SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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BEECHWOOD POB LLC,

Respondent-Plaintiff,

- against -

RICHARD A. BRUMMEL,

Appellant-Defendant, and

GHENYA B. GRANT

Non-Party-Defendant

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Appellate Division Docket No.:
2016-05954
Nassau Index No.:
601000 / 2016

APPELLANT-DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION TO VACATE OR MODIFY THE PRELIMINARY INJUNCTION

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Richard Brummel, residing at 15 Laurel Lane, East Hills, N.Y. 11577, being duly sworn, does depose and say, the following is true to the best of my knowledge or recollection, except what is stated upon information and belief, and that I believe to be true:

Preliminary Statement

1. Movant requests that this Court vacate or substantially modify a preliminary injunction which by its shockingly expansive, legally unfounded, and ultimately unconstitutional terms categorically prohibits Movant, a non-attorney environmental advocate, from continuing his involvement in any further legal challenges, to any present or future element of a massive, roughly $500 million, roughly 150-acre sprawling real estate development in the heart of Long Island, and more to the point precludes an urgently warranted intervention to appeal a trial Court's deeply flawed Decision and Order in an Article 78 special proceeding.

2. The preliminary injunction also prohibits Movant -- as well as the erstwhile attorney for an allied intervenor, a neighbor of the development -- from in any way "assisting" in any effort, in any way related to the development.

3. As will be shown, the sanction is clearly unfounded, in the service of an improper purpose, and interferes with vital and well-founded legal efforts to protect an important environment resource with the laws of this State.

4. To 'earn' such a severe sanction, Movant filed two motions before the trial Court and two before this Court, and assisted the other proposed-intervenor in filing one motion before the trial Court and two before this Court (a third having been withdrawn, as explained below). All the motions at issue are presented here as exhibits, and their circumstances and legal bases are discussed *infra*.

5. There should be little debate about the propriety of the motions. They were detailed,

factual, richly documented, and carefully argued, though undertaken in a hectic rush that appeared necessary at the time due to statutory deadlines and the nature of the environmental harm at stake.

6. Movant will outline a deeply troubling context and subtext wherein clear evidence demonstrates that the trial Court improperly, and by design, frustrated the referenced legitimate attempts to intervene by Movant and the allied-intervenor -- whose purpose was to appeal the trial Court's dismissal of the underlying Article 78 special proceeding wherein the Petitioners had 'thrown in the hat' -- because the trial Court was aware that a 'settlement', which the Court had emphatically encouraged among the original parties, was being rushed to completion at the very time the intervenors were appearing before the trial Court[1].

7. The Court was evidently further aware that such a settlement was predicated on the Petitioners renouncing any appeal of the Decision and Order dismissing their case[2]. And furthermore, in the Court's belief, such a 'so-ordered' settlement 'with prejudice'[3] would *ipso facto*, by law, preclude any such an intervention or appeal from the Court's prior decision[4].

8. The preliminary injunction now before this Court is itself predicated on the supposed 'impropriety' of the lawful actions taken by Movant and another litigant to overcome the trial Court's unjust refusals to grant intervention to Movant and/or the allied intervenor.

9. Moreover the preliminary injunction must be seen as part of the trial Court's overall

[1]The Court fully acknowledged it had urged the parties to negotiate a settlement, and was apprised of settlement talks both before and after it rendered its Decision and Order on the underlying case. Furthermore it is clear and the Court has further stated that the post-decision settlement was aimed at preventing an appeal by the Petitioners (Decision and Order granting preliminary injunction, Exhibit 2, pp. 3-4).
[2]See Footnote 1.
[3]Exhibit 2, p. 4.
[4]Both the trial Court and the Plaintiff have favored the (incorrect) reading of the law that a settlement precludes any intervention or appeal (Exhibit 3 ¶26(e), Exhibit 2, p.4); however, Movant and the allied neighbor-intervenor have demonstrated the contrary is true, especially in the case of an Article 78 special proceeding, see Exhibit 4 ¶64 *ff.*, and *infra.*

design to 'terminate' the underlying case, and to achieve a 'settlement' the Court promoted -- wholly inadequate as it is -- which, in the Court's inaccurate reading of the law, would render the underlying special proceeding forever out of reach of appellate review.

10. The trial Court appears to have become entrenched in its defense of a fundamentally flawed decision that relied on a raft of spurious legal and factual arguments by the three Respondents -- consisting of a dominant regional real-estate developer (Plaintiff), a household-name property owner, and a politically pre-eminent township -- to defend a clearly discredited environmental review process[5]. They will be explored *infra.*

11. Movant regrets to this Court that the circumstances warrant such a direct criticism of the motives and integrity of a trial Court, and Movant further recognizes that prudence and justice therefore demand that the full range of facts and legal issues surrounding both the preliminary injunction and the underlying case must be reviewed to assure the correctness of the claim.

12. Such documentary evidence and legal analysis is incorporated in this motion.

13. The motives and intent of the trial Court are relevant to this Court in understanding how the underlying actions of Movant and an allied intervenor were completely just and proper -- not intransigent, reckless, vexatious, recalcitrant, etc. -- and just as the motions to intervene were improperly rebuffed, the preliminary injunction here at issue was improperly issued on invalid evidence, and the preliminary injunction was also improperly drawn to have the harshest effect on Movant and the allied intervenor.

[5]The Decision and Order was so legally troubled that the 'settled' judgement -- as composed by Plaintiff -- brazenly omitted the principal ground cited in the Decision and Order for ruling against the resident-Petitioners, that being the supposed lack of "standing" of the Petitioners, who are five immediate physical and visual neighbors of the proposed development, and who are also all decades-long users of the largely natural site at issue (Exhibit 5, pp. 11-12). Such a gambit was very possibly undertaken in an effort to render that pillar of the Decision and Order -- which had been utterly discredited by the Petitioners in the underlying case -- arguably immune from appellate review.

14. This motion may be found by the Court to be unusually lengthy and detailed, but Movant -- who is a *pro se* non-attorney -- requests this Court to view it as reflecting a challenge commensurate to the issue, as well as reflective of an 'overabundance of caution' where Movant seeks vital relief the Court is historically predisposed to deny.

15. While it may tend to 'play into' a narrative created by Movant's adversaries[6] that Movant engages in improperly 'over-the-top' legal efforts -- which the injunction intrinsically suggests -- Movant believes the facts when fairly evaluated show such self-serving arguments are baseless.

16. Movant also notes this matter is extremely 'live': As an environmental matter with irreparable harm pending -- and in fact having already begun -- time is of the essence. Some destruction of forests for construction has already begun in one area of the Project[7] and surveying marks are, upon information and belief, also appearing elsewhere. The trial Court delayed issuing preliminary injunction for two months after granting a temporary restraining order. Movant has at this point been under restraint for a period of about four months[8], and an effort to seek a hearing to file new papers 'with Court permission' was rebuffed after about six weeks[9].

17. In the circumstances of this case, such an appeal has previously been sought and will most likely be re-sought by the intervention of a nearby neighbor of the original Petitioners,

[6]Movant has litigated against a number of local governments in Nassau County over environmental and related issues, and it has become a frequent refrain that Movant's actions are improper, but no Court asked to rule on the allegations, including this one has found any basis, until the present matter now before the Court. See, e.g. Matter of Brummel v. Village of East Hills for the East Hills Architectural Review Board *et al.*, Docket No. 2014-08342, Decision and Order of May 21, 2015, in which Movant fully discussed and successfully defended numerous legal actions from allegations of impropriety.

[7]Exhibit 42, Photo of excavation at the site of phase 1 of the underlying Project on May 11, 2016.

[8]The time has been spent trying to obtain community support and financing, and composing a massive review of the facts and issues in the case, and every one of its motions.

[9]Movant sought in early April, 2016, to appear before the trial Court to obtain leave to assist in the filing of a follow-up motion to the appellate court, but was told not to appear (Exhibit 1).

such as the one who sought intervention after the original Petitioners failed to appeal, and possibly by Movant.

18. Absent extraordinary circumstances, the discretion of a trial court to issue a preliminary injunction has been held to warrant deference on appeal. But the circumstances of the present matter cannot be described otherwise than remarkable and troubling, and thus deserving of such a reversal by this Court, in the interests of justice.

19. This Court has only to peruse the several motions upon which the trial Court based its action[10], appended as exhibits, to find that the trial Court's action was without foundation. This affidavit will explore the several motions and their firm legal bases, which may be understood in the context of a Court that did not wish to grant intervention under any circumstances.

20. Given the history of the law of frivolous conduct briefly reviewed herein, and also more fully discussed in an appended prior filing[11], the proposition that Movant's brief and intense, barely one-month course of legal action in the underlying case could be equated to such prohibited conduct should shock the conscience of this Court. The case law on frivolous conduct is replete with overwhelming examples of quantitative excess, quasi-comical illogic and delusion, frankly bizarre conduct and bald abuse. But in the present case there was nothing similar on the record, as the Court will readily see.

21. The fact that there were multiple appearances was regrettable but explainable in the circumstances -- particularly as the trial Court would not budge on the issues, and the

[10]The trial Court presumed to rule not only on Movant's two motions submitted to it, but also two motions Movant submitted by way of appeal to this Court. Beyond that, the trial Court appears to have counted against Movant one other motion submitted to it and two submitted to this Court by an entirely separate party, on separate grounds, by the allied counsel.

[11]See Exhibit 4, pp. 24 *ff.*

appellate court was focused on technical issues not clear to the movants at the time, and was possibly deferring to the supposed better insight of the trial Court.

22. There are also fatal technical legal defects in the Decision and Order granting the instant preliminary injunction, in addition to the deep substantive flaws, concerning its justification already mentioned. Among the technical defects are the following:

(1) The preliminary injunction omits any 'undertaking', as is clearly required by statute; see CPLR Section 6312(b) (Exhibit 2, Decision and Order);

(2) The preliminary injunction ranges in its coverage far beyond the typical exercise of judicial authority in cases of 'frivolous conduct' -- to wit, enjoining further legal filings on a specific matter -- to in addition over-broadly enjoining the "assisting" others, which conduct Movant, a well-known local environmental organizer, might normally undertake as an exercise of his civil rights to assemble, associate, and speak (Exhibit 2, p. 7);

(3) The preliminary injunction also recklessly over-broadly enjoins any legal actions -- or "assisting" -- Movant might wish to undertake bearing any connection whatsoever to the massive real estate development at issue, now or in the future (Exhibit 2, p. 7(b));

(4) The preliminary injunction omits, in violation of settled Constitutional law and standard practice in this State, any mechanism for Movant to seek judicial permission to either file an otherwise-enjoined motion or action, or to 'assist' therein (Exhibit 2, p. 7); and finally

(5) The Hon. Justice who evidently agreed to hear this case -- and a sister case by another Respondent -- due to its 'relatedness' to the underlying case[12]

[12]See Exhibit 45, p. 2.

erroneously failed to recuse himself, inasmuch his prior decisions and actions -- on the underlying case and on the motions to intervene -- form a central 'issue' in the present case, making him essentially an unnamed party to the case, and thus incapable of the requisite neutrality to preside over the action, or to neutrally decide on the merits of the injunctive relief at issue here[13].

23. As a recognized regional environmental advocate[14], Movant has worked tirelessly for well over one year in the present matter to press the municipality, the county, and the developer in the massive Project at issue to fully adhere to state environmental law, the State Environmental Quality Review Act, (hereinafter "SEQRA") by submitting extensive written testimony critiquing the environmental review; by organizing neighbors to bring the issues to court; by rallying members of the community to support the effort; by keeping the community informed via local and regional media and 'social media'; and by pressing for coverage from regional media by extensive press advisories.

24. The trial Court, after making comments Petitioners and Movant heard as welcoming and supportive, while publicly professing a 'complete ignorance' of the relevant environmental law, thereupon engaged in a course of delay and indirection[15] prior to rendering a Decision and Order it frankly sought to avoid making, one predicated on a

[13]In a typical challenge to alleged 'frivolous' practice the putative offender is a party to the case in which the alleged misconduct occurred, but in this matter a new action needed to be launched as a vehicle to challenge the conduct because the alleged offenders were not parties -- having been denied intervenor status. One might say they have become 'honorary' parties for the purpose of the frivolity issue; but inasmuch as the action is separate, and the justification for the trial Court's actions is relevant, a neutral judge was required. Moreover, in the new action -- the present action -- the judge was of necessity assigned by the Individual Assignment System, and it was improper to call the case 'related' and for the Court to accept it on that basis, whereas in a typical case no such new assignment would have occurred.

[14]See e.g. Exhibit 30, news article.

[15]The Court repeatedly scheduled then cancelled hearings on a preliminary injunction, and ultimately failed to hear the issue in public. It also ignored requests by Petitioners to hold a trial of fact on key matters before it regarding "segmentation" of the SEQRA review process, despite the submission of documentary evidence supporting Petitioners' allegations, e.g. Exhibit 6.

baseless -- and in the underlying case thoroughly refuted -- standard of 'exhaustion of administrative remedies' to reject the legal 'standing' to sue of five neighbors and intensive decades-long users of the Project site (Exhibit 5, pp. 11-12)[16].

25. At this critical point, Movant continues to have a vital public role to play. Having acted diligently, reasonably, and lawfully in all respects to this point, Movant should not unjustly and improperly be enjoined from continuing his irreplaceable leadership role.

26. Now is the critical time for the intervenors to be enabled to act, as the development project is actually starting to encroach on the natural lands and the prior legal impediments to the intervention of one or both parties have been resolved.

27. The final intervenor motion, to this Court, appeared to falter only because the trial Court's Decision and Order in the underlying case was not 'settled' (Exhibit 34, Second Dep't Decision and Order on notice of appeal; Exhibit 19, Second Dep't Decision and Order on final motion to intervene (February 19, 2016)).

28. But no sooner was it settled, filed and 'found' by the parties, than the temporary restraining order preceding this preliminary injunction had been issued. In fact it was "filed" fourteen days after it was "entered", which was 'conveniently' for the adverse parties five days after the temporary restraining order was issued[17].

29. The case is now ripe for intervention, and Movant respectfully requests this Court to clear the way forward from improper interference with such a course this preliminary injunction clearly constitutes.

[16]While the Decision and Order ostensibly addressed the substantive issues raised in the Petition, its stated reasoning after articulating its "threshold" decision on standing is conclusory and/or perfunctory (Exhibit 5 pp. 12-14).

[17]The temporary restraining order which preceding this preliminary injunction was issued on February 19 -- the same day as Plaintiff's affidavit was filed (Exhibit 3, p. 1); the Settled Judgment was "entered" on February 10, 2016 (Exhibit 20, p. 6 of Judgement) but was not "filed" until February 24, 2016 (Exhibit 20, cover page from County Clerk) thuds rendering it inaccessible and un-discoverable by Movant -- a non-party -- until days after the temporary restraining order was in force.

Facts

30. On June 10, 2015, five non-attorney residents, in three households in Old Bethpage, N.Y., filed *pro se* an Article 78 Petition seeking on various grounds to invalidate the environmental review conducted with regard to a roughly $500 million real estate development in the Town of Oyster Bay, County of Nassau, known as "Country Pointe at Plainview", hereinafter "the Project"[18], which was to be built across a two-lane road from their homes (Exhibit 47).

31. The Project would encompass a 143.25 acre parcel of a former county-owned property on which were located several clusters of buildings, athletic fields and about seventy (70) acres of woods in the area known as Plainview / Old Bethpage. As approved, the Project would result in the destruction of about 50 acres of woods and 10 acres of heavily-wooded turn-of-the-century hospital grounds to make way for stores, housing, and new (replacement) athletic fields.

32. The neighbors' standing and injury were based on the facts they resided directly across from the lands at issue and the site of planned construction, and had walked and bicycled on the park-like grounds for decades, enjoying the trees, fresh air, and wildlife found there (Exhibit 47, pp. 8-9).

33. The neighbors sued on the grounds that the environmental review conducted under the State Environmental Quality Review Act ("SEQRA") was defective in several respects: (1) it had unlawfully 'segmented' -- and deferred -- the required review in several respects (Exhibit 47, pp. 12 *ff.*); (2) it omitted key information about wildlife on the site (Exhibit 47, pp. 18

[18]The Petition also sought to invalidate any zoning and land-use decisions taken by the Town of Oyster Bay as a result of the environmental review.

ff.); (3) it failed to properly document and analyze the fates of forested, 'habitat' areas on the property (Exhibit 47, pp. 24 *ff.*); and (4) it did not adequately analyze or document a planned 'screening buffer' of vegetation across from the current neighborhood, because among other reasons there would be a virtually un-described 'fitness trail' cutting through its center (Exhibit 47, pp. 37 *ff.*), among other issues.

34. After substantial submission of pleadings, affidavits, exhibits, and memoranda of law by the five residents -- non-lawyers who acted with extensive assistance from Movant -- and responses from three separate municipal and commercial Respondents[19], and after three or four appearances before the trial Court[20], a decision was rendered from the bench on December 2, 2015, and in writing on December 15, 2015, denying Petitioners any relief.

35. During the next weeks, Movant sought to assure that the Petitioners would file an appeal, but unknown to Movant, Petitioners were in talks with the Respondents to undertake a settlement, the ultimate terms of which would preclude any appeal -- or other opposition of any type to the subsequent Project -- in exchange for the preservation of several acres of woods directly across from their houses (Exhibit 2, p. 4).

36. Receiving no commitment from the Petitioners to appeal, and in one case being informed of a decision not to do so (Exhibit 40), Movant began organizing intervenors for the purpose of appealing the Decision and Order.

37. The trial Court by its own account remained significantly involved in the push to 'settle'

[19]The Respondents were: the Town of Oyster Bay; Plaintiff Beechwood POB LLC; and the owner of the property at the time, Plainview POB SPE.

[20]Despite the Court having promised on several occasions to hold a hearing, and despite the Petitioners having stated in their pleadings that a factual hearing would be vital to determine various factual issues related to the 'segmented' environmental review, none of the court appearances were in the manner of hearings, but rather were in the nature of conferences on scheduling and opportunities for the Court to urge settlement negotiations. The Court went so far as to say at the last session that the Court knew the participants expected a hearing but that was only to assure they would all attend.

the matter in some way even after it issued its Decision and Order -- and during the period it would repeatedly deny motions to intervene for the purpose of an appeal by Movant and a proposed neighbor-intervenor residing close to the original Petitioners (Exhibit 2, p. 4).

38. The trial Court wrote in its Decision and Order on the preliminary injunction:

> "At the time this Court issued its 12/2/15 oral decision dismissing the Denton Proceeding [the underlying Article 78 special proceeding], the Court suggested that settlement discussions could continue among the parties to the Denton Proceeding.
>
> Following this Court's 12/2/15 oral decision, Beechwood communicated to the Petitioners that the settlement proposal remained available if the Petitioners would cease further proceedings in the Denton Proceeding, to not take any appeal..., and to not oppose any future application to the Town of Oyster Bay, or any other state or municipal agency....
> On December 7, 2015, the Petitioners indicated their willingness to accept such a settlement...."
>
> Exhibit 2, Decision and Order granting Preliminary Injunction, pp. 3-4

39. Notably, the Court states in its Decision and Order that it was aware a condition of the settlement was that no appeal be taken, a condition that would effectively be frustrated if the applications to intervene were granted by the trial Court, knowing as it did that the entire purpose of intervention was to appeal (Exhibit 2, p. 4)[21].

