

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

---

Matter of Application of Richard A. Brummel,  
Petitioner

For Judgements and Preliminary Injunctions pursuant  
to Article 78 and Section 3001 of the Civil Practice  
Law and Rules

Index No.: 3109 / 13

VERIFIED PETITION

-against-

Village of East Hills, NY, (for the East Hills  
Architectural Review Board and  
the East Hills Zoning Board of Appeal),  
Respondent

---

Petitioner Richard Brummel alleges as follows:

Nature of the Action

1. This is an action brought under NY Civil Practice Law and Rules (CPLR), Article 78, to compel the Village of East Hills, NY (hereinafter the "Village" ) to accept as a matter of right, while staying action pending resolution, appeals of various approvals of applications by Village's Architectural Review Board

(ARB), taken on February 4, 2013 and March 4, 2013, which appeals Petitioner duly submitted to the Village's Zoning Board of Appeals (ZBA), OR asking for nullifications of those approvals of applications, also under Article 78, due to substantive and/or procedural defects. The applications concern plans to (a) build new houses, and/or (b) create additions to existing houses, and/or (c) to destroy trees. Petitioner also asks that all work permits issued upon the applications and approvals complained of be rescinded and work stopped on them.

2. This Action was previously filed on March 14, 2013 and acted upon by the Honorable Justice Anthony L. Parga of the New York State Supreme Court in Nassau County. Because Petitioner did not provide prior notice to Respondent, Justice Parga's Law Clerk Danielle said, Justice Parga would not issue any of the Relief sought in the Order to Show Cause and Affidavit that accompanied this Petition (Exhibits A and B). In order to rectify that issue, according to Danielle, Petitioner could withdraw the Action and re-file it after giving Petitioner at least 24 hours notice. At that point Petitioner executed an Affidavit to withdraw the Action (Exhibit C). Petitioner then notified Respondent in multiple manners, which are described in an accompanying Affidavit attesting to notice given and a stamped letter (Exhibit D) that proves hand-delivery of the original Petition and Order to Show Cause made to the Offices of the Village of East Hills on March 15, 2013 at 1:30 PM. Thereupon Petitioner re-filed this Petition with no changes to the content thereof EXCEPT the addition of this Paragraph (Paragraph 2) and re-numbering subsequent Paragraphs and references thereto to correct the sequence of Paragraphs in

this document, to the best of Petitioner's knowledge.

### Parties

3. Petitioner Richard Brummel, who is 52 years old, grew up in and resided in East Hills from 1960 to 1978. His family has continuously maintained the same residence in East Hills, and he has been living again at the residence since August 2009. During the course of his recent residence, Mr. Brummel has regularly attended various Village meetings including those of the Architectural Review Board (which is responsible for the tree protection and architectural regulations), at which he has participated actively in attempting to save healthy trees from unjustified removal, and to fight over-development by building. He has provided photo evidence that led to the delay in one application and the assignment of the Village external arborist to evaluate a resident's claims. His efforts arguably also led to the formation of a committee to review current tree and zoning laws, although he was excluded from its membership. Petitioner created about three years ago and maintains a website, Planet-in-Peril.org, devoted to the environment in general, and to East Hills and its natural and built environment as well. He has constantly circulated through the community monitoring the state of health of the natural and built environment. He has taken dozens if not hundreds of photos of environmental conditions or damage – including construction projects and tree removals -- in East Hills and posted many on the website he maintains. Frequently he has informed and appealed for help from like-minded residents with fliers he distributes when time permits. His efforts to inform neighbors has led to letters to the editor and appearances at hearings by neighbors who

were not otherwise aware of projects that they felt would injure them. In April 2012 he filed an Article 78 petition in Nassau Supreme Court (J. Phelan and Winslow) to protect a nearby house and its trees from demolition, though he later dropped the matter in an atmosphere of intimidation and fear for his personal safety, after a TRO was issued. He has been attempting to form a new civic association meant to improve the village's environmental stewardship and government practices. The proposed civic association is called the Keep East Hills Green Civic Association, and has been repeatedly promoted at the Village park, at shopping centers, and door-to-door. In addition Petitioner went door-to-door in Spring 2012, visiting several hundred houses, and collecting several dozen signatures from residents representing each of the approximately eight separate subdivisions of East Hills who agreed to support the strong, urgent demand for far better environmental protection in East Hills, and presented it to village board. Many of Petitioner's efforts were reported by The Roslyn News, a local weekly print newspaper in general circulation. Petitioner cares for plants and animals on the property where he resides, which is his mother's house. Petitioner currently works as a cook.

4. Respondent Village of East Hills (hereinafter "the Village" or "Village") is an incorporated Village of the State of New York located in Nassau County. It is a predominantly-residential village of approximately 2245 households on approximately 1472 acres of land on the North Shore of Long Island. It is home to thousands of mature trees of various species, and those trees provide habitat to many species of birds as well as small mammals, insects,

and other living organisms.

#### Venue

5. The venue is proper in Nassau County under CPLR Sections 503 (a) 506 (b) and 7804 (b).

#### Relevant Laws and Factual Background

6. In 2007 the Village Trustees enacted Local Law 5-2007, amended in 2009 by Local Law 2-2009, codified as Chapter 186 of the Village Code, whose stated intent is to “protect the tree canopy for current and future generations,” and to preserve multiple enumerated ecological and non-ecological values for residents by protecting and preserving the trees. The means by which trees are protected is set forth in the law, requiring residents to obtain a permit to remove all trees more than 5 inches in diameter, except in the case of undefined “emergencies” or a landscaping plan approved by a specified village agency, and otherwise empowering both a tree warden and the village's Architectural Review Board to be involved in determining whether the removal of a tree is permitted. Healthy trees are intended to be inspected by a tree warden before their removal, and to be evaluated under criteria such as “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.” (Village Code Section 186-5 (a)). The Architectural Review Board (ARB) under the law entertains appeals from a tree warden's determination, considering such facts as “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.” (Village Code

Section 186-1 (c) (5)).

