHARD ENTEL,

Plaintiffs-Respondents,

-against-

JULIANNE W. BECKERMAN, as Mayor of the Incorporated Village of Muttontown and the MEMBERS OF THE BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF MUTTONTOWN, VIVIEN VAN WAGNER as Village Clerk of the Incorporated Village of Muttontown and the INCORPORATED VILLAGE OF MUTTONTOWN,

Defendants-Appellants.

Appellate Division Case No. 2008-09800

BRIEF FOR DEFENDANTS-APPELLANTS

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Supreme Court, Nassau County, Index No. 07-012654

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Defendants-Appellants.

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 07-012654.

2. The full names of the original parties are the same; there has been no change.

3. Action was commenced in the Supreme Court, Nassau County.

4. Action was commenced by the filing of a Summons and Verified Complaint-Petition, dated July 19, 2007.

5. Nature of action: This is an Article 78 proceeding.

6. Appeal is from an Order of the Hon. Antonio I. Brandveen, dated October 16, 2008 re-instating the Short Form Order dated March 31, 2008.

7. Appeal is on the Record (reproduced) method.

8. There are no trial transcripts involved in this appeal.

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PRELIMINARY STATEMENT

This is a dispute over the ownership of a 1.1 acre parcel of land (the "Parkland") abutting the residential property of plaintiff-respondent Richard Entel ("Mr. Entel") in the Village of Muttontown (the "Village").

Plaintiffs-respondents' purported co-owner, Foreal Homes, Inc. ("Foreal Homes"), whose ownership interest would be extinguished if the Village were to prevail, has not been joined as a party; and certain Village residents, whose property rights in the Parkland were recognized by prior decisions of this Court and the Court of Appeals, and whose rights would extinguished if Mr. Entel were to prevail, have not been joined as parties.

The principal question that divides the parties is a question of law: whether, under the undisputed facts and the applicable provisions of New York Constitution and New York General Municipal Law ("GML") Article 18, then trustee Mr. Entel made an illegal and unenforceable contract with the Village when the Village agreed to give up all of its right, title and interest in the Parkland in exchange for Mr. Entel's promise to plant and maintain screen plantings.

Based on the facts alleged by the plaintiffs-respondents in their pleadings below, the contract was void for two reasons.

First, regardless of the adequacy of consideration received by the Village, Mr. Entel had a prohibited interest in the contract with the Village and, therefore,

the contract violated GML §801 and was void pursuant to GML §804. Mr. Entel had a direct, pecuniary interest in the contract with the Village. His interest was prohibited by GML §801 because, as a member of the Board of Trustees, he had the power to approve the contract. The GML §801 prohibition arises from the power or duty of a municipal officer or employee to approve or authorize a contract in which the officer or employee has an interest, and it is irrelevant that he refrained from the exercise of that power or the performance of that duty. Thus, Mr. Entel's recusal from the vote approving his contract could not, and did not cure the violation of GML §801.

Second, the contract was void because it was not supported by adequate consideration and thus constituted a waste of municipal property in violation of Art. VIII, §1 of the New York State Constitution.

PROCEDURAL HISTORY

This matter is still at the pleading stage. No formal discovery has been conducted.

This action-proceeding was commenced on July 20, 2007. All parties moved for preliminary injunctions, and the defendants-appellants moved to dismiss for failure to join necessary parties and for failure to state a cause of action.

While this dispute has been pending, the plaintiffs-respondents have retained exclusive use, possession and control of the Parkland, and the *status quo* has been

maintained by two preliminary injunctions issued by the court below. On July 20, 2007 the court below granted a preliminary injunction restraining the Village from entering or altering or in any way destroying or disturbing the Parkland and from interfering in any way with plaintiffs-respondents' exclusive use of the Parkland. On August 1, 2007, the court below granted a preliminary injunction restraining the plaintiffs-respondents from alienating or encumbering the Parkland and directing plaintiffs-respondents to maintain the Parkland in its then current use and condition.

On November 21, 2007, defendants-appellants filed a Notice of Removal to the United States District Court for the Eastern District of New York. The action-proceeding was remanded to the court below on July 21, 2008.

On October 16, 2008, the court below denied defendants-appellants' pre-answer motion to dismiss, and on November 19, 2008, plaintiffs-respondents served notice of entry of the order.

On November 25, 2008, the court below granted an order staying the matter pending the hearing and determination of defendants-appellants' motion to disqualify plaintiffs-respondents' prior counsel. Thereafter, plaintiffs-respondents' prior counsel voluntarily withdrew, and current counsel was substituted on December 11, 2008. The court below was notified of the substitution on April 9, 2009.

Issue was joined by the service of defendants-appellants' answer on April 21, 2009. Discovery has not commenced.

FACTS

The facts are more fully set forth in the affirmation of Steven G. Leventhal dated July 30, 2007. Record on Appeal (hereinafter R.) 120-139.

On July 27, 1972, subdivision developer Foreal Homes made an irrevocable offer of dedication of the Parkland to the Village based on a condition of subdivision approval imposed by the Village Planning Board pursuant to N.Y. Village Law §7-730 and Muttontown Village Code §158-27.

The irrevocable offer of dedication was noted on the approved subdivision map and recorded in the office of the Nassau County Clerk. The Village Planning Board required Foreal Homes to provide each prospective purchaser with a copy of the recorded subdivision map before entering into a contract of sale, and to inform each prospective purchaser that the offer of dedication was irrevocable.

Through more than a decade of administrative proceedings and litigation, the Village steadfastly refused to allow Foreal Homes to revoke its offer of dedication. The battle went all the way to the New York State Court of Appeals, which affirmed this Court's holding, *inter alia*, that Foreal Homes could not unilaterally revoke the offer of dedication because the subdivision homeowners purchased their homes in reliance on the irrevocable offer of dedication noted on the recorded

subdivision map. Foreal Homes, Inc., v. Incorporated Village of Muttontown et al., 128 A.D.2d 585 (2d Dept. 1987), *aff'd*, 71 N.Y.2d 821 (1988).

Then, after the Village prevailed, the Planning Board granted an application by Foreal Homes for waiver of the parkland dedication based on a written agreement between Foreal Homes and the subdivision homeowners in which Foreal Homes promised to compensate each of them in exchange for their consent to the waiver, and conditioned upon a deposit by Foreal Homes into the Village's parkland fund. Foreal Homes failed to consummate the transaction, and the waiver lapsed. R. 127, ¶28 through R. 128, ¶32.

Observing the Parkland from the vantage point of his abutting residence and his seat on the Board of Trustees, Mr. Entel, saw his opportunity. He would purchase the Parkland from Foreal Homes through his wholly owned limited liability company, Lexjac, LLC ("Lexjac") for a price of $90,000.00 on the condition – set forth in the recorded deed – that Foreal Homes would retain a right of first refusal to purchase the Parkland, and the right to share in the proceeds of any future sale of the Parkland. R. 83-85.

Before Mr. Entel purportedly acquired title to the Parkland through his limited liability company, his attorney inquired on his behalf to the then Village Attorney as to whether Mr. Entel could purchase the Parkland from Foreal Homes. The Village Attorney responded with a letter stating that:

> ...The filed offer of dedication does not in any way preclude the transfer of fee title to the parcel, but such transfer would be subject to the outstanding offer of dedication and the ultimate divesting of all right, title and interest of the then current owner of the land without compensation at the time the offer is accepted by the Village....

