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

----------X

In the Matter of GLENN K. DENTON and BRIDGET K. DENTON, KATHLEEN J. DUVAL, FRANCIS P. SCALLY and FAY E. SCALLY,

Petitioners-Respondents,

-against-

TOWN OF OYSTER BAY TOWN BOARD BY SUPERVISOR JOHN VENDITTO, BEECHWOOD POB LLC, PLAINVIEW PROPERTIES SPE LLC,

Respondents -Respondents

RICHARD A. BRUMMEL,

Proposed Intervenor-Appellant

Appellate Division Docket Number:

2016-544

Supreme Court Index No.:

5290/15

AFFIDAVIT IN SUPPORT OF MOTION TO REARGUE *and* MOTION TO INTERVENE ON COURT'S OWN AUTHORITY

For relief per New York Civil Procedure Law and Rules ("CPLR") Section 1012 (a)(2) and CPLR 7802(d)

----------X

Preliminary Statement

1. Movant seeks to intervene in an Article 78 proceeding brought under the State Environmental Quality Review Act ("SEQRA") because the named Petitioners unexpectedly failed to appeal the dismissal of the action by the trial Court, and Movant's interests -- and those of an allied 'Proposed-Intervenor' -- are thus substantially harmed.

2. In addition, without any notice to others, including movant who was extensively involved in the case and had been asking since the decision for a disclosure of their intentions, the original Petitioners secretly entered into a purported settlement with Respondents on the

condition that the original Petitioners forgo any appeal -- or even any other further action -- involving the development at any time whatsoever (Stipulation of Settlement, Exhibit 1).

3. Movant, and an allied Proposed-Intervenor, appeared before this Court on January 15, 2016, seeking injunctive relief by Order to Show Cause to reverse the trial Court's refusal to grant them Intervenor status, in order that they might preserve their right to appeal the underlying decision of the trial Court (Exhibit 2). This Court denied such relief at that time by declining to sign the Order to Show Cause (Exhibit 3).

4. But a central presumed basis of the Court's refusal is a question of law that should be revisited, hence this motion to reargue, because at the time of the original hearing, counsel for the original Respondents disclosed for the first time to the proposed-Intervenors that the purported "settlement" and urged that it made the matter "moot."

5. The two proposed-Intervenors disputed the assertion of mootness but due to the surprise nature of the argument they were unable to prepare a complete response, which this motion now reflects to the extent feasible under continuing time constraints imposed by the statute of limitations to file the notice of appeal.

6. As indicated in the accompanying Memorandum of Law there should have been no bar to the intervention for an appeal, notwithstanding either the purported settlement or the judgement of the trial Court.

7. Movant thus submits this motion, which is to re-argue the prior motion for relief from the the trial Court's denial of intervention, based on the following considerations:

(i) Our research shows that the assertion of 'mootness' due to the purported settlement for the purposes of intervention was clearly in error under state law, which clearly allows such interventions; and

(ii) the relevant timeline of the purported "settlement" and the motions to original

Intervene before the lower court demonstrate that the motions in any event preceded the purported "settlement" and thus should not be estopped in any case; and

(iii) the actual merits of the applications to Intervene, which were substantial and convincing, on the grounds of both standing and inadequately defended injury to the Movant and to the allied Movant, deserve further consideration by this Court.

8. Along with the motion to re-argue, Proposed-Intervenor also moves for this Court to grant intervenor status on its own authority established by Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29, and more fully described in the accompanying memorandum of law.

9. It is also Movant's hope that the matter on this motion to reargue may be reviewed with less haste than in the prior appearance, which was admittedly colored by the late arrival of Movant at the courthouse due to the challenge of preparing the mass of papers required, on a tight deadline due to a statute of limitations question, after having appeared before the trial Court three times in the prior week regarding this matter, both on his own behalf and assisting the allied Proposed-Intervenor.

10. The thirty-day deadline for filing the notice of appeal post-service, and the refusal of the Respondents to disclose to the Movant when in fact the Decision-and-Order was served, given the 'entry' date of December 16, 2015, led Movant and the allied Proposed-Intervenor to act on an extremely accelerated schedule that led to possible errors in collating the extensive sets of papers filed with this Court.

