

RESOLUTION NO. 19 of 2020

**RESOLUTION ADOPTING DETERMINATION AND FINDINGS PURSUANT TO
ARTICLE 2 OF THE NEW YORK EMINENT DOMAIN PROCEDURE LAW**

**Town of Middletown / Community Wastewater Management Program
Construction of Community Subsurface Wastewater Treatment Facility**

WHEREAS, as part of the Watershed Protection and Partnership Programs of the New York City Watershed Memorandum of Agreement ("MOA"), New York City provided funding for the New Sewage Treatment Infrastructure Facilities Program (NIP) and the Community Wastewater Management Program to assist in the development of new sewage collection and treatment facilities in up to twenty-two (22) selected villages and hamlets in the NYC Watershed;

WHEREAS, the Hamlet of New Kingston, Town of Middletown, New York ("Town") was identified in the MOA as one of the twenty-two (22) priority communities to receive funding for the study, planning, design and construction of a sewage collection system and/or the creation of a septic maintenance district in the Hamlet of New Kingston (the "Project");

WHEREAS, subject to permissive referendum in the manner provided in Town Law Article 7, a majority of the property owners within the proposed service area of the Project voted in favor of the establishment of the New Kingston Sewer District;

WHEREAS, a certificate of the Town Clerk was filed pursuant to Town Law § 209-e(4) certifying the results of the special election held on June 29, 2019, stating that a majority of property owners in the proposed sewer district voted in favor of the establishment of the district, and per Town Board Resolution No. 14-2019, the Town formed the New Kingston Sewer District ("District");

WHEREAS, due to an overwhelming predominance of small and otherwise problematic lots in the hamlet that could not meet design standards for individual on-site septic systems furthering demonstrable water quality problems. As a result, the community needs a community sewer system to ensure the health, safety and welfare of Town residents and businesses;

WHEREAS, design and construction of the proposed sewer system will be performed in conformance with New York State Department of Environmental Conservation Design Standards for Wastewater Treatment Works, 2014 (2014 NYSDEC Standards), New York State Department of Health Design Standards for Wastewater Treatment System (10 NYCRR Part 75 and Appendix 75-A), and the Rules and Regulations for the Protection from the Contamination, Degradation and Pollution of the New York City Water Supply and its Resources, 2010 (NYCWRR). Regulatory review and approval will be obtained prior to the initiation of construction;

WHEREAS, the Town of Middletown Town Board (the "Board") has reviewed and considered the plans and schematics for the Project, as reflected in the SEQRA Report and the Preliminary Engineer's Report Community Wastewater Management Program for the Hamlet of New Kingston, Town of Middletown, Delaware County, November 2018, including amendments thereto ("Engineer's Report"), prepared by Lamont Engineers, which requires the Town to acquire certain property in the area of the District to accommodate the Project;

WHEREAS, the Board has determined that the Project is in the best interest of the Town and its residents and, as a result, that the contemplated acquisitions are in the best interests of the health, safety and welfare of the Town and its residents, as it is in the public's best interest that the Project be properly constructed and maintained;

WHEREAS, the Board has endeavored and will continue to endeavor to acquire any necessary acquisitions for the Project by voluntary compliance with land owners, but the Board acknowledges that voluntary compliance will not achieve all the necessary acquisitions requiring the Board to exercise its powers of Eminent Domain;

WHEREAS, certain land is necessary for siting the community septic system (which will include, but not be limited to a manhole, a flow meter, an absorption bed dosing pump station and shallow absorption beds ("Treatment System"));

WHEREAS, access across a remaining portion of the same parcel is necessary for ingress and egress to the Treatment System for access, installation, maintenance, operation and repairs to the Treatment System;

WHEREAS, Tax Parcel No. 241.1-1.1 (the "Property") is owned by Michael Moriarty (hereinafter the "Property Owner");

WHEREAS, in Resolution No. 1 of 2020, the Town Board authorized the subdivision of Tax Parcel No. 241.-1-1.1;

WHEREAS, there is an existing deed of conservation easement affecting the Property, which Property Owner conveyed to Watershed Agricultural Council of New York City Watersheds, Inc. ("WAC") by deed of conservation easement dated October 27, 2006, filed in the Office of the Delaware County Clerk's Office on November 2, 2006, and recorded in Deed Book 1158 at Page 261 ("WAC Easement"). The WAC Easement restricts use of the Property and requires WAC approval before the Property can be subdivided for the Project. WAC subdivision approval has been denied;

WHEREAS, the following acquisitions are necessary for the Project;

- Fee Acquisition of a 21.7 acres portion of an 89.85 acres parcel identified on the Middletown Tax Map as Parcel No. 241.-1-1.1 (the 21.7 acre portion of the parcel to be acquired is hereinafter referred to as the "Fee Parcel");
- Permanent Easement for access to the Treatment System over the remaining portion of Tax Map Parcel No. 241.-1-1.1 ("Easement Parcel"); and
- Termination of a Watershed Agricultural Council ("WAC") Conservation Easement encumbering the Fee Parcel.

WHEREAS, in accordance with Article 2 of the New York State EDPL, the Town conducted a public hearing on July 8, 2020 to describe and to invite public comment on the public uses, benefits, and purposes to be served by the proposed acquisition of the Property; the



property interests to be acquired; the reasons for acquiring property at the proposed location; and the general effect of the proposed acquisition on the environment and residents of the locality; and

WHEREAS, notice of the public hearing was duly published in the Mountain Eagle. Property owners and other interested parties also were given advance notice of the hearing by certified mail; and

WHEREAS, prior to and at the public hearing, copies of the surveys and maps of the Property were made available to the public. At the hearing, Lamont explained the Project components and identified those components on the surveys and maps. Attorneys retained by CWC, Young/Sommer LLC, were present at the July 8, 2020 public hearing and made a presentation to the public addressing the above issues; and

WHEREAS, the Town Clerk has been provided a copy of the recording for public review. A transcript of the public hearing has also been prepared. All oral and written comments received during the public hearing were reviewed, made part of the record, and given due consideration.

