SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Richard A. Brummel,
For Judgments and Preliminary Injunctions pursuant to
Article 78 and Section 3001 of the Civil Practice Law and
Rules,

Petitioner,

-against-

Village of East Hills, N.Y. for the East Hills Architectural
Review Board, and Bradley Marks AND/OR owner/
Developer of 90 Fir Drive, East Hills, N.Y.

Respondents.

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Index No. 012313/13

MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION

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Respondent the Incorporated Village of East Hills (the "VEH") respectfully submits this Memorandum of Law in opposition to the Petition, dated October 9, 2013 by Richard A. Brummel ("Brummel").

PRELIMINARY STATEMENT

This is Brummel's third Article 78 special proceeding against the VEH within nineteen months. In the first, upon Brummel's "emergency application" this Court issued an Order to Show Cause on Sunday, April 8, 2012,[1] which was Easter Sunday, but he then almost immediately renounced and abandoned that litigation (Nassau County Index Number 12-004471) ("*Brummel I*").[2] In Brummel's Second Special Proceeding (Nassau County Index Number 3109/13), both this Court (Parga, J.) and the Appellate Division, Second Department (Hines-Radix, J.), rejected Brummel's request for a temporary restraining order ("*Brummel II*").[3] Subsequently, this Court (Parga, J.) dismissed *Brummel II* in its entirety holding that, among other things, Brummel lacked standing.[4]

This special proceeding too is baseless and was frivolously instituted by Brummel. His submissions to this Court, which resulted in an *ex parte* temporary stay, failed to inform the Court that in *Brummel II:* (a) on March 18 and 22, 2013, this Court and the Second Department, respectively, refused Brummel's requests to issue stays to enjoin tree removal; and (b) on May 24, 2013, this Court determined that Brummel does not have standing to challenge Architectural Review Board (the "ARB") decisions concerning other people's homes and tree removal from their respective properties.

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[1] *See,* Affirmation of James F.X. Hiler, dated October 21, 2013, at Exhibit 1, Order to Show Cause in Special Proceeding, Nassau County, Index Number 12-004471, without supporting papers (hereafter, "Hiler Aff. at Ex. 1").
[2] *See,* Hiler Aff. at Exhibit 2, Notice of Entry, Order, and transcript in *Brummel I,* Index Number 12-004471.
[3] *See,* Hiler Aff. at Exhibit 3, a March 18, 2013 Order to Show Cause signed by Justice Anthony Parga, striking Brummel's requested temporary stay, and Hiler Aff. at Exhibit 4, Order to Show Cause issued by the Appellate Division, Second Department, dated March 22, 2013, also striking Brummel's stay request.
[4] *See,* Hiler Aff. at Exhibit 5, this Court's May 22, 2013 Short Form Order.

Nevertheless, for the third time, Brummel challenges a decision by the VEH's ARB about a residential property owned by somebody else in the VEH -- but not any property owned by Brummel and not involving any property that he rents, maintains, occupies, or otherwise has any lawful interest in. As before, Brummel does not have standing, and there is, again, no basis for his attack upon the ARB's decision that he now puts at issue (the "Marks Decision").[5] He is not entitled to interfere with other people's homes and property, especially by asking this Court to become involved.

The Petition should be dismissed with prejudice because:

- in *Brummel II*, this Court held that Brummel lacks standing to challenge ARB decisions regarding eight other people's residential properties and Brummel is now collaterally estopped from attempting this challenge to one more residential property owned by Bradley Marks ("Marks");

- Brummel lacks standing to challenge the Marks Decision[6] because he is not within a zone of interest and he has not suffered some direct harm, *i.e.,* an alleged injury that is in some way different from the general public;

- The Marks Decision is dated August 22, 2013, was filed by the Village Clerk on August 23, 2013, and this special proceeding, initiated on October 9, 2013, is untimely. Village Law §7-712-c(1); *Platzman v. Munno*, 282 A.D.2d 539, 722 N.Y.S.2d 886 (2nd Dep't 2001)

- the Marks Decision is entitled to great deference and, contrary to Brummel's contentions, it has a rational basis, is not arbitrary and capricious, and is supported by substantial evidence;

- Brummel's Open Meetings Law, N.Y. Pub. Off. Law §§100 *et seq.* (the "OML") accusation is wrong, unjustified, and he has personal knowledge that it is baseless;

- Brummel's Petition makes abundantly clear that he attended the August 5, 2013 public meeting of the ARB where the Marks' application was approved in public and there has not been a "secret meeting";

- Brummel cannot demonstrate any modicum of a likelihood of success on the merits, prove that the balance of equities favors him, or show this Court any threat of immediate harm to him or others;

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[5] Hiler Aff. at Exhibit 6, the Marks Decision.
[6] *Id.*

- Brummel has stopped the construction of a family's home before the onset of winter and obtained an *ex parte* temporary stay without posting a bond; and

- Brummel has repeatedly and continues to cause the VEH to incur substantial costs while the VEH is subject to a state mandated 2% budget cap.

The Petition should be dismissed with prejudice. To remedy the financial consequences Brummel causes, the Court should issue sanctions against him for costs and to reimburse the VEH for its attorneys' fees and enjoin him from initiating special proceedings about other people's homes.

STATEMENT OF FACTS

A. Pertinent VEH Ordinances and The ARB

In the VEH, when a property owner wishes to construct a new home, as Marks here, the ARB reviews and considers plans submitted to the VEH Building Department. The ARB's primary focus is to consider property owners' suggested changes to building exteriors and major alterations to a building or construction of new homes. The ARB does not have the power to grant variances. That is the purview of the Zoning Board of Appeals, a separate board. The VEH has a Planning Board too. Those boards are governed by New York statutes inapplicable to the ARB. The ARB addresses design, aesthetics, and, in appropriate and feasible circumstances, preserves trees.

As stated in the VEH's Code, the ARB's legislative mandate is to promote the following objectives:

> 1. To encourage beneficent building design and appropriate appearances, and to relate such design and appearances to the sites and surroundings of buildings;
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> 2. Preserve the prevailing aesthetic character of the neighborhood and its environs, and to enhance the character of the Village by ensuring compatible buildings;
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> 3. Promote and encourage the finest quality of architectural design and utilization of land when new buildings and new

exteriors are constructed or erected, reconstructed, refurbished and altered;

4. Assure the design and location of any proposed building, or the addition, alteration or reconstruction of any existing building, is in harmony with the existing topography of its site and the existing building as well as the neighboring properties;

5. Discourage and prevent any design that would adversely affect or cause the diminution in value of neighboring property, whether improved or unimproved; and

6. Prevent design and appearances which are unnecessarily offensive to visual sensibilities, which impair the use, value, aesthetics or desirability of neighboring properties and/or the general welfare of the community at large.

VEH Code §271-186.

In addition, the VEH Code states that:

> **§ 271-188. Architectural Review Board composition and members.**
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> * * *
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> E. The Architectural Review Board shall have the following enumerated powers, in addition to such other powers as are set forth in § 271-185 et seq.:
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> * * *
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> (4) To either grant, grant with modifications, or deny permission to build, improve, construct or alter any structure which because of its architectural elements, colors, design, building materials, height, bulk, lack of setbacks, or insufficient landscaping, will be excessively similar, dissimilar or inappropriate in its design or in its exterior appearance in relation to the prevailing appearance of buildings in the vicinity thereof or adverse to the desirability of the immediate area or of neighboring areas for residential and commercial purposes.

