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

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TOWN OF OYSTER BAY,

Plaintiff-Respondent,

- against -

RICHARD A. BRUMMEL,

Defendant-Appellant.

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Appellate Division Docket No.:
2016-05215
Nassau Supreme Ct. Index No.:
600968 / 2016

DEFENDANT-APPELLANT'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 seeks the lifting of all or part of an injunction which imposes on him , among other things, unreasonable and unjustified 'pre-filing restrictions' and which, in combination with similarly baseless restrictions imposed in a concurrent injunction granted a party allied with Plaintiff[1], serves as the final bulwark erected by an increasingly partisan trial Court designed to forestall any appellate review of its decision regarding a significant environmental matter.

2. Simply put, both injunctions, the other of which has also been challenged[2], were issued unjustly, after a literal handful of reasonable and compelling motions were filed in a logical and customary sequence by Movant and an allied party, as will become clear to this Court as it examines them and the decisions that resulted.

3. All the motions and other relevant papers are appended hereto as exhibits organized by paper type (e.g. injunctions, affidavits, motions, decisions, evidence etc.).

4. In comparison with the case-law of this State describing frivolous practice, the present factual history will be seen to be completely out of place, and the cases cited by the trial Court and the Plaintiff against Movant are thoroughly inapposite.

5. There are also technical defects in the injunction in that it omits an undertaking, imposes upon certain constitutional civil rights, does not genuinely offer a mechanism for obtaining

[1]See Exhibit 2, order, and Exhibit 8, Affidavit in support of motion to vacate injunction granted to Beechwood POB LLC.
[2]Footnote 1.

Court permission to act contrary to its terms, and the Justice issuing it should have stood aside given that the issues he was called upon to judge included his own actions.

6. This matter is now ripe for appellate review, and has been for some time, but for injunctions imposed by the trial Court on behalf of the Plaintiff Town of Oyster Bay, and on behalf of the developer itself[3]. This injunction notwithstanding, time and circumstances have cured the various stated technical issues which caused the Second Department to dismiss *sua sponte* several related notices of appeal, and to return unsigned motions they related to: to wit, the lack of an appealable paper and the absence of appealability as of right[4].

7. Movant does not lightly impugn the conduct of a Court of this State. However in determining that the trial Court abused its discretion in issuing the preliminary injunctions, such details are material.

8. Movant's assertion is supported by factual evidence -- largely unlikely coincidences and timelines -- in addition to circumstantial evidence furnished by the unjustified preliminary injunction appealed hereby, and the repeated denials of justified motions to intervene filed under Herculean efforts in the early weeks of this year by both Movant and a direct neighbor of the development project.

9. Therefore Movant respectfully requests this Court vacate the preliminary injunction, or modify it such that it imposes no further impediment to Movant's seeking relief himself in the underlying matter -- by intervention and appeal-- or in assisting others in doing so, as he has done in the past, or in undertaking similar related actions regarding issues that arise from the underlying matter, such as protecting fifteen acres of land 'deeded' to Plaintiff by the co-

[3]Exhibit 2.
[4]Authority exists for the appellate courts to permit intervention on its own authority, obviating the need to appeal the denial of intervention by the trial Court.

Respondent developer purportedly for preservation but whose fate in in dispute[5].

Facts

10. The following factual discussion is intended to provide a comprehensive understanding of the motion practice and its full context, content and logic, which constitute the facts and circumstances upon which the preliminary injunction at issue can be properly understood, judged -- and determined to be improper, as Movant alleges.

The Injunctions

11. The preliminary injunction at issue grew out of the efforts by Movant and an allied party in the early weeks of 2016, to ensure that an appeal would be taken from an adverse trial Court judgement in an Article 78 special proceeding which had challenged a large real estate development project, and in which matter the original group of Petitioners, who were non-attorney *pro se* litigants, gave up their rights to appeal in exchange for very modest consideration.

12. The Petitioners agreed in secrecy to settle -- as the trial Court had urged but as they rejected in public --- and did so with no prior consultation with Movant, who had organized their effort, nor upon information and belief with anyone in the community, who had supported their effort.

13. The preliminary injunction at issue was granted on April 15, 2016 on behalf of Plaintiff, simultaneously with the granting by the same trial Court of a corresponding preliminary

[5]The fate of the 'Town-deeded' lands was a matter addressed in the underlying Article 78 special proceeding but may require an additional legal filing. See Exhibit 34, ¶¶36-45.

injunction on behalf of another party, developer Beechwood POB LLC (hereinafter "Beechwood") -- which along with Plaintiff had been one of three victorious Respondents in the underlying Article 78 special proceeding[6].

14. Although the sanctions in the injunction address, among other things, any further litigation in the special proceeding, the two injunctions were issued as part of two separate 'actions' in tort brought in the present case against Movant alone, and in a separate case initiated by Beechwood against Movant *and* the then-attorney for the allied intervenor,

15. Both preliminary injunctions were based on allegations that the persistent efforts of Movant -- and in the other case of the attorney for the allied intervenor as well -- to ensure the appeal, by Movant's submitting, and by assisting the allied intervenor in separately submitting, a modest sequence of motions to intervene and appeal in that locally-significant[7] special proceeding, amounted to 'frivolous action' under the Rules of the Chief Administrator of the Courts, 22 NYCRR 130.1-1.

16. The preliminary injunctions were granted by a Decision and Order on April 15th, which followed by almost two (2) months the two temporary restraining orders issued by the trial Court on the same facts to the same parties on February 19th.

17. The trial Court issued its orders of February 19th which in the case of the Beechwood injunction categorically prohibited any further filings for virtually any reason related the development at issue (Exhibit 10), and in the case of the injunction on behalf of the Town of

[6]Beechwood was granted the injunction in the matter "Beechwood POB LLC v. Richard A. Brummel and Ghenya B. Grant,", Nassau Supreme Court Index No. 601000/2016; that matter is also before this Court on Movant's appeal, Docket No. 2016-05954, filed by order to show cause on June 21, 2016. The remaining underlying Respondent , Plainview Properties SPE LLC did not sue Movant or seek injunctive relief, having upon information and belief transferred its ownership interests to Beechwood earlier this year.

[7]The development of the lands in question had been a matter of great public controversy for a period of at least ten years, and the current project at issue was the subject of considerable contention in the community (Exhibit 48, news article).

Oyster Bay categorically prohibited any filings related to the special proceeding itself (Exhibit 10).

18. The Court refused to entertain any applications for approval of filings during the pendency of the temporary restraining order issued on February 19th, although Movant requested permission to appear for that purpose on April 6th (Exhibit 33).

19. Inasmuch as the actions of Movant must be judged[8] in context of the underlying factual and legal situation of the special proceeding, as well as the nature of motions to intervene and appeal, which were necessarily based on that underlying situation, this motion will recount the relevant facts of the special proceeding, the motions, and the appeal being sought.

The Underlying Article 78 Special Proceeding

20. On June 10, 2015, five non-attorney residents of Old Bethpage, N.Y., constituting three households, filed *pro se* an Article 78 Petition (Exhibit 34) which sought to invalidate, based on several alleged defects, the environmental review -- and zoning actions based thereon -- 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").

21. Movant had identified, organized and assisted the Petitioners. They included a retired New York City police officer, his wife a nurse, a retired Con Edison engineer, his wife a baker, and an office manager who had grown up over fifty years earlier in the house affected

[8]The questions determining whether Movant's actions were sanctionable were, of necessity, whether the motions had a reasonable basis in law, were deliberately vexatious and lacking in lawful purpose, or showed a recalcitrance given settled decisions (22 NYCRR 130-1.1).

by the development, where she still lived.

22. The lawsuit was partially funded by other neighbors as well, who supported their goal of challenging the Project, and the general public was involved thorough emails, Facebook, newspaper interviews, and one public meeting at a local library.

23. The Project, which was to be built across a two-lane road from the Petitioners' homes, would encompass a roughly one hundred and forty-three (143) acre parcel of formerly county-owned property, on which were located several clusters of buildings, athletic fields and about seventy (70) acres of woods, in the community known as Plainview / Old Bethpage.

24. As approved, the Project would result in the destruction of about fifty acres or more of woods and about ten acres of heavily-wooded turn-of-the-century 'tuberculosis hospital' grounds to make way for new stores, housing, and new (replacement) athletic fields.

25. 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 34, Article 78 Petition, pp. 8-9; also Exhibits a30a and a31a, Affidavits attesting to 'injury' by two of the Petitioners).

26. 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 34, pp. 12 *ff.*);

(2) It omitted key information about wildlife on the site (Exhibit 34, pp. 18 *ff.*);

(3) It failed to properly document and analyze the fates of forested, 'habitat' areas on the property (Exhibit 34, 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 34, pp. 37 *ff.*), among other issues.

27. After substantial submission of pleadings, affidavits, exhibits, and memoranda of law by the five residents -- non-lawyers who acted with extensive assistance from Movant, who is also a non-lawyer -- and responses from the three separate municipal and commercial Respondents[9], and after three or four non-substantive appearances before the trial Court[10], a decision was rendered from the bench on December 2, 2015, and in writing on December 15, 2015, denying Petitioners any relief *(Exhibit 38).

Secret Negotiations Aimed At Preventing An Appeal Occurred Concurrently With Intervenors' Effort To Seek To Intervene And An Appeal

28. During the next weeks, Movant sought by telephone and email communications to assure that the Petitioners would appeal the very flawed decision dismissing the special proceeding. .

29. But unknown to Movant, Petitioners were in talks with the Respondents, including Plaintiff, to undertake a settlement 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 the Petitioners' houses (Exhibit 2, Decision and Order on

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

[10]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.

Beechwood preliminary injunction, p. 4).

30. Movant, who was receiving no commitment from the Petitioners to appeal, and in one case was informed of a decision by two parties not to do so (Exhibit 41, Email from one Petitioner-household), began organizing concerned citizens as intervenors for the purpose of appealing the Decision and Order.

31. During the several weeks after Movant resolved to intervene, from early January to late February 2016, movant and the one allied intervenor who decided to go forward between them filed a total of three motions with the trial Court and four with the appellate division, of which one was withdrawn., leaving a total of three motions placed before each Court.

32. Of the motions filed, all but one were filed by orders to show cause which were simply returned unsigned by the trial Court and the Second Department, *infra.*

33. The trial Court by its own account remained significantly involved in the 'push' to settle the matter, and thereby arguably to foreclose any appeal of the Court's decision[11], even after it issued its Decision and Order (Exhibit 2, p. 4). Significantly, in the same period, the Court refused to sign three orders to show cause filed by Movant and the allied intervenor, who both wished to intervene for the purpose of an appeal.

34. 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

[11]The issue of whether a 'settlement' precludes intervention and appeal is central to the issue of whether Movant's actions have been frivolous. The question -- which must be answered in the negative, i.e. the law clearly permits intervention after a settlement -- will be addressed *infra.* The trial Court and the adverse parties have argued, incorrectly, that the settlement rendered the matter 'moot'.

> 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 Beechwood preliminary injunction, pp. 3-4 (emphasis added)

35. Notably, the Court states in its Decision and Order that it was aware a condition of the settlement was that no appeal be taken (Exhibit 2, p. 4), a condition that would 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[12].

36. From the time of the Court's decision on December 2, 2015 until January 15, 2016, the settlement talks were conducted in secrecy, and their existence was not publicly disclosed until the settlement was finalized, upon information and belief. The reason for the secrecy has never been disclosed, upon information and belief.

37. The Settlement only became public when Plaintiff and its co-Respondent Beechwood announced the existence of a finalized "Stipulation of Settlement" when they met in the attorney's room of this Court on January 15th to argue the appeal filed by Movant and the attorney challenging the trial Court's refusal to grant intervenor status.

38. The effort to intervene was undertaken with unquestionable haste and urgency.

39. During the initial weeks after the trial Court decision was announced, 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 16, ¶7, e.g.)[13].

