IAS Part 22

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

THE HON. SONDRA K. PARDES, PRESIDING

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RICHARD A. BRUMMEL,

Petitioner,

- against -

ARCHITECTURAL REVIEW BOARD OF THE VILLAGE OF EAST HILLS, THE BOARD OF TRUSTEES OF THE VILLAGE OF EAST HILLS, and JOSH AND CINDY AARONSON, 55 OAK DRIVE, EAST HILLS, N.Y.,

Respondents.

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Index No.:
6272 / 2016

REPLY

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Preliminary Remarks

1. While this Article 78 special proceeding is at heart an extremely modest case seeking accountability from a local board[1], Respondents have mounted a massive counter-attack that must indeed trouble to Court about 'what is really going on'.

2. The Court may reasonably ask 'what Petitioner is up to' and is he the reckless, abusive, out-of-control *pro se* litigator Respondents seek to portray.

3. Furthermore, the Court may reasonably ask 'if it denies sanctions, or even sustains the Petition, is the Court loosing an unguided missile or assisting a cancer on the court system and the community'?

4. Petitioner will forthwith address the specific legal questions raised in Respondents' opposing papers, but it seems obligatory first to answer the more 'existential' questions created in the Court's mind, to assure a fair hearing by a Court untainted by the prejudice Respondents are obviously keen to evoke.

5. This case is worth the Court's time and effort, and has inherent merit, because (1) the ARB decision at issue -- allowing two healthy Oak trees to be removed because they create acorns -- creates a destructive precedent for future tree-protection policy in the subject Village, and the policy has potential ramifications for tree boards elsewhere; (2) the process leading to the ARB decision at issue is representative of a pattern of sloppiness and error in the discharge of important environmental responsibilities in the Village that should be rectified; and (3) Petitioner does not deserve to be denigrated, because his Herculean

[1] The East Hills Architectural Review Board, hereinafter "the ARB" or "the Board".

individual efforts have mobilized citizens, media, environmental and animal protection groups and even government agencies (see *infra*) to take notice of issues and to act upon them; and furthermore, in contrast to the assertions of Respondents, many of Petitioner's legal efforts have been at least partially successful, or remain pending (*infra*).

6. Respondent Village has submitted a secretly-produced[2] videotape of the Architectural Review Board meeting at issue, showing Petitioner's testimony, which may further assure the Court that Petitioner is a rational, sincere advocate worthy of its attention, not of Respondents' disparagement.

The Bulk of Respondent Village's Allegations Are Governed by *Res Judicata*, The Second Department Having Dismissed Them Last Year

7. This is not the first time Petitioner has been confronted with a 'full frontal assault' by Respondent Village, by which it attacks Petitioner by citing almost every prior case Petitioner has filed in the past several years from Nassau County to Rochester, N.Y.[3]

8. The following argument should sound familiar to this Court, echoed as it is in Village Respondent's current Memorandum of Law . What is notable is that the entire argument was dismissed by the Appellate Division, Second Department, in a Decision and Order last year (*infra*):

[2]The Architectural Review Board and the Village Board have emphatically opposed Petitioner's right to take photos at board meetings due the alleged 'intrusion' on participants' privacy, notwithstanding provisions of the state Open Meetings Law to the contrary. The Village's videotaping of the same meetings have never been announced, to Petitioner's knowledge, its presence is not posted in the meeting room or elsewhere, and to Petitioner's knowledge the disclosure in this proceeding is the first time it has been publicly disclosed. Thus far from 'playing for the camera', Petitioner's testimony was simply a fair representation of his standard actions before this and other agencies.
[3]Petitioner has been behind about a fifteen cases since he began his efforts about four years ago.

"Brummel is a serial litigant. He files, routinely and frequently, frivolous lawsuits. Though they are dismissed in due course, Brummel is undeterred from pursuing appeals, motions for re-argument, and additional actions....Having litigated standing issues several prior matters, Brummel knows and understands that he lacks standing.

.....

Brummel's litigation history can only be described as vexatious and harassing. This Court should require a pre-filing judicial review of any future actions Brummel may seek to bring against the Village....Sanctions are warranted to deter Brummel from abusing the courts and wasting taxpayer revenues."

(Exhibit 6, p. 1 and p. 4, Village Memorandum of Law in Support of Cross-Motion for Sanctions, In the Matter of Brummel v. Village of East Hills, N.Y. for the Architectural Review Board, *et al.*, March, 2015).

9. This jeremiad was filed by the Respondent Village in March, 2015, before the Second Department, accompanied by an affidavit containing as exhibits several of the same non-Village cases that accompany the Village Memorandum of Law in the present case.

10. Petitioner filed an extensive rebuttal of the Village's allegations, concluding in part:

"Given the opportunity to argue Petitioner-Appellant's motion [to re-argue], 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."

(Exhibit 4, ¶ 171, Petitioner Affidavit in Opposition to Motion for Sanctions, etc., In the Matter of Brummel v. Village of East Hills, N.Y. for the Architectural Review Board, *et al* April, 2015)

11. Petitioner hopes the Court will a moment to examine Exhibit 4, the rebuttal, for a clear discussion of the matters raised and an explanation of Petitioner's conduct and motivations.

12. The Second Department summarily rejected the Village's application, arguably creating *res judicata* with respect to issues raised then and now resurfacing:

"Upon the papers fled in support of the motions and the cross-motion [for

sanctions], and the papers filed in opposition thereto, it is ... Ordered that the cross motion is denied"

(Exhibit 3, Decision of the Second Department, May 21, 2015, Justice Rivera presiding).

13. This April, 2016, Petitioner was again obligated to argue before the Second Department against a repeat application for sanctions by the Respondent Village -- on the same or similar grounds -- when in Petitioner's defamation suit against the Village Mayor[4], Respondent Village appealed the rejection by the trial Court (by Justice Iannacci) of the Respondent Village's repetitive application for sanctions. The Village familiarly alleged:

"Plaintiff-Appellant-Respondent Richard Brummel's numerous litigations against the Village...are not simply good faith setbacks as he contends. They, just like his frequent litigations against other municipalities, are frivolous vexatious litigation that waste judicial and municipal resources before dismissals are obtained...."

(Exhibit 7, Reply Brief, p. 1, Richard A. Brummel v. Board Trustees of the Village of East Hills, N.Y. et al.)

14. In the present case, this Court will again, find similar themes and claims in the opposition filed by the Respondents, again despite the findings of the Second Department[5]. The repeated allegation of "frivolous" lawsuits is essentially a material false statement, inasmuch as it is governed by *res judicata* from the Second Department's determination, as well as determinations of other courts rejecting sanctions.

15. While the Respondent Village earnestly speaks of its concern over the costs of litigation

[4]Given the tenor of the Village's legal attacks against Petitioner -- all of them dismissed so far, except one more pending before the Second Department -- it should come as no surprise to the Court that the Mayor, as alleged, made certain false and defamatory allegations challenged in an action by Petitioner that was unfortunately dismissed by Justice Iannacci of this Court on the erroneous theory that virtually any utterance of a mayor, anywhere, if it replies to a criticism warrants absolute or 'at least' qualified privilege, despite clear case-law -- raised by Petitioner -- to the contrary. The matter remains on appeal, awaiting oral argument (Docket #2015-04351).

[5]The Second Department, in its dismissal of the motion for sanctions in 2015, had in front of it a finalized version of every case involving the Village that is now before this Court with the exception of the present case and Petitioner's defamation suit against the Mayor referenced by Respondent Village (Village Memorandum of Law p. 1). For completeness Petitioner appends his Brief in that (defamation) case, Exhibit 8.

and 'judicial economy' in condemning Petitioner's several challenges (Village Memorandum of Law, p. 3: "Brummel's lawsuits are...a waste of limited judicial and municipal resources"), it is the Village that forces the courts to go over the same settled ground again and again with respect to Petitioner's alleged improper legal activities.