7. The procedure under which trees are granted or denied permits is set out in the law as follows: "Upon receipt of an application by the ARB, the Tree Warden shall visit and inspect the site. The Tree Warden will then make a determination on whether a permit should be granted without prior ARB review. The determination by the Tree Warden will be made on the basis of 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. The Tree Warden's decision shall have the full authority and act on behalf of the Village and the ARB. Once a decision is rendered by the Tree Warden, a determination by the Tree Warden may be appealed within 30 days after the filing of the decision with the Village Clerk to the ARB. Appeals shall be in writing, pursuant to § [186-16](#), and must be filed prior to the removal of the tree(s) in question, unless the removal is performed due to an emergency situation pursuant to § [186-10](#). 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:
  - (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.” (Village Code Section 186-5)

8. Under Section 186, hereinafter “the Tree Law,” many applications have come before the Architectural Review Board and in numerous instances residents have been denied a permit to destroy a tree where they would otherwise have done so, upon information and belief.
9. Appeals of ARB decisions on tree removal applications may be taken under Section 186-16 of the Village Code, which states, “Any applicant aggrieved by any decision of the Tree Warden or Tree Subcommittee Chair may appeal to the ARB. Such appeal shall be taken within 30 days after the filing of the decision with the Village Administrator. The ARB may reverse, modify or affirm the action of the Tree Subcommittee Chair. B. Any applicant aggrieved by any decision of the ARB may appeal to the Zoning Board of Appeals of the Village, in the same manner and upon the same criteria as is provided for use variances. Such appeal shall be taken within 30 days after the filing of the decision with the Village Administrator. The Zoning Board of Appeals, after proceeding in the same manner as is provided for use variance applications, may reverse, modify or affirm the action of the ARB.”
10. Under the Tree Law the term “applicant” is defined as “The owner, lessee, occupant or person in possession of any premises in the Village, or any agent thereof, including contractors.” (Village Code Section 186-2, Definitions). No

further restriction or definition of who may appeal a decision is articulated in the law.

11. Petitioner resides at 15 Laurel Lane, East Hills NY 11577 and is thereby an “occupant” and therefore an “applicant” as well under Section 186-2 of the Village Code.
12. The liberal scope of who may appeal decisions is reflected as well in the ZBA appeal guidelines, contained in the state Village Law, which state: “Hearing Appeals. Unless otherwise provided by local law, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any local law adopted pursuant to this article [Article 7, “Building Zones”]. *Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the village [italics added].*” (NYS Village Law, Article 7, 7-712-a (4) Hearing Appeals.)
13. The procedure for all zoning appeals is set out in the Village Code as follows: “The Board of Appeals shall have the power to adopt such rules and regulations for the conduct of its hearings, proceedings and procedures and may amend the same, from time to time; provided, however, that they shall not be inconsistent with or contrary to the provisions of this chapter or of the Village Law of the State of New York.” (Village Code Section 271-133).
14. Under the state Village Law, “An appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official [so charged with administering relevant zoning

rules], by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. (NYS Consolidated Laws, Village Law, Article 7, Section 712A, Paragraph 5b.)

15. There is no indication in the East Hills Village Code how the appeal is to be served upon the “administrative official” when the decision is taken by the ARB as a group.
16. East Hills consists of approximately eight to ten separate neighborhoods and developments which were originally built from the 1930's into the 1950's, upon information and belief. Various architectural styles are present, resulting from original and subsequent development.
17. In order to preserve and enhance the architecture of the Village, and in response to concerns over the objectionable style of some re-developed properties, the Village Trustees enacted in 2005 Local Law 2-2005, Article XX Chapter 271 of the Village Code (hereinafter the Architectural Review Law), to “protect and preserve the character of the community” (Village Code Section 271-185) by empowering the ARB to approve or deny building permits depending on their correspondence with such legislative intent. The law states, “It is the purpose of this article to preserve and promote the character, appearances and aesthetics of the Village, to conserve the property value of the Village by providing procedures for an Architectural Review Board (also referred to as the "ARB") review of the exterior of new construction and of certain alterations, additions, reconstructions and site utilizations, and to promote the following objectives: [\(1\)](#) To encourage beneficent building design

and appropriate appearances, and to relate such design and appearances to the sites and surroundings of buildings;(2) Preserve the prevailing aesthetic character of the neighborhood and its environs, and to enhance the character of the Village by ensuring compatible buildings;(3) Promote and encourage the finest quality of architectural design and utilization of land when new buildings and new exteriors are constructed or erected, reconstructed, refurbished and altered;(4) Assure the design and location of any proposed building, or the addition, alteration or reconstruction of any existing building, is in harmony with the existing topography of its site and the existing building as well as the neighboring properties;(5) Discourage and prevent any design that would adversely affect or cause the diminution in value of neighboring property, whether improved or unimproved; and (6) Prevent design and appearances which are unnecessarily offensive to visual sensibilities, which impair the use, value, aesthetics or desirability of neighboring properties and/or the general welfare of the community at large.” (Village Code Section 271-186).

18. The legislative principles contained Village Code section 271-186 are implemented by “Review Standards” listed in Village Code section 271-190, “Review Standards”.

19. Appeals from decisions of the ARB with respect to buildings, similarly with those decisions affecting trees (see Paragraph 9, above), may be taken under Section 271-196, which states “Any applicant aggrieved by any decision of the Architectural Review Board may appeal to the Zoning Board of Appeals of the Village, in the same manner and upon the same criteria as is provided for use

variances. Such appeal shall be taken within 30 days after the filing of the decision with the Village Administrator. The Zoning Board of Appeals, after proceeding in the same manner as is provided for use variance applications, may reverse, modify or affirm the action of the Architectural Review Board.” (Village Code Section 271-196).