Further, the VEH Tree Preservation and Protection Ordinance (the "Tree Ordinance") states:

> **§ 186-1 Legislative Intent**
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> A. The purpose of this chapter is to promote and protect the public health, safety and general welfare by providing for the *regulation of*

the planting, maintenance and *removal of trees* within the Incorporated Village of East Hills.

B. . . . the intent of this chapter is to *prevent the indiscriminate destruction or removal of trees* within the boundaries of the Village and to ensure the relocation or replacement of trees which may be removed or destroyed.

C. . . . the ARB, Tree Committee Chair or Tree Warden *may* require the applicant to submit the following:

(1) A tree preservation plan specifying the methods to be used to preserve all remaining trees and their root systems and the means of providing water and nutrients to their root systems; and/or

(2) A topographical survey of the site if development or construction will result in change in elevation of more than three feet or if the parcel of land is more than ½ acre in area.

§ 186.6. Replacement of removed trees required; exceptions.

A. Whenever a tree is removed, a replacement tree shall be planted by the applicant . . . as determined by the Tree Warden or by the ARB, as the case may be . . .

B. The Tree Warden or *the ARB shall have the right to waive all requirements where it is determined that site conditions are not appropriate for the replacement of removed trees*.

§ 186-13. Waiver by ARB.

The ARB may waive any of the requirements, standards, procedures or mandates contained in this Chapter 186 of the Code of the Incorporated Village of East Hills. The waiver may be based on any action taken or to be taken which is in the interest of justice and fairness, whether for a hardship or otherwise, which the ARB deems fair, appropriate and necessary under the circumstances.

(Emphasis added.)

The VEH's Tree Ordinance is not a ban on tree removal. VEH Code § 186-1. In many, if not most, municipalities, there is no oversight or limitations regarding tree removal, no matter how many, to allow property owners the right to provide open space on realty that they own and use with

their families. In the VEH, trees may be removed for various reasons such as upon the ARB's authorization, in an emergency, and whenever a permit is secured. As stated in the Tree Ordinance, the ARB "may waive any of the requirements, standards, procedures or mandates [in the Tree Ordinance]." VEH Code §186-13. Additional provisions of the Tree Ordinance pertinent to this special proceeding and the ARB are provided in the annexed Appendix A. The entire VEH Code ("VEH Code") is available at http://www.ecode360.com/EA0847.

B. Brummel

Brummel frequently and inappropriately criticizes the VEH and its residents harshly. In paragraph 3 of Brummel's Petition, he boasts of his website blog that includes this description of the VEH:

> East Hills NY is an affluent "village" of about 7,000 residents on Long Island about 40 miles from Manhattan. Almost all of its residents are white, live in homes values [sic] well over $250,000, and drive imported autos and SUVs costing well over $30,000. (All numerical and dollar figures above are ballpark, and meant to be conservative).
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> * * *
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> There is a culture of lavishness due to high disposable income from jobs in the professions – often law, medicine, and finance – around New York City. However this is not an elite suburb like Greenwich or Princeton or even Great Neck, and lacks any Blue-Blood or Ivy League type cachet. In fact it shares more of a sharp-elbowed ethos with more working-class areas in New York City and Suffolk County.
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> * * *
>
> As we discovered in attempting to fight the expansion of a local firehouse – see the links – the lack of scrutiny and participation of residents leads to very flawed processes and policies.[7]

On Brummel's blog, he also has published the following about *Brummel II*:

> On Monday, March 18th, a State Supreme Court judge hearing the case, Justice Anthony L. Parga, refused to grant preliminary orders to

[7] *See,* Hiler Aff. at Exhibit 7 and 8, "home page" of Brummel's blog and excerpt of page from Brummel's blog.

> force East Hills to halt the issuance of permits and to stop work on the applications pending the hearing of the lawsuit.
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> * * *
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> On Friday, March 22, Mr. Brummel appealed Justice Parga's refusal to stop the work in East Hills in papers filed with the Appellate Division, Second Department in Brooklyn, but a judge there, Justice Sylvia O. Hinds-Radix refused to overrule Justice Parga.[8]

Although Brummel now attempts to distinguish his claims made this past spring in *Brummel II* (Petition at p. 4, ¶3), he in fact seeks the same relief again -- to nullify an ARB decision and to prevent a property owner from improving his or her land in full accord with the VEH's Zoning Code.[9]

C. The Proposed Development at 90 Fir Drive

By a June 11, 2013 "Application for Building Permit," Marks, as owner, and his agent, New York State licensed architect Michael Jay Wallin, requested a permit to demolish an existing home and construct a new two story wood frame residence at 90 Fir Drive to accommodate his family's needs.[10] The estimated construction cost of the residence is $900,000.[11] Again, no variance is required. As the submitted plans show, the proposed construction project included removal of specific trees in the footprint of the construction of the proposed house and driveway and removal of specified trees for backyard recreational space and supplemental plantings.[12] The list of building materials includes grey cedar wall shingles, Boulder Creek stone veneer, and twenty year asphalt roof shingles.[13] The plans submitted included detailed architectural drawings,[14] a landscape plan outlining proposed tree removals and substantial plantings,[15] and a pictorial rendering of the

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[8] *See,* Hiler Aff. at Exhibit 9.
[9] *See,* Hiler Aff. at Exhibits 3, 4, and 5.
[10] See, Hiler Aff. at Exhibit 10, completed Application for Building Permit.
[11] *Id.*
[12] *See,* Hiler Aff. at Exhibits 11, 12, and 13.
[13] *See,* Hiler Aff. at Exhibit 14.
[14] *See,* Hiler Aff. at Exhibit 13.
[15] *See,* Hiler Aff. at Exhibit 12.

envisioned new home.[16] In addition, Messrs. Marks and Wallin submitted a completed Architectural Review Board application form.[17] Mr. Wallin attested as to the accuracy of the submitted plans and that the plans complied with VEH laws.[18]

D. The August 5, 2013 ARB Meeting and Decision at Issue Concerning 90 Fir Drive

For the August 5, 2013 ARB public meeting, by a July 25, 2013 "Notice of Meeting" ("Notice") published in the Roslyn News, the VEH publicized the public meeting to be held.[19] The Notice specifically listed the 90 Fir Drive application and eight other applications on the agenda for that public meeting.[20] In addition, on July 25, 2013, the VEH posted the Notice on the VEH website[21] and at six prominent locations in the VEH where legal notices have been posted for many years including at the main entrance to the office of the VEH's Village Clerk.[22] The VEH also mailed notice letters to residents at seven nearby homes including Elaine Berger ("Berger"), whose October 8, 2013 affidavit Brummel submits.[23]

The August 5, 2013 meeting began as scheduled at 8:00 p.m. with nine applications on the agenda.[24] For 90 Fir Drive, the Marks application, there was a significant presentation by Architect Wallin, Marks spoke too, and several members of the public spoke offering a variety of views.[25]

ARB members offered comments and interposed questions. Topics addressed included the proposed home's architectural design similarity and differences to other homes in the community,