16. Indeed, Petitioner requests this Court consider counter-sanctions with respect to Respondent Village on that basis -- the recalcitrant argument of frivolity despite its being settled law[6], but at very least to avoid 'biting the hook' that Respondent Village dangles in front of every court that hears cases in which Petitioner challenges it, challenges based on reasons ultimately found to be legitimate and defensible.

Why Is Petitioner Generating 'So Many' Cases?

17. This Court may still, after reading Respondents' papers, reasonably be suspicious and skeptical of Petitioner simply based on the number of cases he has brought as well as their purported uniform lack of success.

18. The short response to this concern is that Petitioner has taken a posture of the environmental fighter of 'last resort', and adopted many 'orphan' issues that would not otherwise be brought into judicial review, despite their merit, given the costs of environmental attorneys[7] and the inaction of local environmental organizations in Nassau

[6] Petitioner will weigh a motion for sanctions on notice, as seems to be the proper vehicle for such an application, mindful however of the Court's time and patience, and considering that the Second Department may be a more proper forum, given the prior application (*supra)* made by the Village Respondent in that Court.

[7] When one of the main plaintiff environmental attorneys in the area submitted an application to withdraw from the fight to save the two hundred trees lining South Oyster Bay Road in Hicksville/Plainview, despite its success in obtaining a temporary restraining order from this Court (by the Hon. Justice Brandveen) prior to a change in judge, his unpaid legal invoices bills as disclosed in his unsealed motion exceeded $20,000 for about a week's work. Few residents will entertain such amounts, and few organizations have the funds. (In that case, Petitioner adopted the issue, located Intervenors, and helped one obtain an appellate temporary restraining order; see #6 in the list of semi-successful cases of Petitioner.

County in confronting over-development[8].

19. However it is a false assertion that Petitioner has been uniformly unsuccessful. In fact Petitioner achieved many concrete successes in his legal efforts, among them:

(1) Freedom of Assembly in Nassau Parks:

In the course of challenging, over improperly abbreviated environmental review, the partial destruction of the recreational forest in Christopher Morley Park (Brummel *et al.* v. Town of North Hempstead *et al.*, -- a matter still before the Second department awaiting oral argument), Petitioner was obliged to sue the County to force the issuance of a permit to hold an 'informational rally' in the Park, because, Petitioner was told by the County, Nassau parks did not allow rallies of a political nature, in direct conflict with settled First Amendment law[9]. Upon Petitioner's lawsuit -- despite an emergency Saturday order to show cause being denied by the Hon. Justice Anthony M. Parga and a preliminary injunction being denied by the Hon. former-Justice Michele M. Woodard, Nassau County relented and began permitting political gatherings, not only for Petitioner but for others (Exhibit 9, Decision of Justice Mahon);

(2) Compliance of Architectural Review Board (ARB) with State Open Meetings Law:

After Petitioner's 2012 lawsuit filed against the Village, the Architectural Review Board began to announce its meetings to the public, which it had not previously done, claiming previously it was not subject to the Open Meetings Law (Exhibit 10 p. 16, Respondent Village Memorandum of Law, Brummel v. Village of East Hills, Harbor Hill Road, East Hills NY 11577 etc.);

(3) Procedural Reform by Architectural Review Board:

After Petitioner's second 2013 lawsuit against the Village, challenging the destruction of nine large trees under a landscape plan not publicly aired or voted on by the the Board (Exhibit 5, pp. 11-15, Petitioner's Brief, Richard A. Brummel v. The Village of East Hills, N.Y. for the East Hills Architectural Review Board), the members of the Architectural Review Board began to publicly specify that any 'conditional' landscape plans submitted after a meeting must be returned to the Board for a public vote;

[8] In the several years Petitioner has been active in the area, no land use challenge has been mounted in Nassau County by any group, to knowledge, while in Suffolk County several groups are active, for example the Pine Barrens Society. Petitioner early on appealed for assistance to the Nature Conservancy and the North Shore Land Alliance but was either ignored or told the group changed its strategy away from litigation. The Sierra Club has refused to back up its statements of support with formal involvement in litigation.

[9] See, e.g. Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)

(4) Residents Obtain Protection for Forest Land:

In organizing and assisting five residents in mounting an extensive legal challenge to the 143-acre "Country Pointe at Plainview" project on the former Nassau County "Plainview Office Complex", based on glaring omissions in the environmental review, Petitioner helped the residents obtain from the developer a concession to preserve forest near Petitioners' homes -- even after the case was decided against them -- in exchange for their foregoing an appeal (an agreement Petitioner frankly opposed and which is discussed below in terms of the Decision and Order of the Hon. Justice George R. Peck, (Exhibit 11, pp. 2-3, Stipulation of Settlement, Denton et al. v. Town of Oyster Bay et al.);

(5) Appellate Review of Environmental Status of 'Wildlife Killing Contests':

In struggling alone for three years to obtain financial and legal support for an environmentally-based lawsuit against a widely reviled annual 'squirrel hunting contest' sponsored by an upstate fire department, Petitioner was, after personally assisting a single resident in filing a legal challenge and appeal, finally able to secure the support of a major national animal group and a prominent national corporate law firm to take the case pro bono to appeal and test the extent of the State Environmental Quality Review Act (SEQRA) in regulating 'wildlife killing contests' (Sheive v. Holley Volunteer Fire Co., Fourth Dep't Docket No. 15-01942);

(6) Helped Residents Obtain Reprieve for Trees on South Oyster Bay Road Until Meeting with County Legislators:

With Petitioner's extensive work by locating aggrieved plaintiffs and assisting in the preparation of legal papers for one, Nassau County's widely opposed removal of about two hundred trees -- almost every single tree -- along South Oyster Bay Road in Hicksville/Plainview, in the absence of any environmental review, was halted -- in mid-work -- by a temporary restraining order from the Second Department, giving opponents enough time for a meeting with two local County legislators and an appearance before the County Legislature, and a public revelation that would assist the residents. While a 'loss', the legal action allowed the community to impose 'accountability' squarely on the Legislature. The matter remains on appeal. (Exhibit 11, Temporary Restraining Order, Justice William F. Mastro, Second Department, in Operation STOMP et al. v. Nassau County, Yushen Su, Intervenor[10])

(7) Assuring Public Accountability:

[10]Petitioner assisted Mr. Su in intervening pro se after the original Petitioners were abandoned by their attorney for non-payment of legal fees and refused to proceed on their own.

> In the matter Brummel *et al.* v. Town of North Hempstead *et al.*, Petitioner has assured that judicial review will be taken of a shocking side-stepping of environmental review regarding public lands in the face of untoward political pressure, as well as a gross error in the law of standing-- as well as standard of review on a motion to dismiss -- committed by several levels of local government, and the judiciary.

20. Petitioner took on every case described above when either no other group or individual would do so, or, in the case of the South Oyster Bay Road tree matter described in #6, when the group became paralyzed and inert when their attorney withdrew at the very moment their original temporary restraining order was lifted by new judge.

21. Petitioner has spent hundreds if not thousands of hours, and thousands of dollars of his own funds, in pursuing what he felt a noble and honorable effort to fight for the environment, as well as for the principle of law.

22. Petitioner has put his life essentially on hold, though he is able to work intermittently and hopes to move on at some point, simply because he knows that if he does not act on the matters he acts on, no one else will.

23. It is indeed a matter of some gratification that Petitioner knows his efforts have placed many issues in the media, have exposed conduct of government and the courts that require improvement, and has shown his fellow citizens that they can act, and that one person can create if not 'change' then at least an awareness of what needs to change.