NOW THEREFORE, BE IT RESOLVED, that the Town Board of the Town of Middletown adopts the Determination and Findings (with attached Comments/ Responses) Pursuant to Article 2 of the New York Eminent Domain Procedures Law annexed hereto; and

BE IT FURTHER RESOLVED, that the Clerk is hereby directed to publish a Notice of Adoption of Determination and Findings with Brief Synopsis in two (2) successive issues of the Mountain Eagle and The Reporter; and

BE IT FURTHER RESOLVED, that the Clerk and Special Council for the Town are directed to forward copies of the Notice of Adoption of Determination and Findings with Brief Synopsis on the Property Owner and WAC and to take such other actions as are necessary to implement this resolution.

WHEREUPON, the Resolution was put to a vote and recorded as follows:

Motion made by: Carl P. Davis

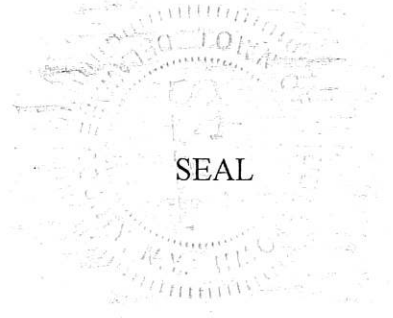
Seconded by: Julia Reischel

Resolution adopted by a vote of 5 ayes and 0 nays

I hereby certified that the above resolution was duly adopted by the Town Board of the Town of Middletown at its regular meeting held on August 12th, 2020.

Dated: August 12th, 2020

Patricia F. Kelly
Patricia F. Kelly, Town Clerk
Town of Middletown



STATE OF NEW YORK }
COUNTY OF DELAWARE }
TOWN OF MIDDLETOWN }

I have compared the preceding copy with the original Resolution on file in this office adopted by the Town Board of Middletown at a regular meeting held August 12th, 2020, and I DO HEREBY CERTIFY the same to be a correct transcript therefrom and of the whole of the original. I further certify the vote thereon was as follows:

MEMBERS PRESENT	MEMBERS ABSENT	VOTE
Davis		<u>Yea</u> /Nay
Sweeney		<u>Yea</u> /Nay
Delameter		<u>Yea</u> /Nay
Reischel		<u>Yea</u> /Nay
Dabritz		<u>Yea</u> /Nay

Dated: August 12th, 2020

Patricia F. Kelly
Patricia F. Kelly, Town Clerk
Town of Middletown



**DETERMINATION AND FINDINGS PURSUANT TO ARTICLE 2
OF THE NEW YORK EMINENT DOMAIN PROCEDURE LAW**

**PROJECT: Town of Middletown Community Wastewater Management Program
Construction of community subsurface wastewater treatment facility.**

In accordance with Section 204 of the New York Eminent Domain Procedure Law ("EDPL"), the Town Board of the Town of Middletown (the "Town") hereby approves the acquisition of certain property described below by eminent domain and adopts the following statutory findings:

I. Project Description and Objectives.

The Town of Middletown ("Town") and New Kingston Sewer District ("District"), through the Community Wastewater Management Program, is constructing a community subsurface wastewater treatment facility consisting of a manhole, a flow meter, an absorption bed dosing pump station and shallow absorption beds, and any ancillary piping or components in the District (the "Project"). The Project is a collaborative effort involving the Town, the District, Catskill Watershed Corporation ("CWC"), New York City Department of Environmental Protection ("DEP"), New York State Department of Environmental Conservation ("DEC"), New York State Department of Transportation ("NYSDOT"), Delaware County Department of Transportation ("DOT") and the United States Army Corp of Engineers ("USACE"). Funding for the Project is from the City of New York through CWC. The Project engineer retained by CWC is Lamont Engineers ("Lamont"). The Project Area extends along County Rt 6, and encompasses property located on County Rt 6. The general boundaries of said proposed Project Area contain those properties located in the hamlet of New Kingston delineated on the proposed Service Area Map on file with the Town Clerk. The Project's objective is to address an overwhelming predominance of small and otherwise problematic lots in the hamlet that could not meet design standards for individual on-site septic systems.

The findings herein are based in part on an in-depth evaluation of the preferred wastewater solution for the Hamlet of New Kingston as described in the SEQRA Report and the Preliminary Engineer's Report Community Wastewater Management Program for the Hamlet of New Kingston, Town of Middletown, Delaware County, November 2018, including amendment thereto ("Engineer's Report"). A CD containing those reports is on file with the Town Clerk.

The Preliminary Engineering Report identified potential management, collection, conveyance and treatment options, and selected different alternatives for further, more detailed development and review. The alternatives for the disposal of the treated wastewater that were identified and reviewed included a Conventional Gravity Sewers, Small Diameter Gravity Sewers, Grinder Pump Pressure Sewers, and Vacuum Sewers. A Small Diameter Gravity Sewer ("SDGS") was recommended as the preferred wastewater solution for the hamlet of New Kingston, due in part to the flexibility of the layout of an SDGS, the elimination of the need for manholes and



primary treatment facilities at the wastewater treatment facility, all of which result in a reduction of the overall project cost.

Areas that are too low for gravity sewers will be augmented with an effluent pump. The Project will include 2,400 LF of small diameter gravity sewer main, 3,200 LF of small diameter force main, 560 LF of lateral stubs, and one (1) main effluent pump station. Approximately twenty-eight (28) lateral connections are also proposed. Each lateral connection would receive a new septic tank equipped with an effluent filter. Five (5) of the lateral connections will have septic tank effluent pumps to convey their flows.

Final treatment and disposal will occur through a community subsurface wastewater treatment facility, consisting of a receiving manhole, a flow meter, an absorption bed dosing pump station and shallow absorption beds ("Treatment System"). As required on other CWMP project subsurface treatment systems, the Treatment System will be constructed in 3 sections each capable of handling 50% of the design flow and will be dosed with a pressure distribution system. The application rate of the absorption beds will be 0.5625 gpd/sf (0.6 gpd/sf with a 30-minute percolation rate, reduced by 25% for using absorption beds and then increased by 25% for constructing 150% of the required absorption area). Also, a 28' x 28' building will be provided for equipment and spare parts storage, to house the permanent standby backup generator for use in case of a power outage and to provide a space for the operator to do paperwork and perform maintenance duties. Odor control will also be provided where necessary.

