

TO BE ARGUED BY:

JOHN E. NATHAN

TIME REQUESTED: 15 MINUTES

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

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JOHN E. NATHAN,

*Plaintiff-Appellant,*

-against-

TOWN OF POUND RIDGE, and  
TOWN OF POUND RIDGE TOWN BOARD,

*Defendants-Respondents,*

-and-

SMMB, INC. (d/b/a Purple Plains),

*Intervenor-Defendant-Respondent,*

-and-

NEW YORK OFFICE OF CANNABIS MANAGEMENT

(necessary party under N.Y. Cannabis Law § 131-A),

*Defendant-Respondent.*

**Appellate  
Division  
Docket No.  
2025-09875**

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**BRIEF FOR PLAINTIFF-APPELLANT**

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Supreme Court, Westchester County, Index No. 68117/2024

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## **QUESTIONS PRESENTED**

1. Did Plaintiff-Appellant (“Appellant”) have standing to bring this action under the Open Meetings Law?

Answer of Court below: No.

2. During the opt-out period (March 31, 2021 to December 31, 2021), did the Town Board give “readily ascertainable” notice that the opt-out deadline was December 31, 2021, thus starting the CPLR § 217 (1) four-month statute of limitations on January 1, 2022?

Answer of Court below: Yes.

3. Did the four-month statute of limitations under CPLR §217 (1) start to run on May 23, 2024, when the Town Board ceased its ameliorating administrative actions to reverse its October 29, 2021 secret, off-the-books decision not to opt-out?

Answer of Court below: The Court below did not address this issue.

4. On a motion to dismiss, was it permissible for the Court below to use its own interpretation of the Supervisor’s October 29, 2021 email documenting the secret, off-the books decision not to opt-out?

Answer of Court below: Yes.

## **NATURE OF THE CASE**

This is a case for violations of New York's Open Meetings Law, Article 7 of the New York Public Officers Law ("Open Meetings Law" or "OML"). The Amended Complaint alleges that the Town of Pound Ridge and its Town Board ("Town Defendants") secretly and off-the-books decided to allow a cannabis dispensary in Pound Ridge. The case is not about a violation of New York's Cannabis Law, or the pros and cons of cannabis, and Appellant is not seeking to ban a cannabis dispensary in Pound Ridge. The issue on this appeal is whether the Town Defendants breached the OML by not disclosing its decision to allow a cannabis dispensary in town, as well as the proceedings that led it, without any input from residents.

Appellant seeks relief under the OML requiring the Town Board to consider the cannabis issue in public. This will allow residents to express their views like the residents did in the neighboring towns. This never happened in Pound Ridge. Appellant is not requesting a second bite at the apple. Rather, Appellant seeks just the first bite that was so plainly denied to the residents of Pound Ridge.

The events are documented and undisputed. In late 2023, Appellant discovered that in 2021 -- two years earlier -- the Town Defendants secretly and off-the-books decided not to exercise its one-time opportunity to opt-out of allowing a cannabis dispensary in Pound Ridge. Under New York's Cannabis Law, § 131 (1), that right to opt-out expired on December 31, 2021.

Appellant's 2023 discovery was confirmed by the Town Defendants' internal files produced in 2024 under the New York Freedom of Information Law, Public Officer's Law, Article 6 ("FOIL"). In violation of the OML, residents received no notice of the 2021 decision not to opt-out. No public hearing on the opt-out issue was ever held. The secret, off-the books decision not to opt-out and the December 31, 2021 deadline to do so were never mentioned in Town Board's meeting minutes and agendas, or in the Town Supervisor's weekly Newsletters and other notifications to residents.

After the secret, off-the-books decision came to light in late 2023, and in response to public pressure, the Town Board spent the next seven months trying to reverse its decision. The Board passed two Town Resolutions endorsing New York State legislation that would have reopened Pound Ridge's right to decide whether to opt-out. Those efforts ceased on May 23, 2024, when the New York State legislation did not advance in Albany. At that time, the Town Board's 2021 decision not to opt-out became final and binding.

On August 24, 2024, less than four months after the Town Board's final and binding decision, Appellant filed this action against the Town Defendants seeking a declaratory judgment, an injunction and related relief for violations of the OML. R 37-69. An Amended Complaint was filed on November 8, 2024, which joined SMMB, Inc. (d/b/a Purple Plains) and the New York Office of Cannabis Management as additional Defendants. R 952-995. Appellant John E. Nathan is a resident of the Town of Pound Ridge, New York and an attorney in good standing in the courts of the State of New York. R 952. Because Appellant is aggrieved by the secret, off-the-books decision not to opt-out, he has statutory standing to bring this action pursuant to OML § 107 (1).

The Town Defendants filed a motion to dismiss the Amended Complaint's First, Second, Third and Fourth Causes of Action for violations of the OML. R 1067-1127. The grounds for the motion were:

- (1) The action was barred by the statute of limitations.
- (2) Appellant's claims were preempted by the New York Cannabis law and are moot.
- (3) Appellant lacked standing.
- (4) The Town did not violate the OML.