20. An “applicant” under the law for building is not defined, in contrast with that for trees (see Paragraph 10, above). Chapter 271, “Zoning” Section 271-7, “definitions,” does not define the word. Article XII of Chapter 271, “Board of Appeals” does not contain a Definitions section. Article XX of Chapter 271, “Architectural Review Board Requirements and Review,” does not define “applicant” in Section 271-187, “definitions; word usage.”

21. Inasmuch as there is no definition in those sections cited above, the sole definition of “applicant” before the ARB is defined in Village Code Section 186-2, “definitions, cited in Paragraph 10, above, as “The owner, lessee, occupant or person in possession of any premises in the Village, or any agent thereof, including contractors.”

22. Petitioner resides at 15 Laurel Lane, East Hills NY 11577 and is thereby an “occupant” in a residence in the Village and therefore an “applicant” under Section 186-2 of the Village Code, entitled to take appeals under Village Code Section 271-196.

23. As stated above in Paragraph 12, the state Village Law provides clear guidance as to who may take appeals to the ZBA, which includes “any person aggrieved,” (NYS Village Law, Article 7, 7-712-1 (4) Hearing Appeals.), and which, again, includes Petitioner.

24. On approximately a monthly basis residents and developers appear before the ARB seeking approval of architectural plans and landscape plans (which often involve destruction of mature trees) for properties in the Village, and the ARB meets in public session to obtain testimony and vote on whether to approve the proposed plans.
25. Proceedings of the ARB, as of other public bodies, are required by state law to be undertaken in an open, rational, lawful manner since they may otherwise be challenged and overturned by certiorari based upon being “made in violation of lawful procedure, ... affected by an error of law or ... arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed” or failing to satisfy the requirement “whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.” (NY Civil Practice Law and Rules (CPLR), Article 78, Proceeding Against Body or Officer, Section 7803, paragraphs 3 and 4).

#### ARB Meeting of March 4, 2013

26. On March 4th, 2013 a proposal for the re-development of 55 Oakdale Lane in East Hills, N.Y. (Please note: All addresses contained herein are in East Hills, N.Y. unless otherwise noted) by Plandome 164 LLC was heard by the ARB in public session. This proposal included demolition of an existing house and its replacement with a new house, and the destruction of 10 trees out of

17 mature trees present on the property, with the replacement of some with young trees and/or shrubs.

27. The following trees were proposed for destruction, with the diameter given as indicated in the "Landscape Plan": Larch, 8"; Oak, 10"; Red Maple, 12"; Norway Spruce, 13", Norway Spruce, 13"; Cedar, 10"; Maple SP [sic] 17"; Norway Spruce, 22"; Norway Spruce, 10"; Norway Spruce, 14".

28. In testimony before the ARB petitioner rose in opposition to the application stating the following objections: (1) the building application was defective and hence unable to be adequately evaluated by the ARB or the Public intervenors in the hearing because spaces on the form to enter existing building floor area, lot coverage, and height, for purposes of comparison with proposed dimensions, were left blank; (2) the design of the house was redundant with other recent designs, such as 37 Laurel Lane, in violation of the ARB precedent for requiring original non-redundant designs; (3) while the proposal asked to destroy ten of seventeen trees on the site, there was no report by the Tree Warden as required by Village Code Section 186-5 (see quotation in paragraph 7, above); (4) the house was proposed with vinyl siding despite current review of Village laws by the Tree and Zoning Review Committee disparaging vinyl siding in the Village, as nonconforming with the goals of Village Code (see Section 271-186, see Paragraph 17, above); (5) the size of the house and its appearance were not in keeping with the community character, in violation of the intent of the Architectural Review Law, section 271-186, quoted in Paragraph 17, above; (6) the application conflicted with the goals of the Village to preserve the "tree canopy", Village Code section

186-1 (see Paragraph 6 above).

29. Notwithstanding Petitioner's objections the ARB voted to approve the application for 55 Oakdale Lane.
30. At the conclusion of the ARB meeting March 4, 2013, Petitioner submitted a written appeal to the Chairman of the ARB, Spencer Kanis, enumerating several properties whose applications that were approved that evening, including 55 Oakdale Lane, 35 Wildwood Lane, 70 Oak Drive, and 15 Fir Drive, by offering the two-page handwritten statement to the Chairman and then touching it upon his hand and placing it before him on the table used as a rostrum for the meeting when he failed to take it voluntarily.
31. On March 11, 2013, Petitioner submitted a revised appeal of this decision and the others noted above (Exhibit 1) addressed to both the ARB chairman and the ZBA chairman, as well as to the Village Attorney. This appeal restated the numerous grounds of objection that Petitioner had raised in the meeting for this property, as well as for the other votes objected to and appealed of in the same letter. It also included objections based on the inability of the public to fully view the site at issue to allow their full participation in the hearing process despite prior formal request (Exhibit 2) to do so which objection may or may not have been also entered during the hearing but upon which issue both the ARB and the Village have been on formal notice since October 2012.
32. On March 11, 2013, Petitioner received a letter (Exhibit 3) from an outside attorney of the Village, on private stationery, and without identifying any authority upon which the letter was composed, purporting to deny this appeal

and all others submitted on March 4, 2013 and February 11, 2013. (Petitioner had already submitted the revised appeal prior to receiving the letter the same day). The one-paragraph letter stated that the appeal and request for stays were denied because “The local law of the VEH states that '[a]ny applicant aggrieved by any decision of the Architectural Review Board may appeal to the [ZBA]...' Any resident who is not an applicant, therefore may not appeal [grammar as in original, abbreviation ZBA added].”

33. On March 11, 2013, Petitioner also submitted a request (Exhibit 4) under the state Freedom of Information Law (FOIL) (Public Officers Law Article 6, “Freedom of Information Law”) and Village Code Chapter 155, “Records”, for immediate notification of all final dispositions of applications from the ARB meetings of March 4, 2013 and February 4, 2013, this one included, filed with the Village Clerk or otherwise promulgated in such a way as the render the decisions final and subject to issuance of relevant permits. No response has been received to date.