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[16] *See,* Hiler Aff. at Exhibit 15.
[17] *See,* Hiler Aff. at Exhibit 16.
[18] *Id.*
[19] *See,* Hiler Aff. at Exhibit 17.
[20] *Id.*
[21] *See,* Hiler Aff. at Exhibit 18, affidavit of VEH's Deputy Clerk, Nancy Futeran.
[22] *See,* Hiler Aff. at Exhibit 19.
[23] *See,* Hiler Aff. at Exhibit 20.
[24] *See,* Hiler Aff. at Exhibit 21.
[25] *See,* Hiler Aff. at Exhibits 6, 22-29.

construction materials, and trees and landscaping.[26] Members of the public also spoke. For example, both Brummel supporters, Berger and Richard Oberlander ("Oberlander"), objected to the Marks' application.[27] Berger objected to the new home being the same color as her home[28] and raised concerns about tree removal.[29] Brummel and Oberlander submitted written and oral objections. On the other hand, and even as the Petition acknowledges (*see*, paragraph 27), other homeowners spoke in favor of the Marks' application, including the selection of trees to be preserved, trees to be removed, the home's design, and its differences from other homes that had been mentioned in comparison.[30]

According to the Petition, in a village of over 7,000 residents, three people opposed the Marks application. After there was no more to be said about the Marks' application, the ARB closed the record and reserved decision. Every ARB member voted in favor of that motion. This happened before the public in the Board Room.[31]

After the completion of the presentation for the last application for the August 5, 2013 public meeting, several people approached different ARB members who had remained seated at the Board's rostrum. The ARB's counsel asked everyone to step away from the ARB and explained, in a projected voice, that the ARB would be deliberating and then voting on matters that had not been decided. He explained that after the deliberations the ARB could vote to continue the deliberations on another night, grant, or deny an application.[32]

The August 5, 2013 deliberations for 90 Fir Drive took place in the very same Board Room

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*.
[32] *See,* Hiler Aff. at Exhibits 22-29.

where the application was heard. ARB members discussed the application publicly and while seated at the rostrum. The room was not cleared and no one was ever asked to leave.[33] ARB members remember clearly that people remained and observed the 90 Fir deliberations. They recall too extended discussion in front of the public. When that discussion came to an end, the ARB voted to approve the application although requiring the landscape plan to be supplemented. Of the seven ARB members that voted, three dissented.[34] The ARB's approval did not require a second public meeting or further review of anything by the ARB.

Even Brummel's Petition includes stark admissions that nothing happened in "secret" despite his speculation. (*See,* Petition at paragraph 2.) The Petition states at paragraphs 13 and 28:

> 13. . . . In fact[,] the application for 90 Fir Drive [the Marks' property] was passed by the Board contingent on the landscape plan, which was deemed incomplete [sic] at its meeting of August 5, 2013.
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> * * *
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> 28. After lengthy discussion regarding the architecture of the proposed house, the Board approved the application "subject to the landscape plan". . .

Brummel has personal knowledge, obviously, that the ARB granted the Marks application although it required a landscape plan that includes a schedule and legend. The Marks Decision is dated August 22, 2013 and was filed by the Village Clerk on August 23, 2013.

Now, on behalf of Marks, the VEH has a landscape plan with a schedule for the VEH's Building Inspector to process permits. As work progresses, the VEH's Building Department can determine conformity with Marks' plans. There is nothing to suggest or warrant another public meeting as Brummel contends that he understood.

As each of the ARB members have attested in their respective affidavits,[35] there was never

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[33] *Id.*
[34] *Id.*
[35] *See,* Hiler Aff. at Exhibits 22-28.

any secret ARB meeting to approve or vote upon the 90 Fir Drive application. Even those ARB members that dissented from the Marks Decision and criticized the application, acknowledge that the ARB observed the OML. The ARB deliberated and voted to approve the application in public.[36] In addition to Brummel's mischaracterization of the ARB's actions, he even misrepresents the intent and action taken by this Court in the October 9, 2013 Order to Show Cause. In an October 17, 2013 local media article Brummel is quoted:

> The judge acted very quickly on the emergency application I presented, so it must have clearly demonstrated to him –the second time a judge agreed – how sloppy the village is in allowing nature here to be wrecked by developers and new residents.[37]

OBJECTIONS IN POINTS OF LAW

POINT I

THIS COURT PREVIOUSLY DETERMINED THAT BRUMMEL LACKS STANDING TO CHALLENGE ARB DECISIONS REGARDING OTHER PEOPLE'S HOMES AND COLLATERAL ESTOPPEL BARS THIS PROCEEDING

The doctrine of collateral estoppel is a "flexible" principle to "avoid relitigation of a decided issue and the possibility of an inconsistent result." *Buechel v. Bain*, 97 N.Y.2d 295, 303 (N.Y. 2001). Concisely, "[c]ollateral estoppel precludes a party from litigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." *Id.* at 303-04; *Breslin Realty Dev. Corp. v. Shaw*, 72 A.D.3d 258, 263, 893 N.Y.S.2d 95 (2d Cir. 2010) ("The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding...whether or not the tribunals or causes of action are the same."). The two

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[36] Hiler Ex. 18 is the affidavit the VEH's Deputy Village Clerk. Hiler Aff. at Exhibit 29 is the Deputy Clerk's handwritten notes of the August 5, 2013 Public Meeting. *Also, see* Hiller Aff. at Exhibit 30 and 31, the VEH's file maintained for 90 Fir Drive including the audio of the presentations, questions, and public comments for each application of the August 5, 2013 hearing were recorded (*See,* Hiler Aff. at Ex.17), but not all deliberations. There is no requirement for any of the proceedings to be taped.

[37] *See*, Hiler Ex. 32, article entitled "East Hills Trees Earn Reprieve in State Court," dated October 17, 2013.

requirements for collateral estoppel are: (i) [t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and [(ii)] there must have been a full and fair opportunity to contest the decision now said to be controlling." *Buechel*, 97 N.Y.2d at 304. These elements, however, are not "rigid rules" and are "intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities." *Id.* ("In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of...fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results.").

Collateral estoppel applies when a party "demonstrate(s) that the decisive issue was necessarily decided in the prior action against a party..." *Id.* The party seeking the benefit of collateral estoppel must also establish "that the identical issue was 'material' to a prior judicial or quasi-judicial determination." *Breslin Realty Dev. Corp.*, 72 A.D.3d at 263 ("[T]he proponent of the doctrine of collateral estoppel need not demonstrate that the particular theory in support of a cause of action was actually raised and litigated in the prior action or proceeding."). The opposing party "bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." *Buechel*, 97 N.Y.2d at 304.

In *Brummell II,* this Court (Parga, J.) determined — over Brummel's most ardent objections — that Brummel lacks standing to challenge ARB decisions regarding other people's homes. Brummel had challenged eight ARB decisions for properties owned by others and he could not establish standing for any. Now, Brummel challenges yet another ARB decision about the Marks home at 90 Fir Drive. Again, he does not own or rent the property at issue or any other property in the VEH. The standing issue in *Brummel III* is identical to the standing issue "which was raised, necessarily decided and material in the first action," *i.e., Brummel II. Parker v. Blauvelt Volunteer*

Fire Co., 93 N.Y.2d 343, 349, 712 N.E.2d 647 (N.Y. 1999). Indeed, Brummel now makes the same arguments that Justice Parga properly rejected. Further, Brummel concedes that he never appealed Justice Parga's decision. Collateral estoppel is particularly applicable here. If every ARB decision requires Brummel's approval, the process will cease to function.