11. This case has been sidelined twice by issues foreign to the merits: first, by the demonstrably incorrect denial of standing at the trial Court; and second, apparently by the erroneous assertion of mootness at this Court, in the first motion presented.

12. The Court of Appeals, in Sierra Club v. Village of Painted Post, last November stated emphatically once again that standing in environmental matters -- where the issue is most

likely to be an inherently subjective one -- is to be evaluated in a way that does not unduly impede the adjudication of rights.

13. This case cries out for wise review and adjudication on the merits, and for that reason Movant seeks leave to reargue, and if so granted, seeks a reversal of the trial Court's denial of the motion to intervene, and/or a grant of the leave to intervene on this Court;'s own authority.

The Facts

14. The underlying matter is an Article 78 special proceeding, filed June 10, 2015 (Exhibit 4) and decided by Decision and Order entered in Nassau County on December 16, 2015 (Exhibit 5), which sought to vacate various land-use actions taken by the Respondent Town of Oyster Bay with respect to the Country Pointe at Plainview development project ("the Project"), due to extensive violations of the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law Chapter 8, 6 NYCRR 6167.

15. Richard A. Brummel, hereinafter "Proposed-Intervenor", on January 7, 2016 sought by application under Civil Procedure Law and Rules ("CPLR") Sections 1012 (a)(2) and 7802 (d) to the trial Court to intervene in this matter and become a Petitioner in order to prosecute an appeal of the Court's Decision (Exhibit 6), among other possible actions.

16. Proposed-Intervenor sought in a second application of January 14, 2016 (Exhibit 7), to amend his prior application to include as a pleading the original Article 78 Petition, which he had assisted extensively in preparing and with which he was thus intimately familiar.

17. A second allied Proposed-Intervenor filed an application with the trial Court on January 13, 2016 which was also denied. That party also applied to this Court on January 15, 2016 to

reverse the trial Court's denial, but is unable to appear today to re-argue due to lack of counsel's availability.

18. The urgency of the effort to obtain Intervenor status is based on the thirty-day deadline to file notice of appeal of the decision and order per Civil Procedure Law and Rules ("CPLR") section 5513, which may or may not apply to the Proposed-Intervenor and is more fully explored in the accompanying memorandum of law.

19. As described below, in the course of one and a half-years of use and enjoyment of, and advocacy for more extensively protecting, the land at issue, Proposed-Intervenor developed a strong connection with, and enjoyment of, the woods and other natural features at the 143.5 acre site of the proposed development. As such Proposed-Intervenor asserted, and asserts, "standing" in environmental legal matters related to the property.

20. This application incorporates by reference the facts as alleged in the Petition (Exhibit 4), Supplemental Petition, and Reply in the underlying special proceeding; and reference is further made to the Memorandum of Law in Support of the Reply in the underlying proceeding as to matters of law. Proposed-Intervenor was intimately involved in the special proceeding and worked with the Petitioners to file and prosecute their case.

21. At the tine the application was made to this Court to appeal the trial Court's denial of the motion to intervene, Proposed-Intervenor had only shortly beforehand been made aware that none of the five original Petitioners would pursue an appeal, and thus that the case would stand as decided unless someone intervened for that purpose.

22. Further, only at the hearing before this Court of January 15, 2016 were Proposed-Intervenor, and his allied Proposed-Intervenor, first informed of the purported settlement signed on January 13, 2016 and so-ordered by the trial Court n January 15, 2016.

23. This appeal continues to be prosecuted in extraordinarily time-limited circumstance as the 30-day statute of limitations for filing notice of appeal may arguably be expiring any day. Therefore the original Affidavit in Support of the motion to intervene as proposed to be amended, Exhibit 8, is extensively relied on.

The Basis for the Motion to Reargue

24. The Court did not sign the orders to show cause submitted January 15, 2016, nor issue any statement regarding their determinations.

25. Intervenors are left to surmise that each of their arguments for intervention were inadequately addressed, and furthermore that an issue raised by Respondents regarding the purported "settlement" strongly influenced the Court's course of action in declining to sign the order to show cause.

26. The points raised in their papers by both proposed-Intervenors were (a) that they each had standing to have intervened before the trial Court per CPLR 7802(d) and 1012, and (b) that they were not adequately represented in the matter due to the Petitioners' failure to appeal.

