

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

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Richard A. Brummel,

PETITIONER

vs

Village of East Hills, N.Y. for the East Hills Architectural Review Board, and Bradley Marks AND/OR owner/developer of 90 Fir Drive, East Hills, NY,

RESPONDENTS

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INDEX NUMBER

012313 / 13

Affidavit in Support of
Motion for CPLR 7804e
Hearing

The Hon. Justice
Arthur M. Diamond, J.S.C.

Petitioner has before the Court an action that challenges the Village of East Hills ("VEH" or "the Village") and Bradley Marks right to proceed with tree removals at 90 Fir Drive, in East Hills, based on Petitioner's allegations that the proceedings of the Village's Architectural Review Board ("ARB" or "the Board") were defective in various respects.

At the present time, it appears that that, absent a continuing injunction by the Court, numerous trees at issue have already been cut down on the property. Nevertheless the action remains before the Court, and various issues including Respondents' demands for sanctions remain pending.

Petitioner seeks at this time to have the Court clear up significant conflict regarding the facts of the ARB meeting of August 5, 2013 ("the Meeting") because what transpired there affects numerous questions before the Court, including: (a) whether a decision was actually made that would have caused a statute of limitations to commence (see Reply Pp. 24 ff.); (b) whether the

decision on tree removals at 90 Fir Drive taken by the ARB at the meeting was an abuse of discretion or defective in a similar manner subject to Article 78 action (Verified Petition Pp. 15 to 17; Reply Pp. 52 ff.); and, (c) whether the actions brought by Petitioner was a justified and reasonable use of this Court's resources due to the nature of the governmental failure it sought to address (Reply Pp. 62 ff.).

Petitioner has described in detail in his Verified Petition and Reply the ways in which proceedings at the ARB meeting of August 5, 2013 lacked required procedural elements to vote on the tree removals proposed by Respondent Marks -- such as the absence of a tree-removal application, lack of specific identifying information about the trees proposed to be removed; and the absence of a report on the ecological significance of the trees from the Village Tree Warden as required by Village law (Verified Petition, Paragraphs 6 to 11, and 19 to 24).

Petitioner further has described that his own tape of the August 5, 2013 ARB meeting demonstrated that ARB members were fully aware and on notice of the deficiencies in the record, and made reference to them both during the initial presentation of the Respondent Marks, and later in the meeting during a separate period when the application of Respondent Marks ("the Application") was considered for a vote and then voted upon (Reply, Pages 7 to 12).

And Petitioner has stated that the tape of the August 5, 2013 ARB meeting provided to him by Respondent VEH on CD (Respondent VEH Exhibit 30) was missing the entire latter portion of the meeting at which the Application was re-considered and voted upon, and the deficiencies were openly discussed on the

record (Reply, Pp. 11 to 12).

Petitioner annexes hereto (CPLR 7804e Motion Exhibit 1) a CD made of the tape he himself made of the ARB meeting of August 5,2013.

On that tape, the entire portion beginning on SideB at 39:30 contains data missing from the CD provided by Respondent VEH, and constitutes a true record of the actual proceedings where the decision on 90 Fir Drive was made -- such as it was (see Reply P. 11).

On Petitioner's CD, significant moments are as as follows:

Board counsel Mitchell Cohen says the public hearing period is over and the Board deliberations will begin (Brummel_SideB 36:00);

Chairman Spencer Kanis makes motion to approve "house" (Brummel_SideB 42:30);

Board member Jana Goldenberg interrupts the vote to ask what about the trees (Brummel_SideB 42:48);

Ms. Goldenberg asks again for a landscape plan (detailing the trees proposed for removal) (Brummel_SideB 44:20);

In addition several moments are missing from Respondent VEH's CD covering the beginning of Board member Jana Goldenberg's earlier comments regarding the missing information about trees from the Application at issue (Brummel_SideA 1:02:21).

Petitioner has made a good-faith effort to submit his own record of the meeting to the Court by requesting permission of Respondents, but they have attached unacceptable terms to their assent -- to wit, the demand for a further response in the form of a "rejoinder" without allowing Petitioner to respond in

kind. (CPLR 7804e Motion Exhibit 2).

CPLR Section 7804e states:

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted. (Emphasis added)

Petitioner believes the court cannot adequately evaluate the merits of Petitioner's action as set out in the Order to Show Cause, Verified Petition, Reply, and herein without fully appreciating the flaws in Respondent VEH processes at the ARB meeting of August 5, 2013, and particularly the fact that the vote was taken not on tree removals but on "the house" (above).

Therefore Petitioner believes it is fully proper and necessary for the Court to order a hearing to ascertain the facts of the meeting.

Petitioner is late in this Motion because he did not realize, and was not informed by Respondent VEH, that the CD presented as "Audio Recording of August 5, 2013 ARB Public Meeting" (Respondent VEH Exhibit 30) was

incomplete; Petitioner realized this the night before his Reply was due; Petitioner was technically unable to duplicate his own tape by the submission time next day; and Petitioner made good-faith efforts to find a way with Respondent's assent to submit his own tape as soon as possible thereafter (see above).

I swear to the truth of the foregoing statements.

Richard A. Brummel, Petitioner
15 Laurel Lane
East Hills, NY 11577
Tel. (516) 669-1741

Sworn before me this

_____ day of _____, 2013

NOTARY PUBLIC