Based on a current inventory of the properties in the proposed Service Area, the existing wastewater load is approximately 7,700 gpd. The estimated residential EDU count is 28 EDU's and the estimated EDU count for the entire Proposed Service Area is 30 EDU's. With an additional 10% allotment added for growth, the New Kingston Total Wastewater Flow Estimate is 9,000 gpd, or 35 EDU's. The Town has established the New Kingston Sewer District following a public referendum in which an overwhelming majority of the property owners in the District voted for the District to be approved.

The Town of Middletown has also adopted a Sewer Use Law to regulate the proposed wastewater collection and Treatment System. The Sewer Use Law addresses all aspects of wastewater collection and treatment, including but not limited to, when use of public sewers is required, sewer extensions, lateral connections, and discharge restrictions and requirements. The New Kingston Sewer District Sewer Use Law also includes a Sewer Rent Law specifying the sewer rate structure and a Sewer Allocation Law defining the procedure for the Town Board to make decisions regarding future connections to the system.

The yearly operation and maintenance ("O&M") cost includes the costs of the operator to administer and manage the system, monitor the systems, keep the books, complete minor repairs to the system and perform required maintenance, including servicing pumps as necessary. The sewer rate to a household is fixed at a \$100 for the first three years and thereafter adjusts with inflation/deflation. Under the proposed sewer rent law, the total operating costs are divided into two categories: (1) those costs allocated to households; and (2) those costs allocated to non-households. Under the Sewer Rent Law, the Town develops a budget for operation and

maintenance in August for the next calendar year. For purposes of this analysis, the total estimated annual budget is \$73,000.00 (including a contingency funded by DEP). The total budget (less contingency) is divided between households and non-households in proportion to flow. The flow assigned to each household is 260 gallons per day for each EDU. At the present time, the Town estimates that it has approximately 27 EDUs for a total residential flow of 7,020 gallons per day. The flow assigned to non-households is either based on actual meter readings, from engineering estimates or from their SPDES permit. Based upon current estimates, the Town estimates that the flow from non-households as 100 gallons per day. Generally, it will be more favorable to non-households to install a meter on their water supply flow than to pay based upon engineering estimates. The non-household portion of the costs is calculated by multiplying the remainder of the cost by the percentage of flow assigned to non-households. The proposed Sewer Use Law imposes a minimum annual charge of \$250 per non-household. The Town estimates that there are approximately 2 non-households and thus the minimum annual charge will raise approximately \$500. The remainder of the non-household costs is allocated to non-household users based upon their actual flow. In addition, mixed uses are entitled to subtract from their total metered flow the household flow (260 gallons per day per EDU). The Town cautions that these are estimates of the expected cost and the actual cost will vary from these estimates.

II. EDPL Public Hearing.

In accordance with Article 2 of the New York State EDPL, the Town conducted a public hearing on July 8, 2020 to describe and to invite public comment on the public uses, benefits, and purposes to be served by the proposed acquisition for the Project; the property interests to be acquired; the reasons for acquiring property at the proposed location; and the general effect of the proposed acquisition on the environment and residents of the locality. Notices of this public hearing were duly published as required under the EDPL. Property owners and other interested parties also were given advance notice of the hearing by certified mail.

Prior to and at the public hearing, copies of the surveys and maps of the property interests to be acquired by the Town for the Project were made available to the public. At the hearing, Lamont explained the Project components and identified those components on the surveys and maps. Attorneys retained by CWC, Young/Sommer LLC, were present at the July 8, 2020 public hearing and made a presentation to the public addressing the above issues. The Town Clerk has been provided a copy of the recording for public review. All oral and written comments received during the public hearing have been reviewed, made part of the record, and given due consideration. *See* attached response to public comments.

III. Location of Property Required for the Project [EDPL§ 204(B)(2)].

The lands under consideration for permanent acquisition for the Project are:

- Fee Acquisition of a 21.7 acres portion of an 89.85 acres parcel identified on the Middletown Tax Map as Parcel No. 241.-1-1.1 (the 21.7 acre portion of the parcel to be acquired is hereinafter referred to as the "Fee Parcel");

- Permanent Easement for access to the Treatment System over the remaining portion of Tax Map Parcel No. 241.-1-1.1 (“Easement Parcel”); and
- Termination of a Watershed Agricultural Council (“WAC”) Conservation Easement encumbering the Fee Parcel.

Respondent Michael Moriarty is the fee owner of certain land located at County Highway 6 in the Town of Middletown, County of Delaware, and State of New York, designated as Tax ID 241.-1-1.1 on the Tax Map of the Town of Middletown and more particularly described in a deed recorded in the Delaware County Clerk’s Office in Liber 1158 of Deeds at page 261 (the “Property”). The portions of property comprising the Fee Parcel and Easement Parcel are part of the Property owned by Michael Moriarty (hereinafter, the “Property Owner”).

The Town Board proposes a fee acquisition of the Fee Parcel where the Treatment System will be located on the Property and termination of the WAC Conservation Easement which encumbers the Fee Parcel.

The Town Board also proposes the acquisition of a required permanent access easement over a portion of the Property to install, inspect, operate, maintain and repair the Treatment System (including a waiver of WAC’s approval for the access easement).

IV. The Public Use, Benefit, and Purpose to Be Served by the Town’s Acquisition of permanent lands to Support the Project [EDPL § 204(B)(1)].

The Town's acquisition of property interests is integral to and necessary for implementing the Project. Because protection of drinking water is paramount for the benefit of the community and the City of New York, the Project will facilitate a dual agenda of a sustainable plan for the future, as well as address an immediate community need. In 1997, the Memorandum of Agreement (MOA) was entered into by the City of New York and other watershed stakeholders (including the Town of Middletown and Delaware County). The purpose of the MOA was to create a partnership between the upstate communities and the City of New York that would allow for the protection of water quality while ensuring continued community sustainability. The MOA stated its objectives as including a land acquisition program that “would allow existing development to continue, and future growth to occur that is consistent with existing community character and planning goals of the Watershed Communities”; and **that the City’s land acquisition goals insure “the availability of developable land will remain sufficient to accommodate projected growth without adverse impacts on water quality and without substantially changing future population patterns in the Watershed Communities.”** Under the MOA, in addition to land acquisition, NYC was authorized to adopt (and the Towns agreed to accept) regulations governing the disposal of sewage (both surface discharges and subsurface discharges). Those watershed regulations were cost prohibitive and, without mitigation, compliance with those regulations would have resulted in the elimination of the hamlet areas within the West of Hudson Watershed. The communities insisted that for the 22 largest hamlet areas, that DEP agree to fund a community septic solution (See MOA Section 122). Without that commitment, there would not have been an



MOA. It took approximately 18 years for the City and CWC to formally start the process of selecting, designing, and permitting a community septic solution for the hamlet of New Kingston. During that period (and continuing), the Town of Middletown has lost housing units and has been significantly impacted by the City Watershed Regulations and Land Acquisition Program. Attached and incorporated herein as Exhibit A is a report dated 2018 prepared by the Delaware County Department of Planning which evaluates the impact that the New York City's Land Acquisition Program has had on the Town of Middletown.