27. They clearly alleged that they were not aware that they were not adequately represented until the Petitioners failed to appeal (Exhibit 2 ¶ 6). Such a circumstance is directly and very supportively addressed by the Court of Appeals in Auerbach v. Bennet (id.) , as discussed in the accompanying memorandum of law.

28. Furthermore, when confronted at the courthouse of this Court by the assertion that the matter was moot having been "settled" by the extant parties, the Intervenors also argued (c) that the law does not prevent intervention despite a purported settlement, nor by the

purported finality of a judgement.

29. Intervenor Brummel argued also that (d) he should have been permitted to amend his application to intervene in order to incorporate as a pleading the Article 78 Petition that was already entered in the case.

30. As to the specifics of the basis for reargument, in the first place Intervenors surmise that the Court placed considerable weight on the assertion of Respondents Town of Oyster Bay and Beechwood that given the purported settlement, the matter was "moot".

31. If this was indeed the basis of the Court's declining to sign the orders to show cause, then Proposed-Intervenor seeks to present the extensive case-law indicating that the reality truth is far different -- the matter is not at all moot -- and thus that the application of the Proposed-Intervenor should be heard on the merits.

32. Proposed-Intervenor bases his inference that the mootness issue weighed heavily because over half the time spent with the Deputy Clerk to discuss the basis of the order to show cause addressed whether the matter was "moot" or the case was "annulled" by the purported secret settlement.

33. While Intervenors attempted to refute the claims of mootness the surprise nature of the disclosure rendered them unable to fully respond. Thus the Court had only a limited argument before it.

34. Furthermore the time-line of the purported settlement and the motions to intervene of the Proposed-Intervenor and the allied Proposed-Intervenor should also have been given far greater weight, inasmuch as both motions to intervene preceded (a) the date the purported settlement was so-ordered and (b) the date the purported settlement was even signed by all eleven parties.

35. The facts are that Proposed-Intervenor made his motion to intervene on January 7, 2016, with a motion to amend the prior motion made on January 14, 2016; the allied Proposed-Intervenor made her motion to intervene on January 13, 2016. The Stipulation of Settlement was not signed by all parties until January 14, 2016, and it was not so-ordered by the Hon. Justice George R. Peck until January 15, 2016.

36. Thus every single motion by the two proposed-Intervenors was made in advance of the time of the so-ordering, and the latest motion made -- the motion of Proposed-Intervenor to amend his prior motion to Intervene -- was made (a) the day before the honorable judge so-ordered the stipulation, and (b) midday on the same day the final signatures were affixed to the secret agreement.

37. Thus even if the purported settlement would have had an effect on the mootness of the motions to intervene, they would have no such effect retroactively as in this case. Inasmuch as all the motions were made before the purported settlement was finalized, the motions were valid, the appeal of their denial is timely, and the appeal to be granted intervenor status should be decided on the merits of the underlying motion.

38. If in fact the matter was decided by this Court on the mootness ground then no consideration would have been given to the underlying merits of the application.

39. But even if the mootness ground was not dispositive, the time devoted to Exhibit 1mining its extensive pleadings -- which included several layers of prior pleadings for the Court's review -- appeared to Intervenors to be incommensurate with the task.

40. The Court should have been in a position to review not only whether the matter was moot, but also whether the two Intervenors made out a case for intervention based on their standing, their injury, and the inadequacy of the representation of their interests by the non-

appealing Petitioners.

41. The added wrinkle of the purported settlement added a complicating legal question that in itself required a significant inquiry.

42. Intervenors take some responsibility for the hasty schedule in that the extensive preparations and the hectic schedule of appearances made them later to court than would have been preferred -- about 4 hours after their 10 AM notice to the opposing counsel.

43. But given the opposing counsel's lack of candor about when the decision and order had been served -- thus triggering the statute of limitations clock (see Auerbach, id., at 628) -- and when the parties planned to begin clearing the dozens of acres of pristine land on the site, Intervenors felt obliged to rush to court as quickly as possible.

44. As it turned out the secret purported settlement also added a justification for Intervenors' haste, although as is argued elsewhere herein, a 'settlement' or judgement should not in any case have been a bar to intervention and appeal, regardless of the timelines.

