SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT
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In the Matter of GLENN K. DENTON and
BRIDGET K. DENTON, KATHLEEN J. DUVAL,
FRANCIS P. SCALLY and FAY E. SCALLY,

Petitioners-Respondents,

-against-

TOWN OF OYSTER BAY TOWN BOARD BY
SUPERVISOR JOHN VENDITTO, BEECHWOOD POB LLC,
PLAINVIEW PROPERTIES SPE LLC,

Respondents -Respondents

REDACTED,

Proposed Intervenor-Appellant

For relief per New York Civil Procedure Law and Rules ("CPLR")
Section 1012 (a)(2), Section 1013, and Section 7802(d)

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Appellate Division Docket
Number:

_____

Supreme Court Index No.:
5290/15

AFFIRMATION IN SUPPORT
OF MOTION FOR LEAVE TO
INTERVENE

Table of Contents

Preliminary Statement

1. This motion seeks leave of this Court on its own authority[1] to intervene for the purpose of an appeal in this Article 78 special proceeding, which was dismissed by Supreme Court on December 15, 2015, and whose Petitioners chose not to file an appeal in the allotted time, but rather entered into a settlement that adversely affected Movant and others so situated.

2. Movant is a thirty-two-year resident of a relatively tranquil, green, suburban neighborhood in Nassau County whose home sits directly across a two-lane road from the 143.25-acre tract of land planned for extensive development, which development is at issue in this environmental law case.

3. That expansive tract of land would be extensively paved, levelled, and constructed upon by the "Country Pointe at Plainview" development ("the Project").

4. The Project site currently consists of woodlands, 'shrubland', abandoned turn-of-the century hospital grounds, rustic athletic fields, tree-lined access roads and some paved parking areas (Exhibit 1, Satellite view; Exhibit 2, Site development plan).

5. For the past roughly nine months, since June, 10, 2015, the Project's approval has been contested in this special proceeding brought by five residents comprising three residences which are, like Movant's residence, situated directly across the two-lane road, Round Swamp Road, from the Project site.

6. The original Petitioners' residences are located about three-quarters of a mile south of Movant's residence, directly along Round Swamp Road.

7. Movant is directly affected by the matter, and she will be injured if the Court's holding is

[1]See Auerbach v. Bennett, 47 N.Y.2d 619 (1979), at 628: "The Appellate Division was vested with all the power of Supreme Court to grant the motion for intervention...."

not reversed on appeal. Furthermore the original Petitioners have failed to adequately represent her interests in the matter and she will and she will be bound by the Court's decision as *res judicata.*

8. Movant is also part of a small class of neighbors similarly situated as the Petitioners along a common roadway abutting the proposed project site, who had a firm understanding that the special proceeding was being prosecuted for the benefit of the community. In fact it has been held that an Article 78 proceeding evinces such a "public" purpose for the similarly situated class[2].

9. Movant sought leave of Supreme Court to intervene by order to show cause on January 13, 2016. Supreme Court declined to sign the order to show cause, without prejudice, stating that the order to show cause was not the correct vehicle to seek such relief[3].

10. Movant appealed Supreme Court's constructive denial of relief to the Second Department on January 15, 2015, which also declined to sign the order to show cause without explanation or prejudice.

11. During the conference with Second Department staff on January 15, Movant was for the first time informed by the Respondents Beechwood POB LLC (hereinafter "Beechwood")

[2]The First Department held that an Article 78 proceeding was a substitute for a class action: "Moreover, this is a proceeding involving a challenge to administrative action, in which context class action status is deemed unnecessary —whether relief is sought by way of CPLR article 78 (Matter of Jones v Berman, 37 NY2d 42, 57) or a plenary action (Rivers v Katz, 67 NY2d 485, 499)—on the reasoning that stare decisis operates to the benefit of any person or entity similarly situated (Matter of Rivera v Trimarco, 36 NY2d 747, 749)." at 398 Ferguson v. Barrios-Paoli, 279 AD 2d 396 (First Dep't, 2001)(where a group of intervenors were permitted to assert the relation-back rule inasmuch as the special proceeding brought to assert civil service seniority rights of only one named petitioner served as a de facto class action for relation-back purposes by its general applicability to others in the 'class', as well as other factors, and based on a ruling of the Court of Appeals that class action was not appropriate in Article 78 proceedings)

[3]Justice Peck wrote: "Refuse to sign. Matter with regard to this petitioner is not properly brought by order to show cause."

and the Town of Oyster Bay (hereinafter "Oyster Bay") that a settlement had been reached with a stipulation of discontinuance.

12. As will be established by law and fact herein, a settlement does not automatically extinguish the rights of parties to intervene, on the contrary the rights have been held to survive settlements.

13. Furthermore, as will be further established, the "relation-back" rule is available to Movant and may properly be invoked to allow her to participate in the case after the expiration of the statute of limitations in the underlying matter for the purpose of bringing an appeal.

14. Furthermore, as will be established herein, Movant is fully justified in invoking her right to intervene under CPLR §§1012 (a)(2), 1013, and 7802(d).

15. Movant has a wholly sufficient basis of environmental "standing" to litigate this matter and to assert necessary interest and injury.

16. Furthermore, Movant will demonstrate that she may not lawfully be 'penalized' -- to wit, be denied 'standing' -- as a result of any failure on her part to directly participate in the convoluted and chaotic administrative process leading to Oyster Bay's environmental findings and zoning changes.

17. It will be shown that the Courts have repeatedly held that environmental review under the State Environmental Quality Review Act ("SEQRA", Environmental Conservation Law Article 8, 6 NYCRR 617) is not to be held hostage to the doctrine of "exhaustion of administrative review", nor should a Petitioner be denied standing if any of the issues she raises have already been raised in the administrative process by any other party.

18. Thus Movant will demonstrate that by the facts and the law, and indeed by equity, she

should be permitted to intervene to take an appeal to protect her rights.

19. A pleading for purposes of intervention as provided for by CPLR 1014 accompanies this application as Exhibit 3.

The Facts

The Legal Proceedings

20. On or about June 10, 2015, the original Article 78 Petition ("the Petition") was filed requesting that Supreme Court annul the environmental review and the subsequent zoning actions taken by Oyster Bay ("the Town") with respect to the Project on May 12, 2015.

21. The Petition cited extensive violations of procedural and substantive requirements of SEQRA, a law intended to raise environmental protection to a cornerstone of every action of public agencies in the state.

22. The Petition was dismissed on December 15, 2015 (Exhibit 6). The Court held that Petitioners lacked standing for having failed to testify themselves at administrative hearings on the project, and further that the issues raised were without merit.

23. For the past roughly nine months, since June, 2015, the Project's approval has been contested in this special proceeding brought by five residents comprising three residences which are, like Movant's residence, situated directly across the two-lane road, Round Swamp Road, from the Project site.

24. The original Petitioners' residences are located about three-quarters of a mile south of Movant's residence, directly along Round Swamp Road.

25. The original Petitioners (hereinafter "Petitioners'"), pursued this matter *pro se* by filing a

Petition with almost fifty exhibits, and a Supplemental Petition was filed on or about July 7, 2015 with new evidence resulting from a Freedom of Information inquiry which showed clear evidence of unlawfully "segmented" review.

26. The Petitioners in furtherance of their petition held a public information session at a local library, distributed fliers throughout the community, and posted large signs along the road in front of their homes announcing their legal effort and seeking contributions from the public.

27. Most importantly to the matter at issue herein they collected about $2000 in donations from the public, the majority of which was contributed by similarly situated residents who reasonably believed the Petitioners were engaged in an action for the benefit of the community residents as a whole. They kept residents aware of the progress of the lawsuit by media coverage and an email list.

28. However after Supreme Court entered its order dismissing the Petition, Petitioners declined to pursue an appeal and moreover no community meetings, newsletters, fliers etc. informed the residents and donors of the decision.

29. Movant resolved and announced her intention to move to intervene for the purpose of taking an appeal almost as soon as she learned that it appeared Petitioners' were not moving to appeal.

30. Movant is in almost all respects indistinguishable from the Petitioners with respect to the impact of the Project on her.

31. As sworn by affidavit (Exhibit 4) Movant is a thirty-two-year resident of a relatively tranquil, green, suburban neighborhood in Nassau County whose home sits directly across a two-lane road from the 143.25-acre tract of land planned for extensive development, which

development is at issue in this environmental law case.

32. As is well known to the Court, that expansive tract of land, now filled checkered with woodlands, 'shrubland', abandoned turn-of-the century hospital grounds, rustic athletic fields, tree-lined access roads and some paved parking areas, would be extensively paved, levelled, and constructed upon by the "Country Pointe at Plainview" development ("the Project").

33. Supreme Court denied the requested relief by Decision and Order signed December 15, 2016, entered on December 16, 2015.

34. During the period during which the statute of limitations for the purpose of filing a notice of appeal was running, it was becoming clear to the public that Petitioners were failing to move to appeal.

35. Almost as soon as Movant became aware of Petitioners' apparent decision not to appeal, Movant, who is in almost all respects indistinguishable from the Petitioners with respect to the impacts of the Project on her -- with the exception that her residence is about 3/4 mile north of them -- resolved and stated her intention to participate in an appeal by intervening in this action.