R. 75-76.

The ultimate insider, Mr. Entel knew that he could do what Foreal Homes was unable to do despite twelve years of trying through applications before the Planning Board and in litigation with the Village – on October 17, 2005 he persuaded his colleagues on the Board of Trustees to decline the offer of dedication and release all of the Village's right, title and interest in the Parkland, conditioned only upon Mr. Entel's agreement to plant and maintain screen plantings that would inure primarily to his benefit by enlarging and improving his backyard and usurping to himself the sole use and enjoyment of the Parkland. R. 84-85.

When the smoke cleared, Lexjac was the owner of the Parkland (subject only to Foreal Homes' retained right of first refusal and right to participate in any future sale proceeds) with no restriction on its development, no compensation to the subdivision homeowners, and no deposit into the Village's parkland fund (a condition that N.Y. Village Law §7-730 and Muttontown Village Code §158-27C authorize the Planning Board to impose in appropriate cases as an alternative to dedication of Parkland). Nor did Lexjac grant a conservation easement to the Village and the North Shore Land Alliance as Mr. Entel claims it was his intent to

do. R 67-68, ¶10.

Without the restriction on development, the Parkland – purchased by Lexjac for $90,000.00 – was then worth at least $1.6 million according to the sworn pleadings and affidavits submitted by plaintiffs-respondents below. R. 25, ¶27 and R. 67, ¶9.

A new Village administration was elected in the June 2006 Village election and, in October 2006, Civic Association President Bonnie O'Connell ("Ms. O'Connell") addressed the new Board of Trustees at a public meeting, reported the group's concerns over the transfer of the dedicated Parkland to private ownership, and requested that the legal status of the Parkland be investigated. R. 308-326.

The new Village administration reviewed nearly 40 years of historical records and initially concluded that the Parkland remained subject to the irrevocable offer of dedication. However, on June 12, 2007, Ms. O'Connell provided the new administration with a copy of the October 17, 2005 resolution by the former Board of Trustees declining the irrevocable offer of dedication conditioned only upon Mr. Entel's agreement to plant and maintain screen plantings.

On July 10, 2007, at the public meeting immediately following this revelation by Ms. O'Connell, the new Board of Trustees adopted a resolution reciting the chronology of events related to the Offer of Dedication of Parkland,

and resolving, *inter alia*, that (i) the resolution of the Board of Trustees dated October 17, 2005 purporting to decline the Offer of Dedication was rescinded; (ii) the Offer of Dedication of the Parkland was accepted; (iii) the new Village Attorney was directed to record the deed from Foreal Homes dated July 27, 1972, conveying to the Village title to the Parkland; and (iv) the new Village Attorney was directed to record a Certificate of Acceptance of the Offer of Dedication. R. 166- 177.

On July 11, 2007, the new Village Attorney caused the deed and Certificate of Acceptance to be recorded in the office of the Nassau County Clerk.

ARGUMENT

I.
THE COURT BELOW ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES

A. Foreal Homes Is A Necessary Party Because Its Interest In The Parkland Will Be Extinguished If The Village Prevails

Under CPLR §1001(a), necessary parties to an action or proceeding fall into two distinct categories: "persons who [1] ought to be parties if complete relief is to be accorded between the persons who are parties to the action or [2] who might be inequitably affected by a judgment in the action." These compulsory joinder provisions are intended "not merely to provide a procedural convenience but to implement a requisite of due process – the opportunity to be heard before one's

rights or interests are adversely affected." Matter of Martin v Ronan, 47 N.Y.2d 486 (1979); *see also*, Cybul v. Vill. of Scarsdale, 17 A.D.3d 462 (2d Dept. 2005), *app. den.* 5 N.Y.3d 712 (2005).

The possibility that a judgment rendered without the omitted party could have an inequitable or adverse practical effect on that party is enough to indicate joinder. 27th St. Block Ass'n v. Dormitory Auth., 302 A.D.2d 155, 160 (1st Dept. 2002); *see also*, Karmel v. White Plains Common Council, 284 A.D.2d 464 (2d Dept. 2001); Hitchcock v. Boyack, 256 A.D.2d 842 (3d Dept. 1998).

Here, this is a dispute over ownership of the Parkland. Plaintiffs-respondents contend that the Village improperly assumed ownership of the Parkland. If the Village prevails, all other ownership interests will be extinguished.

The deed transferring ownership of the Parkland from Foreal Homes to Lexjac expressly provided that Foreal Homes retained the right of first refusal to purchase or lease the Parkland and the right to receive fifty percent of the proceeds of any future sale or lease of the Parkland.

The deed stated in pertinent part that:

> Seller hereby retains the right to 50% of the gross sales proceeds of the subject premises should the premises or any part thereof be sold or leased after the closing of title herein. However, in the case of a sale to a person or entity who is not purchasing the buyer's adjoining property, the basis shall be $90,000. [sic] for future sale/lease. In all cases, the seller holds right of first refusal in the case of buyer's future sale or lease of the property. The deed that will be tendered at closing will contain a reservation of rights in this regard. The buyer shall be

> responsible for upkeep costs for the property post closing including but not limited to taxes, maintenance.

R. 79.

Therefore, Foreal Homes is a party with a retained ownership interest in the Parkland. Accordingly, Foreal Homes might be inequitably affected by the judgment herein, and should be joined as a necessary party. *See,* CPLR §1001(a); In re East Bayside Homeowners Assn., Inc. v. Chin, 12 A.D.3d 370 (2d Dept. 2004), *app. den.* 4 N.Y.3d 704 (2005); Cybul v. Vill. of Scarsdale, 17 A.D.3d 462; Karmel v. White Plains Common Council, 284 A.D.2d 464; Artrip v. Incorporated Village of Piermont, 267 A.D.2d 457 (2d Dept. 1999).

Plaintiffs-respondents argued below that Foreal Homes is not a necessary party because its interest in the Parkland is limited to a share in the proceeds of any sale, and because this matter does not involve a sale of the Parkland. But the interests retained by Foreal Homes (the right of first refusal and the right to participate in any sale proceeds) will be extinguished if the Village prevails here.

Plaintiffs-respondents should not be heard to argue that they are united in interest with Foreal Homes. Their claimed intention is to place a conservation easement on the property that would provide Mr. Entel with a valuable tax deduction but that would defeat the exercise by Foreal Homes of its right of first refusal and frustrate its right to share in the proceeds of a future sale.

Furthermore, the deed from Foreal Homes to Lexjac was facially ineffective

to vest any title in Lexjac because it lacked a legal description of the property conveyed. R. 77-80. Therefore, Foreal Homes remained the record title holder.

Because Foreal Homes retained an interest in the Parkland and remained the record title holder, it is a necessary party here.

B. The Subdivision Homeowners Are Necessary Parties Because Their Interests In The Parkland Will Be Extinguished If Mr. Entel Prevails

In prior litigation involving this same dedication of the Parkland, the Court of Appeals affirmed the decision of this Court holding that the subdivision homeowners acquired an interest in the disposition of the Parkland because they purchased their homes in reliance upon the irrevocable offer of dedication noted on the recorded subdivision map. Foreal Homes, Inc., v. Incorporated Village of Muttontown et al., 128 A.D.2d 585 (2d Dept. 1987), *aff'd*, 71 N.Y.2d 821 (1988); *see also,* Hubbard v. City of White Plains et al., 18 A.D.2d 674 (2d Dept. 1962).