34. Upon information and belief, this application and others approved March 4, 2014, while voted “approved” by the ARB, have not yet been reduced to a “decision” in compliance with the ARB's procedures. Petitioner was told this March 11, 2013 by Deputy Village Clerk Nancy Futeran. But beyond that the status of the approved applications is essentially a mystery. The Village website does not report the status of pending applications or permits, except to announce hearings thereon. Thus the formal “decision” could be promulgated at any time and permits issued forthwith.

35. At the same ARB meeting of March 4, 2013, Mr. and Mrs. Adam Cymbler

submitted a proposal to add a second-story addition to 35 Wildwood Lane that was heard by the ARB.

36. Petitioner rose in objection and stated the following reasons: (1) No trees were listed on the architectural plans, nor was there an indication that no trees were present, rendering the documents inadequate for the public record to allow a clear understanding of impact on trees from the project; (2) a colloquy with self-identified neighbors of the site, Cathy Levitt (spelling?) and her self-identified spouse, indicating that at least one tree was indeed present and would have to be “pruned,” created significant and unanswered questions about the future health of the unidentified tree resulting from permission to build the addition; (3) assurances that the tree would be “maintained” per the colloquy did not prescribe any specifics to assure the health of the tree, or allow for any follow-up or enforcement procedure.

37. Notwithstanding Petitioner's objections the ARB approved the application.

38. Based on those objections Petitioner filed a written appeal to the ZBA noting this property as well, as described in Paragraph 30, above.

39. On March 11, 2013, Petitioner submitted a revised appeal of this decision and others, as described in Paragraph 31, above.

40. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above.

41. On March 11, 2013, Petitioner also submitted a request (Exhibit 4) under the state Freedom of Information Law (FOIL) law, as described in Paragraph 33, above. No response has been received to date.

42. Efforts made to ascertain the current status of the applications in the

Village's processing-procedures indicated the decision on this application was not promulgated as of March 11, 2013, but that it could occur at any time, as described in Paragraph 34 above.

43. A proposal to remove numerous trees at 70 Oak Drive was presented to the ARB at the same meeting March 4, 2013. These trees were present on a site where the previous home was demolished to make way for a new home.

44. A letter (Exhibit 5) from the Village's contract-arborist, Tree-Health stated eight trees needed to be removed because excavation had damaged the trees' roots. Two were already in danger of falling. (Those trees had upon information and belief been removed prior to the ARB meeting.)

45. Petitioner rose in opposition to the application, stating that (1) the careless destruction by the builder of healthy trees without a permit to do so indicated serious competency issues with the professional ability of the builder that should preclude the ARB from permitting further work without appointing a second qualified builder to supervise any further work; (2) Penalties for illegal tree destruction should be levied, as provided for in the Village Code (Section 186-12).

46. Notwithstanding Petitioner's objections the ARB approved the application to removed additional trees, and possibly to perform other work in the application and plans already approved by the ARB.

47. Based on those objections described above, Petitioner filed a written appeal to the ZBA noting this property as well, as described in Paragraph 30, above.

48. On March 11, 2013, Petitioner submitted a revised appeal of this decision and others as described in Paragraph 31 above.

49. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above.
50. On March 11, 2013, Petitioner also submitted a request under the state FOIL law and the Village's Records law for information on promulgated decisions on this application as described in Paragraph 33, above.
51. Efforts made to ascertain the current status of the applications in the Village's processing-procedures indicated the decision on this application was not promulgated as of March 11, 2013, but that it could occur at any time, as described in Paragraph 34 above.
52. At the same ARB meeting March 4, 2013, an application to remove multiple trees at 15 Fir Drive was presented to the ARB by 15 Fir Drive LLC . At the site a new home is partially constructed. The "tree list" filed with the Village October 22, 2012 (Exhibit 6) listed 19 trees proposed for removal.
53. A note (Exhibit 7) from the same village contract-arborist, Tree-Health, was presented to the Board stating in part: "On 2-20-13 certified arborist Chad Russo inspected all requested trees at 15 Fir Drive, Roslyn NY 11576. Trees that are to stay and NOT be removed: Tag #2 Norway Maple (healthy condition) Tag #22 Sugar Maple (healthy condition) Tag #23 Red Oak (healthy condition) Tag #24 Red Oak (healthy condition) Tag #25 Norway Maple (healthy condition) All other trees have various other issues and need to be removed."
54. Aside from the five trees identified for preservation in the arborist's report, fourteen other trees proposed for removal were listed in Exhibit 1 as follows, with the reported diameter following the tree identification: (1) Tag #1,

Mulberry, 28"; (2) Tag #3, Sycamore Maple, 12"; (3) Tag #4, Sycamore Maple, 10'; (4) Tag #5, Norway Maple, 6"; (5) Tag #6, Black Birch, 6"; (6) Tag #7, Tulip, 21"; (7) Tag #8, Spruce, 5"; (8) Tag #9, White Walnut 4"; (9) Tag #11, White Walnut, 11"; (10) Tag #14, White Walnut 4"; (11) Tag #14 Beech, 4"; (12) Tag #26, Black Birch, 9"; (13) Tag #27, White Pine, 7"; (14) Tag #28, Kousa Dogwood, 4"; (15) Tag #29 Spruce, 6".

55. Petitioner rose in objection to the application and stated the following objections: (1) the arborist report calling for removal of multiple trees because they "have various other issues" was vague and conclusory, leaving the ARB and the public with no clear, objective, scientific facts to evaluate the justification for removal of 14 trees (or whatever number was implied by the arborist's phrase "all other trees" in his report). The arborist was not present at the meeting; (2) the vagueness and conclusory nature of the arborist report deprives the ARB of ability to exercise its rational discretion in making public policy, as all such legal entities must exercise under state law (see Paragraph 25, above.) (3) the removal of these trees conflicted with the village's stated goal to "preserve the tree canopy" (Village Code Section 186-1); (4) the public did not have any opportunity to view the trees proposed for removal on the large property. (Petitioner submitted a request that prior to meeting the public should have an arranged access to properties under review in order to be able to participate knowledgeably and to properly express the public interest at ARB meetings, but the request was not fulfilled (Exhibit 2).)
56. Notwithstanding Petitioner's objections the ARB approved the application to remove the additional trees apparently as outlined in the arborist's report.

