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

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RICHARD A. BRUMMEL

Petitioner-Appellant

- against -

VILAGE 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., N.Y.,

Respondents-Appellees

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Appellate Division Docket Number

2014-08342

AFFIDAVIT IN REPLY TO OPPOSITION TO MOTION TO RE-ARGUE AND IN OPPOSITION TO MOTION FOR SANCTIONS

RICHARD A. BRUMMEL
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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 is true to the best of my knowledge:

Preliminary Statement

1. Respondent-Appellee has effectively put Petitioner-Appellant on trial for the various efforts he has diligently and in good faith made to use the courts to uphold laws concerning the environment, and related matters arising from those efforts.

2. Respondent-Appellee uses its memorandum of law in support of its cross-motion ("Respondent-Appellee's memorandum of law") to expand on and add frankly horrendous -- and baseless -- allegations that appear only in less extreme form in its affirmation in support of the cross-motion and opposition to Petitioner-Appellant's motion ("Respondent-Appellee's affirmation"). Thus Respondent-Appellee alleges:

> "[Petitioner-Appellant] files, routinely and frequently, frivolous lawsuits. Though they are dismissed in due course [Petitioner-Appellant] is undeterred....This special proceeding is entirely frivolous because [Petitioner-Appellant] lacks standing....[Petitioner-Appellant] knows and understands he lacks standing." (Respondent-Appellee's memorandum of law p. 1) "...[Petitioner-Appellant] recognizes that he does not have standing." (*ibid.*, p. 2) "His now dismissed appeal never served any purpose and his motion...is without any basis in fact or law." (*ibid.*, p. 3) "[Petitioner-Appellant's] litigation history can only be described as vexatious and harassing." (*ibid.*, p. 4)[1]

3. It is true that Petitioner-Appellant has not met with success in the bulk of the cases in which he has become involved, involving Respondent-Appellee or

1 Petitioner-Appellant undertook about ten special proceedings in the past three years concerning environmental issues, and in related matters one special proceeding regarding the public right of assembly in a public park,, and one action for defamation by an official seeking to discredit Petitioner-Appellant by calculated falsehood in the public eye for his participation in public forums.

otherwise, though two are pending, and several are on appeal. But in no case have the grounds for Petitioner-Appellant's losses been an abuse of the judicial system or frivolous litigation.[2]

4. It is also true that Petitioner-Appellant's efforts have been unusual and for that reason might suggest the type of out-of-control litigant one encounters in reading the case-law on sanctions, as cited by Respondent-Appellee in its memorandum of law.

5. By the frothy, stream-of-consciousness-type tone adopted in Respondent-Appellee's affirmation to recite Petitioner-Appellant's alleged transgressions, and broad condemnatory brush Respondent-Appellee uses in its memorandum of law, Respondent-Appellee clearly seeks to create such an impression.

6. But such an impression is false, as the multiple prior unsuccessful efforts of Respondent-Appellee to discredit Petitioner-Appellant before the lower court has demonstrated.[3] And it is a serious injustice to make the allegations again, here.

7. In its baseless indictment, Respondent-Appellee ranges far afield from matters in which it has a direct stake to those in which it has no stake whatsoever and are irrelevant to the question Respondent-Appellee has placed before the Court: Whether Petitioner-Appellant's actions in the present matter are frivolous and warrant sanction.

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2 In one case, costs were assessed, because the judge evidently felt, upon the Respondent's post-decision application, that Petitioner-Appellant's challenge was blatantly past the statute of limitations -- a matter that was a central question of the litigation, concerning environmental review that preceded final approval of two projects by seven and thirteen years, respectively, and led to a gross violation of at least the spirit of environmental review in this state. Respondent-Appellee's affirmation, Exhibit 7, p. 13 *ff.*

3 See Petitioner-Appellant memorandum of law, Point 2, re *res judicata.*

8. In its focus on vilifying Petitioner-Appellant based on every manner of unrelated or already-settled action, Respondent-Appellee has provided the Court little substantive response to Petitioner-Appellant's motion to re-argue.

9. Finally Respondent-Appellee has not clearly articulated a case that Petitioner-appellant has violated any of the specific provisions of 22 NYCRR 130-1.1. Nor has it presented clear evidence of any allegation it has made that bears upon the provisions of that rule.

Res Judicata and Lack of Standing

10. Respondent-Appellee's motion for sanctions is defective in many respects beyond the falsity of the allegations raised.

11. Most of the instances of alleged frivolous conduct alleged to have been committed against Respondent-Appellee are governed by *res judicata*, having been already raised by Respondent-Appellee in the lower courts, denied by the courts, and not appealed by Respondent-Appellee or any other party -- see Exhibit 10, Exhibit 11 and Petitioner-Appellant's memorandum of law, Point 2).

12. Other matters Respondent-Appellee raises are those in which *res judicata* similarly governs but are also matters in which Respondent-Appellee has no standing -- it was not in any way affected, and frankly lacks full information.

13. The issues relating to cases in North Hills and Holley, N.Y. are discussed *infra*. In each case the innuendo and skewed facts Respondent-Appellee provides do not tell the whole story, and serve only to misinform and deceive the Court for Respondent-Appellee's purposes. The true stories reflect no misconduct on

Petitioner-Appellant's part.[4]

14. Respondent-Appellee evidently introduces the unrelated matters for inflammatory effect, on the pretext that it is giving the Court some deeper insight into Petitioner-Appellant's maleficence than is available strictly on the appropriate record before it. It is a false and malicious undertaking, but will require some response nevertheless.

15. As regards the matters of alleged frivolity in which Respondent-Appellee does have a stake, albeit long-expired, Petitioner-Appellant will discuss the law of frivolity -- the thresholds applied and the proper venue to decide -- in Petitioner-appellant's memorandum of law, as well as the applicability of *res judicata.*

16. Aside from being immune to challenge by *res judicata* in almost all instances, absolutely none of Petitioner-Appellant's conduct bears any resemblance to the cases on record, and the precedent-tests the courts have thus established regarding frivolous conduct.

17. Petitioner-Appellant will provide a sampling of his pleadings to satisfy the Court that this is the case, and his litigation has been reasonable and responsible, *infra,* "History of Relevant Litigation etc.".

18. Each of the four cases Petitioner-Appellant brought against Respondent-Appellee actually shone a valuable light on the type of careless and ultimately lawless conduct that typically occurs -- unchallenged and with impunity -- in smaller

4 Holley/Rochester for instance contained an embarrassing incident that bears discussion, *infra*, in which Petitioner-Appellant was admittedly in the wrong, having relied on incorrect advice from two court officials, one the judge's law secretary, and an outside attorney, but Petitioner-Appellant discovered his error before any of the others, including the judge, and quickly informed the court before any real harm occurred. See *infra*.

political subdivisions of this state, where the media is often absent, and residents have rarely have enough interest, awareness, motivation or knowledge of the law to act on their civic concerns. That certainly is the case in Respondent-Appellee Village.

19. In some cases Petitioner-Appellant brought against Respondent-Appellee or other local governments over the past three years, positive results have ensued, whether the cases remain pending or were decided against Petitioner-Appellant.[5]

20. In each of the cases Petitioner-Appellant brought that are at issue here, Petitioner-Appellant submitted extensive documentation and factual evidence, and increasingly sophisticated presentations of the law as it applied. *See* for example Petitioner-Appellant's Reply in the present case, Appendix p. 180.