36. On January 13, 2016 Movant filed with Supreme Court an order to show cause seeking leave to intervene citing CPLR §§1012 (a)(2) and 7802(d), in order to prosecute an appeal.

37. Supreme Court declined to sign the order to show cause, noting on the unsigned order to show "Refuse to sign. Matter with regard to this petitioner is not properly brought by order to show cause."

38. On January 15, 2016, Movant filed an appeal of Supreme Court's constructive denial of her motion to intervene with the Second Department.

39. During a conference with the Deputy Clerk at the Court, with no forewarning

Respondents announced they had just entered into a stipulation of settlement with the Petitioners which they claimed nullified the matter of intervention and made the special proceeding thenceforth non-existent.

40. This settlement notably came after Respondents had won a favorable ruling from Supreme Court.

41. Movant learned that the terms of the settlement required Petitioners to give up their right to appeal Supreme Court's decision.

42. The settlement was concluded after Movant had already applied to Supreme Court for intervenor status, and was so-ordered on the very day the appeal was first heard by the Second Department and its existence publicly disclosed.

43. Without explanation, and without prejudice, the Second Department declined to sign the order to show cause.

44. Movant appeared at the Second Department on February 1, 2016 for the purpose of re-arguing the order to show cause but withdrew the motion when Movant's counsel was at the request of the Respondents the right to consult with a non-attorney environmentalist who was assisting with the case.

45. Movant seeks by the instant motion to be granted leave to intervene for the purpose of taking an appeal on this Court's own authority.

Movant's Relation To the Project Site

46. Movant is a retired teacher who has for about thirty-two (32) years lived in, and owned the house at REDACTED Round Swamp Rd., Old Bethpage, N.Y. 11804 (Exhibit 4 Affidavit).

47. Movant's residence is directly across Round Swamp Road, a two-lane road, from what are presently soccer fields and unpaved parking areas -- partially screened by a small handful of trees one or two trees deep.

48. The area will, according to the plans of the Project, be partially planted with young new vegetation as a purported "visual buffer" to a depth of one hundred and twenty-five (125) feet, and twenty-five (25) feet from the inner boundary of the "visual buffer" the land will be cleared, paved over, and laid with streets and populated with dozens of closely-spaced houses. (Exhibit 1, Satellite measurement).

49. Movant's home will be about two-hundred-and-seventy-five (275) feet from the new houses[4], and it will be even closer to a "fitness trail" which is to be built somewhere within the one-hundred-and-twenty-five (125) foot visual buffer.

50. The immediate impact of the development on Movant's home can readily be seen in the Final Site Development Plan (Exhibit 2), which shows the intensive development on the eastern portion of the Project site just inside the visual buffer.

51. Movant's Petition also describes -- echoing the original Petition -- the lack of any reliable, scientific, and/or transparent analysis of the efficacy of the "visual buffer" in shielding the homes along Round Swamp Road from the visual impact of the development (Exhibit 3, Movant's Petition, ¶¶ 47 *ff.*).

52. Movant makes clear in her affidavit the special injuries she will suffer (Exhibit 4, Affidavit, ¶¶ 5-8) even though her 'standing' does not depend on them.

[4]A satellite measurement (Exhibit 5) shows that Movant's property is located about one-hundred and twenty-five (125) feet from the property line of the Project, across Round Swamp Road at that location. Inasmuch as the development plan calls for the construction of the new development "150 feet from the easterly property line" (Findings Statement, p. 21), Movant's home will be about two-hundred-and-seventy-five (275) feet from the actual new houses. It will be even closer to a "fitness trail" which is to be created within the one-hundred-and-twenty-five (125) foot "visual buffer".

53. Movant alleges she will be harmed both by the negative impact on her "view"as reasonably anticipated from the Project, and by the impact on her 'use and enjoyment' of the natural resources on the Project site.

54. Movant attests that she enjoys the view from her home of the open space of the fields and the sunsets in the distance, both of which will both be removed by the Project, which will populate those fields with houses up to three stories in height (Exhibit 4, Affidavit, ¶8, *et al.*).

55. Movant also attests that she regularly enjoys walking through the open roads of the Project site and has done so for a period of over thirty years (Exhibit 4, Affidavit, ¶7, etc.).

56. She states she values the peace, tranquility, and nature, all of which will be substantially diminished and obliterated by the Project.

57. Movant attested that she attended a hearing on an earlier incarnation of the present Project, and believed that the matter was settled and would not be revived (Exhibit 4, Affidavit, ¶9).

58. Such direct personal participation in the administrative process is not required, however, to sustain Movant's connection to the Project and the natural resources they contain for standing purposes[5].

59. As will be elaborated herein, Movant has a close connection to the natural resources subject to development in this matter, and clearly also enjoys 'standing' based on (1) the proximity of her residence, (2) her view, (3) her decades of usage, and (4) the fact that the matters at issue here were raised in the administrative process, and are in any event subject to litigation in this SEQRA-based action notwithstanding whether or not they were raised in the

[5]This affirmation will elaborate the substantial case law that rejects the alleged requirement of personal participation as a predicate for standing, particularly -- but not only -- in SEQRA cases.

administrative process.

60. This issue is further discussed *infra* in terms of Movant's 'right to intervene'.

Applicable Law and Rules

61. The overall matter of which this motion is in service is a special proceeding brought under SEQRA, which has as its purpose as follows:

> "In adopting SEQR, it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations."
>
> 6 NYCRR 617.1(b)

62. That intent is to be achieved by procedural mechanisms that require that environmental impacts from government activities in the state -- such as approving construction[6] -- be rigorously analyzed and decisions based on those findings.

63. Further, the law requires the environment be protected, by requiring the agency: must certify that:

> "[C]ertify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable."
>
> 6 NYCRR 617.11(d)(5).

64. Movant has argued in her pleading, in exactly the same way and for the same reasons that Petitioners did in theirs, that Oyster Bay failed to comply with SEQRA due to procedural violations of its provisions, and that thus the Project should not be permitted to proceed.

[6] 6 NYCRR 617(2)(b)(1).

65. The motion to intervene is authorized by CPLR §§1012(a)(2), 1013, and 7802(d).

66. CPLR §7802(d) provides:

> "The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene."

67. In the present matter Movant is an "interested" person under §7802(d) due to the impact the development will have on her property, and her use and enjoyment of the Project site, as described *supra.* The fact she has legal standing in this matter as an adjacent neighbor, among other grounds, described *infra.*, supplies her a cognizable legal interest as well.

68. CPLR §1012 provides for a Movant to seek intervention by right, as in the present circumstances, to wit:

> "Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
> ...
> 2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment...."

69. Movant will be "bound by the judgement" due to its *res judicata* effect[7], and the "representation" of Movant's interests has been "inadequate" (CPLR §1012, *id.*) because Petitioners failed to file an appeal of the adverse decision by the trial Court.

70. The issue of timeliness will be further discussed at length, *infra*, and shown to be consistent with the present motion because Movant filed her motion promptly, and she had no earlier indication that the Petitioners would drop their efforts to litigate, until they did.

71. CPLR §1013 provides for a Movant to seek intervention by permission, to wit:

[7] "[W]hether movant will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect"

Vantage Petroleum v. Board of Assessment Review of the Town of Babylon, 61 N.Y.2d 695 (1984) at 698 (where a school district was denied intervention in a tax certiorari case because one year's tax assessment was held not to be res judicata for the future, and the school district was held ineligible to participate as it was indemnified from liability for tax refunds)

> "Intervention by permission. Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

72. Movant's interest and injury in the matter have a clear "common question of...fact", to wit her residence and use and the impact of the Project in them; and "common question of law", to wit the lawfulness of the Respondent Town zoning decisions based on the deficient environmental review.

73. As will be discussed at greater length, *infra*, the motion to intervene will cause no undue delay or prejudice to the original parties, because the only additional time and effort involved on their part is standard litigation related to a rightful appeal, based on a case whose facts and law are settled matters[8].

74. With respect to litigating under an expired statute of limitations, CPLR § 203(f) states:

> "Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

75. The so-called "relation-back" rule, CPLR § 203(f), would allow the Movant to assert claims in this Article 78 proceeding that would otherwise have been precluded by the four-month statute of limitations applicable to Article 78 proceedings.

76. As will be shown, *infra*, Movant is not precluded from exercising the relation-back rule because there is no prejudice to the original parties, who were fully on notice of all matters raised by Movant[9].

[8]The courts have held such undue delay or prejudice to be caused for instance by renewed discovery, e.g. Halstead v. Dolphy, 70 AD 3d 639 (Second Dep't, 2010), discussed *infra.*

[9]See, e.g., Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d

77. Movant is entitled to seek relief from this Court in that she meets the statutory definition of an aggrieved person within the meaning of CPLR § 5511, which states:

> "An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent."

78. Movant is "aggrieved" in that her property will be affected, a fact typically recognized in zoning matters by the requirement of notification of nearby neighbors. In any event the Court of Appeals has repeatedly recognized the presumptive injury of adjacent neighbors in zoning matters[10].

ARGUMENTS

The Matter Is Not "Moot" Despite A Stipulation Of Settlement In This Matter

79. Respondents argued at the appearance before the Second Department on January 15 that Movant's application to intervene was "moot", because a stipulation of settlement with a provision of discontinuance had just then been entered into by the original parties and so-ordered by the trial Court.