40. During the initial weeks after the Decision and Order was issued, Movant believed that as a matter of law the intervenor(s) would need to file their a 'notice of appeal' within the same thirty-day statute-of-limitations period (CPLR Section 5513(a)) following service of a 'notice of entry' as would apply to the original Petitioners (Exhibit 7, ¶7, e.g.)[22]. Movant and the allied counsel have since identified legal authority that the the thirty-day period should

[21]It could be argued that the specific provision was that the Petitioners not appeal, but it can hardly be denied the overall aim of the Respondents was to avoid an appeal by anyone. They never approached Movant, the neighbor-intervenor, or any other party of which Movant is aware, but fought aggressively to prevent any intervention that could result in an appeal, including by way of the preliminary injunction at issue here.
[22]Movant was unable to learn from the Petitioners when in fact they had been served, however.

'restart' upon a grant of intervenor status[23], but at the time the perceived urgency of the deadline led to accelerated and intensive efforts in the weeks after the Decision and Order was issued[24].

41. Movant on January 7, 2016 filed a motion to himself intervene for the purpose of appealing the Decision and Order (Exhibit **8,** affidavit in support and memorandum of law), and on January 14th filed a motion to amend the January 7th motion -- simply in order to include a pleading as required by CPLR Section 1014 (Exhibit **9)**.

42. The trial Court refused to sign the orders to show cause by which both motions filed were, by reason of urgency, filed (Exhibits 10 and 11)[25]. The Court ruled quickly, and did not hold a hearing or, upon knowledge and belief, receive any opposition, even though some or all of the Respondents were present.

43. On January 15th Movant filed a motion with this Court by order to show cause to appeal the trial Court's 'constructive denials' of his motions (Exhibit **7** Brummel Appellate Motion I) but this Court refused to sign the order to show cause (Exhibit 12). On January 23rd, Movant filed another order to show cause with this Court seeking to re-argue the prior motion (Exhibit 13), but it was also returned unsigned (Exhibit 14)[26].

44. In a parallel action, a nearby resident -- like the original Petitioners, a direct neighbor of the Project -- represented by counsel and with Movant's assistance, on January 13th filed

[23]Matter of Romeo v. NYS Dept. of Educ., 39 AD 3d 916 (Third Dep't, 2007) at 918; Unitarian Universalist v. Shorten, 64 Misc. 2d 851 (Supreme Court, Nassau County, 1970, Meyer, J.), Unitarian v. Shorten (Exhibit 19, ¶207, ¶209)

[24]It later emerged that the Decision and Order needed to be settled, and was in fact settled, and the thirty-day period to timely file a notice of appeal was further modified.

[25]The trial Court included written notations on both orders to show cause indicating its reasoning: the first because Movant allegedly lacked standing and the Court's decision was final, and the second because the Court's decision was final. Both points are discussed below.

[26]Opposing counsel for Beechwood POB and the Town of Oyster Bay were present and argued both orders before a Deputy Clerk of this Court inasmuch as injunctive relief was sought allowing Movant to intervene.

with the trial Court by order to show cause another motion to intervene in order to appeal the Decision and Order (Exhibit 15, Affirmation in Support, with exhibits).

45. Though accompanied by a pleading and various substantive exhibits, that motion too was returned unsigned by the Court, accompanied by a peculiar, evidently erroneous, handwritten explanation[27] (Exhibit 16). Again the Court held no hearing, and upon information and belief did not receive any opposition even though some or all of the Respondents were present, before quickly returning the papers.

46. On January 15th, the neighbor-intervenor's attorney appeared alongside Movant at this Court and filed her own motion to appeal the trial Court's denial of her motion to intervene (Exhibit 17). That motion was also returned unsigned (Exhibit 18).

47. On February 19th, the neighbor-intervenor's attorney filed by notice of motion another motion with this Court, seeking leave directly from the Court to intervene for the purpose of appealing the Decision and Order (Exhibit 19)[28]. That motion was denied by an extremely abbreviated decision of March 24th (Exhibit 21 Sylvester Appellate Decision II), apparently because the Decision and Order needed to be 'settled' to be appealable.

48. None of the motions resulted in sanctions or costs.

49. Unknown at the time to Movant and the neighbor-intervenor or her attorney, upon information and belief, on February 4th and 5th this Court made a series of decisions dismissing the 'notices of appeal' underlying the various motions filed by Movant and the neighbor-intervenor which notices were directed at appealing (a) the Decision and Order of

[27]The Court made a notation on this order to show cause too, stating that it was the wrong instrument to move to intervene: "Refuse to sign. Matter with regard to this petitioner is not properly brought by order to show cause. GRP JSC".

[28]The attorney for the neighbor-intervenor had filed a motion on February 2, 2016, seeking to re-argue the previous motion filed January 15th, but she withdrew that motion after the Clerk of the Court refused to permit Movant -- who accompanied her -- to assist her in any way in presenting the motion.

December 15, 2015, and (b) the orders to show cause that the trial Court had refused to sign.

50. In its dismissals of the notices of appeal, *sua sponte*, this Court made appeared to reveal its previously unspoken reasons for refusing to sign the two parties' several appellate orders to show cause, and for dismissing the neighbor-intervenor's motion to intervene. Notably, none of the motions were dismissed 'on the merits'.

51. In its decision of February 5, 2016, determining the notice of appeal assigned Docket No. 2016-744 (Exhibit 21), this Court ruled that the Decision and Order of December 15, 2015 was unappealable, stating "no appeal lies from a decision".

52. Unremarked by the movants, the Decision and Order was not settled as a judgement[29], as required by its own language (Exhibit 5, p. 14) and hence was unappealable. But this misunderstanding was also adopted by the trial Court, which in its most recent Decision and Order -- on the preliminary injunction -- also counted the thirty days from the notice of entry of the unsettled order[30].

53. Both Brummel Appellate Motion II and Sylvester Appellate Motion II were assigned the same docket number as that decision, No. 2016-744[31], thus the decision served to show why the Brummel order to show cause was returned unsigned, and why Sylvester motion was dismissed with no stated rationale (Exhibit 21).

54. On February 4th, this Court issued three decisions (Exhibit 23, Exhibit 24, Exhibit 25**)**

[29]Because neither Movant nor the neighbor-intervenor were parties to the underlying special proceeding, neither had been served with the settled judgement entered on February 10, 2016 (Exhibit 20) and were not aware of its existence until a file-review was conducted at the County Clerk's office sometime after the filing of the last motion by the neighbor-intervenor on February 19.

[30]Exhibit 2, p. 3: "...Respondents...gave notice of entry of the 12/15/15 Order, by regular mail, on December 28, 2015. Therefore, the parties... had until February 1, 2016 to take an appeal...."

[31]The motion "Brummel Appellate Motion II" was assigned multiple numbers, corresponding to multiple notices of appeal related to it. The order to show cause was assigned Docket Nos. 744, 742, and 540 (Exhibit **22**) corresponding to notices of appeal for the Decision and Order of December 15, 2015, and Brummel Motions I and II, before the trial Court.

dismissing the notices of appeal -- filed by Movant and the neighbor-intervenor -- regarding the trial Court's refusals to sign the orders to show cause to intervene of January 7, January 13, and January 14[32]. Each decision of February 4th stated the appealed order was not appealable as of right, and leave to appeal was not granted[33].

55. Thus was codified the rationale for this Court's declining to sign Brummel Appellate Motion I of January 15 (Exhibit 7), assigned Docket No. 2016-00540, Sylvester Appellate Motion I of January 15 (Exhibit 17), assigned Docket No. 2016-544, and two of the three notices of appeal assigned by Brummel Appellate Motion II of January 25 (Exhibit 13). The rationale for dismissing the remaining notice of appeal was covered by the Decision and Order announced February 5th (Exhibit 21).

56. On February 19th, the Respondents in the original special proceeding, Beechwood POB LLC and Town of Oyster Bay, both obtained temporary restraining orders based on separate new actions, placed (improperly) before the same the trial Court[34] that heard the prior special proceeding and the prior motions to intervene. The temporary restraining orders enjoined Movant and the erstwhile attorney for the neighbor intervenor[35] from filing any further papers in the underlying case, among a wide range of other prohibitions later incorporated into the preliminary injunction at issue here.

57. The temporary restraining order issued on behalf of Plaintiff Beechwood POB

[32]For some reason unknown to Movant the dates of the trial Court orders to show cause were mis-reported in the trial Court notations and in this Court's decisions. Brummel Motion I was filed and 'not signed' on January 7, 2016 (not January 6); Brummel Motion II was filed and returned unsigned on January 14th (not January 16th -- a Saturday).
[33]A decision on a motion in a special proceeding is not appealable as of right (CPLR 5701(b)(1)).
[34]The trial Court is biased and prejudiced in the matters of the case -- whether the litigants were justified in appealing its decisions and contesting its orders, among other reasons -- and has clear improper vested interests in the matter, and should have recused itself instead of accepting the issues as "related"; see *infra.* The preliminary injunction is tainted by that conflict of interest.
[35]The orders obtained by the Town of Oyster Bay named Movant alone -- not the attorney for the neighbor-intervenor, nor any other party. Those obtained by Beechwood POB named Movant and the then-attorney for the neighbor-intervenor. The attorney has since withdrawn, evidently under duress from the lawsuit against her.

categorically prohibited any further motions, and that for the Town of Oyster Bay prohibited any further motions without leave of the trial Court. Two months later, on April 15, the trial Court converted the temporary restraining orders into preliminary injunctions (Exhibit 2, Exhibit **26**) over the strenuously opposition of Movant (Exhibit 4)[36].

58. The preliminary injunction granted to Plaintiff Beechwood POB against Movant is the sole subject of the present motion[37].

59. The injunctions were sought as part of actions for tort filed by Beechwood POB and the Town of Oyster Bay, who asserted that by the several motions recounted herein, Movant and the then-attorney for the neighbor-intervenor had unlawfully harmed them through abusing the judicial system by engaging in frivolous conduct.

60. Movant filed opposition to both motions for preliminary injunctions (Exhibit 4) which defended and explained every filing made by both parties. Movant also filed answers to both actions, denying their basis in fact and law.

[36]A question has recently arisen as to whether the Court ever received from the County Clerk's office and/or reviewed Movant's affidavit in opposition to the preliminary injunction. A recent examination of the electronic filing records performed on June 14, 2016, and inquiries with officials of the Clerk's Office (Exhibit 27) and the Court have been inconclusive and await further review. The papers were proved filed (Exhibit 28). It is uncontroverted that some 'opposition' papers were read by the Court (Exhibit 2, p. 1, "papers...read"), but since there were two defendants, the papers may have been only those of the co-Defendant. In fact at the recent examination the "Efile" record contained evidence of only the co-Defendant's opposition, that being an affidavit of service filed, but not the opposition itself. (Both defendants duly filed their papers in hard-copy, not electronically.) Whether or not Movant's opposition was read, the posture the trial Court cannot be doubted and the Decision and Order issuing the preliminary injunction is thus ripe for review at this time (see e.g. Watergate v. Buffalo Sewer, 46 NY 2d 52 (1978) at 57, where the Court dispensed with the requirement to 'exhaust administrative remedies' where the course would obviously be futile, given the known posture of the agency involved). Furthermore, any further delay in removing the restrictions on Movant -- e.g. to allow a reconsideration by the Court -- will be extremely prejudicial to the Movant given pending environmental destruction.

[37]Movant has chosen to appeal only the Beechwood POB preliminary injunction at this time due to logistical issues of cost and paperwork, as well as the nature of the Beechwood POB injunction being more categorical and inflexible. Movant intends to appeal the Town of Oyster Bay preliminary injunction at a later time.

Immediate Practical Effect Of Lifting The Preliminary Injunction

61. The present preliminary injunction and its sister preliminary injunction -- granted to the Article 78 Respondent Town of Oyster Bay -- have prevented Movant and the allied intervenor from undertaking urgent and reasonable further legal efforts to obtain appellate review of the trial Court's Decision and Order in the underlying Article 78 special proceeding.

62. As noted, *supra*, this situation appears to have been deliberately effectuated by the trial Court beginning with the unfounded denial of the motions to intervene from Movant and the neighbor-intervenor for the improper purpose of facilitating the Settlement (Exhibit 32) and rendering the Decision and Order beyond appellate review.

63. Although the neighbor-intervenor is uniquely situated to intervene, the injunctions and the concomitant resignation of her attorney[38] have shaken her resolve and deterred her continued involvement. Its removal is thus essential to reviving the valid claims she has. Furthermore, other nearby residents have expressed new interest in pursuing the matter as fellow intervenors if the injunction is removed.

64. As more fully described elsewhere herein, an appeal in the underlying matter would be proper and highly meritorious. Furthermore experience has shown Movant's specialized knowledge, experience, assistance and involvement is vital to such an undertaking. Movant is also considering re-submitting his own intervention, despite the fact that his connection to the lands at issue is different in several respects from that of the original Petitioners, and thus marginally more difficult to 'relate back' under CPLR Section 203(f)[39].

[38]Ms. Grant announced her intention to withdraw almost immediately upon filing of the order to show cause for the preliminary injunction.

[39]The relation back doctrine has been recently interpreted to apply as long as the adverse party received notice of the

65. Specifically, in order to obtain appellate review, the intervenors can and should seek, singly or together, permission of this Court to intervene for the purpose of appealing the 'settled judgment' which is now the 'appealable paper'[40].

66. Movant's involvement and support is essential to secure financial and moral support for the continuing legal effort; to help organize the legal logistics; and to perform public liaison roles, apart from potentially intervening himself. Thus, as an initial step to moving this matter back on its lawful and proper course before the appellate bench, on behalf of a deeply aggrieved community demonstrably abused by the administrative process, this preliminary injunction should be vacated, because, as shown, *infra*, justice and the law clearly demand it.

67. As stated, *supra*, the legal impediment that appears to have defeated the final motion to intervene submitted to this Court -- just before this injunctive relief paralyzed the movants -- appears to have been resolved, inasmuch as the Settled Judgement was filed and more importantly unexpectedly uncovered by the movants[41] (Exhibit 20). This Court can address the substantive issues presented by the motion(s) to intervene, and provide a firm legal determination, on the merits, in a case that many are now watching.

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issues claimed, the same relief is sought as the original parties, and the new party bears a material resemblance to the original parties. While Movant is not a resident he has used and enjoyed the lands at issue during the past roughly two years.

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

[41]Inasmuch as the Settlement was purported by the parties to have conclusively closed the case, Movant expected any Settled Judgement to be forsaken, and thus the appeal to have been on more tenuous ground by arguing some other paper was appealable (such as the so-ordered Settlement), if any was. As it was the Settled Judgement was signed before but not filed by the Court until after the Movant and the allied intervenor's attorney had been 'shut down' by the temporary restraining order preceding the instant preliminary injunction. See Footnote 17, *supra.*

Argument

The Motions At Issue Were All Reasonable And Proper

68. In opposition to the preliminary injunction, Movant argued before the trial Court that not only was there no impropriety or frivolity in the two iterations of the same motion to intervene Movant submitted to that Court on January 7th and 14th[42], but in fact each[43] of the several motions filed by Movant and the neighbor-intervenor before that Court and this Court were entirely proper and not in any way frivolous, taken separately and together.

69. The trial Court chose to evaluate for the purposes of the preliminary injunction sought against Movant each and every motion filed by both Movant and the allied proposed-intervenor, before both the trial Court and the Second Department (Exhibit 2, pp. 4-5). Movant will thus address and defend them all, although it appears unfair, unwarranted, and in excess of the trail Court's authority. With respect to the appellate motions not only was it not within the trial Court's jurisdiction to judge motions not found improper by other courts, but Plaintiff Beechwood POB LLC did not even submit the appellate motions for the trial Court to judge[44].

70. Movant detailed for the trial Court the legal and factual content of every motion filed by both parties (Exhibit 4, in its entirety), and specifically defended (1) the legal basis for attempting to intervene 'even' after a judgement or settlement (Exhibit 4 ¶¶64 *ff.*), as clearly allowed by the law, as well as (2) the urgent need for an appeal (Exhibit 4 ¶¶98 *ff.*), and (3)

[42]The second motion was essentially identical except for the addition of a pleading as required by CPLR 1014 in a motion to intervene which was omitted from the initial motion.
[43]Movant argued to the trial Court and continues to believe that Court was in error for that Court to presume to pass judgement on the motions filed in this Court, which motions were not even presented as exhibits by the complaining parties.
[44]Movant supplied the motions -- in full or in part -- for the trial Court to see there was nothing improper in them.

the legitimate legal standing of both Movant and the neighbor-intervenor to intervene (Exhibit 4 ¶¶82 *ff.*) .

71. Each motion thus catalogued was a coherent, legally-defensible, diligent and responsible filing; and it was directed solely toward the goal of obtaining appellate review of a Decision and Judgment of significant public impact in a major local environmental issue.

72. There was no intent to delay or harass, because absent an injunction there was no rational point in doing so where the goal is to protect the lands, wildlife, and community character at issue, and Movant has neither time nor money to waste, involved as he is in multiple environmental battles[45].

73. This Court may satisfy itself of the propriety and proper purpose of each such motion, inasmuch as each one is appended to this affidavit as an exhibit. Each resulting order to show cause or decision for each such motion is also appended. This Court can also review Movant's affidavit in opposition to the preliminary injunction (Exhibit 4), which contains a direct defense of each said motion.

74. There Was No 'Recalcitrance' Because No Motion Was Actually 'Decided' Except The Last One Filed By The Allied Intervenor, And That Decision Did Not Foreclose Further Consideration As It Related Only To Appealability Of A Non-settled 'Decision'

75. With the exception of the final motion by the neighbor-intervenor to this Court -- which was almost wordlessly 'decided' inasmuch as the underlying paper had been adjudged unripe for appeal[46] -- no binding decisions were taken on any of the motions.

[45]Movant is involved in two continuing appeals before this Court (one being not strictly environmental but arising from and affecting indirectly the environmental work) as well as new and continuing issues that have not been litigated but demand significant attention in an around his home area of Nassau County, as well as another environmental issue in the Rochester, N.Y. area currently being litigated.

[46]Exhibit **29**; Exhibit **21**. Movant and the neighbor-intervenor were unaware of the Feb. 5th decision prior to the filing of the final motion on February 19th, the decision not having been served or notice otherwise provided, and the motion having been raised *sua sponte.*

76. Although the trial Court appended abbreviated handwritten notations to the three orders to show cause from the Movant and the neighbor-intervenor offering some 'guidance' the notes could not be considered binding decisions by law.