21. Petitioner-Appellant has three times before been obligated to refute at length Respondent-Appellee's assertion of frivolity, and did so successfully in each case. *See* e.g. Petitioner-Appellant's Reply in this case, Appendix pp. 242-247

22. The record and the law should thus have been settled for Respondent-Appellee but yet Respondent-Appellee persists in vilifying Petitioner-Appellant and forcing Petitioner-Appellant to re-visit settled issues.

23. It should be well-known to Respondent-Appellee that findings of frivolity are

5 In one case, public parks controlled by Nassau County have become open to gatherings for the purpose of political expression, where prior to Petitioner-Appellant's challenge they were by all accounts closed as a matter of policy. Petitioner-Appellant's legal efforts have also led to some reforms in procedure or practice in the Respondent-Appellee Village, where for example meetings of the Architectural Review Board are publicly announced, and members of the Board demand to know whether decisions "pending landscape plans" will be decided in open session of the Board, as was at issue in the present matter.

based on clear infractions that are absent here, like the gross absence of merit, defiant re-litigation in contravention of court rulings and directives, absurd piling on of numerous defendants, etc. (*See*, Petitioner-Appellant's memorandum of law, Point 3.)

24. Nevertheless, Petitioner-Appellant is obliged once again to defend his the record. Petitioner-Appellant will provide an overview and samples of the bulk of his litigation to date, to satisfy the Court none of Respondent-Appellee's allegations have merit, *infra*.

25. Case law indicates the customary forum in every case for a finding of frivolity is before the Court at which the alleged conduct occurred, thus the lower court as opposed to in the appeals process.[6] This in almost all cases cited by Respondent-Appellee in its memorandum of law, the finding of frivolity was made by the lower court as a factual finding it was best suited to making. It thus appears to be a matter that is not properly before the appellate court unless on appeal, and unless the infraction occurred before the Court itself, *see* Petitioner-Appellant's memorandum of law, Point 1, Point IV).

26. Petitioner-Appellant is both pained by the baseless allegations, and troubled by the insistence of Respondent-Appellee on relitigating settled issues. Petitioner-Appellant has had to devote considerable time and effort, as well as some expense, to responding for the fourth time now to Respondent-Appellee's injudicious, false, and already-dismissed allegations (*see* Petitioner-appellant's memorandum of law, Point 2).

27. In fact, each time Respondent-Appellee makes the discredited argument, the

6 cf. Breytman v. Schechter, 2012 NY Slip Op 50315(U) (Sup. Ct., Kings County, Schack, J.)

alleged basis for it becomes more hostile and hurtful in tone.

28. This cross-motion for sanctions should clearly be decided against Respondent-Appellee, and the party should in the future be deterred from persisting in the routine request for sanctions regardless of Petitioner-Appellant's action or its merits. It wastes time and resources for all concerned, and it is unjustly damaging to Petitioner-Appellant. Petitioner-Appellant is thus weighing a motion for the Court to achieve that just result.

29. Finally Petitioner-Appellant requests that a live hearing be held on the issue of sanctions as raised against Petitioner-Appellant.

30. Petitioner-Appellant recognizes the Court exercises its discretion in such a matter as hearings on motions are not as a rule conducted before the Appellate Division. However the rules of the Chief Administrative Judge do appear to permit if not require such a hearing.[7]

31. As the motives and character of Petitioner-Appellant are brought into question by Respondent-Appellee's aggressive and seemingly deeply-felt onslaught, it seems just that Petitioner-Appellant should have an opportunity to introduce himself directly to the Court, in person. It is well known paper representations cannot always be relied on and are therefore given less credit than personal contact. Petitioner-

7 "The relevant provision of 22 NYCRR 130-1.1 (d) requires that a party against whom sanctions are sought to be imposed be given an opportunity to be heard. On November 1, 1989, both parties appeared before this court and were heard on the record with respect to the question of sanctions". Mechta v. Mack, 156 AD 2d 747 (Second Dep't., 1989) at 747-8. A similar procedure is followed in Strout Realty v. Mechta, 161 A.D.2d 630 (Second Dep't, 1990) at 631. A hearing is discussed but not conducted in another appellate case, but the sanction had been imposed by the trial court, and was only being reviewed, Gordon v. Marrone, 202 AD 2d 104 (Second Dep't, 1994) at 111.

Appellant is confident the Court will be able to satisfy itself of Petitioner-Appellant's motives and character through a hearing where paper would not otherwise suffice.

32. Petitioner-Appellant respectfully requests this Court take judicial notice of Respondent-Appellee's disrespect in referring to Petitioner-Appellant by his last name, rather than his role before the Court, as well as the unnecessarily loading on of unrelated matters calculated only to prejudice the Court, and the ascription of ill-motives -- e.g. "duplicitous conduct", Respondent-Appellee affirmation in support of motion for sanctions, ¶ 11, p. 6).

33. The style affected by Respondent-Appellee is, as it has been in prior submissions in other cases, inflammatory and deceptive, and distracts from the gravamen of the arguments and the business of the Court in discerning fact and law.

Respondent-Appellee Offers No Basis For Finding Petitioner-Appellant's Motion To Be Blatantly Without Merit, As Required

34. Petitioner-Appellant had genuine good-faith reasons to bring his motion to re-argue, based on the issues of the appeal and the nature of the decision to dismiss it, and remains hopeful the appeal will be heard on the merits as a result.

35. Petitioner-Appellant brought the instant motion to re-argue or for leave to appeal (hereinafter "motion to re-argue") because the issue before the Court remains a live controversy, not a moot question despite this Court's finding to the contrary.[8]

36. As stated in the motion, the Court based its decision to dismiss on an

8 "Where the case presents a live controversy and enduring consequences potentially flow from the order appealed from, the appeal is not moot" Matter of the New York State Commission on Judicial Conduct v. Rubenstein, 2014 NY Slip Op 4118, Court of Appeals.

unexpected issue, mootness of the appeal, in that (i) Respondent-Appellee raised the issue in one compound sentence of its motion and offered no further argument on its merits (Respondent-Appellee Affirmation in Opposition to Motion to Re-argue Exhibit 4: "Motion to Strike Appeal", paragraph 2); (ii) a large part of this appeal and its brief is concerned with the very question of whether the Court can hear the appeal due to the mootness of elements of the underlying matter (Petitioner-Appellant brief, Point I, pp. 16 *ff.*); and (iii) as Petitioner-Appellant argued in his affidavit in support of the motion to re-argue, Petitioner-Appellant did manage to challenge the issue of mootness in his affidavit in opposition to the motion to strike, but in a limited manner, this preserving the issue but also.

37. The live issue is whether Petitioner-Appellant has standing in environmental issues to sue the Respondent-Appellee Village, where he grew up, currently lives, and has become a highly involved public participant in civic activities (Exhibit 9).

38. Petitioner-Appellant has become deeply familiar with the law of environmental standing in this state, having litigated the issue numerous times and researched it extensively.[9]

39. Petitioner-Appellant is confident that the precedent on standing, as established by the Court of Appeals in Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297 (2009) and Society of the Plastics Indus. v. County of Suffolk, 77 N.Y. 2d 761 (1991), among other cases, gives him wholly valid standing in the present case, as he has argued in various submissions at issue here.