[12]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.
[13]Movant was unable to learn from the Petitioners when in fact they had been served, however.

40. Thus the perceived urgency of the deadline led to accelerated and intensive efforts in the weeks after the Decision and Order was issued both to find allied intervenors and to obtain leave to intervene and appeal[14].

41. Movant and the allied counsel later identified legal authority establishing that the thirty-day period should 'restart' upon a grant of intervenor status[15].

42. However in an example of the adage 'fate favors the swift', the accelerated efforts to intervene resulted in the applications to intervene and appeal being filed in advance of the 'settlement', *infra*, even though its progress and existence were completely unknown to Movant and, upon information and belief, to the allied intervenor or her attorney[16].Movant's Motion To Intervene

43. Thus on January 7, 2016, as the thirty-day clock appeared to be running short, Movant filed with the trial Court a motion to intervene himself, hereinafter "Brummel Motion I" (Exhibit 12**, A**ffidavit in support, and Exhibit 13, Memorandum of Law in support), for the purpose of appealing the Decision and Order.

44. The motion argued:

(1) Movant used and enjoyed the site repeatedly[17] and would be injured by its destruction as planned by the approved development (Exhibit 12, Affidavit in support, ¶¶9-27);

(2) The Petitioners were not moving to appeal the adverse trial Court decision, and were therefore failing to protect Movant's rights (*id.,* ¶¶28-33);

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[14]It later also 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.

[15]Se: 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 21, ¶207, ¶209)

[16]The timing is relevant under one reading of this Court's ruling in Breslin XXX, which governs the timeliness of intervention under rules of the CPLR applying to 'actions', and relied on by Plaintiff and its ally Beechwood,*infra.*

[17]Use and enjoyment are the test of standing in SEQRA matters: see Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297, (2009) at 301.

(3) Such an appeal was meritorious (*id.* ¶¶34-37);

(4) The law supported intervention in such circumstances (*id.* ¶¶39-42).

45. In a memorandum of law (Exhibit 13) Movant:

(1) Buttressed the arguments for standing based on use, enjoyment, and advocacy (*id.*, pp. 2-3);

(2) Addressed the law regarding intervention (*id.*, pp. 3-4); and

(3) Discussed the requirement of a 'pleading' in a motion to intervene as provided by CPLR Section 1014 (*id.*, pp. 4).

46. Despite its holding no hearing, nor receiving any opposition, upon information and belief, from the parties present, including Plaintiff, the trial Court nevertheless returned unsigned the order to show cause by which Movant's motion to intervene was filed.

47. At the bottom of the order to show cause was a handwritten 'explanation', signed by the Hon. Justice George R. Peck, stating that Movant lacked "standing" and that the underlying matter was already decided: "Refuse to sign. Insufficient basis for standing and the matter has already been adjudicated and a decision has been rendered George Peck JSC" (Exhibit 22, p. 2).

48. Behind the scenes Movant's application evidently set in motion a hectic, accelerated, but still secret effort by the original parties in the special proceeding, and the trial Court, to formally conclude -- 'with prejudice'[18] -- the 'settlement' that was agreed on a month earlier, on December 7th[19]. Evidently until this point the parties had pursued a leisurely pace of negotiations because no injunction was in place and the Petition had been dismissed.

49. Thus, four business days after Movant appeared on January 7th, the settlement -- which that had been 'agreed upon' on December 7th -- was being signed by eleven persons, on

[18] *id.*, p. 4, middle.
[19] Exhibit 2, Decision and Order, Beechwood POB LLC preliminary injunction, p. 4, top.

January 13th and 14th. Thus concluded, the settlement would be so-ordered and filed with the County Clerk a day later, early on the morning of January 15th.

Movant's Amended Motion To Intervene

50. On January 14th[20], knowing none of the behind-the-scenes developments that would lead to the so-ordered -- and filed -- "Stipulation of Settlement" the next day, Movant filed an amended motion with the trial Court, "Brummel Motion II" (Exhibit 14**)**, seeking leave to amend the earlier January 7th motion to include a pleading as required by CPLR Section 1014 in a motion to intervene.

51. Movant repeated the bases for intervention raised in the prior motion, and added an argument for permitting him to use the original Petition as his pleading pending the filing of an amended Petition due to the exigencies of time (Exhibit 14, ¶¶43-48).

52. The amended Affidavit was accompanied by an Affidavit in support of the amending of the prior motion, citing the provisions of CPLR Section 3025(b) that permit amendment of papers (Exhibit 15, ¶¶2-5).

53. The trial Court again returned unsigned the order to show cause by which the motion was filed (Exhibit 11)[21], and the order again carried an 'explanation' in this case stating only that the Court would not sign because matter had been decisively "adjudicated"[22].

54. Again, the trial Court held no hearing on the motion, nor did it receive any opposition

[20]Though the Court wrote a notation on the bottom of the order to show cause in this matter, *infra*, rendering the date as "January 16" -- a Saturday -- the correct date of the motion and the order to show cause was January 14th, the day before Movant and the allied intervenor appeared at the Second Department.

[21]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.

[22]The notation said: "January 16, 2016 [sic] Refuse to sign Matter has already been adjudicated between the parties-in-chief George Peck JSC" (Exhibit 18, p. 2).

from the adverse parties, to Movant's knowledge, despite the fact that some or all of the Respondents, including Plaintiff, were present, their having been 'noticed' by Movant.

Movant's Appeal

55. In the following eleven days, Movant appealed by filing with this Court an appellate motion to intervene, and a motion to re-argue, *infra.* Additionally, the allied intervenor appealed, filing two motions with this Court, with Movant's assistance, on January 15th and February 19th[23].

56. On January 15th, Movant filed in this Court "Brummel Appellate Motion I" (Exhibit 16), by order to show cause, to appeal the trial Court's 'constructive denials' of Movant's motions to intervene and appeal[24].

57. The allied intervenor at the same time appealed the denial of her motion to intervene, and Movant and the allied intervenor's attorney appeared together at the Second Department.

58. In "Brummel Appellate Motion I", Movant described:

(1) His extensive 'use and enjoyment' of the lands at issue, and his deep involvement in the SEQRA process related to them, and in the effort to challenge the Plaintiff's environmental and zoning decisions with respect to the lands (Exhibit 16, ¶¶9-29);

(2) The urgency brought on by the inexplicable failure of the Petitioners to challenge the dismissal of their Article 78 special proceeding (*id.* ¶¶30-35);

(3) The merits of an appeal (*id.* ¶¶36-40);

(4) The law regarding intervention (*id.* ¶¶41-44); and

(5) The pleading and amended motion to the trial Court (*id.* ¶¶45-54).

[23]The reasons for the appellate denials were procedural not substantive, and were without 'prejudice', *infra*.
[24]The exhibit is unsigned -- being Movant's computer-copy -- but is identical to the copy signed and filed, and in the Court's files. Furthermore, it is incorrectly dated January 7th instead of the correct date it was signed and filed, January 15th.

59. The motion was accompanied by five exhibits, including the same memorandum of law filed earlier with the trial Court (Exhibit 13).

60. This Court returned the order to show cause unsigned with no explanation (Exhibit 25).

61. The motion was supplied to the trial Court in the present matter as an Exhibit to Movant's Affidavit in opposition to the preliminary injunction (Exhibit 7), and its contents were discussed in the Affidavit (*id.*, ¶¶28-32).

Determination of Movant's Appeal

62. At the time the motion was heard (January 15th), it appeared this Court's reserve judge declined to sign the order to show cause because of the surprise assertion of the Respondents present[25] that the secret "Stipulation of Settlement" -- publicly revealed then for the first time -- had the effect of precluding any further action in the matter, by 'nullifying' the special proceeding, with prejudice. The argument seemed to convince the Deputy Clerk conducting the conference[26].

63. Later, this Court disposed of Movant's and the allied intervenor's appeals of the trial Court rulings by dismissing the notices of appeal related to them because (1) 'leave to appeal' was not granted, and (2) the 'decision' sought to be appealed was not an 'appealable paper' (Exhibits a23a, a24a, a25a, a26a, Second Department Decision and Orders).

64. This Court evidently deferred to the discretion of the trial Court, whereby a 'decision' on a motion in an Article 78 special proceeding is not appealable as of right (CPLR Section

[25]The developer Beechwood POB LLC accompanied the Plaintiff Town of Oyster Bay as the only Respondents present at the January 15th conference.

[26]Movant and the attorney for the allied intervenor later located and documented extensive authority that the settlement did not in fact foreclose intervention or appeal, *infra.*

5701(b)(1)).

65. Unfortunately, the involvement of the trial Court in promoting the secret settlement at the time of its exercise of discretion in denying the motions to intervene was not clearly part of the record before this Court.

66. At the conference on January 15th, Movant and the attorney for the allied intervenor, Ghenya B. Grant, Esq., disputed that the Settlement would automatically preclude intervention, a position (that of Movant and the allied attorney) found to be fully supported by subsequent legal research[27]. However, the surprise character of the Settlement and related claims about the law left the two movants substantially prejudiced and unprepared to fully respond at the time.

Movant's Appellate Motion To Re-Argue

67. Movant therefore filed a motion to re-argue on January 25th. The attorney for the allied intervenor, Ms. Grant, being was otherwise occupied, pursued a re-application at a later date, *infra*.

68. The motion to re-argue, "Brummel Appellate Motion II", assigned Docket Nos. 2016-00540, 2016-00742, and 2016-00744, (Exhibit 17), addressed the bases for re-argument, and a defended the timeliness of Movant's intervention to appeal even after a settlement. The motion was accompanied by a memorandum of law (Exhibit 18), and comprehensive exhibits (Exhibit 17, p. 22).

[27]Movants have shown that the most stringent reading of the "timeliness" restriction on intervention, stated by this Court in Breslin XXX, did not apply to the circumstances of the case (*infra*) because the movants' motions to intervene pre-dated the Settlement; and because the movants exercised a prompt good-faith alacrity in intervening -- in contrast to the Breslin circumstances; and because the Breslin rule governed 'actions' whereas the present case was a special proceeding governed by more 'liberal;' standards of intervention, *infra. See* Exhibit 21, Grant Affirmation, ¶¶79-120; Exhibit 4, Brummel Affidavit in Opposition to preliminary injunction, ¶¶66-72.

69. The motion addressed:

(1) The overall case and the reasons for the re-argument (Exhibit 17 ¶¶1-13);

(2) The nature of the motion-practice before the trial and appellate Courts that gave rise to the motion (*id.* ¶¶14-23);

(3) The issues to be re-argued, specifically relating to the alleged 'mootness' of the underlying case after the settlement (*id.* ¶¶24-44);

(4) The movant's standing to intervene (*id.* ¶¶45-69);

(5) The merits of an appeal and the Petitioners' failure to protect Movant's interests by failing to undertake such an appeal (*id.* ¶¶70-76);

(6) The law regarding re-argument, intervention, and 'relation-back' for purposes of complying with statute of limitations (*id.* ¶¶77-84);

(7) The absence of 'mootness' from underlying matter, referring to arguments contained in the memorandum of law accompanying the motion (*id.* ¶¶85-87);

(8) The reasons justifying reversal of the trial Court's denial of the application for intervention (*id.* ¶¶88-92);

(9) The basis for this Court on its own authority to grant intervenor status to appeal and to accept the notice of appeal as filed *nunc pro tunc* upon the grant of intervenor status (*id.* ¶¶93-99); and

(10) The relief sought (*id.* ¶¶100-101).

70. The motion was accompanied by twelve exhibits, including the underlying motions and decisions being appealed, the Settlement, the original Article 78 petition, evidence of Movant's activism regarding the Project, and illustrations of the lands at issue (*id.*, p. 22).

71. The memorandum of law that accompanied the motion (Exhibit 18) thoroughly addressed the issues that:

(1) the matter was not 'moot but was permitted by well-established law to be intervened in even after settlement (*id.*, pp. 4-6);

(2) Movant was sufficient "aggrieved" to be granted *nunc pro tunc* intervention and appeal retroactive to the prior submission of a notice of appeal (*id.*, pp. 6-9; pp.