77. Thus, Movant showed none of the 'recalcitrance'[47] in challenging settled law that might warrant sanction or a finding of frivolous practice (Exhibit 4 p. 21 ¶94, pp. 23 *ff.*¶¶ 105 *ff.*).

78. Absent any findings as to (1) a 'lack of defensible legal basis' for the motions; (2) their 'ill-motive', or (3) their 'defiance of settled opinion'[48], no basis should have been found for the trial Court to enjoin additional motion practice or supporting actions as needed to pursue the intervention and appeal, and the preliminary injunction should be vacated.

79. The mere number of motions between two parties in an urgent and hectic set of circumstances, though understandably peculiar or inconvenient, does not warrant the necessary finding of vexatious conduct either.

80. But more importantly, as discussed *supra* had the trial Court but granted any of the three justified motions to intervene, all promptly placed before it, there would not have been a need for any additional motions in the first place. In other words the arguably 'burdensome' course of litigation at which the Court 'took umbrage' was actually of that Court's own making. Nevertheless, under the circumstances, the several (six) motions as filed were proper, and not frivolous or sanction-worthy[49].

81. In fact, the entire set of circumstances was 'unnecessarily' created by the trial Court's highly questionable adjudication of the underlying matter, which Movant sought to rectify through the appeal, which was then derailed by the repeated denial of intervention by either

[47]The rules for frivolous behavior prohibit actions that challenge settled law, 22 NYCRR 130-1.1(c)..
[48]Rules of the Chief Administrator of the Courts Judge for frivolous conduct, 22 NYCRR 130-1.1.
[49]As noted elsewhere the neighbor-intervenor filed an additional appellate motion by order to show cause but it was withdrawn when the counsel was barred from consulting with Movant during the conference with the Deputy Clerk.

Movant or the neighbor-intervenor, and the failure to disclose to either of them that the judgement had been settled -- though they were interested parties known to the Court.

The Delays and Number of Appearances Was 'Inconvenient' But Not Unlawfully 'Vexatious'

82. That answering the motions in person five times[50] was time-consuming for Plaintiff, and that the movants were often unable to appear promptly at the time they had announced twenty-four hours earlier in 'notice' provided under the rules of Uniform Court Rules Section 202.7, was regrettable, but was to be expected or excusable in the circumstances especially given the *ad hoc* and thinly-resourced efforts of citizens and a single *per diem* attorney to fight this complicated issue under a deadline -- the notice of appeal deadline -- they were unsure of.

83. Had opposing counsel informed Movant and the allied counsel the actual thirty-day period commenced upon service of the Decision and Order, the process might have been far more orderly and less hectic, as that mysterious perceived deadline was the impetus for the rushed activity[51].

84. But the arguable 'frenzy' was not the result of malice or design; rather it was the natural consequence of the circumstances, to wit: (1) a perceived imminent statutory deadline; (2) a Court refusing to provide justified relief; and (3) an underlying matter threatening irreparable environmental harm. Thus as a matter of reason and law, the conduct could not

[50]There were six orders to show cause filed -- including the one withdrawn by the allied counsel -- but on one occasion both Movant and the neighbor-intervenor appeared simultaneously, and indeed they had planned on an earlier occasion to do so as well, in the interest of judicial economy.

[51]As it was, Movant and the allied counsel later concluded that there was authority for re-commencing the deadline period for a notice of appeal at the time parties are granted intervenor status (see Matter of Romeo v. NYS Dept. of Educ., 39 AD 3d 916 (Third Dep't, 2007), at 918, *infra*). And indeed the deadline probably should not have started either until the settled judgement was served. But Movant and the allied counsel could not know that a settled judgement would even be filed inasmuch as the Settlement was considered dispositive of the matter.

be reasonably construed as vexatious to the level of requiring sanction or prohibition -- except where the Court would take an overly harsh and partisan posture to frustrate appellate review.

85. Furthermore at the present time with the appealable paper being available, the deadline being properly understood, and this Court with authority to grant intervention without the evident conflict of the original court, a lifting of the preliminary injunction should result in only a justified and manageable effort to intervene and appeal.

Movant Had Reasonable Basis To Persist And Assist The Allied 'Intervenor'

86. To reiterate, the Decision and Order was profoundly flawed in that it denied legal 'standing' to the five Petitioners for a reason utterly without foundation in law[52]. Furthermore, the trial Court had before it an overwhelming basis in documentary evidence[53] submitted by the Petitioners to, at minimum, hold an Article 78 "hearing of fact" into the issue of 'segmentation'[54] , as requested by the Petitioners, but it failed to do so and in fact rejected the evidence without a trial[55]. The Petitioners' other arguments had similarly compelling bases.

87. The Settlement provided very limited relief[56] and largely resulted from the *pro se*

[52]The Court found the Petitioners had not brought the arguments themselves before the Town Board (Exhibit **5**, pp. 11-12), a basis soundly rejected by this Court in Matter of Shepherd v. Maddaloni, 103 A.D.3d 901 (Second Dep't, 2013), at 905, a case that had been presented to the trial Court -- among other cases -- to refute arguments raised by the Respondents regarding 'standing'.

[53]Among other evidence, the Court was given an 'approved Site Plan' (Exhibit **6**) that showed athletic fields sketched in where woods currently existed -- woods which were counted as mitigating elements of the Project as preserved woods in the SEQRA Review -- to illustrate that the 'plans' of the Respondent Town to undertake additional un-reviewed construction were anything but speculative, and hence constituted fatal flaws of both 'segmentation' and a failure to take a 'hard look' at the fate of habitat in the SEQRA Review.

[54]CPLR 7804(h), trial of fact in Article 78 special proceeding.

[55]Exhibit 5, Decision and Order, pp. 12-13.

[56]The Petitioners submitted with the Petition affidavits which in heart-felt detail described the extensive environmental harms they would suffer, of which the loss of woods in front of their houses -- the subject of the Settlement -- was only a small element, e.g. Affidavits Petitioners Glenn Denton and Fay Scally, Exhibit **36**, Exhibit

Petitioners' fatigue and disaffection from the judicial process; i.e. it was a consequence of attrition, not reason or justice[57]. They had rejected its thin terms emphatically already (Exhibit 2, pp. 3-4).

88. The Petitioners were also manipulated by the Respondents' counsel to distrust Movant and his 'leaning-in' litigating posture. For example, the Respondents told the Petitioners they would not discuss a settlement -- as directed by the judge -- unless Movant were barred from any meeting -- and he was. Under such circumstances the inexperienced Petitioners were easily manipulated by the opposing counsel through their forensic skills and polished, quasi-official or official posture in the matter[58].

89. The intervenors separately and together had clear legal rights to intervene for the purpose of obtaining appellate review of the flawed Decision and Order (or the 'settled judgement', as it were), yet were denied that right by the same trial Court, for improper substantive and procedural reasons, and by this Court, evidently for procedural reasons that were not clear to them earlier but now appear to be fully capable of being resolved[59].

90. Movant will here again address a number of the key issues raised in the arguments for and against the preliminary injunction: (1) The interests and rights of the proposed intervenors justified intervention under CPLR Rules 1012, 1013, and/or 7802(d); (2) The law permits the intervention of a party such as Movant and the neighbor-intervenor, at the

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37.

[57]The Petitioners had rejected the settlement offer once prior to the Decision and Order, and an email from one couple to Movant attested to a significant motive for finally 'throwing in the towel' prior to an appeal -- i.e. agreeing to the settlement being secretly negotiated, upon information and belief at the same moment -- which was disillusionment and exhaustion with the 'process' several Petitioners had expressed previously(Exhibit 40).

[58]Though the Petitioners did not in fact accept the settlement offer the first time, they did the second time, and the ultimatum to freeze out their colleague and organizer -- Movant -- undermined the cohesion and resolve of the legal effort.

[59]I.e. the issue papers appealable of right versus those not appealable of right (the denial of motions in an Article 78 special proceeding) or at all (the then non-settled Decision and Order).

point in the special proceeding at which they applied for such status -- i.e. before or after the Settlement; also (3) Both parties made reasonable assertions of standing and timeliness under the 'relation-back rule', CPLR CPLR 203 (f)); and furthermore, (4) The number of separate motions filed by Movant (four) and the neighbor-intervenor (three) was neither unreasonable nor improper, nor were they deserving of sanction or injunctive penalty; Also, (5) There is no basis for Beechwood POB's assertion that Movant possessed an improper motive in filing or assisting in the filing of said motions.

91. Finally , (6) Movant will show that an appeal is overwhelmingly warranted by the issues raised in the underlying matter, and how a further motion to intervene might be constructed. Movant does not himself intend to make such a motion at this time, but rather to support one likely by the neighbor-intervenor.

92. As noted, the motions themselves address these issues as well (Exhibit **8**, Exhibit **9**, Exhibit **7**, Exhibit **13**), and Movant's affidavit in opposition to the preliminary injunction also addressed the issues (Exhibit 4). But they will be addressed again in summary fashion for completeness.

93. Movant will also show that technical defects render the preliminary injunction unsupportable as a matter of law.

Intervention Was Permitted At The Time Movant And The Neighbor-Intervenor Sought It; Both Parties Enjoyed Standing And Could Invoke The 'Relation-Back Rule'

94. With respect to standing, Movant in the original motions to intervene affirmed over one year's 'use and enjoyment' of the forested and extensively-wooded lands at issue in the underlying Article 78 special proceeding to both the trial Court (e.g. Exhibit **8** ¶¶7 *ff.*) and to

this Court (e.g. Exhibit **7** ¶¶9 *ff.*)

95. The neighbor-intervenor similarly affirmed regularly using the lands, as well as residing for a period of over thirty years, at a distance of well under five-hundred feet from them, and described her valuing a view across her street of the lands in their present state (Exhibit **15** ¶¶11 *ff.*).

96. The neighbor-intervenor further presented clear authority to refute the erroneous assertion that all the Petitioners and proposed-petitioners, with the exception of Movant, lacked 'standing' to sue because they had not themselves submitted to the Oyster Bay Town Board the arguments raised in the Article 78 petition (Exhibit **15** ¶¶22-26)[60]. Among the cases the neighbor-intervenor cited in support was this Court's important holding Matter of Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905[61].

97. Movant and the neighbor-intervenor both further asserted that under the 'relation-back rule' (CPLR 203(f)), their use and enjoyment and/or view of the lands was similar enough to that of the original Petitioners that the respondent parties would not have been prejudiced in their defense of the lawsuit's claims by granting them petitioner-status *nunc pro tunc*

[60]The wholly unsupported argument that the neighbor-intervenor as well as all the original Petitioners lacked standing because they 'had not raised the SEQRA-related arguments themselves' before the Town Board was repeated in the Respondents' pleadings, in the Decision and Order of December 15, 2015, (Exhibit 5 pp. 11-12), as well as in Plaintiff Beechwood POB's affidavit in support of the preliminary injunction (Exhibit 3 ¶26(c)), and in the order granting the preliminary injunction (Exhibit 2, p. 4). As stated in the final motion to the Second Department, Exhibit **19** ¶140 *ff.*, the Second Department itself rejected that basis for the denial of standing in Matter of Shepherd v. Maddaloni *id.* . Notably, the unsupported holding on standing -- though central to the Decision and Order, was omitted from the settled judgement (Exhibit **20**).

[61]"Contrary to the contention of the Village respondents and the Maddalonis, the Shepherds are not precluded from challenging the site plan approval on the ground that they did not actively participate in the administrative proceeding. The objections to the Planning Board's determination that they raise in this matter were specifically advanced by an attorney representing the three other petitioners/plaintiffs during the administrative proceeding...."Matter of Shepherd v. Maddaloni, *id.* at 905 (where residents across the bay from a construction Project were held to enjoy standing to challenge a government action affecting the construction when another party testified before a board as to the issues they themselves first raised before the Court).

(Exhibit **13** ¶83, Exhibit **19**, ¶166 *ff.*)[62].

98. Both parties qualified for 'relation-back' treatment as the rule is currently applied, requiring only that the claims are similar enough to have (1) afforded notice and (2) present no prejudice[63].

99. As a direct neighbor of long duration to the lands at issue, the neighbor-intervenor was more similar than Movant in several respects to the original Petitioners, and cited the decision of the Second Department sustaining the relation-back rule in a very similar circumstances:

> "'Adding additional petitioners would not have resulted in surprise or prejudice to the respondents, who had prior knowledge of the claims and an opportunity to prepare a proper defense. Moreover, the cross motion, among other things, for leave to amend the petition was not barred by the applicable statute of limitations. The amendment relates back to the original petition, since the substance of the claims are virtually identical, the relief sought is essentially the same, and the new petitioners, like the original petitioners, are residents of the respondent Town of Shelter Island (see CPLR 203 [f]; Fulgum v Town of Cortlandt Manor, 19 AD3d at 444; Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 458 [1988]; see also Bellini v Gersalle Realty Corp., 120 AD2d 345, 347 [1986]).'
>
> Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909 (emphasis added) (where in a matter involving permission to add tenants to a facility, the Court found that the matter was properly dismissed because neither the original petitioners nor the proposed new petitioners had standing, although the Court agreed that the new petitioners could otherwise have been added, were they found to have standing)"

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[62]It appears Movant did not assert the relation-back rule *per se* in the filings before the trial Court, but the issue would certainly have been addressed had the motion been 'accepted' (i.e., signed) and opposition interposed.

[63]Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909, *infra*, and Giambrone v. Kings Harbor Multicare, 104 A.D.3d 546 (First Dep't, 2013) at 548:

> "...[I]n our view, the salient inquiry is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences...[sic] to be proved pursuant to the amended pleading' (CPLR 203 [f])."
> (where a spouse was permitted to be added to a malpractice action via the operation of the relation-back rule based on the identity of transactions at issue and the defendant's general knowledge of the spouse's existence, which would have given notice of the claims to be made)

(Exhibit 31, pp. 11-12, Movant's Appellate Memorandum of Law; Exhibit 15, ¶49, Affirmation in Support of Motion to Intervene (Grant); Exhibit 19, ¶168, Appellate Affirmation in Support of Motion to Intervene (Grant)).

100. Given the movants' standing to sue, and their proper assertion of (or ability to assert) the 'relation-back rule' to comply with the statute of limitations for having 'filed' the Article 78 petition, *nunc pro tunc*, the propriety of the motions to intervene may then be measured simply by the requirements of CPLR 1012, 1013 and 7802(d) which govern intervention in general and with respect to Article 78 special proceedings, respectively.

101. As argued in the various motions filed, the Courts have held that intervention may be granted after a settlement, as occurred in this case[64]:

102. The neighbor-intervenor in Exhibit 19 cited the Court of Appeals holding that an interested party could intervene in an Article 78 special proceeding even after a settlement to which it was not a signatory:

> "'Petitioners and respondents in the instant case commenced settlement negotiations in December 1995, ultimately agreeing to the same settlement terms as the NYSHFA case....Upon discovering that they would not be included in the settlement, proposed intervenors moved on December 15, 1995 to intervene in the case.
> ....
> Pursuant to CPLR 7802 (d), a court may allow other interested persons to intervene in a special proceeding. This provision grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013....Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal.'
>
> Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20 (emphasis added, internal quotations and citations omitted)

[64]The Settlement was only disclosed to Movant and the neighbor-intervenor at the appellate conference on January 15th and thus was not included in filings before then. In fact the arguments raised as to the (incorrectly) alleged finality of the Settlement was the impetus for Movant's second appellate filing and the neighbor-intervenor's follow-on filings, since the Deputy Clerk appeared swayed, and the unsigned appellate orders to show cause offered no guidance, and the movants were unaware of this Court's *sua sponte* actions with respect to the notices of appeal.

(where a group of health care facilities were denied the right to intervene due to a statute of limitations finding, and were held ineligible to assert the 'relation-back' rule, notwithstanding that they could otherwise have intervened even after a settlement)"

(Exhibit 19 ¶¶98-103, *et seq.*)

103. Movant also cited Matter of Greater N.Y. Health Care Facilities Assn., *id.*, and subsequent Third Department cases citing it for authority, as did the neighbor-intervenor:

"'The executed stipulation of settlement resolving the underlying CPLR Article 78 proceeding as entered and 'so ordered' by Supreme Court in June 1999. Although defendant could have attempted to intervene at that time for purpose of pursuing an appeal (see Matter of Greater New York Health Care Facilities Assn v. DeBuono, *supra* at 7820) he failed to do so....'

Town of Crown Pt. v Cummings, 300 AD2d 873 (Third Dep't, 2002) at 874 (emphasis added) (where the Court affirmed the lower court ruling denying a party the right untimely to retroactively challenge a settlement that affected his real property located along a Town road)"

104. (Exhibit 31, Movant's Memorandum of Law, *id.*, pp. 5-6).

105. Much may be made in error of this Court's ruling in Breslin Realty Corp. v Shaw 91 A.D.3d 804 (Second Dep't, 2012) in which this Court held that in the "circumstances" of that case (*id.* at 804) a party could not intervene after a settlement[65]. Properly understood, however, that decision should not invalidate any of the motions to intervene in this case, though it was explicitly relied on by Plaintiff (Exhibit 3, Affidavit in Support, ¶26(e)) and implicitly by the trial Court (Exhibit 2, Decision and Order on preliminary injunction, pp. 4-5)

106. The holding in Breslin -- one turning on the discretionary term "timely" in CPLR Sections 1012 and 1013 -- was clearly distinguishable from the present case for three principal reasons:

[65]The case was referenced by plaintiff Beechwood POB in its affidavit in support of the preliminary injunction, p. 10 ¶26.

(1) Both Movant and the neighbor-intervenor filed orders to show cause in advance of the Settlement being signed by all parties on January 14th, let alone its being so-ordered by the Court on January 15th (Exhibit **13** pp. 2-3 ¶7, p. 5 ¶22[66], p. 7 ¶34, etc.; Exhibit **19** Feb 19th motion, p. 8 ¶42, p. 15 ¶81, p. 16, ¶87, etc.)[67];

(2) The cases upon which Breslin is based make clear that the "circumstances" (*id.*, at 804) of the timing of an attempt to intervene with respect to a settlement are matters to be weighed by the court in finding whether the motions are "timely" under CPLR 1012 and 1013 (Exhibit **19** pp. 18 ¶¶97 *ff.*). The circumstances of the proposed interventions by Movant and the neighbor-intervenor clearly met the standards thus established (Exhibit **19** p. 23 ¶¶115 *ff.*); and

(3) Breslin dealt with an "action", not a special proceeding, and the Court of Appeals has specifically noted that the rules for intervention in a special proceeding are more "liberal", stating:

> "...[T]he standard for permissive intervention under CPLR 7802 (d) is more liberal than that provided in CPLR 1013," Greater New York Health Care Facilities Association, *id.* at 720, (in a discussion of the use of the 'relation-back' provision in such a situation)[68].

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[66]Note: The date the Settlement was finalized -- with signatures of all parties -- was January 14th, not January 13th, as incorrectly rendered in the affidavit as cited (Exhibit **19** p. 6).