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9 Petitioner-Appellant recently was the prime force behind a seventy-page brief on standing currently before this Court on a separate matter, Matter of Richard A. Brummel, Joshua Dicker and David Greengold v. Town of North Hempstead, County of Nassau, and Roslyn Water District, Second Department Appellate Docket No. 2014-10641.

40. Petitioner-Appellant "uses and enjoys" (In the Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297 (2009), at 301) the natural resources of the Respondent-Appellee Village more than other members of "the public at large" (Save the Pine Bush at 305) through his walks and documenting of the environmental issues throughout the community, and suffers injury by the environmental damage brought on by Respondent-Appellee's improper discharge of the laws it has established, thus affording Petitioner-Appellant standing to litigate Respondent-Appellee's conduct when justified.[10]

41. Prior to resorting to litigation, Petitioner-Appellant has attempted to address the problems through intensive participation in the civic forums accorded the public, particularly the Village's Board of Trustees and the Architectural Review Board, as well as the media and civic organizing. Only when those efforts proved futile did Petitioner-Appellant add litigation to the effort to compel the Respondent-Appellee Village to enforce its own laws on the subject.[11]

42. Petitioner-appellant continues to diligently participate in the routine civic activities of the community to assure protection of the environment as mandated, and seeks the option of litigation only as a last resort.

43. Frankly without Petitioner-appellant's willingness to take the Respondent-

10 The ongoing practice of demolishing rebuilding houses across the Respondent-Appellee Village has led to the massive loss of healthy mature trees, and the proliferation of over-sized discordant houses on lots typically under half-and-acre, resulting in substantial degradation of the environment in the eyes of a large segment of the community. See Exhibit 9

11 "Whereas it is in the public interest to protect the tree canopy for current and future generations, the intent of this chapter is to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village....", Village of East Hills Code, Section 186-1.

Appellee Village to court when needed there is no other force in the community to counterbalance a crony government and a slow-motion destruction of the environmental and architectural legacy of the community.

44. Before this Court should properly be two questions: whether collateral estoppel was properly applied, and whether Petitioner-Appellant would properly be adjudged to have standing in the absence of collateral estoppel.

45. Petitioner-Appellant's motion to re-argue asks the Court to address those questions, as they are live matters. Such a request is based on a firm belief that standing does properly lie, and that collateral estoppel did not. Requesting the Court thus to restore the appeal is therefore hardly a vexatious or frivolous imposition on the Court or Respondent-Appellee.

46. Petitioner-Appellant will explore below what Respondent-Appellee seems to ask the Court to consider 'really' in making its application.

Respondent-Appellee Fails To Offer Substantive Arguments Against The Motion

47. Respondent-Appellee's affirmation presents little in the way of answering or challenging Petitioner-Appellant's arguments for leave to re-argue, though Respondent-Appellee argues that the motion is itself reason for the Court to impose sanctions, and is in fact the only reason that might be properly before the Court, given the effect of *res judicata* and standing as discussed, *supra*.

48. In dismissing the appeal, this Court held "the branch of the motion which is to dismiss the appeal on the ground that it has been rendered academic is granted and the appeal is dismissed." (Decision of the Court, Respondent-Appellee's affirmation

Exhibit 1, p. 1)

49. Petitioner-appellant submitted a thorough argument challenging that decision.

50. Respondent-Appellee's affirmation in opposition devotes only one paragraph to its argument against Petitioner-Appellant's motion to re-argue, and the paragraph consists of six bullet points. There is also a later conclusory passage stating Petitioner-Appellant "has no grounds warranting reargument and and suggests nothing justifying [leave to appeal]" (Respondent-Appellee's affirmation, paragraph 11).

51. Three of the bullet-points repeat arguments made in prior motions regarding (1) flaws in the appendix Petitioner-Appellant submitted; and (2) flaws in the extension of the deadline Petitioner-Appellant received for perfecting this appeal. The Court already dismissed those issues as academic in light of its ruling on mootness (Decision of the Court, *ibid.*), and the arguments add nothing to the issue at bar -- Petitioner-Appellant's motion to re-argue the dismissal for mootness.

52. Further, Petitioner-Appellant in prior submission fully argued the points asserted in the three bullet-point, yet Respondent-Appellee does not acknowledge or attempt to refute. Respondent-Appellee simply repeats its arguments as if to pile more weight on its flawed indictment of Petitioner-Appellant.[12]

53. The three bullet points directly addressing the mootness question say nothing

12 For instance, Petitioner-Appellant discussed at length, in answer to Respondent-Appellee's cross-motion regarding an alleged omission from the Appendix, that the omitted affirmation contained exhibits -- described here again by Respondent-Appellee for theatrical effect -- which were wholly irrelevant to the issue before the Court, which is estoppel and standing, and that the omission had no impact on Respondent-Appellee's argument, that Respondent-Appellee did not point to any such injury, that the omission was inadvertent, and that the omission could be easily remedied.

more than the following:

54. (1) Petitioner-Appellant is "not in the zone of interest" of "Marks's property"; (2) "the trees [have been] removed" that were at issue in the case; and (3) the issue of collateral estoppel and standing "is without merit....because, for example, [Petitioner-Appellant did not appeal]...another dismissal of a...special proceeding [brought by Petitioner-Appellant] because he lacked standing." (affirmation for sanctions, p. 3, ¶5).

55. As for the "zone of interest" issue, it is clear that Petitioner-Appellant's challenge of tree-removal permits on the grounds that they will cause a degradation in the environment he enjoys is clearly within the "zone of interests" of a village ordinance intended to protect trees and the "tree canopy", as the term "zone of interests" is properly understood in the context of standing.[13]

56. This point was made for Respondent-Appellee's benefit at least once before, i.e. the "zone of interest" is not a place, but a concept related to relevance, yet Respondent-Appellee persists in making the argument as if Petitioner-Appellant must somehow physically inhabit a "zone" near a property at issue to have standing. In fact the courts have made clear that the proximity to a property is far from the strongest basis for standing (see, e.g. Save the Pine Bush, *ibid.*, at 305).

57. A second bullet-point point out the fact that there are issues which are unquestionably moot in this case -- the removal of the trees and the construction of the house. But that point has been fully acknowledged by Petitioner-Appellant and is

13 "Whereas it is in the public interest to protect the tree canopy for current and future generations, the intent of this chapter is to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village...." Village Code, Section 186-1(B)

settled. The question before the Court is whether notwithstanding that fact, the issues of standing and collateral estoppel are properly before the Court.

58. Thus Respondent-Appellee's statement of the obvious, regarding mootness of tree removals and construction, similarly adds nothing to the argument before the Court.

