

**SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU**

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THE HON. _____ PRESIDING

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RICHARD A. BRUMMEL and STEVEN C. LIU

Index No. _____

Petitioners,

VERIFIED PETITION

- against -

ARCHITECTURAL REVIEW BOARD OF THE VILLAGE OF
EAST HILLS, THE BOARD OF TRUSTEES OF THE VILLAGE
OF EAST HILLS, and DANIEL and MELODY SCHOR, 185 ELM
DRIVE, EAST HILLS, N.Y.,

Respondents.

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Preliminary Remarks

1. This Article 78 special proceeding seeks to annul, and to enjoin any action pursuant to, a Decision of the Architectural Review Board (hereinafter "the Board") of the the Village of East Hills (hereinafter "the Village") which permitted the significant 'de-forestation' of a residential property under its authority, to wit, the removal of twelve mature trees, which Decision occurred despite procedural failures rendering it "arbitrary and capricious", and hence invalid.
2. The improprieties in the Board's decision-process to be cited include: (1) it effectively suppressed and ignored a report by the Village's own consulting-expert arborist that discredited a number of the purported expert-opinions upon which the Decision to de-forest the property was based; (2) it failed to acknowledge or address the expert opinion of a former Village official/Board member/arborist/ and author of the Village 'tree law' who disputed the scientific basis for the removal of almost all the twelve trees at issue; (3) it acted despite the absence of a mandated report by the Village 'Tree Warden' intended to guide and assist in its deliberations; (4) it failed to address in any way the impact of its decision on wildlife, whose protection is part of the Board's 'tree-protection'/environmental protection mandate, despite the fact expert testimony established a clear likelihood that wildlife inhabited some or all of the trees at issue.
3. Such a flawed 'decision-making' process, evidently circumscribed to placate residents and accommodate developers, means the Board fails to properly discharge its statutory duties, and its approval of the tree removals in this case should be declared null and void.
4. This is not an isolated occurrence. The Board's abdication of oversight in recent years has

led to widespread and significant degradation of the Village 'environment' by loss of large parts of the "tree canopy", and the construction of over-sized houses out of harmony with the neighborhood. Both developments contravene the express intent of the East Hills Village Code (hereinafter "the Village Code"), and their visible consequences exert a corrosive effect on 'respect' for local government.

5. This Court is asked therefore to annul and vacate the Board's flawed decision, to return the issue to the Board for proper determination on the merits and with due regard to (1) the relevant provisions of the laws governing its conduct, and (2) to the facts and expert opinion before it, and this Court is further asked to enjoin destruction of any the trees at issue in the interim¹.
6. The Court is requested to be aware removal of the trees is possibly imminent in the absence of injunctive relief, because the board approved the tree removal application about one week ago, and given recent litigation against the Board the Village can be expected to seek swift execution of the Board's controversial tree-removal decisions to preclude further legal challenge.
7. The relief requested herein was previously requested from the Court by a Supplemental Petition filed on October 7, 2016 in connection with a prior Article 78 Petition, Brummel v. Architectural Review Board of the the Village of East Hills et al., Nassau Index #6272/2016, but inasmuch at that matter was decided the day before the Supplemental Petition was filed the Supplemental Petition was returned to Petitioner Brummel and the Order to Show Cause upon which it was moved was not signed.

¹ One of the trees is uniformly agreed to be "dead" and Petitioner Brummel does not object to its removal alone, and so specified in the accompanying order to show cause.

Overview

8. Like many affluent suburban communities in this area, East Hills has for about a decade been subject to the pressure of a real-estate-boom characterized by the rampant demolition and re-construction of old homes, the denuding of vegetation of the decades-old lots where original houses were located, and the frequent wholesale destruction of majestic mature trees by developers and newly-arrived residents for a panoply of proffered reasons.
9. Over the past ten years, the Village Board of Trustees (hereinafter "the Village Board") adopted a series of architectural, tree-protection, and zoning laws -- partially or fully administered by the Architectural Review Board ("the Board") -- ostensibly designed, among other things, "to protect the tree canopy for current and future generations" (Village Code §186-1(B)) and to halt "[t]he recent trend of tearing down existing houses and replacing them with expansive houses or building extremely large additions to existing houses...." (Village Code §271-225(A)).
10. But the public welfare thus defined cannot be protected unless the Board properly discharges its duties by (1) embracing and evaluating expert testimony placed before it, (2) systematically evaluating facts before it in the context of its statutory responsibilities, and (3) complying with all procedural provisions of its enabling Code.
11. The Board violated those procedural safeguard in this case. Intervention by the Court is therefore warranted to assure the proper functioning of the Board and the proper discharge of it responsibilities under the Village Code.
12. As discussed in the accompanying Memorandum of Law, this Court may annul such an administrative decision when it is not 'supported by the record'. Rather than 'interfering' with

the administrative "discretion" of the Board, the Court will in reality help to assure that such "discretion" is in fact being actively exercised for the benefit of the public, as the law requires.

Parties

Petitioner Brummel

13. As described in the accompanying affidavit, Exhibit 17, Petitioner Richard A. Brummel is a fifty-six year old resident of the Village who has been highly active promoting and advocating a deep concern for the environmental and aesthetic character of the Village, mobilizing both residents and the media to get involved in and be aware of the significant adverse environmental and aesthetic changes occurring as a result of the misapplication by Village agencies of Village laws intended to protect the local environment and the community's aesthetic character. See e.g. news article, Exhibit 18.
14. Petitioner Brummel has in the course of extensive local environmental advocacy and organizing, as well as his personal travels in the community, regularly visited, walked around, photographed and spoken in-person to neighbors in the direct vicinity of the property and trees in question at 185 Elm Drive.
15. By Petitioner Brummel's count he is able to recall about twenty occasions in the past three years he has visited the area of 185 Elm Drive and undertaken the acts described (visiting, photographing, etc.).
16. Petitioner Brummel has also spoken on several occasions before the Board about preserving trees and neighborhood character on Elm Drive in regarding applications related

to houses on or near Elm Drive, most memorably 205 Elm Drive where a house was demolished and many trees cut down.