[67]It may be argued that inasmuch as the Court declined to sign the orders to show cause, they cannot be 'counted' as having been filed in advance of the Settlement. But unlike a statutory statute of limitations, the requirement of 'timeliness' under CPLR 1012 and 1013, as applied by Breslin, *id.*, among other cases, is a matter in the discretion of the court, and the good-faith effort of the parties to file promptly is the key issue to be determined. Thus it was the good-faith prompt submission of the motions to intervene prior to the Settlement that should be credited, not the fact the orders to show cause were not signed. It is notable that the timing was fortuitous in any event, as the entire Settlement process was deliberately kept secret from the intervenors by the Petitioners, the Respondents, and indeed by the trial Court..

[68]The Court held that the 'relation-back' rule must first be judged applicable, as it is clearly met in the present case, before a party may be joined as an intervenor regardless of how compelling an interest they can demonstrate, *id.* at 720.

107. The collusive actions of the trial Court and Plaintiff to conclude a settlement without any intervenors or appeal should also bear on the issue of how "timely" the application were under the Breslin standard.

108. At the time Movant and the neighbor-intervenor originally argued against the applicability of Breslin they did not know the extent of the trial Court's involvement in the aggressive effort to push through the Settlement before the intervenors could succeed. In fact the circumstances were such that after having agreed to terms on December 7, 2015 (Exhibit 2, p. 4), the Settlement was ready to be signed by all three Respondents and the Petitioners on January 13 (*id.*) -- four (4) business days after Movant's application to intervene was filed. And once all parties signed, it was so-ordered the very next morning and immediately entered in the County Clerk's Office (Exhibit 32 -- final page[69]) -- albeit two days after the neighbor-intervenor filed her order to show cause which the trial Court, inexplicably at the time, refused to sign[70].

109. Movant and the neighbor-intervenor moved briskly and in a timely fashion[71], even according to the holding in Breslin. But the trial Court improperly handicapped their attempt -- even in ignorance of the secret settlement talks -- to comply. Good faith was unquestionably present, at least among the intervenors, thus conforming with a key element in the authority underlying Breslin.

110. Both movants in this matter noted that the cases cited in Breslin for authority to narrow the construction of 'timeliness' to intervene, as it did, demonstrated a type of

[69]Nassau County Clerk recording page: "Recorded Date/Time: January 15, 2016 10:27:05 AM".
[70]As noted, the trial Court wrote in a short signed comment: "Jan 13/Refuse to sign/matter with regard to/ this petitioner is/ not properly brought/ by order to show cause/ GRP JSC", Exhibit 16, p.2.
[71]As noted the applicants feared the time limit to file a notice of appeal was ebbing, unaware at the time of authority for extending the notice of appeal deadline for new intervenors. See Footnote 20, *supra.*

negligence or 'free-rider' effect which Court evidently disapproved:

> "The common theme in Breslin Realty and the three cases it cites is that the motion to intervene becomes untimely where the circumstances establish a 'recklessness' or even 'free-loading' that colors as unreasonable whatever actual time-period has elapsed, measured from different points of any given case."
>
> (Exhibit 19, Affirmation in Support of Motion to Intervene (Appellate) (Grant) ¶104)

111. For example, in one case cited the 'settlement negotiations' were ongoing and known to the proposed intervenors, who nonetheless waited. But in the present case, the post-decision settlement negotiations were done quickly and in utter secrecy:

112. "In the case cited in Breslin Realty most closely paralleling this action, the proposed intervenors were apparently aware[72] of potentially-adverse settlement negotiations for over one (1) year before they intervened, and a 'proposed stipulation of settlement' was reached in advance of their motion. This Court therefore held such a delay untimely:

> "'After extensive negotiations, the parties entered into a proposed stipulation of settlement in April 1987.....
> The proposed intervenors brought a motion pursuant to CPLR 1012 and 1013. These two provisions require that a 'timely motion' be made. Despite the fact that the proposed intervenors became aware of the events which were transpiring in connection with this action by mid-1986, they did not attempt to intervene in the action until more than a year later. This cannot be considered timely.'
>
> Rectory Realty Assocs., *id.*, at 737-8 (emphasis added)(where neighbors who were evidently aware of settlement negotiations between a developer and a municipality over an action related to rezoning ordinance were held untimely in their motion to intervene that was made just before a stipulation of settlement was to be filed with the court).[73]"
>
> (Exhibit 19 ¶108)

113. The holding in Breslin applied to an action, governed by CPLR 1012 and 1013, whereas intervention in the underlying matter was subject to the more liberal rules of

[72]The term used in the case is "the events which were transpiring," see case quoted *infra*.
[73]Rectory Realty Assoc. v Town of Southampton, 151 AD2d 737, 738 (Second Dep't, 1989).

intervention governing Article 78 special proceedings per CPLR 7802(d). The Court of Appeals held that intervention in a special proceeding is to be permitted more freely:

> "Pursuant to CPLR 7802 (d), a court 'may allow other interested persons' to intervene in a special proceeding. This provision grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action, which requires a showing that the proposed intervenor's 'claim or defense and the main action have a common question of law or fact.'"
>
> Matter of Greater N.Y. Health Care Facilities Assn., *id.*at 720 (emphasis added)

114. Breslin clarified and narrowed the conditions for intervention. The decision applied to an action, not a special proceeding however. But beyond that, whether it is applicable or not, it can readily be distinguished from the present matter, because here the attempted intervention occurred promptly -- actually, with high urgency -- before the settlement was either concluded or ordered, and well before the Decision and Order was itself settled.

115. Thus Movant and the neighbor-intervenor met all the requirements of standing and timeliness to qualify for intervention, and their several attempts to vindicate their rights should not have been held improper and sanctionable by the trial Court.

The Arguments Of The Plaintiff Against The Right Of Movant And The Neighbor To Intervene Are Invalid

116. Plaintiff argued in its Affidavit in Support of the preliminary injunction that Movant and the neighbor-intervenor each knew they were ineligible and in any event discovered so when rebuffed by the Courts and thus engaged in frivolous practice by persisting (Exhibit 3, ¶26).

117. In fact aside from this paragraph the bulk of Plaintiff's affidavit merely repeats the mantra that the courts denied the notices of appeal and the motions were left unsigned, with

the exception of the final one, which was dismissed with no discussion, but obviously was dismissed because the underlying paper was at the time not appealable (Exhibit 21).

118. First the Plaintiff alleges Movant deliberately failed to join the original Article 78 special proceeding before the case was decided, though he was intimately involved in it an therefore could have done so (Exhibit 3, ¶26). In a related point, the Plaintiff adds that Movant "acknowledged" in an appellate conference that he did not have standing to sue at the time the original Petition was filed (*id.*)

119. In answer, Movant would argue that regardless of what he did and what standing he "acknowledged", his motion to intervene was timely because it preceded the settlement by even the strictest rules read into Breslin[74], *id.* As to the timing of Movant's standing, Movant did not realize that his visits to the lands at issue began well over a year prior to the filing of the Petition until he more carefully reviewed his records, locating photos of the lands from April, 2014. But furthermore it is not evident the law would prohibit intervention by a participant whose standing 'vested' after the filing of a Petition, so long as the intervention was based on valid standing and the intervention were "timely" in some fashion consistent with the rules of the CPLR and case law.

120. Plaintiff also rehashes the tired and entirely false argument -- used so baldly against the Petitioners[75] -- that neighbor-intervenor Pamela A. Sylvester. a three-decade resident and user of the lands, lacks 'standing' because she did not personally deliver to the Town Board the legal arguments against the SEQRA Review which she asserts in her pleading (Exhibit 3,

[74]As noted, this Court in Breslin applies to actions, not special proceedings *per se*, as the underlying matter is, and correctly read it does not contradict the Court of Appeals' broader reading of timeliness (e.g. Greater New York Health Care Facilities, *id.*, nor that of the other appellate courts, *supra*, but only tailors them to the unique circumstances of that case itself.
[75]Exhibit 5, pp. 11-12.

¶26(c)). But this argument was demolished as far back as the Petitioners' Reply, and has been repeatedly refuted in almost every pleading filed by the putative intervenors, e.g. Exhibit 15, Grant Affirmation in Support of motion to intervene, ¶¶21-25.

121. The issue is also discussed *supra*: this Court in Matter of Shepherd, *id.* put to rest the canard that each and every movant needed to assert his or her claims before the abstruse administrative tribunals before being able to launch or join an Article 78 special proceeding. Clearly, the issue of standing is in this State meant to allow aggrieved and injured parties to find a judicial forum, not to subject them to random litmus tests to shut the courthouse door, as re-affirmed by the the Court of Appeals in Matter of Sierra Club v. Village of Painted Post, 26 NY 3d 301 (2015):

> "...[S]tanding rules should not be heavy-handed, and...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."
>
> *id.*, at 311, (internal quotations and citations omitted) (the fact that the petitioner was not 'unique' in suffering the environmental impact at issue, and that many others similarly situated -- living along a rail corridor -- would also be affected, did not mean that the petitioner was indistinguishable from the 'general public' as mandated by rules of environmental standing in this state)

122. Further, as this case demonstrates, the full measure of "judicial review" (*id.*) cannot be obtained until appellate review has also been afforded.

123. Finally as to the requirement for intervening parties to be 'closely related' to the original parties in order to invoke the 'relation-back' rule (CPLR 203(f)), as argued by Plaintiff (Exhibit 3, ¶26(d)), both Movant and the allied intervenor have cited this Court's holding in Matter of Shelter Island Association *id.* where the fact that the adverse party was put 'on notice' of the issues raised and no prejudice thus occurred has been a rule now widely

followed to widen the applicability of the 'relation-back' rule and to align it more closely with the language of the statute[76].

124. Thus the Plaintiff's arguments for the supposedly axiomatic lack of legal basis for the intervenors' applications do not withstand scrutiny, and fail to impeach the motives and merits of the applications of Movant and the allied intervenor. Those motions to intervene have, as shown, failed for reasons other than their intrinsic merit, and thus the parties deserve the chance to revive them before it is 'too late', by removing the unjust strictures of this preliminary injunction.

The Interests of Movant And The Neighbor-Intervenor Were Not Being Adequately Protected By The Petitioners Thus Demanding Intervention

125. The interests of Movant and the neighbor-intervenor in using and enjoying the natural lands at issue was clearly not adequately protected when the the five Petitioners agreed to give up not only their rights to appeal, but further accepted a muzzle on their rights in virtually any other way to oppose the Project, or any characteristics of it (Exhibit 32, p. 3 ¶4)[77].

126. The Court of Appeals held that intervention is specifically designed to remedy such a situation, in a case cited by both movants in this matter:

> "'...[I]t was not until [plaintiff's] decision not to appeal...that the inadequacy of [plaintiff's] representation of [proposed intervenor] became apparent [therefore] [proposed intervenor] cannot be faulted for not theretofore having sought intervention .....'

[76]CPLR Section 203(f): "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

[77]The Settlement provides that the Petitioners may not "directly or indirectly object to, or oppose" a complete class of official acts that might in the future affect the Project, nor can they "assist, or finance, in whole or in part" any future litigation over such official acts (Exhibit **32**, p. 3 ¶4). By its expansive preliminary injunction, yet for no consideration at all, Beechwood POB endeavors to similarly constrain Movant.

Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29 (emphasis added)(where the Court permitted one shareholder to intervene in a shareholder derivative action brought by a second shareholder when the second shareholder failed to appeal the dismissal of the case, which occurred before the proposed intervenor's motion to intervene)"

(Exhibit 4, Movant's Affidavit in Opposition to the preliminary injunction, p. 15, ¶72; Exhibit 19, Grant Affirmation in Support of Motion to Intervene, p. 20 ¶102)

127. Furthermore it is axiomatic that in an Article 78 special proceeding the public is an unnamed party insofar as the lawful conduct of government entities -- acting in the name of the public interest -- is at issue. In the present case, the Petitioners recruited the local public who opposed the Project for financial and moral support, and they held a public meeting, circulated fliers, sent email updates, and spoke to the press.

128. Defendant Grant's affirmation of February 19th to this Court described how the First Department had ruled that an Article 78 special proceeding can function as a class-action in a case where non-parties sought to intervene late:

"'Moreover, this is a proceeding involving a challenge to administrative action, in which context class action status is deemed unnecessary —whether relief is sought by way of CPLR article 78 (Matter of Jones v Berman, 37 NY2d 42, 57) or a plenary action (Rivers v Katz, 67 NY2d 485, 499)—on the reasoning that stare decisis operates to the benefit of any person or entity similarly situated (Matter of Rivera v Trimarco, 36 NY2d 747, 749)."

Ferguson v. Barrios-Paoli, 279 AD 2d 396 (First Dep't, 2001) at 398 (where a group of intervenors were permitted to assert the relation-back rule inasmuch as the special proceeding brought to assert civil service seniority rights of only one named petitioner served as a de facto class action for relation-back purposes by its general applicability to others in the 'class', as well as other factors, and based on a ruling of the Court of Appeals that class action was not appropriate in Article 78 proceedings)"

(Exhibit 19, Footnote 2)

129. When it became clear to Movant and the neighbor-intervenor that the Petitioners would not appeal a clearly deficient Decision and Order, they acted to intervene to assure an appeal was filed.

130. Their efforts were thus consonant with the terms of CPLR Sections 1012 and 1013 (see e.g. Exhibit 19, Affirmation in Support of Motion to Intervene (Grant), ¶65 *ff.;* and Exhibit 13, Affidavit in Support of motion to reargue (Brummel), ¶26, ¶70, ¶¶76-76)

The Multiple Motions Were Not Unreasonable Or Frivolous

131. Each motion filed by movant and the neighbor-intervenor was coherent, and reasonably based on the law; each had a rational and legitimate purpose; and none were 'recalcitrant' with respect to any *res judicata* holding of the trial Court or this Court.

132. The number is motions itself was very modest in the scheme of things, and the trial Court can be said to have grossly over-reacted.

133. In reviewing some of the extensive legal history of frivolous action, it becomes clear that both the high quality and the modest quantity of legal filings at issue here is in no reasonable way comparable with the 'quality' and quantity of filings involved in cases adjudged frivolous, harassing, etc. by appellate courts.

134. When the constitutional issue of issue of pre-filing restrictions for alleged vexatious or frivolous conduct was extensively analyzed recently by the U.S. Court of Appeals for the Ninth Circuit in Ringgold-Lockhart v. County of Los Angeles, 761 F. 3d 1057 (U.S. Court of Appeals, 9th Circuit, (2014))[78], that court expressed profound skepticism at a lower court's

[78]"This appeal requires us to consider the limits of a federal court's authority to impose pre-filing restrictions against so-called v**ex**atious litigants. .. The district court dismissed the suit in a series of rulings, culminating in an order declaring Ringgold and co-plaintiff, Justin Ringgold-Lockhart, v**ex**atious litigants. ...We reverse." at 1060 (emphasis added) ...

action in regard to two actions -- and numerous motions -- filed before it. The appellate court vacated the sanctions that had been imposed, for a plethora of reasons that unmistakably rebuked the district court, despite the fact that state courts had already ruled the litigants vexatious[79].

135. As noted previously, had the trial Court in the present matter granted but one of the reasonable motions to intervene, the additional motions -- and the 'inconvenience' complained of by Plaintiff and its allied Respondent -- would have been unnecessary. Moreover the appellate decisions to date, and the refusals to sign the appellate orders to show cause, were all based on non-prejudicial technical issues -- as reflected in the dismissals of the notices of appeal -- that were unfortunately not shared with the movants at the time[80].

The Motions Were Just and Proper

136. As discussed, *supra*, in the 'perceived' urgency to comply with the thirty-day statute of limitations to appeal, Movant submitted one motion to intervene to the trial Court on January 7, 2016, about three weeks after the Decision and Order was issued, and one week later on January 14th submitted a motion to amend the prior motion by adding a proper pleading as required (CPLR Section 1014). Both motions were filed by order to show cause

"Here, the district court found the Ringgolds vexatious primarily on the basis of the current case and an earlier federal case. As an initial matter, two cases is far fewer than what other courts have found 'inordinate.' See, e.g., Molski, 500 F.3d at 1060 (roughly 400 similar cases); Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F. 2d 1515, 1523, 1526 (9th Cir. 1983) (thirty-five actions filed in 30 jurisdictions); In re Oliver, 682 F.2d 443, 444 (3d Cir.1982) (more than fifty frivolous cases); In re Green, 669 F.2d 779, 781 (D.C.Cir.1981) (per curiam) (between 600 and 700 complaints).
The district court also cites the Ringgolds' motions practice, taking issue with their 'numerous motions to vacate prior decisions or relief from judgment.' But examination of the court's list of 'baseless motions' reveals that this description is not entirely accurate...." Ringgold-Lockhardt, *id.*, at 1064-5 (emphasis added)

[79]Ringgold-Lockhardt, *id.* at 1064.

[80]As noted above, the Decision and Order was found to be non-appealable, and the motions to intervene filed with the trial Court were found to be not appealable as of right.

and were returned unsigned.

137. Movant thereafter on January 15th submitted a motion to this Court to appeal the constructive denials of the motions to intervene, and that motion being returned unsigned, Movant submitted a motion to reargue on January 25th.

138. Movant thus submitted two sets of two motions, which was hardly an abusive action.

139. The second motion to this Court was a response to the 'surprise' presented by the opposing counsel in their wholly unexpected announcement at the appellate conference[81] of the 'Settlement' which they claimed rendered moot the underlying Article 78 proceeding and precluded intervention.

140. Neither Movant nor the allied counsel was able to cite the relevant case-law to refute the issue newly raised of alleged 'mootness' caused by the Settlement.

141. The Deputy Clerk appeared markedly unswayed by Movant's improvised arguments to the contrary[82], and Movant and the allied counsel thus believed the issue provided the (erroneous) basis for this Court to refuse to sign the order to show cause, and thus should be re-argued with a complete brief.

142. However the subsequent determinations of this Court regarding the notices of appeal made it clear that the 'mootness' issue was not dispositive; instead, the motions were unsigned because the motions in the Article 78 -- as the motions to intervene were -- were not appealable as of right (CPLR Section 5701(b)(1)), and moreover the underlying paper -- the Decision and Order of December 15th -- was not appealable until it was settled[83].

143. By themselves the two sets of motions could scarcely have given the trial Court basis

[81]See Exhibit 3 ¶22.
[82]The attorney for the neighbor-intervenor, who was also at the January 15th appearance representing her own client, also argued against the 'mootness' claim advanced by the plaintiff and his co-Respondent.
[83]See: exhibits for decisions on notices of appeal: Exhibit **29**, Exhibit **33**, Exhibit **34**, Exhibit **35.**

to enjoin Movant. The Court lumped the allied counsel together with Movant (Exhibit 2 pp. 4 *ff.*) and took account of Movant's acknowledged assistance with the motions of the neighbor-intervenor. However, as should be clear from prior discussion, *supra*, those motions were also correct and proper.

