

**SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF NASSAU**

**THE HON. \_\_\_\_\_ PRESIDING**

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Index No.:

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RICHARD A. BRUMMEL,

**VERIFIED PETITION**

Petitioner,

- against -

ARCHITECTURAL REVIEW BOARD OF THE VILLAGE OF  
EAST HILLS, THE BOARD OF TRUSTEES OF THE VILLAGE  
OF EAST HILLS, and JOSH AND CINDY ARONSON, 55 OAK  
DRIVE, EAST HILLS, N.Y.,

Respondents.

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Petitioner, complaining of the Respondents, as and for his Verified Petition shows to this Court and alleges:

**NATURE OF THE PROCEEDING**

1. This is an Article 78 proceeding pursuant to sections 7803(1) and 7803 (3) of the Civil Procedure Law and Rules ("CPLR") challenging the municipal board Respondent's actions regarding an Application for tree removals which will result in the immediate destruction of two healthy oak trees otherwise protected under the municipal code, and the creation thereby of a precedent that would allow extensive deforestation of the community in violation of the intent of relevant statute.
2. The decision of the board is challenged on the grounds that (1) the board failed to obtain

and consider a legally mandated "Tree Warden report" intended to provide expert opinion on the impact of the proposed action prior to its decision; (2) the board acted in contravention to the formal analysis and advice of its own expert, and in the absence of any countervailing expert advice; (3) the board relied upon evidence submitted by the applicant that was facially incomplete and unreliable, an issue that was brought to the board's attention prior to its decision; (4) the board's action in permitting healthy trees to be removed for no reason other than that the trees exhibit routine tree-like functions, i.e. creating acorns, would appear to violate the spirit of the municipal tree protection law.

3. The removal of the two healthy, fifty-to seventy foot tall trees will have an immediate direct effect on the Petitioner because he often visits the street in question as a resident, environmental advocate, and the organizer for a local environmental advocacy organization. The precedent created by the board's decision, as it leads to a remarkable laxness in the criteria for tree removals, will also directly affect the Petitioner because it will likely lead to a new wave of deforestation. As a vigorous local advocate for environmental protection, particularly of trees and open space, Petitioner spends large amounts of time cataloguing, monitoring, and enjoying the wooded landscape of the local community, and will thus be injured by the more widespread removal of greenery in the community.

4. The removal of the trees is likely to be imminent in the absence of judicial action, in the form of injunctive relief, because the board approved the tree removal Application about two weeks ago and the board typically issues permits based on such decisions within around four weeks of the decision. Furthermore in the present case the Applicant requested an accelerated schedule due to the expectation that acorns would soon begin falling, as they already are in this locale.

## **The Parties**

5. Petitioner Richard A. Brummel is a fifty-six year old resident of the Incorporated Village of East Hills (hereinafter "the Village") who has been highly active promoting and advocating a deep concern for the environmental and aesthetic character of the Village, mobilizing both residents and the media to get involved in and be aware of the significant adverse environmental and aesthetic changes occurring as a result of the misapplication by Village agencies of Village laws intended to protect the local environment and the community's aesthetic character. See e.g. news article, Exhibit 18.
6. The Petitioner spent his entire childhood in the Village, departing after high school to obtain a degree in economics from Yale and to pursue careers in journalism, computers, cooking, and environmental advocacy.
7. The Petitioner returned to his family's home in the Village in late 2009 due to the need for a risky medical operation.
8. As the Petitioner was successfully recuperating, he initiated various environmental protection and preservation efforts in the Village and surrounding areas, eventually undertaking a petition drive in the Village in 2012 that led to municipal hearings and the creation of a municipal committee to review inadequacies in the parts of the legislative code of the Village related to tree preservation, and the protection of the architectural character of the community.
9. During the past seven years the Petitioner has also led environmental efforts involving forested land in four nearby municipalities, as well as leading a wildlife protection effort in the Rochester area.

10. The Petitioner has remained engaged in efforts to protect the environment in the Village by closely monitoring the frequent proposals to destroy healthy trees generally for the purpose of new construction that are placed before the Village's Architectural Review Board (hereinafter "the Board") for approval.
11. The Petitioner similarly reviews the bulk of the dozens of plans submitted annually to the Board to demolish old homes and build much larger new ones, a process that also typically leads to the approved destruction of many of the mature trees, and almost all the original landscaping surrounding the existing houses.
12. The Petitioner maintains a public website, Planet-in-Peril.org, where in one section devoted to activities of the Board he makes publicly available extensive reproduced extracts from the Application files to be acted upon in public sessions by the Board.
13. The Petitioner regularly testifies verbally and in writing before the Board to oppose over-sized new houses and to oppose the destruction of healthy trees. In the present matter he also did so.
14. In the days prior to the meetings of the Board, the Petitioner routinely visits up to two dozen neighbors of the properties in the Village where significant actions of demolition, rebuilding, tree removals and or other construction are proposed, and speaks with the residents, and or leaves an information flier describing the actions under consideration and directing the residents to see the relevant documents in person or on his website. The Petitioner also encourages the neighbors to testify before the Board or send an email to the Petitioner to be presented to the Board. the online files at issue<sup>1</sup>.

