

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____-X

AVC PROPERTIES LLC

Plaintiff/Petitioner,

- against -

VILLAGE OF MAMARONECK ZONING ET AL

Defendant/Respondent.
_____-X

Index No. 59146/2018

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VILLAGE OF MAMARONECK
NEW YORK

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JUN 15 2018

BUILDING DEPT.

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Dated: June 11, 2018

David Klausner

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To: The Village of Mamaroneck

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Mamaroneck, NY 10543

12/14/17

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN,

Defendant(s).

Index No. 59146/2018

NOTICE OF PETITION

Pursuant to 22 NYCRR 130-1.1, David S. Klausner, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous. In addition, this matter was not obtained through illegal conduct, or if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter of sharing in any fee earned there from, and the matter was not obtained in violation of 22 NYCRR 1200.41-a [DR 7-11].

THE LAW OFFICE OF DAVID S. KLAUSNER PLLC
Attorney for PETITIONER
AVC PROPERTIES, LLC
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN,

Respondents

Index No.

NOTICE OF PETITION

PLEASE TAKE NOTICE, that upon the annexed Verified Petition of AVC Properties LLC ("AVC") dated the 11th day of June, 2018, with the exhibits attached thereto, the Affirmation of David S. Klausner ("Klausner Affirmation"), the affidavit of Marc Castaldi ("Castaldi Affidavit"), the affidavits of Benedict Salanitro, P.E., Steven Marchansanti AIA, and George Mottarella P.E., LS, and upon all the prior pleadings and proceedings heretofore had herein, the Petitioner will make application Justice of the Supreme Court, Westchester County, assigned to this case, at the Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601 on July 3, 2018 at 9:30 A.M. in the forenoon of that day, or as soon thereafter at such date and time as such Justice shall determine and as counsel can be heard, for an order/judgment annulling the Resolution of the ZBA dated May 3, 2018 and filed in the office of the Village of Mamaroneck Clerk on May 10, 2018 ("Resolution") as same is affected by serious errors of law, is *ultra vires* in

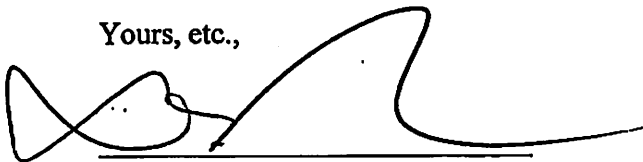
that it addresses issues beyond the statutory authority of the ZBA, and is arbitrary and capricious, illegal, and abusive of discretion, and for associated relief.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 7804 (e), the Respondents are required to file an Answer herein and the certified record/transcript and same shall be served upon Petitioner so as to be received by Petitioner's counsel at least five (5) days before the return date of this Petition.

PLEASE TAKE FURTHER NOTICE, that the venue of this Special Proceeding is Westchester County, the County in which Petitioner has its principle place of business, location of the offices of Respondent and the location of the subject property.

Dated: White Plains, New York
June 11, 2018

Yours, etc.,



David S. Klausner
THE LAW OFFICE OF DAVID S. KLAUSNER PLLC
Attorneys for Petitioner AVC PROPERTIES LLC
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To:
THE VILLAGE OF MAMARONECK ZONING BOARD OF APPEALS
(Comprised of Barry Weprin, David Neufeld, Kelly Wenstrup, Robin Kramer, and Meg Yergin)
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

DAN GRAY
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

JOCELYN DONAT
617 Hampshire Road
Mamaroneck, New York

ANTHONY LIVIDINI
645 Wood Street
Mamaroneck, New York

KAREN COLANERI
649 Wood Street
Mamaroneck, New York

BRIAN GELLMAN
1021 Grove Street
Mamaroneck, New York

STACEY GELLMAN
1021 Grove Street
Mamaroneck, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTERIn the Matter of the Application of
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For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

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BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents.

Index No.

