SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Richard A. Brummel,

PETITIONER

vs

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, NY,

RESPONDENTS

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INDEX NUMBER

012313 / 2013

REPLY AS TO THE FACTS AND THE LAW

INTRODUCTION

Petitioner would like to draw the Court's attention at the outset to several troubling issues of factual integrity that affect this action and evidence submitted by Respondent:

(1) The Notice of Decision concerning the application here at issue, introduced by Respondent Village of East Hills ("VEH") in their Exhibit 6 was alleged to have been filed with the Village Clerk on August 23, 2013, but the meeting minutes, referred to in the Decision and attached thereto, were not prepared until over two weeks later. The dates are important because Respondents assert a Statute of Limitations defense. (See section 2b. below, and Memorandum of Law in Reply, section dealing with Statute of Limitations.)

(2) Respondent VEH did not provide a transcript of its proceedings (as required by CPLR Section 7804 (e)) and instead provided a CD rendering of an

audiotape of the meeting at issue. However, that CD is missing the entire portion of the meeting at which the Architectural Review Board ("ARB" or "Board") decision on 90 Fir Drive was taken -- at the end of the meeting. Respondent made no such disclosure. As it happens, Petitioner also made a tape of the meeting himself, and found that the missing data was quite material to this action (see Section 2a, below).

In light of the tenor of Respondents' submissions to the Court, Petitioner feels compelled to state he fully understands the gravity attached to a judicial proceeding such as he has instituted, and fully believes in the merits thereof.

The disparagement and insults launched in Respondents' Answers, and their more substantive claims for sanctions and damages, mischaracterize the motives for and validity of this litigation. This lawsuit was not a lark or a sudden lashing out. It is the culmination of strenuous and longstanding efforts to reform a badly broken process through diligent and open personal participation, along with efforts to inform and organize public opinion, the diligent petitioning of government, and prior litigation as well, that had foundered for reasons Petitioner believed he could finally fix in a final effort.

As a pro se litigant there may have been an unintended omission of discussion of prior cases in the initial filings but there was no effort to conceal them -- and the prior actions were indeed described in the Verified Petition, paragraph 3.

Rather than a "reckless" act or crie de coeur, the current action is an attempt

to use the third branch of government for its essential purpose: to uphold the rule of law when the legislative and executive branches fail. In East Hills, the legislative branch is monopolized by a single party-like group calling itself "The Koblenz Team" and the boards it appoints, particularly the Architectural Review Board ("ARB"), are like-minded cronies of that group that have a tendency to flout law and procedure.

Before Petitioner began participating in ARB proceedings around the end of 2011, that body did not announce its meetings, believing it was not subject to the Open Meetings Law (NY Public Officers Law Article 7,. "OML".) (Reply Exhibit 1, Petition in Support of Order to Show Cause, 37 Laurel Lane, April 2012, p. 2) . Once it did announce its meetings, it asserted for a brief time that its deliberations would occur in secret because it was a "quasi-judicial" agency. Its officers continue to assert that photographs cannot be freely taken during its meetings, despite the rules of the Open Meetings Law.

But far more damaging, its decisions have flown in the face of its twin legislative mandates to "prevent the indiscriminate removal or destruction of trees" and thereby to "protect the tree canopy for current and future generations" (Village Code Section 186-1) and to "Preserve the prevailing aesthetic character of the neighborhood (sic) and its environs" and to "Assure the design and location of any proposed building, or the addition, alteration or reconstruction of any existing building, is in harmony" with its neighbors (Village Code Section 271-186).

Massive houses or those with lower-priced, disharmonious designs are

approved and built that shock neighbors and disturb the visual balance of neighborhoods *Reply Exhibit 3*).

Prior to Petitioner's first legal challenge, at his own expense he commissioned a professional architect who submitted a written, professional critique of a nearby pending new house, which had already been approved by the ARB without public notice. (This was the only time such an independent opinion was ever introduced in ARB proceedings, to Petitioner's knowledge.) The architect's opinion unequivocally disputed apart the new house's supposed harmonious characteristics (*Reply Exhibit 2*.) and conformity with Village law. The ARB did not allow the opinion to be introduced for a formal, public re-consideration of the house. (And despite that analysis very similar semi-stock designs have since become common throughout the Village.)

Residents who Petitioner involved in the process have written Letters to the Editor complaining or have attended ARB meetings. A petition Petitioner circulated that was extremely critical of both the evolving architectural changes and tree removals attracted dozens of signatures of residents Petitioner visited at random throughout the Village (*Reply Exhibit 3*).

Similarly, many properties have been clear-cut of trees with ARB either approval or, as in the present case, apparent assent. And if not clear-cut, properties that are demolished and rebuilt are routinely denuded of many of their largest and most significant trees. In other cases, massive healthy trees are permitted to be removed for dubious reasons, as was put forth in Petitioner's prior lawsuit over Zoning Board of Appeals process (*Reply Exhibit 4*).

So this case is properly before the Court, because Petitioner argues the ARB has routinely flouted its procedures and its substantive mandates, and as an appointed body, shielded by a deeply entrenched political clique, has proved immune to criticism or reform through normal political or administrative processes.

Petitioner will demonstrate that this case is not estopped, that he maintains it with proper standing, that the Court has clear basis to overturn the "decision" supposedly made by the ARB, that his filing of this action was in no way improper, that he deserves injunctive relief, and that he should suffer no sanction. As for an undertaking required for injunctive relief, Petitioner leaves it for the court to determine.

I. REPLY AS TO THE FACTS OF THE CASE

1. The Village Code

Respondents mischaracterize the Village code. The answers of both Respondents emphasize the issue of "indiscriminate" tree removal while omitting the clear statement that protecting the"tree canopy" -- a unified whole -- is an "interest" of the public that the law is intended to preserve ("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... and to ensure the relocation or replacement...." (Village Code, Section 186-1).

Respondent VEH's selective -- and one might say distorted -- quotation of

the law not only omits the following paragraph (quoted below as it correctly exists) but erroneously substitutes a wholly different passage -- with wholly different thrust -- in its place in their rendering of the law's "Legislative Intent" (VEH Memorandum of Law, p.5):

"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."

Respondent Village of East Hills ("VEH") seeks to minimize the power of the law by emphasizing the waivers that can be issued by the ARB and the optional nature of various plans that can be required. (VEH Memorandum of Law p. 5). In fact these are 'red herrings' -- no such waivers were duly invoked by any official or the ARB in the instant case, and the preservation plans were irrelevant as well.

Neither Respondent challenges or indeed discusses the procedural requirements for the issuance of tree permits, which are at the heart of Petitioner's suit here (Verified Petition paragraphs 7-11.)

A critical element in the Village Code for the success of this case is the specific procedure for determining the merits of an application for tree removals.

The procedures for the ARB's consideration include the presence of an application for the tree removals and a report by the Tree Warden. In this case, neither item was present in the application file as reviewed by Petitioner and as provided by the Village (see Respondent VEH Exhibit 31).

An additional recitation of the procedures for tree removal requests is quoted in the "Architectural Review Board Notice Letter" dated June 28, 2013 which is part of Respondent VEH Exhibit 31:

"All applications for major projects must provide a landscape plan which clearly indicates al proposed tree removals, tree preservation measures and plantings. Please tag on site any trees to be removed, numbering all trees to correspond with the landscape plan. Failure to provide a landscape plan or mark the trees on site will delay project review by the Architectural Review Board."

As will be discussed below regarding the facts of the meeting, the absence of these required elements was not only apparent to Petitioner as set forth in oral and repeated written testimony to the ARB (Petitioner letters of 8/5/13, 9/9/13, and 10/7/13), but the absence was fully and emphatically entered into the hearing record by a member of the ARB (see below, quotation of ARB member Jana Goldenberg).

2a. ARB Meeting of August 5, 2013

Petitioner and Respondents agree that various deliberations occurred on August 5, 2013 regarding an application for 90 Fir Drive.

But Respondents created a classical 'straw-man' to assert -- validly, but irrelevantly, in Petitioner's belief -- that in the course of the meeting of August 5, there were no proceedings that violated the Open Meetings Law (Public Officers Law, Section 7, "OML"). Despite the efforts of Respondents to contest that issue, the issue as they framed it was never in question.

Petitioner never intended to assert that the vote taken August 5 on 90 Fir Drive was in any way violative of the Open Meetings Law. Rather, Petitioner clearly asserted (Verified Petition, Paragraph 2) that since the decision was 'provisional', pending submission of data that would have properly needed to have been deliberated upon by the ARB, then the finality of the decision later reported to him (Verified Petition, Paragraph 39) implied that either a phantom meeting occurred or that no proper deliberation occurred, either case being a legal flaw in the process.

What is actually at issue in the facts of the meeting are wholly different issues: (1) What was the nature of the ARB vote -- was it to allow the removal of trees, or was it narrower or for something else, pending submission of missing data? (2) What was the content of the record upon which the ARB voted i.e. Were there appropriate documentary submissions as required by law upon which to take a vote on removing trees or issuing tree permits as asserted, or were those papers lacking as asserted by Petitioner?

In both cases the answers support the Petitioner's claims in his Verified Petition.

The affidavits of various ARB members state that the vote on 90 Fir Drive on

August 5, 2013 was "...to approve the application including the issuance of a tree removal permit for the specified trees," e.g. Affidavit of Spencer Kanis Respondent VEH Exhibit 23, Paragraph 7.

And the Notice of Decision of the ARB (Respondent VEH Exhibit 6) also states that the decision "(c) approved a tree removal permit."

However, the Minutes of the meeting (Respondent VEH Exhibit 6) state only that ARB approved "the application as presented", and there was no application for a tree removal permit in the application as presented, Respondent VEH Exhibit 31:

Petitioner's own transcription of the meeting contradicts that assertion in part (see below).

It is clear from the "Decision," the Minutes, and the Affidavits of board members included in the Respondent VEH Exhibits that the approval of the application, whatever was in it, or the approval of the "house" (see below) was "subject to resubmission of a landscape plan," per the Minutes, Respondent VEH Exhibit 6.

The Minutes do not report, and there is no "transcript" of the meeting provided by the Respondent (as provided for in the CPLR). But an audio tape of the meeting recorded by Petitioner -- located in his archives after the submission of Verified Petition, but partially discussed at the Court's hearing on October 22, 2013 without objection by the Respondents -- fills in two large blanks about the nature of the "resubmission" contemplated and the nature of the approval voted on.

(Petitioner listened to the CD of the meeting provided as Respondent VEH Exhibit 30. The Court should be aware the tape is missing the end of the meeting, which has the vote of the ARB with respect to 90 Fir Drive. The nature of this omission is not disclosed or explained by Respondent VEH. Furthermore the VEH tape is missing the early portion of the highly material statements of ARB member Jana Goldenberg (see below). Petitioner's own tape of the meeting has preserved the entire meeting (see below). For those reasons Petitioner is relying on his own tape and its transcript, although in some places it is inaudible (see below). Petitioner will provide Respondents a copy of the tape upon request, upon arrangement wit the Court.)