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<sup>1</sup>The Village does not post any documents online despite provisions in the State Open Meetings Law requiring such public access be provided except if the costs are prohibitive. The Village makes paper files accessible at its office during limited "banker's hours" for several days prior to the meetings of the Board, but it does not require that neighbors be given any specifics of any proposals before the Board prior to the meetings. Direct neighbors are

15. By his visits the Petitioner has inspired many residents to write emails to the Board or to appear in person to denounce the proposals and the general trend of development and environmental degradation in the Village, but the outcomes of the Board in typically granting minimally modified approvals are rarely changed.
16. The Petitioner lives about five minutes drive or fifteen minutes walk from the trees and property at issue, which are located at the property known as 55 Oak Drive, East Hills, N.Y. The property and trees are located a distance of about 0.67 miles 'as the crow flies' from the Petitioner's home at 15 Laurel Lane, East Hills, N.Y.
17. Regularly, on at least ten occasions in the past year, the Petitioner has visited Oak Drive, which is a short street about one-quarter mile in length and containing about twenty houses<sup>2</sup>.
18. The Petitioner has viewed the trees and streetscape while speaking with residents on the subject of at least four applications to the Board during that period for work at properties located either on Oak Drive or on an adjacent street where the property of an Oak Drive resident directly abuts the property in question via their backyard.
19. Furthermore an acquaintance of the Petitioner via his environmental work lives on Oak Drive and the Petitioner has on several occasions visited her at her home there, in sight of the trees and property at issue<sup>3</sup>.
20. Additionally the Petitioner has traversed Oak Drive on foot and by car while visiting other locations where work is proposed, and has taken many photographs documenting the

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required to be informed that an Application is before the Board, but no details are required to be provided.

<sup>2</sup>The Petitioner has utilized the website "Daftlogic.com" to obtain measurements of distance referenced in this Petition.

<sup>3</sup>The acquaintance is a former member of the Board named Jana Goldenberg, with whom Petitioner has discussed several applications affecting properties around her home as well as other local environmental issues.

state of the environment on the street and at properties where work is proposed.

21. Petitioner takes great pleasure in the trees and natural landscape of East Hills, which he has known intimately for his entire life. He especially enjoys values and respect the mature large trees his father taught him to cherish as a child. Every lost tree to Petitioner is a tragedy akin to the death of a great whale -- a majestic age-old living organism that provides beauty shelter and the principal environmental feature of the interior North Shore.
22. The Petitioner would thus be affected and harmed by the loss of the trees at 55 Oak Drive because the loss of the trees would damage the local visual landscape the Petitioner appreciates and defends, as well as the environment of the Village which the Petitioner values.
23. The Petitioner's visits to Oak Drive typify his visits to many other areas in the confines of the Village over the past roughly three years, when he became consciously dedicated to a continuing effort to monitor, organize, and advocate against the redevelopment and deforestation trends in the Village.
24. The Petitioner is highly aware and connected with the general character, landscape and environment of the Village via his advocacy efforts. The Petitioner regularly visits on foot each of the roughly eight to ten subdivisions that comprise the Village; the Petitioner has taken hundreds or thousands of photos of the properties and trees at issue before the Board, as well as others notable to the Petitioner for their beauty or disharmony; and the Petitioner has examined hundreds of property files placed before the Board to understand the existing and proposed status of the natural and built environment throughout the Village.
25. In this way the Petitioner has developed a unique appreciation for, enjoyment of and concern about the environmental and aesthetic qualities and challenges in the Village.

26. During the time the Petitioner has been advocating in the Village he has also tried to organize an environmentally oriented civic association, which he operates under the legal (business) name "Keep East Hills Green Civic Association". While the Petitioner continues to invite membership, only a small handful of residents have made membership contributions or acted with the Petitioner in pursuit of the group's goals.
27. On three prior occasions Petitioner has sued the Architectural Review Board over its decisions. In the first case, in 2012, Petitioner withdrew his Petition due to perceived hostility from the builders involved. In the other two cases, Petitioner was determined by the Court not to have standing to sue<sup>4</sup>.