As this Court stated in Foreal Homes, Inc. *supra*:

> Furthermore, although there has been no formal acceptance by the village the plaintiff may not now revoke its offer of dedication because the subdivision residents purchased their properties in reliance upon the park land dedication offer noted the subdivision map.

Citation omitted. Foreal Homes, Inc., at 586, *aff'd*, 71 N.Y.2d 821 (1988).

Plaintiffs-respondents argued below that the subdivision homeowners are not necessary parties because their interests in the Parkland were extinguished by the October 17, 2005 resolution declining the offer of dedication. But, this

litigation will determine whether the October 17, 2005 resolution was legally effective to extinguish the vested interests of the subdivision homeowners. Because the interests of the subdivision homeowners in the Parkland will be extinguished if plaintiffs-respondents prevail the subdivision homeowners might be inequitably affected by the judgment herein, and should be joined as necessary parties. *See,* Ferruggia v. Zoning Bd. of Appeals, 5 A.D.3d 682 (2d Dept. 2004)(Article 78 proceeding challenging grant of variance properly dismissed for failure to timely join landowners and contract vendee); Jenkins v. Strough, 303 A.D.2d 754 (2d Dept. 2003)(adjacent lot owners who had not been made parties may have been adversely affected had the subject permit been annulled).

Accordingly, Foreal Homes and the subdivision homeowners are necessary parties herein, and the Court below should have dismissed this action-proceeding for failure to join them. *See,* CPLR §1001(a).

II.
PLAINTIFFS-RESPONDENTS RELY UPON AN AGREEMENT THAT IS VOID AS A MATTER OF LAW

Mr. Entel was a Village Trustee when he entered into an agreement with the Village to obtain unencumbered title to the Parkland that he owned through his limited liability company. For the reasons that follow, that conduct was illegal and possibly criminal; and the agreement is void as a matter of law.

Article 18 of the GML (Conflicts of Interest of Municipal Officers and

Employees) establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City. GML §800(4).

GML §801 prohibits precisely the kind of agreement that Mr. Entel seeks to enforce in this action-proceeding. It provides in pertinent part that:

> No municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above...

As a Trustee, Mr. Entel was an officer of the Village within the meaning of the statute. *See,* GML §800(5) ("municipal officer or employee" means an officer or employee of a municipality, whether paid or unpaid, including member of any board, commission or other agency thereof).

GML §801 is violated if three elements are established: (1) the existence of a contract with the municipality, (2) a benefit accruing to an officer or employee of the municipality as a result of the contract, and (3) the power or duty of the officer or employee to negotiate, prepare, authorize or approve the contract, either individually or as a member of a Board.

A. First Element: Contract With The Village

Mr. Entel's agreement with the Village was a "contract" within the meaning of the statute. *See,* GML §800(2) ("contract" means any claim, account, or demand against or agreement with a municipality, express or implied).

In the complaint-petition verified by Mr. Entel on July 19, 2007, plaintiffs-respondents admitted that Mr. Entel entered into a contract with the Village:

> On or about October 17, 2005, the Village Board of Trustees and Entel entered into an agreement wherein the Village would formally decline the Offer of Dedication and any and all right, title and interest the Village of Muttontown may have to the parcel would be extinguished. In exchange [Entel] would, *inter alia* plant and maintain appropriate screen planting along Noel Lane as required by the Building Department and maintain the Property.

R. 29, ¶54.

The definition of "contract" set forth in GML §800(2) is clear and unambiguous. It states that:

> "Contract" means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law.

Where the words of a statute are clear and unambiguous, they should be literally construed. McKinney's Cons. Laws of N.Y., Book 1, Statutes, §76. A statute is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction. McKinney's Cons. Laws of

N.Y., Book 1, Statutes, §94.

In GML §802, the legislature enumerated specific exceptions to the broad and inclusive definition of contract. Plaintiffs-respondents do not argue that their contract with the Village fell within any of the statutory exceptions, and it did not.

Here, the plaintiffs-respondents pleaded the terms of their contract with the Village:

> ...[O]n October 17, 2005, the Village Board of Trustees, with Entel, then a member of the Board, recusing himself from the vote, adopted a resolution formally declining the Offer of Dedication and providing that "any and all right, title and interest the Village of Muttontown may have to the parcel is hereby extinguished". The resolution was conditioned on planting and maintaining appropriate screen planting along Noel Lane as required by the Building Department. The other condition was that the resolution not be deemed or construed to authorize the Property as a building lot or to permit the construction of any structure.

R. 26, ¶30.

In their verified complaint-petition below, plaintiffs-respondents claimed that the Village breached this contract on July 10, 2007 by rescinding the October 17, 2005 resolution and accepting the irrevocable offer of dedication. They seek either specific performance of their contract with the Village or money damages for its breach.

Now, despite having brought this claim for breach of contract, and contrary to the broad statutory definition set forth in GML §800(2), plaintiffs-respondents contend that their agreement with the Village was not a contract for purposes of

GML §801. This contention is based on their erroneous reading of dicta in Stettine v. County of Suffolk, 66 N.Y.2d 354 (1985).

In Stettine, the Court of Appeals held that the Civil Service Employees Association ("CSEA") was a voluntary nonprofit association and, therefore, the collective bargaining agreement between the County and the CSEA fell within a specific exception to GML §801 for contracts with such associations. *See*, GML §802(1)(f).

In dicta, the Stettine Court cited a 1968 opinion by the State Comptroller stating that:

> Indeed the Comptroller stated that "a 'contract' contemplates an arrangement between a municipality and a third party whereby a consideration passes from the municipal corporation as a result of goods purchased by it or services rendered to it. Otherwise, relating to the CSEA contract, the highly impractical result would be that every employee of the town who belongs to the CSEA would have an interest in the town-CSEA contract which, although perhaps not prohibited by General Municipal Law §801 would have to be disclosed by the employee pursuant to §802....

Id. at 358.

Subsequently, the Comptroller has been expansive in its application of GML §801. For example, in 1977 N.Y. St. Comp. 147, the State Comptroller responded to an inquiry involving a village trustee who owned property which adjoined a parcel owned by the village. The trustee proposed that the village quit claim title to the parcel to him. As consideration for the parcel, the trustee proposed to grant an

easement to the village over the parcel and his adjoining land. The proposal did not involve any exchange of monetary consideration. Nevertheless, the State Comptroller determined that the transaction would violate GML §801.

But even applying the Comptroller's 1968 definition of "contract" cited by the Stettine Court, the plaintiffs-respondents' agreement with the Village here was a contract for purposes of GML §801. Consideration passed from the Village in the form of its surrender of all its right, title and interest in the Parkland and, in exchange, goods and services were provided to the Village in the form of screen plantings and maintenance.