The 1997 MOA authorized the creation of the WAC Conservation Easement Program consistent with the MOA Objectives. The 1997 MOA required DEP to fund a community septic solution for the Hamlet of Kingston. The Moriarty property was identified as a potential location for the community septic system as early as 1999. It is important to understand that the relationship between land acquisition (and conservation easement acquisition) and water quality in the Watershed Land Acquisition Program is that the development restrictions prevent the property from being developed and that developed property is more detrimental to water quality than vacant land. The ultimate use of this parcel as a community septic system is not inconsistent with that purpose. With the exception of a 28' x 28' building for equipment and spare parts storage, to house the permanent standby backup generator for use in case of a power outage and to provide a space for the operator to do paperwork and perform maintenance duties, the site will remain vacant vegetated land. The Moriarty WAC Easement allows similar out buildings in support of agricultural activities. As a result, the use of this parcel for a community septic system is consistent with the water quality objectives and goals of the easement. If the WAC conservation easement purchase was made in 2006 with knowledge that the Moriarty property had been identified as a potential site for a community septic system and with the intent or knowledge that the purchase would prevent the implementation of this Project under Section 122 of the MOA, the City of New York Land Acquisition Program (including WAC Easement Program) is being conducted in a manner inconsistent with the 1997 MOA Objectives.

In sum, the Watershed Agricultural Program and Community Wastewater Management Program are two NYC funded programs that contribute to watershed protection through land management. The programs operate independently but share a common goal or purpose - to achieve water quality protection. In 2017, DEP requested that the National Academies of Sciences, Engineering, and Medicine ("NAS") evaluate the NYC Watershed Protection Program to determine whether the current watershed protection programs are appropriate and adequate to comply with the Surface Water Treatment Rule into the future. On August 10, 2020, the NAS issued its *Review of the New York City Watershed Protection Program* ("NAS Report")¹ which acknowledged: "In several cases, the Land Acquisition Program's [including WAC easement program] individualized relationship with landowners has inadvertently constrained opportunities for other NYC DEP watershed programs and for local municipalities". The need to locate a community septic system for the Hamlet of New Kingston on land that is encumbered by a Watershed Agricultural Council easement is cited as a specific example. See NAS Report, p. 392. The NAS Report recommends that there should be an ability to modify or revise conservation

¹ National Academies of Sciences, Engineering, and Medicine. 2020. *Review of the New York City Watershed Protection Program*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25851>

easements where alternative uses would increase overall water quality protection. *Id.* at p. 393. The Town's determination to commence eminent domain proceedings to acquire the land needed for this important community wastewater project is consistent with this recommendation.

V. Location of Real Property Interests and Reasons for Selection of those Locations [EDPL § 204(8)(2)].

The proposed alignment for the Project was the product of a rigorous analysis that was performed in conjunction with the environmental review for the Project under the State Environmental Quality Review Act ("SEQRA"). The site selection process is based, in part, on an in-depth evaluation of the preferred wastewater solution for the Hamlet of New Kingston as described in the SEQRA Report and the Preliminary Engineer's Report Community Wastewater Management Program for the Hamlet of New Kingston, Town of Middletown, Delaware County, November 2018, including amendment thereto ("Engineer's Report"). A CD containing those reports is on file with the Town Clerk. A discussion of the alternative sites is provided in the Comment/Response document published and incorporated herein and in the Engineering Report. The second and determining factor in the site selection process is that the funding agreement implementing Section 122 of the MOA requires that the site location be reviewed and approved by DEP (the funder). In reviewing and approving the site location, DEP gives priority to the potential impact on its water supply and the ability to obtain water quality protection. This site is and was the only location that met DEP approval.

With DEP knowledge and support, the Town (through Lamont Engineers and the project attorney) worked with the Property Owner and WAC to develop a project design that met the objectives of all parties. Lamont Engineers, the Town and the Project attorney, Young/Sommer LLC, worked with the Property Owner on project design and fair compensation. Lamont Engineers and the Town also met with WAC officials at the site and provided all of the requested information on the project design. In 2019, the Town and the Property Owner agreed on a project design and the proposed purchase price. With that understanding, upon an application submitted by the Property Owner, the Town Board authorized the subdivision of the tax parcel into two parcels with the 21.7 acre parcel to be sold to the Town for the community septic system.

During this time, the Property Owner also applied to WAC for approval to subdivide the Property (Tax Map No. 241.-1-1.1). Notwithstanding a consensus among the Town, WAC and CWC regarding the need for this project and its consistency with the MOA, the WAC Easement Committee voted that the subdivision did not meet the standards set forth in the WAC Easement. After several months of deliberation and seeking outside counsel and notwithstanding the Town Board issuance of subdivision approval, the WAC Easement Committee determined it could not approve the required subdivision under the terms of the easement.² At the present time, the Town

² Although WAC Conservation Easement Program is part of the City Land Acquisition Program, WAC has consistently maintained that it is in fact a private entity controlled by an independent Board of Directors. The private entity does not consider itself a governmental entity subject to the Public Officer's Law Section 86 (including the Open Meetings Law) and enters into private contracts with property owners relating to conservation easements that run with the land. As the grantee on the Conservation Easements, the WAC takes the position that its decision/determination regarding reserved uses is solely and absolutely in its discretion and not subject to judicial

has not met the construction schedule in the Funding Agreement. As a result, the Town Board elected to proceed with Eminent Domain rather than abandon the project and abandon the sustainability of the hamlet of New Kingston.

