SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

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Matter of Application of Richard A. Brummel, Petitioner

For Judgements and Preliminary Injunctions pursuant
to Article 78 and Section 3001 of the Civil Practice
Law and Rules

Index No.: 3109 / 13

MEMORANDUM OF LAW
IN OPPOSITION TO
MOTION TO DISMISS

-against-

Village of East Hills, NY, (for the East Hills
Architectural Review Board and
the East Hills Zoning Board of Appeal),
Respondent

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Preliminary Statement

Respondents veer in their Memorandum of Law into ugly, self-serving grandstanding and character-assassination that has no place before the court.

This Memorandum of Law in Opposition to that submission will be concerned with the law of the State of New York and Petitioner's understanding of it.

Petitioner has extensively described the laws of the village and the facts at issue in his Amended Petition and to a far lesser extent the Affirmation in Opposition to the Motion to Dismiss. Where necessary Petitioner will expand on the facts, but will not attempt to engage in a blow-by-blow

refutation of Respondent's infamous recitations, which are in most cases irrelevant if not prejudicial to this proceeding.

Respondent repeatedly asserts some implied legal reason that this action should be in some way colored by a prior action. If it does, it may be noted that the Village's governmental processes were so legally egregious as to warrant initial granting of all relief sought (see Respondent's Exhibit 21). Insofar as the abandonment of that case is held up to discredit Petitioner, Petitioner refers to the publicly announced explanation for that outcome in a published Letter to the Editor, Exhibit 3 of Petitioner's Affidavit in Opposition to the Motion to Dismiss.

## Response to Points of Law

### Point I Petitioner Has the Right Under Village Law to Appeal to the Zoning Board of Appeals

It is clearly stated in state Village Law that appeals to the Zoning Board of Appeals created by a local municipality may be taken by "any person aggrieved."

> Unless otherwise provided by local law, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the village. (NY Village Law Section 7-712-a (4)

Inasmuch as the Village of East Hills has designated the Zoning Board of Appeals of this Village to hear the appeals of Architectural Review Board decisions with respect to both trees and houses, and state law allows such a board to operate only with respect to laws created under the authority of "this article", then it stands to reason that both the laws are subject to the standards stated in that state law, including the requirement that the Zoning Board of Appeals be ready to hear appeals from "any person aggrieved."

The laws of the Village of East Hills presume to limit that jurisdiction of the Zoning Board of Appeals to "any applicant aggrieved by any decision of the ARB [Architectural Review Board]" (Village Code Section 186-16)

Although that appeal provision is contained in the Village's tree protection law, the language is categorical and echoes that in the Architectural Review law, as stated in Village Code Section 271-196.

As discussed in the Amended Petition (Paragraph 9 to 12 and 19 to 23) and in the Affirmation in Opposition to the Motion to Dismiss, Petitioner meets the definition for "applicant" contained in the Village code.

Respondent asserts that statutory construction discussed in the McKinney commentaries disposes of the question of eligibility to appeal since allowing an appeal by the "occupant...of any premises" in the Village "defies reason" and would lead to "mischievous or disastrous consequences" were the plain language of the definition of "applicant" contained in the Village code to be accepted, in alleged violation of Section 148 of McKinney's commentary on NY statutes.

But if that contention were so, then what foolishness would one attribute to the plain language of the New York State's overarching Village law, which mandates that any village's Zoning Board of Appeals must be open to "any person aggrieved" by a relevant land use decision?

Clearly, state law does not denigrate the operation of an open, accessible appeals process when properly restricted to those aggrieved (a subject we discuss with respect to "standing"), and the Village's law is by necessity modelled after and must comply with the same law.

> The [Zoning] Board of Appeals shall have the power to adopt such rules and regulations for the conduct of its hearings, proceedings and procedures and may amend the same, from time to time; provided, however, that they <u>shall not be inconsistent with or contrary to the provisions of this chapter or of the Village Law</u> of the State of New York. *East Hills Code Section 271-133, emphasis*

*added*.

Clearly the claims that liberal construction would lead to chaos, or in other words results that are "mischievous" and "disastrous," are in the eye of the beholder. Respondent's claims that "live-in domestic help" and others might otherwise appeal decisions of the Architectural Review Board seems a nonsensical and undignified concern on many levels that need not be addressed here.