POINT II

BRUMMEL LACKS STANDING

A. Having Residence in a Parent's House Does Not Create Standing as to Other People's Private Homes

According to Brummel's Petition, he grew up in the VEH from 1960 to 1978,[38] returned to his mother's house in 2009, where he now resides caring for "plants and animals," and he sometimes takes walks instead of driving his car. This does not create standing to challenge ARB decisions concerning the aesthetics, the landscaping, and/or the improvement by taxpayers of their own residential properties. The pertinent law is well-established:

> To establish standing, an individual must demonstrate an injury-in-fact that falls within the zone of interests protected by the pertinent status (*see New York State Assn. of Nurse Anesthetists v Novello,* 2 NY3d 207, 211, 810 N.E.2d 405, 778 N.Y.S.2d 123 [2004]; *Matter of Colella v Board of Assessors of County of Nassau,* 95 NY2d 401, 409-410 741 N.E.2d 113, 718 N.Y.S.2d 268 [2000]; *Matter of Brunswick Smart Growth, Inc. v Town of Brunswick,* 73 AD3d 1267, 1268, 901 N.Y.S.2d 387 [2010]). Moreover, in matters involving land use development, it is incumbent upon the party challenging the administrative determination to show that he or she will "suffer direct harm, injury that is in some way different from that of the public at large" (*Society of Plastics Indus. v County of Suffolk,* 77 NY2d at 774; *accord Matter of Save the Pine Bush, Inc. v Common Council of City of Albany,* 13 NY3d 297, 304. 918 N.E.2d 917, 890 N.Y.S.2d 405 [2009]; *see Matter of VTR FV, LLC v Town of Guilderland,* 101 AD3d 1532, 1533, 957 N.Y.S.2d 454 [2012]).

[38] *See,* Amended Petition at paragraph 3.

Matter of Clean Water Advocates of N.Y., Inc. v. New York State Dept. of Envtl. Conservation, 103 A.D.3d 1006, 962 N.Y.S.2d 390, (3rd Dep't, February 21, 2013).

There is no showing by Brummel that the Marks Decision affects him in any manner different than the decisions he unsuccessfully challenged in *Brummel II* or different from any resident of the VEH or other members of the general public. If Brummel is somehow deemed to have standing, then every person who resides in the VEH will have standing to challenge every ARB action. (As this is not the law, in *Brummel I*, Brummel attempted to concoct standing by asserting that he one day would inherit an interest in his mother's home.[39]) Contrary to Brummel's generalized complaints, "courts have no inherent power to right a wrong unless the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected." *Schieffelin v. Komfoot,* 212 N.Y. 520, 530, 106 N.E. 675 (N.Y. 1914); *Roosevelt v. Draper,* 23 N.Y. 318, 323, 1861 N.Y. LEXIS 30 (N.Y. 1861).

The standing requirement, *i.e.,* "injury in fact: is to make sure that petitioner has an actual legal stake in the matter being adjudicated." *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 220-221 (1974). In addition to requiring that a person who starts a litigation will see it through (unlike Brummel in the *Brummel I*), the standing requirement - - especially the zone of interest test and requirement of "direct harm, injury different to that of the general public" in land use matters - - serves to support "a ban on adjudication of generalized grievances that are the purview of the legislative and/or executive branches of government." *Allen v. Wright,* 468 U.S 737. at 751; *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 785-786, 573 N.E.2d 1034 (1991).

Brummel's reliance on *Matter of Save the Pinebush, Inc. v. Common Council of the City of*

[39] *See,* Hiler Aff. at Exhibit 33.

Albany, 13 N.Y.3d 297, 918 N.E.2d 917 (2009), is misplaced, although *Pinebush* highlights that Brummel lacks standing. In *Pinebush,* the petitioner and its members proved that they established a protected habitat for an endangered species and, thus, they would be affected differently than the general public. Here, there is no endangered species and Brummel objects to a family removing specified trees to build their home. Mere disagreements with the plans of property owners who wish to improve their respective properties does not confer standing. Brummel's *ipsi dixit* assertions fail including that he attends public meetings, has a self-promotional website, takes pictures of construction projects, and speaks to his neighbors. What is telling is that he abandoned his prior special proceeding, has attempted but been unable to form a civic association, and is reduced to arguing that he "cares for plants and animals on the property where he resides, which is his mother's house." The record before this Court is devoid of any indicia that Brummel has specialized knowledge, experience, education, and/or accomplishments regarding residential land use or development. At most, he is a zealot imposing substantial legal costs, and expenditures of VEH property tax revenues paid by others, and a waste of judicial resources.

B. Brummel's General Interests and Activities Do Not Establish Standing

Contrary to the Court's determination in *Brummel II*, he attempts to argue about whether he has sustained "direct harm, injury that is in some way different from that of the public at large." Brummel's duplicative effort to distinguish himself again demonstrates, however, that he is no different than other members of the public at large. As noted, Brummel asserts that he sometimes takes walks rather than drives through the community, writes letters and otherwise offers complaints, takes photographs, and is sometimes mentioned in the Roslyn News. This does not distinguish him from the VEH's approximately 7,000 other residents. (Many ride bicycles in the VEH, walk their dogs in the VEH, jog on VEH roads, and take part in other activities reported by the media.)

The standing requirement is to ensure that a petitioner has an actual legal stake in the matter to be adjudicated. *Schlesinger v. Reservists To Stop the War,* 418 U.S. 208, 220-221 (1974). This is precisely what Brummel lacks. Thus, he brought and withdrew *Brummel I* and demonstrated that he had nothing to lose by starting and stopping litigation. (His explanation to this Court that he "later dropped the matter in an atmosphere of intimidation and fear for his personal safety," is baldy made. (*See,* Petition at p. 4, middle of the page) and does not justify his initiation of a special proceeding on an emergency basis to withdraw it a day later.) As in *Brummel II*, he "has been attempting to form a new civic association" but, admittedly, without success. This too cannot be the stuff of standing and neither is a self-promotional website blog. In *Brummel I* and *Brummel II*, and here, Brummel did not and does not have an actual legal stake in the litigation he initiated and, therefore, he lacks standing.

POINT III

THE STATUTE OF LIMITATIONS BARS THIS SPECIAL PROCEEDING

For the Marks application the ARB's Decision, dated August 22, 2013, was filed on August 23, 2013. This special proceeding was initiated on October 9, 2013. Village Law Section 7-712-c, entitled "article seventy-eight proceeding," states in relevant part:

> (1) Application to Supreme Courts by aggrieved persons. Any person or persons, jointly or severally aggrieved by any decisions by . . . any officer, department, board or bureau of the village, may apply to the Supreme Court for review by a proceeding under article of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the village clerk.

This special proceeding is untimely and barred by the applicable statute of limitations. *Platzman v. Munno*, 282 A.D.2d 539, 722 N.Y.S.2d 886 (2nd Dep't 2001).