17. Due to his close connection by repeated and regular visits to the vicinity of 185 Elm Drive Petitioner Brummel has a connection that will lead to 'harm' if the trees are removed there as currently contemplated, and thus has "standing" in this matter.
18. The accompanying affidavit supplies extensive additional details related to Petitioner Brummel's relevant actions, attitudes, mind-set, and 'injury'.

The 'Standing' Issue

19. Petitioner Brummel was denied standing in several prior special proceedings despite assertions of his 'use and enjoyment' of certain trees similar to those asserted here, to wit: Petitioner Brummel makes frequent i.e. "repeated, not rare or isolated use" of the natural environment in the vicinity of the trees and property at issue (in the words of two controlling decisions of the Court of Appeals²) and the loss of the trees would cause Petitioner Brummel harm and injury of an 'environmental' nature³.
20. The denial of standing in two cases from 2013 was effectively disposed by the determination of the Second Department that any collateral estoppel from their denial of Petitioner Brummel's standing was "academic" (see discussion in accompanying Memorandum of Law).

² Sierra Club v. Village of Painted Post, 26 NY 3d 301 (2015) at 310 quoting Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) at 305.

³ Save the Pine Bush, id., "...[W]e adopt a rule similar to one long established in the federal courts. In Sierra Club v. Morton, the United States Supreme Court held that a generalized 'interest' in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's aesthetic and environmental well-being would be enough and the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing...." (emphasis added, internal quotations and citations omitted), at 305.

21. The denial of standing in the recent prior matter is under appeal⁴. The present case may be distinguished from it for standing purposes in that Petitioner Brummel has here alleged a direct connection with the locale where the twelve trees are located that is of a duration far longer duration than in the prior matter: at least three years versus one year.
22. Furthermore, the present matter is much more drastic and exerts far more harm to anyone with an environmental connection. In the present matter the issue is the destruction of twelve trees, most of them very large and directly or closely abutting the street, some in a noted "cluster" of roughly six Beech trees.
23. By contrast the prior matter⁵ involved only two trees, relatively far away from the street, and while deeply troubling and unjust -- their being removed because the resident had 'problems' with the trees' acorns -- the immediate impact was a limited one. Longer term the issues may be greater, but the Court did not appear to consider that argument.
24. Of particular note in the discussion in the Memorandum of Law is the concept that even though East Hills is not a "forest" or "nature preserve", the tests of of "standing" established by Save the Pine Bush, id. and Sierra Club v. Village of Painted Post, id. are applicable.

Petitioner Steven C. Liu

25. As described in the accompanying affidavit, Exhibit 19, Petitioner Liu resides next to the subject property where twelve trees have been authorized to be removed. He owns the property and has lived there with his family since 2005. He values the natural environment,

⁴ Brummel v. Architectural Review Board of the the Village of East Hills et al., Second Department Docket No. 2016-10704.

⁵ Decision and Order, the Hon. Justice Sondra K. Pardes, Brummel v. Architectural Review Board of the the Village of East Hills, Index No. 6272/2016 (Exhibit 16).

spends time walking around the neighborhood to enjoy the trees wildlife greenery and fresh air, and would be adversely affected by the removal of the trees, particularly due to the unsubstantiated reasons for which many of not all the trees were approved for removal.

26. Several of the trees are directly adjacent to Petitioner Liu's property and afford him visual enjoyment as well as shade and other direct benefits -- as were richly catalogued in the Village tree law (*infra*). Others of the trees he sees frequently on his walks or as he enjoys his own property, for example the Oak tree in the backyard of 185 Elm Drive.

27. Petitioner Liu would be unquestionably harmed by the removal of the trees and he clearly enjoys standing to maintain this special proceeding.

28. Petitioner Liu did not examine the Architectural Review Board file some of whose documents are appended here as exhibits, and Petitioner Liu has relied on the assurance of Petitioner Brummel as to the documents authenticity.

29. As Petitioner Liu was not present at the Architectural Review Board meeting of October 5, 2016 , he has relied on the verbal reporting and affidavit of Petitioner Brummel for the facts of what transpired at the meeting as reported here.

The East Hills Architectural Review Board and East Hills Board of Trustees

30. The Village of East Hills, which is an incorporated Village under New York State Village Law, is located in Nassau County and comprises roughly 2,300 houses and 7,200 residents, according to the website of the Village⁶. The website further states that less than two percent of the land in the Village is presently undeveloped.

31. The Village comprises roughly 1,500 acres of land that is densely developed with

⁶See, http://www.villageofeasthills.org/village_history.html (data downloaded August 23, 2016).

suburban houses on lots ranging in general from about one-quarter to about one acre in size, with the median lot size roughly one-half acre⁷.

32. Although there are unquestionably thousands of mature trees in the Village surrounding homes and in the ten acre Village park, no tree count has ever been performed, to Petitioner's knowledge, and no analysis of the annual loss of trees to disease, development, or other causes has ever been conducted, despite Petitioner's transcribed testimony urging that such data be compiled.
33. The Board is empowered under various sections of the Code of the Village (Exhibit 4) preserve and protect trees, and to protect the architectural harmony of the Village.
34. With respect to construction, the Board is empowered to "preserve and promote the character, appearances and aesthetics of the Village" (Section 271-186(A), Legislative intent, policies and findings) by conducting "review of the exterior of new construction and of certain alterations, additions, reconstructions and site utilizations" (*id.*) under Chapter 271, Article XX, of the Code of the Village, codified pursuant to the "Architectural Review Act".
35. With respect to mature trees, the Board is also empowered to "consider, research, study, review, examine, investigate and determine the resolution of any Application [to remove trees in the Village]" (Section 186-3(A)(1), "Authority of ARB; designation of Tree Warden") in order to promote the Village goal to "to protect the tree canopy for current and future generations...[and] to prevent the indiscriminate destruction or removal of trees within the boundaries of the Village" (Section 186-1(B), "Legislative intent").