Respondent SMMB, Inc., which intervened in the case after it opened a cannabis dispensary in Pound Ridge under the name "Purple Plains," also filed a

motion to dismiss the OML claims, mirroring the Town Defendants' motion. R 1029-1066.

In a Decision/Order dated June 30, 2025 and entered July 2, 2025, Justice David F. Everett of the Supreme Court, Westchester County, granted both motions. R 10-32. On the First, Second, Third and Fourth Causes of Action under the OML, the Court decided:

- (1) Appellant lacked standing to seek affirmative relief to revisit the fact that the Town did not opt-out. *Id.*, p. 20.
- (2) Appellant and other Pound Ridge residents were given notice of the December 31, 2021 deadline to opt-out. According to the Court, the four-month statute of limitations (CPLR § 217 (1)) began to run on January 1, 2022, when the Cannabis Law made the opt-out choice final and binding, and expired in May 2022. *Id.*, p. 18.
- (3) Alternatively, and without addressing the Town's ameliorating administrative actions from October 2023 to May 2024 to reverse its decision not to opt-out, the statute of limitations began to run on December 10, 2023, when Appellant wrote the New York Cannabis Board asserting that the Town violated the OML, and expired on April 10, 2024. *Id.*, p. 18.

- (4) The Court was entitled to use its own interpretation of the Supervisor's October 29, 2021 email documenting the decision not to opt-out, and did not give the Amended Complaint a liberal construction and the benefit of every possible inference. *Id.*, p. 22.

The Court did not address the Town Defendants' preemption and mootness claims, stating that "[t]he remaining contentions do not require a different result." *Id.*, p. 23.

Appellant's Fifth Cause of Action against the Town Defendants and the Seventh Cause of Action against SMMB sought an award of costs and attorney's fees. The Town Defendants and SMMB countered with requests for attorney's fees. The Court below ruled that "neither party has shown entitlement to attorney's fees. Thus, the Court in its discretion will not award attorney's fees to either party." *Id.*, p. 22. Appellant is not appealing that ruling.

The Court dismissed Appellant's Sixth Cause of Action against SMMB to have its cannabis license declared null and void. The Court ruled that Appellant must address that claim to the New York Cannabis Control Board, and Appellant reserves the right to do so. *Id.*, p. 22. Accordingly, Appellant is not appealing dismissal of the Sixth Cause of Action.

The New York Office of Cannabis Management, a necessary party under N.Y. Cannabis Law §131-A, took no position on the merits of the case and did

participate in the motion practice below. R 1028, December 2, 2024 letter to Court.

Appellant timely filed this appeal of the Court's dismissal of Appellant's First, Second, Third and Fourth Causes of Action under the OML. CPLR § 5513 (a).

### **JURISDICTION AND VENUE**

In the Court below, jurisdiction was proper pursuant to OML §§ 107 (1) and CPLR § 3001. Venue was proper pursuant to CPLR §§ 503 (a), 503 (c), 504. Jurisdiction over this appeal is proper pursuant to CPLR § 5701 (a) (1).

### **STATEMENT OF FACTS**

Effective March 31, 2021, New York passed the Marijuana Regulation and Taxation Act ("Cannabis Law"). The Cannabis Law provided a one-time, nine-month window (from March 31, 2021 to December 31, 2021) allowing any town to adopt a local law prohibiting retail cannabis dispensaries within the town. Towns that opt-out could later opt-in, but towns that did not opt-out could not later change their minds. Cannabis Law, § 131(1); R 966-967, Amended Complaint, ¶¶ 52, 55.

Except for Pound Ridge, all of the surrounding Westchester County towns held public hearings and passed opt-out laws exercising their rights to opt-out before the December 31, 2021 deadline. R 967, Amended Complaint, ¶¶ 56-57. The neighboring towns' public hearing dates and their opt-out laws, and Pound Ridge's failure to even hold a public hearing, are set forth on the following page:

| <u>Town</u>  | <u>Public Hearing</u> | <u>Opt-Out Law</u>                                                                                          |
|--------------|-----------------------|-------------------------------------------------------------------------------------------------------------|
| Bedford      | 12/21/21              | <a href="https://ecode360.com/38245914">https://ecode360.com/38245914</a>                                   |
| Harrison     | 12/2/21               | <a href="https://ecode360.com/38332243">https://ecode360.com/38332243</a>                                   |
| Lewisboro    | 7/12/21               | <a href="https://ecode360.com/38079183">https://ecode360.com/38079183</a>                                   |
| Mt. Kisco    | 7/12/21               | <a href="https://ecode360.com/42952651">https://ecode360.com/42952651</a>                                   |
| New Castle   | 9/21/21               | <a href="https://ecode360.com/38557384">https://ecode360.com/38557384</a>                                   |
| North Castle | 6/23/21               | <a href="https://ecode360.com/37534461">https://ecode360.com/37534461</a>                                   |
| North Salem  | 6/22/21               | <a href="https://ecode360.com/NO1178/laws/LF1456268.pdf">https://ecode360.com/NO1178/laws/LF1456268.pdf</a> |
| Somers       | 6/10/21               | <a href="https://ecode360.com/38555312">https://ecode360.com/38555312</a>                                   |
| Pound Ridge  | None                  | None                                                                                                        |