### **The East Hills Architectural Review Board and East Hills Board of Trustees**

28. The Village of East Hills, which is an incorporated Village under New York State Village Law, is located in Nassau County and comprises roughly 2,300 houses and 7,200 residents, according to the website of the Village<sup>5</sup>. The website further states that less than two percent of the land in the Village is presently undeveloped.

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<sup>4</sup>In March 2013, this Court, by the Hon. Justice Parga, ruled that Petitioner could not sue the Architectural Review Board regarding the decisions challenged because "there has been no showing by the Petitioner that the eight ARB decisions that he challenges affect him in a manner different from any other resident" (Exhibit 1, p. 3). In December 2013, this Court, by the Hon. Justice Diamond, ruled Petitioner was precluded by collateral estoppel from the prior decision from suing the Architectural Review Board (Exhibit 2, p. 4). However, the Appellate Division, Second Department ruled in February, 2015, in an appeal of Justice Diamond's Decision brought by Petitioner, that the matter was "academic" (Exhibit 3, p. . Furthermore the Court of Appeals ruled in the interim that issues of standing should not be used in a manner that shields issues from judicial review: "This Court recognized in *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Env'tl. Conservation* (23 NY3d 1 [2014]) that standing rules should not be heavy-handed,' and declared that we are 'reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review' (23 NY3d at 6 [citation omitted])." *Sierra Club v. Village of Painted Post*, 26 NY 3d 301 (2015) at 311. As required, Petitioner has alleged "direct harm, injury that is in some way different from that of the public at large" and . "repeated, not rare or isolated use" (*id.*, at 310, internal citations omitted) of the environmental resources in question (i.e. the community landscape, specifically that on Oak Drive) Petitioner will further discuss his standing in this matter on the accompanying memorandum of law.

<sup>5</sup>See, [http://www.villageofeasthills.org/village\\_history.html](http://www.villageofeasthills.org/village_history.html) (data downloaded August 23, 2016).

29. The Village comprises roughly 1,500 acres of land that is densely developed with suburban houses on lots ranging in general from about one-quarter to about one acre in size, with the median lot size roughly one-half acre<sup>6</sup>.
30. Although there are unquestionably thousands of mature trees in the Village surrounding homes and in the ten acre Village park, no tree count has ever been performed, to Petitioner's knowledge, and no analysis of the annual loss of trees to disease, development, or other causes has ever been conducted, despite Petitioner's transcribed testimony urging that such data be compiled.
31. The Board is empowered under various sections of the Code of the Village (Exhibit 4) preserve and protect trees, and to protect the architectural harmony of the Village.
32. With respect to construction, the Board is empowered to "preserve and promote the character, appearances and aesthetics of the Village" (Section 271-186(A), Legislative intent, policies and findings) by conducting "review of the exterior of new construction and of certain alterations, additions, reconstructions and site utilizations" (*id.*) under Chapter 271, Article XX, of the Code of the Village, codified pursuant to the "Architectural Review Act".
33. With respect to mature trees, the Board is also empowered to "consider, research, study, review, examine, investigate and determine the resolution of any Application [to remove trees in the Village]" (Section 186-3(A)(1), "Authority of ARB; designation of Tree Warden") in order to promote the Village goal to "to protect the tree canopy for current and future generations...[and] to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village" (Section 186-1(B), "Legislative intent").

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<sup>6</sup>Lacking any systematic official figures the estimates of area are made from the website "daflogic.com" and the lot-size estimates are an estimate based on Petitioner's experience.

34. In both instances the Board, consisting nominally of nine members and three alternates appointed by the Mayor (Section 271-188(B)), meets at least monthly (Section 271-189(A)), and thereupon reviews applications for both construction and tree removals.
35. At its meetings the Board hears unsworn testimony from applicants, their agents, and others wishing to speak, and subsequently votes in public session on whether to approve, deny or defer the applications before it.
36. The Board of Trustees is named herein because the authority to issue Tree Permits may reside not with the Architectural Review Board, a deliberative body, but with the administrative apparatus of the Village whose authority resides with the Trustees.

### **The Residents**

37. Josh and Cindy Aronson are upon information and belief the owners of 55 Oak Drive whose Application to remove two oak trees due to their acorns was approved by the Board on August 8, 2016. They are included as necessary parties in this special proceeding because a decision to disturb the Board's decision will prevent them from removing the trees they have been authorized to destroy.
38. Petitioner is regretful to include the residents but is compelled by law to do so for completeness, and Petitioner will gladly accommodate their concerns aside from the tree removals.

### **The Laws**

39. The Village enacted a law to protect trees in 2006, called the "Tree Protection and Preservation Act of 2006", codified in chapter 186 of the Code. The law was amended in

2007, 2009, 2012 and 2014. The section of the Code implementing the law is hereinafter called "the Tree Law".