⁷Lacking any systematic official figures the estimates of area are made from the website "daftlogic.com" and the lot-size estimates are an estimate based on Petitioner's experience.

36. In both instances the Board, consisting nominally of nine members and three alternates appointed by the Mayor (Section 271-188(B)), meets at least monthly (Section 271-189(A)), and thereupon reviews applications for both construction and tree removals.
37. At its meetings the Board hears unsworn testimony from applicants, their agents, and others wishing to speak, and subsequently votes in public session on whether to approve, deny or defer the applications before it.
38. The Board of Trustees is named herein because the authority to issue Tree Permits may reside not with the Architectural Review Board, a deliberative body, but with the administrative apparatus of the Village whose authority resides with the Trustees.

Daniel and Melody Schor

39. Upon information and belief, Daniel and Melody Schor (hereinafter "the Schors") are the owners of 185 Elm Drive, East Hills, N.Y. 11576, who appeared before the Architectural Review Board on October 5, 2016 to present the application for the removal of twelve mature trees situated on their property: Exhibit 5, "Tree Removal/Alteration Application".
40. The Schors are Necessary Parties because granting relief against the Architectural Review Board will affect their rights and privileges as would otherwise be granted by the Village in granting their application to remove twelve trees from their property.

The Laws

41. The Village enacted a law to protect trees in 2006, called the "Tree Protection and Preservation Act of 2006", codified in chapter 186 of the Code. The law was amended in

2007, 2009, 2012 and 2014. The section of the Code implementing the law is hereinafter called "the Tree Law".

42. The stated intent, which was unchanged by any of the amendments, upon information and belief, is "to protect the public health, safety and general welfare by providing for the regulation of the planting, maintenance and removal of trees within the Incorporated Village of East Hills." (Section 186-1 (A) "Legislative intent").

43. The Code further states:

"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 and to ensure the relocation or replacement of trees which may be removed or destroyed."

(Section 186-1 (B) "Legislative intent").

44. The Code enumerates the benefits of trees and the adverse environmental, aesthetic and economic impact of their removal:

"It is the further intent of the Village to have trees generally continue to stabilize the soil and control water pollution by preventing soil erosion and flooding, absorbing air pollution, providing oxygen, yielding advantageous micro-climatic effects, have intrinsic aesthetic qualities, preserve and enhance property values, offer a natural barrier to noise, provide privacy, and provide a natural habitat for wildlife, and that the removal of trees deprives the residents of the Village of these benefits and disrupts fundamental ecological systems of which trees are an integral part."

(Section 186-1 (C) "Legislative intent").

45. The Code of the Village provides for a multi-step process by which permission for routine (non-emergency) tree removals must be requested by residents before any tree is removed.

46. There is essentially a two-track process that commences with the Applicant furnishing

the details of their proposed tree removal with an Application and payment of a fee (Sections 186-4(B), 186-11(A)).

47. An initial decision is then made by the Village's appointed "Tree Warden" (Section 186-2 "Definitions") as to "whether the need for removal is reasonable and the removal will not have a significant impact on the surrounding properties and the community as a whole" (Section 186-5(A)).

48. If the Tree Warden does not find those conditions to be met, he or she refers the Application to the Board, which must then "consider, research, study, review, examine, investigate and determine the resolution of" such an Application (Section 186-3 (A)(1)).

49. The Board is required to meet once a month (Section 271-189 (A)).

50. For the past several years, under the present chairman, the practice of the Board at its meetings, as authorized by Section 271-189 (E) has been: (1) to listen to a presentation by an Applicant and to have Board members engage the Applicant in a dialogue, if needed, about details of the Application; then (2) to permit members of the public to address the Board about the Application; then (3) to vote on the Application.

51. It has also been the practice of the Board, upon information and belief, to visit the sites of the applications as a group prior to the meetings.

52. As part of the referral to the Board, the Tree Warden is required to compose "a brief written report for submission to the ARB" (Section 186-5(C)).

53. The Code states:

"B. Where the Tree Warden determines that the removal(s) may have a significant impact on surrounding properties or the community as a whole, the Application shall be referred to the ARB for a determination.

C. The Tree Warden shall prepare a brief written report for submission to the

ARB. The Tree Warden shall base his or her determination on the following criteria...."

(Section 186-5 (B) and (C), emphasis added)

54. The contents of the report (hereafter "the Tree Warden report") are evidently supposed to transmit to the Board the basis for the referral, the criteria of which are described in the same paragraph of the Code as the report is mandated:

"The Tree Warden shall base his or her determination on the following criteria:

(1) The condition of the tree or trees with respect to disease, proximity to existing or proposed structures and interference with utility services.

(2) The necessity of removing the tree or trees in order to implement the stated purpose of the Application.

(3) The effect of the tree removal on erosion, soil moisture retention, flow of surface waters and drainage.

(4) The number and density of trees in the area and the effect of tree removal on other existing vegetation and property values of the neighborhood.

(5) Whether any tree in question is a tree worthy of preservation due to characteristics such as health, age, history, size, rarity, financial value or visual importance to the neighborhood."

(Section 186-5 (C))

55. An alternate procedure established by the Code -- but not followed in practice, upon information and belief -- empowers a "Tree Subcommittee Chairman" of the Board to himself or herself make any determination with respect to an Application referred to the Board by the Tree Warden (Section 186-15).

56. The Code also contains a 'waiver' provision (Section 186-13, "Waiver by ARB") that permits the Board to "waive any of the requirements, standards, procedures or mandates contained in this Chapter 186 of the Code".