POINT IV

THERE IS NO BASIS TO DISTURB THE ARB'S 90 FIR DRIVE DECISION WHICH IS RATIONAL, BASED ON SUBSTANTIAL EVIDENCE, AND ENTITLED TO DEFERENCE

As Justice Parga succinctly stated in *Brummel II:*

> . . . It is well settled that in proceeding brought under Article 78 of the CPLR, the function of the Court is only to see that a determination of an administrative body or officer was made in the manner prescribed by law. (*See, Laureano v. Kuhlmann,* 75 N.Y.2d 141; *Voelekers v. Guelli,* 58 N.Y.2d 170). In an Article 78 proceeding, the Court's inquiry is limited strictly to a determination whether a rational basis exists for the agency's actions. (*Jennings v. New York State Office of Mental Health,* 90 N.Y.2d 227, 692 N.E.2d 953 (1997)). The standard of review in an Article 78 proceeding is "whether the agency determination was arbitrary and capricious or affected by an error of law." (*See, Scherbyn v. Wayne Finder Lakes Bd. of Coop. Educ. Services,* 77 N.Y.2d 753 (1991)). A reviewing court may not substitute its own judgment for that of the agency nor may a court overturn a final determination made by an administrative agency unless there is no rational basis for the agency's decision or the act complained of is illegal, arbitrary, capricious or without any legal basis. (*Jennings v. New York State Office of Mental Health,* 90 N.Y.2d 227, 682 N.E.2d 953 (1997); *Hughes v. Doherty,* 5 N.Y.3d 100, 833 N.E.2d 228 (2005); *Pell v. Bd. of Education,* 34 N.Y.2d 222, 313 N.E.2d 321(1974)).

Further, the Second Department has held:

> "Judicial review of the ARB's determination is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion (*see* CPLR 7803[3]; *Matter of Brancato v. Zoning Bd. of Appeals of City of Yonkers, N.Y.,* 30 AD3d 515 [2006]; *Matter of 1215 N. Blvd., LLC v. Board of Zoning Appeals of Town of N. Hempstead,* 63 AD3d 1071, 1072 [2009]; *Matter of Conti v. Zoning Bd. of Appeals of Vil. of Ardsley,* 53 AD3d 545, 547 [2008]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith" (*Matter of Halperin v. City of New Rochelle,* 24 AD3d 768, 770 [2005] [internal quotation marks omitted]).

Birch Tree Partners, LLC v. Town of East Hampton, 78 A.D.3d 693, 694, 901 N.Y.S2d 178 (2d Dept. 2010); CPLR §7803(3)).[40]

The VEH has put before this Court the ARB's Decision, the minutes that are respectively incorporated into that Decision, and the detailed architectural plans, drawings, and landscape plans that are specifically referred to in the Decision.

Contrary to Brummel's assertions, the Marks Decision reflects the objections he and his two supporters made to the application at issue. That the ARB does not give Brummel's objections much weight should be respected by this Court and is entitled to deference. The Marks family seeks to build a family home. They submitted plans that comply with the VEH's zoning laws. The materials to be used were described in detail. Architectural plans were submitted and evaluated. A rendering of the planned home was submitted. The construction calls for nine specific trees to be removed. In fact, the plans submitted show that several trees are in the footprint of the construction proposed home and its driveway. The others are in the backyard where clear space is to be created for typical family use; a suburban backyard.

The ARB's decision was rational and based on the record evidence before it. For this reason, Brummel's opposition papers are generic and the Petition merely offered his extreme opinions disagreeing with the ARB. Also, to the extent Brummel includes criticism of ARB actions, the VEH disagrees and the VEH Code §§ 186-13 states:

> **§ 186-13. Waver by ARB.**
>
> The ARB may waive any of the requirements, standards, procedures or mandates contained in this Chapter 186 of the Code of the Incorporated Village of East Hills. The wavier may be based on any action taken or to be taken which is in the interest of justice and fairness . . .

[40] *See,* Hiler Aff. at Exhibit 5.

The law provides a presumption that the ARB acted correctly. *Preston v. Board of Zoning of Town of North Hempstead,* 229 A.D.2d 585, 646 N.Y.S.2d 41 (2d Dep't 1996) (courts should presume that a zoning board decision is correct); *Levine v. Korman,* 185 A.D.2d 323, 586 N.Y.S.2d 620 (2d Dep't 1992) (the determination of a zoning board should be regarded as presumptively correct); *accord Perlman v. Board of Appeals of the Village of Great Neck Estates,* 778 A.D.2d 832, 570 N.Y.S.2d 656 (2d Dep't 1991), *Fenger v. Levinson,* 163 A.D.2d 477, 558 N.Y.S.2d 163 (2d Dep't 1990). "When reviewing the determinations of a local [municipal] board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination." *Matter of Kearney v. Kita*, 62 A.D.3d 1000, 1001, 879 N.Y.S.2d 584 (2d Dep't 2009) (internal quotation marks omitted). *Accord, Layne v. Eastchester Planning Board*, 75 A.D.3d 643, 905 N.Y.S.2d 275 (2d Dep't 2010) (the planning board's decision to allow a property owner to demolish existing structures and merge three lots into one had a rational basis was not arbitrary, capricious, or contrary to law). Brummel's extreme opinions are insufficient to rebut the presumption that the decisions are correct and that they are well supported by the facts adduced at the public meeting. Proper notice, opportunity to be heard, consideration, and review were afforded by the ARB. A fair and reasonable decision was issued by the volunteer residents serving on the ARB.

The law also provides for broad ARB discretion and deference to ARB decisions. "A local [municipal] board has broad discretion in reaching its determination on applications . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion." *In-Towne Shopping Center v. Planning Board of the Town of Brookhaven*, 73 A.D.3d 925, 901 N.Y.S.2d 331 (2d Dep't 2010); *Birch Tree Partners, LLC v. Town of East*

Hampton, 78 A.D.3d 693, 910 N.Y.S.2d 178 (2nd Dep't 2010). Under the Tree Ordinance, the ARB may approve trees to be removed to improve homes and private properties. For Marks, the ARB heard the application presented, reviewed the detailed plans submitted, considered public comment at a public hearing, and by a public vote approved the project. *Alacantra v. Zoning Board of Appeals, Village of Ossining*, 64 A.D.3d 774, 883 N.Y.S.2d 303 (2d Dep't 2009) (a "determination of a [municipal] board should be sustained on judicial review if it has a rational basis and is not arbitrary and capricious").

It is time-honored law, as established by the Appellate Division, Fourth Department, that:

> The board of appeals [or, as here, the ARB] is clothed with discretionary power on the applications of this character. The determination of the board was an administrative function, which should not be interfered with by the courts in the absence of proof that the board had abused the discretion with which it was clothed by the ordinance creating it . . . Presumptively the Board exercised its judgment and discretion wisely and in the interest of all property owners in the locality, including the realtor [or in this case, the property owner], and the court should not attempt to substitute its judgment in place of the board of appeals' . . .