40. The stated intent, which was unchanged by any of the amendments, upon information and belief, is "to protect the public health, safety and general welfare by providing for the regulation of the planting, maintenance and removal of trees within the Incorporated Village of East Hills." (Section 186-1 (A) "Legislative intent").

41. The Code further states:

"Whereas it is in the public interest to protect the tree canopy for current and future generations, the intent of this chapter is to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village and to ensure the relocation or replacement of trees which may be removed or destroyed."

(Section 186-1 (B) "Legislative intent").

42. The Code enumerates the benefits of trees and the adverse environmental, aesthetic and economic impact of their removal:

"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."

(Section 186-1 (C) "Legislative intent").

43. The Code of the Village provides for a multi-step process by which permission for routine (non-emergency) tree removals must be requested by residents before any tree is removed.

44. There is essentially a two-track process that commences with the Applicant furnishing

the details of their proposed tree removal with an Application and payment of a fee (Sections 186-4(B), 186-11(A)).

45. An initial decision is then made by the Village's appointed "Tree Warden" (Section 186-2 "Definitions") as to "whether the need for removal is reasonable and the removal will not have a significant impact on the surrounding properties and the community as a whole" (Section 186-5(A)).

46. If the Tree Warden does not find those conditions to be met, he or she refers the Application to the Board, which must then "consider, research, study, review, examine, investigate and determine the resolution of" such an Application (Section 186-3(A)(1)).

47. The Board is required to meet once a month (Section 271-189 (A)).

48. For the past several years, under the present chairman, the practice of the Board at its meetings, as authorized by Section 271-189(E) has been: (1) to listen to a presentation by an Applicant and to have Board members engage the Applicant in a dialogue, if needed, about details of the Application; then (2) to permit members of the public to address the Board about the Application; then (3) to vote on the Application.

49. It has also been the practice of the Board, upon information and belief, to visit the sites of the applications as a group prior to the meetings.

50. As part of the referral to the Board, the Tree Warden is required to compose "a brief written report for submission to the ARB" (Section 186-5(C)).

51. The Code states:

"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...."

(Section 186-5 (B) and (C), emphasis added)

52. The contents of the report (hereafter "the Tree Warden report") are evidently supposed to transmit to the Board the basis for the referral, the criteria of which are described in the same paragraph of the Code as the report is mandated:

"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."

(Section 186-5 (C))

53. An alternate procedure established by the Code -- but not followed in practice, upon information and belief -- empowers a "Tree Subcommittee Chairman" of the Board to himself or herself make any determination with respect to an Application referred to the Board by the Tree Warden (Section 186-15).

54. The Code also contains a 'waiver' provision (Section 186-13, "Waiver by ARB") that permits the Board to "waive any of the requirements, standards, procedures or mandates contained in this Chapter 186 of the Code".

55. However the 'waiver' provision of the Code also requires that "An Application, in

writing, must be sent to the ARB containing the facts, information, circumstances and proof of any extenuating situation or need" ( Section 186-13).

56. It appears thus that the 'waiver' is designed to assist applicants in hardship, and requires an explicit Board action in response to an explicit Applicant request.
57. The Code permits an appeal of its decision by "[a]ny Applicant aggrieved by any decision of the ARB" to the Zoning Board of Appeals (Section 186-16(B)). The Code defines an "Applicant" as "The owner, lessee, occupant or person in possession of any premises in the Village, or any agent thereof, including contractors" (Section 186-2 "Definitions").
58. The Board has in the past two to three years followed the practice, possibly in response to Petitioner's prior urging, of obtaining a report from an independent certified 'consulting arborist' firm called "Tree Health" to independently evaluate tree removal applications that come before it.
59. The arborist reports have served to provide an independent written assessment of whether or not the tree(s) proposed for removal is (or are) sick, or dangerous, or in the way of construction, or otherwise justifiably proposed for removal.
60. The authority to use such an independent arborist is stated in the Sections 186-11(B) and 186-12(A) of the tree law.
61. However the consulting arborist (Section 186-12(A)) is not equivalent in the Code to the Tree Warden (Section 186-3(B)), and each have different roles.
62. Similarly the reports of each are different.
63. The written reports submitted to the Board in the past by the consulting arborist by required written report (Section 186-5(C)) do not describe the reasons of the Tree Warden

for referring any applications to the Board and nor do they in any way describe the impact of the tree removal on the community or otherwise.

64. The Board makes the Application files available to the public for review prior to the meetings at the Village office, and announces the availability by legal notice (Exhibit 15). (The Village does not however post any documents on the Internet<sup>7</sup>.) The notice for the August 8, 2016 meeting thus states:

65. "Maps and plans regarding the above applications are available for inspection at the office of the Village Clerk during the hours of 10:30 AM through 3:30 PM."