57. However the 'waiver' provision of the Code also requires that "An Application, in writing, must be sent to the ARB containing the facts, information, circumstances and proof of any extenuating situation or need" (Section 186-13).
58. It appears thus that the 'waiver' is designed to assist applicants in hardship, and requires an explicit Board action in response to an explicit Applicant request.
59. The Code permits an appeal of its decision by "[a]ny Applicant aggrieved by any decision of the ARB" to the Zoning Board of Appeals (Section 186-16(B)). The Code defines an "Applicant" as "The owner, lessee, occupant or person in possession of any premises in the Village, or any agent thereof, including contractors" (Section 186-2 "Definitions").
60. The Board has in the past two to three years followed the practice, possibly in response to Petitioner's prior urging, of obtaining a report from an independent certified 'consulting arborist' firm called "Tree Health" to independently evaluate tree removal applications that come before it.
61. The arborist reports have served to provide an independent written assessment of whether or not the tree(s) proposed for removal is (or are) sick, or dangerous, or in the way of construction, or otherwise justifiably proposed for removal.
62. The authority to use such an independent arborist is stated in the Sections 186-11(B) and 186-12(A) of the tree law.
63. However the consulting arborist (Section 186-12(A)) is not equivalent in the Code to the Tree Warden (Section 186-3(B)), and each have different roles.
64. Similarly the reports of each are different.

65. The written reports submitted to the Board in the past by the consulting arborist by required written report (Section 186-5(C)) do not describe the reasons of the Tree Warden for referring any applications to the Board and nor do they in any way describe the impact of the tree removal on the community or otherwise.
66. The Board makes the Application files available to the public for review prior to the meetings at the Village office, and announces the availability by legal notice (Exhibit 15). (The Village does not however post any documents on the Internet⁸.) The notice for the August 8, 2016 meeting thus states:
67. "Maps and plans regarding the above applications are available for inspection at the office of the Village Clerk during the hours of 10:30 AM through 3:30 PM."

Wildlife Protection

68. The Tree Law specifically raises the issue of wildlife in its description of the "intent" of the law, stating that among the other benefits of trees they are essential to wildlife, and the Village commits to "continue" that role of trees, and the law affirms that the disturbance of their function with respect to wildlife exacts a negative impact on residents:

"It is the further intent of the Village to have trees generally continue to stabilize the soil and control water pollution by preventing soil erosion and flooding, absorbing air pollution, providing oxygen, yielding advantageous micro-climatic effects, have intrinsic aesthetic qualities, preserve and enhance property values, offer a natural barrier to noise, provide privacy, and provide a natural habitat for wildlife, and that the removal of trees deprives the residents of the Village of

⁸Petitioner has repeatedly informed the Board of its obligations under the state Open Meetings Law to make an effort to post its documents online: If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision." (Public Officers Law, Article 7, Section 103(d)(2)(e).

these benefits and disrupts fundamental ecological systems of which trees are an integral part."

(Village Code §186-1 (C), "Legislative Intent", emphasis added, Exhibit 11)

69. Inasmuch as Petitioner Brummel raised the issue of wildlife protection before the Board with respect to specific issues related to the trees at issue in the Petition, this provision of the Village law is relevant here.

Facts

70. Upon information and belief, on or about June 2, 2016, Respondents/Necessary Parties, the Schors, filed with the Village a "Tree Removal/Alteration Application" (hereinafter "tree permit application") seeking permission to remove twelve trees as enumerated in the tree permit application, see Exhibit 5.
71. The Village file with respect to the Schor's application, which Petitioner Brummel examined at the Village office on October 4, 2016, contained among other documents:
- (1) The tree permit application (Exhibit 5);
 - (2) A survey map of the property at issue on which is penciled in numbered locations apparently corresponding to the trees listed by number in the letters issued by the arborists (*infra*) (Exhibit 6);
 - (3) Two letters dated May 31, 2016, both addressed to "Incorporated Village of East Hills" signed by Camilo Pavone, a self-described "certified arborist", under the letterhead of the firm from "Tree Guys", one of which (hereinafter "Tree Guys #1") listed various reasons for removing each of the trees listed in the tree permit application by tree-number, and one of which listed reasons for removing the trees with no numbers but instead geographical locations of the trees (hereinafter "Tree Guys #2), and each offering somewhat different reasons for the tree removals (Exhibit 7 (Tree Guys #1), Exhibit 8 (Tree Guys #2)). While the letters do not state they were submitted by or on behalf of the Schors, the letters were referred to in testimony by the Schor's architect and/or landscape architect in response to questions during the Board's hearing which made it clear the letters were filed by the agent of the Schors.

(4) A letter (hereinafter "Tree Health report") dated September 26, 2016, addressed to the Board and signed by Peter Felix, a certified arborist with the firm "Tree Health", the Village's consulting arborist, which reviewed the conditions of the twelve trees proposed for removal, and was accompanied by three pages of photos of nine of the trees at issue (Exhibit 9).

The Tree Health report was undertaken, the letter stated, at the request of the Village (Exhibit 9, p. 1 ¶1), apparently being performed pursuant to the provision of the Tree Law providing for such an independent verification of data submitted to the Board⁹.

72. The file also contained documents related to architectural changes proposed in the house described as "master bedroom, dining room & kitchen additions with new front portico" amounting to an increase in floor space of 572 square feet (Exhibit 10).

73. The file contained no Tree Warden report although one is required by Village Code (§186-5(C), Exhibit 11). No reference to such report was made at any time in the deliberations of the Board. (The same omission was alleged in the Petition, ¶88.)