The tape shows that during the applicant Respondent Marks' presentation at the ARB meeting of August 5, 2013, ARB member Jana Goldenberg -- who is upon information and belief the Tree Subcommittee Chair of the ARB (per the VEH website) and who thereby has a special interest, special responsibilities, and powers with respect to tree protection -- clearly addressed the defects in the tree information presented to the ARB. She said:

> "The landscape plan number one I don't think the trees were tagged on the property....When you come up to the ARB they must be tagged before you come up to us. How am I going to know what trees you UNINTELLIGIBLE that's number one. Number two this landscape plan UNINTELLIGIBLE I need a little guide I mean in writing and in here UNINTELLIGIBLE.... He needs to tell me what trees he's removing what types of trees the caliper the size the whole nine yards. This literally UNTELLIGIBLE....Every time you come to the ARB ... Trees must be tagged from now on otherwise from now on we're going to postpone.... I need a resubmitted landscape plan." (Tape of ARB meeting, recorded by Petitioner. This partially corresponds to Respondent VEH Exhibit 30 at the "Tape2" at the "06" seconds and following. Petitioner notes his hearing of his own tape and the CD diverge on what Ms.

Goldenberg said in her final six words.)

Furthermore, Petitioner's tape of the meeting also verifies that later in the meeting a vote was taken on 90 Fir Drive, but the vote was not taken on the removal of trees, nor the "application," but rather specifically on "the house":

Spencer Kanis, Chairman: [RE 90 Fir Drive]: "What I'd like to do is obviously each of us have our point of view and UNINTELLIGIBLE what I'd like to do is UNINTELLIGIBLE make a motion on whether to approve the house I make a motion UNINTELLIGIBLE to approve the house UNINTELLIGIBLE [emphasis added]

Richard Brummel (Petitioner): "What about the trees?"

Jana Goldenberg, ARB Member: "Hang on you're right what about the landscape plan? Spencer...the landscape plan"

UNKNOWN PERSON: "subject subject to"

Jana Goldenberg: "But that's not what it says we're saying to approve it. I'm not approving it anyway so it doesn't matter"

UNKNOWN PERSON: "that doesn't work"

UNKNOWN PERSON: "there's a motion on the table"

UNKNOWN PERSON: "subject to"

UNKNOWN PERSON "subject to"

UNKNOWN PERSON: "subject to resubmittal of the landscape plan with the proper schedule of UNINTELLIGIBLE uh removal of trees and plantings"

UNKNOWN PERSON: "I'll second"

Nancy Futeran, Deputy Village Clerk: "Motion to approve subject to resubmittal of the landscape plan ....with the schedule UNINTELLIGIBLE Second UNINTELLIGIBLE."

(The tape reflects that a vote of the ARB members was then taken, leading to approval with some members opposed.)

Respondents ignored all these points in their submissions to the Court.

Despite its materiality to this action, none of the affidavits submitted by the

Respondents, and none of the Affirmations and Memoranda of Law of the Respondents purporting to describe the meeting mentioned (a) that Ms. Goldenberg was extensively on record during the presentation pointing out serious deficiencies in the record before them, to wit the tree information, and (b) that the vote was denominated as strictly regarding "the house".

Furthermore, all the affidavits submitted by ARB members (Respondent VEH Exhibits 22-28, and the Notice of Decision (Respondent VEH Exhibit 6) claim -- erroneously it appears -- that the vote was to approve the tree permits as well. The Minutes (Respondent VEH Exhibit 6) speak vaguely of approving the "application". Likewise the affidavit of the ARB's minutes-taker, Nancy Futeran, also omits reference to any tree permits (Respondent VEH Exhibit 18).

The language of the Minutes of August 5, 2013 as attached to the Notice of Decision for 90 Fir Drive (Respondent VEH Exhibit 6) states that "the Board voted to approve the application as presented, subject to resubmission of a landscape plan that includes a planting schedule and a complete legend."

(The Minutes did however note the discission about the flawed landscape plan (Respondent VEH Exhibit 6)).

2b. Papers Reflecting "Decision" of ARB Meeting of August 5, 2013

The Petition makes clear that Petitioner had no idea that a "Notice of Decision" had been issued on 8/22/13 for the tree removals or even the house applied for at 90 Fir Drive until it became apparent at the ARB meeting of

October 7, 2013 when comments by the ARB chairman and counsel led him to surmise something had occurred without his awareness (Verified Petition, Paragraphs 39 to 43).

(This issue is important for the question of the Statute of Limitations for filing an Article 78 action.)

Petitioner's own notes (Exhibits 8 and 9, see below) indicate the "Notice of Decision" was not present in the file or was not provided to him when he asked for any new papers in the file.

The Verified Petition, Paragraph 33, describes a conversation with Deputy Village Clerk and ARB secretary Nancy Futeran in which inquiries by Petitioner regarding the status of the ARB file related to 90 Fir Drive were answered with the information that the only changes in the file were a new landscape plan.

That inquiry appears to have occurred October 4, 2013. Petitioner has located contemporaneous notes of his pre-meeting inspections of ARB files and documents at Village Hall September 5, 2013 (*Reply Exhibit 4*) and October 4,2013 (*Reply Exhibit 5*).

At neither time did the request to Ms. Futeran to view the 90 Fir Drive file, or the examination of that file as provided by Ms. Futeran, yield the "Notice of Decision" related to that file dated August 22, 2013 and signed (but not otherwise stamped) as "filed" with the Village Clerk August 23, 2013.

It may be noteworthy that the Notice of Decision lacks any type of verification of its date, save the handwritten annotation of the Village Clerk. This fact is especially curious given the fact that the Notice of Decision references Minutes

("prepared minutes incorporated herein") -- which were not prepared, according the their notarized date, until September 9 (Respondent VEH Exhibit 6) -- a date within the Statute of Limitations for this action.

Furthermore, Petitioner recalls a conversation with Ms. Futeran at the September 5th visit when he asked "what was going on and aren't they going to re-hear" (or words to that effect) the 90 Fir Drive application due to missing tree information, and Ms. Futeran's reply was that she did not think they were going to do so (words to that effect). When Petitioner replied that they had to, because the issues were pending, Ms. Futeran did not say anything substantive to contradict that belief upon which Petitioner was continuing both to inspect the files and submit new written comments on the application which he clearly believed remained pending.

According to Respondent VEH Exhibit 6 (the "Notice of Decision"), Ms. Futeran had prepared the August 5 meeting Minutes on September 9, 2013 which would possibly have given her awareness of the completion of the Notice of Decision by the October 4th inquiry of Petitioner.

(There is another apparent discrepancy in the record in that those Minutes were sworn to September 9, 2013 (Respondent VEH Exhibit 6), but they were attached to and incorporated in the Notice of Decision that referred to them despite that document's having been purportedly signed and "filed" two weeks earlier, on August 22 and 23, 2013, respectively.)

2c. Standard ARB Practice with respect to Missing Documentation

Petitioner has stated that he believed the decision by the ARB about tree removal at 90 Fir Drive remained outstanding since required documentation was missing from the ARB file for 90 Fir Drive, and that the "decision" was taken on "the house" only (Paragraph 2a, above).

Petitioner relied on his knowledge of prior meetings of the ARB when similar circumstances occurred. Respondent VEH provided documents of several such meetings that Petitioner was able to analyze.

A. 20 Redwood Drive --

According to the Minutes of the ARB meeting of March 4, 2013 as attached to the Notice of Decision for 20 Redwood Drive (*Reply Exhibit 6*), "...the Board unanimously voted to reserve decision, subject to submission of a landscape plan that shows existing trees and proposed landscaping." Minutes prepared for the ARB meeting of June 3, 2013 (same Exhibit) show that the application was reconsidered when "Robert Campagna, Architect, and Alexander Gunn, landscape architect presented the revised plans and landscape plan" and the ARB then "agreed to approve the application as presented."

B. 65 Tara Drive --

According to the Minutes of the ARB meeting of July 1, 2013 as attached to the Notice of Decision for 65 Tara Drive (*Reply Exhibit 7*), "...the Board unanimously voted to reserve decision pending submission and review of a landscape plan that takes into account the existing boundary shrubbery." Minutes prepared for the ARB meeting of August 5, 2013 , (same Exhibit) show

that the application was reconsidered when "James O'Grady, Architect presented the landscape plan for the rear extension project...." at the site, and later "unanimously voted to approve the design and landscape plan as presented."

C. 400A Locust Lane --

According to the Minutes of the ARB meeting of May 6, 2013 as attached to the Notice of Decision for 400A Locust Lane (*Reply Exhibit 8*), "The Board also requested to view the landscape plans as well. Upon a motion ... the Board unanimously voted to reserve decision so that the revised plans may be presented." Minutes prepared for the ARB meeting of June 3, 2013 , (same Exhibit) "Marcy Beyzavi, of MZB Drafting...presented the revised application....Upon motion...the Board unanimously agreed to approve the revised plans." (No mention was made however of the landscape plan.)

In all three cases, the ARB when faced with missing or incomplete plans, or plans that needed revision, reconvened at a later date to consider the plans then submitted. In two of the cases the phraseology used was "subject to submission" and "pending submission" (A. and B., respectively).

In the deliberations over 90 Fir Drive, the Minutes (Respondent VEH Exhibit 6) report "the Board voted to approve the application as presented, subject to resubmission of a landscape plan that includes a planting schedule and a complete legend." In this case the phrase was "subject to resubmission."

While ARB at the prior meetings did not vote to "approve" the proposals (as they did with 90 Drive) but to "reserve decision" on them, it may be noted that

Petitioner has clearly detailed that the vote on August 5, 2013 was not for the trees but for "the house" only (Paragraph 2a, above). As such it was entirely reasonable for Petitioner to believe based on the record and proceedings that the trees were a separate issue subject to that "resubmission" and a meeting would follow to consider them.

And everything Petitioner did subsequent reflected that belief, until he was told otherwise by the ARB officials on October 7, 2013.

3. Petitioner's Injury and Relation to the Property

Petitioner is submitting a Supplementary affidavit responsive to the challenges raised by Respondents about standing.

But the record as already established demonstrates multiple ways in which Petitioner uses the resources at issue in a manner different from other members of the general public, and has a different connection to them, including 90 Fir Drive.

In the Verified Petition, Petitioner outlines his frequent walks throughout the community, his specific observation and documentation of the flora he observes during those walks, his civic activism which revolves around those walks, as well as his deep concern -- and actions undertaken thereupon -- about the deterioration of the environment that he encounters in East Hills.

In the Petition, there is further clear evidence of multiple visits to the property at 90 Fir Drive as documented in letters to the ARB 8/5, 9/9, and 10/7/2013.

Respondents' own exhibits show Petitioner previously visited and worked on an issue on the same street, at 15 Fir Drive. The web page from Petitioner's site "Planet-in-Peril.org" depicted in Petitioner VEH Exhibit 8 carries a link to an article captioned "Builder asks to cut down SIXTEEN trees at 15 Fir Drive."