Elsewhere, the Court of Appeals has broadly interpreted the statutory definition of contract set forth in GML §800(2). In Rose v. Eichhorst, 42 N.Y.2d 92 (1977), the court held that a town board member's purchase from the county of a tax lien on property within the town was a prohibited interest in a contract pursuant to GML §801, even though the town was not a party to the contract. The Rose Court reasoned that the town and the county had an identity of interest in property tax matters.

Here, plaintiffs-respondents would have this Court conclude that the definition of "contract" for purposes of GML §801 is narrower than the definition of the same term for purposes of a breach of contract claim. However, a plain reading of the statute leads inescapably to the conclusion the opposite conclusion.

See, GML §800(2) ("contract" means any claim, account, or demand against or agreement with a municipality, express or implied).

Faced with the consequence that their illegal contract with the Village was void *ab initio*, plaintiffs-respondents sought to re-characterize the contract as a "land use application" under GML §809. However, GML §809(1) is clear in its scope. It requires disclosure of a municipal officer or employee's interest in:

> every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality...

Where a municipal officer or employee has an interest in a land use application of the type set forth in GML §809, the statute requires written disclosure, and the common law requires recusal. By contrast, a prohibited interest in a municipal contract in violation of GML §801 is not cured by notice and recusal. *See,* 1977 N.Y. St. Comp. 714; 1981 N.Y. St. Comp. 116; 1983 N.Y. St. Comp. 180; 1987 St. Comp. 75; 2000 N.Y. St. Comp. 2.

Plaintiffs-respondents did not allege any facts to support their contention that the contract was an application for exemption from a plat. It is not supported by any allegation of the verified petition-complaint, or of the affidavits of plaintiff-respondent Mr. Entel dated July 19, 2007 and September 20, 2007. There is no allegation that an application for "exemption from the plat" or other land use

determination set forth in GML §809 was filed with the Planning Board (the board empowered by N.Y. Village Law §7-730 to approve subdivision plats) or any other Village board, that any application fee was paid, that notice of a public hearing was published, that a public hearing was conducted, or that any decision after hearing was issued.

Indeed, if Mr. Entel had applied to the Planning Board – as Foreal Homes did – for an amendment of its decision granting subdivision approval so as to eliminate the required parkland dedication, and for deletion on the recorded subdivision map of the reference to the irrevocable offer of dedication, his application would have been heard by an independent board of which he was not a member, after a public hearing on notice to the subdivision homeowners. Instead, he chose to make a deal with his fellow trustees, and circumvent a public hearing before the Planning Board.

If Mr. Entel's application had been made to the Planning Board, the disclosure of his interest under GML §809 would have been sufficient compliance with GML Article 18 because, not being a member of the Planning Board, Mr. Entel would not have had the power or duty to approve the application and thus the transaction would not have been prohibited by GML §801. But instead of filing a land use application with the Planning Board, he chose instead to make a deal with his fellow members of the Board of Trustees involving a *quid pro quo*. As a

member of the Board of Trustees, he had the power and duty to approve the contact (*see,* Point II-C, below). Therefore, Mr. Entel's contract with the Village violated GML §801 even though he recused himself from the vote approving the contract. (*See,* Point II-D, below).

Furthermore, the Muttontown Village Code makes no reference to an "application for an exemption from a plat" as contemplated by GML §809; and the only reference in the N.Y. Village Law to an "exemption of lots shown on an approved subdivision map" is inapplicable here. That reference appears at N.Y. Village Law §7-709, which exempts subdividers from the application of laws that increase the minimum lot size within three years after a subdivision map is approved.

Moreover, if the designation of the Parkland on the subdivision plat constituted a binding dedication so as to require that the plaintiffs-respondents apply for an "exemption" from the plat, then that exemption could only have been granted by the New York State Legislature. *See,* Ellington Constr. Corp. v. Zoning Board of Appeals, 152 A.D.2d 365 (2d Dept. 1989), *aff'd* 77 N.Y.2d 114 (1990).

> It should also be pointed out that neither the Village nor the Town can reconvey parkland which has been irrevocably dedicated for recreational use. Dedicated park areas in New York State are impressed with a public trust, and their use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the legislature plainly conferred (*see,* Matter of Ackerman v. Steisel, 104 A.D.2d 940, 941, *aff'd* 66 N.Y.2d 833; *see also,* Miller v. City of New York, 15 N.Y.2d 34; Stephenson

v. County of Monroe, 43 A.D.2d 897; 16 Opns St Comp, 1960, No. 60-545, at 292).

Id. at 378-379.

B. Second Element: Benefit To Mr. Entel

The benefit accruing to Mr. Entel individually and through his solely owned limited liability company was an "interest" within the meaning of the statute. *See,* GML §800(3) ("interest" means a direct or indirect pecuniary or material benefit accruing to the municipal officer or employee as a result of the contract; a municipal officer or employee is deemed to have an interest in the contract of a firm, partnership or association of which such officer or employee is a member).

Mr. Entel benefited from his agreement with the Village by the increase in value to the Parkland that resulted from the resolution declining the irrevocable offer of dedication of the Parkland. The resolution freed the Parkland from the irrevocable offer of dedication, but neither required Mr. Entel to grant a conservation easement, nor otherwise restricted development. An appraisal prepared for Mr. Entel in 2004 valued the development rights at $1,600,000.00. R. 67, ¶9.

Mr. Entel claimed below that he intended to donate the development rights in the form of a conservation easement, for which he expected to obtain a valuable income tax deduction. But whether he intended to donate the development rights, develop or sell the property, or maintain the property in its undeveloped state, his

agreement with the Village increased its value to at least $1,600,000.00. R. 67, ¶9.

Mr. Entel also benefited by the increase in value of his contiguous 3.32 acre parcel that resulted from its newly acquired potential for use, development or sale together with the unencumbered Parkland.

C. Third Element: Power To Control The Contract

As a member of the Board of Trustees, Mr. Entel had the power to negotiate, prepare, authorize and approve this contract with the Village. *See,* N.Y. Village Law §4-412(1)(a).

For the purposes of GML §801, it is immaterial whether Mr. Entel actually negotiated, prepared, authorized or approved the contract; he need only have had the power to do so.

> ...[I]f a municipal official has an interest in a contract with the municipality, that interest is prohibited...if the official has the "power or duty" to exercise authority with respect to the contract. The official need not in fact exercise that authority but need only possess the right to exercise it. For that reason, neither recusal nor competitive bidding will avoid a violation of [N.Y. Gen. Mun. Law] [§]801.

Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials,* Albany Law Review, 1996, Vol. 59, No. 4, P. 1321 at 1329; *see also,* Dykeman v. Symonds, 85 Misc. 2d 289 (Sup. Ct. Monroe County, 1976) *aff'd* 54 A.D.3d 159 (4th Dept. 1976).

D. Recusal Cannot Cure A Violation Of The Statute

Not every interest that a municipal officer or employee may have in a municipal contract is prohibited by GML §801. Where an officer or employee has an interest in a municipal contract, but does not have control over the contract, the contract does not violate GML §801 and is not a prohibited contract. In such cases the officer or employee must publicly disclose his or her interest pursuant to GML §803.