74. During the hearing on the application for 185 Elm Drive, Petitioner Brummel submitted to the Board the report of Richard Oberlander (hereinafter "the Oberlander statement"), Exhibit 12, who is a former Village Tree warden, former member of the Board, and one of the authors of the Tree Law (Exhibit 13, ¶¶1-9, Oberlander affidavit). Petitioner Brummel in his verbal testimony extensively described to the Board the findings contained therein.

75. Each of the four expert reports thus presented to the Board -- the Tree Health report, the Tree Guys #1 and Tree Guys #2, and the Oberlander statement, provided in many significant cases substantially different evaluations of the trees, which will be catalogued below.

⁹ "The ARB or the Tree Subcommittee Chair, if so designated by the ARB, may hire a qualified tree surgeon or arborist to inspect trees within the Village and may request confirmation of any findings by another qualified tree surgeon or arborist." (Village Code §186.12(A))

76. However the opinions of the independent arborists -- those not associated with the Applicant -- repeatedly disputed the bases to remove the trees at issue.
77. On the tree permit application, the Applicants alleged a variety of defects as "Reasons for Removal". The entries in the application did not, however, directly reference the numbered trees (as indicated in the survey, *supra*), and the "reasons" listed can thus be attributed to specific trees only where the trees are unique, as is the case only with the White Pine and the Tulip.

Experts Dispute Justification for Removals

78. A pattern arose in the the 'independent' reports -- the Tree Health report and the Oberlander statement -- as they disputed some or all of the the conclusions of the Applicant's arborist.
79. For example, the Tree Health report determined that there were absolutely no health problems with the towering 'thirty-inch diameter' Tulip tree, the large Oak tree in the rear yard, nor one of the Beech trees in the rear, directly contradicting the findings of the Schor's arborist, Tree Guys, and also in direct conflict with the Board's ultimate decision on the application.
80. The Board made no effort to resolve the conflicting expert opinions.
81. The Board did not read the Tree Health report into the record, nor discuss it at all. The only time the Tree Health report was introduced into the hearing -- or spoken about -- was when Petitioner Brummel cited its several direct challenges to the Applicant's assertions, and asked the Board to address the conflicts before proceeding with any determination.

82. The Board's failure to introduce or deliberate on its own expert's advice is a situation identical to that raised in the Petition with respect to the earlier hearing, on August 8, 2016 (Petition, ¶96).

Conflicting Evaluations As Presented For Each Tree

83. With respect to the trees at issue in the present application, the following expert opinions were presented to the Board for each tree (determinations that trees can be preserved in bold):

Tree #1 Maple, front near driveway

Tree Permit Application "Reason for Removal": "Declining"

Tree Guys #1: "...badly damaged...rotten base"

Tree Guys #2: "...badly damaged...rotten base"

Tree Health: "...moderate to poor condition...major trunk defect"

Oberlander: (No statement)

Tree #2 Oak Tree, left side

Tree Permit Application "Reason for Removal": "Declining/Dead Root System causing foundation problem"

Tree Guys #1: "...in footprint of the house and roots are damaging the walkway and foundation."

Tree Guys #2: "...in footprint of the house and roots are damaging the walkway and foundation."

Tree Health: "...good health...8 feet from the house. I can't determine if its rots are impacting the foundation...."

Oberlander: "no problems"

Tree #3 White Pine, left side

Tree Permit Application "Reason for Removal": "To (sic) close to house and causing uplifting"

Tree Guys #1: "...in footprint of the house and roots are damaging the walkway and foundation."

Tree Guys #2: "...in footprint of the house and roots are damaging the walkway and foundation."

Tree Health: "...close to the house...misbalanced...roots have cracked the patio"
Oberlander: "There is absolutely nothing wrong with the...Long Needle White Pine in left rear."

Tree #4 Beech, rear yard

Tree Permit Application "Reason for Removal": "Hole in trunks. Hazardous"
Tree Guys #1: "...very close to the house and leaning towards house and shows signs of decline."
Tree Guys #2: "open trunk cavities, hollows, and is leaning over the house and shows signs of decline"
Tree Health: "...Beech trees in good health"
Oberlander: (No statement)

Tree #5 Beech, rear right

Tree Permit Application "Reason for Removal": "Hole in trunks. Hazardous"
Tree Guys #1: "very close to the house and leaning towards house and shows signs of decline"
Tree Guys #2: "very close to the house and leaning towards house and shows signs of decline"
Tree Health: "moderate health...leans toward the house. Can be susceptible to failure after tree number 6 is removed."
Oberlander: (No statement)

Tree #6 Oak, rear right

Tree Permit Application "Reason for Removal": "Declining/Dead Root System causing foundation problem"
Tree Guys #1: "dead"
Tree Guys #2: "dead"
Tree Health: "dead"
Oberlander: (No statement)

Tree #7,8,9,10 [Identical evaluations] Beech trees, front

Tree Permit Application "Reason for Removal": "Hole in Trunks. Hazardous"
Tree Guys #1: "...open cavities, hollows, and are close to the home."
Tree Guys #2: "...open cavities, hollows, and is close to the home."
Tree Health: "...poor shape with several trunk cavities."
Oberlander: "It is impossible to state the Beech trees with cavities should be cut down without knowing the depth of the cavities. The cavities appear dry, not wet. This is an impressive stand of trees that should be carefully evaluated and subject to detailed examination before any decision....One

Beech is cracked at the base, justifying removal."

Tree #11 Tulip, right front

Tree Permit Application "Reason for Removal": "Declining. Bad base."

Tree Guys #1: "...very close to the house and has buried base...signs of decline and possible root rot and/or basal cavity"

Tree Guys #2: "...buried base...signs of decline and possible root rot and/or basal cavity. The roots may be compromised with the expansion of the house."

Tree Health: "...great shape with a straight trunk"

Oberlander: "There is absolutely nothing wrong with the Tulip tree...."

Tree #12 Oak tree, center of backyard

Tree Permit Application "Reason for Removal": "Declining/Dead Root System causing foundation problem"

Tree Guys #1: "...close to the house and in footprint of future construction."