80. The process of negotiating the settlement was cloaked in secrecy and was apparently accelerated as the allied Proposed Intervenor (Richard A. Brummel) rallied residents to

907 (Second Dep't, 2008) at 908-9, *infra.*

[10]The Court of Appeals held: "The fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent or very close to the property in issue gives rise to a presumption of standing in a zoning case. But even in the absence of such notice it is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood. Thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury." Sun-Brite v. Bd. of Zoning, 69 NY 2d 406 (1987) at 413-14 (where a car wash was held to have presumptive standing by proximity but denied standing to sue because its economic interest in monopoly was held not to be a relevant interest in a zoning matter)

intervene for the purpose of filing an appeal.

81. According to the dates on the stipulation of settlement filed with the County Clerk, some of the parties had not even signed it at the time Movant filed her order to show cause before Supreme Court.

82. Whatever weight the Second Department attached to the "mootness argument", the law is clear that the Respondents' assertion of mootness was incorrect, and this matter may be appealed and intervened in as sought by Movant.

83. Movant has asserted her right to intervene under CPLR Sections 7802(d), 1012(a) and 1013[11], the latter two rules requiring the motion be "timely".

84. The CPLR nowhere states that for purposes of intervention, a matter become moot upon a judgement or settlement. The courts have repeatedly held to the contrary[12].

85. The Courts have held only that an excessive delay in intervening, with aggravating factors, renders an application to intervene untimely, or the underlying matter beyond reach, and such a determination is based on various circumstances specific to the cases[13].

86. Such circumstances are absent in the present matter, as will be shown, *infra*.

Movant's Bases For Refuting A Timeliness Argument

87. The following points establish Movant's timeliness and the lack of any mootness attaching to her application to intervene: (1) Movant could not have known of secret settlement talks that would prejudice her interests, but filed an order to show cause to

[11]The original order to show cause filed in Supreme Court only cited CPLR Section 1012, however a second motion filed there and the present application cites both sections 1012 and 1013.

[12]See, e.g., Auerbach v. Bennett 47 NY 2d 619 (1979) at 628-29, and Greater New York Health Care Facilities v. DeBuono, 91 N.Y.2d 716 (1998) at 719-20, *infra*.

[13]Such circumstances, discussed *infra*, include the actual time of a delay in filing a motion, and knowledge of the threat to the intervenor's rights by knowledge of a challenge to its rights or knowledge of a potentially prejudicial ongoing negotiation.

intervene before the settlement was concluded in any event; (2) Movant acted quickly to protect her interests once it was apparent that the Petitioners were not filing an appeal of the adverse trial Court decision; (3) Movant's promptly-filed orders to show cause to intervene were filed prior to (i) the time the stipulation of settlement signed and (ii) the time it was was so-ordered; (4) Movant diligently-pressed claims to intervene on notice and in adversarial circumstances; (5) Movant intends to promptly renew her application to the trial Court by notice of motion and is on the verge of so doing; and (6) Case law holds that a motion to intervene even after settlement or judgement is not untimely (or moot) where an intervenor reasonably believed an original party was protecting the intervenor's rights, and the intervenor acted promptly when the facts came to indicate otherwise.

Movant Acted Promptly To Protect Her Rights

88. The timeline in this case demonstrates Movant moved swiftly to protect her rights -- primarily to foreclose any issues of untimeliness of her notice of appeal -- once it appeared Petitioners were abandoning their efforts in the matter and would not file an appeal.

89. Movant applied by order to show cause to intervene before Supreme Court the day before the parties unknown to her concluded their secret stipulation of settlement, and two days before the stipulation was so-ordered, also without notice, *supra.*

90. Movant filed the original order to show cause on an accelerated schedule because it was evident that no appeal was being taken, not due to the impending settlement, which was held secret from her and apparently everyone else. .

91. When Supreme Court 'declined to sign' Movant's order to show cause, Movant then applied to the Second Department the same day the settlement was so-ordered -- again,

unknown to Movant.

92. Very possibly Movant's appellate order to show cause was filed before the time the settlement was so-ordered, because the copy of the stipulation provided to Movant at the time had no such 'so-ordered' notation.

93. Movant is also refiling her motion to intervene by notice of motion with the Supreme Court to address the notation on the earlier order to show cause that the filing was not the correct vehicle for the motion[14].

94. Movant had not attempted to intervene earlier because it appeared both to her and to the other Proposed Intervenor, as well as to the community at large, that the Petitioners were diligently pursuing their case, which sought categorical relief that would have protected all the neighbors, to wit, annulling the environmental and zoning approvals for the Project.

95. Movant's prompt and diligent efforts to intervene for the purpose to taking an appeal, notwithstanding her delay in doing so until it was apparent the Petitioners were failing to adequately prosecute the case, demonstrate compliance with the requirements of CPLR 1012 and 1013 that a motion to intervene by "timely" according to the law as established by the courts.

The Case Law On Timeliness Establishes A Test Of "Circumstances" Met By Movant

96. In the most recent case concerning timeliness to intervene after a settlement or judgement, the Second Department held as untimely a motion to intervene after a settlement, but specified that its decision was based on multiple factors that created the "circumstances" of that case:

[14]As noted, *supra*, the trial Court wrote: "Refuse to sign. Matter with regard to this petitioner is not properly brought by order to show cause."

"We agree with the plaintiffs' contention that the motion of [the proposed intervenor] for leave to intervene in this action as a party plaintiff should have been denied in its entirety. By the time [the proposed intervenor] filed the motion, the litigating parties had already entered into a stipulation of settlement and this action was discontinued. Further, [the proposed intervenor] was aware of this action from its inception, yet chose not to participate. Under these circumstances, there was no pending action in which to intervene and the motion should have been denied...."

Breslin Realty Development v. Shaw, 91 A.D.3d 804 (Second Dep't, 2012) at 804, (emphasis added) (where intervention after settlement and discontinuance by a non-party seeking to share in damages was held to be untimely)

97. The mere existence of a settlement, or a judgement, has not been held a bar to intervention, and Breslin Realty should not be applied to bar intervention in this matter. On the contrary, Breslin Realty is aligned with other case law establishing that the "circumstances" (*id.*) are such that intervention is indeed supported in the present case.

Intervention Permissible After A Settlement

98. The Court of Appeals has held that in an Article 78 special proceeding -- such as the present case -- intervention can occur at any time, including after a settlement:

"Petitioners and respondents in the instant case commenced settlement negotiations in December 1995, ultimately agreeing to the same settlement terms as the NYSHFA case....Upon discovering that they would not be included in the settlement, proposed intervenors moved on December 15, 1995 to intervene in the case.

....

Pursuant to CPLR 7802 (d), a court may allow other interested persons to intervene in a special proceeding. This provision grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013....Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal."

Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20 (emphasis added, internal quotations and citations omitted) (where a group of health care facilities were denied the right to intervene due to a

statute of limitations finding, and were held ineligible to assert the 'relation-back' rule, notwithstanding that they could otherwise have intervened even after a settlement)

99. The Third Department held that intervention, for the purposes of appealing, is permissible after a settlement, applying in two cases the ruling of Matter of Greater N.Y. Health Care Facilities, *id.*:

> "Intervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal (see Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 NY2d 716, 720 [1998]; Matter of Tennessee Gas Pipeline Co. v Town of Chatham Bd. of Assessors, 239 AD2d 831, 832 [1997]). While the district would not be directly bound by a judgment, as it was neither served with process nor was it a party to the court proceeding....Under the unusual circumstances of this case, we find that the district should have been permitted to intervene at the time of its motion for the purpose of taking an appeal."
>
> Matter of Romeo v. NYS Dept. of Educ., 39 AD 3d 916 (Third Dep't, 2007) at 917-18 (emphasis added, internal quotations and citations omitted)(where a school district was permitted to intervene after judgement in a matter wherein a resident sought by Article 78 to overturn an administrative determination of state agency sustaining the district's denial of residency)

100. The Third Department similarly held in a separate case, also citing Matter of Greater N.Y. Health Care Facilities Assn., *id.*:

> "The executed stipulation of settlement resolving the underlying CPLR article 78 proceeding was entered and 'so ordered' by Supreme Court in June 1999. Although defendant could have attempted to intervene at that point in time for purposes of pursuing an appeal (see Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, supra at 720), he failed to do so...."
>
> Town of Crown Pt. v Cummings, 300 AD2d 873 (Third Dep't, 2002) at 874 (emphasis added) (where the Court affirmed the lower court ruling denying a party the right untimely to retroactively challenge a settlement that affected his real property located along a Town road).