57. Based on those objections Petitioner filed a written appeal to the ZBA noting this property as well, as described in Paragraph 30, above.

58. On March 11, 2013, Petitioner submitted a revised appeal of this decision and others as described in Paragraph 31, above.

59. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above.

60. On March 11, 2013, Petitioner also submitted a request under the state FOIL law and the Village's Records law for information on promulgated decisions on this application as described in Paragraph 33, above.

Efforts made to ascertain the current status of the applications in the Village's processing-procedures indicated the decision on this application was not promulgated as of March 11, 2013 but that it could occur at any time, as described in Paragraph 34 above.

#### ARB Meeting of February 4, 2013

61. The ARB also met in public session on February 4, 2013 and took action on a number of applications to demolish, rebuild, and/or reconstruct houses, and/or to destroy mature trees.

62. A proposal to demolish and rebuild the house at 31 Pinewood Road was submitted by Mr. and Mrs. Samsundar Mohabir.

63. Petitioner rose in objection and stated (1) the home proposed would increase both square footage and lot coverage by approximately 100%, and height by 50%, rendering the plan not in keeping with the scale and harmony of the

community as required by the ARB law, Village Code Section 271-186 (quoted above at Paragraph 11). (2) the removal of trees consequent upon approval of the building plan was not formally proposed by required Tree Removal application; (3) the removal of trees was not evaluated by a Tree Warden report as required by the Village Code Section 186-5 (see Paragraph 7).

64. Notwithstanding Petitioner's objections, the ARB approved the plans.

65. On February 11, 2013, Petitioner submitted an appeal of this decision and others from the same meeting (Exhibit 8) to the ZBA and Village Attorney containing the objections re-stated herein.

66. On March 11, 2013, Petitioner submitted a revised appeal of the ARB vote on this property, as well as the votes pertaining to properties at 205 Elm Drive, 27 Midwood Cross, and 57 Red Ground Road (Exhibit 9). The appeal was addressed to both the ARB chairman and the ZBA chairman, as well as the Village Attorney. This appeal re-stated the numerous grounds of objection that Petitioner had raised in the meeting regarding the application for this property and those other properties appealed of in the same letter.

67. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above

68. On March 11, 2013, Petitioner also submitted a request (Exhibit 4) under the state Freedom of Information Law (FOIL) for this decision and others, as described in Paragraph 33, above.

69. This application and the others voted upon at the February 4, 2013 ARB meeting have already been promulgated in a "decision" format ready for issuing permits, Petitioner was told by the Deputy Village Clerk Nancy Futeran

on March 11, 2013. A request to see the decisions was denied at the same time by Village Clerk Donna Gooch, despite the submission of the FOIL request noted in Paragraph 33, above.

70. At the same ARB meeting of February 4, 2013, an application was submitted for 205 Elm Drive by Mr. Hooman Mairzadeh that included the destruction of four large trees: a 24-inch Oak tree, a 16-inch Oak tree, an 18-inch Beech tree and a 14- inch Cherry tree.

71. Petitioner objected that (1) the removal of healthy trees conflicted with the intent of the Tree Law to protect the “tree canopy”; (2) Petitioner believes but is not certain he made the objection that the required report of the Tree Warden was not created prior to the Board's deliberation, as required by Village Code Section 186-5 (see {Paragraph 4, above); Petitioner will inform the Court within the three days after submission of this Petition whether the objection was in fact made; (3) the descriptions of the trees proposed for destruction in the public file for this application were vague and possibly contradicted by discussions during the hearing; (4) the public could not view the property clearly and see the trees at issue, as referenced above (an issue formally raise with the ARB and Village) in Paragraph 55 and Exhibit 6.

72. Notwithstanding Petitioner's objections the ARB approved the plans.

73. On February 11, 2013, Petitioner submitted an appeal of this decision as described in Paragraph 66, above.

74. On March 10, 2013, Petitioner submitted a revised appeal of this decision as described in Paragraph 67, above.

75. Later on March 11, 2013, Petitioner received a purported denial of the

appeal, as described in Paragraph 32, above

76. On March 10, 2013, Petitioner also submitted a request under the state Freedom of Information Law (FOIL) as described in Paragraph 33, above.

77. This application, and the others voted upon at the February 4, 2013 ARB meeting, have been promulgated in a “decision” format ready for issuing permits, Petitioner was told by the Deputy Village Clerk Nancy Futeran on March 11, 2013. A request to see the decisions was denied at the same time by Village Clerk Donna Gooch despite submission of the FOIL request noted in Paragraph 33, above.

78. At the same ARB meeting February 4, 2013 an application was submitted for 27 Midwood Cross by Autumn Park LLC. The application called for destruction of nine out of sixteen trees on the property.

79. Petitioner rose in objection to the proposal, stating the following reasons: (1) the removal of healthy trees conflicted with the intent of the Tree Law to protect the “tree canopy”; (2) Petitioner believes but is not certain he made the objection that the required report of the Tree Warden was not created prior to the Board's deliberation, as required by Village Code Section 186-5 (see {Paragraph 7, above), and will clarify the issue with the Court within three days of filing this Petition .