The Basis for Intervention

(1) The Proposed-Intervenor's Standing By His Use And Enjoyment Of The Site

45. Proposed-Intervenor made out his case for standing before the trial Court in his Affidavit in Support of the Motion to Amend the Motion to Intervene, Exhibit 8, at ¶ ¶ 7-27, and the Affidavit in Support before this Court, Exhibit 2, ¶ ¶ 9-29.

46. As detailed in that affidavit, Proposed-Intervenor is a 55-year-old native of East Hills, N.Y. who returned to his hometown in about 2009, and became active in environmental causes first in East Hills and then across Nassau County.

47. East Hills is approximately 12 miles and 15 minutes from the planned Country Pointe Plainview Site (hereinafter "the Site").

48. Proposed-Intervenor became aware of the proposed development in or about April 2014 and visited the Site at that time, and took photos of the vine-covered abandoned buildings, woods, and trees there, see Exhibit 9.

49. Proposed-Intervenor was awed by the empty old government buildings and the dense forests around the Site, and has taken numerous photos since.

50. The entire Site is open and accessible, crossed by roads that are freely used by the public. On the site are athletic fields with parking lots used by leagues and the public without restriction. Extensive woods and brushland along Old Country Road and Round Swamp Road are fully visible, and open to access without signage or fencing along large portions of them. There are some signs on the interior of the Site stating that various grassy areas around the empty buildings are private property, but it is entirely possible to see and enjoy the woods and brushland of the entire Site without entering into the private-property portions.

51. Proposed-Intervenor attended the sole, "until 3 AM", public hearing on the SEQRA review on the night of February 4, 2015, and spent roughly two hours there, speaking to some opponents and a local community organizer. Despite an immense crowd, the hearing was inexplicably not adjourned at a reasonable hour for further hearings, but turned into a test of pure stamina that eliminated many interested parties from testifying.

52. Proposed-Intervenor thereafter submitted extensive written testimony identifying shortcoming in the Draft Environmental Impact Statement ("DEIS") which testimony was incorporated and addressed in the Final Environmental Impact Statement ("FEIS") (Exhibit

10).

53. In or about May-to-June, 2015, Proposed-Intervenor went door-to-door speaking to residents of Old Bethpage seeking support and participation to contest the SEQRA review in court, and Proposed-Intervenor thereby met the original Petitioners.

54. Proposed-Intervenor met with the original Petitioners many times and worked with them to draft the Article 78 Petition, the Supplemental Petition, and the various supporting papers in the present case, as well as to prepare for court appearances.

55. Proposed-Intervenor and original Petitioners also together conducted a public information meeting about the Article 78 lawsuit at a local library on or about July 2, 2015.

56. Since the first time Proposed-Intervenor visited the Site and took in the rich and diverse natural terrain and wildlife there, Proposed-Intervenor has visited the Site and walked through it approximately fifteen times, or roughly once a month, except during the depth of winter months.

57. Proposed-Intervenor spends more time in the natural area of the Site than in any other natural area due to his concern for its pending destruction as well as his appreciation for its unique character.

58. While some forests Proposed-Intervenor is acquainted with exist in the sites of the Nassau County Museum near his home, in Roslyn, and in Christopher Morley Park in Manhasset./North Hills, Proposed-Intervenor has been struck by the diversity of the natural habitats at the Site and its fascinating historical background and the dramatic old architecture there.

59. Indeed Proposed-Intervenor has seen hobbyists photographing the buildings on the Site and otherwise enjoying the ghost-town feel of the property, intermingled with the natural

environment and wildlife.

60. The deep rich shrub-land along the public sidewalk on Old Country Road presents particularly interesting conglomerations of vegetation that are identified in the DEIS as "successional shrubland" and "successional old field". A video of that section posted on a Facebook page dedicated to opposing the project received over 100 visits in several days.

61. Each time Proposed-Intervenor visits the Site, walks on the sidewalks and public thoroughfares around the Site, he feels refreshed and renewed. Proposed-Intervenor 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.

62. 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".

63. Proposed-Intervenor 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 (original affidavit in support Exhibit 7).

64. The destruction of large portions of the Site as planned for development will significantly harm Proposed-Intervenor's enjoyment of the Site, and cause him to abandon his visits.