VI. General Effect of Real Property Acquisition on the Environment and Residents of the Locality [EDPL § 204(8)(3)].

The Project's potential environmental impacts were addressed in detail during the SEQRA process. For purposes of this project, the Town Board of the Town of Middletown was declared the Lead Agency and it conducted an exhaustive review of the potential environmental impacts. A Negative Declaration was issued on May 8, 2019 that included a description of the proposed action with a Project specific evaluation of the following: (1) Impact on Land; (2) Impact on Geological; (3) Impact on Surface Waters; (4) Impact on Groundwater; (5) Impact on Flooding; (6) Impact on Air; (7) Impact on Plants and Animals; (8) Impact on Agricultural Resources. There are no significant anticipated adverse impacts on Agricultural Resources; (9) Impact on Aesthetic Resources; (10) Impact on Historic and Archeological Resources; (11) Impact on Open Space and Recreation; (12) Impact on Critical Environmental Areas; (13) Impact on Transportation; (14) Impact on Energy; (15) Impact on Noise; (16) Impact on Human Health; (17) Consistency with Community Plans; and (18) Consistency with Community Character. The Town Board has reviewed the Negative Declaration and confirms the findings therein. The Project will have an overall positive impact on the environment and community sustainability. Impacts to cultural resources, critical habitats, wetlands and other sensitive natural resources were avoided to the extent possible. The Project will protect the groundwater from impacts from sanitary waste. The Project will replace and/or repair failing septic systems serving the community at no-cost or low-cost to those residents. Without the Project, the MOA Objective will not be achieved

Copies of this Determination and Findings by the Town of Middletown are available and will be forwarded without cost and, upon request, by writing to:

Patricia Kelly, Town Clerk
Town of Middletown
PO Box 577
Margaretville, NY 12455

review or due process. The process adopted by the WAC for making these determinations does not conform to basic due process decision making requirements applicable to governmental agencies (motion are limited to approval motions and require unanimous consent of the Easement Committee).

New Kingston – Public Hearing Comments / Response to Comments

Comment No. 1: Comment regarding whether Executive Order allows for in person public hearings.

Response: The Town Board first scheduled an in person public hearing by resolution on May 13, 2020. The public hearing was noticed to take place at the Middletown Town Hall on July 8, 2020. Executive Order 202.39, issued on June 7, 2020 extended Executive Orders 202.15-202.21 (as previously extended by 202.29) to allow Towns to hold virtual public hearings through July 7, 2020. It also appeared to extend the prohibition on in-person public hearings set forth in Executive Order 202.15 until July 7, 2020. *See Reopening Guidance for Town Officials*, New York Association of Towns, dated June 8, 2020. To ensure compliance with the most recent executive orders, the Town Board re-noticed the public hearing to provide for remote access via the Zoom platform if members of the public were unable or unwilling to appear in person. The public hearing notice that was published included a Zoom conference link and call-in telephone number so members of the public could participate remotely. The public hearing was held with in-person attendance and remote access via the Zoom platform. The meeting and public hearing were recorded and will be transcribed for the record.

One member of the public, Steven Finkle, attended the public hearing in person. Mr. Finkle was provided with personal E-mail notification of the public hearing which included the Zoom conference link. Mr. Finkle indicated to the Town Clerk, that he was not familiar with the Zoom platform and specifically requested the ability to attend the public hearing in person. The Town granted that request provided he practiced social distancing and wore a mask. Steve was provided a seat in the corner of the room and was able to provide verbal comments. During the Town Board meeting, Steve confirmed that he was given notice of the public hearing and the opportunity to participate through Zoom and specifically requested the right to appear in person.

On July 9, 2020 (the day after the public hearing) the New York Conference of Mayors confirmed the Governor's Office communicated their position that the language in Executive Order 202.15 which prohibited in-person public hearings was not extended and expired on June 1, 2020 despite executive orders containing language that has been widely interpreted as extending Executive Order 202.15 beyond June 1, 2020. Therefore, it was clarified that public bodies have the ability to conduct public hearings either remotely or in-person following CDC and New York State Department of Health Guidelines. *See Conducting Meetings and Public Hearings During the COVID-19 Pandemic*, New York Conference of Mayors, dated July 9, 2020.

Based on the foregoing, the public hearing that was noticed and held on July 8, 2020, which allowed for in person participation in accordance with these guidelines *and* remote access for members of the public that were unable or unwilling to attend in person, complied with the Governor's executive orders.

Comment No. 2: Request that the Town confirm that it complied with the publication requirements of EDPL §202(A) or (B).

Response: The Town complied with the public hearing requirements of EDPL §202(B) by transmitting notice of the public hearing to the Mountain Eagle for publication. The Mountain Eagle is a weekly publication. The Notice of Public Hearing was scheduled for publication in the June 19th and June 26th print edition of the newspaper, but due to an error by the publisher, the notice was only published in the print edition of the newspaper on June 19th; the second publication was in the newspapers online edition.

EDPL §202(C) provides that an “inadvertent failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.” Under this provision, the Mountain Eagle’s publication of the second notice in its online edition is not jurisdictional and will not affect the validity of any title acquired by the Town.

The content of the Notice also complied with EDPL §202(A) which provides the notice shall “give notice of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternative locations.” Although the Town considered other potential locations and alternatives for the Moriarty property, it does not propose to initiate condemnation proceeds on any proposed alternative locations. Therefore, no proposed alternative locations for condemnation were included in the notice of public hearing.

Comment No. 3: WAC questioned if the Notice of Public Hearing was posted on the Town Website.

Response: The Notice of Public Hearing was posted on the Town website.

Comment No. 4: WAC commented that other locations were considered, but were rejected – not for reasons related to their viability, but for extrinsic reasons (i.e., the owner’s willingness to sell and/or the involvement of other municipal entities). Following the public hearing, the owner of another property that had been considered as a potential site or the proposed Wastewater Treatment System, the Palens, objected to their characterization as an unwilling seller.