A clear reading of the Village's appeals laws and their place in the context of Village law of the state, as pertains to Zoning Boards of Appeals, supplies the simple conclusion that Petitioner is eligible to take appeals as he asserts.

Further inquiry about construction must make reference to case law, which states in consistent refrain that legislative intent is to be referred to in attacking or challenging an asserted reading of statutes:

> In matters of statutory interpretation generally, and particularly here, legislative intent is "the great and controlling principle." (People v Ryan, 274 N.Y. 149, 152.) Legislative intent may be discerned from the face of a statute, but an apparent lack of ambiguity is rarely, if ever, conclusive (New York State Bankers Assn. v Albright, 38 N.Y. 2d 430, 436-437). Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history (*see*, Ferres v City of New Rochelle, 68 N.Y.2d 446, 451; *Matter of* Albano v Kirby, 36 N.Y.2d 526, 529-530; *Matter of* Petterson v Daystrom Corp., 17 N.Y.2d 32, 38).*In the Matter of William S. Sutka v. Margaret Conners, as Chairman of the Board of Fire Commissioners of the Fairview Fire District et al., 73 N.Y. 2d 395 at 403 (Court of Appeals 1989)*

While Respondent rejects Petitioner's reading of the Village code he offers no reference to legislative history or other indicia of "intent". As such the attack on our reading of the law, which follows the clear mandate of the controlling state law on villages, is deficient.

When courts have ruled on statutory construction they do so with a robust record, as reflected in this passage:

> From the history of the Vehicle and Traffic Law we are able to discern a consistent legislative intent (protecting the potential plaintiff as the "injured

> party") that is not "frustrated" by our allowance of this third-party contribution claim (*see*, Zona v Oatka Rest. & Lounge, supra, at 825). *Carol Mowczan as Adminstratrix of the Estate of Richard Mowczan, et al. v James E. Bacon, et al., 92 N.Y. 2d 281 (Court of Appeals, 1989) at 284*

Petitioner did notice a case – which he is unable to locate at this time -- in which the courts spoke of giving presumption of validity to the agency itself that has experience administering its own laws, in deferring to its local interpretation of the laws.

However that precedent is distinguishable in two ways: (1) there is no special expertise that is required to apply the plain language of whether or not an appeal is appropriate, either on the part of the Architectural Review Board or the Zoning Board of Appeals, and (2) to Petitioner's knowledge, and based on the absence of reference in Respondent's submissions, there appears to be no precedent to Petitioner's appeal, and hence there is no superior experience in dealing with the issue on the part of either village agency.

For all these reasons Petitioner has the right under the Village code and state law, as it controls that code, to maintain an appeal as asserted in his Amended Petition.

Point II Petitioner has Standing as an Injured Party to Maintain this Action

The law controlling standing in cases based on considerations of the environmental and land use was recently clarified in the case *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 clarified prior cases like *The Society of the Plastics Industry, Inc., et al. v. County of Suffolk, et al.*, 77 N.Y. 2d 761 (Court of Appeals, 1991) to allow plaintiffs like Petitioner to successfully assert standing.

> 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 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]). Indeed, the *Sierra Club* Court noted that the plaintiff there "failed to allege that it or its members would be affected in any of their activities or pastimes" by the development it challenged (*id.* at 735). 306*306 Petitioners here make the allegation that was missing in *Sierra Club. In the Matter of Save the Pine Bush, ibid, at 305-6.*

Respondent cites approvingly one application of that Court of Appeals ruling in *In the Matter of Clean Water Advocates of New York v. New York State Department of Environmental Conservation, et al.*, 2013 Slip Op 01116 (Third Department, 2013). In that case standing was denied to the plaintiff because no member of the group suing could show harm:

> Here, petitioner identified only one member of its organization, Joanne Woodhouse, in its attempt to establish standing.
> ....
> Woodhouse did not articulate any specific harm that she would suffer based on her proximity to the project, nor has petitioner submitted any proof establishing that DEC's acceptance of the challenged SPPP will have any adverse environmental effects on the property of any of its members. *Ibid, no page numbering listed*

But the court did lay out the various tests that could be met to establish standing:

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

Those tests are clarified in In the Matter of Save the Pine Bush as follows:

> 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.
> .....
> 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. But in other cases, including those brought by organizations devoted to less specific environmental interests—the plaintiff in *Sierra Club,* for example—plaintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail.
> .....
> Striking the right balance in these cases will often be difficult, but we believe that our rule— requiring a demonstration that a plaintiff's use of a resource is more than that of the general public—will accomplish that task better than the alternatives. *ibid, at 301, 306*

Petitioner meets the tests set out.