65. Almost every area he values on the Site will be deforested and denuded as currently documented in public plans.

66. In fact the impending destruction unless it can be stopped pending a renewed environmental review already causes Proposed-Intervenor distress and foreboding, and deep

dismay at the errors that have been made in the public process.

67. In all the ways enumerated, Proposed-Intervenor uses and enjoys the subject Site, and will suffer harm to his well-established 'use and enjoyment' of a unique former public property and an unusual, rich ecological resource not far from his home.

68. His "standing" is thus manifest, and affirmed by the standards recently reiterated in Sierra Club v. Village of Painted Post, 2015 NY Slip Op 08452 (2015) ("This Court recognized in Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation (23 NY3d 1 [2014]) that standing rules should not be 'heavy-handed,' and declared that we are 'reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review.'") more fully described in the the the accompanying memorandum of law.

69. By the same reasoning -- in addition to extensive legal argument that its decision apparently took no cognizance of -- the trial Court was in error in its denial of standing to the original Petitioners and thus its decision begged for appellate review, as proposed-Intervenor seeks to assure. All the more reason to permit the intervention to occur.

Failure to Protect the Rights or Interests of Proposed-Intervenor

70. Proposed-Intervenor detailed for the trial Court the manner in which the original Petitioners failed to protect his interests, thus providing a basis to intervene per CPLR section 1012. Proposed-Intervenor also asserted the right to intervene under CPLR section 7802 (d) Exhibit 8, ¶ ¶ 28-38. Proposed-Intervenor repeated this for this Court, Exhibit 2, ¶ ¶ 30-35.

71. Although Proposed-Intervenor was unaware of the developing secret purported

settlement, Proposed-Intervenor detailed for the Courts the ways in which the five original Petitioners indicated to him their decisions not to appeal, or alternatively had simply not replied to his inquiries on the subject.

72. Furthermore Proposed-Intervenor detailed for the Court the ways in which such an appeal would be meritorious based on the trial Court's failure to accurately apprehend the issues of the case.

73. He further noted that the reported 'admission' by the Town Supervisor whose board has approved the SEQRA review that he no longer felt the review was "sufficient" also provided an avenue for a motion to renew, which the Petitioners also did not appear to be pursuing.

74. Proposed-Intervenor told the trial Court that among other issues inviting appellate review was:

> (1) The legal claim -- and unsupported finding of the Court -- that in the absence (arguably so) of testimony by the Plaintiffs at the hearing stage of the SEQRA review, they thereby lacked "standing", despite the fact that this issue had been fully addressed and refuted in the Reply and Memorandum of Law based on law articulated by this Court among others[1]. Furthermore,
>
> (2) Strong evidence was presented to the Court that the SEQRA review was "segmented" and decisions were concretely taken outside the scope of the review (e.g. the planned athletic fields in the current fifteen acre forested area) and furthermore the Court failed to hold a "hearing of fact" as requested at several points in their pleadings by the original Petitioners if their allegations were in question to the trial Court. The original Petitioners even submitted a supplemental petition with one 'smoking gun' substantiating their allegation of segmentation -- a site plan with woods replaced by athletic fields, and a second 'smoking gun' was noted in their Reply in the form of a Covenant approved by the Town Board specifically requiring the clearing of woods otherwise identified as preserved in the Environmental Impact Statement, See Exhibit 11 -- diagram of preserved woods, site plan with athletic fields, and approved Covenant, excerpts. Finally,

[1] This Court had ruled that when other parties introduced arguments at the hearing stage any other party could make those arguments, but other precedent including from the Court of Appeals made clear that even the absence of testimony did not preclude review: Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905; Jackson v. UDC, 67 NY2d 400 (1986), at 427.

(3) It was clear on the record that the purported "visual buffer" was not analyzed in any reliable scientific way, and was subject to substantial modification (e.g. the "fitness trail") that was in no way analyzed for its impact on said "buffer".

75. Thus the original Petitioners' failure to pursue any of the legal avenues open to all the opponents of the destruction of the environment on the Site as currently planned and approved effectively abandoned Proposed-Intervenor's legal defense of his interests as outlined in this affidavit, and provides grounds for intervention as provided by CPLR Sections 7802(d) and 1012.