59. Respondent-Appellee's final argument as to why Petitioner-Appellant should not be permitted to re-argue does speak to the issue before the Court, but it is incoherent as a matter of law. Respondent-Appellee states in full:

> "Brummel's contention that this special proceeding is not moot because he wishes to argue that collateral estoppel should not be applied against him as part of a determination he lacks standing to litigate about other people's homes and property is without merit. This is because, for example, Brummel did not serve and file a Notice of Appeal as to the May 6, 2014 Decision and Order in Brummel v. The Village of North Hills et al., Nassau County Index No. 0063/2014 (Exhibit 7), another dismissal of a Brummel special proceeding because he lacked standing."
>
> (Respondent-Appellee affirmation in support of motion for sanctions, p. 3, ¶5)

60. Respondent-Appellee's "argument" bears no relevance to the present matter.

61. Despite Respondent-Appellee's apparent assertion, whether Petitioner-Appellant is found not to have standing in another case, in another village, at another time and place, has no bearing on Petitioner-Appellant's standing to sue Respondent-Appellee over the workings of its board, in Respondent-Appellee Village, responsible for protecting the community character and natural assets. And Respondent-Appellee offers no argument that it does. Rather, it simply puts the statement out there and hopes it makes sense. But it does not.[14]

14 In fact, Petitioner-Appellant was denied standing in the other case referred to -- clearly erroneously. And it is correct Petitioner-Appellant did not appeal -- likely also

62. Thus, it is clear the totality of Respondent-Appellee's arguments in opposition to Petitioner-Appellant's motion to re-argue, which is supposedly frivolous and without merit, simply dissolve on inspection. There simply is no real argument presented by Respondent-Appellee as to the motion before the Court.

Respondent-Appellee Falsely Paints A Picture Of Improper Conduct

63. In requesting sanctions, on the other hand, Respondent-Appellee wishes the Court to adopt the mind-set that the material issue is not that Petitioner-Appellant innocently has requested the Court re-consider its order dismissing the appeal, an action no one could reasonably argue is sanction-worthy.

64. Rather, Respondent-Appellee wishes to create the impression that Petitioner-Appellant just refuses to accept the decisions of the judiciary in dismissing his cases 'time and time again', and thus "causes...extraordinary waste" by the courts and others like itself (Respondent-Appellee affirmation, ¶ 11, p. 6), and must be stopped.

65. But that assertion is demonstrably false. Sanctions are not imposed for diligent and persistent advocacy without evidence of a real transgression against accepted conduct.

66. Petitioner-Appellant explores the law of frivolous litigation in the accompanying memorandum of law, and shows the thresholds for sanctions are utterly out of the league of Petitioner-Appellant's actions in this and the other cases.

67. Petitioner-Appellant has indeed devoted extraordinary time effort and resources

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erroneously -- because half a forty-acre forest was already destroyed and Petitioner-Appellant felt -- also erroneously - he was without good legal arguments to fight the Court's decision. *See* discussion and excerpt of the North Hills case, *infra*.

to his temporary role as a *pro se* "Clark Kent", a citizen litigator, where others do not tread.

68. As Respondent-Appellee reports in prejudicial and deceptive fashion, Petitioner-Appellant recently attempted to assist a nationwide movement opposed to the Holley, N.Y. "Squirrel Slam" hunting contest (*Exhibit 1*) by using the State Environmental Quality Review Act ("SEQRA") to challenge the lack of environmental review of the hunt.

69. Calculations established that the hunt could result in the killing of hundreds or thousands of squirrels, many pregnant or nursing, on one day in a narrow geographical area, for competitive rewards based on weight of killed animals, thus causing a potential adverse environmental impact without appropriate review.

70. For three years, supporters hoped to use the courts to make the environmental challenge but were frustrated by various issues related to financing counsel or finding willing and suitable plaintiffs.

71. This year, while there were inadequate funds initially to obtain counsel, and major animal rights groups were unwilling to act, money was collected throughout the country and a plaintiff was ready to act *pro se*. There were complications and missteps, described in further detail below, but Petitioner-Appellant's error as caricatured by Respondent-Appellee for the Court was quite different from that claimed, and the matter is now pending appeal, tentatively with counsel, ready to test the legal groundwork prepared by Petitioner-Appellant (*see* "History of Relevant Litigation, etc." history, *infra*.).

72. There have been other matters Petitioner-Appellant undertook, equally

compelling and either misrepresented by Respondent-Appellee or not recounted for the Court.

73. But the picture painted by the totality of Petitioner-Appellant's work, as well as by each individual case, is of reasoned, judicious, good-faith use of legal mechanisms, rather than the excess alleged by Respondent-Appellee.

Respondent-Appellee Cannot Claim The Present Appeal Is Frivolous

74. Taking the present appeal as a test of Respondent-Appellee's claims, it is clear Respondent-Appellee's allegations are just smoke and mirrors.

75. In order to validate Respondent-Appellee's thesis, suggesting this matter is settled and therefore belaboring the appeal is "vexatious and harassing" (Respondent-Appellee memorandum of law, p. 4), Respondent-Appellee essentially insists the questions before the Court have been answered repeatedly, inasmuch as this and three other cases have been dismissed.

76. "This is the third of four [cases Petitioner-Appellant has brought] against the Village...in two years. Each has been dismissed," Respondent-Appellee writes (affirmation for sanctions, paragraph 3).

77. The facts show there is far less to this argument than meets the eye.

78. Although Petitioner-Appellant filed three varied and distinct special proceedings regarding Respondent-Appellee's flawed environmental stewardship, in April, 2012, March, 2013, and October, 2013, the merits of the cases were only determined in one case, the second one, Matter of Brummel v. East Hills Architectural Review Board and Zoning Board of Appeals, Index No. 3109/13.

79. The first one, related to an imminent though publicly opposed demolition of a charming old home two doors from Petitioner-Appellant's residence, was withdrawn for personal reasons by Petitioner-Appellant prior to Respondent-Appellee's answer, i.e. as Petitioner-Appellant has publicly stated and written, he personally feared the developers in the matter.

80. The third special proceeding, presently before this Court was determined by the trial court to be barred by collateral estoppel, based on the decision rendered in the immediately prior special proceeding, and is the subject of this appeal.

81. A fourth lawsuit to which Respondent-Appellee refers was brought in 2014 against Respondent-Appellee relating to a false and defamatory statement by the mayor of Respondent-Appellee Village, related to Petitioner-Appellant's public testimony at Village proceedings. That action was similarly meritorious but for a misapplication the law by the lower court,[15] now on appeal, (*see infra* for description and excerpts of the case, "History of Relevant Litigation etc.") .

82. Thus in the alleged long train of East Hills cases that Petitioner-appellant supposedly refuses to follow, only one case actually was decided, and that decision is effectively being challenged before this Court, albeit indirectly by the challenge to

15 To wit, the Court erroneously granted a motion to dismiss because it held that (1) a Mayor's statement to a newspaper, in the course of an interview, regarding a profile of Petitioner-Appellant the newspaper was writing, was subject to absolute immunity from claim for defamation, despite the precedent holding that absolute immunity was reserved for a narrow set of official functions; and that (2) the *privileged opinion* of the Mayor that Petitioner-Appellant's public testimony at unspecified village meetings was "disruptive" was protected opinion *even when* embellished with the provably false assertion that "police were called" to address such falsely-alleged "disruption", despite precedent holding that the entire phrase of a defamatory statement -- not pieces of it -- and the impact it has upon a normal listener are the appropriate measures of the defamatory character of a statement.

collateral estoppel. Thus there has been no extreme recalcitrance by Petitioner-appellant to follow the decisions of the courts, despite the deceitful hyperbole of the Respondent-Appellee seeking to create that impression. But it is false, as so much of Respondent-Appellee's indictment here is.