15-17);

(3) the 'relation-back' rule should apply to Movant's claims (*id.*, pp. 10-14); and

(4) Movant enjoyed environmental 'standing' to sue, and the trial Court misapplied standing 'tests' in the underlying matter (*id.*, pp. 13-15)

72. The trial Court in the present matter was furnished the appellate motion to re-argue and the accompanying memorandum of law, which were appended as exhibits to Movant's Affidavit opposition to the preliminary injunction (Exhibit 7, p. 36).

73. The motion was also thoroughly discussed in Movant's Affidavit, as were all the other motions filed by Movant and the allied intervenor whom he worked with (*id.*, ¶¶37-41).

74. This Court returned unsigned the order to show cause for re-argument (Exhibit 27)[28]. In the Decision and Orders issued by this Court with respect to the assigned docket numbers (Docket Nos. 2016-00540, 2016-00742, and 2016-00744) this Court determined only that leave to appeal would not be given (Exhibits a23a and a25a) and the paper sought to be appealed -- the Decision and Order of December 15, 2015 -- was not appealable (Exhibit 31).

75. Thereupon, having twice been rejected by the Second Department, and with the clock running, Movant re-focused attention on the allied intervenor.

Neighbor's Motion To Intervene

76. In a parallel action organized and assisted by Movant, another decades-long resident of the area at issue, who was deeply concerned about the impacts of the development on her home and recreation, and informed by Movant of the Petitioners' evident failure to appeal,

[28]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.

volunteered to get involved sought to intervene and appeal.

77. Like the original Petitioners, the allied intervenor is a direct neighbor and decades-long user of the lands approved for the Project[29]. She was represented by counsel, as well as assisted by Movant.

78. On January 13th the neighbor-intervenor's counsel, Ms. Grant, filed with the trial Court a motion to intervene in order to appeal the Decision and Order (Exhibit 19, Affirmation in Support, with exhibits and new 'pleading'), "Grant/Sylvester Motion I".

79. The motion described:

(1) The failure of the Petitioners to appeal (*id.* ¶9; ¶27);

(2) The applicant's extensive basis for standing, based on proximity, view, and usage of the lands at issue (*id.* ¶¶10 *ff.*);

(3) The laws governing intervention (*id.* ¶¶33 *ff.*);

(4) The applicability of the 'relation-back' rule (*id.* ¶39).

80. Though it was thus compellingly argued, accompanied by extensive substantive exhibits and a thorough new pleading (*id.* ¶¶40 *ff.*), the trial Court declined to sign the neighbor-intervenor's order to show cause.

The Neighbor's Motion Was Ruled "Not Properly Brought By Order To Show Cause" As The Settlement Was Beginning To Be Signed In Secret

81. However, the returned order carried a puzzling handwritten 'explanation', apparently initialed by the Hon. Justice George R. Peck, stating that the 'order to show cause' was not the correct 'vehicle' for such a motion: "Jan 13 Refuse to sign Matter with regard to this petitioner is not properly brought by order to show cause. GRP JSC" (Exhibit 24, p. 2).

[29]Exhibit 14, "Grant Sylvester Motion I", ¶¶5-6; ¶¶10-26.

82. As with the two orders to show cause brought by Movant, the trial Court held no hearing, and upon information and belief did not receive any opposition to the motion, despite the fact that some or all of the Respondents were present, including the Plaintiff in the present matter.

83. Furthermore, as it had done with Movant, the Court returned the unsigned orders with little delay.

84. But unlike the notations accompanying Movant's motion and amended motion, the trial Court did not reject the neighbor-intervenor's 'standing' -- which the Court had already done for Movant and the original Petitioners[30] -- nor did it assert the the 'finality' of the Decision and Order[31]. Instead, by its hand-written 'explanation' the Court implicitly 'invited' the neighbor-intervenor to re-file the motion by 'motion on notice' or some other 'vehicle', such as an Article 78 petition.

[30]See Decision and Order on Article 78 special proceeding, Exhibit 38, pp. 11-12.
[31]See Exhibit 22, Exhibit 23, Justice Peck's other returned orders to show cause with notations (regarding the applications of Movant).

85. However as the trial Court seemed to be aware[32], such a course would *arguendo* have been futile, at least following the trial Court's legal understanding that a settlement precluded intervention[33], because on that same day, January 13th, the original parties were rushing to complete the "Stipulation of Settlement", of which the trial Court was evidently the proud 'midwife'[34], which the Court would 'so-order' and have filed two days later, on a clearly 'expedited' schedule[35].

Neighbor Appeals Denial

86. Fortuitously still believing that the thirty-day statute of limitations clock was running on the intervenors' notices of appeal[36], upon information and belief, the allied intervenor did not pause and attempt to re-file the motion, as 'suggested', but instead joined Movant at the appellate division seeking intervenor status by appellate order, in order to file a timely notice of appeal.

87. Thus on January 15th, the neighbor-intervenor's attorney, Ms. Grant, appeared alongside

[32]The Court has implied, and logic suggests the Court was apprised of the efforts to implement its own suggestion to settle, see Exhibit 2a, p. 4: The settlement was in process, and the matter would thereby purportedly be 'discontinued'.

[33]Exhibit 2a, p. 4: Adopting logic asserted by Plaintiff and its allied co-Respondent in the underlying matter, the Court incorrectly ruled that the settlement puts the Article 78 special proceeding off limits to intervention or appeal, Exhibit 2, Decision and Order on preliminary injunction , p. 2, ¶¶5-6. Movant and the neighbor-intervenor have rebutted this misreading of the law, *infra.,* citing among other authorities Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998), as well as this Court's decision in Breslin Realty Corp. v Shaw 91 A.D.3d 804 (Second Dep't, 2012), given that both intervenors filed their motions before the settlement was concluded, among several other reasons.

[34]See Exhibit 2, Decision and Order granting Beechwood POB LLC preliminary injunction, pp. 3-4.

[35]The Settlement was so-ordered, and filed with the County Clerk at 10:27 AM the morning after all eleven signatories had signed it on behalf of the eight parties, Exhibit 40, *see* County Clerk 'transmittal' sheet, final page of the exhibit.

[36]It later became clear to Movant and the counsel for the allied intervenor that authority existed for the proposition that the thirty-day period to file a notice of appeal by an intervenor began when the intervenor became a party to the case, see 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.), Exhibit 21, Grant/Sylvester Appellate Motion II, ¶207, ¶209.

Movant at this Court to file her own motion, "Grant/Sylvester Appellate Motion I" (Exhibit 20)[37], assigned Docket No. 2016-00544, arguing for appellate relief based on:

(1) The neighbor-intervenor's standing and injury, (*id.* ¶¶20 *ff.*);

(2) The timeliness of her intervention based on the 'relation-back rule' , (*id.* ¶49);

(3) The lack of action by the original parties to pursue a meritorious appeal, (*id.* ¶¶37 *ff.*); and

(4) The laws applicable to intervention, (*id.* ¶¶43 *ff.*).

88. The trial Court in the present matter was furnished this appellate motion as well, as an Exhibit in Movant's Affidavit in opposition to the preliminary injunction, and it was discussed in the Affidavit (Exhibit 7, ¶¶54-57).

89. The order to show cause by which the allied intervenor's motion was filed was returned unsigned (Exhibit 26) -- as was Movant's motion at the same time, *supra*.

90. This Court in its Decision and Order of February 4th ruled only that leave to appeal was not granted (Exhibit 29), and also ruled on February 5th that underlying paper was not appealable (Exhibit 31).

[37]The Exhibit of the motion lacks a signature, but it is identical to that filed with this Court and in the Court's possession.

Motion To Re-Argue Withdrawn

91. On February 1st, Ms. Grant filed with this Court, by order to show cause, a motion to re-argue and intervene, but she promptly withdrew the motion when certain restrictions were imposed on her presenting it in the customary appellate conference[38].

Neighbor's Motion Re-arguing Appeal And Requesting Intervention

92. On February 19th, Ms. Grant returned to this Court and by 'notice of motion' filed "Grant/Sylvester Appellate Motion II" (Exhibit 21), assigned Docket No. 2016-00744, which was intended to rebut the alleged issue of 'mootness' (*id.* ¶¶79-120) and to request leave to intervene directly from this Court for the purpose of appealing the trial Court Decision and Order in the Article 78 special proceeding (*id.* ¶1).

93. The motion extensively discussed the issues raised in the prior motions, including:

(1) The movant's standing (*id.* ¶¶46 *ff.*);

(2) The laws regarding intervention and 'relation-back' (*id.* ¶¶65 *ff.*, ¶¶121 *ff.*, ¶¶166 *ff.*);

(3) Timeliness and intervention after a settlement (*id.* ¶¶79 *ff.*);

(4) The erroneous doctrine of issue of 'standing' earlier held against movant by the trial Court (*id.* ¶¶138-42.); and

(5) The merit of an appeal (*id.* ¶¶193 *ff.*).

94. The trial Court in the present matter was furnished this appellate motion as well, as an

[38]At the demand of the Plaintiff and its allied co-Respondent Beechwood, the Deputy Clerk advised the attorney and Movant -- who accompanied the attorney -- that they would not be permitted to communicate in any way during the order-to-show-cause conference. Having worked collaboratively on the presentation, the attorney believed that being denied Movant's assistance would handicap the presentation and prejudice her success, and thus withdrew the motion at that time.

Exhibit in Movant's Affidavit in opposition to the preliminary injunction, and it was discussed in the Affidavit (Exhibit 7, ¶¶58-63).

Denial of Intervention

95. The motion was returned unsigned (Exhibit 26, order to show cause). The appellate panel subsequently denied the motion by a highly abbreviated Decision and Order of March 24th, Exhibit 32. That Decision and Order stated no reasoning, but apparently relied on the fact that the paper appealed was not appealable, as determined by this Court in its Decision and Order of February 5, also denominated Docket No. 2016-00744 (Exhibit 32).

96. There is ambiguity in the order however in that it states that the paper is not appealable, and also states that the motion to intervene is denied, with no explanation. It is thus arguable whether the order is a substantive denial.

97. But substantive or not, the order was not issued until well after any other motion was filed[39], and also after the instant action was fully submitted, and thus was immaterial to the preliminary injunction here at issue.

98. Thus was the final motion disposed of by this Court.

99. All told, Movant filed two motions each with the trial Court and the Second Department, and the allied intervenor filed one motion with the trial Court and two with the Second Department (a third having been withdrawn prior to any conference on the order to show cause by which it was filed).

[39]The Decision and Order was issued on March 24, 2016 (Exhibit 32), and the last motion was filed on February 19th. The present action was fully submitted on March 9th (Exhibit 9, temporary restraining order).

Dismissals Of The Notices Of Appeal

100. In early February this Court dismissed the notices of appeal filed by Movant, and the attorney for the allied intervenor, in relation to appeals of the three motions to the trial Court and the underlying Decision and Order of December 15, 2015.

101. In its dismissals of the notices of appeal, *sua sponte*, this Court appeared codify its previously un-stated reasons for refusing to sign the two parties' appellate orders to show cause. Notably, none of the motions were dismissed 'on the merits', and none imposed costs or sanctions.

102. On February 4th, this Court issued three decisions (Exhibit 28, Exhibit 29, Exhibit 30**)** dismissing the notices of appeal related to the trial Court's refusals to sign the orders to show cause to intervene (filed on January 7, January 13, and January 14)[40]. Each decision of February 4th stated the appealed order was not appealable as of right, and leave to appeal had not been granted[41].

103. This Court then issued a Decision and Order on February 5th (Exhibit 31), again *sua sponte*, which stated it withdrew the prior "decision and order" of February 4th (*id.*) and "substituted therefor" a determination that the appeals were dismissed because "no appeal lies from a decision" -- i.e. there was not an appealable paper.