### **The Facts**

66. The Village received a "Tree Removal/Alteration Permit Application" (hereafter "the tree permit Application") from Respondents Josh and Cindy Aronson submitted a to the Village on or about May 10, 2016, upon information and belief, requesting to remove one (1) "Oak" due to "arcorn" (sic) (Exhibit 5)<sup>8</sup>.

67. The tree permit Application was accompanied by a letter on commercial letterhead dated June 24, 2016 from Josh Aronson (Exhibit 6) stating that acorns from certain trees in question were damaging the family automobiles.

68. Apparently the May 10, 2016 Application was intended by the Applicant to correct an omission in a prior tree removal Application of March 31, 2016 (Exhibit 17).

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<sup>7</sup>Petitioner has repeatedly informed the Board of its obligations under the state Open Meetings Law to make an effort to post its documents online: If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision." (Public Officers Law, Article 7, Section 103(d)(2)(e).

<sup>8</sup>Petitioner's knowledge of the relevant facts and documents is based on his examination six days before the hearing of the Board's files maintained for public examination at the Village office, and by Petitioner's attendance at the Board's meeting of August 8, 2016 at which the Board made its decision complained of in this special proceeding.

69. The prior Application, to remove a three-foot wide Oak tree, was approved by the Tree Warden for a six month period beginning on April 8, 2016 because the tree is "in fair condition but has moderate storm damage and is damaging cars" (Exhibit 8, Exhibit 9).
70. The finding of the Tree Warden that the one tree he approved for removal was in other than good health was directly contradicted two months later by the Village's consulting certified arborist, who determined both trees complained of were "in good health" (Exhibit 10, emphasis added).
71. The permit was not executed by the Applicant, upon information and belief, and the May Application was intended to supplement it. The May Application was accompanied by a crude map of the trees to be removed stating:
- "Small tree forgot to include. Big tree approved"
- (Exhibit 5, p. 2).
72. Although the Board deliberated and voted upon the removal of the two trees, the original Tree Permit was not specifically rescinded.
73. However, inasmuch as the Board undertook its consideration of both trees in its deliberations and decision on the Application (hereinafter "the Decision"), and the Village consulting arborist evaluated and determined the health of both trees, as instructed (*infra*), it is clear the Board effectively superseded the determination of the Tree Warden, effectively rescinded the original permit and substituted for it the Board's new determinations based on its deliberations on both trees.
74. Furthermore the condition attached to the original tree removal permit, to wit the replacement of the tree by another single tree (see Exhibit 9, Tree Permit), was over-ridden by the Board's Decision of August 8 requiring each removed tree to be replaced by two new

trees.

75. The letter from Josh Aronson states in part:

"I am writing this letter today to provide information about the destruction (sic) of the trees that sit in front of my home....Parts of the tree (sic) including nuts have falling (sic) repeatedly from the tree (sic) over the past year and have severely damaged several vehicles that I own. Attached you will find the specific invoices from Toyota which provide you with the damages of (sic) my Land Rover (sic)....The two trees need to be removed as it (sic) has become a danger to my family and caused destruction on my property....Attached you will find the invoices from the Toyota Service Center showing the damages on (sic) our vehicles along with pictures of the damage that have (sic) occurred. Please contact me as soon as possible that (sic) we may resolve this issue before more damage is done."

76. No photos of the alleged damage were present in the Board's official file made public for viewing at the Village office, nor were such photos referenced by the Applicant or the Board at the hearing on August 8, 2016, or at any other time, upon information and belief.

77. The letter as contained in the Board file was not accompanied by any "invoices".

78. But the letter was accompanied by three single page printouts (Exhibit 11) of alleged service orders for a Toyota Land Cruiser whose apparent identification number ends in -458.

79. No identification is present on the alleged order indicating the company of origin.

80. The alleged order dated "2/19/16" states as the only details of its subject "REPAIR CAR AS PER BODY SHOP ESTIMATE" and includes an apparent price of \$1680.

81. The alleged order dated "3/31/16" states as the only details of its subject "BODY" and includes an apparent price of \$330.

82. The alleged order dated "08/6/15" states as the only details of its subject "PREP NEW CAR", "PERFORM NEW VEHICLE PREP" and "NEW YORK STATE INSPECTION", "PERFORM NEW YORK STATE INSPECTION" and includes apparent prices of \$99 and \$10.