Falvo v. Kerner, 222 A.D. 289, 225 N.Y.S. 747 (4thDep't 1927)

The ARB's acts here must be confirmed if "rational and not arbitrary and capricious." *Matter of Sasso v. Osgood,* 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995). "A reviewing court . . . does not consider whether the determination is supported by 'substantial evidence' within the meaning of the C.P.L.R. 7803 (4)." *Matter of Halpern v. City of New Rochelle,* 24 A.D.2d 768 (2d Dep't 2005). A board's determination is deemed rational if it has some objective factual basis as opposed to being based entirely on subjective considerations such as general community opposition. *Id.*

As to Brummel's ideological opposition to the removal of any tree, he ignores the valid reasons that trees sometimes need to be removed (*e.g.*, to allow a home to be built, reconfigured,

and/or constructed).

POINT V

BRUMMEL'S VAGUE AND FALSE ACCUSATION ABOUT THE OML IS BASELESS AND CONTRARY TO HIS PERSONAL KNOWLEDGE

Brummel's speculation about a "non-public session" of the ARB (Petition at ¶1) or action taken "secretly" (Petition at ¶2) is groundless. Given that Brummel and his two supporters (Berger and Oberlander) all attended and spoke at the August 5, 2013 ARB public meeting, he knows that the ARB followed the OML to the letter of the law. There is no doubt that Brummel observed the ARB's vote to grant the Marks' application for 90 Fir Drive.

Brummel's Petition demonstrates that there has been total compliance with the specific OML provisions that he cites at Petition paragraph 17. To wit:

- N.Y. Pub. O. §103(a) states: "Every meeting of a public body shall be open to the general public. . . ." The August 8, 2013 ARB public meeting was open and well attended by the public, including by Brummel;

- N.Y. Pub. O. §104(1) states: "Public notice of the time and place of a meeting scheduled at least one week prior shall be given to the news media and conspicuously posted in one or more designated areas at least seventy two hours before such a meeting." Here, the public notice was given by July 26, 2013: (a) to the news media for publishing in the Roslyn News; (b) by being posted in six designated public locations in the VEH; and (c) by being posted on the VEH's website;[41]

- N.Y. Pub. O. §103(e) requires "[a]gency records [be] available to the public . . . to the extent practicable . . . prior to or at the meeting during which the records will be discussed." Here, the VEH's records for meetings are made available to that public. Even Brummel's Petition admits to this as he asserts at paragraph 3 that "he has reviewed dozens of plans and [sic] for construction and tree removal." As stated, the Notice for the August 5, 2013 Public Meeting was published, posted, and mailed. The general public, including Brummel, had ample access to the records. The ARB's records, as Brummel has acknowledged, are repeatedly and routinely made available to him

Brummel has no standing under the OML despite his citation to Pub. O. §107(1). Brummel

[41] *See*, Hiler Aff. at Exhibits 17, 18, and 19.

is not an "aggrieved person" for an OML violation because: (a) there were none; and (b) he was not excluded from the August 5, 2013 ARB public meeting or any other meeting. Given Brummel's personal knowledge that in *Brummel II* this Court (Parga, J.) held that he lacks standing and that determination's applicability here, it is apparent Brummel invokes the OML in attempt to manufacture standing. Brummel's ploy is not novel and has been judicially rejected before. In *Matter of Rivers v. Young,* 26 Misc.3d 946, 892 N.Y.S.2d 747 (Westchester Co. 2009), a *pro se* petitioner and municipal resident sought to have the court nullify certain municipal actions and remedy alleged OML violations. The court determined that the *pro se* petitioner lacked standing before even addressing the merits of compliance with the OML. Here, there was no secret meeting, Brummel and his two supporters spoke in opposition to the Marks' application, the ARB ruled to approve the application, and Brummel's OML machinations do not establish standing.

POINT VI

BRUMMEL IS NOT ENTITLED TO INJUNCTIVE RELIEF

N.Y. C.P.L.R. §7805 authorizes a court to issue a stay in an Article 78 proceeding "upon terms including notice, security and payment of costs . . ." Here, a temporary stay was issued but, to date, there has been no posting of security or provision for any payment of costs. The purpose of an undertaking is to provide a "ready source from which the defendant may recover for damages" sustained by reason of a preliminary injunction that is later found to have improperly granted. *Margolies v. Encounter, Inc.,* 42 N.Y.2d 475, 479, 368 N.E.2d 1243 (1977). The amount of an undertaking must be rationally related to the amount of potential damages that the VEH might sustain. *See, Ujueta v. Euro-Quest Corp.,* 29 A.D.3d 385, 814 N.Y.S.2d 551 (2d Dep't 2006); *Blueberries Gourmet, Inc. v. Aris Realty Corp.,* 255 A.D.2d 348, 680 N.Y.S.2d 557 (2d Dep't 1998).

Brummel cannot demonstrate any of the three required elements for injunctive relief. He

does not have any likelihood of success, he cannot prove an irreparable injury, and the balance of equities is decidedly against him. *Brothers Real Estate Co., Inc. v. Limondsi,* 26 Misc.3d 1203(A), 906 N.Y.S.2d 784 (Sup. Ct., N.Y. 2009); *Jarrett v. Westchester County Department of Health,* 166 Misc.2d 777, 638 N.Y.S.2d 269 (Sup. Ct., Westchester 1995).

Brummel has no likelihood of success because, as a matter of law and collateral estoppel, he lacks standing. Further, the Marks Decision is entitled to deference and, on the record before this Court, it cannot be said that approving construction of a new home fully compliant with the Zoning Code or specific trees to be removed to allow that home to be constructed is arbitrary or capricious or irrational.

There is also no suggestion of "irreparable harm" to a person who lacks standing. The balancing of equities demonstrates that a dismissal with prejudice is warranted.

POINT VII

BRUMMEL HAD NO BASIS IN FACT OR LAW TO BRING THIS THIRD SPECIAL PROCEEDING AND HE SHOULD BE SANCTIONED

The VEH is entitled to costs, including attorneys' fees, incurred in opposing Brummel's latest petition. Brummel's sanction should also include enjoining him from bringing additional special proceedings against the VEH concerning other people's homes. Brummel's third special proceeding is "frivolous." The VEH asks this Court to consider that Brummel strains limited municipal and judicial resources, interferes with homeowners' use and enjoyment of their properties, and initiates litigation without a reasonable basis in law and in fact.

22 NYCRR 130-1.1, 22 NYCRR 130-1.1 states, in pertinent part, as follows:

> Section 130-1.1 Costs; sanctions.
>
> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where

> prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.
>
> * * *
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to . . . harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> * * *

"For these purposes, frivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false." *Id.; S&S Management LLC v. Berk*, No. 16866/07, 2008 N.Y. Misc. LEXIS 9054, 11, 2008 NY Slip Op 31547(U) (Sup. Ct., Nassau Cty, May 21, 2008). In *re Sommer*, 183 A.D.2d 832, 833, 584 N.Y.S.2d 76 (2d Dep't 1992), the Court imposed sanctions on a plaintiff who submitted a second motion identical to one decided a few months earlier for "misu[ing]...judicial resources." In *Zysk v. Kaufman*, 53 A.D.3d 482, 483, 862 N.Y.S.2d 72 (2d Dep't 2008), the court stated sanctions are appropriate when a plaintiff "commenced and continued an action in bad faith, and that the action was without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." In *Panther Systems, Ltd. v. Groveman*, No. 5770/91, 1991 N.Y. Misc. LEXIS 467, at *2-3 (Sup. Ct., Nassau Cty, June 4, 1991), the court imposed sanctions where a plaintiff's current "arguments are the same as those made" in a prior proceeding. *See also Dunn v. Kahn*, No. 6494/95, 2008 WL 1786986 (Sup. Ct. Nassau County, Mar. 11, 2008). The circumstances here warrant the Court's exercise of discretion to sanction Brummel.