104. Unremarked earlier by the movants, the trial Court Decision and Order of December 15, 2015 -- dismissing the Article 78 special proceeding -- had not been settled[42], as required

[40]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 returned unsigned on January 7, 2016 (not January 6); "Brummel Motion II" was filed and returned unsigned on January 14th (not January 16th, which was a Saturday).

[41]A decision on a motion in a special proceeding is not appealable as of right (CPLR 5701(b)(1)).

[42]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 39) and were not aware of its

by its own language (Exhibit 38, p. 14) and hence was ruled unappealable. (The same misapprehension was committed by the trial Court, which in its subsequent Decision and Order -- on the Beechwood preliminary injunction -- also counted the thirty-day statute of limitations from the date of notice of entry of the unsettled order[43].)

105. Notably, the scheduling of the trial Court and the Respondents, including Plaintiff, precluded an appeal of an 'appealable paper' because the "Settled Judgement" -- the only appealable paper -- while "entered" by the trial Court on February 10th, was only "recorded" by the County Clerk on February 24th (Exhibit 39, Cover sheet), thus occurring after the trial Court issued temporary restraining orders to halt any appeal[44].

106. Thus, in a manner similar to the trial Court's apparent effort to 're-schedule' the motion to intervene by the allied intervenor until a time after the 'settlement' was concluded, the trial Court conveniently made no 'appealable paper' available to the proposed intervenors until after an injunction precluding further action was in place.

107. Thus were the intervenors handicapped in complying with Court requirements by actions largely in control of the Court.

108. 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 27) corresponding to notices of appeal for the Decision and Order of December 15, 2015, and "Brummel Motion I" and "Brummel Motion II", submitted to the trial Court.

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. In fact the settled judgement was not 'filed' by the County Clerk until February 24th.

[43]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...."

[44]The trial Court held its hearing on February 19th, and Movant and the attorney for the allied intervenor were served with the temporary restraining orders within the next several days.

109. Thus was codified the rationale for this Court's declining to sign Brummel Appellate Motion I of January 15 (Exhibit 16), assigned Docket No. 2016-00540, Sylvester Appellate Motion I of January 15 (Exhibit 20), assigned Docket No. 2016-544, and two of the three notices of appeal assigned by Brummel Appellate Motion II of January 25 (Exhibit 17). The rationale for dismissing the remaining notice of appeal was covered by the Decision and Order announced February 5th (Exhibit 32).

110. At the time the instant injunction was initially issued, by temporary restraining order on February 19th, neither Movant nor, upon information and belief the attorney for the allied intervenor, were aware that this Court had on February 5th ruled that the Decision and Order of December 15, 2015 -- determining the underlying Article 78 special proceeding -- was an 'un-appealable paper' (Exhibit 31).

111. Neither Movant nor, upon information and belief, the neighbor-intervenor or her attorney, were aware contemporaneously of any of the determinations of February 4th and 5th this Court made to dismiss the 'notices of appeal' underlying the various motions filed by Movant and the neighbor-intervenor[45] -- which notices were directed at appealing (a) the Decision and Order of December 15, 2015, and (b) the three orders to show cause that the trial Court refused to sign.

112. All the motions to dismiss were made *sua sponte*, and the Decision and Orders were not served on Movant nor, upon information and belief, upon the attorney for the allied intervenor. Movant and the attorney for the allied intervenor were thus not aware of the determinations until they were appended among many other Exhibits to papers filed by

[45]Inasmuch as the orders to show cause filed with this Court were returned unsigned, there were no motions before this Court to rule on, and the notices of appeal were dismissed on *sua sponte* motions.

Beechwood (and possibly Plaintiff) in support of the motion for a preliminary injunction requested at the same time as that of the Plaintiff.

Movant's Challenge To The Injunctions

113. The preliminary injunction granted to the Town of Oyster Bay against Movant is the sole subject of this motion[46].

114. However, the instant injunction was applied for and granted concurrently with a preliminary injunction granted to Beechwood, which was a co-Respondent with Plaintiff in the underlying Article 78 special proceeding[47], and as described, *supra*, filed an action for tort against Movant in parallel with that filed by Plaintiff, and Movant challenged that preliminary injunction previously. Simply put the two Plaintiffs clearly acted in concert and filed their applications separately but simultaneously.

115. By order to show cause filed with this Court on June 21, 2016 (Exhibit 8), Movant sought relief from the Beechwood injunction on the grounds that:

(1) The motions filed and assisted in my Movant were all entirely proper, based on the law and their intent (*id.*, ¶¶68-81; ¶¶94-115, ¶¶131-171, etc.);

(2) The Beechwood injunctions was technically flawed in that it

(i) Omitted an undertaking (*id.*, ¶¶199-203);

(ii) Lacked a provision for Movant to seek Court-permission to file further legal papers (*id.*, ¶¶204-249);

(iii) It improperly abridged Movant's civil rights to speak, associate and organize (*id.*, ¶¶250-266);

[46]Movant chose to appeal the Beechwood POB preliminary injunction separately as it presented many different issues.

[47]The two separate actions have not been consolidated yet but Movant foresees a motion to that effect soon.

(iv) It was improperly broad in that it proscribed even legal action beyond the issues of the underlying Article 78 special proceeding (*id.*, ¶¶250-266);

(v) Improperly considered appellate motions that were not put into evidence by the Plaintiff Beechwood (*id.*, ¶¶267-70); and

(vi) It was intrinsically flawed because Justice Peck was essentially an unnamed party in the actions for frivolous conduct, inasmuch as the merits of his own rulings were centrally material to the matter, and therefore Justice Peck should not have accepted the case under the 'related' designation in the Request for Judicial Intervention because he could not be a neutral arbiter(*id.*, ¶¶271-281)[48].

116. The order to show cause Movant filed to challenge the Beechwood preliminary injunction was signed by this Court on June 21, 2016 (Exhibit 50) with the interim injunctive relief excised, and the matter was set as returnable for June 30th.

117. Although she is also a party to the Beechwood action, the attorney for the allied intervenor has not challenged the preliminary injunction.

Argument

Preliminary Argument

118. It should be readily apparent from the factual history of the case that the motions filed were reasonably argued, legally sound, and properly related to entirely reasonable legal purposes.

[48]Movant has

119. The order granting the present injunction is predicated exclusively on the assertion that the motions were filed recalcitrantly, constituting an 'abuse of judicial process', essentially because (1) Movant has lacked 'standing' all along" and (2) none of the motions succeeded and (3) the decisions made against them -- dismissals of notices of appeal -- were final and dispositive[49].

120. Despite the trial Court's purported finding of "fact" that Movant lacked standing to sue[50], and thus had no reasonable basis at any time to intervene, the actual facts Movant placed in evidence clearly established standing based on Movant's regular and repeated 'use and enjoyment' of the lands at issue, thus satisfying with the test established by the Court of Appeals in Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297, (2009)[51] -- as Movant has repeatedly argued to the trial Court.

121. The entire narrative marshalled against Movant is both exaggerated and grossly oversimplified. In short, there was no recalcitrance, but only diligent and proper legal effort, as fully endorsed by all the case-law on sanctions (see Memorandum of Law).

122. All but one of the 'determinations' taken directly against Movant and the allied intervenor, including the three 'determinations' of the trial Court, were 'refusals to sign'

[49]Exhibit 1, Decision and Order, p. 2. Note that the Court's count of the number of motions and notices of appeal attributed to Movant is unequivocally in error, combining as it does motions filed by Movant with those filed by a completely separate intervenor party represented by counsel, *infra.*

[50]In the order granting the preliminary injunction, the Court states that Movant's supposed lack of standing was is one of its "findings of fact" whereas in fact it is a legal finding, not a factual one (Exhibit 1, pp. 1-2). Indeed the trial Court found over the course of the special proceeding and the two motions for preliminary injunctions that NO party who came before it had 'standing', including Movant and the decades-long direct neighbors of the lands at issue, both the original Petitioners and the allied intervenor; nor did it find standing for those who used the lands regularly, such as Movant and the Petitioners and the allied intervenor. Such findings were both implausible and erroneous.

[51]"We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource."
Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297, (2009), at 301 (where regular users of a park area adjacent to private property were held to enjoy standing to sue over the environmental review of that private property in connection with the impact of its development on the land they use)

orders to show cause. Of the rest, all but one were *sua sponte* dismissals, purely on rectifiable technical grounds, of the notices of appeal filed simply to accompany the orders to show cause contemporaneously[52].

123. The one arguably substantive determination against the allied intervenor -- not Movant -- was an order of this Court[53] dismissing ambiguously and almost in passing a motion for intervention filed on notice. The grounds for that decision on a very thorough and extensive filing by an attorney were un-stated, but arguably the central issue was the inadvertent attempt to appeal a non-appealable paper.

124. But significantly for the present issue, that 'decision' -- which was free of any 'costs' and sanctions -- was issued after all the motions had been filed, and thus could have no bearing on any 'recalcitrance' judged by the trial Court in the present matter.

125. Significantly, the absence of an appealable paper -- the key technical failing identified by the appellate Court, which has since been rectified -- was the direct result of actions of the trial Court and the prevailing parties in the underlying action: notably, the 'appealable paper' -- a "Settled Judgment" -- was not "filed" by the Court until over two months after the trial Court signed the Decision and Order the intervenors were attempting to appeal[54].

126. Of further note, that appealable paper was not filed until some days after the injunctions blocking appeal -- the temporary restraining orders preceding the preliminary injunctions -- were served on Movant and the allied intervenor.

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[52]Among the motions at issue -- as described *infra* -- were simply one motion to intervene which Movant filed with the trial Court, and an amended (corrected) motion thereto; one motion Movant filed with the Second Department, and a motion to re-argue it; one motion to intervene submitted to the trial Court by counsel for an allied intervenor; and two motions submitted by counsel for the allied intervenor to the Second Department. The notices of appeal were one for each such paper, and two for the underlying decision in the Article 78 special proceeding -- one notice of appeal of that decision for each movant.

[53]Exhibit 32.

[54]Exhibit 39.

127. Such a fact cannot be ignored when combined with other evidence of a deliberate program to frustrate appeal. Movant will show a train of circumstances which appear to indicate a calculated effort to stymie intervention and appeal, and which this color this preliminary injunction.

128. With respect to the development project challenged by the underlying matter, substantial irreparable environmental damage has already occurred that Movant, an environmental organizer and user of the lands at issue, strenuously sought to prevent as an intervenor along with the allied intervenor, a direct neighbor of the lands at issue. But despite the damage done as of early July, 2016, some dozens of acres of pristine natural land as well as richly wooded former hospital grounds remain intact, and there remain viable issues to be litigated and appealed, if the injunctions are lifted or substantially modified, as justice demands[55].

129. The trial Court in its order granting the preliminary injunction (Exhibit 1) sets out what appears to be a plausible argument for Plaintiff's alleged aggrievement. It alleges: (1) Movant's effort to contrive a legal action where he personally lacked standing; (2) Movant's nevertheless filing an oddly large number of motions to intervene with the trial Court and the appellate Court; (3) Movant persisting in seeking to intervene even when the matter was terminated with prejudice by a post-decision settlement; (4) the refusal of the two courts to sign any of the orders to show cause and the Second Department's dismissal of all the notices of appeal; and (5) Movant's consequent abuse of the judicial system by such recalcitrant litigation[56].