**VERIFIED ARTICLE 78
PETITION**

Petitioner, AVC Properties, LLC ("AVC"), by and through its attorneys, The Law Office of David S. Klausner PLLC, as and for their Verified Petition in the above-captioned proceeding, respectfully allege as to their conduct, and upon information and belief the conduct of others and matters of public record as follows:

PRELIMINARY STATEMENT¹

1. For nearly four (4) years, Respondent Jocelyn Donat ("Donat")² has engaged in a scorched earth crusade against Petitioner AVC and its principal Marc Castaldi involving and relating to a three (3) lot subdivision which now contains three (3) state of the art single family residences on beautifully landscaped lots. All three of the residences are essentially mirror images

¹ The Court is referred to the supporting Affirmation of David S. Klausner, Esq. which contains the legal arguments, statutory and case law citations in support of the Petition which has been annexed hereto as Exhibit "A", incorporated herein by reference and made a part hereof.

² Although the application related to the border fence on 1017 Grove Street was brought by Donat and two (2) adjoining property owners (Lividini and Colaneri), neither participated in the process and Donat is clearly behind the latest challenges to the Grove Street Project. For convenience, this Petition will use the word "Donat" to reflect the positions taken in the applications.

with differing front facing facades to preserve community character. All three residences are currently occupied and Marc Castaldi resides with his family (including three (3) young children) at 1017 Grove Street.

2. The Zoning Board of Appeals issued a resolution dated May 10, 2018 ("Resolution") which is rife with significant errors in law, arbitrary and capricious, and invalid on the basis of mootness. Accordingly, Petitioner is seeking an order pursuant to Article 78 of the CPLR annulling and dismissing the resolution in its entirety. (Resolution annexed hereto as Exhibit B).

3. The three (3) single family residences constructed are now known as 1017, 1019 and 1021 Grove Street. The latest in Donat's administrative and judicial challenges focuses on certain aspects of the long since completed construction and a border fence. Although somewhat convoluted in its construction, Donat made a series of applications to the Village of Mamaroneck Zoning Board of Appeals ("ZBA").

4. The first was filed on June 13, 2017 by Donat and adjoining property owners Anthony Lividini and Karen Colaneri appealing a permit to install a border fence (Permit 17-0429). These Respondents (actually just Donat) were later permitted to amend the application to include appeal of the temporary certificate of occupancy for 1017 Grove Street. This application was designated Application #4I-2017. Since, aside from the border fence, the Resolution no longer applies to 1017 Grove Street since it only related to the temporary certificate of occupancy, this Petition will not address the other aspects of the application related to 1017 Grove Street. However, for completeness, the consolidated applications related to 1017 Grove Street will be hereinafter referred to as "Application 1". (Application 1 is annexed hereto as Exhibit "G").

5. Application 1 argued that (1) the fence was an accessory structure and therefore it (a) violated mandatory property line setbacks and (b) was not permitted pursuant to the resolution of

the Planning Board (which created the subdivision). Once amended, Application 1 also alleged that the construction had differed in certain ways from the original plans submitted along with the application for the building permit (which was what was approved by the Board of Architectural Review) ("BAR").

6. A permanent certificate of occupancy for 1017 Grove Street was issued on May 1, 2018 (after the hearings were closed) thereby rendering those aspects of Application 1 dealing with 1017 Grove Street null and void. As such, the challenge to the Resolution (respecting Application 1) is limited to the border fence.

7. On August 14, 2017, Donat (individually) appealed the issuance of a separate building permit (Permit # 17-0840) which was filed after the certificate of occupancy was issued for 1019 Grove Street, on the grounds that the construction had differed in certain ways from the original plans submitted along with the application for the building permit (which was what was approved by BAR). This was designated Application #5I-2017 (hereinafter "Application 2") ("Application 2 is annexed hereto as Exhibit "H").