101. The Third Department also held that a motion to intervene in the underlying case was proper after a settlement, for the purpose of having it set aside (instead of appealing):

> "Appellants contend that the school district was not entitled to intervene and that

> the order based upon the stipulation is binding.... Here, the motion was made promptly after knowledge of the order of compromise and settlement, and prior to the return day of the proceeding to review the assessment.... The school district is entitled to be heard...."
>
> Matter of Stanford Assocs., 39 AD2d 800 (Third Dep't, 1972), at 800-801 (emphasis added) (where a school district affected by a tax assessment change was permitted to intervene to set aside a so-ordered settlement)

102. The Court of Appeals has held that a delay in intervening may be excusable where an interested non-party believed its interests were being properly represented (*cf.* CPLR 1012(a)(2)) up until the point when the original party failed to appeal an adverse decision -- as in the present matter:

> "...[I]t was not until [plaintiff's] decision not to appeal...that the inadequacy of [plaintiff's] representation of [proposed intervenor] became apparent [therefore] [proposed intervenor] cannot be faulted for not theretofore having sought intervention ....."
>
> Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29 (emphasis added)(where the Court permitted one shareholder to intervene in a shareholder derivative action brought by a second shareholder when the second shareholder failed to appeal the dismissal of the case, which occurred before the proposed intervenor's motion to intervene)

103. To be understood in the context of the existing case-law, and the cases it cites for authority, Breslin Realty must be related to the special "circumstances" (*id.*) of the case -- and not held to be a blanket prohibition on intervention after judgement or settlement.

Absence Of Circumstances That Render Intervention Untimely In Instant Action

104. The common theme in Breslin Realty and the three cases it cites is that the motion to intervene becomes untimely where the circumstances establish a 'recklessness' or even 'free-loading' that colors as unreasonable whatever actual time-period has elapsed, measured from different points of any given case.

105. The 'delays' identified in Breslin Realty and the three cited cases were measured by the courts from completely different points of the cases. Those points were when: (a) Settlement negotiations began[15]; (b) The proposed intervenor received a notification that claims were filed adverse to its interests[16]; (c) A judgement was filed[17]; or (d) The case had been initiated and/or the settlement had occurred[18].

106. The 'delays' thus measured ranged from six months with respect to a notice of a challenge to intervenor's property rights[19] to a period of about four years in Breslin from the inception of the case in Breslin Realty itself. (In one case the period of two years cited was not necessarily the entire basis for the decision, however[20].)

107. The current matter is distinguished from the Breslin and its cited cases because until the Petitioners' failure to appeal, there was no indication the Movant's interests were at risk by not intervening -- and once it became evident, the motion to intervene was made "promptly" (see Matter of Stanford Assocs., *id.*).

108. In the case cited in Breslin Realty most closely paralleling this action, the proposed intervenors were apparently aware[21] of potentially-adverse settlement negotiations for over one (1) year before they intervened, and a "proposed stipulation of settlement" was reached in advance of their motion. This Court therefore held such a delay untimely:

"After extensive negotiations, the parties entered into a proposed stipulation of

[15]Rectory Realty, *infra.*
[16]Carnrike, *infra.*
[17]176 E. 123rd St. Corp. *infra.*
[18]Breslin, *id.*
[19]Carnrike, *infra.*
[20]The two years figure is part of the third case cited by the Court, a trial Court decision called 176 E. 123rd St. Corp. v. Frangen, 67 Misc. 2d 281 (Civil Court, New York, 1971, Stecher, J.) which involved a motion by the City of New York to intervene in a matter that had been decided two years earlier. But the trial Court held the motion to intervene unsustainable on multiple grounds, and thus the holding was not entirely clear as to the relevance of the time period cited.
[21]The term used in the case is "the events which were transpiring," *infra*.

settlement in April 1987.

....

The proposed intervenors brought a motion pursuant to CPLR 1012 and 1013. These two provisions require that a 'timely motion' be made. Despite the fact that the proposed intervenors became aware of the events which were transpiring in connection with this action by mid-1986, they did not attempt to intervene in the action until more than a year later. This cannot be considered timely."

Rectory Realty Assocs., *id.*, at 737-8 (emphasis added)(where neighbors who were evidently aware of settlement negotiations between a developer and a municipality over an action related to rezoning ordinance were held untimely in their motion to intervene that was made just before a stipulation of settlement was to be filed with the court)

109. In the first and most recent prior case cited by Breslin Realty, which involved a judgement not a settlement, the Third Department stated that the proposed intervenor delayed for six months from the time it had been notified that its property rights were being challenged, and the motion was therefore untimely:

"Here, in addition to acknowledged receipt of a notice of pendency at least six months prior to entry of the default judgment, the Town was also provided notice of the underlying action in the form of a letter from plaintiff's attorney dated [three months before the judgement]..... Notwithstanding such information, the Town waited until the action was no longer pending to file its motion to intervene (see Town of Crown Point v Cummings, 300 AD2d 873, 874 [2002]). Under such circumstances, we do not consider the motion timely (see Rectory Realty Assoc. v Town of Southampton, 151 AD2d 737, 738 [1989]; compare Matter of Stanford Assoc. v Board of Assessors of Town of Niskayuna, 39 AD2d 800, 800-801 [1972], lv denied 31 NY2d 643 [1972])."

Carnrike v. Youngs, 70 AD 3d 1146 (Third Dep't, 2010), at 1147 (emphasis added)(where a municipality was held untimely in its motion to intervene and defend its challenged property rights in an action wherein the plaintiff, who ultimately prevailed, had notified the municipality of the action six months in advance of entry of the judgment, and by an attorney's letter three months in advance of the entry of the judgement)

110. Carnrike, *id.*, also highlights the proposition that the settlement is not automatically foreclosed by a settlement, so long as the motion is made promptly.

111. Carnrike points by way of contrast ("compare...", *ibid.*,) to Matter of Stanford Assoc. *id.*

where the Court did permit intervention where the motion was made "promptly" (*supra*) after the settlement.

112. The lower court's decision[22] on the motion to intervene in Breslin Realty shows that motion was made almost immediately upon the filing of the settlement[23], but the underlying case had been pending for about four years prior to the settlement[24].

113. This Court did not elaborately explain its rationale for holding the proposed intervenor untimely, but it pointed out that (1) the settlement had already occurred and (2) "[intervenor] was aware of this action from its inception, yet chose not to participate" (Breslin Realty , *id.*, at 804).

114. Inasmuch as the Court of Appeals has endorsed intervention after settlement, as well as long after the start of cases -- for instance in the decisions in Greater N.Y. Health Care Facilities[25] *id.*, and Auerbach[26] *id.*, -- clearly it is the character of 'unreasonableness' that determined the Court's holding in Breslin Realty.

115. The distinguishing factor in Breslin Realty is that it was apparent to the intervenor that his interest in a portion of a settlement fund to which he was not a party would necessarily reduce the total available to the other parties, and thus that his interests and those of the original plaintiffs could not be in harmony, the same "circumstances" (Breslin Realty, *id.*) as

[22]The order is in the form of an annotated 'order to show cause' filed by the proposed intervenor.
[23]Evidently the stipulation of settlement was "dated 10/7/09" and the "emergency affirmation" in support was dated October 13, 2009 and service was required by October 14, 2009.
[24]The stipulation of settlement was dated October 7, 2009, according to the trial Court's order permitting intervention (Breslin Realty Development v. Shaw, 91 A.D.3d 804, Record on Appeal, p. 31) while the underlying malpractice action was filed on March 18, 2005, Breslin Realty Development -v. Shaw, 2008 NY Slip Op 50887(U) (Supreme Court, Nassau County, Warshwsky, J.).
[25]The Court held: "Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding....", *id.*, at 720.
[26]The Court held: "...[W]hen it was not until plaintiff Auerbach's decision not to appeal from the dismissal by Special Term that the inadequacy of Auerbach's representation of Wallenstein became apparent, Wallenstein cannot be faulted for not theretofore having sought intervention....", *id.* at 628.

in two of the three cases Breslin Realty cited for authority[27].

116. The Court implies there is an element not of ignorance but of 'free-loading' that render the attempt to intervene after the case was 'won' unreasonable. In the present case, by contrast, Movant is not free-loading on a wining case but picking up the burden caused by the unexpected abandonment of the central purposes of the action by the Petitioners.

117. In the third case cited in Breslin Realty on this point, Rectory Realty, settlement negotiations between a municipality and developer over an allegedly *ex post facto* restrictive zoning ordinance were ongoing for one year before the intervenors' motion. In that case, the court implied, it should have been apparent to the neighbor-intervenors that the municipality might be angling to compromise on the development that they opposed.

118. The facts are materially different in the present case on all those points of 'rationale' for denying intervention in Breslin Realty and the cases it cited for authority: (1) Movant had no inkling of the Petitioners' secret settlement talks with the developer; (2) Movant (and the community) had no indication that the Petitioners take a position different from that in their Article 78 Petition calling for completely annulling the environmental review and the zoning approvals; (3) it was not until the Petitioners were evidently failing to appeal (*cf.* Auerbach, *id.*) that Movant was aware that the Petitioners were not effectively pursuing the interests of the surrounding property-owners; and (4) Movant moved promptly to intervene once the threats to her interests became apparent.

119. Thus the facts of Movant's actions do not correspond with the criteria of Breslin Realty -- that the intervention after a settlement or judgement becomes untimely where it is

[27]In Carnrike the municipality's property interests were mutually exclusive with those of the plaintiff, *id.*, and in 176 E. 123rd St. Corp. the municipality's interest in a rent-escrow account were opposed to those of the tenants who sought to have their rents refunded from the account.

unreasonable due to the length of time elapsed and the foreknowledge of the proposed-intervenor.