Tree Guys #2: "...buried base...signs of decline and possible root rot and/or basal cavity. The roots may be compromised with the expansion of the house."

Tree Health: "...great condition located in the middle of back yard."

Oberlander: "There is absolutely nothing wrong with the...Oak in the back"

Contradictions With Applicant's Arborist

84. As shown above, in at least three instances both 'independent' experts directly contradicted the Schor's arborist's report, with respect to trees #4, 11, and 12, some of the largest most aesthetically significant ones in the Decision.
85. Both independent arborists dismissed the claims in the following cases: (1) with respect to allegations of "decline" and/or lean and/or "bad base" in the rear 'twenty to twenty-eight-inch' diameter Beech tree (#4); (2) with respect to the towering 'thirty-inch' diameter Tulip tree (#11) close to the street; and (3) with respect to the towering 'twenty-eight to thirty-inch' diameter rear Oak tree (#12).
86. The Tree Health report pronounced all three trees to be in "good health", "great shape",

and "great condition", respectively. Mr. Oberlander stated there was "nothing wrong" with the Tulip and Oak, but he did not submit an evaluation of the rear Beech tree.

87. The independent arborists also pronounced Oak tree #2 a matter of question, at very least.
88. The Board made no inquiry into any of the contradiction, indeed showing no awareness of them despite Petitioner Brummel's comments to it.

Issues Not Raised in the Application

89. With respect to the claims in Tree Guys #1 and #2 that the rear Beech (#4) was "leaning over the house", the issue was not raised in the application and thus not properly before the Board.
90. Nor was the issue of the lean considered in the Tree Health report, which pronounced the tree to be "in good health".
91. Upon information and belief, Tree Health typically does not even see the Applicant-arborist's report, rather evaluating proposed tree removals trees "double-blind" -- based exclusively on issues raised in the tree permit application and its own independent inspection.
92. In any event the Board did not address the issue of 'lean' in its deliberations. Indeed it addressed barely any of the specific claims in the tree permit application or the expert reports, except the proximity of the Pine and one Oak tree (#2) to the house.
93. With respect to the claims by "Tree Guys" that the magnificent Tulip, and the rear Oak tree (#12) "may be compromised" by construction, as alleged in Tree Guys #2 (emphasis

added), that issue was not even raised in the tree permit application submitted by the Schors (Exhibit 5), hence also not independently evaluated by Tree Health.

94. With respect to the issues thus raised by the Tree Guys report that were absent from the tree permit application, the process was effectively 'sand-bagged' by new claims, and public who reviewed the files were, like Tree Health, in the dark about issues. The Board thus was deprived of any potentially 'corrective' testimony on those issues.

Distinctive Stand of Beech Trees

95. At the Board's roughly fifteen-minute hearing on the Schors' application, the architect and landscape architect discussed the planned renovations to the house and, prompted by the Board, addressed the plans to remove several of the trees.

96. Board chairman Spencer Kanis told the Applicant, according to Petitioner Brummel's notes (Exhibit 14, that the "cluster" of mature Beech trees in the front of the house bordering the street was a notable feature of the property and the local streetscape. "We all looked at it" Mr. Kanis reported.

97. Mrs. Schor then told the Board, according to Petitioner Brummel's notes (*id.*), that she was afraid of the trees because the family planned to locate a children's room near where branches from the trees are located and "it's scary". But the Board did not inquire whether this was a new ground for removal of trees the Applicant wished the Board to consider.

98. With respect to trees #2 and #3, the landscape architect "Mr. Scott" told the Board the trees were too close to the house and foundation. Board member "Dr. Fisher" remarked that when he visited the house he "had to duck" due to one of the trees, according to Petitioner Brummel's notes (*id.*).

Endangered Wildlife Issue Raised -- But Ignored

99. Petitioner Brummel submitted verbal and written testimony to the Board.

100. In his verbal testimony, Petitioner Brummel told the Board that the Tree Health report contradicted the Schor's arborist with respect to the health of the Tulip tree and the Oak tree in the center of the backyard.

101. Petitioner Brummel also told the Board of Mr. Oberlander's written testimony that the cavities in the five Beech trees in front of the house were likely homes to animals, and further that such cavities cannot be said to diminish the structural integrity of the trees without determining first that they are of such depth and character to do so. The simple presence of the cavities is not conclusive, Petitioner Brummel told the Board, referring to the written statement of Mr. Oberlander which Petitioner Brummel submitted at the same time.

102. Mr. Oberlander's written testimony states, among other things:

"It is important the board understand that the presence of cavities is not in itself an indication that a tree needs to be removed: The cavities are likely home to animals like squirrels and raccoons, and thus critical to supporting local wildlife -- a principle of the Village's Tree Protection law which I helped write (Code §186-1 (C))¹⁰ -- and trees can thrive even with such cavities, depending on their location

¹⁰ "It is the further intent of the Village to have trees generally continue to stabilize the soil and control water pollution by preventing soil erosion and flooding, absorbing air pollution, providing oxygen, yielding advantageous micro-climatic effects, have intrinsic aesthetic qualities, preserve and enhance property values, offer a natural barrier to noise, provide privacy, and provide a natural habitat for wildlife, and that the removal of trees deprives the residents of the Village of these benefits and disrupts fundamental ecological systems of which trees are an integral

size and tendency to retain water (a matter that can be remediated by creating a drain hole). Especially at this breeding season it is important for the board to take care not to unwittingly allow the killing of baby squirrels now in the nests."

(Exhibit 12, p. 2)

103. Petitioner Brummel also urged the Board to pay attention to the part of its mandate that speaks of the value of trees to wildlife, and to understand that the cavities are homes to local indigenous animals and that any disturbance of the trees may kill babies or render them homeless and exposed to the elements.