130. Yet the truth is quite opposite to the Court's recitation. In fact: (1) Movant did not lack

[55]A coordinate appeal of the second injunction is now pending before this Court, *infra.*
[56]Exhibit 1, order granting preliminary injunction.

standing at the time he sought to intervene, but six months earlier he had organized local residents who were direct neighbors of the project, and whose standing was unimpeachable, given the proximity of their homes to the proposed project and their decades-long residency, and their routine use of the lands in question -- which had been public property and remained open after being privatized; (2) The Court was in error that Movant filed all the motions it attributed to him: about half the motions and notices of appeal were filed by an attorney on behalf of an entirely separate allied intervenor; (3) Rather than waiting 'too long' as claimed, Movant and the allied intervenor hastened to file, and filed their motions to intervene prior to the Settlement -- despite its being concluded in secrecy; and furthermore it is settled law that a settlement would not have precluded intervention under the circumstances, as has been clearly documented by the intervenors; (4) Though the two court refused to sign the orders to show cause, and the Second Department dismissed the notices of appeal, in only one case, after the circumstances the trial Court ruled on, did an arguably substantive dismissal of a motion occur[57]; all the other adverse findings were either non-dispositive 'refusals to sign' or dismissals on rectifiable technical issues, such as non-appealability of a paper; (5) Movant was not recalcitrant, having filed only two motions before each Court, and in no case were the adverse determinations of the Courts against his motions in the nature of judicially recognized 'final decisions'[58].

131. Each of these issues was thoroughly addressed for the trial Court in Movant's Affidavit in opposition to the preliminary injunction (Exhibit 7), and should have removed any basis for the issuance of the preliminary injunction challenged here.

[57]As noted *supra* this Court dismissed a motion, but its holding was ambiguous as to its *res judicata* effect (Exhibit 37).

[58]The trial Court appended comments to the orders to show cause it refused to sign which did suggest the motions should not be re-filed, and indeed they were not.

132. The trial Court has shown an egregious predilection for adopting plausible-sounding reasons and bases for decisions which in actuality lacked foundation, as illustrated in the present matter, as well as in (1) The concurrently-issued injunction which includes wildly indefensible provisions and defects[59]; and (2) the underlying special proceeding, dismissed largely on the basis of alleged 'standing' issues, and which the self-same Court's bad-faith acts and injunctions have for months catastrophically prevented Movant from properly challenging himself, or from continuing to assist the allied intervenor in challenging.

133. One reasonable explanation for the trial Court's unjust denial of intervention and the issuance of baseless injunctions is that the trial Court became partisan and defensive in this matter, resolving to end the matter with a 'fig-leaf' of a settlement despite the rights of outside parties with legally cognizable stakes in the matter to intervene and appeal, and to upset the Court's preferred outcome. The factual and circumstantial evidence supports this hypothesis.

134. The injunctions were in fact and in law unjustly issued at a critical point in the efforts to obtain appellate review due to an abuse of discretion, colored by the Court's no-longer-neutral posture in the case, as the factual evidence will show.

135. To make sense of the circuitous motion practice in this matter, it must be understood that intervention became necessary in order to complete the prosecution of the weighty underlying special proceeding, because in January, 2016, the original five Petitioners in a community-spirited Article 78 special proceeding took a 'deal' and left the 'stage' they had occupied as self-portrayed community defenders.

136. The Petitioners had been assembled by Movant, an environmentalist and user of the

[59]See BW action and appeal pending.

instant natural lands, and financed in part by neighbors, for the purpose of undertaking a *pro se* environmental challenge to a massive development project on about 100 acres of verdant land that was opposed by many of its direct neighbors and by others who saw their suburban community being degraded by massive new amounts of traffic and a disastrous loss of natural lands.

137. The Petitioners, however, decided among themselves to capitulate and accept a previously-rejected settlement offer soon after the trial Court announced its shocking adverse decision which among other things inexplicably rejected the Petitioners' standing to sue. The decision, taken after protracted negotiations hidden from the public, came after repeated public urgings to settle by the trial Court, both before and after it rendered its decision.

138. The Petitioners agreed to renounce any appeal of the Court's adverse decision in exchange for a very modest concession by the developer whose terms -- the preservation of some minimal acres of forest facing their homes -- they had rejected only weeks earlier as utterly incommensurate with their objections to the development project.

139. The allied but separate intervenor applicants -- Movant and a resident who is a close neighbor of the Petitioners -- enjoy real and substantial interests in the underlying matter which they wished to protect by prosecuting the case through appellate review. The two movants thus began the effort to intervene and appeal when it became apparent that whether or not the Petitioners planned to appeal, the statute of limitations for filing a notice of appeal might be expiring quickly[60].

140. But the effort to intervene was rebuffed by the trial Court, in a puzzlingly resolute

[60]The urgency of the statute of limitations colored the hectic pace of the motions to intervene, but Movant and the attorney for the allied intervenor later located authority that extended the statute of limitations for intervenors to file their notices of appeal beyond that of the original Petitioners.

manner which did not even entertain opposition before quickly and in one case inexplicably ruling against the movants.

141. The movants then appealed to this Court separately by orders to show cause which were returned unsigned[61], evidently due to (a) non-prejudicial 'technical' issues including the absence of appeal of an 'appealable paper'); and (b) a misplaced deference to the 'discretion' on the trial Court.

142. As the facts show, the true story in this matter is composed of *first*, a deeply flawed decision to exonerate a fundamentally defective -- if voluminous -- environmental review, with dire consequences to extensive natural lands; then, *second*, a trial Court which became 'partisan' in defending its 'preferred' outcome for the case -- a settlement -- leading it to unjustly rebuff legitimate intervenors seeking appellate review; and finally, *third*, entirely unwarranted injunctive relief, including the preliminary injunction at issue[62], designed to ensure the premature end of such efforts to obtain appellate review.

143. While there remain considerable intact woodland and wooded institutional-grounds on the lands at issue as of the filing of this motion, further delay is fraught and compounds the injustice that has persisted for the interim as Movant -- a non-lawyer -- has alone undertaken the daunting task of documenting and arguing to this Court how a distinguished Court of this State abused its discretion, and effectively misled this Court into deferring to its discretion in denying intervention.

144. The time is thus more than ripe to repair this error.

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[61]In each case except one, the courts returned unsigned the orders to show cause by which the motions had been filed. Subsequently this Court dismissed *sua sponte* the notices of appeal upon which the motions were based. In the case of the last motion filed, by the allied intervenor, this Court dismissed the motion for lack of an appealable paper and possibly but not clearly for other unstated reasons (Exhibit 32).

[62]Movant on June 21, 2016, filed an order to show cause with this Court asking relief from the terms of the concurrently-issued injunction, Docket No. 2016-005954.

Immediate Practical Effect Of Lifting The Preliminary Injunction

145. This preliminary injunction and its coordinate member -- granted concurrently to the Article 78 co-Respondent, developer Beechwood -- have for over four months prevented Movant and the allied intervenor from undertaking urgent further legal efforts to obtain appellate review of the trial Court's Decision and Order in the underlying Article 78 special proceeding.

146. As noted, *supra*, this predicament was effectively engineered by the trial Court beginning in January with its unfounded denials of the motions to intervene from Movant and the neighbor-intervenor, evidently in order to facilitate its preferred resolution[63], the Settlement (Exhibit 40) intended to render the underlying Decision and Order beyond appellate review.

147. While the Beechwood injunction specifically enjoins Movant from "assisting" any other party in challenging the Project or any issue arising from it (Exhibit 2, p. 7) -- and has explicitly handicapped the process in that manner, Plaintiff's injunction enjoins Movant from "causing" any other party to so act (Exhibit 1, p. 3) and thus appears arguably functionally identical.

148. Thus the Town of Oyster Bay injunction may cause the same improper mischief as that raised by the direct prohibition on "assisting", and evokes similar constitutional objections to such a broad proscription of Movant's freedom to act in a political sphere, *infra.*.

149. In both cases the present 'remedy' is unwarranted; if it were evident that Movant were deliberately manufacturing frivolous actions by 'straw men' litigants, the issue could be re-

[63]As noted *supra* the trial Court had repeatedly promoted a settlement, e.g. Exhibit 2, Decision and Order regarding Beechwood preliminary injunction, pp. 3-4.

visited, but that caricature by the Plaintiff and its ally Beechwood has not been substantiated, and thus should not be penalized as an unfounded hypothetical.

150. Although the neighbor-intervenor was uniquely situated to intervene, the injunctions and the concomitant resignation of her attorney[64] shook her resolve and deterred her continued involvement. The removal of the injunctions is essential to reviving the valid claims she as a directly-affected neighbor has.

151. The lifting of the injunction would also restore public credibility to the legal undertaking -- shaken as it was by the trial Court's sanctions -- thus restoring public support essential to its further progress.

152. At the present time a considerable amount of forest destruction has occurred (Exhibits 42, 45) on the lands at issue. However there remain significant areas (Exhibits 46) that have not yet been destroyed including approximately fifteen (15) acres of pristine forest that was 'deeded' to the Town of Oyster Bay[65] and will need to be further defended by litigation that the present preliminary injunctions may prohibit[66].

153. As more fully described elsewhere herein, an appeal in the underlying matter would be proper and highly meritorious. Experience has shown Movant's specialized knowledge, experience, 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

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

[65]The fifteen acres figured in the segmentation challenges in the Article 78 Petition and a Supplemental Petition filed specifically addressing issues surrounding the fifteen acres. The trial Court dismissed the claims despite documentary evidence submitted by the Petitioners along with a request for an Article 78 trial of fact (Exhibit 29, Petition, ¶¶39-44; ¶¶51-58).

[66]The terms of the Beechwood preliminary injunction clearly prohibit any further litigation with respect to any part of the Project or decisions related to it; the Town of Oyster Bay injunction is more narrowly drawn, but arguably could be claimed to cover the deeded forests as they were part of the underlying special proceeding.

difficult to 'relate back' under CPLR Section 203(f)[67].

154. Specifically, in order to obtain appellate review, the intervenors may if permitted seek, singly or together, permission of this Court to intervene for the purpose of appealing the Settled Judgment which now furnishes the 'appealable paper' previously lacking[68].

155. 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 uncovered by the movants[69] (Exhibit 39). This Court can then address the substantive issues presented by the motion(s) to intervene, and provide a firm legal determination, on the merits.

The Motions At Issue Were All Reasonable And Proper

156. 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[70], but in fact each[71] of the

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

[68]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...."

[69]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.*

[70]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.

[71]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.

motions filed by Movant and the neighbor-intervenor before that Court and the Second Department Court were entirely proper and not in any way frivolous, taken separately and together.

157. In the order granting a preliminary injunction granted to Beechwood the argument was that Movant was the facilitator of the various motions and thus partially culpable if they were improper.

158. The present order, for Plaintiff Town of Oyster Bay, appears to follow that premise by prohibiting Movant from 'causing' others to file motions (Exhibit 1, order, p. 3). This prohibition can easily be over-stretched to function as the Beechwood injunction explicitly -- and highly improperly -- did, as Movant described in the recent appeal of that order (Exhibit 8, ¶¶253 *ff.*).

159. In the present matter as noted *supra* the Court erroneously attributed all the motions directly to Movant, and did not even acknowledge the presence of another movant and her attorney (Exhibit 1, p. 2).

160. Movant can and will address and defend <u>all</u> the motions filed, although it appears unwarranted, and in excess of the trial Court's authority, particularly with respect to the appellate motions.

161. 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 the Plaintiff did not even submit the appellate motions for the trial Court to judge[72].

162. Movant detailed for the trial Court the legal and factual content of every motion filed by both parties (Exhibit 7), and specifically defended (1) the legal basis for attempting to

[72]Movant supplied the motions -- in full or in part -- for the trial Court to see there was nothing improper in them.

intervene 'even' after a judgement or settlement (Exhibit 7, ¶¶64 *ff.*), as clearly allowed by the law, as well as (2) the urgent need for an appeal (Exhibit 7, ¶¶98 *ff.*), and (3) the legitimate legal standing of both Movant and the neighbor-intervenor to intervene (Exhibit 7, ¶¶82 *ff.*) .

163. 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.

164. 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[73].

165. 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 7), which contains a direct defense of each said motion.

166. 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.

167. 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

[73]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.

initial motions[74]; 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[75].

168. 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 39)[76] -- 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.

169. 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.

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

171. 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.

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[74]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.

[75]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.

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

172. 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.

173. 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.

174. 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.