The Town Board's minutes of its 15 meetings between April and December 2021 never mentioned the December 31, 2021 deadline to opt-out. In addition, the Town Board never told residents about its October 29, 2021 secret, off-the-books decision not to opt-out. The evidence is based solely on the Town's own documents. Specifically:

At a Town Board meeting on April 6, 2021, less than a week after the Cannabis Law became effective, the Town Supervisor made a one-minute, oral announcement about the new Cannabis Law and the December 31, 2021 deadline. R 968, Amended Complaint, ¶¶ 58, 61- 62. No prior notice of this announcement

was made in the agenda for the April 6, 2021 Town Board meeting or in any other manner. R 968, Amended Complaint, ¶ 60.

The minutes of the April 6, 2021 meeting confirmed the necessity to decide whether to opt-out, but critically failed to mention the December 31, 2021 deadline:

“New legislation regarding cannabis will require towns to decide whether to opt out of being a location for dispensaries.” R 968, Amended Complaint, ¶ 63.

During the entire opt-out window from March 31, 2021 to December 31, 2021, the Town Board met in public 15 times. The videos of those meetings total 1079 minutes (18 hours). When word leaked out in town about the cannabis issue in late 2023, Appellant watched every minute of those videos. Only one minute during the entire nine-month opt-out period was devoted to the Board’s discussion of the cannabis opt-out, namely the Supervisor’s foregoing April 6, 2021 one-minute oral announcement. R 969, 971, Amended Complaint, ¶¶ 64, 71-73.

Also in late 2023, Appellant read all the agendas and minutes for the Town Board meetings and work sessions during the opt-out period. Those agendas and minutes confirm that the Town Board publicly discussed the new Cannabis Law and the need to make a decision about opt-out by December 31, 2021 only once, i.e., the Supervisor’s April 6, 2021 one-minute oral announcement. R 969, Amended Complaint, ¶ 65.

The Town Board's silence on the cannabis issue was continued in the Supervisor's weekly Newsletters and other notifications to residents. During the entire nine-month opt-out period, the Supervisor sent 42 weekly Newsletters and other notifications to Pound Ridge residents on countless subjects, including new legislation. In late 2023 Appellant read every one of those Newsletters and other notifications. The Supervisor failed to mention anything about the Cannabis Law or the December 31, 2021 deadline to opt-out. R 969, Amended Complaint, ¶ 66.

On November 9, 2021, when there was still time for the Town to exercise its opt-out right before the December 31, 2021 deadline, the Town Board held a Town Board meeting. The meeting includes a video report on numerous subjects from guest speaker N.Y. Assemblymember Chris Burdick, whose Assembly District includes the Town of Pound Ridge. Mr. Burdick briefly mentioned the opt-out issue and advised that he was a co-sponsor of the opt-out provision, because it was "especially important to my district." He never mentioned that there was a December 31, 2021 deadline. R 970, Amended Complaint ¶ 67, November 9, 2021 video at 14:35 – 15:10. Most importantly, the minutes of the meeting stated only that Mr. Burdick "discussed cannabis legislation" and made no mention of the deadline. November 9, 2021 Minutes, p. 2, available on the Town's website at:

[https://www.townofpoundridge.com/sites/default/files/fileattachments/town\\_board/meeting/33911/11.09.2021\\_tb\\_minutes.pdf](https://www.townofpoundridge.com/sites/default/files/fileattachments/town_board/meeting/33911/11.09.2021_tb_minutes.pdf)

After Mr. Burdick spoke, none of the Town Board members said a word about opt-out during the remainder of the meeting. R 970, Amended Complaint, ¶ 69.

In 2024, Appellant obtained some of the Town Board's 2021 internal documents on the opt-out issue under FOIL. R 70-916 (FOIL 1-847). The FOIL documents are documentary evidence on how the Town Board in 2021, acting in secret and off-the-books, decided not to opt-out. R 972, Amended Complaint, ¶ 77.

Specifically, the FOIL documents reveal that the Town Board's decision not to opt-out was reached after the Town Board received information from area officials, organizations, consultants and lawyers on the pros and cons of opt-out, as well the necessity to act before the December 31, 2021 deadline. See R 378 (FOIL 309-10) (County Executive Latimer conference call); R 391-92 (FOIL 322-23) (North Salem Town Attorney advice); R 417 (FOIL 348) (Assn. of Towns); R 419 (FOIL 350) (Council on Addictions webinar); R 432-35 (FOIL 363-66) (attorney PowerPoint); R 439-474 (FOIL 370-405) (Aaron Weiner, PhD PowerPoint); R 478-479 (FOIL 409-10) (North Salem Supervisor on opt-out and upcoming election); R 487-492 (FOIL 418-423) (Record Review inquiries); R 495-520 (FOIL 426-51) (another attorney PowerPoint); R 656-674 (FOIL 587-605) (reports from neighboring towns on their decisions to opt-out); R 675-676 (FOIL 606-07) (reminder from Assn. of Towns on deadline); and R 900-916 (FOIL 831-47) (Nat'l Cannabis Industry Assn. Overview for Medical Professionals and Policymakers).