In each of his letters to the ARB Petitioner urges denial of the proposal to cut down trees -- which he notes repeatedly are not clearly indicated -- because the trees are "unusually beautiful". The passion and effort with which the submissions are made should clearly indicate Petitioner's interest in and concern about the trees on that property. Such concern was also placed on the record at the August 5 ARB meeting, and it much should have been amply clear to the ARB, as it should be to a neutral observer.

4. Conversations with Village Officials

Conversations with Village officials reported in the Verified Petition (Nancy Futeran paragraph 33; Counsel Mitchell Cohen paragraph 40-42, and Spencer Kanis paragraphs 39 and 41) are disclaimed by Ms. Futeran (Affidavit, Respondent Exhibit 18) and Mr. Cohen (Verified Answer, Paragraphs 41 and 43). That neither of those who deny the reports in the Verified Petition chooses to state what actually was said, in their own words, is unhelpful and fails to convincingly rebut Petitioner's sworn assertions.

5. Facts Regarding Petitioner

Petitioner is faced with a barrage of innuendo and slurs on his motives, his character, his lifestyle, and his conduct. Terms like "reckless," "chronic complainer," "zealot," "vendetta," etc. are used by Respondents. But Respondents helpfully introduce Petitioner's own words and actions into the record. A perusal of the web pages reproduced in the VEH Exhibits 7 to 9, as well as Petitioner's conduct before the court, and the content of his legal filings, should help to challenge that unjustified effort to ad hominem discredit Petitioner, his actions, and his legal efforts.

Unhelpfully Respondent VEH offers a caricature of Petitioner based on distorting quotations from the Verified Petition (Respondent VEH Memorandum of Law p. 13). A fair reading of Petitioner's attempt to provide a full picture of his actions and status as they are relevant to this action (Verified Petition paragraph 3) should dispel the distorted picture so drawn.

6. Interference with Projects of Robert Beer

Robert Beer, who was served under the theory he was a possible owner of the property -- as indeed he listed himself in at least one paper (Respondent VEH Exhibit 31, Application for Building Permit [among large stack of related papers]) -- claims that Petitioner "has brought proceedings against he Village that have affected all of my current projects in the Village" (Affidavit of Robert Beer, Paragraph 10). Petitioner has no knowledge of any other projects so

affected, as Petitioner has no other litigation outstanding.

7. Trees Present on 90 Fir Drive and their impact on Construction

Respondent Bradley Marks asserts that there are 40 trees on the property (Affidavit of Bradley Marks, Paragraph 32). A similar assertion was made by a Respondent counsel, in my recollection Mr.. Sahn, during the hearing of the court on October 22 in argument to oppose a Temporary Restraining Order. As such the statement was material to the Counsel's argument.

But the record appears to contradict this assertion.

A landscape drawing title "Total Landscape Plan" (Respondent VEH Exhibit 11)dated August 22, 2013 -- the same day the ARB decision was promulgated as a Notice of Decision (Respondent VEH Exhibit 6) -- shows in total there were 33 "trees" on the property, of which nine would be removed. Instead of 31 trees remaining, there would be 24.

But of equal importance, observations by Petitioner at the property suggest the width and height of trees to remain were in many cases wholly different -- far smaller -- than the trees to be removed. The dimensions of all but two of the remaining trees were omitted, and those two trees were the smallest ones listed, at 8 inches in diameter. As a result the tree canopy would be changed far more significantly than suggested by Respondent on this record.

Additionally, Respondents have asserted that failing to remove the trees pending adjudication of legal questions would severely delay the construction

process (Affidavit of Bradley Marks, Paragraphs 5 and 7).

However Respondent's own affidavit states that four of the trees at issue -- and they would appear to include the largest ones of 40 inches and 22 inches, at least (see landscape plan (Respondent VEH Exhibit 11) -- are not in the building envelope but only in the way of the proposed circular driveway (2) and in the rear yard (2) (Affidavit of Bradley Marks, Paragraph 32).

8. Impact on Marks Family

Various assertions are alleged by Respondent regarding the impact of any delay in the project to more fully comply with VEH law or to adjudicate the questions before the court (Affidavit of Bradley Marks, Paragraphs 7 and 8). The record contains no documentary evidence of the alleged facts.

II. REPLY IN REGARD TO THE LAW

9. Statute of Limitations

Respondents argue that this action is barred by the statute of limitations in NY Village Law (Respondent VEH Memorandum of Law P. 16, Respondent Bradley Marks Memorandum of Law P. 6).

Respondents argue that the clock began ticking when the ARB "Notice of Decision" was filed with the Village Clerk on August 23, 2013, and from that day thirty days were allowed to file an Article 78 challenge to the decision under NY

Village Law Section 7-712-c.

In reply Petitioner makes three arguments as follows:

(1) The period calculated by Respondents is wrong because the Notice of Decision could not have been promulgated early enough for the Statute of Limitations to have run out.

The Notice of Decision could not have been completed before September 9, 2013, which was 30 days before Petitioner filed his Article 78 action.

The Notice of Decision references Minutes ("prepared minutes incorporated herein") which were not prepared, according the their notarized date, until September 9 (Respondent VEH Exhibit 6) a date within the Statute of Limitations for this action.

If the Notice of Decision was filed prior to the Minutes, which are denoted as an integral part of the Decision, the decision was not complete. The Minutes having been dated September 9, 2013, the Notice of decision could not have been full and complete until that date, at the earliest.

Even if the law provides for a 30 day statute of limitations -- as Petitioner does not agree it does (see below) -- the filing would have been timely.

(2) The CPLR does not require a 30-day Statute of Limitations for ARB decisions.

The CPLR provides for a four-month period in which to appeal: "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner,"

CPLR 217(1).

The CPLR defines such entities as: "The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article" (CPLR Section 7802).

The shorter period asserted by Respondents applies specifically to proceedings by the Zoning Board of Appeals of a village, or apparently to officers or agents working on its behalf.

The CPLR section under which the 30-day limit occurs is devoted to zoning; the "grant of power" for Section 7-700 and its subsequent sections relates to building height and lot coverage, etc., and to historical preservation specifically, not to any other functions of the village[1].

Respondents assert that Section 7-712-c of the Village law applies to every entity operating in a Village because its language appears inclusive.[2]

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1 Village Law, section 7-700: "For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. As a part of the comprehensive plan and design, the village board is empowered by local law, to regulate and restrict certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of natural heritage. Such regulations shall provide that a board of appeals may determine and vary their application in harmony with the general purpose and intent, and in accordance with general or specific rules therein contained."

2 Any person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the village, may apply to the supreme court for review by a proceeding under article

However the Second Department has held that a village board of trustees is subject to the four-month period for an Article 78:

> "At a meeting on October 13, 2010, the Board of Trustees adopted a resolution determining that the site plan was consistent with the LWRP....The Supreme Court properly granted that branch of the separate motions which was to dismiss the third cause of action, which sought review of the finding of consistency with the LWRP, as time-barred by the applicable four-month statute of limitations (see CPLR 217 [1]). *Matter of Shepherd v. Maddaloni*, 103 AD 3d 901 (Appellate Div., 2nd Dept. 2013), at 902 and 903.

Furthermore, the case, Platzman v. Munno, 282 A.D. 2d 539 (Second Department 2001), cited alone by Respondent VEH in its Memorandum of Law to support their argument over the statute of limitations is inapposite, as it deals with Town law, not Village law, as in the present action: "Pursuant to Town Law § 267-c (1), the petitioners had 30 days after the filing of the respondents' determination denying their application for a use variance to commence a proceeding to review that determination." ibid., at 539.

(3) There was no statute of limitations applicable because no decision was actually rendered on the trees at 90 Fir Drive.

In our introductory remarks, section 2a through 2c, we describe the nature of the proceedings and describe how no decision was actually taken with respect tot trees to 90 Fir Drive.

Hence our challenge to the actions of the ARB with respect to tree permits is an action against a phantom, and only those elements of our action that govern the actions that the Village would take pursuant to such phantom

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seventy-eight 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.

decisions is relevant to the court. And those actions are not cloaked in any statute of limitations.

It might be argued that the assertion that the 'incorrectness' of the decision is a matter for the courts to adjudicate, not a matter of presupposition; and that arguing that such incorrectness then dispenses with the statute of limitations, such that the courts can then rule on it, involves a sort of circular reasoning.

But we are arguing that the court need not rule on the "decision" but rather the facts -- that the decision on tree removal did not exist per se, and that therefore the statute of limitations The "decision" as rendered in the "Notice of Decision" was inaccurate inasmuch as it purported to cover the vote of the ARB with respect to trees. As presented above (Point 2 "ARB Meeting") the vote by the ARB was only on "the house" per the motion of the chairman. The rest of the "Notice of Decision" that purports to render a decision on tree permits or the landscape plan was based on error, and as such is a nullity, not subject to any statute of limitations. It should be enough to draw the Village's attention to the error to have it corrected. As it is erroneous it has no basis in law and deserves no consideration of the statute of limitations.does not apply to it -- nor could it apply to something that does not exist.

The "Notice of Decision" itself was not even available to Petitioner prior to instituting this action; so it was only the presumed actions of the Village, without regard to any purported "decision" that Petitioner sough judicial relief from.

(3) Equitable estoppel tolled the statute of limitations until October 7, 2013.

It is an essential element of the law of the statutes of limitations that

deliberate concealing of the underlying facts tolls the timing of the limitations (see below), and that furthermore the due diligence by a plaintiff defending against the statute of limitations is a consideration in its application when tolling is justified. In this case there was both concealment of the decision and due diligence on the part of the Petitioner once he became aware of the need to file.

The Court of Appeals has held that where a government agency creates an ambiguity that delays a plaintiff from timely asserting his rights, or where the plaintiff relies on implications that the statute of limitations clock is not yet ticking, then

> "The burden [is] put on a public body to make it clear what was or was not its determination. In dealing with this dilatory defense the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court." (Matter of Castaways Motel v Schuyler, 24 N.Y.2d 120, 126-127)
>
> City of NY v. State of NY, 40 NY 2d 659, 670 NY: Court of Appeals,1976 (In this case the Court sided with the City which delayed its lawsuit for reimbursement of outlays well past a statutory limit because various negotiations and other inter-government processes were underway in the interim)

Furthermore,

> "The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense.
>
> 'Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding' (General Stencils v Chiappa, 18 NY2d 125, 128 [1966]).
>
> Thus, this Court has held that equitable estoppel will apply "where plaintiff was induced by fraud, misrepresentations or deception to

> refrain from filing a timely action" (Simcuski v Saeli, 44 NY2d 442, 449 [1978]). Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations (see Simcuski, 44 NY2d at 449)."
>
> Zumpano v. Quinn, 6 N.Y.3d 666, 673-4 Court of Appeals, 2006 (A case where the Court refused to toll the statute of limitations in claims of church sexual abuses due to the failures of plaintiffs to demonstrate their inability to act more quickly in asserting claims.)