8. The ZBA is an entity comprised of individuals. While those individuals may have differing views, differing political leanings and differing personalities, their actions are limited to the statutory authority granted to them. Unfortunately, the currently constituted ZBA has grossly exceeded its authority, rendered decisions which are inconsistent with its own prior determinations on this same project and made findings and determinations which are arbitrary and capricious. Despite a clear absence of legal authority and through creative construction and outright overreach, this ZBA has made itself a "Super Board" charged with having the final say for anything to do with properties in the Village of Mamaroneck.

9. This Petition conclusively establishes that regardless of the legal issues and innuendo, Donat (along with the other applicants) were contemporaneously aware of each and every aspect of the construction and failed to take action to preserve the *status quo*. As such, under the doctrine of laches, the determinations made in the Resolution are moot as a matter of law.

10. This Petition challenges the authority of the ZBA to make determinations and rulings based on the resolution of another administrative entity: in this case the Planning Board. While the ZBA previously (in a prior resolution which was the subject of a prior action before this Court) represented that it had no authority to review compliance with a Planning Board Resolution, in the current Resolution it decided to make a contrary finding.

11. This Petition further establishes that the ZBA cannot creatively make findings which are outside of its clearly delineated authority by simultaneously ignoring its own controlling code and giving meaning to terms that are—in no way—defined in the laws governing their conduct.

12. This Petition further establishes that the ZBA cannot create phantom issues of ripeness by mandating further proceedings when the issues before this Court are the ZBA's legal authority and whether their edicts are permissible interpretations within their limited jurisdiction or *ultra vires* and impermissible legislative actions.

13. Finally, this Petition demonstrates that the applicant(s) is/are not "aggrieved parties" and the matters complained of (raising or lowering of side windows, adding windows, the location of below grade window wells, rear steps and a rear patio) do not—in anyway—cause any actual or cognizable harm.

14. When, as here, an administrative entity goes far afield from its limited jurisdiction, makes findings and determinations that are arbitrary and capricious and makes such findings and determinations that are clearly moot as a matter of law, the Resolution must be annulled and

dismissed in its entirety. To find otherwise, would be to allow the ZBA (or any other administrative entity) to act on the whims of individuals with agendas and motivations that make it impossible to get a true and fair hearing.

PARTIES TO THE ACTION

15. Petitioner is a New York State Limited Liability Company and the fee owner of the properties known as 1017 and 1019 Grove Street, Mamaroneck, New York ("Grove Street Properties").

16. Respondents Weperin, Neufeld, Weinstrup, Kramer and Yurgin are the duly appointed members of the Village of Mamaroneck Zoning Board of Appeals ("ZBA").

17. Respondent Dan Gray is the Building Inspector of the Village of Mamaroneck ("Building Inspector").

18. Respondent Donat is an adjoining property owner with an address of 617 Hampshire Road, Mamaroneck, New York.

19. Respondents Livididi and Colonaeri are adjoining property owners with an addresses at 645 and 649 Wood Street, Mamaroneck, New York respectively.

20. Respondents Brian and Stacey Gellman (the "Gellmans") are the owners of 1021 Grove Street, and occupy one of the single family residences constructed by AVC. The issues now before this Court would have implications on the Gellmans and they are included as Respondents for that purpose.

JURISDICTION AND VENUE

21. The venue of this Special Proceeding is Westchester County, the principle place of business, the location of Respondents and the Grove Street Properties.

22. The instant Proceeding is ripe for review by this Court.

23. Petitioner timely brings this action pursuant to CPLR §7801-7806 et seq. to review the actions by bodies or officers who have failed to properly perform duties required by law.

STATEMENT OF FACTS³

A. Background

24. The matter now before this Court has its origins in an application for a three (3) lot subdivision at 1017 Grove Street presented to the Planning Board of the Village of Mamaroneck ("PB") on January 10, 2014. By resolution dated May 27, 2015, the PB approved the three (3) lot subdivision on May 27, 2015 ("PB Resolution"). (See PB Resolution annexed hereto as Exhibit "I"). The three lots were designated as 1017, 1019 and 1021 Grove Street (collectively "Grove Street Project").⁴

25. Jocelyn Donat ("Donat") has engaged in over three (3) years of administrative and judicial challenges to the Grove Street Project and her applications were the purported basis of the Resolution.