83. Petitioner in his written testimony stated: "There is no clear indication that the bills presented are for acorn damage" (Exhibit 12, p 4).
84. The counsel to the Board, Mitchell Cohen Esq., during the hearing questioned why Land Rovers were being serviced at a Toyota dealer, but the counsel failed to note contradictory 'facts' and factual deficiencies in the alleged 'evidence' presented to the Board:
- (1) The alleged service orders were for a Toyota Land Cruiser, not a Land Rover, as Josh Aronson claimed in his letter had been damaged by acorns (Exhibit 6);
  - (2) The alleged service orders were not "invoices", were not marked 'paid' or completed, did not specify the damage involved, were not clearly attributed to any known company, and were not marked 'paid' or otherwise complete.
  - (3) No photos accompanied the letter.
85. At the Board's hearing Cindy Aronson provided unsworn oral testimony<sup>9</sup>.
86. She told the Board (Exhibit 13) "branches and acorns are all over my driveway", that the acorns were "huge", that neighbors also wanted the Aronsons' Oak trees cut due to the acorns because "they're falling on their side as well", and that the Aronsons "even asked the people behind us if we can cut their tree" to prevent its acorns from falling on the Aronson property.
87. She further stated, as Petitioner recalls, her children were being struck by acorns from the trees.
88. The Application file contained no report from the Tree Warden referring the Application to the Board nor was any such report presented at the hearing or referenced by the Board in its discussions or deliberations.

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<sup>9</sup>Petitioner relies on his recollections and notes of the meeting (Exhibit 13). Petitioner has not requested the Minutes of the meeting for fear of alerting the Village to the preparation of this lawsuit, which depends on secrecy to prevent a pre-emptive removal of the trees in question. However Petitioner will request the Minutes after the lawsuit is filed, and amend the Petition if any relevant information is turned up, and Petitioner plans to submit the minutes into evidence in his Reply papers.

89. Petitioner in his written testimony (Exhibit 12) objected to the Board that no Tree Warden report accompanied this tree removal Application or any other tree removal Application before the Board:
90. "PLEASE NOTE NONE OF THE APPLICATIONS INVOLVING TREE REMOVALS IS ACCOMPANIED BY A TREE WARDEN IMPACT ASSESSMENT REPORT AS PROVIDED BY VILLAGE CODE SECTION 186-5(c)." (Exhibit 12, p. 3)
91. Petitioner has routinely so informed the Board, in oral and written testimony, for several years that applications for tree removals were uniformly unaccompanied by the required Tree Warden reports.
92. Petitioner has never received a reply from the Board or the Village to this objection.
93. The Application file contains a letter from the Village Buildings Department to the Applicant (Exhibit 16) informing them that their Application was denied and that they needed to appear before the Board. But the letter does not specify any reasons for the referral and is not signed by the Tree Warden.
94. The Village consulting arborist, Tree Health, provided a written expert opinion (Exhibit 10) which was included in the public Application file and stated in full:
- "As per your request I inspected the two trees to be removed at 55 Oak Drive. These trees are in good health. Pruning can be done to minimize acorns falling on cars. Other than the homeowner complaining of acorns falling on cars, I see no other reason to remove these trees" (emphasis added).
95. The arborist report was signed by Peter Felix , an arborist certified by the International Society for Arboriculture, the recognized national accrediting authority for arborists, or experts in tree health and maintenance.
96. Prior to Petitioner's testimony, there was no mention of the arborist's report in the public

presentation of the Application nor in the discussion of the facts of the Application between the Board and the Applicant.

97. Petitioner in his oral testimony recounted to the Board the Board consultant's determination that trimming the trees would resolve the issues raised by the Applicant, and Petitioner criticized the Board for failing to publicly disclose or deliberate upon its consultant's report.

98. No other expert report on the Application or any issues around was submitted by the Applicant, nor was one mentioned during the Applicant's presentation, nor was one referenced in the Board's dialogue or deliberations, and no other expert opinion was included in the file.

99. Oral testimony against the Application was also provided by Richard K. Oberlander, an experienced septuagenarian arborist, former 45-year resident of the Village, former Village Tree Warden and former member of the Board who had been cited by the Village mayor as a "prime contributor" to the Tree Law (Exhibit 7).

100. Mr. Oberlander warned the Board that approving an Application to remove trees for such a frivolous reason as an objection to acorns from an Oak tree would set a precedent allowing a multiplicity of new reasons for requesting tree removals with harmful effects on the community undermining the intent of the Tree Law (Exhibit 14, paragraphs 2-13).

101. Mr. Oberlander also testified that on his own property when he lived in the Village he parked his cars under Oak trees with no ill effects.

102. At no time in its deliberations, upon information and belief, did the Board address any of the specific issues raised in the Tree Law as criteria used by the Tree Warden for considering the impact of proposed tree removals (Code Section 186-5 (C)) with the possible

exception of Section (C), discussing only in passing the efficacy of the removal on the alleged problems caused by the trees.