However, the New York State Comptroller has consistently stated that abstention and recusal do not cure an otherwise prohibited interest in a contract. For example, where a village mayor sought to purchase real property from the village, the State Comptroller found that:

> It is immaterial that sealed bids were solicited and that the mayor's bid was the highest of all submitted, or that the mayor refrained from voting on the acceptance of the bid. There is no exception to the prohibition of General Municipal Law §801(1) based upon the utilization of bidding procedures. It is also irrelevant that the mayor did not cast a vote when the board of trustees voted on the acceptance of the bid. The mere fact that an officer or employee has the power or duty to perform a function enumerated in [§]801(1) gives rise to the prohibition contained therein (without regard to whether he actually performs the function).

1981 N.Y. St. Comp. 116; *see also,* 1983 Opns. St. Comp. No. 83-180; 1987 Opns. St. Comp. No. 87-75; 2000 N.Y. St. Comp. 2.

Similarly, in 1977 N.Y. St. Comp. 147, the Comptroller stated that:

> The benefit to the trustee does not necessarily have to be pecuniary in nature in order for him to have a statutory interest in the agreement with the village. This interest is prohibited by General Municipal Law §801(1) because the trustee, as a member of the board of trustees, has the power or duty to approve the agreement. Village Law §4-412(1). In this regard, it is immaterial that the trustee dissociates himself from board proceedings relative to the transaction. The §801(1) prohibition stems from the power or duty of the trustee to approve or authorize the contract, etc., and it is irrelevant that he refrains from the exercise of that power or the performance of such duty.

1977 N.Y. St. Comp. 147.

Because a violation of GML §801 cannot be cured by recusal, the plaintiffs-respondents attempt to cast the contract as a land use application. Specifically, plaintiffs-respondents claim that their contract with the Village was an application for an "exemption from a plat". There is no allegation in plaintiffs-respondents' pleading or motion papers below that would support this characterization, nor is there any factual basis for this contention. There was no application filed with the Planning Board for an exemption from a plat, no application fee paid, no notice to the subdivision homeowners, no public hearing conducted, and no deposit was made to the Village parkland fund.

If an application for an amendment of the recorded subdivision plat had been submitted to the Planning Board (the Planning Board is the municipal board authorized to decide applications for subdivision approval pursuant to N.Y. Village Law §7-730), the application would have been decided by a Board of which Mr. Entel was not a member. Such an application would have been decided after a

public hearing, on notice to the subdivision homeowners. If the Planning Board had granted the application, it could have required the applicant to make a compensating deposit to the Village parkland fund (*see,* N.Y. Village Law §7-730(4)(c)). Instead, Mr. Entel chose to bypass the Planning Board, and strike a deal with his fellow trustees; thus accomplishing what Foreal Homes was unable to do through twelve years of applications to the Planning Board and litigation with the Village, and enriched himself at the expense of his neighbors and the Village.

None of the cases or advisory opinions cited by the plaintiffs-respondents in their papers below support their contention that disclosure and recusal were sufficient to cure Mr. Entel's GML §801 violation. Each of the opinions involved fact patterns in which at least one of the elements of a violation of GML §801 was missing. In each case, there was no prohibited interest in a contract with the municipality because either: (i) there was no contract with a municipality, (ii) the contract did not result in a benefit to the municipal officer or employee, or (iii) the official did not have the power or duty to approve the contract either individually, or as a member of a board.

For example, plaintiffs-respondents cited Matter of Tuxedo Conservation and Taxpayer Association v. Town Board of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979), for the erroneous proposition that a violation of GML §801 can be cured by recusal. But Tuxedo did not involve a violation of GML §801. Rather, it involved a

common law appearance of impropriety. The Tuxedo line of cases stands for the proposition that public officials are held to a high standard of conduct, and New York courts will negate certain actions that, although not violating the literal provisions of GML Article 18, violate the spirit and intent of the statute, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety.

Quoting Chief Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464 (1928), the Tuxedo Court noted that "[a] trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Tuxedo at 324.

E. No Exception Applies

GML §802 enumerates certain exceptions to GML §801. However, Mr. Entel's interest in this contract with the Village does not fall within any of those exceptions.

F. Contract Void

A contract willfully entered into by or with a municipality in violation of GML §801 is "null, void, and wholly unenforceable". GML §804. The Board of Trustees had no power to waive the prohibition imposed by GML §801.

> This statutory nullification acts as 'bar to any waiver of the prohibited conflicts of interest through consent of the governing body or authority of the municipality'. Indeed, the municipality may be entitled to receive both restitution and the benefit of the contract.

Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials,* Albany Law Review, 1996, Vol. 59, No. 4, P. 1321 at 1333.

A contract "willfully" entered into in violation of the statute is void whether or not the official knew that his interest in the contract was prohibited. Id. By contrast, a municipal officer or employee who "willfully and knowingly" violates GML §801 is guilty of a misdemeanor.

Here, Mr. Entel admitted in his affidavit dated July 19, 2007 that he was fully informed of the "history of the property based on ... [his] personal knowledge gained from... [his] time as a resident and as an active participant in Village government." R. 65, ¶4.

Mr. Entel specifically admitted knowing that:

(i) the Planning Board's approval of the final subdivision map was conditioned upon the offer of dedication of parkland. R. 65, ¶5; R. 23, ¶¶8-11;

(ii) the Subdivider's attempt to revoke the offer of dedication was opposed by the Village and the subdivision homeowners in five years of litigation that resulted in a decision by the Court of Appeals that the Subdivider could not unilaterally revoke the offer of dedication. R.6 ¶7; R.24, ¶¶16-18;

(iii) at the time he purchased the Parkland from the Subdivider for $90,000.00, the "development rights" were worth $1,600,000.00. R.67, ¶9; R. 25, ¶¶26-27;

(iv) after purchasing the Parkland from the Subdivider, Mr. Entel requested that the Village release the offer of dedication. R. 67-68, ¶10;

(v) Mr. Entel was a Village Trustee at the time of his request that the Village release the offer of dedication. R.68, ¶11; R. 26, ¶ 30;

(vi) on October 17, 2005, Mr. Entel entered into a contract with the Village providing that the Village would give up all of its right, title and interest in and to the Parkland, and he would plant and maintain screen plantings. R. 26, ¶30 and R. 29, ¶54; and

(vii) Mr. Entel had an interest in the Board of Trustees October 17, 2005 resolution declining the offer of dedication. R. 68, ¶11.

G. The Village Acted Promptly Upon Discovery Of The Illegal Contract

Plaintiffs-respondents argued below that the Village delayed for nearly two years before rescinding the illegal contract. This argument was disingenuous. The Board of Trustees that entered into the contract with Mr. Entel on October 17, 2005 remained in office and in control of Village policy until July 2006. The current Board of Trustees acted to rescind the contract within one month of its

discovery on June 12, 2007 that the previous Board of Trustees had declined the offer of dedication. R. 403, ¶4 through 406, ¶13.

Only one of the six Trustees present and voting on the July 10, 2007 resolution was in office on October 17, 2005 when the prior Board of Trustees purported to decline the irrevocable offer of dedication and release all of the Village's right, title and interest in the Parkland.

The current Board of Trustees, installed in July 2006, promptly undertook to investigate the facts and circumstances when the matter was first brought to its attention on October 10, 2006 by the then president of the subdivision's Civic Association, Ms. O'Connell. The Board of Trustees' initial review of Village records and the results of a May 18, 2007 title search of documents filed in the office of the Nassau County Clerk led it to conclude that Mr. Entel's limited liability company acquired title to the Parkland subject to the irrevocable offer of dedication, and that the offer of dedication remained outstanding. These findings were reported at the Board of Trustees' public meeting on June 12, 2007.