26. Donat filed a purported Article 78 Petition on April 26, 2016 seeking to enforce certain provisions of the subdivision approval ("Donat Petition 1"). (See Donat Petition 1 annexed hereto as Exhibit "J"). Donat Petition 1 was dismissed following motion practice on several grounds including failure to timely challenge the Planning Board Resolution and failure to exhaust administrative remedies. (See August 11, 2016 decision and order of Barbara Zambelli A.S.J. ("Zambelli 1") annexed hereto as Exhibit "K").

³ The Court is referred to the Affidavit of Marc Castaldi, the sole member of Petitioner AVC which recites further and additional facts supporting this Petition as well as identifies and attaches certain documents submitted in support of this petition annexed hereto as Exhibit "B" which affidavit has been incorporated herein by reference and made a part hereof.

⁴ The issues and matters covered in the Resolution equally apply to 1021 Grove Street; which was one of the three single family residences constructed by AVC. However, Donat chose not to include 1021 Grove Street in her application.

27. In January 2016, AVC submitted applications for building permits to allow for construction of single family homes at 1017, 1019 and 1021 Grove Street. These applications contained the construction plans including the dimensions, heights and set back of the proposed single family residences. Importantly, these applications also included plans for basement window wells which would function as both retaining walls for the clear operation of the below grade windows and provide New York State mandated means of egress from the underground basement.

28. The building inspector of the Village of Mamaroneck issued Permit #16-0310 (for 1017 Grove Street) and #16-0307 (for 1019 Grove Street) on March 30, 2016 (collectively "Building Permits").⁵

29. On April 13, 2016, Donat appeals to the ZBA the Building Permits in an appeal which was designated by ZBA as 1I-2016 ("Donat 2"). Donat 2 challenged the legality of the lots created by the Planning Board Resolution and alleged that the Building Permits should not have been issued due to allegations that the building plans submitted by AVC were not complying with various provisions of the Planning Board Resolution.⁶

30. Construction pursuant to the Building Permits commenced on or about April 1, 2016.

31. After over twelve (12) months of public hearings and fifteen (15) months, the ZBA issued a resolution dated October 6, 2016, dismissing Donat 2 ("ZBA Dismissal"). (See ZBA Dismissal annexed hereto as Exhibit "L"). The ZBA Dismissal made a clear statement recognizing its inability and lack of jurisdictional authority to review compliance with a Planning Board Resolution. The specific wording was as follows: "Nor is this Board authorized to review Property Owner compliance with specific conditions of final plat approval by the Planning Board including

⁵ Since Donat decided not to include 1021 Grove Street, it will not be discussed herein but any allegations pertaining to 1019 would equally apply to 1021 Grove Street.

⁶ Four of the basement window wells were set forth in the original building plans submitted as part of the Building Permits.

compliance with Village Code Chapter 294 (SWPPP) and bond requirements, which are not within the purview of this Board to review.”

32. On November 14, 2016, Donat filed a petition pursuant to Article 78 challenging the ZBA Dismissal on numerous grounds (“Donat Petition 2”). AVC along with the ZBA and Building Inspector Daniel Gray, moved to dismiss the Donat Petition 2 by motions made May 16, 2016 and May 13, 2016. The ZBA and Mr. Gray based their application—amongst other grounds—on the undisputed fact that as of the date of filing, the Grove Street Project was substantially completed and that Donat’s failure to seek an injunction to preserve the *status quo* rendered the application moot. The Village’s motion to dismiss was accompanied by the affidavit of Assistant Inspector Ferrell dated January 9, 2017 which included photographs which show the substantial completion of the single family residences which are the subject of Donat’s current applications (“Farrell Affidavit”). (See Farrell Affidavit annexed hereto as Exhibit “M”). The Farrell Affidavit further attested that the construction was all approved, justified and substantially complete as of that date. As respondents to the Donat Petition 2, the Village of Mamaroneck ZBA and Building Inspector Dan Gray, took the position that the failure of Donat to take any action to maintain the *status quo* required dismissal of Donat Petition 2 on the basis of mootness. (See Village/Gray’s Memorandum of Law annexed hereto as Exhibit “N”).