None of these documents was sent or otherwise disclosed to the Pound Ridge residents. R 973, Amended Complaint, ¶ 78.

The FOIL documents also include extensive email discussions among area Mayors and Supervisors on whether to opt-out. R 70-82, 215-226, 389-392, 475-482, 656-674 (FOIL 1-13, 146-157, 320-323, 406-413, 587-605; R 973, Amended Complaint ¶ 79. The Pound Ridge Supervisor is included on all these emails, none of which was disclosed to his residents. Among the documents is FOIL 597 (R 666), dated October 29, 2021, in which the Pound Ridge Supervisor emailed 15 area Supervisors and Mayors about the Town Board's decision not to opt-out:

"I guess you will be waiting to see what happens in Pound Ridge. We didn't opt-out. We are comfortable with the possibility of a dispensary. On-site consumption isn't even considered a possible viable business for Pound Ridge since we have zero public transportation, no pedestrian foot traffic, and minimum UBERs."

The Supervisor's October 29, 2021 email documenting the Town Board's decision not to opt-out was never sent to Pound Ridge residents, discussed at a Town Board meeting, reported in any Town Board minutes or mentioned in any of the Supervisor's weekly Newsletters and other notifications to residents. R 973 (Amended Complaint, ¶ 81).

In contrast, the Supervisor reported the Town Board's decision to a Bedford Corners resident, but not to Pound Ridge residents R 974 (FOIL 772), Amended Complaint, ¶ 82:

“The Town of Pound Ridge did not opt out. Therefore we are staying ‘in’. I understand we are one of only a few municipalities not to opt out.”

The Supervisor knew in 2021 that the decision to opt-out was the subject of “heated political battles” in neighboring Lewisboro and Bedford. R 974 (FOIL 418), Amended Complaint ¶ 83. The Amended Complaint alleges, which is uncontested, that the Supervisor also knew that the issue of whether to opt-out would be a similar heated political battle in Pound Ridge. Nevertheless, the Supervisor never advised his residents of Town Board's decision not to opt-out, thereby denying residents the right to debate the issue. R 974, Amended Complaint, ¶ 83.

In 2023 and 2024, Appellant found evidence that a quorum of the Town Board (the Supervisor and two other Town Board members) had decided not to opt-out by the December 31, 2021 deadline. The evidence was found in the FOIL documents and through searches of press articles not generally available to residents. Their decisions and reasons not to opt-out were never disclosed to Appellant or Pound Ridge residents at large. R 974-976, Amended Complaint, ¶¶ 84, 86-89.

By December 14, 2021, the Supervisor had received numerous inquiries from persons interested in opening cannabis shops in Pound Ridge. The Supervisor never disclosed any of these inquiries to his residents. R 974 (FOIL 779), Amended Complaint, ¶ 85.

Starting in October 2023, when Appellant discovered the Town's 2021 secret, off-the-books decision not to opt-out, the Town Board spent the next seven months trying to reverse its 2021 decision. It held nine meetings and passed two Town Resolutions supporting N.Y. Senate Bill S9148 and Assembly Bill A10091, which sought to reopen Pound Ridge's opt-out period. R 977, 1182-1211, 1212-1254, Amended Complaint, ¶ 95; Exhibits 11-12. The Town Board's efforts to reverse its decision are documented in its minutes:

1. October 10, 2023, R 1184, p. 2 (call for public hearing)
2. November 14, 2023, R 1188-1189, pp. 1-2 (motion for public hearing)
3. December 5, 2023, R 1195-1200, pp. 2-7 (public hearing)
4. December 9, 2023, R 1205-1211, pp. 1-7 (public hearing)
5. January 16, 2024, R 1213-1214, pp. 1-2 (Town Attorney report on proposed NYS legislation giving Town second opportunity to opt-out)
6. February 6, 2024, R 1220-1221, pp. 1-2 (1<sup>st</sup> Town Resolution requesting NYS legislation to reinstate nine-month period to opt-out)

7. March 19, 2024, R 1230, p. 2 (Town Attorney report on awaiting word from Albany regarding legislation that might open-out period)
8. April 16, 2024, R 1241, p. 6 (discussion of opt-out)
9. May 7, 2024, R 1244-1245, pp. 2-3 (2<sup>nd</sup> Town Resolution requesting NYS legislation to reinstate nine-month period to opt-out by passing N.Y. Senate Bill S9148 and Assembly Bill A10091)

Of particular note is the December 9, 2023 meeting, the first ever public hearing on the opt-out issue. Appellant attended that public hearing, along with hundreds of other residents. R 971, Amended Complaint, ¶ 74. Many residents expressed their outrage and dismay that the Town Board made such a consequential decision without notice, in private, in secret, off-the-books and without any input from residents. R 971-972, Amended Complaint, ¶ 75.