The current Board of Trustees did not learn of the October 17, 2005 resolution until after the close of its public meeting on June 12, 2007, when it was revealed by Ms. O'Connell. The Board of Trustees immediately confirmed the information, and rescinded the resolution at its next public meeting on July 10, 2007. R. 403, ¶4 through 406, ¶13.

There are no allegations set forth in the verified complaint-petition or Mr. Entel's affidavits that dispute this chronology of events, or establish that the current Board of Trustees failed to act promptly upon learning of the illegal contract.

In their opposition papers below, plaintiffs-respondents cited Landau v. Percacciolo, 66 A.D.2d 80, 89 (2d Dept. 1972), for the proposition that a municipality must act promptly in disaffirming a contract. However, a more complete reading of Landau is needed. The Landau court stated that:

> The defendants should not be permitted to disaffirm, however, if they did not act promptly. We think that in this case they did. Shortly after the involvement of... [the former municipal official] was revealed by the testimony [in public hearings], notice of rescission of the contracts was given to the plaintiffs by the defendants. Though there is evidence that certain county officials knew of the concealment of... [the official's] interest almost from the beginning, there is no evidence that the majority of the members of the Board of Supervisors were aware of his interest until the revelation resulting from the hearings.

In Landau, the contracting party argued, as Mr. Entel did below, that the municipality should have been precluded from rescinding the contract because he incurred costs in reliance upon the contract. Addressing the issue, the Second Department stated that "[i]n our view, the use of the property and the loss endured thereby are not grounds compelling the enforcement of the contract." Id. at 90.

To this date, Mr. Entel retains the exclusive use and benefit of the Parkland that he annexed to his residence, landscaped for his own enjoyment, and fenced in

to exclude his neighbors. Mr. Entel's landscaping expenditures are not grounds for compelling the enforcement of his illegal contract with the Village. Id.

H. Plaintiffs-Respondents' Claim Of Political Retaliation Is Unsupported By The Facts

There is no dispute that Mr. Entel willfully entered into a contract with the Village. Plaintiffs-respondents admit the existence of a contract in their verified pleading. It is also undisputed that Mr. Entel derived a benefit from the contract and that, as a member of the Board of Trustees, he had the power to approve the contract.

Plaintiffs-respondents cannot escape the legal significance of the undisputed facts. Nevertheless, they wrongly seek to portray themselves as benefactors and the Village as vindictive. Mr. Entel claims that the Village's action in accepting the offer of dedication was motivated by political animus against him because he was the Mayor's electoral opponent. He points to the fact that the Village sued another electoral opponent of the Mayor. Mr. Entel neglected to inform the court below that on June 14, 2004, then Trustee Mr. Entel himself voted with a unanimous Board of Trustees to authorize the former Village Attorney to pursue the same claim against the same person. R. 413-414.

III.
MR. ENTEL'S CONTRACT WITH THE VILLAGE WAS NOT SUPPORTED BY CONSTITUTIONALLY ADEQUATE CONSIDERATION AND IS THEREFORE VOID

The Constitution of the State of New York prohibits a municipality from making a gift or loan of its property except for enumerated purposes none of which apply here. *See,* N.Y. Const. Art. VIII, §1.

A transfer of municipal property made in violation of N.Y. Const. Art. VIII, §1 is void. *See,* Solow v. City of New York, 25 A.D.2d 442 (2d Dept.1966), *aff'd* 20 N.Y.2d 960 (1967).

The transfer of municipal property for less than adequate consideration constitutes an unconstitutional waste of municipal property, Grand Realty Co. v. White Plains, 125 A.D.2d 639 (2d Dept. 1986); Sag Harbor v. Chelberg, et al., 12 A.D.2d 520 (2d Dept. 1960).

Here, the Village received less than adequate consideration in exchange for the valuable property rights that it transferred to Mr. Entel through his limited liability company by declining the irrevocable offer of dedication and releasing all of its right, title and interest in and to the Parkland. The sole "consideration" recited in the October 17, 2005 resolution of the Board of Trustees that memorialized the agreement between Mr. Entel and the Village, was the condition that Mr. Entel would:

> ...plant appropriate screen planting[s] along Noel Lane... to screen totally the road frontage on Noel Lane from view, and that it, its successor and assigns thereafter be obligated to maintain this screen plantings [sic] in a first class manner similar to other front yards on Noel Lane.

In exchange for Mr. Entel's promise to plant and maintain screen plantings, the Village released property rights to Mr. Entel's limited liability company that Mr. Entel's appraiser valued at $1,600,000.00.

The Village derived no benefit from the landscaping or improvements that Mr. Entel is alleged to have made to the Parkland, and maintenance that he is alleged to have performed. These inured to his own benefit as owner of the Parkland and as owner of the adjoining residential property.

Thus, any benefit that Mr. Entel may claim inured to the Village was illusory or, at best, grossly disproportionate to the value of the benefit that he received in acquiring unencumbered ownership and unrestricted use of the Parkland. Accordingly, the transaction was an unconstitutional waste of Village property and void as a matter of law.

There is no dispute that Mr. Entel's contract with the Village provided for the Village to surrender all of its right, title and interest in the Parkland, and that the surrender of these rights increased the value of the Parkland from $90,000.00 to at least $1.6 million. R. 25, ¶27; R. 67, ¶9. Certainly, the value of Mr. Entel's contiguous residential property was also increased.

The only consideration flowing to the Village in exchange for the release of its rights was Mr. Entel's promise to plant and maintain screen plantings. The October 17, 2005 resolution stated that this obligation would bind Mr. Entel's successors and assigns, but no instrument was executed or recorded to effectuate that condition. R. 410-412.

Mr. Entel repeatedly attempted to mislead the court below by claiming that he surrendered the development rights to the Parkland. This false claim by Mr. Entel is relevant only to the issue of whether the Village's release of its interest in the Parkland was an unconstitutional waste of Village assets. It is not relevant to the issue of whether the contract violated GML §801.

But Mr. Entel cannot deny that the Village neither required nor obtained any restriction on development of the Parkland when it released its interest. In fact, in language that plaintiffs-respondents omitted to mention, the October 17, 2005 resolution declining the offer of dedication expressly reserved Mr. Entel's right to develop the property, subject only to approval by the Village Planning Board. It stated that:

> This resolution shall not be deemed or construed as Village approval or recognition that the 1.1 acre parcel is a legal building lot or to permit the construction of any structures on the property, *which recognition or permission shall be subject to the approval of the Incorporated Village of Muttontown Planning Board and compliance with any conditions and requirements that it may deem appropriate and necessary.*

R. 84-85 (emphasis added).

On December 12, 2005 the former Village Board of Trustees adopted a resolution purporting to accept a conservation easement over the Parkland. Mr. Entel admits that he never granted a conservation easement to the North Shore Land Alliance due to its refusal to certify that he was entitled to a tax deduction. R. 203-204, ¶12. A title examination ordered by the Village revealed that there was no recorded conservation easement restricting development of the Parkland as of May 18, 2007. R. 410-412.