83. The other cases raised by Respondent-Appellee as evidence of Petitioner-Appellant's supposedly wasteful, meritless, recalcitrant conduct may be similarly challenged.

History of Relevant Litigation: Cases Brought By Petitioner-Appellant Demonstrate Substance, Reason and Merit

84. Respondent-Appellee's argument of frivolity is improperly based upon cases in which Respondent-Appellee has no stake or standing, or which have been settled by the lower courts and not appealed by Respondent-Appellee, and hence the claims for sanctions Respondent-Appellee asserted before the lower courts are immune from review by res judicata.

85. But for the record, and out of a surfeit of caution, Petitioner-Appellant feels it prudent to present an overview of the cases he has been involved in to satisfy the Court's concern or curiosity.

East Hills Cases

86. Petitioner-Appellant brought four cases against East Hills, three on environmental issues and one for defamation. All the cases have been different and based on largely different theories of law, and all on entirely different facts.

87. The first case was withdrawn quickly by Petitioner-Appellant, who became

fearful of Respondent-Appellee's co-respondents in the case, who were builders, almost immediately upon being granted a temporary restraining order. It was a decision Petitioner-Appellant regretted and attempted to rectify in the next cases.

88. The three other cases Petitioner-Appellant lost on motions to dismiss -- all incorrectly, Petitioner-Appellant feels, and two now on appeal including the present case before the Court.

89. A summary of each case follows, and opening pages from each case are attached as exhibits, except the current case where the appendix in the Court's possession provides substantial documentation of the case.

90. Cases not involving the Respondent-Appellee but referred to be Respondent-Appellee are similarly treated, *infra*.

91. (1) Brummel v. Village of East Hills, East Hills Architectural Review Board, Builder Property Owner 37 Laurel Lane, ("EH-I-37 Laurel"): This article 78 proceeding, brought in April 2012, sought to enjoin the village and a developer from demolishing a home and removing several massive trees from a home about seventy-five feet from his because (i) meetings of a board were not properly announced under the state Open Meetings Law; (ii) when a re-hearing was requested for residents to speak and submit testimony, they were denied; (iii) evidence submitted to the board, in the form of an extensive critique of the plans by a licensed architect, was not considered and demonstrated the board's decision was not rational. (Exhibit 2)

92. (2) Brummel v. Village of East Hills, East Hills Architectural Review Board and Zoning Board of Appeals, ("EH-II-ARB/ZBA"): This article 78 proceeding, brought in March, 2013, challenged decisions of a board because (i) the board failed to obtain

a mandated 'tree warden' reports describing the impact of plans to remove multiple massive trees from throughout the Respondent-Appellee Village in the course of demotions and rebuilding, despite Petitioner-Appellant's having raised the issue repeatedly in public hearings; (ii) other defects in the process of approvals given by the board; and (iii) Petitioner-Appellant was denied the right to appeal the defective decisions of the board to the Respondent-Appellee Village zoning board of appeals despite provisions in both the village code and state law that permitted such appeals by an aggrieved party, as Petitioner-Appellant argued he was. (Exhibit 3)

93. (3) Brummel v. Village of East Hills, East Hills Architectural Review Board, and Bradley Marks, 90 Fir Drive ("EH-III-90 Fir Drive"): This article 78 proceeding, brought in October, 2013, now before this Court, challenged a permit granted to a builder and new resident to cut down several massive trees, one, a hundred- foot tall Red Oak tree, an informal local landmark prized by some neighbors, on the basis that the board granting such permission had specifically deferred its decision on the "landscape plan" including vague descriptions of proposed tree removals, in a public vote on the application, pending a future deliberation and vote, but the Respondent-Appellee Village later secretly granted the permit absent a formal vote by the board, thus violating lawful procedure, and the public's right to participate in the proceedings.

94. (4) Brummel v. Board of Trustees, Michael R. Koblenz, as Mayor and Individually, Blank Slate Media et al., ("EH-IV-Defamation"): The fourth litigation Petitioner-Appellant brought against Respondent-Appellee Village was an action for defamation, filed in March, 2014. The action, taken after extensive attempts at

alternate resolution and almost a year after a Notice of Claim, was against Respondent-Appellee Village, the mayor of Respondent-Appellee Village, and the newspaper that published false and defamatory statements attributed to the mayor. Over the course of almost a year, Petitioner-Appellant sought in writing and verbally to have the various parties retract false and defamatory claims purportedly made by the mayor. Respondent-Appellee Village was on notice for about nine months prior to the lawsuit being filed due to a Notice of Claim Petitioner-Appellant filed.

95. Petitioner-Appellant's defamation action was in no way frivolous, and was erroneously dismissed on the basis that (i) the mayor purportedly enjoyed absolute immunity in comments he made to a newspaper about a resident being profiled (Petitioner-Appellant) and (ii) because part of a defamatory statement was opinion, the entire statement was privileged as fair comment. Both prongs of the decision were thoroughly refuted by Petitioner-Appellant's analysis of the facts and the law, and a notice of appeal was filed immediately. The matter is pending, (*see*, excerpts, Exhibit 4).

96. Equally important the action was not taken out of malice or otherwise but to restore Petitioner-appellant's good name. Petitioner-appellant communicated with the respondent parties for a year to get them to retract the false statements, but they did not.

Rochester Squirrel Hunt

97. This case extensively, cited by Respondent-Appellee in its affirmation regarding the squirrel hunt near Rochester, consuming a page and a half of a six-page

submission (Respondent-Appellee affirmation ¶¶ 7-10), bears some analysis and explanation.

98. Petitioner-Appellant committed an embarrassing error in a rush to help prepare a lawsuit 400 miles distant from his home, but had relied in good-faith on counsel from officials of two different courts, and an attorney. Petitioner-Appellant discovered the error himself, with no help from them, immediately notified the party affected and the Court, and caused no harm to any party. The Court itself felt no sanction was warranted (Respondent-Appellee affirmation Exhibit 9, p. 3).

99. The facts are as follows: For three years, beginning in 2013, a movement emerged throughout at least the eastern part of the US to oppose a squirrel-hunting contest in Holley, N.Y. sponsored by the local volunteer fire department, arguably a government agency under state law (*Exhibit 1*).

100. By Facebook and petition sites, the effort which at times included two national animal rights groups sought to cajole the local authorities into ending the contest.

101. It has emerged that at the time of year the hunt is held, in February, squirrels are pregnant or nursing their babies. As the object of the hunt is to kill the largest five squirrels, the hunt effectively targets pregnant or nursing females.

102. Furthermore it emerged that the squirrel hunters were most likely baiting the squirrels in the time leading up to the hunt in order to trick them into trusting their feeders and congregating. As hundreds of tickets to the hunt were sold, it could be expected hundreds if not more squirrels would be killed.

103. Petitioner-Appellant saw an application of the State Environmental Quality Review Act ("SEQRA") and struggled to get the national groups to use this way of

challenging the hunt.

104. In 2013, there was a willing plaintiff, a local wildlife rehabilitator, and a Rochester attorney specializing in environmental law ready to litigate the SEQRA claims, but the necessary funding could not be secured. In 2014, the same plaintiff dropped out, and no plaintiffs could be found. At least one local couple was ideally situated but afraid to stand up, and a second plaintiff volunteered but changed her mind.