After residents spoke, the Town Board addressed the residents. Except for the Supervisor, all of the other Town Board members apologized to residents for the way the opt-out issue had been decided in 2021. R 972, Amended Complaint, ¶ 76. Rather than apologize to his constituents, the Supervisor submitted an Affirmation in this case blaming the residents for not coming forward during the opt-out period, even though they knew nothing about the right to opt-out. R 1095, Hansan Affirmation, ¶ 10.

With regard to the other Town Board members, one stated that it is her greatest regret in her time on the Town Board. Another member stated that Board should make every effort to find a way to revisit the decision. Another member expressed commitment to exploring the possibility for a look-back and a referendum. R 972, Amended Complaint, ¶ 76; minutes of December 9, 2023 Special Meeting, p. 7.

The Town's efforts to reverse its 2021 decision ceased on May 23, 2024, when the Town-supported N.Y. Senate Bill S9148 and Assembly Bill A10091 did not advance in the New York State legislature. R 977, Amended Complaint, ¶¶ 94-96. Only then did the Town Board's decision not to opt-out become final and binding.

This action was filed on August 26, 2024, less than four months after the Town Board's decision not to opt-out became final and binding. R 37-69, Summons and Complaint.

## **ARGUMENT**

### **POINT I**

#### **APPELLANT HAS STANDING TO BRING THIS ACTION UNDER THE OPEN MEETINGS LAW**

The Amended Complaint alleges that Appellant was aggrieved by the Town Board's actions by being excluded from the Town Defendants' proceedings and its decision not to opt-out. R 971-974, Amended Complaint, ¶¶ 71-73, 78-79, 81-85.

Appellant has standing to bring this action for a declaratory judgment (First Cause of Action), an injunction (Second Cause of Action), reconsideration (Third Cause of Action) and a training session (Fourth Cause of Action). R 988-990. This is expressly set forth in OML § 107 (1), which provides:

“Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government. An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.” (emphasis added)

The history and purpose of the OML are well-known to this Court . In In the Matter of Suzanne McCrory et al. v. Village of Mamaroneck Board of Trustees, 181 A.D.3d 67, 68, 74 (2<sup>nd</sup> Dept. 2020), this Court stated:

“The Open Meetings Law (Public Officers Law art 7) was passed in 1976 in the aftermath of Nixon’s Watergate. Its relevance and significance is as crucial today as it was in 1976. This legislation fosters two main objectives: access and transparency. The statute’s purpose is clearly set forth, as follows:

‘It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it” (Public Officers Law § 100).’

\* \* \*

“The purpose of the Open Meetings Law and the intent of the Legislature in enacting that law dictate that the harm or injury is the alleged unlawful exclusion of the public from a municipal meeting. The Open Meetings Law plainly confers upon the public the right to attend certain meetings of public bodies. ... Consistent therewith, the harm or injury of being excluded from municipal meetings that should be open to the public is sufficient to establish standing in cases based upon alleged violations of the Open Meetings Law.” (emphasis added; citations omitted)

The McCrory rule on standing does not require exclusion from an actual physical meeting. The OML is violated and standing conferred if there is collective decision not open to the public. As stated in Cheevers v. Town of Union et al., 1998 N.Y. Misc LEXIS 758 (Supreme Court, Broome County), at pp. 7-8:

“The issue was the Town’s policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but the four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were ‘present’ and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to have a ‘meeting’ circumvents the

intent of the Open Meetings Law.... This court finds that telephone conferences among the individual members constituted a meeting in violation of the Open Meetings Law.” (emphasis added, citations omitted)

Cheevers’ prohibition on secret, collective decisions has been consistently followed by New York’s Committee on Open Government (“COG”).<sup>1</sup> The COG has repeatedly concluded that the OML prohibits a secret, collective decision. As the COG has stated:

“[A] series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting or vote held by means of a telephone conference, by mail or e-mail, in our opinion, would be inconsistent with law.”

\* \* \*

“The characterization that three of the five board members ‘collaborated’ on a letter, yet ‘were not together at the same time’ implies that a majority of the Board took action in private, and not during a meeting held in accordance with the Open Meetings Law. If that is so, we believe that the Board, and at the very least the three Board members, would have failed to comply with law. In that circumstance, as in Cheevers, we believe that a court would find the action to be a nullity and determine that the members failed to comply with law.” COG Opinion OML-AO-05205 (2011), R 1160-1163, pp. 1, 3 (emphasis added)

See also COG Opinion OML-AO-4177 (2006), R 1164-1168.

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<sup>1</sup> The COG is empowered to “issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law.” OML § 109.

In addressing whether Appellant had standing under the OML to bring this case, the Court below did cite McCrary. R 28-29, Decision/Order, pp. 19-20. But the Court never applied the McCrary rule to the facts of this case. In addition, the Court never considered Cheevers or the COG Advisory Opinions following Cheevers. As established by the documentary record, Appellant was excluded from the proceedings that led to Town Board's collective decision not to opt-out, as well as from the decision itself. That gave Appellant standing under the OML.