144. The allied neighbor-intervenor submitted only one motion to intervene to the trial Court, by order to show cause, on January 13th, which was returned unsigned. The movant then submitted an appeal on January 15th, which this Court also declined to sign, evidently for the reasons discussed above, to wit, according to the orders of this Court dismissing the notices of appeal, *supra*, the motions denied by the trial Court in the special proceeding were not appealable as of right.

145. However, the allied neighbor-intervenor was like Movant 'ambushed' at the Deputy Clerk's conference on January 15th by the Respondents' announcement of a Settlement, and like Movant the attorney representing the neighbor-intervenor was left to believe the Court was incorrectly swayed by Respondents' claim the matter had thus become moot.

146. Consequently the neighbor-intervenor submitted another extensively argued motion on February 19th, by notice of motion, which was intended to address and resolve for once and for all the various issues that impeded the intervention and appeal[84].

147. Unfortunately, that motion was similarly undermined by this Court's orders of February 4th and 5th dismissing the various notices of appeal. But while the orders pre-dated the motion of February 19th, the orders were based on *sua sponte* motions of this Court, and

[84]A further motion was submitted but withdrawn by the neighbor-intervenor on February 2nd when the Deputy Clerk determined -- at the behest of the Respondents -- that Movant was forbidden to assist the attorney in any way with presenting the motion, and could not even communicate in any way with the attorney during the Deputy Clerk's conference. Inasmuch as the attorney and Movant had prepared together, the restriction was deemed too handicapping for the motion to be presented at that time, as was explained to the parties at that time.

had not been served on Movant and the neighbor-intervenor or otherwise communicated to them.

148. That motion was determined by this Court on March 24th (Exhibit **21**) in a very abbreviated Decision and Order which evidently relied on the Court's earlier holding, i.e. the trial Court Decision and Order was not appealable because it was not settled (Exhibit **29**)[85]. This Court's Decision and Order thus offered no finding as the merits of the motion to intervene.

149. At this point in time, with the Court's reasoning -- and 'guidance' -- abundantly clear, either Movant, or the allied neighbor-intervenor, or both can reasonably re-submit their motions to intervene and appeal, basing the appeal on the settled judgement (Exhibit **20**), and invoking this Court's inherent authority to grant intervention for the purpose of an appeal[86]. The only impediment to such a motion is the trial Court's injunctions, one of which this motion seeks to vacate[87].

150. The two sets of motions, by Movant and the allied neighbor-intervenor, were intended to be submitted in tandem once the second party became involved subsequent to Movant's initial motion of January 7th. Indeed on January 15th both parties simultaneously argued before this Court their appeals of the trial Court's denials of their motions to intervene. The divergence of the timing of the motions was neither deliberate nor intended to inconvenience the other parties; instead it was the result of logistical issues, and the varied availability of

[85]Inasmuch as the final motion at issue here sought intervention on the Court's own appellate authority it was not invalidated by the issues of prior motions appealing the interim orders in the special proceeding.
[86]This Court may grant intervention for appeal: see Auerbach v. Bennett, 47 N.Y.2d 619 (1979), at 628: "The Appellate Division was vested with all the power of Supreme Court to grant the motion for intervention...."
[87]The injunction of the allied plaintiff Town of Oyster Bay will be separately challenged as it contains different defects and content. Furthermore that injunction makes provision for the permission of the trial Court to submit further motions, an option which Movant may exercise alternatively.

counsel for the neighbor-intervenor.

151. The totality of motions and appearances must reasonably be viewed in context, in determining whether any fault lies or whether such extraordinary relief as this injunction is warranted.

152. Such a context would explain the perceived urgency of filing the appeal before any statute of limitations expired, as the intervening parties believed at the time they filed their initial motions[88]; the reasonableness of the various motions based on the facts and the law; why the intervening parties were unaware of this Court's reasoning with respect to the three appellate order to show cause motions which were returned unsigned[89].

153. The context would also show that within about a month of the Settlement's being so-ordered, and only about two weeks of the filing of the Settled Judgment (Exhibit **20)**[90] -- thus creating the appealable paper, the trial Court issued a temporary restraining order which has since been converted to the instant preliminary injunction. Thus were the intervenors prevented from filing any corrective motion from being filed.

154. Furthermore the inquiry into 'reasonableness' should address why the two different parties were in fact seeking to intervene. But there was no sanctionable conduct in this regard either.

155. Movant, being neither a resident nor a decades-long user of the lands at issue, was not as 'strong' an intervenor as the neighbor-intervenor, whose life situation made her almost

[88]It may be noted even the opposing parties believed the time element was urgent -- though they did not volunteer to the intervening movants the date when they had served the papers that would -- for the Petitioners -- commence the statute of limitations under CPLR Section 5513(a). In one colloquy the counsel for either Beechwood POB LLC or the Town of Oyster Bay stated that the statute of limitations would expire in the first days of February.

[89]As noted, the Court held that the Decision and Order was not appealable until settled, and the motions to intervene were not appealable as of right.

[90]Movant only discovered the Settled Judgement by inspecting the Clerk's file of the underlying Article 78 special proceeding case, which was not 'efiled'.

indistinguishable from the original Petitioners, down to the directly-corresponding location of her home with respect to the lands at issue.

156. Thus, while Movant legitimately filed his own motion to intervene early enough to assure compliance with the most disadvantageous possibility of the statute of limitations to file a notice of appeal (CPLR Section 5513(a)), the joining of the case by the neighbor-intervenor was a welcome addition.

157. There no intent to create a 'multiplicity' of separate intervenors, but only an effort to join the most advantageous parties at the earliest possible time. Nor was there any intent -- or reality -- to the notion that there was an unreasonable multiplicity of motions submitted by those two intervenors.

158. In fact, due to the narrow technical issues that prompted this Court to dismiss all the motions to intervene and appeal, the two intervenors have never had a determination of their motions on the merits and the law.

159. It is such an unsatisfying and unjust situation that this motion seeks to resolve, by permitting Movant -- at the time all the issues have been resolved -- to assist his allied neighbor-intervenor or others, and possibly to renew his own motion, to intervene in order that the underlying matter may be reviewed by this Court on the merits, as justice clearly demands.

Neither Movant Nor The Neighbor-Intervenor Have Harbored Any Untoward Motive Or Intent Their Legal Efforts To Intervene

160. Plaintiff has no viable evidence that Movant or the allied counsel have done anything with intent to delay the proceedings -- in fact, quite to contrary, given the recitation of the

hectic pace of filings and appeals to intervene so far.

161. As its only affirmative alleged evidence of the alleged ill-intent of Movant under the Rules of the Chief Administrator of the Courts on sanctions (22 NYCRR 130-1.1(c)) Plaintiff Beechwood POB LLC alleged in its Affidavit in support of the preliminary injunction that Movant used the word "game" in one social-media post describing the legal proceeding (Exhibit 3, ¶33), but the reading is a deliberate distortion of one phrase among thousands of words Movant wrote.

162. Plaintiff's allegation was also based on 'circumstantial evidence' of the allegedly-baseless sequence of motions at issue (Exhibit 3, ¶27), and Movant's allegedly ignoring settled decisions in filing the motions, and in assisting his allied intervenor in doing so (*id.*).

163. Movant described, *supra*, the completely valid reasons for each of the several motions[91], as well as the fact that the negative decisions or failures to sign the orders to show cause were not 'with prejudice' or final, and thus the attempts to revisit the issues did not indicate an improper recalcitrance by Movant or the allied intervenor.

164. With respect to the alleged "game", Movant as an environmental activist and organizer made frequent and elaborate posts to social media about this case in order to mobilize supporters and the news media, and to obtain financial support for the legal efforts. Indeed some roughly $2,000 in community contributions had helped finance the costs of the litigation.

165. Movant published thousands of words on Facebook a crowd-funding website, and his own environmental-advocacy website in the period up to and after the legal action was filed

[91]Movant filed two motions with the trial Court and two with this Court; the allied intervenor with Movant's help filed one motion with the trial Court and three with this Court, of which one was summarily withdrawn as described above, when the planned presentation was frustrated by the policy of the Deputy Clerk at his conference.

in June, 2015. All the postings were then and are now fully accessible to the public.

166. Of the thousands of words thus published describing the legal strategy, the facts, the legal process, etc., Plaintiff Beechwood POB found but a single phrase -- or one word, "game" -- to allegedly support its claim that Movant was improperly motivated in the litigation[92]. Notably, none of the Petitioners shared any such evidence with the Plaintiff. But in fact there never was any such evidence.

167. Plaintiff Beechwood POB claimed a phrase in which Movant expressed his frustration with the judicial system -- motivated by among other issues several negative rulings on legal standing in other environmental cases[93], whereby Movant bemoaned that cases were treated as a "'game' with the courts" instead reflected Movant's own approach to the judicial system[94]. As argued in Movant's opposition to the preliminary injunction:

168. "Plaintiff Beechwood misleadingly cites one quotation from the Facebook postings that asserts the Courts play a 'game' in their adjudicating ([Exhibit 3] Beechwood Affidavit in Support, Exhibit A, ¶22): 'True this is a "game" with the courts because they don't always play it straight.' In contrast to the tortured meaning ascribed by Plaintiff Beechwood POB, the statement was intended to state that in Proposed-Intervenor Brummel's experience the Courts appear to improperly take into account political, social, economic, governmental or other considerations, while reaching decisions that may not strictly comport with the law. It is not an uncommon opinion of those dealing with the legal system.

[92]See Exhibit 3 ¶33.

[93]Movant ids party to another appeal before this Court where another Nassau Supreme Court judge ruled that three parties, two of whom reside adjacent to a public forest, did not have standing to sue to protect a public forest from a quasi-industrial facility where the environmental impacts were perfunctorily reviewed at best, Matter of Brummel *et al.* v. Town of North Hempstead *et al.*, Appellate Division Docket Number 2014-10641.

[94]Movant's phrasing was conversational and unintentionally ambiguous, using the word "with" to refer to the actions of the courts instead of "by" or such an unambiguous reference, but clearly the intent was to refer to the courts because several words later the reference "they" could not have meant any party other than the courts, who "don't play it straight [according to the law]."

> "Plaintiff Beechwood POB distorts the statement from its facial meaning to suggest that to Proposed-Intervenor Brummel the litigation itself was a 'game' -- suggesting some improper motive in the effort being undertaken. But clearly that purported meaning was false and self-serving."
>
> (Exhibit 4, p. 20 ¶¶90-91)

169. Thus the intended meaning of the quoted phrase was to suggest that one goes to court and submits his arguments diligently -- and if necessary repeatedly -- with some expectation that one will nevertheless not succeed in the best of circumstances, because the legal system is fallible (and at times worse), and the courts do not operate mechanically to uphold the laws. It is surely a sentiment shared by many, and the reason for a multi-tiered appellate process.

170. As Movant concluded in the affidavit in opposition:

> "Plaintiffs make at best a circumstantial argument that because their own interpretation of various legal provisions militates against the proposed intervention, and because the courts failed to sign the orders to show cause presented to them, therefore the purpose of the applications must be designed to harass or delay. But that argument cannot be supported.
> "In fact the sequence of motions has been logical and the legal bases have been clearly articulated in each motion. The purpose of each was clear: to obtain leave to intervene in order to appeal, not to harass or vex."
>
> (Exhibit **5** ¶¶92-93)

171. There is simply no basis to the claim of intent to harass or delay. Movant has neither time nor funds for such a purpose, and the critical demands of protecting the environment -- juggled ceaselessly -- as well as the diligence and logic reflected in the various legal papers at issue provides clear motive and evidence of Movant's straightforward desire to succeed on the merits, before a fair judicial arbiter, and not to play 'games'.

The Submission Of Additional Motions After Adverse Outcomes Did Not Reflect Improper Recalcitrance On The Part Of Movant

172. As argued above, each motion was filed for a proper legal purpose, and each was properly grounded in the law.

173. But a distinguishing aspect of this matter is that none of the motions were formally adjudicated on the underlying merits, and the specific procedural errors that defeated those before this Court were non-prejudicial, and readily resolvable once identified[95].

174. Of the motions filed by Movant, two were returned unsigned by the trial Court and two by this Court. For the allied intervenor, one was returned unsigned by each Court. For the most part this left Movant and the allied intervenor guessing as to what the issues were, and attempting to resolve them with proper following motions.

175. The trial Court rejected both orders to show cause filed by returning them unsigned, with peremptory 'decisions'. The Court appended brief explanatory notations to both orders to show cause, stating on January 7th that (1) Movant lacked standing and (2) the matter was already fully adjudicated and thus immune from intervention or appeal, and which on January 14th repeated only the second 'reason' (Exhibit **10**, Exhibit **11**).

176. It cannot be reasonably found that such notations constituted proper 'decisions' of the trial Court with any *stare decisis* effect, given their entirely unconventional and summary character. In any event no further motions were filed with the trial Court after those 'determinations'; Movant did not belabor he point and appealed.

[95]While the trial Court appended handwritten explanatory notations to the orders to show cause by which Movant brought his motion to intervene and his amended motion to intervene of January 7th and 14th , respectively, it cannot be reasonably found that such notations constituted proper 'decisions' of the Court with any *stare decisis* effect, given their entirely unconventional and summary character. In any event no further motions were filed with the trial Court after those 'determinations' and the rest of the motions were of an appellate character.

177. It may be noted that as a matter of law, as Movant has elaborated above[96], there was no basis for the Court to claim that the matter could *not* be intervened in after the Court had 'spoken'. In fact Movant's first motion was filed a week before the secret arrangements for the Settlement were concluded, though it is likely the Court -- having emphatically publicly explicitly encouraged such an outcome -- may well have been aware it was in process.

178. It is noteworthy that the Court had also rejected the original Petitioners for their alleged lack of legal standing -- based on entirely discredited legal analysis. Thus it was hardly 'recalcitrant' for Movant to challenge these determinations, as they were highly questionable as matters of law.

179. The trial Court's rejection of allied neighbor-intervenor's motion to intervene was similarly questionable. The Court stated again via handwritten notation on the order to show cause, that the order to show cause was not the correct instrument for the movant to to attempt to intervene[97]. Under the perceived time urgency as described *supra*, the neighbor-intervenor did not belabor the point and appealed the constructive denial of relief .

180. This Court's orders dismissing the notices of appeal (Exhibit 29, Exhibit 33, Exhibit 34, Exhibit 35) establish the logic for returning unsigned Movant's two orders to show cause, and the allied neighbor-intervenor's one appellate order to show cause, but the reasons were procedural, non-prejudicial, were unknown to the movants at the time the new motions were filed, and thus there was no 'recalcitrance' shown by the follow-up motions filed by each movant. As noted, this Court found that the trial Court denials of the motions to intervene

[96]See for instance Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20, *supra*.

[97]Exhibit **16, p. 2:** "Refuse to sign/matter with regard/ to this petitioner is/not properly brought/ by order to show cause/ GRP JSC" p. 2.

were not appealable as of right[98], and the Decision and Order was not an appealable paper[99].

181. As further noted, the circumstances of the Deputy Clerk conference of January 15th strongly suggested -- to Movant and the attorney for the neighbor-intervenor -- that this Court was swayed by the Respondents' unexpected and unprepared-for arguments that the just secretly-concluded Settlement itself rendered the matter moot. The follow-up motions by Movant on January 23 and the neighbor-intervenor on February 19 were intended to address that issue, which appeared central.

182. Thus the provisions of the Chief Judge's rules prohibiting the flouting of established decisions could not properly be applied in this matter, either because (a) there were no such decisions to flout, or (b) they were not apparent nor served at the time the motions were filed, or (c) the decisions -- such as they were -- were simply being properly appealed or re-argued by follow-up motions.

183. As stated in Movant's affidavit in opposition to the preliminary injunction:

> "Furthermore the issues were not settled and repeatedly re-litigated. In no case was a formal adverse decision rendered on the orders to show cause, but only a failure to sign the order to show cause. The decisions ultimately rendered on the "notices of claim" (Plaintiff Beechwood POB Affidavit in Support, Exhibit F) were apparently technical ruling[s] on the failure to have sought leave to appeal orders in an Article 78 proceeding, although the decisions related to the judgement of December 15, 2015 are puzzling and unclear."[100]
>
> (Exhibit 4, p. 21 ¶94)

184. Simply put there was no recalcitrance only diligent and urgent litigation on behalf of an urgent and compelling public issue of public interest and environmental protection.

[98]Exhibit **23**, Exhibit **24**, Exhibit **25** citing CPLR Section 5701(b)(1).
[99]Exhibit **21**, under the earlier determination regarding the same Docket Number, 2016-0744, in Exhibit **29**.
[100]The issue of the Decision and Order needing to be converted to a settled judgement for its appealability was not clear to Movant or the attorney representing the neighbor-intervenor was not clear until consultation with the staff of this Court, and that consultation did not occur until the parties became aware of the order of February 5th (Exhibit **21**) when it was 'served' as an exhibit of the Plaintiff's supporting papers inasmuch as the order was made *sua sponte* by this Court. .

Again, there was on issue, as well, no basis for the trial Court to impose an injunctive remedy by the preliminary injunction it granted, and the preliminary injunction should be lifted.

The Appeal Is Compelling

185. Movant has previously touched on the meritorious character of the appeal which Movant and the neighbor-intervenor intended -- and which one or both still intend -- to file in the underlying matter.

186. As noted, the Settlement was entered into only because the Petitioners felt they 'had a gun to their heads' after they had followed a torturous legal odyssey of over six months, which had already cost them time, expense, and public effort they were inexperienced in[101]. The experience was also disillusioning to them, as indicated by one letter sent to Movant by one couple[102].

187. The affidavits the Petitioners filed in support of the Article 78 clearly showed that the token Settlement, at best a cosmetic concession which preserved a small slice of forest across from their homes, in no way addressed the emphatic concerns they had with the massive destruction of a cherished environmental resources they had enjoyed for decades, and which an accurate environmental assessment would likely have protected far more

[101]Among other grinding and wearing experiences the five laymen underwent was the fact they underwent strenuous legal preparation at least three times in advance of what the trial Court scheduled as substantive hearings, only to have the Court 'change its mind'. The first such hearing would have been when the temporary restraining order was presented. The Court adjourned that hearing for a month. Upon their appearance at the later time, the Court expressed 'surprise' that no opposition papers were filed and re-scheduled the hearing for about a month hence. At the Court meeting at the later time, the Court announced it would not hold such a hearing but wanted the parties assembled so they could negotiate a settlement.

[102]Exhibit 40: "...[E]ven though we are disappointed with the decision and the reasons stated seem lacking Fay and I have reached a point that we will not go on with any further action...." (Email to Movant from Petitioner Francis P. Scally, dated December 17, 2015.

extensively.