Further,

> "...[D]ue diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel, to be demonstrated by the plaintiff when he seeks the shelter of the doctrine (see Plaintiff's Diligence as Affecting His Right to Have Defendant Estopped From Pleading the Statute of Limitations, Ann., 44 ALR3d 760, § 7, pp 774-779). Under this approach, which we endorse, the burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational. Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances.
>
> (Simkuski, above, at 450)

In the case of 90 Fir Drive, the impression was clearly created to Petitioner through the record (See Facts, Sections 2a - 2c, above) that the "decision" had not been taken with respect to the trees because further information was needed.

> "Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship. . . which gave the defendant an obligation to inform him or her of facts underlying the claim" (Gleason v Spota, 194 AD2d 764, 765 [2d Dept 1993]).
>
> Zumpano, above, at 675

Petitioner twice visited the Village offices after the August 5, 2013, ARB

meeting, to inspect what he was led to believe were the relevant updates to the ARB file related to tree removal at 90 Fir Drive (Facts, Section 2b.). At those times he neither found in the file nor was given the "Notice of Decision" purportedly promulgated and filed with the Village Clerk on August 22 and 23, 2013, respectively. (Respondent VEH Exhibit 6).

The absence of that decision from the file could be called concealment. Whether there existed a "fiduciary relationship" is questionable; but not fatal, because the full statement of the Court in Gleason is that the relationship required giving the information to the Plaintiff.

Here, the affirmative obligation of the Village was to maintain a full and complete file, for the examination of the public when that examination was legally available, as it is under the state Freedom of Information Law. In any event the file was missing essential information, or the Secretary of the ARB withheld the information, and the information was concealed but relied on.

There were however misrepresentations as well.

Conversations with the Secretary to the ARB seeking information about new information regarding the proposed tree removals at 90 Fir Drive (Facts, Section 2b. and 4., above) also failed to elicit any information that would have made Petitioner aware that a "decision" had supposedly been made.

Whether the failure to disclose the facts about the "decision" to Petitioner was deliberate and calculated is not known to Petitioner and cannot be known based on the record. But failing to see evidence either way the presumption should favor a just solution.

Furthermore, Petitioner demonstrated the due diligence required to assert equitable estoppel (see Simkuski, above.) .

Petitioner learned that a final decision may have been taken on October 7, 2013. The "Notice of Decision" for 90 Fir Drive (Respondent VEH Exhibit 6) was purportedly filed with the Village Clerk August 23, 2013 (but not officially stamped or otherwise so memorialized). The Order to Show Cause was filed with the Court October 9, 2013. Running the clock from the purported filing date produces a deadline of September 23, 2013 -- a mere 16 days earlier than the suit was filed.

In fact once Petitioner became aware of the possibility that a decision had been taken, within 48 hours he filed the Order to Show Cause, Verified Petition, and Memorandum of Law with this Court (Verified Petition Paragraphs 2 and 39 to 43).

It might be argued that Petitioner should, by a due diligence standard, have filed Freedom of Information Law (FOIL) requests regularly to learn whether a decision had been made. But given the press of other matters in a busy life, it is reasonable to ask to what degree a reasonable person would have felt that such a gesture was necessary.

Petitioner would argue that the facts before him as he waited for an expected follow-up hearing -- regarding the proceedings he had witnessed, the vote on the "house" he had heard, the language regarding a "resubmission" he had heard, and his prior experience of the ARB's practices (see Fact, Sections 2a to 2c) -- led him to comfortably believe that a decision on the trees he was

committed to could not have been made, and was pending, so that a FOIL request would be simply superfluous and indeed a needless challenge to the essential transparency of the ARB's proceedings, which he had not in the recent past found to be deficient.

Given the unreasonableness of expecting Petitioner to learn that a "Decision" had been filed on August 23, the first time Petitioner could actually know that a decision may have purportedly been made was October 7, 2013 (Verified Petition, Paragraphs 39 to 43), so the statute of limitations should properly commence from then.

Given that, this action is not by law time-barred.

10. Collateral Estoppel

Respondents assert collateral estoppel as a defense.

Petitioner asserts two defenses to estoppel: (1) The facts in the current case are different from those in the first; and (2) Petitioner did not have a full and fair opportunity to litigate in the prior action due to several handicaps or deficiencies that qualify for exception.

Before presenting specific defenses against this challenge to Petitioner's standing, we would like to draw the Court's attention to the fact that in almost all cases we encountered in New York case law regarding collateral estoppel, the "issue" in question was a far more substantive, for want of a better term, than the issue of standing. In *Ryan v. New York Tel. Co.*, 62 NY 2d 494 (Court of

Appeals 1984) the "issue" to be collaterally estopped was the guilt of a crime; in *Matter of Choi v. State*, 74 NY 2d 933 (Court of Appeals 1989).

Further, the issue was medical malpractice; in *Breslin Realty v. Shaw*, 72 AD 3d 258 (Appellate Div., 2nd Dept. 2010) the issue was legal malpractice. in *Parker v. Blauvelt Fire Co*., 712 NE 2d 647 (Court of Appeals 1999) the issue was whether due process was violated; and in *Buechel v. Bain*, 766 NE 2d 914 (Court of Appeals 2001), the issue was whether a fee arrangement had been already decided.

In the one case we saw where standing was an issue, *Westchester County Correction Officers Benevolent Association v. County of Westchester*, 65 AD 3d 1226 (Appellate Div., 2nd Dept. 2009), the issue was whether a union had standing to represent certain of its members. The Second Department ruled that the issue had already been decided in the union's favor, and the County was estopped from challenging it again.

In that case, the union in the earlier case represented 15 corrections officers, and in the later case represented two more. The situation would appear far more clear-cut than the present action.

The Second Department stated in that case,

> "`The two elements that must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue'" (Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co., 60 AD3d at 899, quoting Luscher v Arrua, 21 AD3d at 1007; see Kaufman v Eli Lilly & Co., 65 NY2d at 455). *ibid*., at 1227

We will challenge the assertion of estoppel here on those two grounds. First,

the facts are different in the present action and allow Petitioner standing even with the Court's very limited definition of it as a matter of law (see below). Second, facts of the prior litigation caused a lack of a full and fair opportunity to litigate.

(1) The "Issue" is different because the facts are different:

On May 22, 2013, The Honorable Justice Anthony L. Parga of this Court ruled against Petitioner in a previous action wherein Petitioner sought to force the Village to permit appeals to the Zoning Board of Appeals ("ZBA") and simultaneously challenged the procedural and substantive validity of eight ARB prior decisions (*Reply Exhibit 9*, Verified Petition, In the Matter of Richard A Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013).

The Court made a determination with respect to Petitioner's legal standing to challenge those ARB decisions by Petitioner's Article 78 petition, the Court siding with Respondent VEH in granting its Motion to Dismiss.

Now, Respondents VEH and Bradley Marks seek to have that ruling on standing applied to the instant case by collateral estoppel.

Respondent Bradley Marks asserts:

> "This Court, in one of Brummel's prior Article 78 proceedings against the Village, has already determined that Brummel lacks standing to challenge determinations made by the ARB regarding properties that he does not own, and in which he has no interest, as he is doing in the instant proceeding.... This Court concluded that Brummel "does not have standing to bring the within application challenging the decisions of the ARB on the properties which he does not own." (quoting from Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C., emphasis added here).

(Respondent Bradley Marks Memorandum of Law, P. 7, emphasis added.)

Respondent VEH asserts:

"In Brummel II, this Court (Parga, J.) determined -- over Brummel's most ardent objections -- that Brummel lacks standing to challenge ARB decisions over 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, 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. (Respondent VEH Memorandum of Law Pp. 12-13.)

Both Respondents improperly stretch the meaning of the Court's ruling. The Court ruled on standing with respect to "the within application" (Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.), p. 2, not with respect to any and all challenges to ARB determinations with respect to an entire class of properties, as the Respondents would have the Court believe.

That being said the challenge is a factual one: to determine whether the facts and/or law affecting the present case can be distinguished from the prior one to relieve Petitioner of the strictures of collateral estoppel with respect to standing. We will show how that is the reasonable reading of the law and of the facts of this action.

This Court (Justice Parga) ruled that the law applied to standing is as

follows:

> "It is well settled that '[t]o establish standing, an individual must demonstrate an injury-in-fact that falls within the zone of interests protected by the pertinent statute. 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."' Clean Water Advocates of New York, Inc. v. New York State Dept. of Environmental Conservation, 103 A.D.3d 1006, 1007, 962 N.Y.S.2d 390, 391-392 (3 Dept. 2013)" Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.), P. 2, internal citations omitted.).

On the facts, the Court stated:

> "There has been no showing by Petitioner that the eight ARB decisions that he challenges affect him in a manner different than any other resident of the Village or other members of the general public," Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.), P. 3.

This Court's inquiry must then be how the facts differ in the two actions, with respect to the law as stated by the Court, above.

In the prior case, Petitioner set forth in his Verified Petition facts of his connection to the properties at issue as: (1) His long-term residence in the Village; (2) his participation in Village governmental functions related to the environment; (3) his website covering environmental issues including many in the Village; (4) his frequent walks in the community enjoying and documenting the environment there, as well as alerting neighbors to specific issues; (5) his prior litigation on behalf of the environment in the Village; (6) his effort to form a new civic association dedicated to the environment in the Village; (7) his petition on behalf of the environment in the Village (*Reply Exhibit 9*, Verified Petition, In

the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013), Paragraph 3).

Petitioner in the prior case also alleged "Second, Petitioner will suffer irreparable harm since (a) the destructions of massive decades-old, if not century-old, trees cannot be remedied by simple replacement by saplings; and (b) the demolition or massive alternation older homes cannot be easily or practically reversed; and (c) even the partial renovation of houses often cannot be fully reversed because of structural changed effected," (*Reply Exhibit 9*, Verified Petition, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013), Paragraphs 127 and 131).

Petitioner in the prior case also argued for his environmental connection in his Memorandum of Law in Opposition to the Motion to Dismiss. He stated "Petitioner in his Amended Petitioner laid out the extraordinary connection he has established with the local environment" and quoted therein from the Verified Petition and the Affidavit in Opposition to the Motion to Dismiss (*Reply Exhibit 10*, Memorandum of Law, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013), P. 7, and *Reply Exhibit 18*, Affidavit in Opposition to Motion to Dismiss, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013), Paragraph 5).

Petitioner repeated several of the same claims in the present action (Verified Petition, Paragraphs 3 and 47), because Petitioner was no less convinced that current Court of Appeals and Appellate Division precedent would indeed otherwise afford him standing.

His general assertions about his use of the local resources that he seeks to protect (the tree canopy and neighborhood natural and architectural environment) clearly appear within the meaning of the Court of Appeals when it stated, "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," In the *Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany*, 13 N.Y. 3d 297 (Court of Appeals, 2009), P. 301.

But Respondents' assertion of collateral estoppel effectively requires an additional and different showing of standing in the present case, the former case not having satisfied that theory of law and fact.