76. As discussed in the the accompanying memorandum of law, the Court of Appeals has held that where a party who might otherwise have intervened during the pendency of the case only becomes aware of the flaw in the original parties' representation of his interest by their failure to appeal (or p[presumably fail to seek a motion to renew, if relevant, as here) then that failure is excusable and the intervention may be granted at the point of appeal (Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29).

Applicable Law and Rules

77. Reargument is authorized by the Court's rules, 22 NYCRR 670.6(a):

"Motions to reargue a cause or motion...shall be made within 30 days after service of a copy of the decision and order determining the cause or motion...."

78. The motion to Intervene submitted to the trial Court is authorized by CPLR Section 1012 and CPLR Section 7802(d).

79. CPLR Section 7802(d) states:

"(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene."

80. CPLR Section 1012 provides as follows:

> " § 1012. Intervention as of right; notice to attorney-general, city, county, town or village where constitutionality in issue. (a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
> 1. when a statute of the state confers an absolute right to intervene; or
> 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment...."

81. In the present matter Proposed-Intervenor is an "interested" person (Section 7802(d)) due to his connections as detailed to the Site, and the "representation" of his interests appears on evidence to be "inadequate" (Section 1012) because no appeal was taken by original Petitioners, nor was a motion to renew filed in light of the adverse judgement and the admission of the Town Supervisor regarding the flawed SEQRA review.

82. Proposed-Intervenor also sought to amend his original motion to intervene in order to include what appeared to be the statutorily required 'pleading', and Proposed-Intervenor cited his right to do so under CPLR section 3025(a) and otherwise, although the section was apparently inadvertently omitted from the pleading filed with to the trial Court.

> "A party may amend his pleading once without leave of the court within twenty days after its service, or at any time before the period for responding to it expires...."

83. The "relation-back" rule, CPLR Section 203(f), would allow the Proposed-Intervenor(s) to assert claims in this Article 78 proceeding that would otherwise have been precluded by the four-month statute of limitations applicable to Article 78 proceedings. The rule states:

> (f) Claim in amended pleading. 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.

84. CPLR Section 5511 states with regard to appeals:

> "An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent."

Argument

1. The Argument Of Respondents That The Matter Has Been Made Moot Is False

85. As discussed above the the accompanying memorandum of law will fully address the claim of Respondents made to this Court that the purported settlement so-ordered on January 15, 2016 (Exhibit 1) should in any way affect the liveness of the matter for review -- and for intervention by Proposed-Intervenor and the allied Proposed-Intervenor who cannot appear until a later date.

86. In the first place, as described above, the motions to intervene of both Proposed-Intervenor and the allied Proposed-Intervenor preceded the settlement, whether its so-ordered version or its actual signing by the parties.

87. Secondly, and more importantly, the courts have ruled repeatedly that a settlement or judgement does not rob an interested party of the right to appeal the matter, as more fully detailed in the the accompanying memorandum of law.

2. This Court Has Ample Basis To Reverse The Denial Of Intervention By The Trial Court

88. Proposed-Intervenor substantiated before the trial Court his connection to the project

Site such that his use and enjoyment would afford him standing as established by the courts in New York, thus giving him a right to intervene under CPLR sections 7802(d) and 1012.

89. Proposed-Intervenor also fully established in the motion to the trial Court that the failure by the original Petitioners to take an appeal -- or file a motion to renew -- is both manifestly apparent and an error based on the unsupported or challengeable aspects of the trial Court's judgement.

90. As explored further in the the accompanying memorandum of law, the right to intervene under Section 7802(d) may require an invocation of the "relation-back" rule, CPLR Section 203(e).

91. The fact that the matter is already adjudicated, and the only issue is whether an appeal is taken, or a motion to renew based on commonly known statements of the Town Supervisor is filed, means that there is no prejudice to the Respondents because they already know everything that is at issue -- there are no new transactions introduced.

92. Furthermore, the Respondents are not exposed to any further liability, because the only issue has always been whether to vacate the SEQRA review and annul the zoning and land use actions arising therefrom. Thus the tolling of the statute of limitations for the Article 78 claims would apply to the Proposed-Intervenor via the relation-back rule.

3. This Court Should Grant Proposed-Intervenor's Motion To Intervene *Nunc Pro Tunc*, On Its Own Authority

93. As more fully explored in the the accompanying memorandum of law, this Court has been deemed to have the authority to grant intervention with "all the power" of the Supreme Court (Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29).