24. Furthermore Petitioner was able to obtain support from the Sierra Club Long Island Group, the Nassau Green Party, and the animal rights group Long Island Orchestrating for Nature ("LION") in articulating support for several issues Petitioner raised and led, including the destruction in Christopher Morley Park (Exhibit 12) and the development in North Hills (Exhibit 13).

Supporters of Petitioner in East Hills and Elsewhere

25. Respondent Village portrays Petitioner as a pathetic (or menacing) solitary figure, always losing his legal efforts, at best a Don Quixote or at worst a malicious 'crank' (Village Memorandum of Law, p. 1, p. 6, p. 16, e.g.).

26. As shown above, the outcomes have not been uniformly 'unsuccessful', even with respect to prior actions in the the Village of East Hills.

27. Furthermore media and established groups have taken up causes begun by Petitioner. For example there has been repeated coverage of Petitioner's efforts that has served to educate and inspire the public: See Exhibit 15, media coverage of North Hills and Plainview/Old Bethpage matters (not listed and #4, above, respectively).

28. Petitioner enjoys a smattering of supporters in East Hills, as shown by the petition he collected in 2012 (see Petition, Exhibit 18). By visiting the surrounding neighbors of proposed home-rebuilding and/or tree removals, Petitioner has motivated some to submit testimony to the Architectural Review Board raising their concerns, both specifically and in general.

29. (The Architectural Review Board fails to post any of its documents online, and a form letter sent to neighbors regarding nearby projects does not describe any details the project might involve. Petitioner has taken it upon himself to post documents online, and to provide neighbors with a detailed notification he drops at their doors, time permitting -- see Exhibit 16, Notice for Neighbors.)

30. The Court may peruse some emails, appended as Exhibit 21, which were sent to Petitioner on the eve of Architectural Review Board meetings after Petitioner spoke notified

the residents in person of proposed actions -- the vast majority since approved -- after the residents had received only non-specific notification of proposed actions near their homes:

> 1 -- "I grew up in the house in Lakeville Estates...directly behind the house situated at 14 Peacock Drive [where multiple trees were proposed to be removed during rebuilding]. ...I believe my 92 year old mother is the only original resident still living in her home in Lakeville Estates.
> ....
> My father a physician and professor of medicine...loved the trees. When one appeared ill he would treat it as a respected living thing....He would be heartbroken to know that healthy, living things were being cut down. Some of the trees our neighbor wants to cut down are over 50 years old. They deserve to live out their lives." (Janice S. Liebowitz)
>
> 2 -- "...I am writing to let you know of my concerns regarding the proposed removal of TEN trees on my block. Although all of the building in the neighborhood is great for my property value, i am concerned about the lasting effect of the natural beauty and the protection of the tree canopy. The size of the new houses are swallowing up the land and transforming the neighborhood into a showcase for mega mansions...." (Beverly Edelman)
>
> 3 -- "I am across the street from the location, I am strongly against this plan. It will not enhance the value of my house, it will cause havoc to the neighborhood. The proposed house belongs in a community originally zoned for mega houses. Time for the community and the board to say no." (Jack Kolbrener)

31. The longtime president of one of the community's civic association, and an author of the Architectural Review Board law and the Tree Protection Law provided Petitioner a statement as he gathered support for another challenge to Village policies (Exhibit 14):

> "I reside at 76 Great Oaks Road, East Hills, NY. I was president of the Norgate at East Hills Civic Association for over ten years. I proposed and helped write the Architectural Review and Tree Preservation laws now in force in the Village of East Hills. I was also a founding member of the Architectural Review Board (ARB).
> I recently drove through Country Estates at East Hills and observed first-hand the types of new houses being constructed there over the past several years.
> ....
> I was frankly horrified by what I saw in various new houses on Ash Drive, Elm Drive, Birch Drive, and Walnut Drive. The Tree and Atrchitecture (sic) laws I helped create are not being followed when such houses are being permitted. The

neighborhood character is being degraded due to the over-sized new construction and the excessive removal of trees."

(Statement of Hilda Yohalem, accompanied by photo, Exhibit 14)

32. Petitioner possesses additional such statements of concern about either specific proposals or general policy affecting the character and quality of life in East Hills.

33. Furthermore, several East Hills residents have contributed money to support Petitioner's legal efforts including a substantial contribution toward the present case by a direct neighbor.

34. As such, it should be evident to the Court that another central predicate of the legal onslaught by Respondent Village and the Respondent Aaronsons, that Petitioner is at best a quixotic lone "chronic complainer and obstructionist" (Aaronson Memorandum of Law p. 3), is demonstrably unfounded.

35. Rather than a "complainer" or "obstructionist" Petitioner is a conscientious civic activist whose efforts are quietly supported by many others in East Hills and elsewhere, and who works to improve and reform, as well as to preserve and protect, as the law demands. .

Respondents' 'Request' for Sanctions

36. Petitioner believes the requests for sanctions raised by Respondents in their memoranda of law are not properly before the Court, because they should be applied for not in an Article 78 'Answer' but rather by a motion on notice (Civil Procedure Law and Rules ("CPLR") §7804(d), §2211, §2214(a)).

37. As the Court is aware Petitioner in any event had limited time to prepare this Reply, far less than would be available if the matter were raised by motion.

38. Furthermore the 'request' should be deemed in large measure governed by *res judicata*, inasmuch as substantially the same request, based on substantially the same facts, was rejected in a Decision and Order of the Second Department dated May 21, 2015, discussed, *supra*, and appended as Exhibit 3.

39. Petitioner nevertheless offers a preliminary rebuttal against the purported application for sanctions, which would be wholly unwarranted, based on the facts and the law.

40. Petitioner demonstrates, *infra*, that the present legal challenge is based on a reasonable interpretations of the applicable law -- e.g. judicial review of agency determinations, standing, collateral estoppel; the challenge was not undertaken to vex or harass; and the papers do not contain deliberate factual misrepresentations, which elements constitute the three bases for sanctions under the Rules of the Chief Administrator for the Courts, 22 NYCRR 130-1.1.

41. It appears to Petitioner, and it should appear to the Court, that Respondent Village may well have a sincere belief that it is being unfairly afflicted by Petitioner -- though as documented above many residents share Petitioner's concerns about the environmental stewardship of the community.

42. But the depth and intractability of the indignation undergirding Respondent Village's counter-allegations, including those for sanctions -- if not simply a legal tactic -- betrays an insular and factually irrational view of the Village's own actions.

43. The Village is operated in a highly personalized manner -- politically akin to a cult of personality -- by a longtime leader (see, e.g., the Village website home page, Exhibit 17), and the borderline hysterical legal response to Petitioner's legal challenges may be grounded more in a personal psyche averse to challenge than to any objective misfeasance by

Petitioner.

44. There is simply stated no reasonable grounds for the Court to find the Petition frivolous under the terms of the relevant statute.

Pending Injunctions Against Petitioner

45. Respondent Village raised the issue two related injunctions against Petitioner issued in February by the Hon. Justice George R. Peck, arising from the environmental matter outlined above, as #4 in the list of Petitioner's 'partial successes', Village Memorandum of Law p. 4, p. 25).

46. In the interest of economy Petitioner refers the Court to Petitioner's affidavit opposing the injunction, appended as Exhibit 18. (Please note, Petitioner's opposition to the Town of Oyster Bay application is virtually identical that opposing the application by Beechwood POB LLC, inasmuch as both are based on identical facts and law.)

47. The remarkable injunctions were interposed as Petitioner and an allied party, a resident, urgently sought to intervene in an Article 78 special proceeding when it became clear the named *pro se* Petitioners (whom Petitioner had organized and assisted) would not appeal the Court's adverse ruling.