104. Petitioner Brummel told the Board, echoing his written testimony (Exhibit 15, p. 3 (H)) that Tree Health places trees in only two categories, 'perfectly healthy' or 'in need of removal'. Petitioner Brummel told the Board it needs to listen to experienced arborists like Mr. Oberlander and see that trees with defects can survive and constitute no threat, and continue to provide ecological benefits despite having imperfections or even disease that can be treated, i.e. there can be cavities that are not fatal and do not justify removals of the trees.

105. Petitioner Brummel also verbally told the Board it lacked a required Tree Warden report, which Petitioner Brummel said was all the more important given the extent of the proposed tree removals and the significant character of the unique stand of Beech trees in front of the house.

Request For Further Investigation of Condition of Trees

106. Petitioner Brummel urged the Board to deny all the tree removal applications (with the possible exception, as Petitioner Brummel recalls, of the tree agreed as being "dead" and

part...."

possibly the Beech tree Mr. Oberlander found to be cracked), and to defer its decision until such time as the conflicting expert opinions could be sorted out and proper evaluation done of the Beech trees whose cavities had not been evaluated in the manner Mr. Oberlander advised.

107. In response to Petitioner Brummel's comments regarding the Tulip tree, the Schor's architect or landscape architect told the Board that (1) the Tulip tree was located within twenty feet of the house and was thus too close to planned construction, and (2) that the arborist had found problems in the "crown" of the tree.

108. The latter issue was nowhere raised in the written reports, and the issue of proximity was not submitted for examination in the tree permit application, and in any event the Tree Guys report stated only "[t]he roots may be compromised [during construction]" (Exhibit 8).

109. Petitioner Brummel rose from his seat and told the Board that neither claim had been raised in the tree permit application, and their accuracy thus had not been evaluated by Tree Health.

110. In Petitioner Brummel's written statement, Petitioner Brummel reiterated the absence of a Tree warden report with respect to the application (p. 4, Exhibit 15), told the Board of Mr. Oberlander's concerns (*id.*) and highlighted the fact that "Tree Health disputes the owner's arborist report in several key respects" (*id.*).

111. Petitioner Brummel's written statement also contained a routine general plea to the Board that it take into account the impact of tree removals on wildlife (*id.*, p. 1).

112. The Board failed to discuss the lack of a Tree warden report.

113. The Board failed to discuss the findings of Tree Health that conflicted with those of the Schor's arborist.
114. The Board failed to discuss Mr. Oberlander's advice with regard to further analyzing the cavities in the six Beech trees.
115. The Board failed to discuss the potential impact of the removal of twelve trees on wildlife, and failed to address in any way Petitioner Brummel's statement that the cavities observed in the Beech trees were likely home to local wildlife that would be adversely affected by the trees' removal.
116. The Board imposed the condition that twelve new trees be planted. Petitioner Brummel rose and objected that such a 'replacement' would not address any of the environmental damage caused by the removals of the mature trees.
117. With the condition of the planting of twelve small new trees as 'replacements', the Board unanimously approved the application to remove the twelve trees.

AS AND FOR A FIRST CLAIM FOR RELIEF

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

Violation of Duty to Consider Tree Warden Report Prior to Approval of Tree Removals

118. Petitioners repeat and re-allege every allegation set forth hereinbefore.
119. Respondent Village's procedures require the Tree Warden to submit a report to the Board as a referral for the Board's action upon an Application to remove trees. Such a report is intended to provide the Board a framework for consideration of the Application based on

the Tree Warden's duty to determine the public impact and consequence of the proposed tree removals.

120. The routine omission of the Tree Warden report has deprived the Board and the public of a key written component of the Village's consideration and action upon requests to remove trees and thereby to degrade the "tree canopy" and reduce the benefits the community in general receives from the presence of trees and greenery in the community.

121. The Board was specifically told that given the aesthetic significance of the stand of trees of which five Beech sought to be removed were an integral part, the Tree Warden report was all the more important to the application before them.

122. The Board's failure to adhere to proper procedure resulted in a decision that would injure Petitioner Brummel by depriving him of the enjoyment of the subject trees.

123. The Decision should therefore be declared null and void, and Respondent Board and Village should be enjoined from issuing any tree permit(s) based on the Board's Decision, and further the Respondents and Necessary Parties should be enjoined from in any way altering or damaging the twelve trees included in the Decision.

AS AND FOR A SECOND CLAIM FOR RELIEF

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)

(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

Abuse of Discretion, Arbitrary And Capricious In Failing To Address Conflicts In Expert Testimony

124. Petitioners repeat and re-allege every allegation set forth hereinbefore.

125. The Village arborist's expert opinion -- submitted in writing to the Board and referenced by Petitioner Brummel in his oral testimony to the Board -- clearly disputed the Schor's arborist with respect to at least three trees: the Tulip (#11), the rear Beech tree (#4), and the Oak tree in the middle of the backyard (#12). Questions were also raised regarding the claims justifying removal of Oak tree #2.
126. The Oberlander testimony also disputed most of the findings submitted by the Schor's arborist.
127. Petitioner Brummel specifically and emphatically raised the issues of conflicting testimony before the Board, and urged the Board to step back, defer any decisions, and allow the issues to be resolved.
128. The Board failed to identify, discuss, attempt to evaluate or attempt to reconcile the conflicting testimony in any way. It appeared the Board had a decision in mind and was not going to address the facts before it.
129. With respect to the Tulip tree, for example, the Board did not inquire as to why both independent arborists found no health issues whatsoever with the tree, while the Schor's arborist claimed it was in "decline", had "possible root rot and/or basal cavity".
130. The Board did not question whether any of the Beech trees had been or could be evaluated as Mr. Oberlander advised, to determine whether the cavities were structurally significant, now or in the future.
131. The claim by the resident that the trees were "scary" was not considered as a likely sign that regardless of the health of the trees or their proximity to the construction, the resident simply wished to have many of the trees removed and obtained an arborist report

designed to sustain such a desire, regardless of the objective facts before the Board.