94. This Court should therefore grant Proposed-Intervenor intervenor status, for the purpose of taking an appeal and/or other such just and proper actions as would more fully protect his interests and rights in this matter, on its own authority and based on the arguments and pleadings the Court has before it.

95. As stated above, the Courts have a complete and adequate basis to grant Proposed-Intervenor intervenor status based on the law and the facts of his interest and standing with respect to the project Site and the neglect of his interests by the original Petitioners, which fact only became evident when they failed to challenge the adverse judgment wither by an appeal or by a motion to renew, or otherwise.

96. Proposed-Intervenor timely filed a notice of appeal on the underlying Decision and Order of the trial Court on January 15, 2016 (Exhibit 12), which was timely as it was a day before thirty days from the time the Decision and Order was entered (See Exhibit 5), which was the earliest time the Decision and Order could have been served.

97. As more fully explored in the the accompanying memorandum of law, the Court of Appeals has held that such an notice of appeal may be validated by retroactively granting an intervenor his intervenor status (Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29). Such authority appears to be contingent on Proposed-Intervenor being "aggrieved" by the Decision and Order.

98. Proposed-Intervenor meets the criteria of being "aggrieved" at least insofar as, enjoying "standing" in environmental matters with respect to the project Site, he has a property interest in it, as well as a more generalized interest in seeing the laws, to wit SEQRA, discharged properly to protect his interest (in the Site).

99. Inasmuch as Proposed-Intervenor meets the criteria thus established, this Court should

follow the precedent thus established and assure that (i) the Proposed-Intervenor is granted intervenor status and (ii) the notice of appeal timely filed on January 15, 2016, with respect to the Decision and Order of December 15, 2015, is held valid to proceed with the appeal.

Conclusions

100. It was in error for this Court to have denied Proposed-Intervenor relief and the motion to reargue should be granted, along with the relief sought -- to wit, intervention *nunc pro tunc* such that the already-filed notice of appeal in the underlying matter -- decided December 15, 2015 -- is validated for the purposes of taking the appeal the underlying decision so clearly demands.

101. Alternatively the Court might only reverse the trial Court and grant the injunctive relief for Intervenor status in order to prospectively file the notice of appeal. Unfortunately given the time frame the statute of limitations may expire before such a notice of appeal may be logistically possible to effect, as the statute of limitations may indeed expire today.

102. The relief herein has been previously sought as follows: Motion to intervene before the trial Court by Proposed-Intervenor (January 7 and 14, 2016, both denied) and allied Proposed-Intervenor Pamela Sylvester (January 13, 2016, denied); appeal of denial of Motion to intervene before this Court by the same two parties (January 15, 2016, denied).

Dated: Kings County, N.Y.
January 25, 2016

Sworn before me this 25th day of January, 2016

NOTARY PUBLIC
PATRASIA M DUNCAN
Notary Public, State of New York
No. 05DU6306208
Qualified in Kings County
Commission Expires June 23, 2018

Richard A. Brummel, *Proposed-Intervenor*

15 Laurel Lane
East Hills, N.Y. 11577
Tel. (516) 238-1646
Email: rxbrummel@gmail.com

Exhibits

Exhibit 1 Stipulation of Settlement
Exhibit 2 Affidavit in Support of Motion to Appeal Denial of Intervention of January 15, 2016
Exhibit 3 Order to show cause of Appellate Div. January 15, 2016
Exhibit 4 Article 78 petition
Exhibit 5 Decision and Order entered December 16, 2015.
Exhibit 6 Order to show cause Supreme Court of January 7, 2016 and Notice of Appeal.
Exhibit 7 Order to show cause Supreme Court of January 14, 2016 and Notice of Appeal.
Exhibit 8 Affidavit in Support of Motion to Intervene and Amend Prior Motion (January 14, 2016)
Exhibit 9 Photo of Woods at Project Site, taken by Proposed-Intervenor April, 2014
Exhibit 10 Final Environmental Impact Statement Containing Testimony by Proposed-Intervenor
Exhibit 11 Draft Environmental Impact Statement Figure 27A "Post-construction Ecological Communities", Approved "Site Development Plan"
Exhibit 12 Notice of Appeal on Decision and Order of December 15, 2015 as filed January 15, 2016