Specifically, the documentary record establishes that by October 29, 2021 the Town Board collectively decided in secret and off-the books not to opt-out. Appellant and the other Pound Ridge residents were never told about the proceedings or the resulting decision. Making matters worse, the Supervisor advised his counterparts in neighboring towns about the Town Board's decision in his October 29, 2021 email. But he never told his own constituents.

Appellant was not only excluded from the proceedings that led to this 2021 decision, but he only found out about the actual decision in 2024 when the Town produced the October 29, 2021 email in response to Appellant's FOIL request. R 972, Amended Complaint, ¶ 77.

The Court below ignored Appellant's absolute rights conferred by OML § 107 (1) when it concluded that Appellant "lacked standing to assert the causes of

action in the amended complaint.” R 29, Decision/Order, p. 20. In reaching this result, the Court stated:

“With respect to the Town’s motion, [Appellant] does not have standing to seek affirmative relief to revisit the fact that the Town did not opt-out. ... [Appellant] does not allege that he has suffered an injury in fact or that he suffered some personal deprivation or exclusion.” *Id.*

This ruling was erroneous for two reasons:

First, OML § 107 (1) expressly empowers the Court to order “reconsideration” of an action taken in violation of the OML. See, e.g., In re Town of Eastchester, 23 A.D. 3d 484 (2<sup>nd</sup> Dept. 2005) (OML violated; decision nullified; new hearing and determinations ordered). Hence, Appellant has standing to seek affirmative relief requiring the Town Defendants to revisit its 2021 secret, off-the-books decision not to opt-out.

Second, the Amended Complaint canvassed in detail the history of the Town Board’s secret, off-the books decision, and how Appellant only found out about it two years after the fact when word leaked out. The Town Board’s deliberations should have been conducted in public, and the Town Board’s decision not to opt-out should have been published in the minutes. Since Appellant was excluded from those proceedings or from even knowing about the decision, he was harmed. Just like the plaintiff in McCrory, Appellant is an “aggrieved person” and has standing under the OML.

Accordingly, the Court’s conclusion that Appellant lacked standing under the OML should be reversed.

## POINT II

### **THE FOUR-MONTH STATUTE OF LIMITATIONS (CPLR § 217 (1)) DID NOT START TO RUN ON JANUARY 1, 2022 BECAUSE THE TOWN BOARD NEVER GAVE “READILY ASCERTAINABLE” NOTICE OF THE DECEMBER 31, 2021 DEADLINE TO OPT-OUT**

All parties agree that this case is governed by the four-month statute of limitations set forth in CPLR § 217 (1):

“... a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner....” (emphasis added)

CPLR § 217 (1) itself is silent on when the determination becomes “final and binding.” The Court below concluded that the statute of limitations “began to run on January 1, 2022, when the Cannabis Law made the opt-out choice final and binding.” R 27, Decision/Order, p. 18.

The Court’s ruling ignored governing law that to be binding on a party, that party must receive notice of the determination. As the Court of Appeals ruled in Matter of Yarbough v. Franco, 95 N.Y.2d 342, 346-48 (2000), the four-month period for review runs from the petitioner’s receipt of the decision.

In addition to requiring notice, the law also requires that the notice be “readily ascertainable” so that the aggrieved party knows or should have known that the party was aggrieved. Save the View Now v. Brooklyn Bridge Park Corp., 156

A.D.3d 928, 931-32 (2<sup>nd</sup> Dep't. 2017); Matter of Riverkeeper v. Crotty, 28 A.D.3d 957, 962 (3<sup>rd</sup> Dept. 2006).

In this case, there was no “readily ascertainable” notice. The Town knew and should have disclosed to residents under the OML that the opt-out period ended on December 31, 2021. It failed to do so. It is true that the Supervisor made a one-minute oral announcement on April 6, 2021. But the Supervisor and his fellow Town Board members gave no prior notice of this announcement, nor one word of follow-up -- orally or in writing -- during the next nine months. The deadline was never mentioned again. Not in any Town Board meeting, not in any Town Board minutes, not in any Town Board agendas, and not in any of the Supervisor’s weekly Newsletters and other notifications to residents.

Once word leaked out in late 2023 about what the Town Board had done, Appellant discovered the April 6, 2021 one-minute oral announcement by listening to 18 hours of Town Board meetings. This microscopic blip on the radar does not constitute “readily ascertainable” notice.

The Court below found that the April 6, 2021 announcement “put [Appellant} and every other resident on notice.” R 31, Decision/Order, p. 22. In the real world, having to search 18 hours of video-taped proceedings for a one-minute oral announcement is simply no notice at all.

The Court compounded its error when it found that:

“Each resident had the ability to learn from the Town Board minutes posted on its website that the cannabis opt-out deadline was December 31, 2021.” R 31-32, Decision/Order, pp. 22-23.

This was simply incorrect. The documentary record proves that the deadline was never mentioned in any of the Town Board minutes. See *supra*, pp. 9-10.

It is apparent that the Court was misled about the minutes by the Supervisor’s Affirmation, which stated:

“[E]very Town resident knew, or had the ability to learn from the Town Board minutes posted on its website, that the cannabis opt out deadline was December 31, 2021.” R 1094, Hansan Affirmation, ¶ 4.