The Court of Appeal has said:

> "Of course, the issue must have been material to the first action or proceeding and essential to the decision rendered therein (Silberstein v Silberstein, 218 N.Y. 525, 528; see, 501*501 also, Hinchey v Sellers, *supra*; Ripley v Storer, *supra*; Ward v Boyce, 152 N.Y. 191), and it must be the point actually to be determined in the second action or proceeding such that "a different judgment in the second would destroy or impair rights or interests established by the first" (Schuylkill Fuel Corp. v Nieberg Realty Corp., *supra*, at p 307 [Cardozo, Ch. J.]; see, also, S. T. Grand, Inc. v City of New York, 32 N.Y.2d 300, 304-305," *Ryan v. New York Tel. Co*., 62 NY 2d 494, 500-501 (Court of Appeals 1984)

Standing is a factual and legal determination, and the facts in one action are necessarily different from those in another. We now provide that showing of distinct facts:

Petitioner does demonstrate a direct and robust connection with the specific

property at 90 Fir Drive beyond the general assertions of environmental usage and activism demonstrated in the prior case -- although in the context thereof as carried into the present action.

Petitioner spent time in close proximity with the property at 90 Fir Drive when earlier this year he worked on a preservation effort for 15 Fir Drive (*Reply Exhibit 11*, flier for 15 Fir Drive). At that time Petitioner also went door-to-door along Fir Drive speaking with neighbors about the planned tree removals and other work there. So Petitioner developed a generalized awareness of the character of the street and its flora (*Reply Exhibit 12*, Supplementary Affidavit).

Petitioner became acquainted with the property at 90 Fir Drive and composed three separate letters to the ARB seeking to protect the property (Verified Petition, Paragraphs 24, 30, 35, and 36, RE letters and visits of Petitioner). Petitioner engaged a certified arborist to evaluate the trees on the property, and obtained two rounds of expert testimony as a result, accompanying the arborist to the property on more than one occasion (Verified Petition, Paragraphs 25, 30, 31, and 36 RE visits and Letters of Arborist Richard Oberlander).

Petitioner spent further time in the neighborhood of the property and mobilized neighbors in opposition to the application, including Elaine Berger, an across the street neighbor (Verified Petition, Paragraphs 37 and 39). Other neighbors canvassed by Petitioner either signed a petition (*Reply Exhibit 13*, petition signed by Stuart Feinstein) or added personalized letter to the ARB stating their opposition (*Reply Exhibit 14*, letter signed by Bruce S. Herman).

Petitioner further spent time visiting the property to photograph it and to follow up with nearby neighbors (*Reply Exhibit 11*, Supplementary Affidavit). Petitioner was concerned and alarmed enough about the plans for 90 Fir Drive that he created and distributed an illustrated flier around the nearby neighborhood (*Reply Exhibit 15*, flier for 90 Fir Drive).

Unlike in the present case, where we now systematically illustrate our direct connection to the property at issue, in the prior action Petitioner did *not* make claims on the record regarding such a connection, because the legal theory Petitioner then asserted did not seem to require it.

In the prior action, it was stated on the record that letters were presented to the ARB from both Petitioner and the same certified arborist working with Petitioner, but that fact was not anywhere asserted as demonstrating the connection to the properties, again because it was not felt to be necessary.

Furthermore, in the circumstances of the prior action, Petitioner also created at least one flier that alerted neighbors to the work planned at 15 Fir Drive, but that fact was not entered into the record of the prior action at all, again because Petitioner's theory standing did not seem to demand it.

(Petitioner in the prior action relied on his general use of, and multi-faceted connection with, the overall Village natural setting to justify his standing with respect to the constituent elements thereof.)

As recounted above, the Court stated that there was no demonstration that the applications at issue would affect Petitioner in any manner different from others. That was the extent of the Court's holding of the *facts* with respect to the

law.

Given the facts of the present action, as specifically recounted herein, it would seem difficult to make the same conclusion. Petitioner clearly demonstrates a special concern for and interest in the specific property at 90 Fir Drive, as well as visits to the immediate vicinity both before and after the application was submitted to the ARB.[3]

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3 One might argue that trying to assert 'injury' for standing by the presence of advocacy could create a 'slippery slope' that would smudge the limitation in *Morton* -- embraced in *Pine Bush* -- that mere 'interest' in the environment was not enough to confer standing, if now advocacy based on that interest -- absent other evidence of injury -- would confer standing. One might say a party could try to 'manufacture' standing -- by advocacy -- in each case where it would be convenient to have it. However, those issues do not seem fatal. That unintended outcome could be corrected by looking at the totality of evidence of a plaintiff's connection with the ecology at issue, before asking whether the specific interest (and injury), proved by advocacy, is real or a mere contrivance. Beyond that, it would also seem this 'fine line' is one one of semantics. The Court made a very overt effort to broaden environmental standing. The old rule, in practice, required injury to be asserted by a direct neighbor, and that was seen by the Court as illogical and overly restrictive. The opinion pointedly dismissed as incongruous a reliance on the mere coincidence of proximity -- which in *Pine Bush* yielded only nearby shopping malls and office complexes -- to seek those who would have a connection to the sensitive Pine Barrens. ("The City asks us to adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site; that rule would be arbitrary, and would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury." *Save the Pine Bush v. Common Council,* 13 NY 3d 297, 305 (NY Court of Appeals 2009)) Instead they relied on those who took an active interest and made use of them. In this case the reason for the parties' interest was apparently partially because the area had endangered wildlife. Similarly here, Petitioner has taken a greater degree of interest because of the endangerment of the surrounding suburban trees -- and especially those targeted for removal. The injury is real, not manufactured or a contrivance. And we add an element to distinguish our facts from those of so-called "generalized interest" disallowed by the Court of Appeals -- "In recognizing that injury of the kind petitioners here allege can confer standing, we adopt a rule similar to one long established in the federal courts. In Sierra Club v Morton (405 US 727, 734 [1972]), the United States Supreme Court held that a generalized "interest" in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's "[a]esthetic and

As such his harm would be distinct from others, even nearby neighbors who took no such direct interest.

Once the threat of serious environmental transformation of the property was raised, Petitioner's interest was indeed magnified. But it was not for synthetic legalistic purposes to create standing; instead it was from genuine concern that this property would be degraded, and would thereby damage the larger environment of the community.

That concern would be akin to the butterfly watchers in Pine Bush, *supra*, who were connected to the specific local butterfly and its habitat partially because of their mutually imperiled existence. ("Here, the City does not challenge the reality of the injuries petitioners assert—understandably so, since it seems highly likely that many members of an organization called Save the Pine Bush, Inc. are people who frequently visit and enjoy the Pine Bush." *Save the Pine Bush*, *supra*, 306.) Here Petitioner took a similar interest.

(2) Petitioner did not have his "full day in court" in the prior action when the

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environmental well-being" would be enough (see also Lujan v Defenders of Wildlife, 504 US 555, 562-563 [1992] ["the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"]; Friends of Earth, Inc. v Laidlaw Environmental Services [TOC], Inc., 528 US 167, 183 [2000])" Save the Pine Bush., supra, 305). Because beyond the "generalized interest" asserted in prior action, there is a well-documented context for Petitioner's interest -- it is a sustained connection to the entire ecosystem, followed up by a direct interest and involvement with those specific pieces whose existence becomes especially fraught -- and whose character becomes more notable by their problems. In the present case, Petitioner has shown a sustained connection, injury of the type contemplated in *Pine Bush*, and a type beyond what was demonstrated to the Court in the prior action.

Court ruled on on standing.

The relevant estoppel test is whether a party had a "full and fair opportunity to litigate the issue":

"...[T]he party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding...." Breslin Realty v. Shaw, 72 AD 3d 258, 263 (NY Appellate Div., 2nd Dept. 2010),

The Second Department opinion in *Breslin* cited *Ryan v. New York Tel. Co*., which provides a fuller description of the question to be addressed:

> "A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of "the `realities of the [prior] litigation', including the context and other circumstances which * * * may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him". (People v Plevy, 52 N.Y.2d 58, 65.) Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation. (Gilberg v Barbieri, 53 N.Y.2d 285, 292; Schwartz v Public Administrator, 24 N.Y.2d 65, 72.) *Ryan v. New York Tel. Co*., 62 NY 2d 494, 501 (NY Court of Appeals 1984)

Petitioner asserts that he was handicapped in several respects from fully litigating the issue of standing:

(A) Petitioner did not have a full "incentive and initiative to litigate" because of a misunderstanding of the law, and was relatedly handicapped by "the competence and expertise of counsel":

Petitioner is a pro se litigant. He sought and received legal and procedural

advice from an attorney who specializes in environmental matters with whom he became acquainted in a prior environmental issue. Petitioner was advised by that counsel, arguably incorrectly, that the Court's ruling would *not* have a collateral estoppel effect on future litigation.

Further Petitioner's concerns that a rather extended delay in the Court's issuance of a ruling would have rendered the issues moot for appellate review was not corrected by Counsel in light of numerous holdings that mootness would not bar review of issues of public interest likely to be raised again (see e.g. *Matter of Heaven C*., 71 AD 3d 1301 (Appellate Div., 3rd Dept. 2010):

> "....However, because the issue...is novel, likely to recur and...likely to evade appellate review, we find that the exception to the mootness doctrine exists and, therefore, address this narrow issue (see Matter of M.B., 6 NY3d 437, 447 [2006]; Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 811 [2003], cert denied 540 1303*1303 US 1017 [2003]; Matter of Rodriguez v Wing, 94 NY2d 192, 196 [1999]; Matter of Schermerhorn v Becker, 64 AD3d 843, 845 [2009]; see also City of New York v Maul, 59 AD3d 187, 191 [2009]).," at 1302

The legal advice at issue was rendered by attorney Mindy Zoghlin, Esq., of Bansbach and Zoghlin, Rochester NY. (see *Reply Exhibit 16*, Invoice from Counsel.)

For those reasons, among other subsidiary ones, Petitioner did not submit the prior action for appellate review, despite Petitioner's strong belief that the Court's holding was at variance with the law of standing as re-stated after *Save the Pine Bush*, *supra*. (See for instance Petitioner's public statement of June 9, 2013: "The judge's decision barely touched on any of the evidence or arguments we put forward , and indeed relied on obsolete court decisions...." (Respondent

VEH Exhibit 9, Planet-in-Peril.org website screen-shot).)

(B) "The availability of new evidence":

This problem in this action is connected to the issue of "competence and effectiveness of counsel," in this instance a failure of competence due to limited research resources.

The evidence Petitioner asserts to be at issue is a recent and important (but predating the prior action) ruling on standing by the Appellate Division, Second Department, that followed the decision Clean Water Advocates that the Court relied on in the prior action (Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.), p.3)

The decision of the Second Department, *Matter of Shepherd v. Maddaloni*, 103 AD 3d 901 (Appellate Div., 2nd Dept. 2013) was dated February 27, 2013, while the ruling in Clean Water Advocates was dated February 21, 2013.