132. The Board also failed to note issues raised outside the tree permit application that left Tree Health and the public in the dark about alleged justifications unexpectedly presented to the Board.

133. As such the Board did not have before it a record that supported its decision, and its decisions with regard to the tree removals was arbitrary and capricious, an abuse of discretion, in violation of lawful procedure, and affected by an error of law.

134. The Board's failure to adhere to proper procedure resulted in a decision that would injure Petitioner Brummel by depriving him of the enjoyment of the subject trees.

135. The Decision should therefore be declared null and void, and Respondent Board and Village should be enjoined from issuing any tree permit(s) based on the Board's Decision, and further the Respondents and Necessary Parties should be enjoined from in any way altering or damaging the twelve trees included in the Decision.

AS AND FOR A THIRD CLAIM FOR RELIEF

(CPLR §7803(1) Failure To Perform A Duty Enjoined Upon Respondent By Law)
(CPLR §7803(3) Determination Affected By Errors Of Law, Arbitrary And Capricious, Abuse Of Discretion)

Abuse of Discretion, Arbitrary And Capricious Failure To Consider Impact Of Tree Removals On Wildlife

136. Petitioners repeat and re-allege every allegation set forth hereinbefore.

137. Both Petitioner Brummel and Mr. Oberlander told the Board that the presence of cavities in the trees indicated a likelihood that animals are nesting there.

138. Both Petitioner Brummel and Mr. Oberlander told the Board that the Tree Law

describes part of the goal of regulating tree removals as protecting the trees for the benefit of wildlife.

139. Six mature Beech trees surrounding the house, including a distinctive stand of trees in front along the street, showed a marked presence of cavities in which animals would nest, a fact agreed upon by all the experts who submitted testimony.

140. As such there existed a clear likelihood that animal nests were present, and that the proposed removal of the trees would have a deleterious impact on the local wildlife.

141. But the Board made no reference to the concern over the fate of wildlife in its deliberations.

142. The Board also lacked a Tree warden report which could also have framed the Tree Warden's concerns for referring the application to the Board, including the impact on the community, which could include the wildlife consideration enumerated in the statement of "intent" of the Tree Law.

143. As such the Board failed to discharge its duty to fully evaluate the record before it with respect to the criteria enumerated in the Tree Law, including "the further intent of the Village to have trees generally continue to...provide a natural habitat for wildlife...." (Village Code §186-1(C)).

144. As such the Board's decision with regard to the tree removals was arbitrary and capricious, an abuse of discretion, in violation of lawful procedure, and affected by an error of law.

145. The Board's failure to adhere to proper procedure resulted in a decision that would injure Petitioner Brummel by depriving him of the enjoyment of the subject trees.

146. The Decision should therefore be declared null and void, and Respondent Board and Village should be enjoined from issuing any tree permit(s) based on the Board's Decision, and further the Respondents and Necessary Parties should be enjoined from in any way altering or damaging the twelve trees included in the Decision.

WHEREFORE, Petitioners respectfully request that this Petition be granted and judgement entered in favor of the Petitioners as follows:

- (1) Declaring null and void the Decision of the Board permitting the twelve trees to be removed;
- (2) Preliminarily enjoining the Respondent Board and Village from issuing any Tree Permits based on the Decision until the determination of this Petition; and
- (3) Rescinding any and all Tree Permit(s) already issued related to the trees in the Application complained of and addressed by the Board in its Decision complained of;
- (4) Preliminarily enjoining the Respondents from permitting or effecting in any way the or damaging the twelve trees included in the Decision until the determination of the Petition;
- (5) Permanently enjoining the Village and Board from issuing any permits to remove the twelve trees at 185 Elm Drive unless and until said Board adheres to the Village Code and other lawful procedure in making any decision thereon;
- (6) Permanently enjoining all the Respondents from in any way damaging or destroying the said trees unless and until the Board adheres to the Village Code and other lawful procedures in making any decision thereon;
- (7) Awarding Petitioners reasonable costs; and
- (8) Granting Petitioners such other and further relief as to the Court seems just and proper.

Dated: Nassau County, New York,
October _____, 2016

RICHARD A. BRUMMEL

(Verified Petition, Brummel et al. v. Architectural Review Board of the Village of East Hills et al.,
continued)

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EXHIBITS

- Exhibit 1 Minutes with respect Board's August 8, 2016 hearing on 55 Oak Drive
- Exhibit 2 Google maps image of Elm Drive identifying the "upper" portion
- Exhibit 3 Distance from Petitioner Brummel's home to to 185 Elm Drive
- Exhibit 3 Photo of work at 205 Elm Drive, late 2013
- Exhibit 5 Tree Removal/Alteration Application
- Exhibit 6 Survey map with tree locations
- Exhibit 7 Letter from applicants' arborist (trees un-numbered)
- Exhibit 8 Letter from applicants' arborist (trees numbered)
- Exhibit 9 Letter from Tree Health, the Village consulting arborist
- Exhibit 10 Architectural Review Board Application (construction)
- Exhibit 11 Village Code Chapter 186, "Tree Preservation and Protection"
- Exhibit 12 Statement of arborist Richard Oberlander
- Exhibit 13 Affidavit of Oberlander
- Exhibit 14 Petitioner Brummel's Notes of ARB Meeting of Oct. 6, 2016 (185 Elm Drive only)
- Exhibit 15 Petitioner Brummel's written statement
- Exhibit 16 Decision of Justice Pardes in prior Brummel special proceeding
- Exhibit 17 Affidavit of Petitioner Brummel
- Exhibit 18 News Article about Petitioner Brummel
- Exhibit 19 Affidavit of Petitioner Liu