48. The Petitioners were actually secretly negotiating a settlement at the Justice's urging and with his apparent knowledge; the motions to intervene seemed to accelerate that process but they predated the conclusion thereof.

49. The injunctions were issued after Petitioner filed one motion before the trial Court, followed by a motion to amend, and one motion before the Second Department, followed by a motion to re-argue.

50. While the Court asserted in its Decision and Order that Petitioner alone filed "four" applications to the Second Department, that information was inaccurate, as reflected in the court's companion Decision and Order in Beechwood POB LLC v. Brummell (sic) *et al.* As shown -- Exhibit 19, p. 5, ¶1. -- the allied party, represented by counsel, filed an appellate motion to intervene, simultaneous with Petitioner, and then a motion to re-argue[11].

51. Petitioner alleged in his initial appeal -- which was denied -- that Justice Peck 's decision to issue the injunctions was an improperly "partisan" tactic, reflecting a proprietary interest in and designed to protect his preferred outcome in the case, a settlement.

52. Notably, Justice Peck ruled that standing was absent for all seven parties who came before him in the case, including Petitioner -- who had been visiting the subject site for two years, and the five direct neighbors who were original Petitioners, and the neighbor who sought intervenor status -- all of whom had lived across the street from the site for decades, and used it regularly.

53. Petitioner asks that this Court, in weighing the 'reliability' for its own judgement of Justice Peck's determinations, take specific note of the fact that prior to any trial of the underlying action, Justice Peck, in his orders ruled on the merits of the underlying case.

54. He wrote: "this Court concludes, as a matter of law, that [Petitioner] has abused the judicial process...." (Village's Exhibit 6, p. 2) and "this Court concludes as a matter of law that...said applications are without factual or legal basis...." (Exhibit 19, p. 5, Decision and Order of the Justice Peck in Beechwood POB LLC v. Brummell (sic) *et al.*).

[11]The motions to re-argue came after the Respondents disclosed to the Court that a settlement had been signed and asserted it precluded intervention. As a matter of law that assertion was wrong (see, e.g. Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20, and the Intervenors were caught-guard by the surprise new circumstances, and thus sought to address that point which they surmised may have influenced the reserve judge in declining to sign the orders to show cause.

55. Both orders have been appealed to the state's highest court, as of right, based on constitutional issues related to their excessive breadth -- they prohibit Petitioner' from even "assisting" others in any further challenges to the development at issue , or even related issues (Exhibit 19 p. 7 (b), Decision and Order, Beechwood).

56. Further, Petitioner has notified the other parties he is preparing a motion seeking Justice Peck's recusal from the case, based on, among other issues, conflict of interest in his pre-judgement and pre-knowledge of material facts related to the case, which should indeed have previously precluded his involvement, in any way.

57. For the foregoing reasons, this Court should not rely on Justice Peck's determinations in judging the conduct of Petitioner. Furthermore the underlying actions that Justice is judging remain pending, and no legal conclusions may be properly reached. At best the Justice may determine that some cause exists, but Petitioner believes his opposition papers, Exhibit 18, above clearly challenge such a conclusion based on the intricacies of the law related to intervention, among other issues.

Petitioner's Threat of Making the Board a "Laughing-stock" Does Not Indicate Petitioner's Intent to 'Harass' the Village

58. Petitioner indeed told the Board in his testimony he would attempt to broadcast its decision far and wide and subject it to ridicule (Village Exhibit 16, p. 11, Transcript). This may be considered an indication that Petitioner attempts to use this litigation to harass or vex the Village (see 22 NYCRR §103-1.1).

59. Petitioner told the Board at the time (Transcript, *id.*, p. 11) his intention was to publicize the Board's action, should it approve the removal of the trees due to their acorns. Petitioner

composed and widely circulated a press release after the Board meeting, as an effort to create the type of attention he promised (Exhibit 20).

60. The Petition was filed on its own merits, and not in a further effort to obtain any attention -- though such attention would have been welcome.

61. As it was there was no media attention received.

Factual Merits of the Petition

62. Except by qualified boilerplate denials in their Answers, Respondents do not refute any of the allegations describing violation of procedure, the absence in the proceedings of reliable documentary evidence, or the presence of official expert opinion opposing the determination at issue.

63. They do not refute the absence of a required Tree Warden report, the absence of photographic evidence alleged to have been supplied, nor the unsubstantiated character of the "service records' submitted.

64. Furthermore they do not challenge the expert opinion of the Village consulting arborist that the removal of the trees is unnecessary even if there is the type of problem the applicants allege.

Village Law

65. Respondents materially misrepresent the relevant Village Law, despite the ready availability of the law (Petition Exhibit 4) Petitioner's balanced recitation of it in the Petition.

66. Respondent Village initially mischaracterizes the environmental role of the Respondent

Board despite the fact that the ARB enjoys the sole authority to rule on significant tree-removal applications[12] (Village Memorandum of Law , p. 4: "Generally the ARB addresses issues of home design....").

67. Both Respondents deliberately omit from their recitation of the intent of the Tree Protection Law its initial predicate, which is : " Whereas it is in the public interest to protect the tree canopy for current and future generations...." (Petition §41, Village Memorandum of Law p. 5; Aaronson Memorandum of Law p. 9).

68. Third, and most materially, both Respondents attempt to portray the 'waiver' mechanism in the Tree Law as an all-purpose and automatic 'get-out-of-jail-free card', presumably to provide cover for the failure of the ARB to obtain or consider the required Tree Warden report (Petition ¶§51-2, §§89-92).

69. The Respondents misrepresent the 'waiver' provision by materially omitting, without any disclosure to the Court (e.g. by ellipsis), the law's stated requirement that to obtain such waiver, "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)" . As noted by Petitioner that requirement telegraphs its obvious intent to address applicant hardship, *not* Village sloppiness (Village Memorandum of Law p. 5, Aaronson Memorandum of Law p. 10).

70. The Petition clearly quoted the requirement (Petition ¶ 55).

71. The Respondents, clearly working together, thus falsely suggest the mandates of the Tree Law are ethereal, and any omission thus excusable. Such is clearly not the case. And in

[12]As described in the Petition (§45) the Tree Warden determines if the application is significant enough to warrant ARB consideration. Furthermore the Planning Board may approve general landscaping actions for matters under its authority, but such is rarely the case in the recent discharge of Village land-use actions.

fact the 'waiver' provision was never raised in the Board's deliberation on the Application, no waiver "application" was submitted to the Board to omit the Tree Warden Report or for any other reason, upon information and belief , and no waiver was ever invoked by the Board.

72. Respondents never assert that any waiver provision was raised in the Board's deliberations, though they invoke it now in their memoranda of law to defend the proceedings (Village Memorandum of Law p. 20, Aaronson Memorandum of Law p. 10). Thus their arguments based on the 'waiver' fail.

Errors in the Board's Deliberations

73. Respondents agree the judicial standard of review is whether the Board's actions were "arbitrary and capricious", a test for land-use actions affirmed in Halperin v. City of New Rochelle, 24 AD 3d 768, (Second Dep't, 2005) at 770, among other cases (Village Memorandum of Law pp. 19 *ff.*, Aaronson Memorandum of Law pp. 8-9).

74. The Courts have since held that whether a decision is 'arbitrary or capricious' is determined from the administrative record: thus the test is whether a decision is "supported by the record" (Harris v. Town of Carmel, 137 AD3d 1130 (Second Dep't, 2016) at 1131, or whether "the evidence in the record supported the...finding" (Kramer v. ZBA Town of Southampton, 131 AD3d 1170 (Second Dep't, 2015) at 1172.