Some anomaly in the indexing function of Westlaw, which was relied on by Petitioner to gather relevant cases, led to *Matter of Shepherd* being absent from the search on standing in zoning matters that Petitioner conducted in preparing the prior action, in April, 2013 (see *Reply Exhibit 17*, Westlaw Keycite Headnote results).

As a pro se litigant Petitioner has limited access to legal research materials. Because there is, in Petitioner current knowledge, at present no public or college library open to the public in Nassau County that has standard legal research services Westlaw or Lexis-Nexis, Petitioner was limited to the Supreme

Court Law Library and the "Google" search function.

In surveying the law through the limited current resources of the Supreme Court library, the gathering of Westlaw Keycites is a fundamental technique -- among other things due to the relatively limited time the library is open.

The absence of *Matter of Shepherd* from Petitioner's arguments to the Court had a serious effect of handicapping Petitioner's argument over standing, the issue sought to be controlled by collateral estoppel now.

The Second Department ruled in *Matter of Shepherd* that the plaintiff in a zoning challenge enjoyed standing because of "their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property," *ibid*. at 906. The plaintiff lived half a mile from the property whose relatively modest reconstruction also abutted the harbor at issue (*ibid*. at 902-903.)

In its *Shepherd* decision, the the Second Department said that *Matter of Save the Pine Bush*, *supra*, gave the plaintiffs standing to litigate a zoning matter that generally affected an environmental resource that they had a general interest in and use of. That factual and legal situation closely tracks what Petitioner asserted as the basis for standing in his prior action.

So the absence of *Shepherd* from the search Petitioner conducted arguably led to a questionable ruling by the Court.

The nature of the circumstances should lead this Court to dismiss the assertion of the collateral estoppel defense due to the exception demanded by the rulings in *Breslin* and *Ryan*, *supra*.

In sum, Petitioner, should not be estopped from litigating the present claims on the basis of the prior holding on standing by this Court because: (1) Petitioner was, and is, in a different factual relation to the property at 90 Fir Drive than he was to the properties in the prior action; and further, he did not present an argument about whatever special relation he did have to those earlier properties because given the precedent on environmental standing he asserted, he did not believe the issue to be dispositive, hence the Court ruled on a relation that was less than fully presented in any case; and (2) that Petitioner did not have a full and fair opportunity to litigate the issue of standing due to questionable legal advice he received and due to an anomaly in legal research facilities that led to an important controlling decision being unavailable.

While this action is a narrow and modest one, it is an important challenge to a local government run amok, procedurally and substantively, absent effective oversight. The Court should not allow these issues to be immunized from judgement simply because in a prior case they regrettably escaped that scrutiny.

11. Standing

With respect to standing, Petitioner incorporates by reference his Memorandum of Law filed with the Court with his Verified Petition.

Petitioner also refers to the preceding section of this Reply that discusses the issue of collateral estoppel. Petitioner has in extended detail discussed the facts and law that are, within Petitioner's understanding, controlling in this action

based on the prior holding of this Court (Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.)).

In Petitioner's Memorandum of Law, we rely on the Court of Appeals decision *In the Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany*, 13 N.Y. 3d 297 (Court of Appeals, 2009), which broadened standing in environmental and land-use cases to explicitly include "a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public," *ibid.* at 301.

We relied in the Memorandum of Law on showing that Petitioner uses the general environment in the Village -- the "natural resource" related to In the Matter of Save the Pine Bush -- "more than most other members of the public," *Matter of Save the Pine Bush*, *supra.*

But in our discussion of collateral estoppel, above, taking notice of this Court's prior holding, we also took pains to demonstrate the additional elements that distinguished Petitioner's connection to 90 Fir Drive from any more general connection to the Village environment, and from the connections asserted in the ;prior action before this Court.

As a result, our assertion of standing relies on repeated visits to the property and the nearby neighborhood in in relation to the ARB application at issue now as well as a prior one in October 2012 regarding 15 Fir Drive.

This Court said,

> "...[I]t 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.'" *Clean Water Advocates of New York, Inc. v. New York State Dept. of Environmental Conservation*, 103 A.D.3d 1006, 1007, 962 N.Y.S. 2d 390, 391-392 (3 Dept. 2013)" Short Form Order, In the Matter of Richard A. Brummel, No. 3109/2013 (Sup. Ct. Nassau Co. May 22, 2013, Justice Anthony L. Parga, J.S.C.), P. 2, internal citations omitted.).

Petitioner has endeavored to show that.

But it is also incumbent on Petitioner to reply to the erroneous assertions of Respondents concerning the broader law of standing as the Appellate Division and the Court of Appeals have currently defined it.

We do not assert that those holdings apply to us insofar as they diverge from the rulings of this Court as collateral estoppel dictates in the present action. But it would be remiss to permit those erroneous assertions to remain unchallenged, and a brief discussion should serve to correct them.

Respondent VEH regrettably employs selective, vituperative caricature in its argument about Petitioner's alleged lack of standing (VEH Memorandum of Law p. 15, etc.), while at the same time recounting his myriad activities that connect him to the local environment far more than other members of the general public or the local community at large.

VEH wrongly asserts that the holding in *Save the Pine Bush v. Common Council*, 13 NY 3d 297 (Court of Appeals 2009) was that "members proved that they established a habitat for endangered species and thus they would be affected differently from the general public," (Respondent VEH Memorandum of Law at 15). In reality, the holding in *Pine Bush* made only passing reference to the issue of the endangered species (*ibid.*, at 301).

In fact, the Court's central finding was that petitioners visited the Pine Bush and used that resource there more than other members of the general public:

> "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.'" (*ibid.*, at 305).

Respondent Marks also distorts the Court's holding: "The Court of Appeals found that harm to the Pine Bush habitat would be sufficient to give the petitioners standing as it would directly affect their activities and pastimes in enjoying and studying its endangered species." (Respondent Marks Memorandum of Law , p. 9)

The Court set out the test of standing as "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," (*ibid.*, at 301).

The Court set limitations to the broad-brush that excerpt implies. It also held that

> "In recognizing that petitioners' alleged injuries are a sufficient basis for standing, we do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face. Standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case" (*ibid.*, at 306).

But the Second Department has very recently showed how that standard is

to be applied in practice, and in a case similar to that faced in the Village, *Matter of Shepherd v. Maddaloni*, 103 AD 3d 901 (Appellate Div., 2nd Dept. 2013). Without specifically saying so, the Court addressed situations where discrete actions that have limited effects on a larger ecosystem can be contested, with standing, by parties who utilize the same ecosystem even from a far distance.

In *Shepherd*, a homeowner who lived on a bay was found to enjoy standing to challenge the re-construction of another residential property ("a new single-family residence with a pool and pool house," *ibid.*, at 902) half a mile away -- absent any specific showing of how the limited construction would directly, or even indirectly, affect the bay itself or the petitioner. It was enough that there could be an effect on the general ecosystem (or in *Pine Bush* terms "natural resource", and that the petitioner also shared that ecosystem ("natural resource"). The Court said:

"...[T]he Shepherds established their standing to challenge the site plan approval by alleging "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 761, 774 [1991]). Their allegations that the approved construction project will harm their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property, are sufficient to confer standing (see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, 13 NY3d 297, 304-306 [2009])." *ibid.*, 905-906.

Similarly in the Village there is a "tree canopy" that is recognized by law as a key part of a unified ecosystem, like the body of water in *Shepherd*

> "...[I]t is in the public interest to protect the tree canopy for current and future generations, [so] 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....[T]he removal of trees deprives the residents of the Village of these benefits and disrupts fundamental ecological systems of which trees are an integral part," Village Code Section 186-1 (b) and (c).

The attack on that canopy by constant tree removals, often for demolition and rebuilding of homes,. damages that "natural resource" and the fact that Petitioner utilizes and embraces that natural resource as he demonstrably does -- in a manner far more intensely than other members of the public -- would otherwise afford standing under *Save the Pine Bush* and *Shepherd*.

Respondent Marks challenges the standing issue thusly:

> "Here Brummel has not pointed to any direct effect upon his activities or pastimes that Marks' proposed construction project would have. Brummel attempts to create his legal standing by contending that he 'uses and enjoys the natural resources more than most other members of the public.' But, the only connection to the natural resources which Brummel points to are his frequent walks throughout the community," (Respondent Marks Memorandum of Law, pp. 9-10)

In fact, the elements that Petitioner asserts -- the walks to enjoy the nature of the Village and the civic activism that demonstrates the importance with which he regards the nature he so enjoys would otherwise conform with the standing tests laid out in Save the Pine Bush.

We have added and clarified to the record in this Reply in adding specific instances of connection to the specific property at 90 Fir Drive. But under the test of standing otherwise established -- outside of the collateral estoppel created by this Court's prior judgement, which we address elsewhere -- those particular

elements would not be needed.

In concluding his argument against standing, Respondent Marks asserts that Petitioner "does not even contend that he passes by the subject property to enjoy its particular natural resources," (Respondent Marks Memorandum of Law p. 10). But again Respondent Marks seeks to impose a higher burden than raised in *Save the Pine Bush* or in *Shepherd*.

But in neither of those controlling cases did the petitioner, who was found to have standing, assert nor were they found to have direct contact with the property to be developed. The simple fact that the development of the property would or could have some generalized effect on the "natural resource": that they did actually utilize was found adequate to show they would suffer harm, and enjoyed standing to litigate.

(*Confer*, "The City asks us to adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site," *Save the Pine Bush*, 305; and "Elizabeth Shepherd and Peter Shepherd...reside one half mile away from the Maddalonis on property located on Stony Brook Harbor." Shepherd, 903 "Their allegations that the approved construction project will harm their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property, are sufficient to confer standing ," *Shepherd*, 906.)

The Court of Appeals, in its recent holding on environmental standing, has broadened the ability of parties who value and enjoy this State's natural resources to petition the courts to compel the enforcement of some of the the

extensive network of laws intended to protect them, when it appears that agencies under various other pressures and interests fail to do so.

As with any new legal regime, the change in emphasis may take tiem to displace older understanding of the law that had served as a quick route to dispose of cases.

Rulings like that in *Shepherd* help bring the *Save the Pine Bush* ruling into proper local application. Respondents should not successfully argue for an outdated version of the standing rule.

12. Judicial Review

Petitioner addressed in his Memorandum of Law in support of the Verified Petition precedent that allows this Court to review the decision of the ARB at issue here.

Respondents assert boilerplate rules established for review that are well-known. No one disputes, for instance, the general standards Respondent VEH quoted from a decision by the Second Department:

> "Judicial review of the ARB's determination is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion. '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 thee record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith." *In the Matter of Birch Tree Partners LLC v. Town of East Hampton*, 78 AD 3d 693 (Appellate Div., 2nd Dept., 2010) (Internal citations and quotations omitted).

Respondent Marks cites the same decision quotation, among others describing the various rationales for that standard of review.