80. Notwithstanding Petitioner's objections the ARB approved the plans.

81. On February 11, 2013, Petitioner submitted an appeal of this decision as described in Paragraph 66, above.

82. On March 10, 2013, Petitioner submitted a revised appeal of this decision as described in Paragraph 67, above.

83. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above.
84. On March 11, 2013, Petitioner also submitted a request under the state Freedom of Information Law (FOIL) as described in Paragraph 33, above.
85. This application, and the others voted upon at the February 4, 2013 ARB meeting, have been promulgated in a “decision” format ready for issuing permits, Petitioner was told by the Deputy Village Clerk Nancy Futeran on March 11, 2013. A request to see the decisions was denied at the same time by Village Clerk Donna Gooch despite submission of the FOIL request noted in Paragraph 33, above.
86. At the same ARB meeting February 4, 2013 an application was submitted by Mr. and Mrs. Tomasz Dzieziach to build additions to the house at 57 Red Ground Road.
87. Petitioner rose in objection to the proposal, stating the following reasons: (1) the building as proposed would turn the houses into a large square box, a design of lacking the architectural merit demanded by the Architectural Review Law, replacing instead of a nuanced building with significant architectural character, and clashing with other quality houses nearby, in violation of the Architectural Review law principles contained in Village Code section 271-186 (see Paragraph 16, above); (2) the material to be used in the proposed building, including “fieldstone mosaic,” clashes with neighboring buildings, in violation of the aforementioned Architectural Review law section; (3) the proposed building would extend very close to the property line and impinge on the privacy of the neighboring property, in violation of the

aforementioned Architectural Review law section.

88. Red Ground Civic Association president Carmen Krauss spoke in opposition to the application, stating objections that (1) the “set-backs” of the proposed building would be too small; (2) “concerns about privacy” would be presented by the new building with respect to the neighboring property; (3) the proposed house would be “very elevated compared to the houses on both sides”; (4) the size of the house as proposed would go to the limits of the zoning code.
89. Notwithstanding the objections raised the proposal was approved by the ARB.
90. On February 11, 2013, Petitioner submitted an appeal of this decision as described in Paragraph 66, above.
91. On March 10, 2013, Petitioner submitted a revised appeal of this decision as described in Paragraph 67, above.
92. Later on March 11, 2013, Petitioner received a purported denial of the appeal, as described in Paragraph 32, above.
93. On March 10, 2013, Petitioner also submitted a request under the state Freedom of Information Law (FOIL) as described in Paragraph 33, above.
94. This application, and the others voted upon at the February 4, 2013 ARB meeting, have been promulgated in a “decision” format ready for issuing permits, Petitioner was told by the Deputy Village Clerk Nancy Futeran on March 11, 2013. A request to see the decisions was denied at the same time at the same time by Village Clerk Donna Gooch despite submission of the FOIL request noted in Paragraph 33, above.

### First Cause of Action

(Declaratory Judgement That Cited Appeals Should Be Accepted By ZBA re Applications Approved By ARB March 4, 2013 )

95. Petitioner repeats and re-alleges allegations stated above concerning applications for 55 Oakdale Lane, 35 Wildwood Lane, 70 Oak Drive, and 15 Fir Drive.
96. The ARB and ZBA, and their chairmen and members, are included in the phrase “body or officer” contained in Article 78 of the CPLR.
97. Respondent has by its staff told Plaintiff (see Paragraph 34, above) that the ARB vote on this and other applications heard at the March 4, 2013 meeting have not yet been converted to formal written “decisions” capable of being the basis for permits from the Buildings Dept. However there is no schedule or pre-notification or announcement planned when the decisions are in fact made. It would be, in this case, unreasonable and a handicap to justice to require the Court and the Petitioner to wait for, and hold in abeyance legal action until, the mysterious appearance of a written statement merely reflecting the decision already approved by the ARB. To wait would also risk irreparable harm were building or tree-removal permits to be issued prior to a rush to the courthouse and urgent action by a jurist. This decision and the others are ripe enough now for adjudication.
98. Respondent has apparently denied the request for appeals and stays, as described in Paragraph 31, above.
99. The denial of appeals for the decisions cited, despite clearly articulated

grounds for the appeals that are in no instance contradicted by the Village Code but rather are wholly in keeping with the stated intent and procedures of the Village Code, and state law affecting the ZBA (see Paragraph 12) is in violation of Article 78 because it is an arbitrary and capricious act, an abuse of discretion, a violation of lawful procedure, and is as well affected by an error of law, by and on behalf of the Village and its officers.

100. As a result of the failure of the Village to implement the appeals process if the tree destruction and alteration of neighborhood character or other negative effects of the approved building should occur, as proposed, Petitioner will suffer damage and injury in his enjoyment of the affected community resources – architectural aesthetics and harmony, and environmental integrity and natural aesthetics.

101. Petitioner has no other remedy at law.

102. Petitioner is entitled to a judgement that overturns the denial of the ZBA appeal and instead compels Respondent to grant the request and institute an appeals process for the referenced properties, while staying any actions contained in the relevant applications.

#### Second Cause of Action

(Declaratory Judgement That The ARB Decisions March 4, 2013 As Cited Were Arbitrary And Capricious, A Violation Of Discretion, Affected by an Error of Law, in Violation of Lawful Procedure and/or were Not Supported by Substantial Evidence Under Article 78 and Must Be Nullified)

103. Petitioner repeats and re-alleges allegations stated above concerning applications for 55 Oakdale Lane, 35 Wildwood Lane, 70 Oak Drive, and 15 Fir Drive.

104. The ARB and ZBA, and their chairmen and members, are included in the phrase “body or officer” contained in Article 78 of the CPLR.

105. The formal decision based on the ARB vote has not yet been promulgated by the Village, as noted above in Paragraph 97; however the opaque nature of the proceedings renders the requirement of finality an unreasonable hurdle, antithetical to justice, to be required to cross prior to the judicial intervention sought now. So again we argue that the issue is now ripe for adjudication.