1. Petitioner Uses and Enjoys the Natural Resources More than Most Other Members of the Public

Petitioner in his Amended Petitioner laid out the extraordinary connection he has established with the local environment through several years of documenting the assault by developers, and his extensive public efforts to stop it. Petitioner also maintains strong connections with the environment – the flora and fauna – by frequently walking rather than driving through the community – to shop at the East Hills Commons, a 20 minute walk each way, to attend village meetings or visit village offices, a 10 minute walk each way, to visit acquaintances, to view and document actions by parties like the Long Island Power Authority, developers, and others, which can lead to hour-long walks, as well as to document “roadkill” in the local streets (see Exhibit 4 in Petitioner's Affidavit in Opposition to Motion to Dismiss).

Petitioner's website as stated in the Amended Petition contains extensive documentation created by Petitioner of the ecological and built state of the East Hills community, and it is unique to do so as far as Petitioner is aware.

As such Petitioner has demonstrated amply that he uses and enjoys the resources differently and

to a far greater extent that typical members the public and will therefore suffer a special harm and injury of those resources are damaged, as he asserts is an ongoing process due to the legally flawed decision-making and decisions of the Village bodies charged with upholding the Village's own environmental protection and neighborhood preservation laws.

2. Petitioner is Injured by the Decisions of the Architectural Review Board that Damage the Tree Canopy and that Over-build Neighborhoods

The Village's own Code lays out the problems that can arise when trees are removed and houses are over-built:

> 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. *Village Code Section 186-1 emphasis added.*
>
> The Architectural Review Board may approve any application if the ARB finds that the building, structure or alteration, if constructed, erected, reconstructed or altered in accordance with the submitted plan, would be in harmony with the purpose of this chapter and the zoning laws, would not be visually offensive or inappropriate by reason of poor quality of exterior design, monotonous similarity or striking visual discord in relation to the sites or surroundings, would not mar the appearance of the area, would not impair the use, enjoyment and desirability and reduce the value of properties in the area, would not be detrimental to the character of the neighborhood, would not prevent the most appropriate utilization of the site or of adjacent land, and would not adversely affect the functioning, economic stability, prosperity, health, safety and general welfare of the entire community. *Village Code Section 271-190 emphasis added.*

Petitioner has demonstrated how in many ways that the decisions of the Architectural Review Board were flawed both substantively and procedurally, and as a result trees were wrongly permitted to be removed and over-size badly designed houses were permitted to be built or re-built. The Village code itself supplies the reasons such attacks on the community environment – both natural and built – were intended to be prevented, due to the extensive harms they create. The Village, the Respondent, cannot then assert that such tree destruction and overbuilding or

poor design does not create harms, because plainly it does.

A nationally certified arborist, Richard Oberlander, who was singled out for praise for helping write the tree protection laws of this Village, and who was a member of the Architectural Review Board and was Tree Warden but not re-appointed by the Mayor of East Hills, and who is also a long-time resident of the Village has attested to the harms created by the excessive sanctioned tree removals in the Village as well as to the damage by over-size homes and poor design, see Exhibit 1, Petitioner's Affidavit ion Opposition to Motion to Dismiss.

3. The Injury to Petitioner Falls within the Zone of Interests in the Law

Respondent appears at times to believe that the phrase Zone of Interest refers to a physical geographical 'zone', but clearly the phrase refers to the intent behind the law that a plaintiff is asserting the protection of.

> The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the "zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted (Lujan v National Wildlife Fedn., 497 US ___, ___, 110 S Ct 3177, 3186; *see also*, *Matter of* Mobil Oil Corp. v Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433).*The Society of the Plastics Industry*, ibid, at 73.

As discussed above in the context of harm and injury, it is clearly the intent of the Village laws respecting tree preservation and architectural review, which are here at issue, that they protect and preserve the natural and built environment.

The issues of which Petitioner complains, improper removal of healthy trees and overbuilding and poor design, are clearly in the zone of interest of the laws here at issue.

Respondent argues that *In the Matter of Pine Bush* is inapplicable to Petitioner because in that case the members of the organization suing had successfully created a preserve and were concerned with an endangered species, but the Court of Appeals ruling in no way specifies or

requires those elements. As stated above the Court said at the outset, ”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” (above) and Respondent has no basis for asserting additional elements not present.