The Second Department has approved the enjoining of a chronic litigant because "pressing a frivolous claim can be extremely costly to the defendant and can waste an inordinate amount of court time, time that [the Second Department] and the trial courts can ill afford to lose." *Sossower v. Signorelli*, 99 A.D. 2d 358, 472 N.Y.S.2d 702 (2nd Dep't 1984); *Pignato v. Davis*, 8 A.D.3d 487, 778 N.Y.S.2d 528 (2nd Dep't 2004). Brummel should be enjoined from litigating against the VEH concerning other people's homes.

CONCLUSION

Brummel has instituted, for the third time in nineteen months and at the VEH's expense, a special proceeding by an Order to Show Cause that is entirely meritless. His actions consume the VEH's valuable resources. This special proceeding is particularly objectionable because Brummel creates a hardship for a family by bringing to a halt construction of their home as winter approaches.

Many municipalities have no tree laws whatsoever and there is no requirement that they enact them at state or federal level. Still, because of the institution of this case, the VEH is required to provide this Court the voluminous record of proceedings before it that Brummel challenges. This special proceeding is just one example of how Brummel wastes the time, efforts, resources, and money of the VEH. The Petition is without any merit and should be dismissed with prejudice.

Dated: New York, New York
October 21, 2013

WECHSLER & COHEN, LLP

By: _____
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APPENDIX A

186-1 Legislative Intent

A. The purpose of this chapter is to promote and protect the public health, safety and general welfare by providing for the regulation of the planting, maintenance and removal of trees within the Incorporated Village of East Hills.

B. Whereas it is in the public interest to protect the tree canopy for current and future generations, the intent of this chapter is to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village and to ensure the relocation or replacement of trees which may be removed or destroyed.
C. It is the further intent of the Village to have trees generally continue to stabilize the soil and control water pollution by preventing soil erosion and flooding, absorbing air pollution, providing oxygen, yielding advantageous micro-climatic effects, have intrinsic aesthetic qualities, preserve and enhance property values, offer a natural barrier to noise, provide privacy, and provide a natural habitat for wildlife, and that the removal of trees deprives the residents of the Village of these benefits and disrupts fundamental ecological systems of which trees are an integral part. It is the further intent of this chapter to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village and to provide for the relocation or replacement of trees which may be removed or destroyed.

* * *

186-2 Definitions

APPLICANT
The owner, lessee, occupant or person in possession of any premises in the Village, or any agent thereof, including contractors.

ARCHITECTURAL REVIEW BOARD
The appointed committee which has specific jurisdiction and responsibilities set forth in the Code of the Incorporated Village of East Hills. The Architectural Review Board ("ARB") may also be composed of subcommittees as from time to time may be appointed by the Mayor and approved by the Board of Trustees.

* * *

TREE PERMIT
A written authorization by the Incorporated Village of East Hills or its authorized committee or agent to remove a tree or trees pursuant to this chapter of the Code of the Incorporated Village of East Hills.

* * *

§ 186-3 Authority of ARB; designation of Tree Warden
B. Designation of Tree Warden

> (1) The Mayor shall appoint a code enforcement official, certified arborist or otherwise qualified individual to perform the activities of Tree Warden. The Tree Warden will, as an agent of the Village, be authorized to conduct on-site inspections for the purpose of issuing tree removal permits in cases where, in the opinion of the Tree Warden, the need for removal is reasonable and will not have a significant impact on the surrounding properties and the community as a whole.

§ 186-4, Permit Required to Remove or Destroy Trees; exceptions.

* * *

B. Process. Every person, corporation or business seeking a tree permit shall submit to the Village a written application, a copy of which can be obtained from Village Hall, together with a filing fee as set forth in §**186-11**. Each application shall include the following information:

(1) The name and address of the applicant.

(2) The status of the applicant with respect to the subject property (site).

(3) Written consent of the owner or owners of the site, if the applicant is not the sole owner.

(4) The name of the person preparing any map, drawing or diagram submitted with the application.

(5) Location of the site, including a street number and address and legal description as shown on the Nassau County Land and Tax Map.

(6) A diagram of the site, specifically designating the area or areas of proposed tree removal and the proposed use of such areas, and designation of trees to be removed.

(7) Location of all proposed structures, driveways and paved areas on the site.

(8) Identification of all diseased, dead or damaged trees.

(9) Identification of any trees endangering any roadway, pavement or utility line.

(10) Any proposed grade changes that might adversely affect or endanger any trees on the site and specifications to maintain them.

(11) The purpose of the tree removal.

(12) The size and species of all replacement trees.

B. In addition to the information, data and responses required in Subsection B above, the ARB, Tree Committee Chair or Tree Warden may require the application to submit the following:

(1) A tree preservation plan specifying the methods to be used to preserve all remaining trees and their root systems and the means of providing water and nutrients to their root systems.

* * *

§ 186.5 Process and determination.

A. Upon receipt of an application by the ARB, the Tree Warden shall visit and inspect the site. The Tree Warden will then make a determination on whether a permit should be granted without prior ARB review. The determination by the Tree Warden will be made on the basis of whether the need for removal is reasonable and the removal will not have a significant impact on the surrounding properties and the community as a whole. The Tree Warden's decision shall have the full authority and act on behalf of the Village and the ARB. Once a decision is rendered by the Tree Warden, a determination by the Tree Warden may be appealed within 30 days after the filing of the decision with the Village Clerk to the ARB. Appeals shall be in writing, pursuant to § 186-16, and must be filed prior to the removal of the tree(s) in question, unless the removal is performed due to an emergency situation pursuant to § 186-10.

§ 186.6. Replacement of removed trees required; exceptions.

A. Whenever a tree is removed, a replacement tree shall be planted by the applicant . . . as determined by the Tree Warden or by the ARB, as the case may be . . .

B. The Tree Warden or the ARB shall have the right to waive all requirements where it is determined that site conditions are not appropriate for the replacement of removed trees.

* * *

§ 186-10. Emergency action.

In the event of an emergency, all necessary and proper action may be taken with regard to the removal of trees by a resident to ensure the safeguarding of family and property.

§ 186-13. Waiver by ARB.

The ARB may waive any of the requirements, standards, procedures or mandates contained in this Chapter **186** of the Code of the Incorporated Village of East Hills. The waiver may be based on any action taken or to be taken which is in the interest of justice and fairness, whether for a hardship or otherwise, which the ARB deems fair, appropriate and necessary under the circumstances.