188. And ultimately the underlying Decision and Order on the Article 78 special proceeding constitutes a serious miscarriage of justice, for which he instant preliminary injunction is a baseless instrumentality, as discussed, *supra.*

189. The affidavit by Petitioner Glenn K. Denton stated in part:

> "My wife and I get tremendous enjoyment from walking amongst the forested areas. The magnitude and beauty of the varied types of forestation is astonishing. Nothing like you see in the developed areas of Nassau County and Long Island. I really get a feeling of being connected to nature, and Creation in general, as I walk through the area.
>
> I have seen numerous forms of wildlife in the area: Foxes, hawks, rabbits, chipmunks, squirrels, many species of birds. The area appears to be a regular migration point for Canadian Geese as I've seen up to 500 Canadian geese collected during various times of the year. The removal of any substantial part of the forest will have a profound effect on me as it will at least partially destroy the sanctuary I've come to enjoy, and depend on, on a daily basis.
>
> Disturbing all or part of the forest will have a profound impact on the wild life there. Simply put, Where do they go? Especially considering the large amount of development that has occurred in our local area in recent years."
>
> (Exhibit 36 ¶¶19-22)

190. The affidavit of Petitioner Fay E. Scally stated in part:

> "As a retiree I use the former Nassau County East Office Complex property 2-4 times a week either to walk through or around or ride through on bicycles.
> The under developed area are in such a shortage the my interests in walking and cycling will end on Long Island and feel sad for myself and future generations.
>
> While walking or cycling I see a variety of wildlife: Many different birds, squirrels, chipmunks, rabbits, and butterflies, which all add to our enjoyment of the area.
> These will be severely reduced and removed if the land is substantially cleared as planned, never to be replaced.
>
> If this Project goes forward the value of my property will greatly diminish due to the change of a park like setting into a mini city. Instead of trees and animals constantly being seen a homeowner such as myself will see buildings and

concrete."

(Exhibit 37 ¶¶8-12)

191. The damages to the lands are thus far more extensive than addressed by the Settlement, and the concerns of the Petitioners were hardly assuaged.

192. The matters of direct harm raised by Movant and the allied neighbor-intervenor were similar. Movant stated in his Affidavit in Support of his motion to intervene:

> "Each time Intervenor-applicant visits the Site, walks on the sidewalks and public thoroughfares around the Site, he feels renewed and refreshed. Intervenor-applicant is inspired by the vigorous wildlife, mostly birds being visible during daylight, and is charmed by the shy rabbits on the grass around some of the empty buildings.
>
> Along Round Swamp Road there is a rich and varied forest that contains towering trees interspersed with conifers -- an unusual formation identified in the DEIS as 'successional southern hardwoods'.
>
> Intervenor-applicant has also been immensely active rallying support for a change in the Project through press releases, web-pages and announcements on his website, Planet-in-Peril.org, a Facebook page, and various funding pages to support the legal effort (Exhibit 7 [sic]).
>
> The destruction of large portions of the Site as planned for development will significantly harm Intervenor-applicant's enjoyment of the Site, and cause him to abandon his visits.
>
> Almost every area he values will be destroyed -- cleared and levelled -- as currently documented in public plans regarding the Country Pointe Plainview development.
>
> In fact the impending destruction unless it can be stopped pending a renewed environmental review already causes Intervenor-applicant distress foreboding, and deep dismay.
>
> In the manners enumerated above, Intervenor-applicant uses and enjoys the subject Site and will suffer harm that use and enjoyment of a unique piece of former public property and an unusual ecological resource not far from his home."
>
> (Exhibit 8 pp. 4-5 ¶¶21-27)

193. The neighbor-intervenor in her affidavit in support of her motion to intervene raised similar issues:

> "I enjoy the open fields and wildlife that lives in the former Nassau County "Plainview Office Complex", and the sense of tranquillity the site provides.
> I walk in the former Office Complex about once a week as I have done for over 30 years, and I enjoy the natural environment, plant life, and the animals. I find the trees very impressive due to their immense size, the shade they provide, and the experience of being among them. I also enjoy the fresh air in the natural area.
> Building the development as approved will diminish my enjoyment of my home as follows: Now I see open fields across from my home, and I enjoy the sunset from my windows. Instead if the development is built I will see a dense residential development that obstructs my view of the far distance and the sunsets. Further I expect there to be very substantial increases in traffic creating noise pollution and hazardous conditions on my street."
>
> (Exhibit 38 ¶¶6-8)

194. The legal issues to be addressed in a appeal are also compelling. In the prior discussions of the legal basis for each motion, *supra*, Movant alluded to the central issues to be raised in the appeal:

> (1) The SEQRA review was impermissibly "segmented", by among other issues the deferral of environmental review of fifteen-acre area that includes tracts of land "deeded" to the Town of Oyster Bay and 'erroneously' both counted as 'preserved land' (see Exhibit 39) and (a) obligated by covenant to be cleared by the developer and (b) depicted as athletic fields -- exclusively -- in the adopted "final site plan' (see Exhibit 6). The documentary evidence for the "segmentation" issue was so compelling that in several points in their pleadings the Petitioners requested the trial Court to hold a 'trial of fact' on the issue (CPLR Section 7804 (h)), but the trial Court called no such hearing, and the Decision and Order summarily dismissed the issue[103] after having concluded at length that the

[103]Exhibit 5, p. 13.

Petitioners lacked standing[104];

(2) The SEQRA Review failed to take a required "hard look" taken at issues of habitat preservation and loss caused both by the same contradictory double-counting of the fifteen-acre tract deeded to the Town, as well as by a failure to systematically and transparently account for contiguous-acreage affected by the Project;

(3) the SEQRA Review failed to take a "hard look" at the Project's impact on wildlife when it failed to perform any quantitative assessment of wildlife-populations on the lands at issue, a deficiency specifically noted in timely testimony on the Project's Draft Environmental Impact Statement;

(4) The SEQRA Review failed to conduct a "hard look" at the proposed "visual buffer" inasmuch as the analysis lacked any type of scientific or engineering assessment as to the "buffer's" efficacy, compounded by an omission of any specifications of the planned "fitness trail" to be cleared and built within the "buffer" area; and finally,

(5) The appeal would address the issue as to whether the Petitioners indeed possessed standing, inasmuch has (i) they used and enjoyed the lands at issue for decades; (ii) their residences were well under five hundred feet from the point of construction across from them; and (iii) although not all the Petitioners raised all the issues presented in the Article 78 Petition in front of the administrative hearings, other parties did raise the issues, and therefore there was

[104]The holding on standing in the Decision and Order, having formed the predicate for the peremptory dismissal of the substantive issues the Petition raised (Exhibit 5, p. 11), was notably omitted from the narrative of the Settled Judgment.

no estoppel to their being raised nor to the Petitioners standing to sue.

195. The findings of the trial Court rejecting such issues were perfunctory and selective; as noted the crying need and request for a trial of fact was ignored despite documentary evidence (Exhibit 5, pp. 11-14).

196. This Court would thus have a range of important, substantive issues to adjudicate if the intervenors were enabled to proceed and bring the underlying matter within this Court's purview.

Technical Defects In The Preliminary Injunction Render It Invalid

197. Until this point Movant has challenged whether any of his conduct before this Court or the trial Court warranted the preliminary injunction based on the Rules of the Chief Administrator of the Court, upon which basis the trial Court issued the preliminary injunction (Exhibit 2, p. 6). However, technical defects in the preliminary injunction also provide compelling and substantial bases for this Court to revoke the preliminary injunction or substantially modify its terms so as to permit Movant and the neighbor-intervenor freely to proceed to appeal.

198. The defects to be documented, are un-surprising given the regrettable tenor of the proceedings, and their departure from proper judicial form.

The Preliminary Injunction Is Defective Because It Omits An 'Undertaking'

199. The trial Court imposed no undertaking as a condition of the injunction, despite the fact that the injunction severely constrains Movant's freedom of action and civil rights, and that Movant is furthermore injured by being unfairly painted as a reckless party.

200. The CPLR is clear that no injunction may be issued absent the imposition of an undertaking (CPLR Rule 6312(b)), and the courts have held that an injunction may be vacated where no undertaking has been incorporated in the injunction[105].

201. The fact that such an expansive and unyielding injunction as was imposed in this matter, as elaborated below, also flagrantly omits a basic protection required by law -- an undertaking -- is regrettably of a piece with the trial Court's and the Plaintiff's reckless treatment of Movant and the case as a whole, including: (1) the decision in the underlying matter, (2) the subsequent frustration of the effort to intervene while the Court likely knew settlement talks were underway, and (3) the further frustrating of the effort to appeal by the imposition of this baseless preliminary injunction, which this motion seeks finally to rectify.

202. It should not be argued that Movant himself should have raised the absence of an undertaking in the original order to show cause, because there was no requirement of such a provision until the order was granted, and it was a matter entirely within the purview of the trial Court to impose.

203. The appellate courts have been held fully authorized to exercise discretion to reverse the trial court in all such matters related to an injunction[106].

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[105]"Neither the 'judgment' nor the order appealed from made any provision for the posting of a bond as a condition of the restraining or injunctive provision. Apparently no consideration was given to the provisions of CPLR 6301 and 6312. The granting of a preliminary injunction without requiring the posting of a bond would appear improper.
.....
The order should be modified by striking from it the restraining paragraph which is designated...."
Frontier Excavating, Inc. v. Sovereign Construction Co., 45 AD 2d 926 (Third Dep't, 1974) at 926-7 (internal citations omitted)(where an injunction which omitted an undertaking was deemed invalid and vacated by the appellate court, in a case revolving around a construction Project, and said injunction prevented the disbursement of funds)

[106]"The Appellate Division exercises the same discretion as does Special Term and may modify a Special Term order in the exercise of discretion even though it cannot be said that Special Term abused its discretion." Barry v. Good Samaritan Hosp., 56 NY 2d 921 (1982) at 921 (internal citations omitted) (where the Court ruled that the appellate division could reverse the discretion of the trial Court, whether or not the lower court had 'abused' such discretion)

The Preliminary Injunction Is Defective Because It Imposes A Blanket Denial Of Any Further Filings Without Allowing An Opportunity To Be Heard Via A Customary 'Permission Clause'

204. The injunction as written is extraordinarily broad: it can readily be interpreted as denying Movant the right to file any further legal papers in any court that evince any connection whatsoever with the massive development Project originally challenged on environmental grounds related to municipal decisions in the Article 78 special proceeding. And beyond that, further to prohibit Movant from in any way "assisting" in such acts by any other party, *infra*[107].

205. But compounding the injury, the injunction significantly omits a provision for the trial Court -- or another court -- to grant 'permission', upon request and review, to file any further such papers, or to 'assist', despite the fact such a provision is a standard and customary element of such injunctions in this State, and more importantly, is implicated in Constitutional right(s)[108] of 'access to the courts' by federal decisions, *infra.*

206. On the one hand the virtually unlimited scope of the injunction seems to run afoul of federally-recognized Constitutional requirements governing 'access to courts', *infra*[109]. On the other hand the omission of what one may call the 'permission clause' creates a restriction so harsh it is unlike almost every other injunction issued in similar situations, based on a survey of comparable cases cited by Plaintiff in support of the proposed injunction[110].

[107]See Exhibit 2 p. 7, ¶(a) and ¶(b).
[108]Access to courts has been located in several Constitutional rights, *infra.*
[109]The courts have held that a permission mechanism is required, see e.g. Safir v. United States Lines, Inc., 792 F. 2d 19 (U.S. Court of Appeals, 2nd Circuit, 1986) at 25, discussed *infra*.
[110]See Movant's affidavit in opposition to the preliminary injunction, Exhibit 4 ¶115 *ff.*, which examined each of the dozen cases cited by Plaintiff in support of this injunction. The term 'comparable' is used advisedly, because while the trial Court evidently held that for the purposes of the preliminary injunction Movant's conduct was comparable, a review of the actual cases, as provided in the affidavit in opposition, *id.*, establishes that the cases cited were different, by an order of magnitude, in the type of conduct alleged and sustained as contrasted with the very modest and defensible conduct of Movant.

207. The U.S. Court of Appeals for the Second Circuit invalidated that part of one injunction which also categorically restricted judicial 'access', *infra*.

208. As such the injunction under review here appears to abridge both Constitutional and statutory rights, and should be vacated in the interest of justice.

209. The federal courts have been emphatic about the potential for abuse of punitive 'pre-filing' sanctions, overturning those that that go too far and rebuking the lower courts, as the U.S. Court of Appeals for the Ninth Circuit did in the following case (which is further explored, *infra*):

> "Restricting access to the courts is, however, a serious matter. The right of access to the courts is a fundamental right protected by the Constitution. The First Amendment 'right of the people ... to petition the Government for a redress of grievances,' which secures the right to access the courts, has been termed 'one of the most precious of the liberties safeguarded by the Bill of Rights.' BE & K Const. Co. v. NLRB, 536 U.S. 516, 524-25, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (internal quotation marks omitted, alteration in original); see also Christopher v. Harbury, 536 U.S. 403, 415 n. 12, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) (noting that the Supreme Court has located the court access right in the Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause).
> Profligate use of pre-filing orders could infringe this important right as the pre-clearance requirement imposes a substantial burden on the free-access guarantee."
>
> Ringgold-Lockhart v. County of Los Angeles, 761 F. 3d 1057 (U.S. Court of Appeals, 9th Circuit, 2014) at 1061-2 (emphasis added, some internal quotations and citations omitted)(where the Court vacated and remanded an injunction requiring pre-filing permission (NB) because the district court (1) unfairly evaluated the motions that were allegedly frivolous and excessive; (2) defined an overly broad category of litigation to be enjoined; and (3) included as criteria for pre-filing approval excessive standards, among other issues, all of which raised questions of constitutional violations of 'access to the courts')

210. Notably, the Ninth Circuit in Ringgold-Lockhardt questioned that the district court had even entertained the issue of 'vexatious' conduct given that only two actions (and numerous motions) had been filed, which is a number comparable to the present matter, where Movant

only filed two related motions (one being an amended motion) before the trial Court. The Court noted that typically 'massive' abuse is required to trigger sanctions[111].

211. The U.S. Court of Appeals for the Second Circuit ruled that an injunction that imposed a categorical 'pre-filing' prohibition without a 'permission clause,' as in the instant matter, could not stand:

> "...[T]he injunction, which precludes Safir from instituting any action whatsoever, is overly broad. Although we are unable to divine any relief still available to Safir arising out of, or relating to, those events, we do not wish to foreclose what might be a meritorious claim. Consequently, we modify the injunction to provide that Safir is prevented only from commencing additional federal court actions relating in any way to defendants' pricing practices or merchant marine subsidies during the 1965-1966 period without first obtaining leave of the district court."
>
> Safir v. United States Lines, Inc., 792 F. 2d 19 (U.S. Court of Appeals, 2nd Circuit, 1986) at 25 (where the Court imposed the provision of prior court approval instead of a categorical prohibition to protect a litigant's rights in a case wherein for twenty years after the litigant was victimized by illegal collusive price-fixing he continued to pursue increasingly questionable legal theories and causes of action, bringing eleven actions to recoup damages at the point the sanction was imposed) (emphasis added)

212. Although required as a minimum to protect constitutional right of access, in the present case a 'permission clause' would not appear to provide such needed protection for Movant's interests, given the urgent time issues involved and, more importantly, given the trial Court 's history of obstinacy in refusing to grant any of the original motions for intervention[112], and in so recklessly granting injunctive relief with such glaring defects as are

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[111] "Here, the district court found the Ringgolds vexatious primarily on the basis of the current case and an earlier federal case. As an initial matter, two cases is far fewer than what other courts have found 'inordinate.' See, e.g., Molski, 500 F.3d at 1060 (roughly 400 similar cases); Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F. 2d 1515, 1523, 1526 (9th Cir. 1983) (thirty-five actions filed in 30 jurisdictions); In re Oliver, 682 F.2d 443, 444 (3d Cir.1982) (more than fifty frivolous cases); In re Green, 669 F.2d 779, 781 (D.C.Cir.1981) (per curiam) (between 600 and 700 complaints)." Ringgold-Lockhardt, *id.*, at 1064-5 (emphasis added).

[112]The trial Court refused to even sign any of three orders to show cause for the purpose of initiating the motions for such permission to intervene, thus effectively disposing of complex substantive issues after a cursory examination of the papers. For Movant the Court denied standing and argued -- twice -- the matters were concluded based on the Decision and Order and beyond the right to intervene, Exhibit **10** p. 2, Exhibit **11** p.2. And with respect to the allied proposed intervenor the Court stated that the order to show cause was not the correct vehicle to seek intervention,

being described[113].

213. The courts in this state have in fact relieved parties of the need to follow administrative appeals procedures where the 'answer' they would receive was obviously pre-ordained or "futile"[114] as in the present case.

214. Plaintiffs at the very outset of their legal argument for sanctions cite a case based on Safir (*id.*), Lipin v Hunt, 573 F. Supp. 2d 836 (U.S. Dist. Court, Southern Dist. of N.Y., 2008. Holwell, J.), thus tacitly embracing the federal standards[115] which in the case they cited offered a wholly inapposite comparison with the present facts no matter how far they are contorted by the Plaintiff.

215. As an additional matter of interest, Lipin and Safir both exclude appeals from their requirements for pre-filing permission, *id.*[116]:

> "...Ms. Lipin is enjoined from further litigation of any claims relating to her father's coin collection, the Moose Pond property, actions taken in connection with her father's estate or estate property, or actions taken in connection with legal proceedings involving her father's estate or estate property, without first obtaining leave of this Court, except to submit papers responding to a submissions by a defendant, or, when appropriate, to seek appellate review of a decision."
>
> Lipin v Hunt, *id.* (emphasis added) (where the Court, ruling on a motion for sanctions in a multiple-jurisdiction, convoluted and long-running matter revolving around an inheritance, found that the conduct of the plaintiff was frivolous and imposed as a sanction the condition of 'prior-approval' only with respect to certain

Exhibit **16** p. 2.

[113]Movant is pursuing recusal of the justice for the conflict-of-interest presented by his interest in 'protecting' his decision through preventing an appeal.

[114]Watergate v. Buffalo Sewer, 46 NY 2d 52 (1978) at 57.

[115]Exhibit 46. p.4.