120. In the instant action, Movant did not know in advance that her interests would be abandoned, and she did not delay once the facts appeared to suggest that was the case. Thus her motion should be held neither untimely nor moot.

Movant Has A Clear Right To Intervene

121. Where the matter is still open to intervention, as the forgoing demonstrates, a proposed-intervenor must still establish that she has a right to intervene, which in the instant case Movant clearly can.

122. Whether Movant is considered an "interested person" or one who has "a real and substantial interest" in the matter (*infra*), the Courts have held that such a person may intervene.

123. Movant's incontrovertible "standing" in the matter gives her such an 'interest' as needed to intervene, and the *res judicata* effect of the trial Court ruling binds her to the judgement in the case, as required by CPLR §1012(a)(2).

124. Movant also asserts here the right to intervene under CPLR §1013:

> "Additionally, a court, in its discretion, may permit a person to intervene, inter alia, 'when the person's claim or defense and the main action have a common question of law or fact' (CPLR 1013). Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted 'where the intervenor has a real and substantial interest in the outcome of the proceedings.'"
>
> Global Team Vernon, LLC v. Vernon Realty Holding, LLC, 93 AD 3d 819 (Second Dep't, 2012) at 820 (where a holder of a defaulted contract in a real estate matter was permitted to intervene as a creditor (only) in a foreclosure action to protect its interests as a 'defendant')

125. Movant's claims -- violations of SEQRA -- are identical to those of the Petitioners as a matter of law, and the facts of her domicile and injuries from the Project are all but indistinguishable from those of he Petitioners.

126. The Court of Appeals ruled that the standard for intervention is lower under CPLR Article 78 than CPLR 1013, and allows for intervention by an "interested persons":

> "Pursuant to CPLR 7802 (d), a court may allow other interested persons to intervene in a special proceeding. This provision grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action...."
>
> Greater New York Health Care Facilities, *id. ,* at 720

127. This Court has ruled that the standard for intervention is a "liberal" one, and includes one with "a real and substantial interest in the outcome":

> "Upon a timely motion, a person is permitted to intervene in an action as of right when, among other things, the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment. Additionally, the court, in its discretion, may permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact. However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013 is of little practical significance and that intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."
>
> Spota v. County of Suffolk, 110 AD 3d 785 (Second Dep't, 2013) (emphasis added, internal quotations and citations omitted) (where a non-party intervenor who sought as a voter and taxpayer to argue for the constitutionality of term limits was held not to possess the requisite interest to intervene)

128. It can hardly be disputed that Movant has a "real and substantial interest" (Spota., *id.*), where her home of over thirty years will have a 'front-row-seat' to the proposed development, and her regular 'use and enjoyment' of the Project site over a thirty-year period will be stopped (Exhibit 8, Affidavit of REDACTED).

129. Movant will lose the 'use and enjoyment' of the natural lands she has used, enjoyed, and valued for over thirty years because not only will they will become 'off-limits', but also because they will be largely obliterated.

130. Those types of "interest" are designated "standing" in environmental cases. Such "standing" is clearly enjoyed by Movant, as indeed it should have been found for the original Petitioners, who are similarly situated as homeowners who have resided for long periods across Round Swamp Road from the Project, and who have 'used and enjoyed' the Project site over decades as Movant has.

131. The Second Department has emphatically sustained standing (or 'interest') of those residing directly across from a project:

> "The petition alleged that [Petitioner 1] resided directly across from the main building complex of the Infirmary, that [Petitioner 2's] property directly abutted the site of the proposed Project, and that they would suffer an adverse scenic view. Other proof in the record established that [Petitioner 1] had a view of one of the older structures and portions of others, and that [Petitioner 2] had a view of the Infirmary from a distance of 1,200 feet. Since [Petitioner 1] and the [Petitioner 2] alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA, they established the requisite standing to challenge the Legislature's resolutions."
>
> Barrett v. Dutchess Co. Legisl., 38 AD 3d 651 (Second Dep't, 2007) at 654 (Internal quotations and citations omitted)(where the Court reversed the denial of standing to some petitioners but sustained the dismissal by crediting SEQRA compliance).

132. In Matter of Shapiro v. Town of Ramapo, 98 A.D.3d 675 (Second Dep't, 2012), this Court held that a Petitioner who lived "across the street from the site" was entitled to standing in a SEQRA-and-zoning case:

> "...[T]he petitioners, who live across the street from the site, commenced this proceeding pursuant to CPLR article 78....
> ....
> Since the petitioners live in close proximity to the portion of the site that is the

> subject of the challenged determinations, they did not need to show actual injury or special damage to establish standing....Further, the injuries alleged by the petitioners fell within the zone of interests to be protected by SEQRA
>
> Shapiro *id.*, at 677 (emphasis added, internal quotations and citations omitted) (where the Court ruled that proximity was a solid basis for standing, further that the issues raised were in the zone of interest of SEQRA and therefore remitted the matter for full adjudication of SEQRA claims).

133. Movant has alleged she lives directly across from the Project site, and that the development will replace her current view of soccer fields and woods with houses and other structures that will substantially negatively affect the view from her home of a natural landscape she enjoys.

134. The claims are thus identical to those asserted and sustained in Barrett and Matter of Shapiro, and clearly support a finding of "standing" based on the harm to the view.

135. Movant has also affirmed that she regularly visits, uses, and enjoys the Project site (Exhibit 4).

136. The Court of Appeals has emphasized that such a connection to a property by 'use and enjoyment' also warrants the finding of standing:

> "We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource."
>
> Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297, (2009), at 301 (where regular users of a park area adjacent to private property were held to enjoy standing to sue over the environmental review of that private property in connection with the impact of its development on the land they use)

137. The Court held that the 'usage' required to distinguished users with standing from the general public lacking standing is "repeated" use, as Movant affirms she does:

> "Here, petitioners allege that they use the Pine Bush for recreation and to study

and enjoy the unique habitat found there. It is clear in context that they allege repeated, not rare or isolated use. This meets the Society of Plastics test by showing that the threatened harm of which petitioners complain will affect them differently from the public at large."

Save the Pine Bush, *id.* , at 305 (emphasis added, internal quotations and citations omitted)

138. A further issue of "standing" bears discussion here, to wit the so called doctrine of "exhaustion of administrative remedies."

139. Supreme Court denied the original Petitioners standing on this discredited theory (with respect to standing), yielding to the claims of Respondents that a movant must *himself* (or herself) have raised in the administrative phase of the approval process any arguments later to be litigated (Decision and Order, p.11,).

140. The Second Department specifically rejected that argument, holding that no such record of self-advocacy needs to be raised -- if the issue was raised by anyone in the administrative process:

"...Supreme Court erred in determining that the Shepherds lacked standing to challenge the site plan approval. Contrary to the contention of the Village respondents and the Maddalonis, the Shepherds are not precluded from challenging the site plan approval on the ground that they did not actively participate in the administrative proceeding. The objections to the Planning Board's determination that they raise in this matter were specifically advanced by an attorney representing the three other petitioners/plaintiffs during the administrative proceeding (see Matter of Youngewirth v Town of Ramapo Town Bd., 98 AD3d 678, 680-681 [2012]; Matter of Shapiro v Town of Ramapo, 98 AD3d 675, 678 [2012]; cf. Matter of Miller v Kozakiewicz, 300 AD2d 399, 400 [2002]; Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack, 148 AD2d 130, 135 [1989]; Aldrich v Pattison, 107 AD2d 258, 267-268 [1985])."

Matter of Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905 (where residents across the bay from a construction project were held to enjoy standing to challenge a government action affecting the construction).

141. The Court of Appeals has gone further with respect to SEQRA actions -- as the current

action is -- stating that even if an issue of contention were not raised in the administrative process, it is still not immune from judicial review:

> "Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS, yet failed to mention any impact on archaeology. While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners' silence cannot be overlooked in determining whether the agency's failure to discuss an issue in the FEIS was reasonable."
>
> Jackson v. UDC, 67 NY2d 400 (1986), at 427 (emphasis added, internal quotations and citations omitted in places) (where the court ruled that arguments not raised before the administrative hearing could still be considered by the courts)

142. One trial Court sharply dismissed the exact basis for the denial of urged by Respondents and embraced by Supreme Court against the Petitioners, to wit:

> "Although the Municipal Respondents correctly cite the Second Department's 1985 decision in Aldrich v. Pattison for the principle that 'the doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather than to the courts...Respondents have failed to take into consideration the Court of Appeals subsequent decision in Jackson v. New York State Urban Development Corp., N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298.
> .....
> The Court of Appeals disagreed with the lead agency, finding that the doctrine of exhaustion of administrative remedies did not foreclose judicial review. (id p. 427). Instead, the Court found that the petitioners' failure to raise the issues at the administrative level was merely a factor to be considered in determining whether the lead agency acted reasonably in failing to consider the issues in its environmental review of the proposed action.
>
> Thus, even assuming that the Petitioner failed to raise its SEQRA objections during the proceedings before the Municipal respondents, such a failure does not foreclose judicial review of those objections herein. Therefore, this Court is left to determine whether the Municipal Respondents acted reasonably in failing to consider the numerous environmental issues associated with the rezoning."
>
> Waldbaum v. Village of Great Neck, 10 Misc. 3d 1078(A), 2006 N.Y. Misc. LEXIS 160 (Supreme Court, Nassau County, Bucaria, J., 2006) (emphasis added, internal quotations and citations omitted in places) (where the Court held the

Village failed to take a 'hard look' and segmented its consideration of waterfront development)

143. In the present matter, the Petition documented that for the most part the issues before the trial Court were indeed raised earlier (Original Petition, ¶71; ¶75; ¶ 117; ¶188; and ¶189).