106. The votes to approve the cited applications were defective due to procedural and substantive errors as alleged above. They did not uphold the rules stated in the Village Code for review of tree and architectural applications, and/or they failed to present to the public and the ARB proper documentary evidence required by the Village Code, and the decisions taken thereon were therefore arbitrary and capricious, an abuse of discretion, made in violation of lawful procedure, were affected by an error of law, and/or were not supported by substantial evidence, as described by Article 78 of the CPRL.

107. As a result of the erroneous decisions cited, and if the tree destruction and alteration of neighborhood character or other negative effects of the approved building should occur, as proposed, Petitioner will suffer damage and injury in his enjoyment of the affected community resources – architectural aesthetics and harmony, and environmental integrity and natural aesthetics.

108. Petitioner has no other remedy at law.

109. Petitioner is entitled to a judgement that overturns the cited decisions and instructs the Village to otherwise remedy its deliberations on the applications, while staying and/or rescinding any actions consequent upon approval of the cited applications.

### Third Cause of Action

(Declaratory Judgement That Cited Appeals Should Be Accepted By ZBA re Applications Approved By ARB February 4, 2013)

110. Petitioner repeats and re-alleges allegations stated above concerning applications for 31 Pinewood Road, 205 Elm Drive, 27 Midwood Cross, and 57 Red Ground Road.

111. The ARB and ZBA, an their chairmen and members, are included in the phrase “body or officer” contained in Article 78 of the CPLR.

112. As noted in Paragraph 68 above, Petitioner has been told by Village staff that the promulgated decisions on the cited applications approved at the ARB meeting February 4, 2013 are now prepared and ready for further action, such as issuance of permits; however as noted Petitioner was denied access to the decisions despite submission of a FOIL request and is hence unable to provide the documents to the Court at this time. Nevertheless Petitioner argues that the issues are indeed ripe for adjudication because (a) the decisions do indeed exist, upon information and belief, and are capable of causing the unjust injuries alleged above; (b) Petitioner has made a good-faith

attempt to obtain the documents, as indicated above; and (c) the failure of Petitioner to have the documents is caused by Respondent.

113. Respondent has apparently denied the request for appeals and stays, as described in Paragraph 32, above.

114. The denial of appeals for the decisions stated, despite clearly articulated grounds for the appeals that are in no instance contradicted by the Village Code but rather are wholly in keeping with the stated intent and procedures of the Village Code, is in violation of Article 78 as an arbitrary and capricious act, an abuse of discretion, a violation of lawful procedure, and is as well affected by an error of law, by and on behalf of the Village and its officers.

115. As a result of the failure of the Village to implement the appeals process if the tree destruction and alteration of neighborhood character or other negative effects of the approved building should occur, as proposed, Petitioner will suffer damage and injury in his enjoyment of the affected community resources – architectural aesthetics and harmony, and environmental integrity and natural aesthetics.

116. Petitioner has no other remedy at law.

117. Petitioner is entitled to a judgement that overturns the denial of the ZBA appeal and instead compels Respondent to grant the request and institute an appeals process for the referenced properties, while staying any actions contained in the relevant applications.

#### Fourth Cause of Action

(Declaratory Judgement That The ARB Decisions February 4, 2013 As Cited

Were Arbitrary And Capricious, A Violation Of Discretion, Affected by an Error of Law, in Violation of Lawful Procedure and/or were Not Supported by Substantial Evidence Under Article 78 and Must be Nullified)

118. Petitioner repeats and re-alleges allegations stated above concerning applications for 31 Pinewood Road, 205 Elm Drive, 27 Midwood Cross, and 57 Red Ground Road.

119. The ARB and ZBA, an their chairmen and members, are included in the phrase “body or officer” contained in Article 78 of the CPLR.

120. Petitioner re-argues as set out in Paragraph 103, above, that the decisions of February 4, 2013 are indeed ripe for adjudication, since they have been promulgated by the Village while not made available to Petitioner, as described above in Paragraph 69.

121. The votes to approve the cited applications were defective due to procedural and substantive errors as alleged above. They did not uphold the rules stated in the Village Code for review of tree and architectural applications, and/or they failed to present to the public and the ARB proper documentary evidence required by the Village Code, and the decisions taken thereon were therefore arbitrary and capricious, an abuse of discretion, made in violation of lawful procedure, were affected by an error of law, and/or were not supported by substantial evidence, as described by Article 78 of the CPRL.

122. As a result of the erroneous decisions cited, and if the tree destruction and alteration of neighborhood character or other negative effects of the approved

building should occur, as proposed, Petitioner will suffer damage and injury in his enjoyment of the affected community resources – architectural aesthetics and harmony, and environmental integrity and natural aesthetics.

123. Petitioner has no other remedy at law.

124. Petitioner is entitled to a judgement that overturns the cited decisions and instructs the Village to otherwise remedy its deliberations on the applications, while staying and/or rescinding any actions consequent upon approval of the cited applications.

#### Fifth Cause of Action

(Preliminary Injunction Preventing Action or Rescinding Permits Issued on Applications Approved March 4, 2013)

125. Petitioner repeats and re-alleges allegations stated above concerning applications for 55 Oakdale Lane, 35 Wildwood Lane, 70 Oak Drive, and 15 Fir Drive.

126. A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do or is doing or procuring or suffering to be done an act in violation of a plaintiff's rights respecting the subject of the action, and tending to render the judgement ineffectual or in any action where the plaintiff has demanded and would be entitled to a judgement restraining the defendant from the commission or continuance of an act which if continued or committed during the pendency of the action would produce injury to the plaintiff. NY CPLR Section 6301. Courts have held that a preliminary injunction is appropriate and should be granted when three

elements are shown: A likelihood of success on the merits; irreparable injury to the movant; the balancing of equities lies in the movant's favor. See e.g. *Melvin v Union College* NYS 2d 141, 142-3 (2d Dept 1993) (granting preliminary injunction in Article 78 proceeding).