75. The Petition described numerous flaws in the record, none of which were controverted by the Respondents.

76. The Petition showed that testimony from the Village's own expert rejected the necessity of removing the subject trees to achieve the desired ends, favoring pruning instead, if the acorns were a problem (Petition ¶¶ 94-5).

77. The Petition noted that the expert's testimony was not even entered into the public deliberative record by the Board, nor discussed, until raised by the Petitioner (Petition §96), and that no expert testimony was received in opposition to that expert testimony (Petition §98).

78. Aside from qualified boilerplate 'denials' in their Answers, Respondents do not, address or attempt to refute that expert opinion.

79. The Petition also shows the Board was warned of the dangerous consequences of approving the application -- in terms of precedent -- by an original author of the Tree Law and former member of the ARB (Petition ¶¶ 99-100)[13]. There is no evidence in the record that the Board deliberated on the issues thus raised.

80. Respondents do not address that quasi-expert testimony[14], except by qualified boilerplate denials in their Answers, and by the Village's gratuitous *ad hominem* attack on the former ARB member based on his current domicile (Village Memorandum of Law p. 10).

81. In fact, Respondent Village inaccurately omits Mr. Oberlander's warning[15] (Transcript, Village Exhibit 16, pp. 16-17) while claiming to provide a complete rendition of his comments (Village Memorandum of Law , p. 10).

82. The Petition also challenged the lack of photo evidence despite its having been referenced in the Applicants' letter (Petition ¶ 76), but again there was no attempt to refute the allegation except for the qualified boiler-plate language in Respondents' Answers.

[13] Both Respondents shamefully denigrate the septuagenarian, who has devoted countless hours to the Board and to continuing to provide his professional input in defense of the local environment, as a "New Jersey resident (e.g. Village Memorandum of Law pp. 9-10).

[14] Mr. Oberlander's bona fides were described in his affidavit and news article included as evidence (Petition Exhibits 14, 7 respectively).

[15] "There are people...it's going to go to the acorns are falling on their skylights...it's keeping them up at night...It doesn't stop." (Transcript, Village Exhibit 16, pp. 16-17).

83. The Respondents similarly did not address the inadequacies raised by the various "service orders" submitted by the Applicants as detailed in the Petition (Petition ¶¶ 77-84), except as standard in the qualified boiler-plate language of the Answers.

84. The Respondent Aaronsons dwell on the danger to their cars and children posed by branches and acorns in their Memorandum of Law , in their letter to the Board (Petition Exhibit 6) and in their verbal testimony (Village Exhibit 16, p. 1 *et seq.*).

85. But there is no independent evidence that the danger, or the damage exists[16]. It is axiomatic that the unsworn, self-serving testimony of one with an interest in the proceeding must be held inherently unreliable in the absence of evidence, and the more so when the evidence submitted is facially flawed.

86. Indeed Mrs. Aaronson in her testimony spoke of opposition to acorns (and possibly mature trees themselves) elsewhere on her property, nowhere near the driveway her children allegedly use : "We've cut like so many because we did that retaining wall....We've even asked the people behind us sometimes if we can like cut their trees...." (Village Exhibit 16, p. 5).

87. Petitioner testified to the Board the issue was "bizarre...unjustified" and did not "stand the laugh test" (Transcript, Village Exhibit 16, p. 9) and also stated in written testimony "No one else has this problem. It is absurd" (Village Exhibit 21, ARB file, Brummel letter, p. 4). In his testimony to the Board Petitioner also raised the issue of the reasonableness and veracity of the issues raised by the Applicants (Petition ¶ 83; Transcript, Village Exhibit 16, p. 9).

[16] The Tree Warden aka Building Inspector's report on the first tree removal does mention damage to the cars, but it is unclear whether the statement is based on first-hand knowledge, and in any event the initial findings of the Tree Warden were superseded when the application was referred to the Board, and an independent arborist report demanded. See further discussion, *infra.*

88. Respondent Aaronsons allege that Petition "does not, and cannot, point to any evidence...that was ignored by the ARB" (Aaronson Memorandum of Law p. 11).

89. Respondent Village alleges the ARB decision "was rational and based on the record evidence (sic) before it (and is consistent with ARB prior decisions)" (Village Memorandum of Law p. 20).

90. Yet neither Respondent refutes Petitioner's enumeration of key elements of the record that fail to support or directly refute (A) the Aaronsons' testimony or (B) the course of action the Board approved.

91. Nor do Respondents point in their pleadings to any independent evidence, other than the Aaronsons' unsupported and unsworn claims, that the trees endanger their children or have damaged their cars.

92. In fairness it must be noted -- though Respondents and the Board failed to do so -- that the "Building Inspection Report" originally approving one tree removal prior to the referral of the application to the ARB referral stated "tree...has storm damage and is damaging cars" (Village Exhibit 21, Building Inspection Report of 4/7/16).

93. But there is no evidence that the building inspector personally observed the alleged damage, nor whether the cause was acorns or falling branches.

94. Furthermore, the referral to the ARB of <u>both</u> applications suggests the Tree Warden's earlier support for the removal was effectively withdrawn -- along with the reported justifications -- because of the amplified environmental-impact of removing two trees.

95. The subsequent professional advice of the Village's consulting arborist was, in any event, to simply prune the subject trees. Similarly, the consulting arborist found none of the "storm damage" allegedly justifying removal of the 36-inch wide Oak tree. He stated instead:

"These trees are in good health. Pruning can be done to minimize acorns falling on cars" (Petition ¶ 94, Brummel Exhibit 10, Village Exhibit 21).

96. Finally the Board did not discuss the two reports or attempt to reconcile their potentially different determinations. Petitioner noted in his testimony the Board has not even mentioned the arborists report (Village memorandum of law Exhibit 16, p. 8). Indeed the Board did not mention the Building Inspection Report either.

97. Clearly however, as argued in the Petition (§73 *et seq.*), the Building Inspection Report was superseded by the arborist report, and its advice superseded the Tree Warden's determination. Even if the Tree Warden provided some basis for the allegation of vehicular damage, the record shows that the expert advice to rectify such an issue was no longer to remove the trees, but to prune them.

98. Thus there are numerous deficiencies in the record before the Board, none directly refuted by the Respondents aside from boilerplate qualified denials in their Answers: the absence of a Tree Warden report to guide their deliberation; the questions raised by the absence or inadequacy of evidence of damage or danger; the advice of the Village's own expert against removing the trees and the absence of any countervailing expert advice; the warning of the practicing arborist and former official (Mr. Oberlander) that an approval would create a dangerous precedent; and Petitioner's emphatic argument that an approval was deeply at variance with the Tree Protection Law's intent.

99. As such it is clear that the record before the Board was inadequate to support the decision, and should be annulled as "arbitrary and capricious".

100. (It may be natural to ask now 'Why did the Board act in such a manner?' The answer is, in Petitioner's experience, that the Board is far more interested in placating a new generation

of highly affluent young residents/voters/taxpayers than in enforcing the letter and spirit of the relevant laws, and as such has repeatedly and routinely approved immense rebuilt houses and the virtual clear-cutting of land around the new houses, in direct conflict with both the architectural and tree protection laws. Thus it is incumbent on an independent third party -- the Courts in this instance -- to assure that duly created laws and agencies designed to enforce them actually do their job, and protect the public interest as democratically defined, by law.)

Collateral Estoppel

101. As argued in the Petition and supporting memorandum of law, the Second Department, in finding Petitioner's appeal of the prior East Hills decision moot (Petition Exhibit 3), effectively disposed of the collateral estoppel issue in Petitioner's favor.

102. A review of the case-law shows the Appellate Division last year would not have ruled as moot ("academic") Petitioner's prior appeal, In the Matter Brummel v. Board of Trustees of the Village of East Hills *et al.*, Docket #2014-08342, had the issue of collateral estoppel been deemed 'live' and imposing a 'continuing disability' on Petitioner, as now asserted by Respondents (Village Memorandum of Law pp. 4 *et seq.*, Aaronson Memorandum of Law pp. 4 *et seq.)* .