103. The Board split three-to-three in an initial vote, but reconsidered the Application at the end of the meeting and on a re-vote approved the Application by five-to-one decision (hereinafter "the Decision") after stipulating that the Applicant must plant four trees of three-inches in diameter or greater to replace the original trees.

104. No additional opportunity for public comment was provided when the new proposed conditions of the Application were raised.

105. However, Petitioner and Mr. Oberlander have repeatedly testified previously before the Board that youthful new trees of diameters and heights only a tiny fraction of the size of the trees being removed fail "to protect the tree canopy for current and future generations" as stated as the intent of the Tree Law (Code Section 186-1 (B) "Legislative intent") or to provide the environmental, ecological and aesthetic benefits enumerated in the Code until many decades later.

#### **AS AND FOR A FIRST CLAIM FOR RELIEF**

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)  
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

#### **Violation of Duty to Consider Tree Warden Report Prior to Approval of Tree Removals**

106. Petitioner repeats and re-alleges every allegation set forth hereinbefore.

107. Respondent Village's procedures require the Tree Warden to submit a report to the Board as a referral for the Board's action upon an Application to remove trees. Such a report is intended to provide the Board a framework for consideration of the Application based on

the Tree Warden's duty to determine the public impact and consequence of the proposed tree removals.

108. The routine omission of the Tree Warden report has deprived the Board and the public of a key written component of the Village's consideration and action upon requests to remove trees and thereby to degrade the "tree canopy" and reduce the benefits the community in general receives from the presence of trees and greenery in the community.

109. In this specific instance the omission of the Tree Warden report caused the Board's deliberation prior to the Decision to be truncated and to omit any discussion of the values of the trees, their community impact etc. as provided in the Code, Section 186-5 (C). Further the Board lacked the required official opinions of the Tree Warden prior to its deliberations.

110. The omission of the Tree Warden report should therefore render the Respondent's decision on the Tree Permit Application null and void, and Respondent Board should be enjoined from issuing any tree permit Application based on the Board's decision, and further any permit previously issued should be declared null and void and the Respondents should be enjoined from in any way altering or damaging the two trees included in the Decision.

### **AS AND FOR A SECOND CLAIM FOR RELIEF**

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)  
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

#### **Abuse of Discretion in Ignoring Expert Testimony of Village Arborist**

111. Petitioner repeats and re-alleges every allegation set forth hereinbefore.

112. The Village arborist's expert opinion, submitted in writing to the Board and referenced by Petitioner in his oral testimony to the Board, was that any damage from acorns could be

rectified by pruning the trees in question.

113. The prime author of the Tree Law, a practicing arborist, testified that in his personal experience Oak trees did not damage his own vehicles.
114. No expert opinion was submitted that contradicted the opinions of the consulting arborist or the former Board member and former Tree Warden, Mr. Oberlander.
115. The Board's approval of the Application to remove the two trees was thus based on no professional opinion supporting it, and in fact contradicted the expert opinions.
116. The Board's decision was thus arbitrary and capricious, an abuse of discretion, and affected by an error of law.
117. The Decision should therefore be declared null and void, and Respondent Board should be enjoined from issuing any tree permit(s) based on the Board's Decision, and further any permit previously issued should be declared null and void and the Respondents should be enjoined from in any way altering or damaging the two trees included in the Decision.

**AS AND FOR A THIRD CLAIM FOR RELIEF**

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)  
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse  
Of Discretion)

**Abuse of Discretion in Acting Upon the Application in the Absence of Any Reliable  
Evidence**

118. Petitioner repeats and re-alleges every allegation set forth hereinbefore.
119. The evidence submitted by the Applicant failed to in any reliable way support the Application, but instead in specific ways the evidence even contradicted the information

alleged.

120. The letter from the Applicant Mr. Aronson referred to alleged acorn damage to an automobile that was not referenced in any of the alleged service orders submitted to the Board.
121. The alleged service orders did not name the Aronsons as owners of the vehicles in question, nor the "Land Rover" allegedly damaged, nor the firm issuing the alleged orders.
122. The alleged service orders also failed to reference any specific damage to the automobiles, and one in fact referenced only vehicle "prep" and a state inspection.
123. There were no photos of other indications of damage submitted, although photos were referenced in the letter to the Board.
124. The Board in its Decision clearly relied on the representations of the alleged damage to the Applicant's automobiles but the evidence presented was fatally deficient in all respects.
125. Mr. Oberlander, the practicing arborist and former Board member, specifically challenged the reliability of the alleged damage, telling the Board that his own vehicles were routinely parked under Oak trees with no damage arising.
126. Petitioner pointed out to the Board in his written testimony that the documentary evidence failed to make any mention of acorn damage.
127. In effect there was no evidence except for the unsworn testimony of the Applicants that formed the factual basis for the Board's Decision, and yet the unsworn testimony was in part contradicted or discredited by the written submissions in the Application.
128. The allegation that branches were falling in the Applicant's driveway is contradicted by the determination of the Village consulting arborist that the trees are both "in good health".
129. As such the Board's Decision was arbitrary and capricious, an abuse of discretion and

affected by errors of law.