[116]"...[T]he district court permanently enjoined Safir from (1) proceeding further in the instant action except to seek appellate review or a writ of certiorari, or to submit papers responding to applications by defendants and (2) asserting in any federal court any new claims related to, or arising out of, the events of 1965 and 1966. We fully agree with the district court's denial of Safir's preliminary injunction motion and its dismissal of Safir's complaint. We also agree with the district court that an injunction restricting Safir's future federal litigation was warranted; however, we believe the injunction, as it presently stands, is more restrictive than the circumstances require. Accordingly, we affirm the judgment of the district court but modify the injunction to provide only that no new federal action, motion, petition, or proceeding arising out of, or relating to, the events of 1965 and 1966 may be brought by Safir without first obtaining leave of court." Safir (*id.*) at 22 (emphasis added)

matters already litigated, while excluding from that restriction both replies to defendant motions and appellate filings)[117]

216. Such a limitation is not included in the present injunctive order.

217. In contrast to the federal cases, our State courts have located the limitation on pre-filing restrictions in State statute instead of constitutional law. Thus it has been held that a judge may not, through rules of his/her 'part', require prior permission for motions. The First Department held:

> "Even though the practice of conditioning the making of motions on prior judicial approval may, in some instances, discourage the filing of frivolous motions, it may also prevent a party from exercising the option to move for relief to which he or she may be entitled. 'A judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law' (22 NYCRR 100.3 [a] [4]). Conditioning motion practice on prior approval from the court may also run afoul of certain statutory provisions such as CPLR 3212 (a) which authorizes any party to move for summary judgment in any action, after issue has been joined. Denying a party permission to engage in motion practice hinders the performance of counsel who are encouraged and, in fact, are required to be zealous in their representation of their clients (Code of Professional Responsibility EC 7-1). Any inclination on the part of counsel to file frivolous motions may be discouraged by the court's authority to impose sanctions."
>
> Hochberg v. Davis (First Dep't, 1991) at 195 (emphasis added) (where the Court held that 'rules' of a 'part' purporting to require the court's prior permission to make a motion were inconsistent with statute and should be vacated, in a petition directed against a judge of the Supreme Court)

218. In the same way that CPLR 3212(a) provides such a "statutory provision" for summary

[117]The overall case in Lipin -- as in all other cases of sanctions -- was wholly incomparable tot eh present matter: "Ms. Lipin has filed two lengthy complaints purporting to assert dozens of causes of action against the defendants.[6] The Court has granted Hunt and Bergquist's motions to dismiss for lack of personal jurisdiction, as the complaints set forth no basis whatsoever for the exercise of personal jurisdiction over either defendant.

...

Since the dismissal of her claims in the Hunt action, Ms. Lipin has filed motions in both the Hunt and Bergquist actions seeking disqualification of all defendants' counsel, judicial disqualification, vacatur of the Court's dismissal of this action, and permission to assert claims against the law firms....

...

Ms. Lipin's latest set of motions, as well as the Allegaert action, appear not to have been brought in good faith, but rather as part of Ms. Lipin's practice of suing and/or moving to disqualify judges and opposing counsel following adverse rulings." Lipin v. Hunt 573 F. Supp. 2d 836 (U.S. Dist. Court, Southern Dist. N.Y., 2008, Holwell, J.) Lipin (*id.*) at

judgment (Hochberg, *id.*), other provisions of the CPLR create statutory rights to appeal (CPLR Section 5701) and to move to intervene (CPLR 1012, 1013, 7802(d)).

219. By practice the courts of this state have protected the rights to file motions by typically including the "permission clause" in any pre-filing restrictions imposed.

220. It is worth noting that in all the cases cited by the Plaintiff in support of the motion for sanctions, the conduct of the sanctioned litigant was established with finality as a matter of law, unlike in the present case. Thus the comparable New York cases of alleged frivolous conduct should if anything provide an upward limit on the restriction of civil practice, not a lower limit, yet the instant categorical prohibition means that the opposite occurred. Furthermore, as has been noted, *supra*, those cited cases were of marked extremes which the present case in no way resembles, and with which a direct comparison is farcical.

221. A brief examination of the cases Plaintiff cited in this case[118] establishes that the standard overwhelmingly observed by New York courts where pre-filing prohibitions are imposed -- in cases where abusive practice is actually established as a matter of law -- is that, as in federal practice, a litigant is also provided the opportunity to make further motions or filings with permission of a court.

222. Furthermore, of the cases cited by the trial Court in support of its authority for sanctions (Exhibit 2, pp. 6), in all but one, whose provisions are ambiguous, where pre-filing restrictions were imposed there was in each case a permission clause incorporated, *infra*. (In a large number of the cases cited by the trial Court, *id.*, the appellate courts vacated sanctions or sustained the denial of injunctive relief or sanctions, *infra.*)

[118]The cases are more fully explored and compared -- their irrelevance shown -- in Movant's affidavit in opposition to the injunction, Exhibit 4 ¶¶115-150.

223. Of the eleven cases cited by Plaintiff regarding frivolous practice[119], in only three of them was it not apparent that a procedure for court approval was incorporated, and in those cases either alternate conditions were referenced, or the actual conditions are ambiguous from the appellate decision referenced. The vast majority included the 'permission clause' as a fundamental component, thus:

224. (1) In Naclerio v. Naclerio, 132 AD 3d 679 (Second Dep't, 2015) the courts imposed prior court approval:

> "Additionally, the Family Court did not improvidently exercise its discretion in enjoining the father from commencing further proceedings with respect to custody or visitation without prior court approval." at 680 (emphasis added)

225. (2) In Breytman v. Olinville Realty, 2012 N.Y. Slip Op. 06572 (Second Dep't, 2012) the courts imposed prior court approval:

> "Further, under the circumstances of this case, the Supreme Court properly granted that branch of the defendant's cross motion which was to enjoin the plaintiff from filing any further motions without leave of the court." at 652 (emphasis added)

226. (3) In Dimery v. Ulster Sav. Bank, 2011 NY Slip Op 2345 (Second Dep't, 2011), the courts imposed prior court approval:

> "Accordingly, it was not improper for the Supreme Court to enjoin the plaintiff from bringing any further motions regarding the subject matter of the instant action without its permission." (emphasis added, internal quotations and citations omitted)

227. (4) In Ram v. Hershowitz, 76 AD 3d 1022 (Second Dep't, 2010) the courts imposed prior court approval:

> "...[T]hat branch of the cross motion which was to enjoin the petitioner from instituting or maintaining any action or proceeding...without prior court approval, is granted." at 1024 (emphasis added)

[119]See Beechwood POB LLC memorandum of law, Exhibit 46.

228. (5) In Molinari v. Tuthill, 59 AD 3d 722 (Second Dep't, 2009) the courts imposed prior court approval:

> "Here, the Family Court providently exercised its discretion in granting that branch of the mother's motion which was to require that the father seek permission of the court before filing future custody or visitation applications." at 723 (emphasis added)

229. (6) In Manwani v. Manwani, 286 AD 2d 767 (Second Dep't, 2001) the courts imposed prior court approval:

> "Ordered that the petitioner is enjoined from bringing any further petitions for upward modification of spousal support without the advance permission of the Supervising Judge of Family Court, Queens County;..." at 768 (emphasis added)

230. (7) In Matter of Wagner, 114 AD 3d 1235 (Fourth Dep't, 2014) the courts imposed prior court approval:

> "We conclude that the Surrogate did not abuse his discretion in ordering that petitioner obtain court approval before filing any further pro se applications against respondent, the estate, or the attorney for the estate..." at 1237 (emphasis added)

231. (8) In In Re Marion C.W. v. JPMorgan Chase, 2016 NY Slip Op 00203 [135 AD3d 777], (Second Dep't, 2016) the courts imposed prior court approval:

> "Here, the court properly determined that the petitioners forfeited the right to free access to the courts by abusing the judicial process with repeated motions seeking to relitigate matters previously decided against them, and, therefore, required them to obtain leave of the court before filing further motions or commencing new proceedings regarding Marion C.W...." (emphasis added)

232. The following three cases diverge on some respect from the practice described in the foregoing eight cases of stipulating that permission must be available.

233. In one of the following cases, it appears from the appellate decision that the trial Court imposed a categorical prohibition, but only on one specific *topic* raised in prior motions; in another, the court alludes to but does not specify a complete ban in some manner; and in the

final case the appellate court sustains a requirement that further legal action must be undertaken only by a licensed attorney on behalf of the litigant judged vexatious. Notably Movant's co-defendant is an attorney, and the legal filings at issue are not of the 'bizarre' character the referenced court sought to rectify.

234. Thus in Gorelik v. Gorelik, 71 AD 3d 729 (Second Dep't, 2010) this Court appears to sustain a complete ban on one subject matter of litigation, "the preclusive effects" of a Bankruptcy Court decision that has already been litigated to a conclusion[120]:

> "...[T]he Supreme Court properly exercised its discretion in enjoining him from bringing any further motions regarding the issue of the preclusive effect of the findings contained in a Bankruptcy Court order on these proceedings in light of his numerous requests in several other motions for the same relief." at 730 (emphasis added, internal quotations and citations omitted)

235. Although this Court sustained the apparent atypical 'categorical' filing restriction, the Court cited for authority (*id.* at 730) four cases, three of which do contain the permission provision, and one of which is ambiguous on the point, and is discussed below[121].

236. Clearly there is less than meets the eye in this one atypical case which -- evidently -- omitted a 'permission clause', but confined the restriction to one extremely narrow, specific and settled topic, unlike the injunction presently at issue, which is almost breathtakingly expansive and deals with matters not fully determined at all.

237. The other case imposing some type of restriction that did not explicitly mention a permission clause was Sassower v. Signorelli, 99 AD 2d 358 (Second Dep't, 1984).

238. This is a relatively infamous case heard by the Second Department which it stated

[120]The false parallel that might be urged with respect to the several 'motions to intervene' filed in the present case can be readily distinguished by the fact that the motions in the instant case were not determined on their merits, nor were the dismissals of the motions or notices of appeal 'with prejudice' because they were dismissed due to remediable issues of appealability of the papers at issue, *supra*, or being unsigned orders to show cause they were not conclusively adjudicated.

[121]Sassower v Signorelli, 99 AD2d 358, 359 (Second Dep't, 1984), *infra.*

involved "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," *id.* at 358.

239. This Court stated "we have held that the defendant was acting in a judicial capacity [and], he is absolutely immune from suit " *id.*, at 359, and this Court sustained the restriction whereby it stated that "Special Term acted properly in putting an end to plaintiffs' badgering of the defendant and the court system" *id.* at 360 (emphasis added).

240. No further details of the "putting an end", *id.*, are supplied. No reference was made to a permission clause. But the case is distinguishable in that the issues had been adjudicated (*id.*, at 359) and the litigation seems unquestionably abusive, based on the cursory recitation, *supra.*

241. In the final case the Court imposed a requirement that the litigant required an attorney for further litigation:

> "Betty O. Muka is enjoined, restrained and prohibited from hereafter commencing any civil action against the New York State Bar Association, its officers or employees...unless she be represented in said action by an attorney duly licensed to practice law in New York State and who is actively engaged in the practice of law in New York State...."
>
> Muka v. NYS Bar Assn., 120 Misc. 2d 897 (Supreme Court, Tompkins County, 1983, Zeller, J.) at 905.

242. The subject of the restriction was a litigant[122] held to be beyond the pale in that, among other history, she "has either sued or accused of crime all Supreme Court Justices of the Sixth Judicial District, one of whom she once took into custody by means of a 'citizens arrest'....[and] has had pending an action in which the named defendants are the 'Supreme Court of the State of New York and its judges, law clerks, clerks, employees and staff, as officials and as private individuals....'" *id.*, at 898-9 (emphasis added).

243. Again, that case is readily distinguishable from the present matter by its clearly 'bizarre' character, and in any event does not categorically prohibit further litigation, but only makes it contingent on its begin performed by a licensed attorney given the bizarre history.

244. Thus taken together those three cases constituting exceptions to the established practice of incorporating a 'permission clause', which was omitted in the present matter, do not discredit the practice, but offer unusual and narrow modifications or exceptions which could not reasonably apply in the present case.

245. In the three cases, either the restriction itself was exceedingly narrow (Gorelik *id.*) or the issue was unquestionably settled and the nature of the restriction was nevertheless ambiguous (Sassower *id.*) or the litigant was, due to an evident mental 'mania', required to use an attorney (Muka *id.*) while not otherwise restricted.

246. Still, in the overwhelming majority of cases involving formal findings of sanctionable conduct as cited by Plaintiff -- which appear to constitute a fair sample -- the courts

[122]"Mrs. Muka is a middle-aged married woman who is a graduate of a law school but not an attorney at law. She has engaged in pro se litigation for over 10 years (see Muka v Board of Educ., 41 AD2d 882), and has commenced hundreds of actions in the courts of this State. For the most part they lacked merit and have been dismissed.
...
In addition to the action of August 28, 1982 which alleges conspiracy against the Supreme Court of the State of New York and its Judges, law clerks, clerks, secretaries, court reporters and staff, Mrs. Muka has pending a similar action against the Court of Appeals of the State of New York and its Judges, law clerks, clerks, employees and staff; another one against the Appellate Division, Third Department...."

adhered to a standard practice of only imposing pre-filing restrictions where the litigant could invoke a 'permission clause' to circumvent the restriction if justified.

247. The trial Court itself cited Sassower, *id.*, and four other cases that involved pre-filing sanctions. As illustrative of Movant's point, each non-Sassower case incorporated a 'permission clause'[123] -- except the one in which sanctions were denied and the decision was sustained[124].

248. The standards established in the federal cases, *supra*, also bring into play the Constitutional issues presented by the omission of the 'permission clause'. As noted the Second Department found such a restriction invalid, Safir, *supra*.

249. Thus the categorical pre-filing restriction imposed in the present case, omitting any permission clause', is improper on the facts and law, Constitutionally flawed, and excessive, when viewed in light of the constitutional issues addressed by the federal courts, *supra*, and the standard almost uniformly observed by New York courts.

The Preliminary Injunction Is Defective Because It Is Far More Expansive Than Required Or Justified, And Thus Unconstitutionally Restricts 'Access To The Courts' And Conduct -- Freedom Of Expression

250. As discussed *supra,* the federal courts have examined more closely than New York courts the Constitutional challenges posed by over-broad pre-filing restrictions imposed on litigants, and those federal holdings clearly speak to the injunction here at issue.

251. The breadth of control the trial Court presumed to exercise over Movant's actions based on no more than four motions (or two sets of two related motions) he filed in the two

[123]Strunk v. New York State Bd. of Elections, 126 AD 3d 777 (Second Dep't, 2015) at 778; Naclerio v. Naclerio, 132 AD 3d 679 (Second Dep't, 2015) at 679; Shreve v. Shreve, 229 AD 2d 1005 (Fourth Dep't, 1996) at 1006.
[124]Matter of Leopold, 287 AD 2d 718 (Second Dep't, 2001) at 718-19.

different courts over a period of six weeks[125] in pursuit of an appeal is indeed astounding in light of the Constitutional considerations. Notably, none of the motions themselves were adjudged frivolous by any court at the time they were considered.

252. In its order, the trial Court begins by enjoining Movant from filing further motions to intervene or to pursue any other legal aim, or "assisting" any other party in doing so, with respect to the underlying special proceeding -- which that Court repeatedly insisted erroneously was conclusively disposed of upon settlement[126], (Exhibit 2 p. 7, ¶(a)).

253. The Court's preliminary injunction omits a definition of "assisting", but the term may be expansive enough to include Movant's educating affected residents about their rights and the import of state law, pointing others toward legal resources, holding public information sessions, finding them legal assistance, helping them raise funds, etc.

254. Expanding that initial over-reach, the trial Court does not stop at prohibiting litigation directly related to the purportedly "settled and discontinued" special proceeding as it related to the Town of Oyster Bay zoning actions (Exhibit 2, p. 7(a)), but goes on to prohibit Movant from litigating or "assisting" in litigating "any matter related to such approvals or Project" (Exhibit 2 p. 7 ¶(b), emphasis added), thus embracing a breathtaking universe of subject matter.

255. In other words, the trial Court has, at the behest of the Plaintiff, undertaken to immunize from judicial challenge assisted in any way by Movant -- who is the exclusive current organizer of opposition to and criticism to the Project[127] -- a range of potential

[125]At worst the Court may add to the count Movant's involvement and assistance in the filing of three motions by the attorney for an allied party, or four if a withdrawn motion is also counted. It is also true that five notices of appeal were filed as precursors to those motions. All were dismissed on strictly technical grounds related to appealability (*supra).*

[126]As discussed *supra,* notwithstanding the trial Court's oft-repeat claim that a settlement precludes further action, the courts of this State have repeatedly held that intervention and appeal after settlement is permissible.

[127]See Exhibit 30

concerns in any way connected with the development Project hypothetically including: (1) the contentious disposition of fifteen acres of woodlands whose ownership was, as part of the Project 'deal', transferred to the Town of Oyster Bay, but whose fate is undetermined, at least formally[128]; (2) any new issues regarding ground-water and the like; (3) issues related to compliance of the developer and Town with the terms of the Project's SEQRA "Findings Statement" or SEQRA "Final Environmental Impact Statement"; (4) issues related to traffic impacts; and (5) myriad other issues that may arise as this massive, roughly half-billion dollar Project proceeds over the next several years across about 100 acres of land in the center of a busy community.

256. Movant is also arguably prohibited from "assisting" (Exhibit 2, p. 7 , ¶(b)) in disseminating information about, organizing further opposition to, recruiting legal help for, or gathering funding to help bring such matters to court ("making of any further ...judicial filings", Exhibit 2, p. 7 , ¶(b)), whether they are justified and desired or not.

257. In sum, prior to any final determination of frivolous conduct -- as unlikely as that would reasonably be based on the facts and the law -- the trial Court has undertaken to silence and prevent Movant from performing, with regard to this development, any of the type of civic, political, and legal action he has uniquely demonstrated both an interest in and an ability to perform with respect to the environmental issues raised by development Projects of this type.

258. Such an exercise of authority by the trial Court clearly violates not only the types of standards articulated by the federal courts with respect to Constitutionally protected access to the legal system, but also broader guarantees of civil rights protected by the First

[128]The matter was a key issue in the Article 78 proceeding and the Decision and Order (Exhibit 5, pp. 12-13).

Amendment to the U.S. Constitution.

259. As quoted *supra*, the U.S. Court of Appeals for the Ninth Circuit, in reversing the imposition of pre-filing restrictions for an alleged vexatious litigant, thus characterized the protected status of judicial access:

> "The First Amendment 'right of the people ... to petition the Government for a redress of grievances,' which secures the right to access the courts, has been termed 'one of the most precious of the liberties safeguarded by the Bill of Rights.' BE & K Const. Co. v. NLRB, 536 U.S. 516, 524-25, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (internal quotation marks omitted, alteration in original); see also Christopher v. Harbury, 536 U.S. 403, 415 n. 12, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) (noting that the Supreme Court has located the court access right in the Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause)."
>
> Ringgold-Lockhardt, *id.*, at 1061-2 (emphasis added)

260. That Court further held that any remedy deemed justified -- as has been noted *supra* would be exceedingly difficult to establish in the present matter -- must also be focused narrowly on the specific area of 'transgression' so as not to trample the general right of judicial access, *supra*:

> "Finally, pre-filing orders 'must be narrowly tailored to the vexatious litigant's wrongful behavior.' Molski, 500 F.3d at 1061[129]. In Molski, we approved the scope of an order because it prevented the plaintiff from filing 'only the type of claims Molski had been filing vexatiously,' and 'because it will not deny Molski access to courts on any ... claim that is not frivolous.' *Id.*"
>
> *id*. at 1066 (emphasis added)

[129] Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir.2007) (per curiam)

261. The instant injunction as written by the trial Court creates a pervasive and blanketing reach, extending far beyond the underlying special proceeding to any matter whatsoever related to the entire real estate Project as approved. As such the order cannot by any stretch of reason be considered "narrowly tailored" (Ringgold-Lockhardt, *id.* at 1066) as required[130].