103. The Second Department held in its Decision and Order of February 2, and then re-affirmed in its Decision and Order of May 21, that Petitioner's appeal -- and necessarily all the issues raised thereby -- was "academic" (Exhibit 2, Exhibit 3).

104. The Court did so even as Petitioner emphatically argued, in both his Brief (Exhibit 8) and in a separate motion to re-argue (Exhibit 4), that it was not moot due specifically to the

collateral estoppel issues he wished the Court to adjudicate.

105. The Court of Appeals recently re-affirmed that where an otherwise moot matter has a continuing effect, it should be permitted to proceed to appeal, thus allowing to be appealed an expired "order of protection":

> "...[G]iven the totality of the enduring legal and reputational consequences of the contested order of protection, respondent's appeal from that order is not moot."
>
> In the Matter of Veronica P. v. Radcliff A., 24 N.Y.3d 668 (2015) at 673 (emphasis added)

106. The Second Department held recently, quoting from the Veronica P. decision:

> "An appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal...."
>
> In the Matter of Powell v. Mount Saint Mary's College (Index No. 1929/15), Slip Op. 06083 (internal quotations omitted, emphasis added) (See Exhibit 1)

107. Both courts relied for their holdings on mootness and 'continuing-effect' on case-law such as Matter of New York State Commn. on Jud. Conduct v Rubenstein, 23 NY3d 570, a case Petitioner also cited in his appeal on the same point (e.g. Exhibit 4, Affidavit in Support of Motion to Re-argue, ¶19)

108. Notably two of the four justices sitting in the Powell case, Justices Rivera and Hinds-Radix, also participated in the two Decision and Orders relied on here by Petitioner, with Justice Rivera presiding in all three cases (Exhibit 1 Exhibit 2, Exhibit 3).

109. It should thus be unquestionable that the Second Department found collateral estoppel inapplicable, and "academic"[17].

110. Respondent Village simply ignores Petitioner's argument that the Appellate Division

[17]It is of course somewhat surprising the Court chose to make its finding in that manner instead of permitting the appeal to be more fully argued, but the Court chooses its calendar and how it may most economically proceed.

determination affected both the substantive issue of a long-since-removed trees *as well as* the more freighted issue of collateral estoppel.

111. The Village Respondents simply state: "Brummel now makes the same arguments that Justices Parga and Diamond properly rejected. Further...the Second Department dismissed his appeal of the *Diamond Decision* [Matter of Brummel v. Village of East Hills]. Collateral estoppel is applicable" (Village Memorandum of Law p. 13).

112. The Aaronson Memorandum of Law simply ignores the Second Department holding and Petitioner's arguments related to it.

113. The Aaronson Respondents rely on the assertion that Justice Parga's determination was controlling in that Petitioner "'does not have standing to bring the within application challenging the decisions of the ARB on properties which he does not own"" (Aaronson Memorandum of Law p. pp. 4-5).

114. Both Respondents implicitly assert that one judge, based on one case, can determine, in a blanket and enduring fashion, that a party cannot ever have standing in a certain set of circumstances, in this case Petitioner with respect to decisions made by the East Hills Architectural Review Board.

115. But such an assertion conflicts with numerous well-established grounds for standing that were not even raised in the cases previously decided, ignoring for a moment the determination of the Second Department.

116. Thus Petitioner could clearly assert standing based on 'proximate residence', living -- without any condition of ownership -- within the roughly five-hundred-foot distance affording presumptive standing in land-use matters (see e.g. Matter of Shapiro v. Town of Ramapo, 98 AD3d 675 ((Second Dep't, 2010)[18] or based on 'view' (see e.g. Matter of Barrett

[18] "Since the petitioners live in close proximity to the portion of the site that is the subject of the challenged

v. Dutchess County Legislature, 38 AD 3d 651 (Second Dep't, 2007)[19].

117. Thus it is clearly erroneous to argue that Justice Parga could reasonably have determined Petitioner's standing in any circumstances raised or occurring, now and forever, based only on the specific set of facts and allegations in the one case before him.

118. Petitioner alleged a general 'use and enjoyment' of the community as the basis for standing in the case before Justice Parga, invoking the standing test established by Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) at 301.

119. Even if collateral estoppel were upheld, it would reasonably affect only that specific assertion of standing as articulated, not unrelated bases of standing such as 'view', 'proximity', or those made in the present case, alleging 'repeated visits' to the specific street and locale (*cf.* "repeated, not rare or isolated use" Save the Pine Bush, *id.* at 305).

120. Thus it is clear that however expansive the intent of the ruling it never could have had the effect ascribed it, notwithstanding the appellate decision negating it altogether.

121. The Respondents may wish that Justice Parga, who has demonstrated a marked -- and often reversed -- impatience with those opposing development[20], might assert unlimited

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determinations, they did not need to show actual injury or special damage to establish standing (see Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 687 [1996]; Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 409-410, 413-414 [1987]; Matter of Village of Chestnut Ridge v Town of Ramapo, 45 AD3d 74, 89-90 [2007]; Matter of Ontario Hgts. Homeowners Assn. v Town of Oswego Planning Bd., 77 AD3d 1465, 1466 [2010])." (*id.*, at 677)

[19] "The petition alleged that Griffith resided directly across from the "main building complex of the Infirmary," that the Bartons' property directly abutted the site of the proposed Project, and that they would suffer an adverse scenic view. Other proof in the record established that Griffith had a view of "[o]ne of the older structures and portions of others," and that the Bartons had a view of the Infirmary from a distance of 1,200 feet (see Matter of Parisella v Town of Fishkill, 209 AD2d 850 [1994]). Since Griffith and the Bartons alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA, they established the requisite standing to challenge the Legislature's resolution." (*id.* at 654)

[20]Petitioner stumbled upon two cases in which appellate courts significantly reversed Justice Parga in his rulings allowing development to proceed -- in one case such development being opposed by the local agency, in the other case it being supported by the local agency: Pecoraro v. Board of Appeals Town of Hempstead 2 N.Y.3d 608 (2004), and Patel v. Board of Trustees of the Village of Muttontown, 115 A.D.3d 862 (Second Dep't, 2014), respectively.

dominion over a party the Justice finds unworthy. But there are clear limits to such authority, and the Second Department imposed them by erasing the collateral estoppel effects of the original ruling against Petitioner when he finally, belatedly appealed it[21].

Standing

122. Petitioner articulated clear factual bases for a specific class of standing well established by the court in Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) and Sierra Club v. Village of Painted Post, 26 NY 3d 301 (2015) (Petitioner's Memorandum of Law pp. 3-5).

123. There is a torrent of argument against Petitioner's standing but it may be reduced to several elements that Petitioner will refute.

124. Respondents (1) manufacture standing 'tests' not recognized in the law; (2) mis-state the law of standing; (3) repeatedly mischaracterize Petitioner's claims regarding standing, and (4) irrelevantly invoke prior cases in which other judges ruled against Petitioner's standing (one of which is on appeal, and others of which are questionable, but all of them irrelevant).

125. The Petition reflects that standing is asserted due to (1) Petitioner's regular 'use and enjoyment' of the street where the trees at issue are located (Petition ¶3, ¶¶ 16-22, Petitioner's Memorandum of Law pp. 4-5); and (2) The precedent set by Board's decision may affect Petitioner's overall use and enjoyment of the community, which is different in kind and degree from the use and enjoyment by the 'general public' (Petition ¶1, ¶3, ¶¶23-26,

opsed oppossagainst the wishes of the local board, one case in the cases

[21]In his appellate Brief, Petitioner explained why he had not appealed Justice Parga's ruling at the time, and the circumstances that should allow it to be appealed in the context of the subsequent holding by Justice Diamond: see Brief, Exhibit 5 pp. 35 *ff.*

¶100; Petitioner's Memorandum of Law p. 4).