Response: After the Town agreed to participate in the Community Wastewater Treatment Program, CWC undertook a study of the hamlet and determined that a community septic project was the best wastewater treatment solution to for the hamlet of New Kingston. CWC then undertook an investigation of potential sites for the Wastewater Treatment System. In or around 2015 approached the Palen’s about acquiring their property. The Palen’s responded by letter stating:

Cassie and I are not interested in having our property available for soil testing for a possible cluster/community leach field or any variation thereof to be used as a site of a sewage treatment facility.

Aside from the invasion of and devaluation of our property such an undertaking would entail, having attended the information meeting with The Town Board and Lamont Engineers, the most cost effective proposal was shown to be ‘a septic maintenance district.’

After CWC received that letter, it explored other properties within the Hamlet of New Kingston, including the Faulkner and Moriarty properties. Unfortunately, the soils on the Faulkner property were not suitable, leaving only the Moriarty property.

The project was thereafter planned for the absorption (leach) field to be located entirely on the Moriarty property, as it was the only property with a willing seller and suitable soils.

Last year, CWC approached the Palens again to see if they would be willing to allow a right of way to the absorption field to be located on their property. They indicated they may be willing to sell their property for the absorption field itself if an agreement could be reached on price as well as several additional conditions. CWC then asked Lamont Engineers to review whether or not an absorption field could be located on the Palen property and if soils were suitable. The size of the property available of 8 acres is much smaller than the available 22 acres at the Moriarty property and CWC was not allowed to conduct soil tests on the Palen property. An absorption field design on 8 acres would be an extremely tight fit under the best of circumstances. In addition, the price was also higher than the price per acre of the Moriarty property. CWC reviewed the matter with DEP and DEP would not authorize further discussion regarding acquisition of the Palen property.

At that point (last October), Mr. Moriarty had already agreed to sell CWC the 22 acres needed for the absorption field (rather than CWC having to purchase the whole property which includes hundreds of acres). As such, CWC recommended to the Town that they acquire the Moriarty property. It has more acreage for the absorption fields, suitable soils, and a willing seller with a known price and no additional conditions.

Comment No. 5: Comment regarding notice to New York State Attorney General and New York City Department of Environmental Protection (DEP).

Response: The Town provided notice to property owners, Mr. Moriarty and WAC, by certified mail, return receipt requested, on June 24, 2020 in accordance with EDPL §202(C). Additional notice was provided to WAC as a courtesy via E-mail on July 1, 2020.

In addition, CWC has been in contact with both the Attorney General's office and DEP on the Eminent Domain for several years. Under the agreement the Town entered into with CWC to participate in the Community Wastewater Management Program, DEP must approve the site of the proposed Wastewater Treatment System and the compensation paid for the property acquisition. DEP approved the Moriarty site and rejected all other sites that were identified in the Preliminary Engineering Report.

The Town (through CWC) provided DEP with the details regarding the eminent domain proceeding. Representatives of DEP attended the public hearing but did not provide any comments for the record.

The Attorney General has also received notice of the condemnation proceedings. CWC first reached out to the Attorney General's office (through the Watershed Inspector General Phil Bein)

more than two (2) years ago to seek his support on the eminent domain. Since that time, the Attorney General has been following with interest the impending condemnation proceedings. The Attorney General has also received formal notice of the proceeding pursuant to Section 29 of the Deed of Conservation Easement.

Comment No. 6: WAC maintains, under the “doctrine of prior public use,” land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issues, unless the use would not materially interfere with the current public use”.

Response: The Town is not aware of any case law that would indicate the ownership of a conservation easement by a private not-for-profit entity constitutes a public use. WAC’s attorney indicated that the Conservation Easement constitutes a public use because it was established for the purpose of water quality protection. Although WAC does receive public funding from the City of New York (“Funder”) to acquire Conservation Easements, WAC has consistently maintained that it is in fact a private entity controlled by an independent Board of Directors. The private entity does not consider itself a governmental entity subject to the Public Officer’s Law Section 86 (including the Open Meetings Law) and enters into private contracts with property owners relating to conservation easements that run with the land. As the grantee on the Conservation Easements, the private entity takes the position that its decision/determination regarding reserved uses is solely and absolutely in its discretion and not subject to judicial review or due process. The process adopted by the private entity for making these determinations does not conform to basic due process decision making requirements applicable to governmental agencies.

Even if a conservation easement owned by a private entity could be considered a “public use” the public use would be defined by the stated purpose of the easement which is to protect the water quality of the New York City watersheds. *See* Conservation Easement, paragraph 1 (“Conservation Purpose”). WAC purchased the Conservation Easement on the 21.7 acres for less than \$40,000 (with funding received from the City of New York). In contrast, the City has approved and funded the community septic system project for the New Kingston Sewer District at a cost in excess of \$5 million all for the purpose of protecting water quality of the NYC watersheds. In other words, a portion of the public use being made by the condemner is the protection of water quality and the funder has committed over \$5 million to protect water quality through the purchase of the 21.7 acres and the construction of the proposed Wastewater Treatment System.

Thus, WAC’s position that the proposed acquisition would be prohibited by the “prior public use” has no basis in law or fact. The construction of a Wastewater Treatment System that is approved and funded by the City of New York as part of the Community Wastewater Management Program – a program that was established to protect water quality of the New York City watersheds – would promote the stated purpose of the Conservation Easement to protect water quality. The condemnation would further the public purpose of the easement rather than “materially interfere” with the prior public use. *See e.g., Board of Coop Educ. Servs. v. Town of Colonie*, 268 A.D.2d 838 (3 Dept. 2000)(determination to condemn a portion of petitioner’s exclusive easement was not prohibited by the prior public use doctrine).