Respondent VEH claims, in direct conflict with the record, that the ARB had all the data before it that was needed to vote on the proposed tree removals: "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 (sic). The others are in the backyard where clear space is to be created...." (Respondent VEH Memorandum of Law, p. 18).

Respondent Marks says basically the same thing: "The record shows that the ARB only approved the removal of tress that were necessary for Marks' construction project -- those that were in the envelope of the new home or driveway, and two to open up the backyard...." (Respondent Marks Memorandum of Law, p. 14)

However as our review of the transcript for the ARB meeting clearly shows (see Facts, section 2a, above) there was in fact no vote by the ARB on the matter of trees, in large part because by the ARB members' own observations on the record of the meeting, the necessary information regarding the proposed tree removals was missing.

But even beyond what the ARB members complained of, other filings required by Village law to be submitted prior to the issuance of tree-removal permits, as the Notice of Decision asserted was done (Respondent VEH Exhibit 6) was also missing.

As stated in Petitioner's Verified Petition, there was, as is unfortunately typical in ARB proceedings, no "application" for tree removals nor "report" from the Tree Warden describing the facts of the situation, as required by Village code

(Verified Petition Paragraph 11). The Village code clearly requires a detailed "application"[4] and a reasoned "report" to the ARB from the Tree Warden [5].

As settled as is the law concerning judicial restraint in reviewing agency decisions, so too is the law settled, it would appear, that rules of agencies must be followed to afford them immunity from judicial upset.

4

1 Village Code Section 186-4

A. Jurisdiction

(1) An application(s), permit(s) and fees to remove or destroy trees shall not be required, and the Architectural Review Board and the Tree Subcommittee shall have no jurisdiction and involvement whatsoever when the removal or destruction of trees results from either:

(a) Emergencies as provided in § 186-10; or

(b) When the removal or destruction of trees occurs pursuant to a set of plans or drawings approved by either the Planning Board or its agent, or the Zoning Board of Appeals or its agent insofar as such plans comply with the terms of § 186-4C(1) and (2), and incorporate documentation for replacement trees and landscaping in accordance with § 186-6.

(2) In all other cases it shall be unlawful for any person, except a Village official or authorized agent of the Village acting on behalf of the Village, to destroy, remove, or substantially alter any tree within the Village without having first obtained a valid tree permit from the ARB. This restriction extends to any tree planted within any right-of-way required, permitted or granted under the law.

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.

One authority states: "If a body or officer fails to follow its own rules or regulations in rendering the determination, however, that determination will be deemed arbitrary and capricious," Weinstein, Korn & Miller, *NY Civil Practice*, 2d Edition, Lexis-Nexis 2012, CPLR Paragraph 7803.03 [1].

The authorities cited the case *Matter of Frick v. Bahou*, 56 NY 2d 777 (Court of Appeals 1982), which is a well-cited case, which says: "The rules of an administrative agency, duly promulgated, are binding upon the agency as well as

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(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.

C. In addition to the information, data and responses required in Subsection B above, 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 1/2 acre in area.

5 Village Code Section 186-5

B. Where the Tree Warden determines that the removal(s) may have a significant impact on surrounding properties or the community as a whole, the application shall be referred to the ARB for a determination.

C. The Tree Warden shall prepare a brief written report for submission to the ARB. The Tree Warden shall base his or her determination on the following criteria:

(1) The condition of the tree or trees with respect to disease, proximity to existing or proposed structures and interference with utility services.

(2) The necessity of removing the tree or trees in order to implement the stated purpose of the application.

(3) The effect of the tree removal on erosion, soil moisture retention, flow of surface waters and drainage.

(4) The number and density of trees in the area and the effect of tree removal on other existing vegetation and property values of the neighborhood.

(5) Whether any tree in question is a tree worthy of preservation due to characteristics such as health, age, history, size, rarity, financial value or visual importance to the neighborhood.

upon any other person who might be affected," at 777, citation omitted.

Similarly:

> "While the courts will generally defer to an agency's interpretation of its regulations, it is also "axiomatic that an agency is bound by the language of its own regulation and cannot construe it in such a manner that the plain language on the face of the regulation is rendered meaningless (Matter of Grace Plaza v Axelrod, 121 AD2d 799, 801; see, Matter of Frick v Bahou, 56 N.Y.2d 777, 778)," *Duflo Spray-Chem. v. Jorling*, 153 AD 2d 244 (Appellate Div., 3rd Dept. 1990) at 247.

We have in our Memorandum of Law described a typical casualness with which the Board articulate its "reasons" for coming to a decision, but at the time we did not have a copy of the Board's decision. We now have seen the Notice of Decision (Respondent VEH Exhibit 6).

As we noted in our discussion of the Statute of Limitations question (above) the Notice of Decision takes liberties with the record as compiled by audiotape. But insofar as it lays out a rationale for the decision on the trees, its statements are conclusory and do not evidence analysis of the impact of the tree removals as contemplated by the law.

(Lacking the required tree warden report and tree-removal application that failing may be understandable; taking a decision nevertheless is not thereby justified, however.)

The Minutes state: "The nine trees to be removed are within the building envelope, within the path of the proposed driveway, and 2 are to be removed in the rear yard area." Further, "The landscape plan was also discussed, and it was noted that it lacks a legend, planting schedule, and the trees were not tagged on site."

These are factual statements only. There is no notation of any discussion by the ARB regarding those facts, or the environmental issues that would surround the proposed cutting down of nine large trees, despite the testimony of four people who made various arguments related to the issue of the proposed tree removals, as reported in the Minutes.

Expert written testimony by certified arborist Richard Oberlander (Verified Petition Paragraph 25, 55-57) was not referenced at all either in the Minutes or in the Decision.

As Petitioner noted in the Memorandum of Law, while the courts in *Halpern* for example (Petitioner Memorandum of Law, p. 8) spoke of deference to local boards, the deference was accorded in the context of a clear record that the boards did their job. In this case that evidence is absent.

For the reasons discussed -- the failure to follow procedure, the missing documents, and the lack of clear evidence of any effort to deliberate upon the environmental issues, the Court has the authority to question the ARB decision such as it was, and to rule it flawed under the various standards of Article 78 of the CPLR.

But in the context of Petitioner's discussion of the actual lack of a proper decision having even been made -- rightly or wrongly -- with respect to the trees at 90 Fir Drive, the Court can simply strike the Notice of Decision as a nullity with respect to tree removals, and we urge it to do so.

The courts are indeed limited in reviewing agency decisions. But without the ability to review cases such as the present one, the whole function of Article 78

would be rendered useless.

13. Open Meeting Law ("OML")

Respondents assert that Petitioner's claims regarding the Open Meeting Law (Public Officers Law Section 7, "OML") are at least erroneous and at most actionable. In their papers they state:

> "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," Respondent VEH Memorandum of Law, p. 21.

"The Petition must be dismissed because the proceedings of the ARB conformed to the requirements of he OML," Respondent Marks Verified Answer, p. 10.

As we discussed in our Verified Petition and Order to Show Cause, our claims regarding Open Meetings issues were speculative of some unknown meeting. And that speculation arose because the purported "decision" asserted by ARB officials, as we also demonstrated in our Introduction, Sections 2a and 2b above, was never taken in the public session that we -- or apparently the members of the ARB itself -- ever attended.

In other words, the decision as it related to cutting down trees was a phantom, as we discussed above, Section 2a - 2c.

However, as we further discussed above, the Respondents were fully apprised of our reasoning by the statements contained in our Verified Petition and Order to Show Cause. Respondent VEH says as much: "Brummel's speculation about a 'non-public session' of the ARB...is groundless," Respondent

VEH Memorandum of Law, p. 21.

It bears noting that the law states: "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner," OML, Section 100, legislative declaration.

With that clear mandate in mind, and notwithstanding the absence of any decision on cutting down trees actually having been taken, as we have demonstrated, the assertion of the ARB counsel that the decision on tree removals may have been contingent on a 'self-executing' submission of a fully detailed landscape plan (Verified Petition, Paragraph 40), an assertion repeated by Respondent VEH counsel at the Court's hearing on October 22, 2013, would indeed seem to violate the spirit if not the letter of the OML.

It can only be called a truism that a public body cannot deliberate on papers it does not have. And if those papers are legally required to be submitted to it for the purpose of informed deliberation, it would appear that any decision taken in their absence would be defective, barring a finding of the body otherwise.

(See our discussion of Judicial Review, where Weinstein, Korn & Miller is cited: "If a body or officer fails to follow its own rules or regulations in rendering the determination, however, that determination will be deemed arbitrary and capricious," Weinstein, Korn & Miller, *NY Civil Practice*, 2d Edition, Lexis-Nexis 2012, CPLR Paragraph 7803.03 [1].

So it can hardly be considered a lawful remedy to deliberations rendered defective by the absence of required data, that the data is submitted post-facto as if to legitimize an otherwise flawed decision.

To assert otherwise would be to claim that not only could lawful actions be taken in the absence of public participation, but such actions could also be taken in the absence of the participation of the public body itself -- that the papers could approve themselves, simply by being submitted.

(In this case, the opposite was true: the Board clearly demanded the papers for its deliberations (see discussion in the Introduction, Section 2a, above) and seemed not to take that decision.)

Although the OML would seem at very least to prohibit that sort of public administration, that seems to be is what Respondent VEH counsel has repeatedly asserted. Obviously such an argument is untenable.

Petitioner's cause of action with respect to the OML covers both eventualities: that a secret meeting took place, or that no meeting took place and yet the "decision" occurred anyway, by some type of administrative magic. Either way, the resulting 'decision' is an unlawful one.

(In the context of Respondent VEH OML argument, we pray the Court takes notice of the injudicious manner in which the Respondent VEH describes not only Petitioner but others who spoke to the ARB against the application for 90 Fir Drive -- two septuagenarians who have resided in the Village for decades.

Similarly the Court may wish to question Respondent VEH's overly-strenuous assertions about their erroneous understanding, at best, of Petitioner's OML claim, which was made in the context of an emergency Order to Show Cause.)

14. Petitioner Aggrieved

Respondent Marks in his Affirmation asserted Petitioner is not aggrieved. Petitioner has addressed this question in the above discussions of Collateral Estoppel, Standing, and the Injury to Petitioner (Section 3).

15. Joinder

Respondent Bradley Marks asserts that Petitioner has failed to join necessary parties citing the Court of Appeals in *NYC v. Long Island Limo Service*, 48 NY 2d 469, NY Court of Appeals 1979. (Memorandum of Law, P. 16).

The Court held that the State Commissioner of Transportation should have been joined in a suit that affected limousine service in the City of New York, particularly because the two levels of government were asserting different powers with regard to the limousine service: "In this case the resolution of the controversy between the city and the limousine service involves a determination of the rights and powers of a third party, the State Commissioner of Transportation, who is not before the court," *ibid*. at 475.