That statement was false and should never have been submitted to the Court.

The Court further found that “[there] is no requirement that the Town had to continuously advise the residents.” R 32, Decision/Order, p. 23. With respect, the Court missed the point: the Town never advised its residents, in a readily ascertainable manner, about the deadline in the first place.

In addition to not alerting residents about the deadline, the Town never gave any notice about its October 29, 2021 secret, off-the books decision not to opt-out. Indeed, Appellant only uncovered this critical event from the FOIL documents the Town produced in 2024 -- over two years after the decision.

In short, the only notice Appellant ever received about the deadline and the decision not to opt-out came in October 2023. Not from the Town, but by word of

mouth when word leaked out. That is not “readily ascertainable” notice from the Town and thus did not trigger the statute of limitations.

The Court’s conclusion that the Town Board gave notice of the December 31, 2021 deadline and the statute of limitations started to run on January 1, 2022 should be reversed.

### POINT III

**THE FOUR-MONTH STATUTE OF LIMITATIONS (CPLR § 217 (1)) DID NOT START TO RUN UNTIL MAY 23, 2024, WHEN THE TOWN BOARD CEASED ITS AMELIORATING ADMINISTRATIVE ACTIONS TO REVERSE ITS OCTOBER 29, 2021 SECRET, OFF-THE-BOOKS DECISION NOT TO OPT-OUT; THIS ACTION WAS TIMELY FILED ON AUGUST 26, 2024**

The Court below found in the alternative that the statute of limitations started to run on December 10, 2023, when Appellant wrote the New York Cannabis Control Board. R 27, Decision/Order, p. 18. This was error because at that time the Town Board’s decision was not “final and binding” within the meaning of CPLR § 217 (1). The letter did not trigger the start of the statute of limitations because it was sent during the period when the Town Board was taking ameliorating administrative actions to reverse its decision not to opt-out, specifically by passing two Town Resolutions supporting New York State legislation reopening Pound Ridge’s opt-out window. See *supra*, pp. 14-15.

The law is clear. As the Court of Appeals ruled in Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30, 34

(2005), a decision is “final and binding” within the meaning of CPLR § 217 (1) when the agency has “reached a definitive position on the issue that inflicts actual, concrete injury [that] may not be prevented or significantly ameliorated by further administrative action ....” (emphasis added)

In this case, the Court below cited the Best Payphones rule. R 25-26, Decision/Order, pp. 16-17. Like its failure to apply the McCrory test to the standing issue, the Court never applied Best Payphones to the “final and binding” issue here. In particular, the Court did not address the Town’s seven-month, nine-meeting efforts to reverse its decision not to opt-out, which under Best Payphones only became final and binding when those efforts ceased on May 23, 2024.

As set forth on pages 14-15, the undisputed record established that in October 2023 word leaked out about the Town Board’s secret, off-the-books decision not to opt-out. In response to public pressure, the Town Board spent the next seven months and nine meetings trying to reverse its decision. It held nine Town Board meetings, including a public hearing attended by hundreds of residents. It passed two Town Resolutions endorsing New York State legislation (Senate Bill S9148 and Assembly Bill A10091) that would have reopened Pound Ridge’s window to opt-out. Those ameliorating administrative efforts ceased on May 23, 2024, when the New York State legislation did not advance in Albany. Only then, did the Town

Board's decision become "final and binding" within the meaning of CPLR § 217 (1) and Best Payphones.

Thus, the four-month statute of limitations did not start to run until May 23, 2024, when the Town ceased its administrative actions to reverse its 2021 decision and the injury inflicted on Appellant and other Pound Ridge residents. That gave Appellant four months -- until September 23, 2024 -- to file suit. Appellant did so on August 26, 2024. R 37-69, Summons and Complaint. Accordingly, Appellant's action was timely.

It should be pointed out that in their reply memoranda on their motions to dismiss, the Town Defendants and SMMB tried to avoid Best Payphones and the Town Board's seven-month efforts to reverse its decision not to opt-out. R 1275, Town Reply, p. 2; R 1300-1302, SMMB Reply, pp. 5- 7. They claimed that the Town Board's actions were "legislative" in nature and did not qualify under Best Payphones as ameliorating administrative action. This is incorrect. The Town Board's actions were administrative because the Board did not introduce N.Y. Senate Bill S9148 and Assembly Bill A10091 reopening Pound Ridge's opt-out period but only supported their passage by the New York State legislature.

Moreover, the Town Board's own admission proves that its efforts to reverse its decision were not "legislative." Specifically, on May 10, 2024, when the Town

Board submitted its Home Rule Requests for enactment of New York State legislation Senate Bill S9148 and Assembly Bill A10091 reopening Pound Ridge's period to opt-out, the Town Board stated:

“The local government does not have the power to enact such legislation by local law.” R 1312-1316, Submission of Home Rule Requests dated May 10, 2024). (emphasis added)

The Court's alternative conclusion that the statute of limitations started to run on December 10, 2023 should be reversed.