It is also noted the N.Y. ECL contains a specific grant from the legislature that Conservation Easements held by a not-for-profit conservation organization may be extinguished upon the exercise of eminent domain. *See* N.Y. ECL §49-0307(1)(c). Moreover, the Conservation Easement itself expressly provides for the exercise of the power of eminent domain against the property, in which event, “the Grantee [WAC] shall be entitled to forty-eight percent (48%) of the gross sale proceeds or condemnation award” and that WAC must use the proceeds “consistent with the Conservation Purposes of this Easement”. *See* Conservation Easement, paragraph 29. The New York Court of Appeals has rejected the prior public purpose doctrine under substantially similar circumstances. *See e.g., Westchester Cr. Corp. v NY City Sch. Constr. Auth.*, 286 AD2d 154, 160 (1st Dept 2001)(“Public authorities Law [] confers the power to transfer property that is otherwise subject to an interest of the City to the School Construction Authority and lease under which petitioner occupies the premises expressly provides for the exercise of the power of eminent domain against the premises; “where the City of New York indicates its acquiescence, this Court perceives no statutory impediment to the condemnation of City property by respondent School Construction Authority”); *aff’d Westchester Cr. Corp. v NY City Sch. Constr. Auth.*, 98 NY2d 298, 302 (2002)(“the Public Authorities Law expressly permits the condemnation of City-owned property, provided that the City, through its Mayor, is first given the right to object to such taking”).

To the extent that WAC’s Conservation Easement constitutes a public use, it was a public use that incorporated and was made possible by the 1997 Memorandum of Agreement (MOA) that was entered into by the City of New York and other watershed stakeholders to protect the water quality and ensure continued community sustainability in the NYC watershed. The same agreement that authorized the creation of the WAC Conservation Easement Program also authorized and required the Community Wastewater Management Program and the implementation of the Watershed Rules & Regulations regarding septic systems and sewage treatment plants. That agreement provided for a community septic solution for the Hamlet of Kingston. The Moriarty property was identified as a potential location for the community septic system as early as 1999. If WAC’s purchase of a Conservation Easement on this 21.7 acres in 2006, with full knowledge that it had been identified as a potential site for a community septic system, prevents acquisition of the property and implementation of the this Project under Section 122 of the MOA and the Community Wastewater Management Program, then the City of New York Land Acquisition Program (including WAC Easement Program) is not being conducted in a manner consistent with the 1997 MOA.

In sum, the Watershed Agricultural Program and Community Wastewater Management Program are two NYC funded programs that contribute to watershed protection through land management. The programs operate independently but share a common goal or purpose - to achieve water quality protection. In 2017, DEP requested that the National Academies of Sciences, Engineering, and Medicine (“NAS”) evaluate the NYC Watershed Protection Program to determine whether the current watershed protection programs are appropriate and adequate to comply with the Surface Water Treatment Rule into the future. On August 10, 2020, the NAS issued its *Review of the New York City Watershed Protection Program* (“NAS Report”)¹ which acknowledged: “In several cases, the Land Acquisition Program’s [including WAC easement program] individualized

¹ National Academies of Sciences, Engineering, and Medicine. 2020. *Review of the New York City Watershed Protection Program*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25851>



relationship with landowners has inadvertently constrained opportunities for other NYC DEP watershed programs and for local municipalities”. The need to locate a community septic system for the Hamlet of New Kingston on land that is encumbered by a Watershed Agricultural Council easement is cited as a specific example. *See* NAS Report, p. 392. The NAS Report recommends that there should be an ability to modify or revise conservation easements where alternative uses would increase overall water quality protection. *Id.* at p. 393. The Town’s determination to commence eminent domain proceedings to acquire the land needed for this important community wastewater project is consistent with this recommendation.

Comment No. 7: WAC comments that EDPL §302 requires that “[r]eal property to be acquired by the exercise of the power of eminent domain shall be appraised on behalf of the condemnor by an “appraiser”.

Response: In making its offer to WAC for compensation, the Town used the appraisal that was performed by WAC that was the basis of its purchase in 2006 of the Conservation Easement. In determining the value for the 21.7 acres, the Town used the per acre value of the Conservation Easement and adjusted that value for inflation. In the offer letter, the Town explained the basis of its offer and acknowledged Section 29 of the Conservation Easement which provides as follows:

If the easement is terminated and the property is sold or taken for public use, then, as required by the Internal Revenue Service regulations, the Grantee shall be entitled to forty-eight percent (48%) of the gross sale proceeds or condemnation award which is equal to the ratio of the appraised value of this easement to the unrestricted fair market value of the property, as this ratio is determined on the date of this easement.

As part of those discussions, as incentive to initiate a discussion, the Town also offered to reimburse WAC for obtaining a new appraisal of the 21.7 acres from one of its own certified appraisers and use that as the basis for the compensation.

**NOTICE OF A BRIEF SYNOPSIS OF THE DETERMINATION AND FINDINGS
PURSUANT TO §204 OF EMINENT DOMAIN PROCEDURE LAW**

Resolution #19, dated August 12, 2020

Tax Parcels Effected: Middletown Tax Map No. 241.-1-1.1

Nature of Acquisition: Fee Title and Easement and Termination of WAC Conservation Easement

Project: Town of Middleton, Hamlet of New Kingston Community Sewer System

NOTICE IS HEREBY GIVEN that by Resolution #19, dated August 12, 2020, the Town Board of the Town of Middletown adopted the Determination and Findings pursuant to §204 of the Eminent Domain Procedure Law entitled:

**DETERMINATION AND FINDINGS PURSUANT TO ARTICLE 2
OF THE NEW YORK EMINENT DOMAIN PROCEDURE LAW**

**Town of Middletown Community Wastewater Management Program
Construction of community subsurface wastewater treatment facility**

Section 204 of New York State Eminent Domain Procedure Law ("EDPL") requires the Town to publish in the newspaper and mail to assessment record billing owners a brief synopsis of the Findings and Determination. This Notice constitutes the brief synopsis.

By a resolution of the Town Board of the Town of Middletown duly adopted on June 10, 2020; a duly noticed public hearing was held by the Town of Middletown on July 8, 2020, pursuant to Article 2 of the Eminent Domain Procedure Law of the State of New York ("EDPL"), to consider the acquisition by exercise of the power of eminent domain of the following lands:

- Fee Acquisition of a 21.7 acres portion of an 89.85 acres parcel identified on the Middletown Tax Map as Parcel No. 241.-1-1.1 (the 21.7 acre portion of the parcel to be acquired is hereinafter referred to as the "Fee Parcel");
- Permanent Easement for access to the Treatment System over the remaining portion of Tax Map Parcel No. 241.-1-1.1 ("Easement Parcel"); and
- Termination of a Watershed Agricultural Council ("WAC") Conservation Easement encumbering the Fee Parcel.