The December 12, 2005 resolution of the former Board of Trustees contemplated that Mr. Entel would keep the Parkland in its natural state. The resolution, in pertinent part, stated:

> WHEREAS, the Parcel consists of existing trees, grasslands, and shrubbery which together contain and provide a natural environment for wildlife; and
>
> WHEREAS, the Parcel in its present open, undeveloped and natural condition has substantial and significant value and character as an aesthetic, scenic and natural resource for the Village and the local community.

But, Mr. Entel was not constrained by these non-binding recitals. He admits that he significantly altered the natural condition of the Parkland by adding "substantial" fill and sod, planting non-indigenous species, and installing an irrigation system. R. 70, ¶17.

The plaintiffs-respondents claimed below that their December 12, 2005 offer

to the Village of a conservation easement was additional consideration for the October 17, 2005 contract. But nowhere in the detailed recitals set forth in the October 17, 2005 resolution was there any mention that Mr. Entel would give a conservation easement to the Village, and none was required by the resolution. Moreover, the resolution expressly acknowledged that the Parkland might be developed, subject only the approval of the Planning Board.

In opposition to this motion below, plaintiffs-respondents only submitted an unsigned copy of the purported conservation easement, together with an undated letter from Mr. Entel's attorney bearing a fax transmission date of December 9, 2005, stating that the attached conservation easement was "proposed" for consideration by the Village. R. 86-100.

Mr. Entel's explicitly stated intention in offering the conservation easement was to obtain a valuable tax deduction. The December 12, 2005 resolution, drafted by Mr. Entel's attorney (compare R. 86-100 with R. 223-230) provided in pertinent part, that:

> WHEREAS grantor intends to grant a qualified real property interest in perpetuity by restricting the future use of the parcel, which will qualify as a conservation contribution pursuant to Internal Revenue Code section 170(h)(3) and be recognized as a conservation easement pursuant to the New York State Environmental Conservation Law Article 49 ("ECL");

The former Board made sure to adopt the resolution in December, before the 2005 tax year came to an end. (Indeed, in an October 5, 2005 letter to the then

Village Attorney, the then Mayor wrote "I do not want to jeopardize Rich Entel's ability to gift the development rights and get a tax deduction", *see* R. 162.) But no executed conservation easement was ever delivered to the Village or recorded because the North Shore Land Alliance would not give Mr. Entel the certificate that he needed to qualify for a tax deduction. Incredibly, Mr. Entel claimed below that he was not motivated by the personal tax benefit that he would have received. Straining logic and credulity, he claims that:

> ...contrary to the Village's unfounded charge, I was not seeking a tax deduction out of personal greed. I am in the process of establishing a charity qualified under §501(c)(3) of the Internal Revenue Code and any tax refund I received was intended for the funding of the charity.

R. 203-204, ¶12. But obviously, even if Mr. Entel made a charitable donation of the entire benefit that he would receive from the tax deduction for granting the conservation easement (that is, assuming the refund would represent his entire tax benefit) he would still receive another tax deduction for donating his tax refund to a qualified charity.

Mr. Entel's unfulfilled intention to grant a conservation easement, whether it was charitable or mercenary, cannot validate his illegal agreement with the Village.

IV.
THE EMINENT DOMAIN PROCEDURE LAW WAS NOT APPLICABLE

The Village did not exercise its right of eminent domain. Rather, it exercised its right pursuant to New York Village Law §7-730 and Muttontown Village Code

§§158-27 and 158-28 to accept an irrevocable offer of dedication of parkland made pursuant to the Planning Board decision approving the final subdivision map.

It is well settled that a municipality may accept a dedication offer at any time prior to the offer's valid revocation by all interested parties. Hubbard v. City of White Plains et al., 18 A.D.2d 674 (2d Dept. 1962); Landon v. City of Binghamton, 79 A.D.2d 810 (3d Dept. 1980).

There is no dispute that the irrevocable offer of dedication remained in effect prior to the adoption of the October 17, 2005 resolution of the Board of Trustees purporting to decline the irrevocable offer of dedication.

The October 17, 2005 resolution was void as a matter of law, because Mr. Entel, as a Village Trustee, had a prohibited interest in his agreement with the Village (*see,* Point II, *supra*), and because the transaction was an unconstitutional waste of Village property (*see,* Point III, *supra*).

Accordingly, because the offer of dedication was not validly revoked or declined, the Village was entitled to accept the offer of dedication, as it did on July 10, 2007.

V.
SEQRA COMPLIANCE WAS NOT REQUIRED BECAUSE THE SUBDIVISION APPROVAL WAS GRANTED BEFORE SEQRA WAS ENACTED

New York Environmental Conservation Law ("ECL") Article 8, State Environmental Quality Review Act ("SEQRA") was enacted by chapter 612 of the

Laws of 1975, and pursuant to §4 of chapter 228 of the Laws of 1976, the act became effective September 1, 1976.

SEQRA requires a review of certain "actions" that may have a significant impact on the environment. *See,* ECL §8-0109, subd. 2. The impact of an action must be considered as an organic whole, and not in segments. Defreestville Area Neighborhoods Ass'n v. Town of North Greenbush, 299 A.D.2d 631 (3d Dept. 2002); Long Island Pine Barrens Society, Inc. v. Town of Riverhead, 290 A.D.2d 448 (2d Dept. 2002). The SEQRA review must be undertaken "as early as possible in the formulation of a proposal for an action." *See,* ECL §8-0109, subd. 2.

Here, the "action" was undertaken by the Village on July 2, 1969, when the Village Planning Board approved the subdivision map entitled "Map of Melanie Heights", and conditioned its approval upon the dedication to the Village of a certain 1.1 acre parcel of land for recreation purposes.

Clearly, if SEQRA had been in effect at that time, the Planning Board would have been required to consider the environmental impact of its decision granting subdivision approval conditioned upon the dedication of parkland.

ECL §8-0111 provides that actions undertaken or approved prior to the effective date of SEQRA are exempt from compliance with the statute. ECL §8-0111, subd. 5, ¶(a) states that the requirements of ECL §8-0109 subd. 2 (preparation of an environmental impact statement) shall not apply to:

> Actions undertaken or approved prior to the effective date of this article, except:
>
> (i) In the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or
>
> (ii) In the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification.

The same grandfather provision appears at N.Y.C.R.R. 617.5(c)(34).

In Salmon v. Flacke, 61 N.Y. 2d 798 (1984), the Court of Appeals upheld two decisions by the Fourth Department [reported respectively at 91 A.D.2d 867 (4th Dept. 1982) and 91 A.D.2d 868 (4th Dept. 1982)] that a town's renewal of a landfill permit was not an "action" requiring SEQRA compliance because the landfill was previously approved before the effective date of SEQRA.

The July 10, 2007 resolution accepting dedication of the Parkland implemented the July 2, 1969 decision of the Planning Board approving the subdivision map conditioned upon dedication of the Parkland. For this reason, and because preservation of the Parkland as open space could only have a positive effect on the environment, the Board of Trustees was not required to prepare an

environmental impact statement before adopting the resolution.