#### **POINT IV**

**ON A MOTION TO DISMISS, THE COURT BELOW SHOULD HAVE GIVEN THE AMENDED COMPLAINT A LIBERAL CONSTRUCTION AND THE BENEFIT OF EVERY POSSIBLE INFERENCE, AND SHOULD NOT HAVE SUBSTITUTED ITS OWN INTERPRETATION OF THE SUPERVISOR'S OCTOBER 29, 2021 EMAIL DOCUMENTING THE SECRET, OFF-THE-BOOKS DECISION NOT TO OPT-OUT**

The test for assessing a motion to dismiss was set forth in Jadidian v. Drucker, 171 A.D.3d 1146, 1148 (2<sup>nd</sup> Dept. 2019):

“On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88; *Santaiti v Town of Ramapo*, 162 AD3d 921, 924-925; *Berlin v DeMarzo*, 150 AD3d 1185).”

\* \* \*

“Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence ‘utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’ (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; see Kolchins v Evolution Mkts., Inc., 31 NY3d 100, 106; Leon v Martinez, 84 NY2d at 88).”

In this case, the Court below ignored this well-established rule and instead substituted its own interpretation of the documentary record.

Of pivotable importance is the Supervisor’s October 29, 2021 email to his counterparts in surrounding towns, but never shared with Pound Ridge residents. See *supra*, p. 12. The email used the word “We” three times, clearly meaning the Supervisor was speaking for the entire Board. Any fair reading of the email establishes that the Town Board collectively decided not to opt-out. The email went on to give the Town Board’s various reasons for its decision.

At a minimum, the Court should have given every favorable inference to the Amended Complaint’s allegations about the email, namely that it documented the Town Board’s decision not to opt out, as well as its reasons to do so.

Instead, the Court substituted its own interpretation of the email in concluding that it merely reflected the Supervisor’s own opinion. Ignoring that the email used the word “We” three times, which obviously means more than one, the Court concluded the email did not report on the Town Board’s decision since the Supervisor was “the only member of the Town Board who participated in the email communications.” R 31, Decision/Order, p. 22. This interpretation, which the

Court was not entitled to make under Jadidian and the other authorities noted above, is simply unrealistic and ignores the use of the plural “We.” The Town Supervisor would hardly report to neighboring supervisors and mayors about his personal view, as opposed to the decision of the entire Town Board.

The Court also erred when it interpreted the Amended Complaint as alleging that the Town Board conducted a secret meeting during which it decided not to opt-out. R 31, Decision/Order, p. 22. The Amended Complaint made no such allegation. What the pleading averred is that a quorum of the Town Board secretly and off-the-books collectively decided not to opt-out. See supra, p. 13. It was this secret, off-the-books collective decision that violated the OML.

The Town Defendants claimed below that in this case the COG “opined that there was no violation because there was no decision and no meeting”. R 1123, Town Memorandum, p.18. As documented in the Amended Complaint, ¶¶ 97-104 (R 977-980), Appellant did ask for the COG’s Advisory Opinion, but the COG never gave one. After refusing to consider the record Appellant had compiled or the COG’s prior relevant Advisory Opinions, one COG member merely gave her informal “view” that there was no OML violation because there was no formal vote. That view was based on only on a fragment of the record and without the benefit of the COG’s own prior Advisory Opinions. Those prior Advisory Opinions expressly concluded that a formal vote was not required; a collective decision was enough to

violate the OML. See COG Opinions OML-AO-05205 and OML-AO-4177 cited above.

The Court below properly ignored the informal view of the COG member because it was not a formal COG Advisory Opinion that followed the COG's prior Advisory Opinions.

Because the Court below improperly used its interpretation of the Supervisor's October 29, 2021 email, did not give the Amended Complaint the benefit of every possible inference, and failed to recognize that a collective decision outside a formal meeting can violate the OML, its decision that the Town Board did not breach the OML should be reversed.

## **CONCLUSION**

As set forth in Points I – IV, the Court below made four fundamental errors in dismissing the Amended Complaint:

- I. In ruling that Appellant lacked standing under the OML, the Court failed to apply McCrory, which establishes that Appellant has standing because he was excluded from the Town Board's proceedings and its collective decision not to opt-out.
- II. In finding that Appellant was put on notice about the December 31, 2021 opt-out deadline, and that the statute of limitations began to run on

January 1, 2022, the Court ignored established law that the notice must be “readily ascertainable.”

- III. In finding in the alternative that the statute of limitations started to run on December 10, 2023, the Court failed to apply Best PayPhones to the Town Board’s “ameliorating administrative” actions, which did not cease until May 23, 2024, when the Town Board’s decision not to opt-out became final and binding.
- IV. The Court failed to give the Amended Complaint a liberal construction and the benefit of every possible inference, and instead substituted its own interpretation of the Supervisor’s October 29, 2021 email and his use of the pronoun “We.”

Accordingly, this Court should reverse the Court’s decision and grant the relief sought in Appellant’s First, Second, Third, and Fourth Causes of Action against the Town Defendants for violations of New York’s Open Meetings Law.

Dated: Pound Ridge, New York

November 17, 2025

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