144. But as is clear from case-law, it is unnecessary for the issues to have been raised earlier, and the question should have no role in determining Petitioners' or Movant's standing.

145. There should thus be no question that Movant has standing and thus enjoys a "real and substantial interest" in the matter -- which the Second Department in Spota, *id.,* held to be a valid basis for intervention.

Intervention As Of Right Based On A *Res Judicata* Effect

146. The provisions of CPLR 1012(a)(2) allow intervention as of right where a non-party would be "bound by the judgement" in the underlying case, and the non-party's interests are not otherwise adequately protected.

147. It has been held by the Court of Appeals that being "bound by the judgement" (CPLR §1012(a)(2)) is equivalent to a *res judicata* effect of the case:

"[W]hether movant will be bound by the judgment within the meaning of that subdivision is determined by its res judicata effect"

Vantage Petroleum v. Board of Assessment Review of the Town of Babylon, 61 N.Y.2d 695 (1984) at 698 (where a school district was denied intervention in a tax certiorari case because one year's tax assessment was held not to be res judicata for the future, and the school district was held ineligible to participate as it was indemnified from liability for tax refunds)

148. Vantage, relied on the heavily-cited case Matter of Unitarian Universalist Church v Shorten (64 Misc 2d 851, 854, Supreme Court, Nassau County, 1970, Meyer, J. vacated on other grounds 64 Misc 2d 1027), which found that neighbors of a proposed nursery school

would be bound by a *res judicata* effect from the outcome of a case challenging a zoning ruling, and hence could intervene if they could also show standing:

> "...[R]es judicata effect will be given to a judgment against not only the parties to the judgment but their privies as well and an adjoining property owner is privy with and represented by the Board of Zoning Appeals in a zoning proceeding".
>
> Matter of Unitarian, *id.*, (internal quotations and citations omitted)

149. Movant does not argue that she "is privy" with the Petitioners (Matter of Unitarian, *id.*), but rather that is it is clear that the determination of the present Article 78 special proceeding with respect to the Project will unquestionably establish *res judicata* of the issues raised in it for Movant and any other non-party.

150. Because of the *res judicata* effect of the Article 78 special proceeding on Movant, she is "bound by the judgement" of the trial Court and this has the right to intervene under CPLR § 1012(a)(2).

151. Movant also asserts the right to intervene as an "interested person" under CPLR §7802 (d), for largely the same reasons.

Intervention By Movant Is Permitted Under CPLR §1013 As There Will Be No 'Prejudice' Or Undue Delay

152. Intervention is permitted by the Court's discretion under CPLR §1013 where there exists a common question of law or fact, subject to the restriction that the discretionary intervention does not unduly delay the action or prejudice the parties:

> "CPLR 1013 provides that upon timely motion, a court may, in its discretion, permit intervention when, inter alia, the person's claim or defense and the main action have a common question of law or fact, provided the intervention does not unduly delay determination of the action or prejudice the rights of any party."
>
> Yuppie Puppy Pet Products v. Street Smart Realty, 77 AD 3d 197 (First Dep't,

2010) at 200-201 (where a mortgage holder was permitted to intervene to in a real estate dispute based on its interests at stake and its actions were found scrupulously timely and not prejudicial)

153. The facts of Movant's injury and interest are all but indistinguishable from those of the existing Petitioners.

154. Furthermore, the issues of law raised by Movant are identical to those raised by the Petitioners, all being related to the specific violations by the Respondent Town of the provisions of SEQRA in the environmental review od the Project.

155. The question of "prejudice" and "delay" should not preclude Movant's intervention under CPLR §1013 for the following reasons:

156. There is no prejudice caused to either Respondents or Petitioners by Movant's intervention for the purpose of appealing, as no new issues are raised, and no additional liability is attached by such the appeal.

157. An intervention and appeal in the instant action will unavoidably prolong its ultimate resolution, but it will not "unduly delay" it (Yuppy Puppy, *id.*) in the sense the courts have established.

158. The courts have interpreted the absence of 'undue delay' as satisfied, for example, by the preclusion of additional discovery:

> "We reject the contention of the Todoro defendants that HealthNow's motion was untimely and that they are unduly prejudiced by the delay. Although HealthNow did not seek to intervene until over four years from the time that it became aware of plaintiff's potential malpractice claims, we conclude that the court neither abused nor improvidently exercised its discretion in granting HealthNow's motion where, as here, the Todoro defendants will suffer no prejudice from the delay.... HealthNow demands no additional discovery, and the Todoro defendants have already conducted discovery on the various medical expenses paid on behalf of decedent."
>
> Poblocki v. Todoro, 2008 NY Slip Op 7384 (Fourth Dep't, 2008) (emphasis added, internal quotations and citations omitted)(where a plaintiff's insurer was

permitted to intervene in a medical malpractice case)

159. Similarly, intervention prior to a note of issue but after several years pendency of a matter was held to be not an undue delay provided the intervenor stipulated it would not seek to engage in discovery:

> "Although Cambridge did not seek leave to intervene until more than four years after the commencement of this action, intervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties. Here, the motion for leave to intervene was made before a note of issue was filed in this action, and Cambridge indicated its willingness to obviate delay and prejudice to the existing parties by stipulating that it will conduct no additional discovery in this action. Under these circumstances, Cambridge should have been granted leave to intervene on the condition that it so stipulated."
>
> Halstead v. Dolphy, 70 AD 3d 639 (Second Dep't, 2010) (internal quotations and citations omitted) at 640 (where a mortgage holder was permitted to intervene is a matter involving real property despite a length period of time having elapsed since the matter was commenced)

160. In both instances cited, the addition of a new party could certainly be expected to occasion greater time at trial, additional pleadings, and other natural and customary increases in the time and effort needed to resolve the matters. But those elements were not held to create undue delay or prejudice.

161. Only a repetition and/or expansion of discovery would constitute such an undue delay, both courts held.

162. In the present matter, the case is complete at the trial court level, to the point of having reached the trial Court's judgement, so there is no such risk of prolonging the process of reaching a decision, unless the judgement is reversed on an appeal sought by the intervenor.

163. Should the matter be remitted by the appeals process due to an erroneous judgement, that could hardly be considered a "delay" but rather the correct operation of the judicial process.

164. The exercise of the intervenor's right in taking an appeal -- if permitted -- can similarly not be called a delay but rather a proper functioning of jurisprudence.

165. Thus Movant merits leave to intervene under the provisions of CPLR §1013, because her claims raise identical questions of fact and law as the original case, and because there will be no undue delay or prejudice to the parties from her intervention for the purpose of taking an appeal at this time.

The Claims Of Movant Are Timely Under The Relation-Back Doctrine, CPLR 203(f)

166. Where the intervention of a party will occur after the statute of limitations for filing such an action has expired, the party may (and must) invoke the "relation-back rule", CPLR 203 (f), as noted in Greater New York Health Care Facilities, *supra*., at 719-20.

167. That rule is available to one so situated as Movant because the relevant standard for the rule is whether the adverse parties will by such an amendment of pleadings be "prejudiced", or will incur greater "liability". It has also been held that "notice" is a central issue in the Court's determination as to whether invoking the relation back rule will unfairly disadvantage any party.

168. Thus the Second Department found that adding similarly situated Petitioners was permissible:

> "Adding additional petitioners would not have resulted in surprise or prejudice to the respondents, who had prior knowledge of the claims and an opportunity to prepare a proper defense. Moreover, the cross motion, among other things, for leave to amend the petition was not barred by the applicable statute of limitations. The amendment relates back to the original petition, since the substance of the claims are virtually identical, the relief sought is essentially the same, and the new petitioners, like the original petitioners, are residents of the respondent Town of Shelter Island (see CPLR 203 [f]; Fulgum v Town of Cortlandt Manor, 19 AD3d at 444; Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 458 [1988]; see also

Bellini v Gersalle Realty Corp., 120 AD2d 345, 347 [1986])."

> Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909 (emphasis added) (where in a matter involving permission to add tenants to a facility, the Court found that the matter was properly dismissed because neither the original petitioners nor the proposed new petitioners had standing, although the Court agreed that the new petitioners could otherwise have been added, were they found to have standing)

169. That Court's finding that "the substance of the claims are virtually identical, the relief sought is essentially the same, and the new petitioners, like the original petitioners, are residents of the respondent Town" *id.* (emphasis added) , accurately describes Movant as well.

170. The circumstances here are just as they were in Shelter Island Association, *id.*: (1) Movant's claims are identical to the original ones -- that the SEQRA review was fatally flawed; (2) the relief sought is as in the original Petition -- nullification of the Findings Statement and the zoning changes; and (3) the "new" petitioner, is like the original ones, a resident of precisely the same street, Round Swamp Road, along the same development strip, a mere three-quarters-mile distant in an indistinguishable plot of land and home.