105. This year, the second plaintiff agreed to sue, and Petitioner-Appellant coached her on the law and the process so that she could represent herself *pro se*. At some point, she became uncomfortable and asked for a lawyer instead. Petitioner-Appellant worked under tight deadlines to find a lawyer and the funding.

106. The date of the hunt was being kept secret, so every weekend in February became a possible deadline for filing the challenge to prevent a slaughter. It was a crisis atmosphere for Petitioner-appellant and for some dozen or so people closely involved around the country.

107. As Petitioner-Appellant rushed to find a lawyer, cognizant of the hunt possibly occurring at any time, one lawyer reputed to be an environmental specialist -- identified by name in Petitioner-Appellant's statement to the Court -- told Petitioner-Appellant he himself could represent the plaintiff, with a power of attorney. Others confirmed this for Petitioner-appellant, though it turned out to be false.

108. But at the time, in an urgent time crunch, where Petitioner-Appellant had already twice driven seven hundred miles to Rochester and back, Petitioner-Appellant had little time to research the issue. Petitioner-Appellant called the judge's

law clerk and asked if she believed Petitioner-Appellant could represent the plaintiff with power of attorney, and she said yes. Petitioner-Appellant also asked the *pro se* office of the Nassau Supreme Court the same question, and also received an affirmative answer.

109. Petitioner-Appellant thereupon travelled back to the Rochester area, met with the plaintiff, filed a power of attorney in her county, and prepared for court. He filed an order to show cause with TRO which was signed, and was scheduled to appear in two days.

110. After effecting service locally and on the secretary of state, and preparing to argue the preliminary injunction, Petitioner-Appellant at some point finally had time to review the law of power-of-attorney and quickly determined he was not given accurate information, and had no right to represent the plaintiff.

111. Petitioner-Appellant immediately informed the plaintiff and drafted a statement to the Court (Exhibit 5). Before anything occurred in court Petitioner-Appellant submitted the statement. As the transcript indicates (Respondent-Appellee affirmation, Exhibit 9, p. 4) the judge remained under the mistaken belief, upholding his law secretary Ms. Heath, that Petitioner-Appellant was properly before the Court "Provided you had power of attorney".

112. A reading of the brief three-page statement submitted to the Court should completely explain the circumstances and refute the shameless innuendo in regard to the incident by Respondent-Appellee.

113. In fact the entire episode before the Court may have been the result of a paper error: while Petitioner-Appellant submitted the power-of-attorney form (Exhibit 6) to

the Court, he also submitted an affidavit from the plaintiff as to why she wished to be represented by Petitioner-Appellant and not appear herself. It appears possible the Court lacked the power-of-attorney form, it not having been included in the papers by from the County Clerk, and the Court believed the affidavit was all there was to the purported power-of-attorney.

114. In any event Petitioner-Appellant's error was nothing like represented by Respondent-Appellee. It was innocent, had no serious ramifications, was excused by the Court, and was immediately acknowledged and repaired by Petitioner-Appellant.

115. Ultimately an attorney was retained to take the case forward, to the appellate level, where it remains.

North Hills

116. An article 78 proceeding regarding actions by developers and the Village of North Hills, filed in January, 2014, is also cited by Respondent-Appellee for the purpose of false innuendo (Respondent-Appellee affirmation, p. 4).

117. The case involved the imminent destruction by major developers of the final half of a one-hundred-acre state-recognized Oak and Tulip forest in under the jurisdiction of North Hills. The plans had been approved without a current or valid environmental review, as Petitioner-Appellant demonstrated in his submissions. Petitioner-Appellant's efforts notwithstanding, it was indeed levelled in during 2014.

118. The petition in the case demonstrates a detailed, reasoned legal argument based on extensive research of the history of the projects in question (*see* excerpts, Exhibit 7). The exhibits ran to several hundred pages.

119. The Sierra Club, the Green Party and an animal rights group, among others, appeared and testified imploring the Village of North Hills to desist and undertake proper SEQRA review prior to its actions. Several years earlier the state Department of Environmental Conservation wrote a letter imploring the village to protect the forest, all to no avail. Litigation was the only hope.

120. In the several months leading up to the village board's final approval, Petitioner-Appellant had begun exploring and documenting the forest at issue. As it was undeveloped and not otherwise restricted from entry, Petitioner-Appellant did so lawfully, under state law.[16]

121. Respondent-Appellee claims that Petitioner-Appellant knew he lacked standing and tried to recruit plaintiffs from an assisted-living facility (affirmation, ¶ 10 *ff.*), implying Petitioner-Appellant was egregiously looking for infirm people to use as puppets in the litigation.

122. The facts are far different, and the innuendo is utterly false.

123. Petitioner-Appellant definitely did have standing based on regular visits to a state-designated[17] forest and spending time in the woods there, which as unenclosed undeveloped land was by law open to public use. *See* footnote 15.

124. Petitioner-Appellant sought other plaintiffs in the area around the forest only to bolster the case, as he always has done. The closest residence was a luxury assisted-

16 "A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner." Penal Code 140.00 (5)

17 The forest was listed, as of October 2013, as the only such documented Oak-Tulip forest on Long Island by the New York State Natural Heritage Program, a state agency of biologists and ecologists (Element Occurrence ID 2034).

living facility, with many active residents, but Petitioner-Appellant cast a far broader net than just that location. Petitioner-Appellant approached the staff at the facility, including the director of activities, and also put flyers on the windshields of cars in the parking lot. Some of the residents' apartments faced the forest.

125. Petitioner-Appellant did not obtain any volunteers, and would not have taken any volunteers who were infirm. Petitioner-Appellant was informed some of the residents were quite active and had cars they routinely used. Respondent-Appellee's insinuation of any impropriety is calculated calumny.

126. Elsewhere in the area, Petitioner-Appellant indeed found an additional plaintiff, a computer consultant whose home overlooked the forest and was deeply opposed to any destruction of it. Petitioner-Appellant sought leave to add him to the petition during an appearance for a preliminary injunction, as Petitioner-Appellant recalls, but was denied by the judge at that point and did not pursue the issue subsequently.

127. As for the merits of the case, the fact was the judge in the case, The Former Hon. Justice Michele M. Woodard, was effectively forcibly retired from the bench shortly after the decision, having been abandoned by the major parties in Nassau County and having been the subject of intense criticism on the website "therobingroom.com".

128. This was one judge who, in a later case, Petitioner-Appellant asked that she recuse herself due to the hostile and abusive manner in which she was speaking to Petitioner-Appellant. She agreed.

129. Other cases are similarly misrepresented by Respondent-Appellee's blanket

claim that Petitioner-Appellant "brought eight baseless litigations against Nassau County municipalities" (Respondent-Appellee's affirmation, ¶ 11). A sampling of introductory statements of all or most of the eight cases is attached for the Court's review. As stated previously, *supra*., in no case were the matters determined to have been frivolous.

130. Only in the North Hills case did the judge award costs on settlement, after her decision had appeared to deny them. The judge, who as noted was effectively forcibly retired from the bench, failed to appreciate the merits of the case with respect to standing, accepting Respondents claim Petitioner-appellant had been "trespassing", and also dismissing the compelling fact that environmental reviews were long-outdated and in one case laughably inadequate. Petitioner-appellant's inexperience led him to walk away too early from an important case, wrongly decided.