Lack of Property Ownership

126. Respondent Village and Respondent Aaronsons both emphasize Petitioner's personal circumstances both to discredit him in the eyes of the Court and induce it to dismiss him as a malicious eccentric, and to undermine his claim to standing.

127. Respondent Village emphasizes Petitioner has "no legal interest in any Village real estate" and "does not own or rent the property at issue or any other property in the Village (Village Memorandum of Law p. 7, and p. 13, respectively). It asserts "Living in a parent's house does not create standing as to other people's private homes" (Village Memorandum of Law p. 13). The Village implies the opposite is, in fact, the case.

128. Respondent Aaronsons echo: "Brummel does not own any real property in the Village" (Aaronson Memorandum of Law p. 4).

129. The 'ownership of real property' is not a test of standing, rather real "injury" is (e.g. Save the Pine Bush at 304: "in land use matters . . . the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large" (internal quotations omitted).

Similar Use As Other Residents

130. Both Respondents claim that Petitioner cannot have standing because many other residents similarly enjoy the streetscape, and thus they also would have standing. The Court of Appeals recently rejected this line of reasoning, to great relief by environmentalists[22].

[22]Respondent Village points (Village Memorandum of Law p. 17) to the dismissal, now on appeal, of a special proceeding in which Petitioner joined with two others to defend the public forest at Christopher Morley Park,

131. In fact, by acknowledging that Petitioner would have the same standing as others, both Respondents actually acknowledge Petitioner's arguments for standing, given the Court of Appeals' holding that 'shared standing' is equally valid, if the facts support it.

132. Respondent Village argues Petitioner shows is no different from others in the Village who could claim standing: "Many ride bicycles, walk their dogs in the Village" (Village Memorandum of Law p. 17).

133. Respondent Aaronsons argue "Brummel is no different from countless others in the Village community who like to take walks outdoors and have...taken pictures of the environment" (Aaronson Memorandum of Law p. 6).

134. But the Court of Appeals specifically rejected this argument against standing -- which had become a common new tactic to defeat standing, over-ruling the Appellate Division in Sierra Club v. Village of Painted Post and holding that just because a person is not unique, or many share the injury, the party is not thus denied standing:

> "(W)e have ... made it clear that standing is not to be denied simply because many people suffer the same injury... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody"]). The harm that is alleged must be specific to the individuals who allege it, and must be different in kind or degree from the public at large (Society of Plastics at 778), but it need not be unique.
>
> Sierra Club v. Village of Painted Post, id. at 311 (internal quotes omitted, emphasis added)

135. Thus the claim Petitioner lacks standing because others also may share his activities that bring him in contact with the street and trees at issue is contrary to the law, and actually

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Brummel et al. v. Town of North Hempstead et al., Nassau Index #6105 / 2014. This matter, still awaiting oral argument (Docket #2014-10641), was dismissed on exactly the grounds reversed in Sierra Club v. Village of Painted Post. (*See* Decision, J. McCormack, Village Exhibit 22, p. 9, ¶3). The case is thus illustrative of the abusive use of standing against environmental litigants which the Lippman Court has struggled to end.

supports Petitioner's assertions of standing.

Standing Does Not Distinguish Public and Private Land

136. The Village Respondents suggest Petitioner is precluded from asserting standing because the property is private not public, and asserts that the case Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) involves public land (Village Memorandum of Law pp. 17-18).

137. To be clear, the legal issue in land-use cases is the impact of the public decisions of public agencies on the well-being of litigants, whether the decisions affect public or private property.

138. The Village is also incorrect on the facts of the case, because Pine Bush actually addresses a change in use of private land (*id.* at 301), and the effect of the decisions allowing such change on the litigants.

Respondents Fail To Address The "Injury" Caused by the 'New' Policy-Precedent

139. Neither Respondent -- except in the qualified boiler-plate 'denials' of their Answers -- addresses the second part of Petitioner's claim of injury: The dangerous precedent set for the future deforestation of the Village by the precedent thus set (Petition ¶1, ¶3, ¶¶23-26, ¶100; Petitioner's Memorandum of Law p. 4, as noted).

140. Petitioner argued that if indeed he is among the class of Village residents 'specially harmed' by damage to the local environment -- one who takes a special interest in the environment, frequently walks the wooded street, fights for the preservation of the local

environment, takes photos and publishes his concerns and interests on a website and Facebook page, etc. -- then a new precedent allowing trees to be removed, not because they are 'sick', or because they impede construction, but because their healthy natural functions are considered a nuisance, will create additional harm by affecting future tree removals.

141. Neither Respondents address a word about that issue in their memoranda of law, or elsewhere outside the rote denials of the Answers.

Prior Cases

142. Respondent Village's makes much of the fact Petitioner's assertions of injury in this special proceeding are no different from those previously rejected (Village Memorandum of Law p. 15).

143. Further Respondent Village raises the issue of prior cases where Petitioner was denied standing.

144. As Petitioner has stated, standing as been an issue the Court of Appeals has deemed to have been abused in environmental cases and one which it has attempted to reform during the term of Chief Justice Jonathan Lippman (Petitioner's Memorandum of Law pp. 3 *et seq.*).

145. Petitioner showed, above, the Second Department ruled "academic" any collateral estoppel effect of Justice Parga's ruling denying Petitioner standing in Petitioner's first fully-pursued case regarding the Architectural Review Board, in 2013.

146. Respondent Village invokes other rulings against standing in cases Petitioner brought (1) to protect about thirty acres of state-recognized "Oak Tulip" forest in North Hills (Village Memorandum of Law p. 14), and (2) to protect the thirty-acre public recreational forest in

Christopher Morley Park (Village Memorandum of Law p. 17).

147. Inasmuch as Petitioner is portrayed as a lone eccentric, it should be noted that in the latter case Petitioner was joined by two others as plaintiffs -- an attorney and a financial specialist, both residing adjacent to the subject park in Roslyn Estates, and the case is thus mis-reported as "Brummel v. Town of North Hempstead" (see Village Exhibit 22, Decision of Justice McCormack).

148. As noted above (Footnote 22) the latter case is awaiting oral argument before the Second Department, in an appeal grounded in an error of both standing and the standard of review in a motion to dismiss, both of which Petitioner and his two co-Petitioners emphatically argued before both Courts was is-applied by the Hon. Justice McCormack.

149. In the other case, Justice Woodard -- who is no longer on the bench -- denied Petitioner standing because she found that although Petitioner regularly visited the imperiled state-recognized "Oak-Tulip forest", and despite Petitioner's diligent argument that state law declares "unimproved land" to be fully open when not 'posted' or fenced, and users to be deemed enjoying "license and privilege"[23], the Court nevertheless ruled that Petitioner's visits were not "legal or authorized" and could therefore not create injury for standing purposes (Decision of Justice Woodard, Village Exhibit 20, p. 11, ¶1).

150. This Court can therefore not rely on the rulings from prior cases to establish any reliable indication of standing in the present case, both because the prior cases were deeply flawed, and because the cases were wholly unrelated and separate.

[23] Penal Code §140.00(5) states: "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."

151. If anything the prior cases demonstrate that the "heavy-handed," and "overly restrictive" imposition of standing tests should not be used to "shield a particular action from judicial review" (as stated in Sierra Club v. Village of Painted Post, *id.*, at 311), and should be avoided here notwithstanding Respondents' urging.