171. The Court of Appeals held that the issue for allowing relation-back was lack of "prejudice" from the new party:

> "...[W]here the proposed intervenor's claim would be barred by the Statute of Limitations, the question arises whether its claim may properly be related back to the filing date of the petition.
> .....
> We conclude that a party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also, the proposed intervenor and the original petitioner must be so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent."

Greater New York Health Care Facilities, *id.* at 720-21 (emphasis added)

172. As noted *supra,* Movant meets each of the tests established by the the Court of Appeals such that there is no "prejudice" and there was adequate "notice" to Respondents: the "transaction" at issue is the SEQRA review and zoning changes predicated thereon, as well as the Decision and Order of the trial Court deciding the Petition; the Movant is "closely related" to the original Petitioners because of she resides on the same street abutting the same portion of the development; and she has resided there for a comparable period of time in decades; and she has, like the Petitioners, regularly taken the opportunity to use the publicly accessible for those decades of residence. By the the Court of Appeals standards (Greater New York Health Care Facilities, *id.*,) as by those of Supreme Court (Matter of Shelter Island Association, *id.*) , the present case is almost a textbook example of where the relation-back rule was intended apply.

173. In Greater New York Health Care Facilities, the proposed intervenors were found not to be eligible for "relation back" because as each hospital had a different 'reimbursement rate' thus: "Permitting intervention in these circumstances would expose respondents to additional liability from entirely separate claimants whose claims were otherwise time barred" at (*id. ,* 721).

174. In the present matter, however, the application of the relation-back rule would have presented no such "different" liability to the Respondents because the same "transactions" are at issue, namely the SEQRA review and the zoning votes predicated on it.

175. Movant seeks only to adopt the arguments already raised in the original Petition, in her own pleading which does not go further than the original Petition in the facts or law or

remedies sought.

176. Inasmuch as the special proceeding has been heard on the merits, and the record of it is closed, the only issue is the Court's Decision and Order may be appealed for review. Thus there is no additional "liability" or "prejudice" to the Respondents from the standpoint of the relation-back rule.

177. The current holding of the appellate division suggests that even an increased "liability" is not a bar to invoking the relation-back mechanism. The First Department has held that only the "prejudice" issue (via lack of notice) is the proper inquiry for the courts, where such "prejudice" would lead to deficient opportunity to prepare defense:

> "...[I]n our view, the salient inquiry is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences... to be proved pursuant to the amended pleading' (CPLR 203 [f]).
> .....
> Defendant's exposure to greater liability does not require denial of the motion to amend (see e.g. De'Leone, 45 AD3d 254 [amendment of complaint to include derivative claim for future medical expenses permitted]; see also Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981] [regarding prejudice, 'there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position']). Here, defendant, 'from the outset of [its] involvement in the litigation, [had] sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation' (Vincent C. Alexander, 2006 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:11, 2013 Pocket Part at 69)."
>
> Giambrone v. Kings Harbor Multicare, 104 A.D.3d 546 (First Dep't, 2013) at 548 (emphasis added)(where a spouse was permitted to be added to a malpractice action via the operation of the relation-back rule based on the identity of transactions at issue and the defendant's general knowledge of the spouse's existence, which would have given notice of the claims to be made)

178. Furthermore, where the Second Department had earlier held the opposite -- that a spouse's derivative claim was indeed time-barred, and could not invoke the relation-back rule

-- it did so on the basis that the claim for spousal 'loss of services' was a different and unexpected claim, of which the defendant would have had no notice, in contrast to the present matter where there is no such a 'new claim'.

179. Thus the Second Department held:

> "...[T]he prior pleadings gave the defendants no notice that a claim for loss of services would be asserted. In light of the foregoing, the husband's action cannot be construed as relating back to the time when the action was originally commenced...."
>
> Clausell v. Ullman, 141 AD 2d 690 (Second Dep't, 1988), at 690-91 (emphasis added) (where a spouse was denied use of the relation-back rule to assert loss of marital services in a malpractice case because the defendants had no prior notice of the unexpected claim) acc'd Lucido v. Vitolo, 251 AD 2d 383 (Second Dep't, 1998)(where the application to amend a complaint for loss of service in a malpractice case was denied as time-barred because the lack of notice of the claim meant the relation-back rule did not apply)

180. Unlike the 'new' claim for loss of marital services frowned on in Clausell -- though permitted in Giambrone -- in the present case the "claim" is for violation of SEQRA, and that claim is no surprise to anyone.

181. Thus there is no prejudice to be found by applying the relation-back rule, whether it is governed by the more-liberal test stated in 2013 by the First Department, or by the stricter test stated by the Second Department in 1988.

182. The additional 'burden' on the parties from an appeal is not the type of "prejudice" the restrictions on the relation-back rule are designed to prevent. Rather the issue militating against the use of "relation-back" has been squarely held to be "prejudice", of which the present matter poses none.

183. Nothing evident in the case presented by the Respondents was predicated on the forbearance of the Petitioners to take an appeal. In fact the settlement was not even concluded

until almost a month after the issuance of the Decision and Order.

184. Thus, the Respondents are not prejudiced by any difference between the parties, and the relation back should be sustained.

The Appeal Would Be Meritorious

185. An appeal of the Decision and Order would have a high degree of merit, and thus its absence constitutes an unexpected failure of the Petitioners to adequately represent Movant in a matter in which she has real and substantial interest, and will be bound by its result as *res judicata.*

186. The grounds cited in the Decision and Order for denying relief in this action had been fully substantiated in fact and in law in the extensive filings of the case.

187. Among other issues, (1) the legal claim that absence (arguably so) of testimony by the Plaintiffs at the hearing stage of the SEQRA review denied them "standing" was an issue firmly refuted in the Reply and its Memorandum of Law.

188. Furthermore (2) strong evidence was presented to the Court that the SEQRA review was "segmented" and decisions were concretely taken outside the scope of the review (e.g. the planned athletic fields in the current fifteen (15) acre forested area).

189. Furthermore, the Court failed to hold a "trial of fact" that Petitioners requested[28] on the issue of "segmentation" if the Court found Petitioners' allegations in any way questionable, notwithstanding *prima facie* evidence in support thereof.

[28]A trial of fact, as provided for by Civil Procedure Law and Rules ("CPLR") 7804(h), was requested in the Petitioners' Reply (¶22, 188, 344, 373, 395) and in their Memorandum of Law in Support of the Reply (p. 33), with respect to well-documented plans -- and actual provisions of law -- by the Respondent Town of Oyster Bay to level a 15-acre area of woodland on the Project Site that was simultaneously claimed to be preserved and counted as "woods" in the environmental review, but also described as leveled for athletic fields and dedicated a s such in a "covenant" attached to the Town zoning resolution for the project. .

190. Finally (3) it was clear on the record that the purported "visual buffer" was not analyzed in any reliable way and was subject to substantial modification (e.g. the "fitness trail") that was in no way analyzed for its impact on the buffer.

191. The Petitioners' apparent failure to pursue any of the post-decision legal avenues open to them effectively abandoned Movant's meritorious legal defense of her interests thus providing grounds for intervention as provided by CPLR §§1012(a)(2), 1013, and 7802(d).

192. Movant has already filed a Notice of Appeal, and will re-file if necessary once granted Intervenor status.

The Notice Of Appeal Filed Prior To The Grant Of Intervenor Status Should Be Sustained By the Court

193. Notwithstanding that Movant had not yet been granted "intervenor" status, Movant on January 15, 2016, filed with the Nassau County Clerk a Notice of Appeal (Exhibit 7) for the Decision and Order entered by the trial Court December 16, 2015, in order to assure that timely filing no more than thirty days from the earliest time the Decision and Order may have been served.

194. The Court of Appeals has endorsed the *nunc pro tunc* granting of intervenor status to validate such a Notice of Appeal when the statute of limitations necessitates it:

> "Wallenstein cannot be faulted for not theretofore having sought intervention and for serving a Notice of Appeal to the Appellate Division — time for which was limited and if not complied with would have precluded any procurement of appellate review of Special Term's dismissal — then moving in the Appellate Division for permission to intervene...."
>
> Auerbach, *id.* , at 628-29 (emphasis added)

195. In the circumstances of Auerbach, the Court found that the appellate court had the

authority retroactively to grant the intervenor such standing as had been needed to have filed the Notice of Appeal -- which Notice of Appeal would otherwise have needed to predate the appellate action, in order for that court to have "jurisdiction".