The Fee Parcel and Easement Parcel are located at County Highway 6 in the Town of Middletown, County of Delaware. The Fee Parcel and Easement Parcel are more particularly described in a deed recorded in the Delaware County Clerk's Office in Liber 1158 of Deeds at page 261 The portions of property comprising the Fee Parcel and Easement Parcel are part of the Property owned by Michael Moriarty (hereinafter, the "Property Owner"). The Fee Parcel is encumbered by a WAC Conservation Easement that the Town Board also seeks to terminate. The Fee Parcel and Easement Parcel to be acquired and WAC Conservation Easement to be terminated through eminent domain are hereinafter referred to collectively as the "Property".

The public hearing was duly held as scheduled, and the purpose and proposed location of the public project and all other pertinent information was outlined, and thereafter all persons in attendance were given a reasonable opportunity to present oral or written statements, or to submit other documentation concerning the specified public project, and a record of the hearing was made, and

Based upon the EAF and other supporting documentation prepared pursuant to SEQRA, the Town Board determined that the community sewer system including the acquisition of the lands (both Fee Parcel and Easement Parcel and termination of the WAC Conservation Easement) will have no significant environmental impact or adverse impact on local residents, as the project will provide benefits and enhance the environment and assist in maintaining and enhancing water quality in the area. The Town Board adopted its Negative Declaration on May 8, 2019.

At its Board meeting on August 12, 2020, the Town Board of the Town of Middletown, pursuant to the Constitution of the State of New York, Town Law and Eminent Domain Procedure Law, made determination and findings including the following:

1. The Property to be acquired by the exercise of eminent domain is identified as: Fee Acquisition of a 21.7 acres portion of an 89.85 acres parcel identified on the Middletown Tax Map as Parcel No. 241.-1-1.1 (the 21.7 acre portion of the parcel to be acquired is hereinafter referred to as the "Fee Parcel"); Permanent Easement for access to the Fee Parcel over the remaining portion of Tax Map Parcel No. 241.-1-1.1 ("Easement Parcel"), and; Termination of a WAC Conservation Easement encumbering the Fee Parcel.
2. The land so acquired shall be used for public use and is necessary for the protection of the environment and the health, safety and welfare of the residents of the Town of Middletown. The engineering study prepared by the Town's Engineer determined that there is an overwhelming predominance of small and otherwise problematic lots in the hamlet that could not meet design standards for individual on-site septic systems. A Small Diameter Gravity Sewer ("SDGS") was recommended as the preferred wastewater solution for the hamlet of New Kingston, due in part to the flexibility of the layout of an SDGS, the elimination of the need for manholes and primary treatment facilities at the wastewater treatment facility, all of which result in a reduction of the overall project cost. Areas that are too low for gravity sewers will be augmented with an effluent pump. The Project will include 2,400 LF of small diameter gravity sewer main, 3,200 LF of small diameter force main, 560 LF of lateral stubs, and one (1) main effluent pump station. Approximately twenty-eight (28) lateral connections are also proposed. Each lateral connection would receive a new septic tank equipped with an effluent filter. Five (5) of the lateral connections will have septic tank effluent pumps to convey their flows. Final treatment and disposal will occur through a community subsurface wastewater treatment facility, consisting of a receiving manhole, a flow meter, an absorption bed dosing pump station and shallow absorption beds ("Treatment System"). As required on other Community Wastewater Management Program ("CWMP") project subsurface treatment systems, the Treatment System will be constructed in 3 sections each capable of handling 50% of the design flow and will be dosed with a pressure distribution system. The application rate of the absorption beds will be 0.5625 gpd/sf (0.6 gpd/sf with a 30-minute percolation rate, reduced by 25% for using absorption beds and then increased by 25% for constructing 150% of the required absorption area). The Property acquisition is integral to and necessary for

implementing the Project. Because protection of drinking water is paramount for the benefit of the community and the City of New York, the Project will facilitate a dual agenda of a sustainable plan for the future, as well as address an immediate community need.

3. The location of the Property to be acquired was selected following an in-depth evaluation of the preferred wastewater solution for the Hamlet of New Kingston as described in the study performed by the Town's Engineer. A CD containing the Engineering Report is on file with the Town Clerk. A discussion of the alternative sites that were evaluated is included in the Engineering Report and in the Comment/Response document published and incorporated in the Town Board's Determination and Finding. The second and determining factor in the site selection process is that the funding requirements for the Project specify the site location must be reviewed and approved by the City of New York Department of Environmental Protection ("DEP"). In reviewing and approving the site location, DEP gives priority to the potential impact on its water supply and the ability to obtain water quality protection. This Property is and was the only location that met DEP approval.
4. The funding for Property acquisition shall be obtained from the DEP through the CWMP, which is administered by the Catskill Watershed Corporation ("CWC"). The New Kingston Sewer District has adopted a Sewer Use Law which specifies the sewer rate structure and procedure for the Town Board to make decisions regarding future connections to the system. The proposed Sewer Use Law establishes a minimum annual charge of \$250 per non-household. The Town estimates that there are approximately 2 non-households and thus the minimum annual charge will raise approximately \$500 (plus a potential additional charge based upon usage). The Town cautions that these are estimates of the expected cost and the actual cost will vary from these estimates.
5. The Town Board adopted the Determination and Findings, pursuant to EDPL §204 and authorizes the Town Clerk and the Town Attorney to take such steps as may be necessary to carry out the intent of the resolution and to publish such findings in accordance with section 204 of the EDPL and to mail copies of this notice together with notice under Section 207 of the EDPL regarding the procedure and timing for judicial review.
6. Copies of the record of the Public Hearing and Determination and Findings are available for examination without cost during normal business hours at the office of the Town Clerk. Further, copies of the record of the Public Hearing and the Determination and Findings shall be produced upon written request by any interested party, without cost.
7. Under Section 207 of the New York State Eminent Domain Procedure Law, an impacted property owner has thirty (30) days from the newspaper publication of this Notice to commence a proceeding seeking judicial review of the Town's determination and findings.
8. Under Sections 207 and 208 of the EDPL, the exclusive venue for judicial review of the Town's determination and findings is the Appellate Division of the Supreme Court in the Judicial Department where any part of the property is located.

Dated: August 14, 2020