152. Respondents provide extremely imaginative and expansive -- yet unfounded -- arguments against Petitioner's standing, pointing to collateral estoppel, Petitioner's personal situation, the allegedly disqualifying similarity of Petitioner's activities with that of other residents', and prior cases that Respondents argue to be relevant apart from the collateral estoppel argument.

153. As demonstrated, *supra,* upon more careful examination, it should be clear Petitioner's factual, legally-grounded, and straight-forward assertions of standing should not be disturbed.

Basis for Injunctive Relief

154. Petitioner has defended the assertions submitted in the Petition against the extensive but unreliable attacks by Respondents.

155. Petitioner has substantiated that he enjoys standing to sue because he will be harmed if the trees are removed and because the precedent for further such removals will be established; that the Petition has strong merits in that the proceedings at issue were defective as a matter of law, and hence that Petitioner has a strong likelihood of success; further Petitioner has shown the damage to the trees and the precedent set by the Board's determination, based on a flawed proceeding, will cause Petitioner irreparable harm; and finally Respondents have not shown the balance of equities is in their favor.

156. Respondent Aaronsons have about a month's time period at most to address their distaste and dread of acorns, if the subject trees are left standing during this special proceeding. They can do so simply and conveniently. They can mitigate any danger by having their children wear helmets when in the driveway or simply have them play elsewhere, away from the trees at issue; notably they have not asked to remove any other 'dangerous' trees on their property, so it appears the rest of the property is 'safe'. They can park their vehicles in their garage or cover their roofs with blankets during the month-long acorn period.

157. By contrast the removal of the trees will be 'forever' or at least have a decades' long impact, inasmuch as any replacements would require decades to grow and replicate the aesthetic and environmental services provided by mature trees.

158. Furthermore the precedent set by leaving the Board's decision undisturbed -- approving the removal of trees for no other reason than that the trees are trees, and do what trees do -- could have extensive and dire effects for the community and for the authority of the Board, issues not explored at all by the Board though raised before them in testimony by their former member Mr. Oberlander (Transcript, Village memorandum of law, Exhibit 16, pp. 16-17).

Summary

159. This case presents at its heart a question whether the Architectural Review Board made its determination based on a rational exercise of its authority, to weight whether the record before it supported its decision.

160. Petitioner has argued that the record is inadequate to support a weighty decision with

potential future impact by precedent that appears to conflict with the stated intent of the Tree Protection Law, i.e. "...to protect the tree canopy".

The factual issues with the record that deny it a 'rational basis are clear: (1) The record before the Board was missing a mandated report (the required but absent Tree Warden Report); (2) The documentation submitted in support of the application was deeply flawed (e.g. it was facially unreliable and missing photos alleged to be part of it); (3) The Village's own expert opinion -- by its accredited arborist - rejected the necessity and wisdom of the proposed action, and no countervailing expert opinion was addressed by the Board[24]; (4) The potential dangers of the precedent created by such a 'subjective' and elective basis for tree removal was not addressed by the Board though it was raised before them by an authority on its law, former Board member Mr. Oberlander.

161. Respondents argue unconvincingly that collateral estoppel bars Petitioner from standing -- despite a dismissal of the issue by the Second Department. Both Respondents simply ignore the arguments Petitioner makes to that effect, outside the qualified boiler-plate language of their Answers.

162. Petitioner demonstrates exactly the type of standing the Courts have endorsed -- repeated not isolated use of the small street where the trees are located, as well as an enjoyment of not only that streetscape but the streets throughout the Village, which he and similarly situated environmentally- and outdoors-oriented residents would potentially lose were the Board's decision to become firm precedent.

163. As for the issue of sanctions, Petitioner argues that the Respondents should move for

[24] As noted above, the "Building Inspection Report" did make reference to damage to vehicles, but it was unclear if it was due to acorns or errant branches, and in any event it was (a) superseded by the referral of the entire application to the Board and (b) the attribution of damage in any event did not contradict the accredited arborist's solution to address any such problem, nor were the inconsistencies raised or addressed by the Board.

such relief in a motion on notice, not in a memorandum of law supporting an Article 78 "answer".

164. But on the merits, sanctions are not warranted. They were rejected by the Second Department on similar assertions by the Village in 2015, and the Respondent Village's constant repetition is itself at this point abusive.

165. Furthermore both this and Petitioner's other legal efforts have been earnest and responsib.le, and this special proceeding bears none of the characteristics defined by 22 NYCRR §103-1.1 justifying sanctions -- to wit, the special proceeding is not meritless as a matter of law, is not intended to vex or harass, and does not contain material mis-statements of fact.

166. In fact Petitioner makes extreme efforts to show both sides of the story, and provide a complete and reliable version of the facts. By contrast Petitioner has shown numerous instances where Respondents mis-state and misrepresent facts, including the relevant provisions of the Village law, the qualifications of Petitioner's ally Mr. Oberlander, and the actual outcomes and characteristics of the many legal proceedings Petitioner has been involved in for the public interest.

167. Therefore Petitioner asks this Court to continue the injunction, sustain the Petition, and reject any request for sanctions against him.

168. Should the Court continue the injunction Petitioner is prepared to provide a manageable and appropriate bond as established in the Court's wisdom.

Dated:
Nassau County, New York
September 26, 2016

_____

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EXHIBITS

Note: All pleadings are presented without any of their exhibits.

Exhibit 1 Decision Powell v. Mount St. Mary's College, Docket No. 2016-05726
Exhibit 2 Decision Brummel v. Village of East Hills, Second Department, February 2, 2015 (motion to dismiss)
Exhibit 3 Decision Brummel v. Village of East Hills, Second Department, May 21, 2015 (motion to re-argue, cross-motion for sanctions)
Exhibit 4 Petitioner's Affidavit in Support of Motion to Re-argue, Richard A. Brummel v. The Village of East Hills, N.Y. for the East Hills Architectural Review Board
Exhibit 5 Petitioner's Brief, Richard A. Brummel v. The Village of East Hills, N.Y. for the East Hills Architectural Review Board
Exhibit 6 Respondent Village Memorandum of Law, Richard A. Brummel v. The Village of East Hills, N.Y. for the East Hills Architectural Review Board
Exhibit 7 Village Reply Brief, Richard A. Brummel v. Board Trustees of the Village of East Hills, N.Y. et al., Docket No. 2015-04351
Exhibit 8 Petitioner's Brief in Richard A. Brummel v. Board Trustees of the Village of East Hills, N.Y. et al., Docket No. 2015-04351
Exhibit 9 Decision of Justice Mahon in Brummel v. Unknown John Doe as Commissioner of of the Nasasau County, N.Y. Department of Parks, etc.
Exhibit 10 Respondent Village Memorandum of Law, Brummel v. Village of East Hills, Harbor Hill Road, East Hills NY 11577 etc.
Exhibit 11 Temporary Restraining Order trees issued by Justice William F. Mastro of the Second Department in Operation STOMP et al. v. Nassau County, Yushen Su, Intervenor
Exhibit 12 Articles in The Roslyn Times and The Roslyn News re Christopher Morley Park
Exhibit 13 Article in The New Hyde Park Times re the development in North Hills
Exhibit 14 Statement of former ARB founding-member Hilda Yohalem, photo of Ms. Yohalem in front of 'rebuilt' houses on Ash Drive in East Hills, October, 2015.
Exhibit 15 Media coverage, CBS TV, Plainview-Old Bethpage Herald
Exhibit 16 Neighbors' Notice form
Exhibit 17 Village home-page
Exhibit 18 Petitioner's Affidavit in Opposition to the Injunction, Town of Oyster Bay v. Brummel
Exhibit 19 Decision and Order, Beechwood POB LLC v. Brummell (sic) *et al*.
Exhibit 20 Press Release
Exhibit 21 Emails from residents opposing proposed changes