175. Whether this Court's order of March 24 substantively dismissed the allied intervenor from obtaining appellate leave to intervene, or only did so in the context of the absence of an appealable paper is a question for that party's counsel to evaluate, and to evaluate lawful options to pursue the matter under those circumstances, but free of the impediment of the injunctions imposed by the trial Court in an unjustified manner.

Erroneous Attribution Of All Motions To Movant

176. It is some measure of the trial Court's partisanship or predilection for error that in its order granting the preliminary injunction (Exhibit 1) it omits mention of the allied intervenor, and instead attributes all the motions and the notices of appeal underlying them

to Movant (*id.*, p. 2). That erroneous recitation of such 'facts' oddly contradicts the recitation of the same 'facts', by the same Court, on the same day, in its order granting injunctive relief to the allied Plaintiff (Exhibit 2, pp. 4-5).

177. This mis-attribution of the motions -- the supposedly 'unreasonable' quantity of which is a central argument for sanctions -- may be a consequence of the self-serving and false narrative constructed by Plaintiff, in which rendition all the other parties in the matter are reduced to agents and puppets of Movant, and his supposedly 'shadowy' motives, *infra.*

178. In actuality, Movant is a volunteer environmental activist, largely self-financed, and the other parties in this matter are decades-long residents whose homes directly face the still-substantially verdant lands approved by Plaintiff for development. The residents' affidavits of fact in support of their pleadings, appended here as exhibits[77], attest to their unquestionable stakes in the underlying matter, and to their moral investments in the matter they sought to pursue.

The Trial Court Became Partisan

179. The facts substantiate that the preliminary injunctions were issued by the trial Court as the result of a partisan or improperly 'proprietary' position the Court took with respect to its preferred outcome -- the Settlement -- and its preferred parties, the original Petitioners and Respondents.

180. The relevant dates and times of the motions and the behind-the-scenes actions of the various parties show that just as the intervenors -- Movant and the allied intervenor -- filed their applications with the trial Court, the Plaintiff, and the Plaintiff's co-Respondents in the

[77]Exhibits a31a, a32a, and a33a.

underlying matter appeared to coordinate a 'headlong rush' to conclude the 'Settlement' designed to *preclude* intervention or appeal.

181. As noted earlier, the Settlement was agreed to by December 7, 2015 (Exhibit 2, p. 4), but its meandering course of negotiation suddenly concluded and the Settlement began being signed on January 13, 2016 (Exhibit 40, p. 5), merely four business days after Movant on January 7, 2016, filed with the trial Court his abortive attempt to intervene.

182. Thus at precisely the same time the Settlement designed to preclude appeal was being rushed to completion, the trial Court was inexplicably denying the motions to intervene (and appeal). In the case of the allied intervenor it did so by inexplicably returning an order to show cause unsigned, but with the notation that the motion was "not properly brought by order to show cause"[78].

183. The trial Court and the the parties appear to have delayed the public 'filing' of a signed 'Settled Judgement' -- the necessary 'appealable paper' in the underlying matter -- for a period of two weeks (Exhibit 39, Cover Sheet), until such time as injunctive relief was in place to stymie the proposed intervenors (Exhibits a48a, a49a).

184. By its own account the trial Court appears to have been apprised of the progress of the settlement negotiations (Exhibit 2, pp. 3-4), which it had emphatically encouraged in public (*id.*).

185. The Court would surely have been aware in encouraging a post-decision settlement (Exhibit 2, p. 4) the only thing Petitioners had to offer, and thus a prime condition of any settlement, would be to renounce any appeal. As a corollary, it would have been clear to the Court that permitting intervention-to-appeal, as requested, would have disrupted that 'plan',

[78]Exhibit 24, p. 2.

and it appears the Court therefore prejudicially acted to frustrate appeal, the preliminary injunctions being a component of such a 'forbidden fruit'.

186. As such the Court improperly abridged the rights of the intervenors granted by CPLR Sections 1012(a), 1013, and 7802(d) to intervene to protect their rights when the original partes failed to do so, a right fully endorsed by the Court of Appeals in Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20, a case cited many times by the intervenors after they became aware of the Settlement (e.g. Exhibit 7, ¶68, etc.).

187. While it may have felt its duty was only to the named parties, the trial Court had additional inherent duties and obligations to the larger public affected by the matter, including the proposed intervenors, inasmuch as the 'public' is by definition an arms'-length party to an Article 78 special proceeding.

188. That is, the 'class' of the public that is directly affected by an Article 78 special proceeding, such as Movant and the allied intervenor, have been held to be eligible to intervene in the matter Ferguson v. Barrios-Paoli, 279 AD 2d 396 (First Dep't, 2001), a case cited by the allied intervenor[79], (Exhibit 21, Footnote 2).

189. The Court's partisanship -- essentially its desire to promote and protect the Settlement, among other possible interests -- thus tainted the process, including the granting of the preliminary injunctions that for a critical period guaranteed the efforts to intervene would

[79]""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)"

halt, despite their lack of basis.

190. Additional circumstantial evidence of such 'accommodation' among the Court and the original parties is furnished by the peculiar omission from the Settled Judgement of any mention of the central pillar of the trial Court's Decision and Order: its erroneous holding that because the Petitioners allegedly did not participate in certain administrative hearings, and therefore did not themselves previously present the arguments contained in the Article 78 Petition, they lacked 'standing' to sue on those grounds (Exhibit 33, Decision, p. 11; Exhibit 34, Settled Judgement, pp. 5-6).

191. The trial Court inexplicably so ruled on 'standing' despite a thorough rebuttal of the argument by the Petitioners in their memorandum of law and their reply, an argument repeated in Movants' pleadings (e.g., Exhibit 14, Affirmation in support of motion to intervene, ¶¶22-25). The intervenors cited as had the Petitioners a relatively recent decision of this Court[80], among other unequivocal authority.

192. That determination on standing essentially 'cut the legs out from under' the *pro se* Petitioners, and was arguably an important impetus for them to capitulate and forgo appeal, thus its omission from the Settled Judgement was particularly curious. Arguably its omission also immunized the issue from appeal, despite its centrality to the decision.

193. The totality of the facts suggest the trial Court was not impartial in denying the motions to intervene nor in granting the preliminary injunctions, and as such the clear facts and law disputing the basis for the injunctions should overcome any deference to the trial Court's discretion in the matter.

[80] Matter of Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905

The Court's Partisanship And Pre-judgement Removes Any Utility From The 'Permission-Clause' In The Injunction

194. While the Court in granting the injunction to Plaintiff rectified a defect in the order granted Beechwood, to wit it includes a clause allowing Movant to petition the Court to file further papers or presumably assist others, this clause is useless i the present case given the Court's declared positions.

195. The trial Court has ruled as a matter of "fact" that Movant lacks standing in the underlying case (Exhibit 1, p. 2) and furthermore that Movant is an irresponsible and vexatious litigant (*id.*, p. 2).

196. As such the Court cannot be expected to grant any motions, though they may be made in good faith.

197. The supposed obligation to follow a 'futile' process otherwise procedurally required has been relieved by the Courts as an unnecessary 'fool's errand', for instance in the case Watergate v. Buffalo Sewer, 46 NY 2d 52 (1978) at 57, where it was held that a ratepayer need not appeal a rate when the outcome was fore-ordained.

198. In the present case the 'permission clause' is essentially worthless as long as the trial Court remains in position as the arbiter. For that reason Movant plans to seek the recusal of the trial Court at some near time.

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

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

200. But a distinguishing aspect of this matter is that none of the motions were formally adjudicated on the merits as they were filed, and the specific procedural errors that defeated those before this Court were non-prejudicial, and readily resolvable once identified[81].

201. Of the motions filed by Movant, two were returned unsigned by the trial Court -- one motion and an amended motion -- and two by this Court -- a motion and a motion to re-argue.

202. For the allied intervenor, one order to show cause was returned unsigned by each Court, before the final motion on notice was dismissed -- on ambiguous terms -- well after all the motion practice had ended.

203. 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.

204. The trial Court rejected both orders to show cause with brief 'notations' appended stating on January 7th that (1) Movant lacked standing and (2) the matter was already fully adjudicated and thus immune from intervention or appeal (Exhibit 22). The order returned unsigned on January 14th repeated only the second 'reason' (Exhibit 23).

205. It cannot be reasonably found that such notations constituted proper 'decisions' of the

[81]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.

trial Court with any *res judicata* effect, given their entirely unconventional and summary character. In any event no further motions were filed with the trial Court after those 'determinations', thus Movant did not belabor he point, instead appealing the denials.

206. It may be noted that as a matter of law, as Movant has elaborated above[82], 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, and as stated already it is highly likely the Court -- having emphatically publicly explicitly encouraged such an outcome -- was aware of the process.

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

208. In fact the trial Court has rejected standing for every party related to this case: the original Petitioners Movant and the allied intervenor. This is hardly what the the Court of Appeals had in mind in the recent holding in Matter of Sierra Club v. Village of Painted Post, 26 NY 3d 301 (2015), where it was held that 'standing' should not immunize actions from judicial review (at 311).

209. The trial Court's rejection of the allied neighbor-intervenor's motion to intervene was similarly questionable. The Court stated again via handwritten notation that the order to show cause was not the correct instrument for the movant to attempt to intervene[83]. Under the perceived time urgency as described *supra*, the neighbor-intervenor did not belabor the

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

[83]Exhibit 24**,** p. 2**:** "Refuse to sign/matter with regard/ to this petitioner is/not properly brought/ by order to show cause/ GRP JSC" p. 2.

point and appealed the constructive denial of relief .

210. This Court's orders dismissing the notices of appeal (Exhibit 31, Exhibit 28, Exhibit 29, Exhibit 30) codified the basis 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, and significantly to the issue of 'recalcitrance' were unknown to the movants at the time the new motions were filed, and thus fail to substantiate any 'recalcitrance' by the follow-up motions filed by each movant.

211. As noted, this Court found that the trial Court denials of the motions to intervene were not appealable as of right[84], and the Decision and Order was not an appealable paper[85].

212. As further noted, the circumstances of the Deputy Clerk conference of January 15th strongly suggested -- to Movant and, upon information and belief, to 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 rendered the matter 'moot'.

213. The follow-up motions by Movant on January 25th and the neighbor-intervenor on February 19th were intended to address that issue of alleged 'mootness', which appeared central.

214. Neither Movant nor, upon information and belief, the attorney for the neighbor-intervenor were aware of the February 5th decision that the Decision and Order of December 15, 2015 determining the special proceeding was not an appealable paper prior to the filing of the final motion on February 19th.

215. The February 5th decision was not served on Movant, nor was notice provided

[84]Exhibit 23, Exhibit 24, Exhibit 25 citing CPLR Section 5701(b)(1).
[85]Exhibit 32, under the earlier determination regarding the same Docket Number, 2016-0744, in Exhibit 31.

otherwise, and upon information and belief the same circumstances applied to the attorney for the neighbor-intervenor. Furthermore the motion was raised *sua sponte*, with no prior awareness of Movant or upon information and belief the attorney for the neighbor-intervenor.

216. At noted *supra* this Court's decision of March 24th dismissing the motion of the neighbor-intervenor (Exhibit 32) was arguably the only order that made a substantive finding with respect to any of the motions filed, holding simply: "Motion...for leave to intervene...and for leave to appeal to this Court from a decision of the Supreme Court, Nassau County, dated December 15, 2015...is denied" (*id.*).

217. It may be argued that while the *second* part of the March 24th order denying leave to appeal the unsettled Decision and Order was non-prejudicial -- echoing as it did the Decision and Order of February 5th (Exhibit 31), the *first* part of the order, denying leave to intervene, was a more substantive ruling on the facts and law, that would color the neighbor-intervenor's ability to act going forward.

218. But inasmuch as the entire motion was predicated on the unappealable order of December 15, 2015, it appears to be an open question whether a future motion appealing the Settled Judgement would be precluded by the highly abbreviated Decision and Order of March 24th.