196. The Court of Appeals ruled that the appellate court possessed inherent jurisdiction based on the definition of who may appeal as found in CPLR 5511 (Auerbach, *id. ,* at 629). The Court ruled:

> "...[W]e reject Andersen's contention that the Appellate Division lacked power to permit intervention nunc pro tunc because that court lacked jurisdiction of the case by reason of Wallenstein's lack of standing to serve and file a valid, timely Notice of Appeal. Because Wallenstein came within the ambit of a 'party aggrieved' as that term is employed in CPLR 5511, no jurisdictional defect existed."
>
> Auerbach, *id.* , at 629

197. Movant should be accorded the same grant of intervenor status, by the same *nunc pro tunc* technique, because Movant is "aggrieved" for the following reasons:

(1) Movant's original motion to intervene should have been granted by the trial Court, thus making her an "aggrieved" party to the matter per CPLR 5511;

(2) Inasmuch as Movant enjoys 'standing' to assert legal protections for the Project site, she possesses a species of property rights and direct legal interest that have been held to constitute aggrievement: see, e.g. Triangle Pacific Building Products v. National Bank of North America, 62 A.D.2d 1017 (Second Dep't, 1978) at 1017, (where a non-party's interest in a joint bank-account was held to give her the right to intervene in an appeal of an order affecting that account);

(3) This Court has held that having the right to Intervene, as Movant demonstrated she does, *supra*, is equivalent to being "aggrieved" for the purpose of CPLR Section 5511:

"Since Nichols could not intervene in the action, it follows that he may not claim to be aggrieved, within the meaning of CPLR 5511, by determinations made in the action...."

Spota, *id.* , at 787

198. Inasmuch as the Court held that "it follows" that not having the right to intervene disqualifies one from being "aggrieved", it should also "follow" that the contrary is also true.

199. In any event the Courts have expressed an intent to allow a common-sense flexibility to apply as to who may be "aggrieved." This Court held in Auerbach:

"Appearances aside, the statute has not been so narrowly construed and we think the unusual facts in this case furnish grounds for not putting a cramped construction on its language. We have granted appellant status to nonparties who were adversely affected by a judgment (People v Dobbs Ferry Med. Pavillion, 40 AD2d 324, 325, affd 33 NY2d 584). The true question is whether the nonparty may be bound by the judgment if he does not take affirmative action in the litigation to protect his rights."

Auerbach, *id. ,* at 104

200. Even the question thus framed as who may be "bound by a judgment" (Auerbach, *id.*) has been held a flexible one in its answer:

"CPLR 1012 (subd [a], par 2) provides for intervention by a third party as of right when the representation of that person's interest by the parties is inadequate and that person is or may be bound by the judgment. CPLR 1013 provides that, within the court's discretion, any person may be permitted to intervene when his claim or defense has a common question of law or fact. As a practical matter, however, under liberal rules of construction the distinctions between the two forms of intervention are not important (2 Weinstein-Korn-Miller, NY Civ Prac, par 1012.05). Thus, it has been said that where the intervenor has a real and substantial interest in the outcome of the proceeding, intervention should be allowed.".

Plantech Hous. Inc. v. Conlan, 74 AD 2d 920 (Second Dep't, 1980) at 920-21 (emphasis added) (where a non-party was permitted to intervene in the interest of justice because this substantial interests were affected -- in the case by potential liability to refund tax money), acc'd Spota, *id.*

201. The terms "aggrieved" (Auerbach, *id.*), "bound by the judgement" (Plantech, *id.* , Spota,

id.), etc., have been held to be terms with flexibility meant to address the issues of justice in the particular case.

202. In Auerbach that issue of justice was framed in a manner equally applicable in the present case, thus:

> "...[I]ntervention may be allowed in the appellate court in a proper case (7 Weinstein-Korn-Miller, NY Civ Prac, par 5511.04 [emphasis supplied]). It cannot be disputed that, absent Wallenstein, his interests would not have been adequately represented in the Appellate Division; Auerbach's decision not to appeal would have meant that such interests would not have been represented at all!"
> Auerbach, *id.* , at 629

203. In the present case, justice clearly demands appellate review based on the unjustified denial of standing to the Petitioners, and the facially inadequate determinations of other questions regarding the quality of the SEQRA Review.

204. Movant has made out a compelling case for environmental standing, as well as manifold clear interests that will be affected by the matter.

205. The present conundrum flows from the trial Court's denial in error of intervenor status, and without immediate relief, the opportunity to file a timely Notice of Appeal may, arguably, disappear.

206. The circumstances are compelling and legally justifiable for Movant to be granted Intervenor status *nunc pro tunc* with the Notice of Appeal filed January 15, 2016.

207. Alternately, the circumstances invite this Court to grant Intervenor status along with specifying a thirty-day period to file the Notice of Appeal from the time the new "party" is served with the Decision and Order[29],or from the time of the order.

[29]See, e.g., the reasoning of the Court in Unitarian Universalist v. Shorten, 64 Misc. 2d 851 (Supreme Court, Nassau County, 1970, Meyer, J.) "What the time for appeal from the October 9, 1970 judgment is if movants, or either of them, prove aggrievement is not expressly provided for by the CPLR. Logically the time for appeal should not begin to run until their intervention motion has been granted and perhaps not until they have been served, after the granting of that motion, with a copy of the judgment."

Upon Granting Intervenor Status This Court Should Provide A Period Of Time To File A Notice Of Appeal

208. In the event this Court does not choose to validate the existing notice of appeal *nunc pro tunc,* the courts have also established that the statutory period to file a notice of appeal may be re-started for a new intervenor.

209. Thus the Third Department decreed in Matter of Romeo, *id.*, that a new thirty (30) day period for an intervenor timely to initiate its appeal:

> "...[W]e find that the district should have been permitted to intervene at the time of its motion for the purpose of taking an appeal.
> ....
> Accordingly, the district may intervene as an appellant on the appeal from the January 6, 2006 judgment provided that it files a notice of appeal within 30 days following entry of this Court's order."
>
> Matter of Romeo, *id.,* at 918 (emphasis added, internal quotations and citations omitted)

210. Such a procedure as followed by the Third Department is consistent with the plan raised by Judge Bernard S. Meyer in a similar circumstance, Footnote 30.

211. The Second Department endorsed the findings of Matter of Romeo, although it did not have reason to discuss or apply the thirty-day extension for the notice of appeal, in Halstead, *id.*

Conclusion

212. This is a case of a massive development project that will obliterate large portions of a 143-acre largely-natural space, in an otherwise intensively developed area, which project has evaded effective scrutiny since it was initially presented to the local authorities for environmental review.

213. The history of this Project has been a process of disillusioning and wearing down the public who disagreed with the premise of continued development notwithstanding the costs to the environmental and the local quality-of-life. The original Petitioners were similarly victims.

214. At this juncture the case cries out for appellate review.

215. Movant has diligently worked to quickly seek relief by order to show cause, and now resorts to notice of motion to assure a full hearing of the complex matters raised.

216. Movant understands the imperative of "finality" but at the same time relies on clearly sated case-law that provides in cases like this a means to prevent serious injustice to a blameless party.

217. The case-law for intervention is complex, and appears to endorse intervention in circumstances such has this, where Movant has been diligent and the underlying case presents troubling questions that would remain unexamined but for her efforts.

218. Movant has shown that the facts are that her application to intervene before the trial Court predated the conclusion of the purported settlement and discontinuance.

219. Furthermore the law establishes that such action in any event do not create a bar to timely intervention by valid outside parties, such as Movant is, assertions of the Respondents notwithstanding.

220. Movant further demonstrates that she strongly merits 'standing to sue' in this matter based on her over thirty (30) year residence directly across from the Project site, and her routine and decades-long use and enjoyment of the natural resources on the site.

221. Because Movant is almost indistinguishable from the original Petitioners in any material sense related to her standing, there is no additional "liability" or "prejudice" or unexpected

claim that Respondents would face were the relation-back doctrine applied to her claims on intervention.

222. Further Movant's "aggrievement" or equivalent interest in the underlying matter render her appeal inherently jurisdictional for the appellate court, thus allowing it to grant her intervenor status *nunc pro tunc* to validate the Notice of Appeal filed earlier, on January 15, 2016.

223. Movant clearly demonstrates that her 'delay' in intervening was predicated on the assumption that the original Petitioners were proceeding diligently and would carry to case to its conclusion (Exhibit 4, Affidavit). Their failure to appeal created, in conformity with the holding in Auerbach, *id.*, an excusable delay in joining the lawsuit.

224. This Court may grant intervenor status *nunc pro tunc* to validate the already-filed notice of appeal, or grant intervenor status and decree that the Notice of Appeal must be filed within thirty days of its order, as done by the Third Department in Matter of Romeo, *id.*

225. Granting Movant intervenor-status and taking this appeal is justified based on the law and the facts presented, and furthermore based on the public-policy imperative which under these circumstances should be to err on the side of protecting the many public interests at stake.

226. The relief sought herein has been sought by Movant from Supreme Court on January 13, 2016 and from this Court on January 15, 2016, by orders to show cause that were in both instances unsigned without explanation and without prejudice.

227. The Decision and Order of December 15, 2015, and notice of appeal are appended as Exhibit 6.

228. WHEREFORE, Movant seeks an Order of this Court (i) granting leave to intervene to

take an appeal on the Court's own authority; (ii) granting such leave to intervene *nunc pro tunc* with the Notice of Appeal filed January 15, 2016, and (iii) granting such other and further relief as to this Court seems just and proper.

Dated: New York, N.Y.
February 19, 2016

SIGNED .....

Exhibits

Exhibit 1 Satellite View of Site
Exhibit 2 Site Plan
Exhibit 3 Proposed Pleading
Exhibit 4 Affidavit of REDACTED
Exhibit 5 Satellite Measurement to Home
Exhibit 6 Decision and Order of December 15, 2015 and notice of appeal