Nassau County

131. As stated, Petitioner-Appellant is currently in litigation with Nassau County over two matters, both connected to a plan to put a water-treatment facility in the pristine forty-acre recreational forest of a county park, without performing proper environmental review: Brummel et al v. Town of North Hempstead et al. Second Department Appellate Docket No. 2014-10641, and Brummel v. Unknown John Doe Commissioner et al., Nassau Supreme Court Index # 5405/14. *See* excerpts, Exhibit 8.

132. In the former case, three residents -- Petitioner-appellant, a corporate attorney,

and a financial consultant who reside adjacent to the subject park, are litigants of a case that drew the support of several large groups and hundreds of users of Christopher Morley Park ("the Park").

133. In the latter case, Petitioner-Appellant sought a permit to hold a small rally in the Park, regarding the planned project in the other case, as the County Legislature was preparing to vote on the issue, but was denied the permit because, he was told by several officials involved in the decision process, Nassau County does not allow assemblies in parks for 'political' purposes.

134. on First Amendment and other grounds, Petitioner-Appellant sought a TRO to hold the rally and was denied -- by Justice Parga, of EH-II-ARB/ZBA, sitting in special term for the weekend. Petitioner-Appellant was further denied by Justice Woodard, of "North Hills" prior to her recusal. The case is still pending before a different judge.

135. In neither case was the matter in any way frivolous or improper. Instead, the cases are important efforts to preserve nature and to restore constitutional protections that have for several decades been denied in Nassau -- and now are intended to be used by Petitioner-appellant to help express the public interest in protecting nature, specifically in the Park at issue.

136. Illustrating the value of Petitioner-appellant's resort to the courts when needed, after the suit was filed Petitioner-appellant was granted a permit to hold two rallies with groups including the Sierra Club, which garnered valuable media and public attention to the issue. And in a separate illustration of the value of the lawsuit, an animal rights group protesting a circus held in a County park informed Petitioner-

Appellant that it was granted a permit to rally, where the prior year, before the lawsuit, it had been told such a rally was prohibited, and was forced to rally on the roadside outside the park.

Need For Citizen Litigators

137. As described, *supra*, About ten times in the past three years Petitioner-Appellant has helped bring issues to court, either alone, with others, or helping others represent themselves, that would otherwise not have been adjudicated, though the law and justice demanded it or benefited from it.

138. In the Village of East Hills, Petitioner-Appellant became allied with a seventy-year old man, a thirty-year resident, who is a professional and accredited arborist, and who was identified by the mayor village Mayor as a prime architect of the village's tree-protection law.

139. The man, and the lady who agitated for the tree law, was been forced off the board enforcing the law or resigned in protest over the flawed discharge of the laws, respectively. He was largely hopeless of change, until Petitioner-appellant began working with him.

140. Upon their gradual acquaintance Petitioner-appellant and the man, Richard Oberlander, the began to regularly to review developers' plans to remove numerous ecologically-valuable trees in their re-building projects, which have lately dotted East Hills with over-sized and architecturally-inappropriate new houses, their properties often largely devoid of mature trees, despite village laws intended to prevent that precise outcome.

141. Both Petitioner-Appellant and Mr. Oberlander, often with support of other neighbors, regularly testified and submitted written critiques of the proposals to cut down magnificent and healthy trees, and to build over-sized inappropriate houses as part of a massive real estate speculation here.

142. It was on the basis of this type of testimony, and the legally flawed conduct of the Village in approving such proposals, that Petitioner-Appellant brought three separate lawsuits against the Village, as described herein.

143. Prior to Petitioner-appellant's efforts the concern of residents was stymied at crony-packed village boards. At least with Petitioner-appellant's efforts there was a chance the facts and law would emerge. That still may happen, depending on this Court.

144. In another illustration of the constructive and unique contributions of a citizen-litigator such as himself, Petitioner-Appellant last fall and winter aided the mass of residents in Plainview and Hicksville, Long Island, who were outraged that Nassau County ("the County") planned to cut down all the trees on the main thoroughfare of their community, South Oyster Bay Road, as it had recently done elsewhere nearby before citizens could mobilize to prevent it (see Exhibit 12).

145. In Plainview/Hicksville, a residents committee had, with Petitioner-Appellant's help, learned the relevant law of environmental review, which had been ignored by the County, and found willing local plaintiffs. They chose to retain an attorney, who obtained a TRO.

146. But when the judge recused himself under bizarre circumstances, and was replaced by a judge who denied a preliminary injunction, rather than appealing the

bad decision, the attorney demanded payment he said was missing, and refused to appeal.

147. The citizens could not afford to pay, but refused to proceed *pro se*. Petitioner-Appellant spoke to dozens of residents who adamantly opposed the County's plan, and found among them numerous volunteer litigants who agreed to learn the law and help write the legal papers. Among them were (1) a pediatrician, (2) a life-long resident over 90 years old, and (3) a leader of a Buddhist community.

148. Petitioner-Appellant assisted the doctor to reach the appeals court, where it appeared lack of 'adequate' notice -- despite urgency and risk -- doomed his application.

149. As the doctor was unable to return and try again with adequate notice, the Buddhist leader picked up the effort. He was able to obtain a TRO from the Second Department, Operation S.T.O.M.P. *et al*. v. Nassau County, Jushen Su Intervenor, Appellate Docket No. 2014-10214 (Justice Mastro presiding), but the preliminary injunction was denied on unclear terms.

150. Nevertheless, the roughly ten-day delay in the County's tree-destruction process achieved by TRO enabled citizens to confront their local representatives and top County officials while the program could still be halted, and thus created an accountability of those officials when the program was not, and the trees were destroyed, about 200 or more. It also provided a teachable moment about the law in the media.

151. The cases Petitioner-Appellant has brought, in a tiring and frustrating marathon of public-mindedness, in East Hills and elsewhere, shared the same circumstances,

from Hicksville to Rochester: laws were being ignored, residents or others were unhappy, but a legal challenge was unavailable for practical reasons without the help of a volunteer *pro se* litigant, or legal assistant to other such volunteers.

152. In environmental cases in particular, the multiplicity of development challenges, especially in prospering areas like Long Island real estate, means large groups cannot handle the challenge, and the issues occur in scatter-shot fashion often too fast or too minor for citizens to organize, despite their displeasure.

153. There are also the issues of the high cost of legal counsel, demands on time, the issue of the "public good" that no one owns, and frankly ignorance, fear or distrust of the legal process. It takes considerable sacrifice of time, money, effort, and personal comfort to do what Petitioner-Appellant has done, and only an unusual set of circumstances currently enable Petitioner-appellant to do so.

154. As an overview demonstrates, in no case were the issues Petitioner-appellant pursued frivolous, brought on by malice, or otherwise abusive. Petitioner-Appellant often lost, but those losses often did not reflect on the merits of the case.

155. Respondent-Appellee's hurtful caricatures are wrong, and damaging. As stated, Petitioner-Appellant is weighing a motion that would ask the Court to review sanctions for Respondent-Appellee's unjust and repeatedly denied backlash.

Recusals

156. Respondent-Appellee states that several judges recused themselves, and insinuates this is proof of Petitioner-Appellant's sanction-worthy misconduct before the courts (Respondent-Appellee affirmation, ¶ 12, p. 6). Once again this is an

inflammatory insinuation that proves meritless.