130. The Decision should therefore be declared null and void, and Respondent Board should be enjoined from issuing any Tree Permit(s) based on the Board's Decision, and further any permit(s) previously issued should be declared null and void and the Respondents should be enjoined from in any way altering or damaging the two trees included in the Decision.

**AS AND FOR A FOURTH CLAIM FOR RELIEF**

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)  
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

**The Board Neglected to Rescind the Original Application and Permit But By Its Actions Did So**

131. Petitioner repeats and re-alleges every allegation set forth hereinbefore.
132. As described, *supra*, the Application itself and the Board proceedings were confused and chaotic as the Board considered two separate tree permit requests one of which had already been granted without explicitly acknowledging the fact.
133. The Board deliberated upon both applications and directed the Village's consulting arborist to re-examine the huge tree described in the first application which had already been approved for removal by the Tree Warden.
134. In fact the arborist came to the opposite conclusion of the present Tree Warden, who is not an arborist, and determined the larger tree initially approved for removal was in "good" health and did not need to be removed for any reason, including the acorns which, he determined, could be resolved by pruning.

135. The Board having subsequently explicitly considered the two tree removals and voting on both applications superseded and effectively rescinded the Tree Warden's determination and the original Tree Permit (Exhibit 9).

136. Furthermore evidence that the Board superseded the permit is supplied by the fact that the Decision changed the conditions attached to the first tree removal, requiring the tree's replacement by two immature trees rather than one as had been stipulated in the original "Building Inspection Report" (Exhibit 8) and Tree Permit.

137. In order to effect justice in this matter, and protect both trees that the Board deliberated upon and decided in its Decision of August 8th, this Court's determination that the Board's procedures and actions were, for reasons previously stated, affected by errors of law and abuses of discretion, were arbitrary and capricious and manifested a failure to perform a duty enjoined by law should be applied to both tree applications.

138. Therefore the the original (April 8) Tree Permit should be declared superseded by the Decision, and as such it and the Tree Warden determinations underlying it should be declared null and void, the Village should be directed to vacate and rescind the Permit and the Tree Warden "Building Inspection Report", and the Village should be enjoined from issuing any new such permit until the Village and Board comply fully with the Code.

139. No prior request for the relief requested herein has been made.

WHEREFORE, the Petition should be granted and judgement should be entered in favor of the Petitioner:

- (1) Declaring null and void the Decision of the Board permitting the two trees to be removed;
- (2) Preliminarily enjoining the Respondent Board and Village from issuing any Tree Permits based on the Decision until the determination of this Petition; and

- (3) Rescinding any and all Tree Permit(s) already issued related to the trees in the Application complained of and addressed by the Board in its Decision complained of;
- (4) Preliminarily enjoining the Respondents from permitting or effecting in any way the or damaging the two trees included in the Decision until the determination of the Petition;
- (5) Permanently enjoining the Village and Board from issuing any permits to remove the two trees at 55 Oak Drive complained unless and until said Board adheres to the Village Code and the lawful procedure in making any decision thereon;
- (6) Permanently enjoining all the Respondents from in any way damaging or destroying the said trees unless and until the Board adheres to the Village Code and the lawful procedure in making any decision thereon;
- (7) Awarding Petitioner reasonable costs; and
- (8) Granting Petitioner such other and further relief as to the Court seems just and proper.

Dated: Nassau County, New York,  
August \_\_\_\_\_, 2016

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## **EXHIBITS**

- Exhibit 1 Decision of the Hon. Justice Parga
- Exhibit 2 Decision of the Hon. Justice Diamond
- Exhibit 3 Decision of the Second Department
- Exhibit 4 Village Code Regarding Trees
- Exhibit 5 Tree Permit Application of May 10, 2016 including 'map'
- Exhibit 6 Letter from Josh Aronson
- Exhibit 7 Roslyn News article
- Exhibit 8 "Building Inspection Report"
- Exhibit 9 Tree Removal Permit
- Exhibit 10 Village Consulting Arborist Report
- Exhibit 11 Service orders (purported)
- Exhibit 12 RB Testimony
- Exhibit 13 RB notes of meeting
- Exhibit 14 Richard Oberlander affidavit
- Exhibit 15 Meeting announcement and document availability
- Exhibit 16 Building Department letter to Applicant
- Exhibit 17 Tree Permit Application of March 31, 2016
- Exhibit 18 News Article on local petition drive