262. Thus the trial Court's injunction is, as written, an unconstitutional abridgement of the federally protected right to access to the courts, in addition to any violation of state law it commits[131].

263. Furthermore by prohibiting, in notably vague language, any "assisting" with any further challenges of any type, by anyone, to "any matter related to such approvals or Project" (Exhibit 2 p. 7, ¶(a),¶(b)), the injunction impermissibly abridges protected rights of speech, association, and assembly protected by the First Amendment to the U.S. Constitution.

264. The Courts have held the right to associate in the manner here enjoined indispensable to a functioning free society:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See Gitlow v. New York, 268 U. S. 652, 666;

[130]The U.S. Court of Appeals for the Second Circuit, which has jurisdiction in New York, has established a set of criteria for frivolous litigation different from those of the Ninth Circuit (see Ringgold-Lockhardt, *id.* at 1062). But inasmuch as the cases cited in Ringgold-Lockhardt establishing those rights are those of the U.S. Supreme Court, the difference in circuits should not affect the nature of the right of judicial access to be applied in this case. As to the fact that the Ninth Circuit cited its own case regarding the 'narrow tailoring' of the remedy, such a stricture would appear uncontroversial as a matter of law, and is echoed by cases of the U.S. Supreme Court cited, *infra*, regarding the other civil rights improperly affected by the instant injunction, *cf.* Buckley v. Vallone, 424 US 1 (1976) at 25.

[131]As noted *supra* the injunction, by omitting a provision for judicial permission, improperly abridges rights of access -- the making of motions --as guaranteed by New York statute; see Hochberg v. Davis (First Dep't, 1991) at 195, *supra.*

Palko v. Connecticut, 302 U. S. 319, 324; Cantwell v. Connecticut, 310 U. S. 296, 303; Staub v. City of Baxley, 355 U. S. 313, 321"

NAACP v. Alabama ex rel. Patterson, 357 US 449 (US Supreme Court, 1958) at 460 (emphasis added, some citations omitted) (where the Court invalidated a contempt citation issued upon the refusal to supply a membership list) acc'd Matter of Curle v. Ward, 46 NY 2d 1049 (Court of Appeals, 1979) at 1052 (emphasis added) (where the Court sustained the prohibition of membership in the Ku Klux Klan for state prison guards)

265. Any attempts to restrict such fundamental rights must be carefully justified and tailored:

"In view of the fundamental nature of the right to associate, governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny....Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."

Buckley v. Vallone, 424 US 1 (1976) at 25 (internal quotations and citations omitted) (where the Court invalidated restrictions on campaign expenditures as overly restricting the freedom of speech)

266. As noted, access to the courts is a constitutional right not to be abridged lightly (*supra*). But this injunction ranges into matters of speech, political organizing and assembly as protected by the First Amendment, and is thus recklessly defective and warranting removal.

The Trial Court Should Not Have Considered Matters Filed With The Appellate Court That Were Not Put Into Evidence By The Plaintiff

267. Plaintiff argued that the type of frivolous conduct it claimed warranted sanction was evidenced by the totality of the legal filings by Movant and the allied counsel, which consisted of a total of three motion to the trial Court and four motions to the Second Department (an additional one having been withdrawn and re-filed).

268. However both the Complaint and Plaintiff's Affidavit in Support of the preliminary injunction fail to include as exhibits any of the motions submitted to the appellate court. While Movant did append the appellate motions, it is unclear if the Court ever even Movant's opposition (see Footnote 36) and in any event no reference was made to the substance of the motions, but rather the simple numerical outcome of their being returned unsigned.

269. Thus there is a strong presumption that the trial Court was finding the appellate motions to be part of a 'frivolous' action for no other reason than that the notices of appeal were dismissed -- all for technical reasons and some basically in deference to the trial Court, and that the orders to show cause were returned unsigned.

270. This Court should not countenance such casual findings of misconduct and imposition of sanctions where the original pleadings were not even put into evidence by the party seeking such relief.

The Trial Court Should Have Recused Itself For Conflicts-Of-Interest

271. The Hon. Justice George R. Peck, who heard the underlying Article 78 special proceeding. The motion-practice of that case forms the subject matter of this case, whereby that Justice ruled against Movant and the neighbor-intervenor in their motions to intervene, yet was freshly assigned by the IAS system to this case, as well as a sister case brought by a co-Respondent in the prior special proceeding. Such an assignment was and is improper, and the preliminary injunction is therefore defective, because the cases are not 'related' in a manner that promotes judicial efficiency but rather in a manner that creates an irremediable conflict-of-interest and prejudice.

272. The Court and the Plaintiff either deliberately exploited Movant's *pro se* status and limited legal expertise, or themselves committed an act of negligence, when they contrived to have the Justice so assigned, and accepted the assignment, despite the fact that Justice is effectively an unnamed party to these follow-on actions.

273. The Justice is effectively an unnamed party to the case because the questions posed by the action -- in general terms: 'Whether Movant's conduct was 'frivolous' or not' -- are predicated on key issues in the prior matter in which the Justice was materially and intimately involved, including: (1) The quality and fairness of the Justice's Decision and Order regarding the Article 78 special proceeding, which led to the motions to intervene here at issue; (2) The justness and correctness of the Justice's rejections of Defendant's motions to intervene, and those of counsel for the allied neighbor-intervenor; furthermore (3) The validity of Defendant's and counsel for the allied neighbor-intervenor's several strenuous challenges to those 'decisions' to reject the motions to intervene; and (4) The overall tenor and management of the original special proceeding that led to the urgent efforts by Movant and the allied neighbor-intervenor to intervene and appeal the relevant decisions.

274. In other words Justice Peck's own actions, and Movant's actions in response, are central, material elements to the case. As such, Justice Peck cannot be a neutral arbiter.

275. It may be argued that in typical cases of alleged frivolous conduct, the alleged 'wrongdoers' are already parties to the case, and the same judge thus regularly hears the issues raised, whereas in the present matter a new case was filed only to bring Movant, and counsel for the neighbor-intervenor -- non-parties -- within the Court's jurisdiction. Nevertheless, the IAS process should, by its random design, have provided a welcome if unintended degree of independence to the search for truth in this matter of alleged frivolous

practice had it not been frustrated by actions of the Plaintiff and the Court.

276. Evidently the assignment of Justice Peck was achieved by the designation of the case as 'related' on the Request for Judicial Intervention by Plaintiff Beechwood POB. Clearly Beechwood POB was aware that this judge was a very sympathetic ear.

277. Even if the action underlying this preliminary injunction -- an action for tort for frivolous practice -- may be 'related' in a way that would otherwise justify 'related-assignment', in fact it would be overwhelmingly ineligible because nature of that 'relation' simultaneously created obvious conflicts-of-interest as described, *supra.* In a word, the Court was being asked to to sit in judgment or preside over a trial of its own actions.

278. Yet even the 'related' designation is questionable, because aside from the matter that raise the conflict-of-interest, this case presents <u>entirely</u> <u>different</u> issues from the original special proceeding. Whereas the original case was a special proceeding revolving around environmental issues concerning land use, this case is a civil action sounding in tort that has nothing whatsoever to do with land use or the environment.

279. And even if the several motions here at issue were tangentially related to the environmental case, their legal and factual bases, and thus their justness and propriety, were based instead on the law regarding intervention, timeliness of intervention, appealability of papers, etc. -- matters completely separate from the environmental and zoning issues presented by the original case.

280. Again, the fact that the judge had direct knowledge and involvement in the underlying case presents a matter of prejudice and conflict-of-interest, not simply a matter of judicial economy for which the 'related' concept was designed.

281. Thus the assignment of Justice Peck to hear the action and to issue the preliminary

injunctions was improper, presented an obvious conflict of interest, which was the duty of the Court to detect and rectify, and having failed to do so, the preliminary injunction at issue here is fatally compromised, and this Court should vacate it entirely on that basis alone.

Compliance With Rules For This Motion

282. Movant has not previously sought the relief described herein, or in the accompanying order to show cause, from this or any other Court.

283. The Notice of Appeal in the appealed matter -- the preliminary injunction issued by the trial Court's pursuant to it Order signed April 15, 2016, is appended as Exhibit 41. The trial Court's Decision and Order signed April 15, 2016 is appended as Exhibit 2.

284. Movant provided the other parties in this matter at least twenty-four (24) hours' notice of this hearing, as required by Uniform Court Rules Section 202.7, by notifying them on June 17, 2016 by email[132] and follow-up communications. Movant notified Beechwood POB, LLC, by emailing the party's attorney, John M. Wagner, of Certilman, Balin, Adler & Hyman, LLC, and shortly thereafter leaving a personal message describing the email with a receptionist of Certilman, Balin, on the same day. Movant notified Ghenya B. Grant directly by email, and received an email acknowledging receipt the same day. Mr. Wagner provided an email acknowledging receipt at 10:14 AM on the morning of June 20, 2016.

Conclusions

285. Movant has set out detailed arguments upon the numerous inter-twined issues going to the heart of not only the preliminary injunction but the underlying case and the motions to

[132]Exhibit 43, copy of email notice of hearing seek injunctive relief to lift preliminary injunction issued April 15, 2016.

intervene in order to demonstrate: (1) Movant and the allied intervenor had a firm legal basis to intervene; (2) The motions filed for that purpose were responsible and rational exercises of legal practice; (3) The rejections of the motions by the trial Court appear to have been without basis in the law and the facts; (4) The appellate orders to show cause appear to have been rejected for technical issues not based on the substance of the matter; (5) Movant and the allied intervenor still have valid and important legal interests to pursue if this Court relieves the strictures of the preliminary injunction; (6) The preliminary injunction is fundamentally defective in that (i) It omits an undertaking; (ii) It omits a 'permission clause'; (iii) It is overbroad in its applicability to legal subjects; and (iv) It is an unconstitutional abridgment of extra-juridical conduct protected by the U.S. Constitution.

286. It is easy to lose sight of what is at stake in this matter: There is an imminent, irreparable threat to dozens of acres of lush and beautiful trees now in all their summer splendor; to dozens of species of birds; to uncounted numbers of small mammals; to an immense variety of vegetation and insect life; and to the fresh air, scenic and recreational resources this land represents to a community that was built around it.

287. All these 'natural resources' were intended to be protected by the strict provisions of the State Environmental Quality Review Act ("SEQRA") which mandates that comprehensive, frank and forthright environmental analysis based on 'hard looks' be performed on such projects. In fact the law was clearly designed with such rampant large-scale projects in mind. The law requires furthermore that the local government choose the least damaging alternative from the possible plans a developer has (6 NYCRR 607.11(d)(5)), whereby the agency must "certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that

avoids or minimizes adverse environmental impacts to the maximum extent practicable" (emphasis added).

288. In the present case, the Petitioners and Movant identified a plethora of deep flaws in the Project's environmental review, many identified prior to its finalization, with the result being that the local agency approved a plan whereby almost the entire area of natural vegetation on the roughly 145 acre site, except roughly 10 acres, is shortly to be completely levelled -- setting aside the 'fifteen acres' that function as both 'preserved land' -- temporarily -- and 'replacement soccer fields' by clear evidence, *supra.*

289. The trial Court was content to deny the existence of the flaws, throw out Petitioners' 'standing', and push a settlement -- a 'compromise' -- that would permit the highly destructive and unlawful outcome to come to pass, but with a 'fig-leaf' of legitimacy in the capitulation wrought from the Petitioners[133].

290. Hundreds of users of the area, from the local community and across the region, have recently signed a petition demanding the lands be preserved. The petition was collected over several recent weekends single-handedly by Movant a stone's throw from the Project lands, on a state 'bike-trail' just out of reach of these developers. Were it not state land it would have also been ready to be consumed. Few of the petition signers had any idea the woods they were accustomed to may well disappear this summer, in the absence of judicial action.

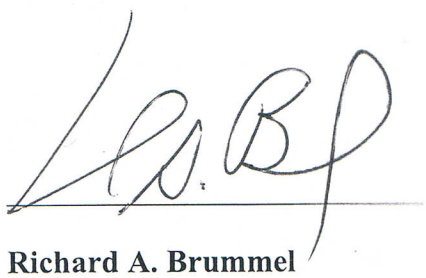
291. Movant did nothing warranting the instant preliminary injunction. The sanction serves to make fixed and fast a set of clear injustices: (1) The flawed SEQRA review; (2) The erroneous Decision and Order sustaining it -- which when 'settled' omitted the key finding

[133]That the Court told the Petitioners they "lacked standing" -- thus in a sense discrediting Movant who had organized them -- and then signed a Settled Judgment omitting that central but discredited finding constitutes a revealing element of the case whereby the interests of the Court and the Plaintiff aligned too closely.

that Petitioners had no standing, *supra*; and (3) The denial of intervention for the purpose of appealing.

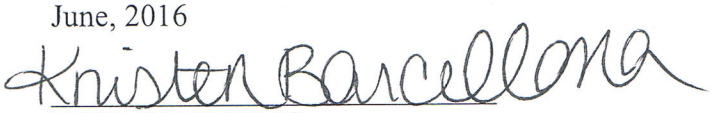
292. For the foregoing reasons Movant respectfully requests this Court (1) Grant the order to show cause and vacate or modify the preliminary injunction such that Movant and the allied attorney are permitted to act as needed to assist the neighbor-intervenor and anyone else to intervene and obtain appellate review, and such other relief as is just and proper in the underlying matter and any other matter in any way related to the Project; and (2) Grant such other and further relief as is just and proper.

Dated: ~~Nassau~~ Kings County, New York,
June ~~20~~ 21, 2016



Richard A. Brummel
Appellant-Defendant *pro se*
15 Laurel Lane
East Hills, New York 11577
Tel. (516) 238-1646

Sworn before me this 21 day of
June, 2016



NOTARY PUBLIC

KRISTEN BARCELLONA
Notary Public, State of New York
No. 01BA6183514
Qualified in Nassau County
Commission Expires 03/17/2020

Exhibits

Please Note: All pleadings are without their own exhibits, except in one case, noted below.

Exhibit 1 Letter to Sup. Ct. of April 7 regarding proposed hearing on 'permission to file'

Exhibit 2 Sup. Ct. Decision and Order, preliminary injunction, Plaintiff Beechwood POB

Exhibit 3 Plaintiff Beechwood POB LLC Affidavit in Support of motion for preliminary injunction

Exhibit 4 Brummel Affidavit in Opposition to Plaintiff Beechwood POB LLC motion for preliminary injunction

Exhibit 5 Sup. Ct., Decision and Order, underlying Article 78 special proceeding

Exhibit 6 Final (approved) Site Plan of May 12, 2015

Exhibit 7 Brummel Affidavit in Support of appellate motion I to appeal and intervene (January 15)

Exhibit 8 Brummel Affidavit in Support of motion to intervene, and memorandum of law (January 7)

Exhibit 9 Brummel Affidavit in Support of motion to amend motion to intervene (January 14)

Exhibit 10 'Unsigned' Sup. Ct. Order to Show Cause of January 7 (sic) (Brummel)

Exhibit 11 'Unsigned' Sup. Ct. Order to Show Cause of January 14 (sic) (Brummel)

Exhibit 12 'Unsigned' Second Dept. Order to Show Cause of January 15 (Brummel)

Exhibit 13 Brummel Affidavit in Support of appellate motion II to reargue (January 25)

Exhibit 14 'Unsigned' Second Dept. Order to Show Cause of January 25 (Brummel)

Exhibit 15 Grant (Sylvester) Affirmation in Support of motion to intervene (January 13) including exhibits *except* 'Article 78 Petition', *see* Exhibit 46, below.

Exhibit 16 'Unsigned' Sup. Ct. Order to Show Cause of January 13 (sic) (Grant [Sylvester])

Exhibit 17 Grant (Sylvester) Affidavit in Support of appellate motion I to appeal and intervene (January 15)

Exhibit 18 'Unsigned' Second Dep't Order to Show Cause of January 15 (Grant [Sylvester])

Exhibit 19 Grant (Sylvester) Affirmation in Support of appellate motion to intervene II (February 19)

Exhibit 20 Settled judgement in underlying Article 78 special proceeding

Exhibit 21 Second Dep't Decision and Order, Docket No. 2016-00744 (Grant [Sylvester] Motion of February 19)

Exhibit 22 'Unsigned' Second Dep't, order to show cause, January 25, 2016 (Brummel)

Exhibit 23 Second Dep't, Decision and Order, Intervenor Motion I, No. 2016-00540 (Brummel appeal of Sup. Ct. of Jan 7)

Exhibit 24 Second Dep't Decision and Order, Intervenor Motion II, No. 2016-00544 (Grant [Sylvester] appeal of Sup. Ct. of Jan 13)

Exhibit 25 Second Dep't Decision and Order, Intervenor Motion III, No. 2016-00742 (Brummel appeal of Sup. Ct. of January 14)

Exhibit 26 Sup. Ct. Decision and Order, preliminary injunction, Respondent Town of Oyster Bay, April 15, 2016

Exhibit 27 Email from Nassau County Clerk's Office.

Exhibit 28 Stamped receipt County Clerk of filing papers referenced in Exhibit 4

Exhibit 29 Second Dep't Decision and Order to dismiss notice of appeal, No. 2016-00744

Exhibit 30 Newspaper article on Brummel legal effort, "Plainview-Old Bethpage Herald", January 20, 2016, p. 1.

Exhibit 31 Brummel Memorandum of Law in support of appellate motion to re-argue (January 25)

Exhibit 32 Settlement in underlying Article 78 special proceeding

Exhibit 33 Second Dep't Decision and Order to dismiss notice of appeal, No. 2016-00540

Exhibit 34 Second Dep't Decision and Order to dismiss notice of appeal, No. 2016-00544

Exhibit 35 Second Dep't Decision and Order to dismiss notice of appeal, No. 2016-000742

Exhibit 36 Petitioner Glenn K. Denton, Factual Affidavit of injury in Article 78 special proceeding

Exhibit 37 Petitioner Fay E. Scally, Factual Affidavit of injury in Article 78 special proceeding

Exhibit 38 Proposed-intervenor Pamela A. Sylvester, Factual Affidavit of injury

Exhibit 39 "Country Pointe-Plainview" Draft Environmental Impact Statement ("DEIS") Figure 27A, "Post-Construction Ecological Communities" (emphasis added)

Exhibit 40 Email to Movant from Petitioner Francis P. Scally

Exhibit 41 Notice of Appeal in this matter

Exhibit 42 Photo beginning of land 'clearance' for the underlying Project

Exhibit 43 Email Notice to parties of appellate hearing.

Exhibit 44 Satellite photo of lands at issue

Exhibit 45 Request for Judicial Intervention ("RJI") in this matter of Plaintiff Beechwood POB LLC

Exhibit 46 Beechwood POB LLC memorandum of law in support of motion for preliminary injunction.

Exhibit 47 Article 78 Petition