157. As Petitioner-Appellant recollects, there were three recusals at issue, of which two were requested by Petitioner-Appellant, and the third that was not requested but welcomed by Petitioner-Appellant.

158. In Brummel v. Village of North Hills et al., Petitioner-Appellant requested The Hon. Justice Jerome C. Murphy to recuse himself because his father-in-law, The Hon. Former Sen. Alphonse Petitioner-Appellant. D'Amato, was a close friend of the founder of the real estate firm being sued by Petitioner-Appellant, RXR (Rechler) Realty. Justice Murphy did recuse himself, for unspecified reasons.

159. In the same case, as Petitioner-appellant recollects, The Hon. Justice Anthony M. Parga also recused himself -- to Petitioner-Appellant's relief -- having been the judge who presided over EH-II-ARB/ZBA.

160. Petitioner-Appellant had expressed strong criticism of Justice Parga in public, in the media and on his website, but it is not known whether Justice Parga was aware of the criticisms, nor the basis for his recusal. Justice Parga has been similarly the subject of extreme criticism for hostility to plaintiffs in "therobingroom.com", and Petitioner-Appellant felt his decision in EH-II-ARB/ZBA was extremely incorrect -- for reasons outlined in the present case.

161. As noted in the brief in the present matter (pp. 33 *ff.*), Petitioner-Appellant had not appealed Justice Parga's ruling because he was advised by an attorney that the decision would not affect his future rights, including standing, and the properties and trees at issue had been largely damaged by the time of the decision, injunctive relief having been denied.)

162. As noted above with respect to Brummel v. North Hills et al., former Justice Woodard recused herself, at Petitioner-Appellant's request, after yet another injudicious and belittling exchange in Brummel v. "John Doe Commissioner" Nassau County, *supra*.

163. In the latter case, which concerned Nassau County's denial of the right of public assembly in county parks, when for political or public policy purposes, Justice Woodard had opined from the bench -- U.S. Supreme Court decisions to the contrary, *cf.* Hague v C. I. O., 307 US 496 (at 515) -- that 'public parks should really be for the benefit of children', and 'protesters could find elsewhere to assemble'.

164. Subsequent to this exchange, Petitioner-Appellant asked the judge to recuse herself after she began bickering with Petitioner-Appellant about his failure to 'rise', despite his apology, when giving her a one-word answer to a question, as Petitioner-Appellant recalls. Petitioner-Appellant had been subjected to similar inappropriate admonitions and hectoring each of the occasions he appeared before this judge, and Petitioner-Appellant felt they were indicative of hostility and prejudice, particularly to his *pro se* status.

165. Apparently the judge agreed.

166. As is apparent, in each case of recusal, the judges were either requested to recuse on good grounds, or the judge chose -- in the case of Justice Parga -- to recuse because of an unspecified reason, but possibly due to some rancor generated by his prior decisions in a prior case.

167. It is relevant here that Justice Parga stated no reason for recusal, and levied no sanction against Petitioner-Appellant for his reasoned criticism of the decision,

which presumably is Petitioner-Appellant's incontrovertible right.

168. Again, the story of innuendo constructed by Respondent-Appellee differs from actual fact, and Respondent-Appellee's request for sanctions is fatally weakened by the deceptiveness of its representations, as well as the simple absence of the misconduct it alleges.

Conclusions

169. As Petitioner-Appellant has shown, Respondent-Appellee has failed to substantively challenge Petitioner-Appellant's arguments for leave to re-argue, and the arguments Respondent-Appellee did present are irrelevant to the issues before the Court related to the motion, or incoherent, or both.

170. Instead of clear arguments as to why the issues raised in the motion are invalid, Respondent-Appellee's opposition consists almost entirely of baseless, irrelevant allegations of Petitioner-Appellant's supposed transgressions in every matter except those presently before the Court.

171. Given the opportunity to argue Petitioner-Appellant's motion, Respondent-Appellee instead launches into a wide-ranging attack on almost everything Petitioner-Appellant has done before the courts, evidently hoping the sheer weight of such innuendo and conclusory allegations (a pale impostor for 'evidence') would somehow crush the arguments in favor of Petitioner-Appellant's request, in the absence of an actual answer to them.

172. Respondent-Appellee is more concerned with the theatrics of seeking sanctions

than with cogently opposing the motion, but Respondent-Appellee fails in both respects.

173. Ultimately there is nothing wrong with Petitioner-Appellant asking for a re-argument, nothing frivolous or improper. It is a routine request, unworthy of any sanction. Petitioner-appellant has a valid argument on appeal regarding the misapplication of collateral estoppel, exceptions to mootness to hear the case, and standing as a matter erroneously denied in the first place.

174. Almost all of Respondent-Appellee's arguments for sanctions are related to matters long-since settled and barred by *res judicata*. Most are also matters over which Respondent-Appellee has no standing. Beyond that, they simply have no merit -- which is why the lower courts ruled against them consistently, three times for Respondent-Appellee thus far.

175. Other matters raised, such as the supposed 'pattern' of recusals by judges, the supposed attempt to recruit infirm plaintiffs, and the alleged attempt to unlawfully represent a plaintiff upstate, disintegrate upon a fuller presentation of the facts, and are shown to be scurrilous claims.

176. They are also irrelevant to the present matter, in that the 'facts' presented are not sworn or known first-hand, nor adequately documented to form a reasonable evidentiary basis for this Court to take judicial cognizance of them in the decision on sanctions. They are simply inflammatory and prejudicial.

177. Petitioner-Appellant's conduct in no way resembles that involved in any of the cases cited in Respondent-Appellee's memorandum of law. The standards for sanction are meant to address and deter clear abuse of the judicial system, not

diligent and aggressive pursuit of justice.

178. Respondent-Appellee is simply using the cudgel of sanctions to try to shut the door of the judicial system to an conscientious, competent citizen activist, and possibly to vindicate itself.

179. Respondent-Appellee's recitation of the law in its memorandum of law is deceptive and sloppy. It adds nothing to the case except venom. It is a disservice to this Court.

180. Respondent-Appellee's ceaseless tactic of bashing Petitioner-Appellant and seeking sanctions, without a reasonable basis, is clearly documented. It clearly warrants sanction and injunction -- a matter upon which Petitioner-Appellant is weighing a further motion.

181. With respect to Petitioner-appellant, sanctions are clearly unwarranted. Imposing pre-filing leave would put Petitioner-appellant subject to the whims of a very uneven bench, whose decisions are often disheartening or whimsical. Further, such sanction could delay environmental cases where time is critical. Such an action by this Court would also chill valid public participation in the civic and judicial process.

182. Finally, Respondent-Appellee has not clearly articulated a case that Petitioner-appellant has violated any of the specific provisions of 22 NYCRR 130-1.1. Nor has it presented clear evidence to support any allegation it has made that bears upon such such a violation.

183. Perhaps a constructive dialogue between the parties could help to settle the emotions; Petitioner-appellant has continued to be engaged in such a dialogue. But

sanctions against Petitioner-appellant are unwarranted and unjust, whether for that or any other purpose.

Dated: Nassau County, New York,
April 16, 2015

_____

Richard A. Brummel
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East Hills, New York 11577
Tel. (516) 238-1646

Sworn before me this ___ day of
April, 2015

_____

NOTARY PUBLIC