Further, Respondent crudely posits that the withdrawal of a prior action (see Preliminary Statement, above), the failure to rally large-scale support for a “green” civic association, and the mention that Respondent cares for flora and fauna on the property where he resides somehow disqualify him from the legal-standing principles set out by the Court of Appeals. Such an assertion is unsupported by the legal precedents.

Point III Failure to Join Necessary Parties is Not a Reason for Dismissal

Petitioner is a pro se litigant and pursued this action in the manner presented to the court under the belief that the acts complained of were acts of and by the Village, and hence remediable and answerable by that entity.

The actions at issue here are t he denial of the right to take a set of appeals to the Village's Zoning Board of Appeals, and a set of decisions by the Architectural Review Board that were defective.

In each case where relief is sought, the relief contemplates further administrative action to correct the legal defects, at which time all parties with an interest in the issues can be heard.

Case law is very clear that the policy of the courts is to join parties whose rights in land use decisions may be at risk. but that can be remedied in re-hearings and new deliberations that would remedy the legal flaws in the original proceedings.

The major controlling case, cited by Respondents, was decided by the Court of Appeals in 2005, *Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals,*

*et al.*, 5 N.Y. 3d 452.

The Court ruled that a case can proceed despite lack of joinder once the lower court satisfies itself in answering a number of questions the parties in question can be joined to the, but that dismissal is "a last resort:

> When a necessary party can be joined only by consent or appearance, a court must engage in the CPLR 1001 (b) analysis to determine whether to allow the case to proceed without that party. Though CPLR 1001 (b) protects the absent party who might be inequitably affected by a judgment in the action, it also treats dismissal for failure to join a necessary party as a last resort (*see* Siegel, NY Prac § 133, at 227 [4th ed]). Thus, under the statute 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. *Ibid at 459-60*

In *Red Hook* a complicating factor was the presence of a 30 day statute of limitations that had expired. In the present action the court is faced with no such complicating deadline. It is worth noting that in this case, even though the statute of limitations had expired, the Court of Appeals majority returned the case to the lower court for full adjudication, after joining the missing party.

In another case, also cited by Respondent, a similar result was reached. Where the constitutionality of a town statute was at issue, and the town had not been named, the Second Department ruled that the party should be joined:

> Under the circumstances, the town is a necessary party respondent to the determination of the petitioner's constitutional claim and in its absence we are precluded from considering the merits of that issue (see CPLR 1001; *Matter of* Brandt v Zoning Bd. of Appeals of Town of New Castle, 90 Misc 2d 31, affd on the opn at Special Term 61 AD2d 1012). The court may add parties at any stage of the proceeding (see CPLR 1003). Accordingly, petitioner is directed to serve a supplemental notice of petition and petition on the Town of New Castle (see *Matter of* Fellner v McMurray, 41 AD2d 853). *In the Matter of Roal Ozols v. Earle B. Henley, et al., Constituting the Planning Board of the Town of New Castle, 81 A.D. 2d 670 (1981) at 671.*

Respondent citation of the case In the Matter of Ronald Tecler *v Lake George Park Commission* 261 A.D. 2d 690 (Third Department, 1999) represents a case prior to the Court of Appeals' ruling in *Red Hook/Gowanus* (2008, above) and is therefore no longer controlling.

Under that review of the case law, we oppose the argument to dismiss by the Respondent that dismissal is warranted, and instead submit that the Court should allow the joinder of necessary parties at its discretion if they be necessary to proceed.

## Point IV Whether the Court can Overturn the Municipal Board's Decisions in an Article 78 Proceeding

The Court under Article 78 of the CPLR may determine "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence" (CPLR 7803).

Petitioner has presented the Court extensive evidence of procedural and substantive issues raised before the Architectural Review Board with respect to the building and or tree removal applications here at issue but which did not affect the ultimate disposition of applications by the board

Furthermore Petitioner has explained that in each he then attempted to take an appeal to the Zoning Board of Appeals, under procedures outlined in the Village code, based on the various problems with the applications and the decisions rendered thereon, and was again refused.

In each case, the original decisions themselves were by their nature arbitrary and capricious, abuses of discretion, and not supported by substantial evidence, and the refusal of the Village to permit appeals despite lawful procedures to do so were arbitrary and capricious, the applications

and abuses of discretion as official acts.