127. Petitioner satisfies all three requirements. Petitioner demonstrates a likelihood of success both to compel appeals to the ZBA and to nullify the decisions as arbitrary and capricious and an abuse of discretion. The Village Code provides for appeals of decisions of the ARB; Petitioner is entitled to request such appeals; Petitioner submitted such appeals, and yet the Village denied the opportunity to have the appeals heard. Similarly the Village Code provides for substantive and procedural standards for the evaluation of applications before the ARB that were not followed in numerous respects rendering the decisions fatally flawed. Second, Petitioner will suffer irreparable harm since (a) the destructions of massive decades-old, if not century-old, trees cannot be remedied by simple replacement by saplings; and (b) the demolition or massive alteration older homes cannot be easily or practically reversed; and (c) even the partial renovation of houses often cannot be fully reversed because of structural changes effected. And third, Petitioner has demonstrated clear defects in procedures, in application of relevant statutes, or in common-sense public administration, such that the merits of his appeals are at very least highly plausible, if not overwhelmingly compelling. Respondent has in many cases been processing the builder and/or tree removal applications for weeks if not months, and as stated above the Assistant Village Clerk told Petitioner that the approved applications had not

been finalized as of March 11, 2013 (see Paragraph 34, above). The balance of equities demands that in the public interest adequate additional time be set aside to fully review the merits of the applications and the nature of the ARB decision-making, considering additionally the precedent value to future Village actions where this body is blatantly operating outside the expectations, legal standards, and policy declarations of the Village Code.

128. By reason of the foregoing Respondent should be enjoined from taking any action in furtherance of the the applications for the specified properties, and any permits issued should be rescinded by the Village, and the Village should be required prohibit further work on them, pending completion of review as required by the ZBA, or a re-hearing by the ARB, depending on the judgements of the Court.

#### Sixth Cause of Action

(Preliminary Injunction Preventing Action or Rescinding Permits Issued on Applications Approved February 4, 2013)

129. Petitioner repeats and re-alleges allegations stated above concerning applications for 31 Pinewood Road, 205 Elm Drive, 27 Midwood Cross, and 57 Red Ground Road. .

130. To repeat the criteria discussed above, a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do or is doing or procuring or suffering to be done an act in violation of a plaintiff's rights respecting the subject of the action, and tending to render

the judgement ineffectual or in any action where the plaintiff has demanded and would be entitled to a judgement restraining the defendant from the commission or continuance of an act which if continued or committed during the pendency of the action would produce injury to the plaintiff. NY CPLR Section 6301. Courts have held that a preliminary injunction is appropriate and should be granted when three elements are shown: A likelihood of success on the merits; irreparable injury to the movant; the balancing of equities lies in the movant's favor. See e.g. *Melvin v Union College* NYS 2d 141, 142-3 (2d Dept 1993) (granting preliminary injunction in Article 78 proceeding).

131. Petitioner satisfies all three requirements. Petitioner demonstrates a likelihood of success both to compel appeals to the ZBA and to nullify the decisions as arbitrary and capricious and an abuse of discretion. The Village Code provides for appeals of decisions of the ARB, Petitioner is entitled to request such appeals, Petitioner submitted such appeals yet the Village apparently denied Petitioner the opportunity to have the appeals heard (see Paragraph 31). Similarly the Village Code provides for substantive and procedural standards for the evaluation of applications before the ARB that were not followed in numerous respects rendering the decisions fatally flawed. Second, Petitioner will suffer irreparable harm since (a) the destructions of massive decades-old, if not century-old, trees cannot be remedied by simple replacement by saplings; and (b) the demolition or massive alternation older homes cannot be easily or practically reversed; and (c) even the partial renovation of houses often cannot be fully reversed because of structural changes effected. And third, Petitioner has demonstrated clear defects in

procedures, in application of relevant statutes, and/or in common-sense public administration, such that the merits of his appeals are at least plausible, if not overwhelmingly compelling. A pattern of such error has manifested itself in meeting after meeting of the ARB, with no effort to rectify it. Petitioner's objections are indeed met with amusement and mockery by the members and chairman of the ARB, while occasional objections to building or tree destruction applications by other Village residents are politely dismissed and ignored. The precedent set by compelling full public review is desperately needed. Delay will be occasioned by this process, but Respondent has in many cases been processing the builder and/or tree removal applications for weeks if not months, completing the promulgation of the decisions only a week ago, according to the Deputy Village Clerk Nancy Futeran (see also Paragraph 68, above). The balance of equities demands that in the public interest adequate additional time be set aside fully to review the merits of the applications and the nature of the ARB decision-making.

132. By reason of the foregoing Respondent should be enjoined from taking any action in furtherance of the the applications for the specified properties, and any permits issued should be rescinded by the Village, and the Village should prohibit further work on them, pending completion of review as required by the ZBA, or a re-hearing by the ARB, depending on the judgement of the Court.

Prayer for Relief

133. Petitioner respectfully requests this Court render a judgement and order containing the following relief --

- i. Nullify the decisions on the referenced applications approved by the ARB March 4, 2013, OR require Respondent to stay the referenced applications approved by the ARB March 4, 2013 pending a review by the ZBA as provided by law; AND
- ii. Nullify the decisions on the referenced applications approved by the ARB February 4, 2013, OR require Respondent to stay the referenced applications approved by the ARB February 4, 2013, pending a review by the ZBA as provided by law; AND
- iii. Enjoin Respondent from undertaking any action on permits to perform construction, demolition, or tree destruction, or other work connected with referenced applications approved at the ARB meeting of March 4, 2013, and suspend any such permits already issued and require a halt to work they would otherwise have permitted, pending review by the ZBA or re-hearing by the ARB; AND
- iv. Enjoin Respondent from undertaking any action on permits to perform construction, demolition, or tree destruction, or other work connected with referenced applications approved at the ARB meeting of February 4, 2013, and suspend any such permits already issued and require a halt to work they would otherwise have permitted, pending review by the ZBA, or re-hearing by the ARB.

Dated: East Hills, New York

By

March 12, 2013

---

Richard Brummel, Petitioner