* * *

§ 186-16. Appeals

A. Any applicant aggrieved by any decision of the Tree Warden or Tree Subcommittee Chair may appeal to the ARB.

B. Any applicant aggrieved by any decision of the ARB may appeal to the Zoning Board of Appeals of the Village, in the same manner and upon the same criteria as is provided for use variances. Such appeal shall be taken within 30 days after the filing of the decision with the Village Administrator. The Zoning Board of Appeals of the Village, in the same manner and upon the same criteria as is provided for use variances. Such appeal shall be taken within 30 days after the filing of the decision with the Village Administrator. The Zoning Board of Appeals, after proceeding in the same manner as is provided for use variance applications, may reverse, modify or affirm the action of the ARB.

* * *

ARTICLE XX. ARCHITECTURAL REVIEW BOARD REQUIREMENTS AND REVIEW

§ 271-186. Legislative intent, policies and findings.

A. It is the purpose of this article to preserve and promote the character, appearances and aesthetics of the Village, to conserve the property value of the Village by providing procedures for an Architectural Review Board (also referred to as the "ARB") review of the exterior of new construction and of certain alterations, additions, reconstructions and site utilizations, and to promote the following objectives:

(1) To encourage beneficent building design and appropriate appearances, and to relate such design and appearances to the sites and surroundings of buildings;

(2) Preserve the prevailing aesthetic character of the neighborhood and its environs, and to enhance the character of the Village by ensuring compatible buildings;

(3) Promote and encourage the finest quality of architectural design and utilization of land when new buildings and new exteriors are constructed or erected, reconstructed, refurbished and altered;

(4) Assure the design and location of any proposed building, or the addition, alteration or reconstruction of any existing building, is in harmony with the existing topography of its site and the existing building as well as the neighboring properties;

(5) Discourage and prevent any design that would adversely affect or cause the diminution in value of neighboring property, whether improved or unimproved; and

(6) Prevent design and appearances which are unnecessarily offensive to visual sensibilities, which impair the use, value, aesthetics or desirability of neighboring properties and/or the general welfare of the community at large.

§ 271-187. Definitions; word usage.

MAJOR ALTERATION

An application which involves (A) more than a twenty-percent addition either to the surface area of a facade or to the floor area of a building or structure, and/or (B) more than a fifteen-percent revision of either the surface area of the front elevation (inclusive

of roof area) or the facade of an existing building or structure which faces the street. However, in calculating the percentages in (A) and (B) in this subsection, the size of any addition or revision made to the residence within the two years preceding the date of the application for a permit for such addition or revisions shall also be aggregated and included within these limits.

MINOR ALTERATION
Each and every other residential application which is made and which is not a major alteration or new building construction, except for ordinary maintenance, replacement made with same materials and/or repairs to the building.

NEW BUILDING CONSTRUCTION
An application to build a new building, structure, or to build an accessory building which is more than 80 square feet in size, in all residential and commercial zones.

§ 271-194. Agenda items.

A. Procedures

(4) At least three members of the Architectural Review Board shall inspect every site and the adjacent premises prior to the meeting at which the application is scheduled to be heard.

Excerpts of Additional Pertinent VEH Ordinances state:

§ 271-188. Architectural Review Board composition and members.

A. The Board of Trustees hereby creates an Architectural Review Board, which shall also be referred to as the "ARB."

B. The Architectural Review Board shall consist of nine members and three alternates, who shall serve without compensation and who shall be appointed by the Mayor.

* * *

E. The Architectural Review Board shall have the following enumerated powers, in addition to such other powers as are set forth in § **271-185** et seq.:

(1) To propose modified procedures with regard to the procedure of its meetings.

(2) To propose modified procedures with regard to the information, documents and other submissions required of applicants, including, in its discretion, but not limited to, site plans . . .

* * *

(4) To either grant, grant with modifications, or deny permission to build, improve, construct or alter any structure which because of its architectural elements, colors, design, building materials, height, bulk, lack of setbacks, or insufficient landscaping, will be excessively similar, dissimilar or inappropriate in its design or in its exterior appearance in relation to the prevailing appearance of buildings in the vicinity thereof or adverse to the desirability of the immediate area or of neighboring areas for residential and commercial purposes.

§ 271-190. Review standards.

A. In considering an application, the Architectural Review Board shall take into account natural features of the site and surroundings, exterior design and appearances of existing structures, and the character of the neighborhood and its peculiar suitability for particular purposes, with a view to conserving the values of property and encouraging the most appropriate use of land.

B. The Architectural Review Board may approve any application if the ARB finds that the building, structure or alteration, if constructed, erected, reconstructed or altered in accordance with the submitted plan, would be in harmony with the purpose of this chapter and the zoning laws, would not be visually offensive or inappropriate by reason of poor quality of exterior design, monotonous similarity or striking visual discord in relation to the sites or surroundings, would not mar the appearance of the area, would not impair the use, enjoyment and desirability and reduce the value of properties in the area, would not be detrimental to the character of the neighborhood, would not prevent the most appropriate utilization of the site or of adjacent land, and would not adversely affect the functioning, economic stability, prosperity, health, safety and general welfare of the entire community.

* * *

D. The Architectural Review Board may disapprove any application for a permit, provided that the Architectural Review Board has afforded the applicant an opportunity to confer at least one time with respect to suggestions for change of the plan or map, and provided that the Architectural Review Board finds and states that

the structure or building for which the permit was requested would, if erected, constructed, reconstructed or altered as indicated, create one or more of the harmful effects set forth in § **271-186B** hereof by reason of:

(1) Monotonous similarity to any other structure or building located or proposed to be located in the same subdivision or located within 200 feet of the lot on which the structure for which a building permit is requested, in respect to one or more of the following features of exterior design and appearance:

(a) Substantially identical facade, including color;

(b) Substantially identical size and arrangement of either doors, windows, porticos, porches or garages or other openings or breaks or extensions in the facade, including reverse arrangements; or

(c) Other substantially identical features, such as, but not limited to, setbacks from street lines, heights, widths and lengths of elements of building design, and exterior materials and treatments.

(2) Striking dissimilarity, visual discord or inappropriateness with respect to other structures or buildings located or proposed to be located in the same subdivision or located within 200 feet of the lot on which the structure for which a building permit is requested, in respect to one or more of the following features of exterior design and appearance:

(a) Facade, including color;

(b) Size and arrangement of doors, windows, porticos, porches or garages or other openings, breaks or extensions in the facade;

(c) Other significant design features, such as, but not limited to, heights, widths, length of elements of design, roof structures, exposed mechanical equipment, service and storage areas, retaining walls, landscaping, signs, light posts, parking areas, fences; or

(d) Exterior materials and treatments. The following exterior materials and treatments shall generally be considered to be dissimilar and inappropriate: aluminum used for exterior surfaces other than windows, door frames, garage doors and/or soffits, and acrylic stucco or nonacrylic stucco (or similar material), glass block, artificial brick or artificial stone, provided that a majority of the members of the ARB present at a meeting at which there is a

quorum of at least five members present may determine otherwise in a particular case.

(3) Visual offensiveness or other poor qualities of exterior design, including, but not limited to, excessive divergences of the height or levels of any part of the structure or building from the grade of terrain, harmony or discord of color, or incompatibility of the proposed structure, building, refurbishing, reconstruction, alteration or addition with the terrain on which it is to be located, the failure of the exterior design to complement and enhance the natural beauty of its site in regard to landscape, topography, surrounding structures and the scenic character of roadways when visible from said roadways.