The Architectural Review Board is charged with making complex and important decisions that affect the future environmental and aesthetic integrity of the community.

As for architecture, the board must follow a law that states it is designed to " ...[P]remote the character, appearances and aesthetics of the Village, to conserve the property value of the Village by providing procedures for an Architectural Review Board (also referred to as the "ARB") review of the exterior of new construction and of certain alterations, additions, reconstructions and site utilizations" (Village of East Hills Code section 271-186).

In upholding this role the board is required to operate as follows: "In considering an application, the Architectural Review Board shall take into account natural features of the site and surroundings, exterior design and appearances of existing structures, and the character of the neighborhood and its peculiar suitability for particular purposes, with a view to conserving the values of property and encouraging the most appropriate use of land."(Village of East Hills Code section 271-190)

With respect to its authority to help "protect the tree canopy for current and future generations" (Village of East Hills Code section 186-1), the board is charged with ruling on tree permits upon report of the Tree Warden that is based 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."

As is evident multiple questions are pertinent in the deliberations of Architectural Review Board with respect to both proposed construction and the preservation of trees.

Case law shows courts repeatedly deferring to municipal "land use" boards: As Respondent cited in a 2010 case from the Second Department:

> "A local planning board has broad discretion in reaching its determination on applications . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Matter of* Kearney v Kita, 62 AD3d 1000, 1001 [2009]; *see Matter of* Davies Farm, LLC, v Planning Bd. of Town of Clarkstown, 54 AD3d 757 [2008]). "When reviewing the determinations of a local planning board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of* Kearney v Kita, 62 AD3d at 1001 [internal quotation marks omitted]). (In the Matter of In-Towne Shopping Centers, Co. v Planning Board of the Town of Brookhaven, 73 A.D. 3d 925)

But as that decision indicated, the discretion is not limitless, and the court reversed he planning board because "[c]ontrary to the Planning Board's contention, the record lacked sufficient evidence to support the rationality of its determination," *Ibid. at 927*.

It is not enough to assert that the local board deserves deference, that is settled law. What is needed is to assure that the actions of the board indeed reach the level of thoroughness that the deference is in the given case supported by the record.

In another case cited approvingly by the Respondent is *Matter of Halpern v. City of New Rochelle*, 24 A.D. 3d 768 (2005) also ruled on by the Second Department, which states:

> [T]he determination of a municipal land use agency must be confirmed if it "was rational and not arbitrary and capricious" (*Matter of* Sasso v. Osgood, supra at 384). A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition. *Ibid at 772*

But again the records is what counts. The court found the city had met its burden

> In this case, the Zoning Board balanced and weighed the statutory factors, and its

> findings were based on objective facts appearing in the record (see Matter of Ifrah v. Utschig, supra; Matter of Sasso v. Osgood, supra). The Zoning Board's determination to grant the requested area variances was rational and not arbitrary and capricious, and therefore it must be confirmed *Ibid at 773*.

In the cases at issue here, the records submitted by the Respondent show almost no such effort to "balance and weigh" issues or to make reasoned decisions based on the record before it.

Respondent's Exhibits 7 though 16 contain papers titled "Notice of Decision of the Architectural Review Board" and contain uniform statements to the effect that "The Architectural Review Boards Secretary prepared minutes, incorporated herein, recording the unanimous vote" or words to that effect (Exhibit 9).

In no case is there an indication in the "minutes" that the board discussed or considered the objections raised to the various applications.

For instance with respect to 55 Oakdale Lane, Petitioner objected on the record to the absence of a Tree Warden report, and multiple other objections based on the destruction of multiple mature trees and the planned building of a house lacking in scale and harmony with the surrounding properties (see Amended Petition, Paragraph 28).

But the report records the board's actions as follows:

> PROPOSED WORK Mir. Zarabi presented his application for the construction of a new . house at the premises. The materials proposed include ... .with a Belgian block apron.
> Mr. Mishel, landscape architect, presented the proposed landscape plan, which calls for maintaining the hedges on the side of the premises and removing eight trees in the vicinity of the new house footprint, including five Norway spruce trees that are declining, one oak tree, and one red maple tree. The Japanese maple on the front lawn has storm damage and must also be removed. Proposed plantings include Eve shade trees (three red oak trees, one willow oak tree, and one katsura tree), several flowering trees, and conifers in the backyard.
> Mr. Eric Schweritzer of 65 Oakdale Lane spoke in favor of the application. Mr. Richard Oberlander of 73 Holly Lane asked that the oak tree in the front yard be saved. Mr. Richard Brummel of 15 Laurel Lane objected to the house design and its apparent similarity to other houses. He further objected to the construction of homes for profit, the lack of an arborist's report, and to the landscape plan presented.