The present case presents no such challenge to determine the rights and powers of a plenary officer of government, because the Tree Warden and Buildings Commissioner are wholly agents and employees of the Village of East

Hills, which is already a party. As employees and agents they have no standing or interests separate from the Village. Their decisions on permits or trees are made wholly on behalf of the Village, and so their interests are one and the same with, and are fully represented by, the Village, which is a party.

In any event parties may be joined if the court determines they are needed, without dismissing an action:

> "[A] court has the discretion to allow a case to continue in the absence of a party, as justice requires. To assist in reaching this decision, the Legislature has set forth five factors a court must consider. Of those five factors, no single one is determinative; and while the court need not separately set forth its reasoning as to each factor, the statute directs it to consider all five. One of the factors a court must consider — "whether and by whom prejudice might have been avoided" (CPLR 1001 [b] [3]) — obviously includes inquiry into why a litigant failed to name a necessary party prior to the expiration of the statute of limitations." *Red Hook/ Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals*, 5 N.Y.3d 452 (Court of Appeals 2005) at 459-60

Thus the issue of joinder is both not persuasive and not in any event dispositive, as Respondent Marks claims.

16. Sanctions, Costs , Frivolous Action

Respondent VEH and Respondent Marks argue for costs based on "reckless abuse of the judicial system" (Memorandum of Law Marks P. 17) and the claim this action is "frivolous" (Memorandum of Law VEH P. 23).

At first blush it might appear the Respondents arguments have some merit. This is the third action in 18 months Petitioner has launched against the Village over ARB activities, and the first two actions were unsuccessful for reasons that

have been discussed (Verified Petition Paragraph 3).

It might even appear that Petitioner is arguing over issues that have already been settled (see discussion of Collateral Estoppel, infra.) or that are repetitive and identical.

But one has only to look at Petitioner's various papers presenting the facts in the three actions to see the profound errors of law, procedure and discretion that Petitioner has distilled from the public record and sought review of.

The first action presented substantive violations of the Open Meetings Law; substantive challenges to the ARB's discretion from a respected, licensed independent architect among other issues that were leading to the demolition of a cherished home over strong public opposition.

That action raised public policy issues concerning (a) the ARB's failure both to hold open meetings or then to rectify failings in due process caused by that error; and (b) substantive issues of improperly discharged discretion, where expert opinion sharply contradicted the ARB's findings, and was then ignored and kept off the deliberative record.

The second action challenged municipal and state statutory language that invited appeals of ARB decisions; catalogued procedural defects in ARB deliberations; catalogued the rampant destruction of trees despite the clear intent of the Village Tree Law.

That case raised public policy issues of the rights of residents to appeal ARB decisions -- like zoning decisions -- without immediate recourse to the courts, as municipal legislation appeared to allow, and as a subsidiary issue the integrity of

the ARB decision process and the validity of its results. The fate of about two dozen large healthy trees was at issue, as well as several demolitions and rebuilding that would substantially alter neighborhoods.

The present action has shown numerous points at which the public record as asserted by Respondents -- and acted upon by the Village -- diverges from the true record as pieced together from a meeting tape and other records. In addition to imperiling important ecological assets, this conduct reveals a reckless and arrogant abuse of power by an agency doing the bidding of the entrenched political clique, to the financial benefit of developers and wealthy new residents of the Village.

The current action raises public policy questions about (a) the care and compliance with procedural requirements of local law with which its discretion over environmental issues is discharged by the ARB; (b) the transparency of the governmental processes of that agency; (c) the integrity of its decisions, and by implication the integrity of local Village government generally.

Each action is different, each is based on a detailed analysis of the facts and record, each was preceded per the evidence by diligent and good-faith participation in the process by the Petitioner, and each held significant issues of public interest that were worthy subjects of judicial review.

None of the actions was frivolous or meant to achieve any other goal than to correct deficiencies in the administration of the public's business. To allege otherwise is to seriously distort the facts.

In fact Respondent VEH adduces a slew of cases that purport to justify

sanctions for this legal challenge. But a perusal of the cases shows them to be an inapposite pile of legal sand that blows away upon inspection. In fact the weakness of their legal support suggests the claim is meant to intimidate and deter Petitioner, rather than to vindicate the need for smooth administration of justice by the court system.

Respondent VEH (Memorandum of Law p. 25) cites the case of *Pignataro* (below) -- in which "spite" is deemed an element where custody of a child is at issue: --

> "All three petitions demonstrated the mother's continuing hostility toward the father, and her propensity for commencing litigation over minor infractions. Public policy generally mandates free access to the courts (see Sassower v Signorelli, 99 AD2d 358, 359 [1984]). However, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will (see Duffy v Holt-Harris, 260 AD2d 595 [1999]; Matter of Shreve v Shreve, 229 AD2d 1005 [1996])." *Pignataro v. Davis*, 8 AD 3d 487, 488-89 NY: Appellate Div., 2nd Dept. 2004 (child custody case)

Respondent VEH also cites (Memorandum of Law p. 25) the case of Sassower (below), for "frivolous and repetitious claims, motions, petitions...." in which a fiduciary of the court fights back against oversight with numerous pieces of legal process:

> "This appeal is the latest in a series of frivolous and repetitious claims, motions, petitions, collateral proceedings and appeals arising from the rulings of the defendant, the Surrogate of Suffolk County, which required plaintiff George Sassower to account for his activities as a fiduciary. We affirm the order insofar as appealed from, and utilize the opportunity to caution these plaintiffs, as well as others, that this court will not tolerate the use of the legal system as a tool of harassment." Sassower v. Signorelli, 99 AD 2d 358, 358-59 NY Appellate Div., 2nd Dept. 1984 (Case regarding duties of fiduciary under Surrogate's Court)

Respondent VEH also cites (Memorandum of Law p. 24) the case of *Zysk* (below), maintained in "bad faith", which is vague but operates under the section of the CPLR devoted to "personal injury, injury to property or wrongful death":

> "... the complaint was patently devoid of merit...Moreover, the court properly granted that branch of the defendants' motion which was to impose a sanction for frivolous litigation pursuant to CPLR 8303-a (a), based on the findings that the plaintiff, an experienced attorney, commenced and continued this 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 (see CPLR 8303-a [c] [i], [ii]; Grasso v Mathew, 164 AD2d 476 [1991]). Zysk v. Kaufman, Borgeest & Ryan, LLP, 53 AD 3d 482, 482-83 NY Appellate Div., 2nd Dept. 2008 (Case not at all described but operates under secton of CPLR devoted to cases of "personal injury, injury to property or wrongful death")

Respondent VEH also cites (Memorandum of Law p. 24) the case of *S&S Management,* in which a seller of property tries to force the compliance with a purchase-contract despite the evidence that the contract had been properly voided -- and in which <u>no sanction</u> was granted by the court:

> "The branch of Defendants' motion which seeks costs and sanctions pursuant to 22 NYCRR 130-1.1 is denied....Under the circumstances extant, Defendants have not established that an award of sanctions is justified here." 2008 NY Slip Op 31547(U) *S&S Management v. Berk* (An action concerning the nullification of a contract to purchase property due to title issues.)

Cleary Respondent VEH attempted to pile on cases without regard to their validity with relation to the current action, wasting time for the Petitioner and the Court, and serving to intimidate Petitioner. This inappropriate practice may be called a variety of the Strategic Litigation to Against Public Participation (SLAPP).

Respondent Bradley Marks makes a similarly questionable citation of case

law(Memorandum of Law p. 18), in this case a single citation of *McGill* (below) wherein sanctions were *denied* to the defendants in a defamation action brought brought by members of the New York City carriage horse business who had unsuccessfully sued animal-advocates (the defendants) for their public statements:

> "While sanctions for prosecuting a frivolous action are available to a defendant in a defamation action where application of the dispositive privilege is so obvious that the action is clearly without any basis in fact or law (Grasso v Mathew, 164 AD2d 476, 480, lv dismissed 77 N.Y.2d 940, lv denied 78 N.Y.2d 855), it is not enough that the action be meritless; it must be brought or continued in bad faith. (CPLR 8303-a [c] [ii].) What is required, in effect, is a showing that the plaintiff and counsel knew or should have known that the action lacked merit. (Mitchell v Herald Co., 137 AD2d 213, 218-219.) None of plaintiffs' causes are so blatantly meritless as to justify sanctions. Nor can it be said that plaintiffs' lawsuit resulted in an improper use of the court's time. (Cf., CCS Communication Control v Kelly Intl. Forwarding Co., 166 AD2d 173, 175.)" *McGill v. Parker*, 179 AD 2d 98, 111NY Appellate Div., 1st Dept. 1992

Respondent Marks, like Respondent VEH, presents case-law that is inapposite on its face. They have simply shown their own hostility to Petitioner and his right -- and the Court's right -- to question their conduct.

The assertions of both parties with respect to sanctions for frivolous behavior, or otherwise, clearly lack merit for the reasons presented above: (1) the suits in the past and this one as well are based on strong merit of the factual record; (2) they are based on important questions of law and policy, and (3) they are or were properly and with good faith placed before the Court for adjudication.

17. Injunctive Relief

Respondents argue that Petitioner is not entitled to injunctive relief and in any event should be required to post bond while obtaining it. Insofar as injunctive relief was not continued, the matter of bond has for the moment become moot, although Petitioner defers to the Court to determine its nature should the Court grant such relief upon review of these filings.

Petitioner has made out an argument why he is entitled to injunctive relief based on the requirements set out in *Melvin v Union College,* N.Y.S. 2d 141, at 142-3 (2d Dept 1993): A likelihood of success on the merits; irreparable injury to the movant; the balancing of equities lies in the movant's favor.

Petitioner will stand upon the arguments made out already in the Verified Petition (Paragraphs 45-47, 50-51, and 54-57) and in the Memorandum of Law (p. 9), bolstered by the issues and facts raised herein.

In addition Petitioner notes that the failure of Respondent VEH to provide a full and accurate record of the proceedings at issue (see Facts, Sections 2a - 2c above) raises the specter of further delay in the Court's inquiry, that can lead to further irreparable harm barring injunctive relief.

Petitioner defers to the Court for a determination of any appropriate undertaking required.

Conclusion

Petitioner has peeled back many layers of Village conduct in preparing both the Petition and Reply. The evidence is strong that the Village casually violates both its own lawfully established procedures and its obligation to discharge its laws -- in this case those duly created to protect and enhance the community and the environment -- in a diligent and rational manner. The remedy is not to be found, unfortunately in the normal give-and-take of the political and civic processes -- that has been tried and it failed.

Instead judicial intervention has been sought, at the expense of money, effort and and time, because the third branch of government was established in large part as a corrective to improper action on the part of the other two branches.

Petitioner believes he has rebutted the claims of Respondents that were used to oppose both injunctive relief and final judgement as outlined in Petitioner's Verified Petition. Petitioner now asks the Court to impose those remedies.

Petitioner is also cognizant that issues he has raised about the record of proceedings introduced by Respondent VEH (Introductory remarks and Section 2a above) may require further proceedings of an evidentiary and fact-finding nature before the Court. He leaves those issues fort he Court to determine.

SIGNED