219. In any event the order, substantive though it may be, was the only such substantive and potentially prejudicial order issued with respect to the several motions filed, and it came *after* all the motions had been filed, and indeed *after* the applications for sanctions were fully submitted. Thus it could have no bearing on the decision of the trial Court now at issue, i.e. the order granting the preliminary injunction to the Plaintiff Town of Oyster Bay against

Movant.

220. Thus the provisions of the Chief Judge's rules prohibiting the flouting of established decisions (22 NYCRR 130.1-1) could not properly be applied in this matter, as alleged in the trial Court's Order (Exhibit 1, p. 2), because (a) there were no such final, dispositive, prejudicial decisions to flout; and/or (b) such decisions as there were, were not apparent nor served at the time the successive motions were filed; and/or (c) the decisions -- such as they were -- were simply being properly appealed or re-argued by follow-up motions, not by recalcitrant improper redundant motions on matter already decided.

221. 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"...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."[86]
>
> (Exhibit 7, ¶94)

222. 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. 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.

[86]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 32) when it was 'served' as an exhibit of the Plaintiff's supporting papers inasmuch as the order was made *sua sponte* by this Court. .

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

223. That answering the motions in person five times[87] was undoubtedly time-consuming for Plaintiff (Exhibit 3, ¶¶15 *ff.*) , 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.

224. 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[88].

225. 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 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

[87]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.

[88]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.

review.

226. 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'

227. To reiterate, the underlying Decision and Order was profoundly flawed in that it denied legal 'standing' to the five Petitioners for a reason utterly without foundation in law[89]. Furthermore, the trial Court had before it an overwhelming basis in documentary evidence[90] submitted by the Petitioners to, at minimum, hold an Article 78 "hearing of fact" into the issue of 'segmentation'[91] , as requested by the Petitioners, but it failed to do so and in fact rejected the evidence without a trial[92]. The Petitioners' other arguments had similarly compelling bases.

[89]The Court found the Petitioners had not brought the arguments themselves before the Town Board (Exhibit 38, 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'.

[90]Among other evidence, the Court was given an 'approved Site Plan' (Exhibit 43) 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.

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

[92]Exhibit 38, Decision and Order, pp. 12-13.

228. The Settlement provided very limited relief[93] and largely resulted from the *pro se* Petitioners' fatigue and disaffection from the judicial process; i.e. it was a consequence of attrition, not reason or justice[94]. They had rejected its thin terms emphatically already (Exhibit 2, pp. 3-4).

229. 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[95].

230. 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[96].

231. Movant will here again address a number of the key issues raised in the arguments for and against the preliminary injunction:

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[93]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 35, Exhibit 36.

[94]The Petitioners had rejected the same settlement offer prior to the Decision and Order (Exhibit 2, Justice Peck's Decision and Order, pp. 3-4). Two Petitioners emailed Movant attesting that they were essentially disillusioned and exhausted with the 'process', as several Petitioners had expressed previously (Exhibit 41).

[95]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.

[96]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).

232. (1) The interests and rights of the proposed intervenors did in fact justify intervention under CPLR Rules 1012, 1013, and/or 7802(d);

233.

234. (2) The law permitted the intervention of parties such as Movant and the neighbor-intervenor when they attempted to do so, including even after a Settlement;

235. (3) Both parties made reasonable assertions of standing and timeliness under the 'relation-back rule', CPLR CPLR 203 (f));

236. (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;

237. (5) There is no basis for Plaintiff's assertion that Movant possessed an improper motive in filing or assisting in the filing of said motions.

238. (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.

239. As noted, the motions themselves address these issues as well (Exhibit 12, Exhibit 14, Exhibit 16, Exhibit 17), and Movant's affidavit in opposition to the preliminary injunction also addressed the issues (Exhibit 7). But they will be addressed again in summary fashion for completeness.

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

Both Parties Enjoyed Standing And Could Invoke The 'Relation-Back Rule'

241. 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. Exhibits a8a ¶¶7 *ff.*) and to this Court (e.g. Exhibit 16 ¶¶9 *ff.*)

242. 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 19 ¶¶11 *ff.*).

243. 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 19 ¶¶22-26)[97]. 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[98].

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[97]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 38 pp. 11-12), as well as in Beechwood's affidavit in support of the preliminary injunction (**OLD BW AFF** ¶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 21 ¶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 39).

[98]"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).

244. Despite the rulings of the trial Court which denied standing to every complaining party in the underlying case and in the post-decision proceedings to intervene, the courts are not supposed to create unreasonable hurdles to litigation of important issues -- as this matter clearly was -- by invoking unreasonable tests of standing.

245. The Court of Appeals has once again so held 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)

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

Intervention Was Permitted When Movant And The Neighbor-Intervenor Filed

247. As argued in the various motions filed with this Court since the settlement was disclosed, the Courts have held that intervention may be granted after a settlement, as occurred in this case[99]:

248. The neighbor-intervenor in Exhibit 21 cited the Court of Appeals holding that an

[99]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.

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) (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 21 ¶¶98-103, *et seq.*)

249. 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)"
>
> Exhibit 18, Movant's Memorandum of Law, *id.*, pp. 5-6

The Decision in "Breslin Realty" Did Not Invalidate Intervention

250. 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[100]. Properly understood, however, that decision should not invalidate any of the motions to intervene in this case, though it was explicitly relied on by Beechwood and implicitly by the trial Court (Exhibit 2, Decision and Order on preliminary injunction, pp. 4-5)

251. 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:

(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 17 pp. 2-3 ¶7, p. 5 ¶22[101], p. 7 ¶34, etc.; Exhibit 21 Feb 19th motion, p. 8 ¶42, p. 15 ¶81, p. 16, ¶87, etc.)[102];

(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 21 pp. 18 ¶¶97 *ff.*). The circumstances of the proposed interventions by Movant and the neighbor-intervenor clearly met the standards thus established (Exhibit 21 p. 23 ¶¶115 *ff.*); and

(3) Breslin dealt with an "action", not a special proceeding, and the Court of Appeals

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

[101]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 21 p. 6).

[102]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..

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)[103].

252. 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.

253. 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 40 -- final page[104]) -- albeit two days after the neighbor-intervenor filed her order to show cause which the trial Court, inexplicably at the time, refused to sign[105].

254. Movant and the neighbor-intervenor moved briskly and in a timely fashion[106], even according to the holding in Breslin. But the trial Court improperly handicapped their attempt

[103]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.

[104]Nassau County Clerk recording page: "Recorded Date/Time: January 15, 2016 10:27:05 AM".

[105]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 24, p.2.

[106]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.*

-- 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.

255. 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 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 21, Affirmation in Support of Motion to Intervene (Appellate) (Grant) ¶104)

256. 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:

257. "In the case cited in Breslin Realty most closely paralleling this action, the proposed intervenors were apparently aware[107] 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

[107]The term used in the case is "the events which were transpiring," see case quoted *infra*.

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).[108]"

(Exhibit 21 ¶108)

258. 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 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)

259. 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.

260. 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.

261. Plaintiff also rehashes the tired and entirely false argument -- used so baldly against the Petitioners[109] -- that neighbor-intervenor Pamela A. Sylvester, a three-decade resident

[108]Rectory Realty Assoc. v Town of Southampton, 151 AD2d 737, 738 (Second Dep't, 1989).
[109]Exhibit 38, pp. 11-12.

and user of the lands, lacked 'standing' because she did not personally deliver to the Town Board the legal arguments against the SEQRA Review which she asserts in her pleading (**OLD BW AFF**, ¶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 19, Grant Affirmation in Support of motion to intervene, ¶¶21-25.

262. 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)

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

264. 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)), 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[110].

265. The 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

266. 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 40, p. 3 ¶4)[111].

267. 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 .....'

[110]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."

[111]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 40, 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 21, Grant Affirmation in Support of Motion to Intervene, p. 20 ¶102)

268. 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.

269. 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 21, Footnote 2)

270. 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.

271. Their efforts were thus consonant with the terms of CPLR Sections 1012 and 1013 (see e.g. Exhibit 21, Affirmation in Support of Motion to Intervene (Grant), ¶65 *ff.;* and Exhibit 17, Affidavit in Support of motion to reargue (Brummel), ¶26, ¶70, ¶¶76-76)

The Multiple Motions Were Not Unreasonable Or Frivolous

272. 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.

273. 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.

274. 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.

275. 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.

276. Paradoxically 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[112].

277. 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 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.

278. 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))[113], that court expressed profound skepticism at a lower court's 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[114].

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[112]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.

[113]"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) ...

"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)

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

279. As previously noted, the trial Court even went so far as to mis-attribute about half the motions filed to Movant -- even motions filed in this own Court (Exhibit 1 order, p.2; see Exhibit 19, motion, e.g.).

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

280. Plaintiff starts with innuendo impugning Movant's motives in attempting to intervene and appeal, a posture evidently sustained by the trial Court. Movant claims in its Affirmation in support of the injunction that Movant has been "Acting on the basis of some unknown motivation" (Exhibit 3, ¶3).

281. Yet later in the same document Plaintiff answers its own question about Movant's "desire to satisfy his own interests" (*id.*, ¶14): the real reason is that Movant "is attempting to use the courts to further his own interest of stopping the Country Pointe project" (*id.* at 19).

282. But this is not an improper goal, nor one Movant has hidden: Movant believes that the environmental review was deeply flawed -- as so many are, in the service of ceaseless development on Long Island and elsewhere. And therefore he has helped others turn to the Courts to vindicate the law.

283. The Plaintiff includes many pages of Facebook postings by Movant as an exhibit in its Complaint, but a cursory reading indicates that Movant had a very transparent and genuine agenda: to make sure the trial Court's decision was appealed and overturned if possible (Exhibit 51).

284. The allied party Beechwood offered a far more hostile -- and unfair false -- interpretation of Movant's actions, that should for completeness be addressed.

285. Beechwood 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 and thus revealed his true aim -- an anarchistic abuse of the Courts.

286. But the reading is a deliberate distortion of one phrase among thousands of words Movant wrote, as a perusal of the Facebook updates shows (*id.*).

287. Beechwood's allegation was also based on 'circumstantial evidence' of the allegedly-baseless sequence of motions at issue and Movant's allegedly ignoring settled decisions in filing the motions, and in assisting his allied intervenor in doing so.

288. Movant described, *supra*, the completely valid reasons for each of the several motions[115], 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.

289. 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.

290. Movant was actually expressing frustration with the judicial system -- motivated by among other issues several negative rulings on legal standing in other environmental cases[116], whereby Movant bemoaned that cases were treated as a "'game' with the courts".

[115]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.

[116]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.

291. Beechwood however twisted the meaning to claim it reflected Movant's own approach to the judicial system[117]. As argued in Movant's opposition to Beechwood's preliminary injunction:

292. "Plaintiff Beechwood misleadingly cites one quotation from the Facebook postings that asserts the Courts play a 'game' in their adjudicating ...: 'True this is a "game" with the courts because they don't always play it straight.' In contrast to the tortured meaning ascribed by Beechwood, 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."

293. 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.

294. There is simply no basis to the claim of intent to harass or delay, or that Movant entertains some self-interested hidden motive.

295. 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

[117]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]."

straightforward desire to succeed on the merits, before a fair judicial arbiter, and not to play 'games'.

The Appeal Is Compelling

296. 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.

297. 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[118]. The experience was also disillusioning to them, as indicated by one letter sent to Movant by one couple[119].

298. 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 extensively.

[118]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.

[119]Exhibit 41: "...[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.

299. 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.*

300. 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 35 ¶¶19-22)

301. 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 36 ¶¶8-12)

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

303. 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 16 [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 12 pp. 4-5 ¶¶21-27)

304. 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 37 ¶¶6-8)

305. 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 44) 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 43). 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[120] after having concluded at length that the Petitioners lacked standing[121];
> (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;

[120]Exhibit 38, p. 13.
[121]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 38, p. 11), was notably omitted from the narrative of the Settled Judgment.

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

306. 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 38, pp. 11-14).