> DECISION: The Architectural Review Board Secretary prepared minutes, incorporated herein, recording the unanimous vote: (a) approving the design and plans presented, dated 1/21/2013, including removal of the storm damaged Japanese maple tree; (b) approving the issuance of a Building Permit upon the review and approval of the plans by the Building Inspector of the Incorporated Village of East Hills; and (c) approving the issuance of a tree removal permit.

According to Respondent's own record, there was no deliberation on the issues raised , and no application of the discretion reposed the board by its enabling legislation.

Furthermore, while Respondent does not dispute Petitioner's recounting of objections he raised, the official report omits important ones such as the defective building permit application (Amended Petition Paragraph 28).

Legal precedent regarding judicial deference to local boards contains numerous instances where the court sided with boards that were attempting to preserve their communities by denying variances or special use permits, and the appellants were typically applicants who wanted those decisions overruled. See e.g., *In the Matter of Campo Grandchildren Trust v. Marvin L. Colson et al.*, 834 N.Y.S.2d 295 (2007), *In the Matter of Lemir Realty Corp. v. Edward P. Larkin et al., Constituting the Town Board of the Town of Hempstead* 11 N.Y.2d 20 (1962, Court of Appeals), *In the Matter of Jacoby Real Property LLC v. Joseph Malcarne et al.*, 946 N.Y.S.2d 190 (2012). But what is common in those decisions are findings like those in the latter case,

> Here, the minutes of the ZBA meeting held on September 23, 2010, reveal that the ZBA considered the five factors in granting the area variance, and set forth specific findings as to those factors, which were supported by evidence in the record. Further, contrary to the petitioner's contention, the ZBA did not rely on conclusory statements or generalized community pressure in reaching its determination.... *Ibid at 750.*

As we have shown the Architectural Review Board did not exercise its discretion in any such systematic or careful manner, and cannot assert the shield of judicial deference without such evidence.

As for the refusal of the Zoning Board of Appeals to accept an appeal as provided for by law (as discussed in Point XX in this submission), such a denial based on no facts presented (Amended Petition Exhibit 3) also cannot be considered anything other than an arbitrary and capricious act, and an abuse of discretion.

## Point V Respondent is Entitled to Injunctive Relief

The time for preliminary injunctions is past, as the action is not being finally adjudicated, bug Respondent re-asserts that the three elements as described in the Amended Petition remain valid: Respondent suffers irreparable injury due to the erroneous and legally deficient decisions by the Architectural Review Board, the facts and law presented t the court argue for a likelihood of success of the action, and the balance of equities – preservation of decades old trees and homes for a brief period of time while the law is being decided versus their irreparable loss, all argue for the granting of preliminary relief.

## Conclusion

Petitioner has made a strenuous effort to document the story of the failure of East Hills to live up to its own laws and to follow lawful processes in making decisions on environmental protection its leaders have pretended to embrace. This effort before the court follows months and years of herculean efforts to create a documentary and political basis to protect the natural and built environment in East Hills the way the Village's own law claims it should be protected. These efforts have at times generated considerable support in the community and news media, and at other times interest has waned (see Exhibit 2 in the Affidavit in Support of the Motion in Opposition to the Motion to Dismiss).

As the effort has continued, Petitioner has faced mounting hostility and outright attack from the

political establishment in East Hills, including improper actions by members of the bar who have a responsibility to the court.

Respondent's submissions to the court, which are not signed by any Village official, continue the shameful, baseless efforts to smear Petitioner. In fact the digression from legal norms evidenced in Respondent's papers is illustrative of the general tenor of legal and governmental conduct in the Village, and should be viewed as evidence of the failings Petitioner's action complains of. Petitioner urges the Court to ignore and reject the smear tactics and extra-judicial appeals, and give Petitioner the presumption of honest intent and rational basis for his efforts, and to judge based on the facts and the law.

Dated: East Hills, New York

April 15, 2013

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Richard Brummel, Petitioner