By characterizing the July 10, 2007 resolution as an "action" for SEQRA purposes, the plaintiffs-respondents seek to improperly segment the subdivision project. A project is improperly segmented when the segmented portion (here the acceptance of the irrevocable offer of dedication) "has no independent utility, no life of its own, or is simply illogical when viewed in isolation." Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 836 F. 2d 760, 763-64 (2d Cir. 1988); In re Village of Westbury v. Dep't of Transp., 75 N.Y.2d 62, 69 (1989).

By contrast, the October 17, 2005 resolution of the former Board of Trustees declining the offer of dedication was inconsistent with the Planning Board's decision approving the subdivision map conditioned upon dedication of the Parkland. Moreover, the resolution had an inherently negative impact on the environment because it declined dedication of the Parkland, and because it was not conditioned upon preservation of the Parkland as open space.

Therefore, the prior Board of Trustees' resolution declining the Parkland dedication was a modification of the Planning Board's decision approving the subdivision map conditioned upon dedication of the Parkland, and was not exempt from SEQRA compliance under the grandfather exception. *See,* ECL §8-0111, subd. 5, ¶(a)(ii), and N.Y.C.R.R. §617.5(c)(34).

Nevertheless, plaintiffs-respondents do not deny that the prior Board of

Trustees failed to prepare an environmental impact statement or otherwise comply with SEQRA before adopting the October 17, 2005 resolution.

SEQRA provides at N.Y.C.R.R. §617.5(c)(34) that a municipal action is not subject to review under SEQRA when the action is "undertaken, funded or approved" prior to the effective date of SEQRA, except in certain cases where the Commissioner of the New York State Department of Environmental Conservation requires compliance; or where the responsible agency proposes a modification of the prior action and a significant adverse environmental impact may result.

Here, the decision of the Planning Board approving the final subdivision map showing the dedication of parkland took place in 1969, prior to the enactment of SEQRA in 1978. Thus, the irrevocable offer of dedication was "undertaken, funded or approved" prior to the effective date of SEQRA, and the resolution accepting the offer of dedication was not subject to SEQRA review.

Rather, it was the October 2005 resolution declining the irrevocable offer of dedication that may have constituted a modification to the Planning Board's 1969 decision approving the final subdivision map subject to the irrevocable offer of dedication and, therefore, that action may well have required SEQRA compliance, although none was performed.

Indeed, the 2005 resolution declining the irrevocable offer of dedication of the Parkland was an action that might very well have had an inherent adverse

impact on the environment. By contrast, the July 2007 resolution accepting the irrevocable offer of dedication preserved open space by creating a Village Park, and thus had no inherent adverse impact on the environment.

Nevertheless, despite the fact that SEQRA compliance was not required in connection with the July 10, 2007 resolution accepting the irrevocable offer of dedication, the Board of Trustees complied with the spirit and intent of SEQRA. It appointed itself lead agency for the purposes of SEQRA compliance, made an environmental assessment of the proposed action, and adopted a resolution declaring that the action would have no negative impact on the environment.

CONCLUSION

The Court below erred by denying the motion of defendants-appellants to dismiss for failure to join necessary parties. Foreal Homes is a necessary party because it expressly reserved an interest in the Parkland when it conveyed title to Lexjac. This reservation of an interest in the Parkland was set forth in the recorded deed. Foreal Homes retained a right of first refusal to purchase the Parkland and the right to participate in any sale proceeds. The retained interest of Foreal Homes will be extinguished if the Village prevails here.

The subdivision homeowners are also necessary parties because they purchased their homes in reliance upon irrevocable offer of dedication noted on the recorded subdivision plat. Their interests in the Parkland were recognized by this

Court and by the Court of Appeals in prior litigation. The interests of the subdivision homeowners will be extinguished if Mr. Entel prevails here.

Accepting all of the material allegations of the verified complaint-petition as true, six of the seven causes of action alleged in the pleading fail to state a cause of action because plaintiffs-respondents rely upon a contract that is "null, void and wholly unenforceable". The remaining cause of action alleged by the plaintiffs-respondents fails to state a cause of action because SEQRA compliance was not required.

Based on the facts alleged by the plaintiffs-respondents, the contract is void for two reasons. First, regardless of the adequacy of consideration received by the Village, the contract is void because it violated GML §801. *See,* GML §804.

Second, the contract is void because it was not supported by adequate consideration and thus constituted an unconstitutional waste of municipal property.

Because the contract is void, the first cause of action for breach of contract must fail. Similarly, the void contract cannot be the basis for the declaratory judgment that the plaintiffs-respondents seek in their second cause of action.

The third cause of action to resolve conflicting claims of title, and the fourth cause of action for damages based on a *de facto* taking also fail to state a cause of action because the October 17, 2005 contract was void and, therefore, the irrevocable offer of dedication remained outstanding, and the Village was free to

accept the offer.

The seventh cause of action seeks to enforce the contract by compelling the Village to record an instrument declining the irrevocable offer of dedication. This is simply another means by which the plaintiffs-respondents seek to enforce a contract that is null, void and wholly unenforceable. It fails to state a cause of action.

Even accepting the allegations of the verified complaint-petition as true, the current Board of Trustees did not act irrationally in adopting the July 10, 2007 resolution as alleged in the fifth cause of action. The resolution, on its face, set forth the detailed, chronological facts upon which the Board of Trustees relied. It cannot be argued that the Board of Trustees lacked a rational basis for its action. Nor can the facts alleged by the plaintiffs-respondents support a finding that the action of the current Board of Trustees was arbitrary, capricious, or an abuse of discretion. The contract here violated both the letter and the spirit of GML Article 18, and also violated N.Y. Const. Art. VIII, §1. The current Board of Trustees had a duty to rescind the illegal and unconstitutional resolution adopted by the prior board.

Mr. Entel had a direct, personal, pecuniary interest in the contract with the Village. His interest was prohibited by the express terms of GML §801 because, as a member of the Board of Trustees, he had the power to approve the contract. "The

§801(1) prohibition stems from the power or duty of the trustee to approve or authorize the contract, etc., and it is irrelevant that he refrains from the exercise of that power or the performance of such duty." 1977 Op. N.Y. St. Comp 147. Thus, Mr. Entel's recusal from the vote approving his contract could not, and did not cure the violation of GML §801.

GML Article 18 is intended to ensure the reality of government integrity, and to foster public confidence in government. *See,* Laws 1964, ch 946, §§1 and 13-17 (legislative declaration of policy and purpose). It is axiomatic that an appearance of impropriety undermines public confidence in government. Mr. Entel's conduct here clearly violated the letter and the spirit of GML Article 18, was inconsistent with public policy, and reeked of self-interest, partiality and economic impropriety.

The sixth cause of action alleging non-compliance with SEQRA fails to state a cause of action because the decision requiring the dedication of the Parkland was made prior to the effective date of SEQRA, September 1, 1976 and, therefore, SEQRA compliance was not required.

For the foregoing reasons the court below erred in denying defendants-appellants' motion for an order: (a) dismissing plaintiffs-respondents' verified complaint-petition pursuant to CPLR §3211(a)(10) for failure to join necessary parties; and (b) dismissing plaintiffs-respondents' verified complaint-petition

pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

Dated: Roslyn, New York
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CERTIFICATE OF COMPLIANCE

PURSUANT TO 22 NYCRR § 670.10.3(F)

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