307. 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

308. 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. However, certain technical defects also provide a basis 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.

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

309. The trial Court imposed no undertaking as a condition of the injunction.

310. 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[122].

311. 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.

312. The appellate courts have been held fully authorized to exercise discretion to reverse the trial court in all such matters related to an injunction[123].

The Pre-filing Restriction Is Overly Onerous

313. As noted *supra* the trial Court has given every indication that despite incorporating a 'permission clause' in the injunction there is no likelihood of its permitting any actions by Movant -- or anyone else.

[122]"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)

[123]"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)

314. 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')

315. 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[124].

[124] "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

316. 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)

317. 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[125], and in so recklessly granting injunctive relief with such glaring defects as are being described[126].

318. The courts in this state have in fact relieved parties of the need to follow

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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).

[125]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 22 p. 2, Exhibit 23 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, Exhibit 24 p. 2.

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

administrative appeals procedures where the 'answer' they would receive was obviously pre-ordained or "futile"[127] as in the present case.

319. The remedy in this case is for the appellate court to remove from the trial Court any authority to require pre-filing clearance with respect to appellate motions, as long as the trial Court remains in charge of the cases.

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

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.

320. In its order, the trial Court does not impose a prohibition as broad as that requested by Beechwood and granted to it to prevent Movant from "assisting" any other party in doing, but does enjoin the "causing" of any other party to act in the case (Exhibit 1, p. 3).

321. 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.

322. 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

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

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.

323. Inasmuch as this injunction works in tandem, with the injunction granted Beechwood their impacts overlap.

324. By the term "causing" Movant is also arguably prohibited from "assisting" (Exhibit 2, p. 7 , ¶(b)) which in the Beechwood context apparently includes 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.

325. 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, between the two injunctions, to silence and prevent Movant from performing, with regard to this development, many types 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.

326. 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 Amendment to the U.S. Constitution.

327. 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)

328. 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[128]. 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)

329. The two injunctions 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 two orders cannot by any stretch of reason be considered "narrowly tailored" (Ringgold-Lockhardt, *id.* at 1066) as required[129].

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

[129]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.

330. Insofar as it works in tandem with the Beechwood injunction, Plaintiff's injunction may well function as an unconstitutional abridgement of the federally protected right to access to the courts, in addition to any violation of state law it commits[130].

331. Furthermore by prohibiting, in notably vague language, any "causing" any further challenges the injunction impermissibly abridges protected rights of speech, association, and assembly protected by the First Amendment to the U.S. Constitution.

332. 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; 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)

333. 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

[130]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.*

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)

334. 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

335. 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).

336. 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.

337. 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.

338. 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

339. The Hon. Justice George R. Peck, who heard the underlying Article 78 special proceeding, is also presiding in the action brought by Plaintiff and its allied party, Beechwood. 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 the instant two cases.

340. Such an assignment appears facially improper, and the preliminary injunction -- foregone conclusion that it was -- is defective as a result.

341. The two actions and the special proceeding 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.

342. 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, via the 'related case' provision of the requests for judicial intervention (RJIs) (Exhibits 5 and 6), and accepted the assignment.

343. 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.

344. Such issues include; (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.

345. In other words Justice Peck's own actions, and Movant's actions in response, are material elements in the present cases, and as such, Justice Peck cannot be a neutral arbiter.

346. 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.

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

348. 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.

349. Yet even the 'related' designation is questionable, because aside from the matter that raise the conflict-of-interest, this case presents entirely different 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.

350. 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.

351. 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.

352. 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

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

354. 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 53. The trial Court's Decision and Order signed April 15, 2016 is appended as Exhibit 2.

355. Movant provided the other party 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 July 5, 2016 by email[131] and follow-up communications before 10 AM. Movant notified the Town of Oyster Bay by emailing its attorney, Matthew Rozea Esq., and shortly thereafter dictating a personal message describing the email with a receptionist, and spoke to Mr. Rozea during the afternoon to confirm the date and time.

Conclusions

356. 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 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

[131]Exhibit 54, copy of email notice of hearing seek injunctive relief to lift or modify preliminary injunction issued April 15, 2016.

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 is an unconstitutional abridgment of extra-juridical conduct protected by the U.S. Constitution.

357. 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.

358. 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).

359. 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.*

360. 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[132].

361. 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.

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

363. 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 is permitted to act as needed to himself seek intervention and/or to assist the neighbor-intervenor and anyone else properly before the courts to intervene and obtain appellate review, and such

[132]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.

other relief as is just and proper; and (2) Grant such other and further relief as is just and proper.

364. Movant requests that this Court consider this motion together with the motion previously filed with regard to the Beechwood injunction, Docket No. 2016-05954, because the two matters are related.

Dated: KINGS County, New York,

July 6, 2016

RICHARD A. BRUMMEL
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Sworn before me this 6 day of
July, 2016

NOTARY PUBLIC

KRISTEN BARCELLONA
Notary Public, State of New York
No. 01BA6183514
Qualified in Nassau County
Commission Expires 03/17/20

KRISTEN BARCELLONA
Notary Public, State of New York
No. 01BA6183514
Qualified in Nassau County
Commission Expires 03/17/20

EXHIBITS

Note: All pleadings are presented without any of their own exhibits, except in one case, noted below, Exhibit 19.

Exhibit 1	Sup. Ct. Decision and Order granting preliminary injunction, Plaintiff Town of Oyster Bay
Exhibit 2	Sup. Ct. Decision and Order granting preliminary injunction, Beechwood POB LLC
Exhibit 3	Plaintiff Town of Oyster Bay Affidavit in support of motion for preliminary injunction
Exhibit 4	Plaintiff Town of Oyster Bay Complaint
Exhibit 5	Request for Judicial Intervention ("RJI") of Beechwood POB LLC
Exhibit 6	Request for Judicial Intervention ("RJI") of Plaintiff Town of Oyster Bay
Exhibit 7	Movant Affidavit in Opposition to Plaintiff Town of Oyster Bay motion for preliminary injunction
Exhibit 8	Movant Affidavit in support of appellate motion to vacate or modify preliminary injunction granted by the Sup. Ct. to Beechwood POB LLC
Exhibit 9	Temporary restraining order granted to Town of Oyster Bay
Exhibit 10	Temporary restraining order granted to Beechwood POB LLC
Exhibit 11	Appellate order to show granted (in part) to Movant, June 21, 2016
Exhibit 12	Brummel (Movant) Affidavit in Support of Motion to intervene, Brummel Motion I, January 7, 2016
Exhibit 13	Brummel memorandum of law in support of Affidavit to intervene, January 7, 2016
Exhibit 14	Brummel Amended Affidavit in support of motion to intervene, Brummel Motion II, January 14, 2016.
Exhibit 15	Brummel Motion to amend prior motion, Brummel Motion II, January 14, 2016
Exhibit 16	Brummel Affidavit in support of Appellate Motion I, to appeal and intervene, January 15, 2016 -- assigned Docket No. 2016-00540

Exhibit 17 Brummel Affidavit in support of Appellate Motion II to re-argue motion to intervene, January 25, 2016 -- Assigned Docket Nos. 540, 742, 744; see order to show cause Exhibit 22

Exhibit 18 Brummel Memorandum of Law in support of appellate Motion II to re-argue January 25, 2016

Exhibit 19 Grant/Sylvester Affirmation in support of motion to intervene, Grant/Sylvester Motion I, January 13, 2016 including all exhibits *except* 'Article 78 Petition', *see* Exhibit 34, below.

Exhibit 20 Grant/Sylvester Affidavit in support of motion to appeal and intervene, Grant/ Sylvester Appellate Motion I, January 15, 2016

Exhibit 21 Grant/Sylvester Affirmation in support of Appellate Motion II to intervene February 19, 2016

Exhibit 22 'Unsigned' Sup. Ct. Order to Show Cause of January 7, 2016 [sic] (Brummel)

Exhibit 23 'Unsigned' Sup. Ct. Order to Show Cause of January 14, 2016 [sic] (Brummel)

Exhibit 24 'Unsigned' Sup. Ct. Order to Show Cause of January 13, 2016 (Grant/Sylvester)

Exhibit 25 'Unsigned' Appellate Order to Show Cause of January 15, 2016, Docket No. 2016-00540 (Brummel)

Exhibit 26 'Unsigned' Appellate Order to Show Cause of January 15, 2016, Docket No. 2016-00544 (Grant/Sylvester)

Exhibit 27 'Unsigned' Appellate Order to Show Cause of Jan. 25, 2016, Docket Nos. 540, 742, 744 [sic] (Brummel)

Exhibit 28 Second Dept., Decision and Order, Feb. 4, 2016, Brummel Appellate Motion I, Docket No. 2016-00540 (Brummel appeal of Sup. Ct. denial of Jan 7, 2016 [sic])

Exhibit 29 Second Dept. Decision and Order, Feb. 4, 2016, Grant/Sylvester Appellate Motion I, Docket No. 2016-00544 (Grant/Sylvester appeal of Sup. Ct. denial of January 13, 2016)

Exhibit 30 Second Dept. Decision and Order, Feb. 4, 2016, Brummel Appellate Motion I [sic], Docket No. 2016-00742 (Brummel appeal of Sup. Ct. denial of January 14 [sic])

Exhibit 31 Second Dept. Decision and Order, Feb. 5, 2016, dismissing unspecified "appeals";

Docket No. 2016-00744 (Brummel and Grant/Sylvester appeals of Sup. Ct. Decision of Dec. 15, 2015)

Exhibit 32 Second Dept. Decision and Order, March 24, 2016, Grant/Sylvester Appellate Motion II, Docket No. 2016-00744 (Grant/Sylvester Motion of February 19, 2016)

Exhibit 33 Letter to Sup. Ct. of April 7, 2016 regarding 'permission to file' hearing

Exhibit 34 Article 78 Petition in matter "Denton *et al.* v. Town of Oyster Bay *et al.*"

Exhibit 35 Petitioner Glenn K. Denton, Factual affidavit of injury in support of Article 78 Petition

Exhibit 36 Petitioner Fay E. Scally, Factual affidavit of injury n support of Article 78 Petition

Exhibit 37 Proposed-intervenor Pamela A. Sylvester, Factual affidavit of injury

Exhibit 38 Sup. Ct., Decision and Order, in matter "Denton *et al.* v. Town of Oyster Bay *et al.*"

Exhibit 39 Settled judgement in matter "Denton *et al.* v. Town of Oyster Bay *et al.*"

Exhibit 40 Stipulation of Settlement in matter "Denton *et al.* v. Town of Oyster Bay *et al.*"

Exhibit 41 Email from Petitioners Francis P. Scally and Fay E. Scally to Movant rejecting appeal

Exhibit 42 Satellite photo of lands at issue with approximation of current 'status' of work shown (current as of July 4, 2016)

Exhibit 43 Final (approved) Site Plan of May 12, 2015

Exhibit 44 "Country Pointe-Plainview" Draft Environmental Impact Statement ("DEIS") Figure 27A, "Post-Construction Ecological Communities" *emphasis added*

Exhibit 45 Photo of land 'clearance' for the underlying Project

Exhibit 46 Photos of examples of current remaining natural lands at project site (July 4, 2016)

Exhibit 47 Newspaper article on Plaintiff's legal efforts, "Plainview-Old Bethpage Herald",

January 20, 2016, p. 1

Exhibit 48 Newspaper article describing legal issues regarding the controversy over development, "Plainview-Old Bethpage Herald", November 18, 2016, p. 1.

Exhibit 49 Email from Nassau County Clerk's Office.

Exhibit 50 Stamped Court receipt of filing papers referenced in Exhibit 7.

Exhibit 51 Exhibit 7 of Plaintiff's Motion for injunctions (Exhibit 3, *supra*) -- Facebook posts from Movant's organizing efforts in this matter

Exhibit 52 Email threat of legal action from attorney for Plaintiff

Exhibit 53 Notice of Appeal in this matter

Exhibit 54 Email Notice of appellate hearing