33. By decision and order dated March 20, 2017, Judge Barbara Zambelli dismissed the Donat Petition 2 principally on the basis that Donat was clearly aware of the ongoing construction and her failure to seek an injunction to preserve the *status quo* rendered her application moot (“Zambelli 2”). Judge Zambelli further noted that the single family residences were substantially complete and any remedial or corrective action would cause substantial prejudice to AVC. (See Zambelli 2 annexed hereto as Exhibit “O”).

34. Donat either ignored or chose to disregard the findings made by this Court in her continued efforts to harass and frustrate the Grove Street Project. Similarly, the ZBA in passing the Resolution chose to utterly disregard its prior position that any challenge to the now completed Grove Street Project was moot.

B. Construction of the Residence at 1019 Grove Street

35. Shortly after breaking ground, AVC discovered several architectural drawing and transposition errors on the plans submitted and approved by the Building Inspector.⁷ The specific architectural errors/omissions included: (a) a powder room window was shown on the floor plan but not on the elevation plan, (b) an incorrect ceiling height was listed for each floor (it was supposed to be 9 feet)⁸ which was merely a drafting error, (c) the stairwell window was improperly located at the level of the stairwell platform and should have been higher to provide adequate illumination to the stairwell, (d) the plans accidentally omitted some structural beams needed for support and (e) the two (2) side facing garage windows were located at a height that made them essentially unusable.⁹ In addition, AVC realized that the building plans were missing steps and a patio at the rear of the residence (leading to the yard), another two (2) windows were needed (one of which was to include a window well to provide New York State mandated egress) for the basement, and two (2) additional side facing windows, one in each of the upstairs bedrooms, were needed for ventilation and light. The foregoing items (with the exception of the Window Work as hereinafter defined) shall be collectively referred to as "Correction Items".

⁷ The errors/deficiencies applied equally to all three single family residences. However, Donat decided not to challenge anything related to 1021 Grove Street (the one property no longer owned by AVC). 1017 Grove Street (currently occupied by Mr. Castaldi and his family) is not bound by the Resolution (since it applied to the temporary certificate of occupancy which was replaced by a certificate of occupancy filed on May 1, 2018).

⁸ The 9 foot heights for the first and second floor are still well below what is permitted under the codes.

⁹ The Court is referred to the Affidavit of project architect Steven Marchasanti (Exhibit F) which is incorporated herein by reference and made a part hereof.

36. The work regarding windows; specifically, the powder room window, the raising of the stairwell window, the lowering of the two (2) garage windows on the left side of 1019 Grove, and the two additional side facing windows on the upstairs bedrooms, shall be collectively referred to as "Window Work".

37. The Correction Items and the Window Work (which did not—in anyway—affect the front façade or look of the residence) were submitted as amended plans to the Building Department on July 13, 2016.

38. The Building Inspector advised that he was getting pressure to send these proposed changes to the Board of Architectural Review ("BAR"). Mr. Castaldi argued that none of the proposed changes/corrections had any bearing on nor fell within the jurisdiction of BAR. Mr. Castaldi was assured by the Building Inspector that this was simply a ministerial act and AVC appeared (by Mr. Castaldi) at the BAR meeting on August 18, 2016. Donat had e-mailed local activists and had encouraged them to appear and use the BAR as a further means to advance her agenda against AVC. It became quickly apparent that despite the limited jurisdiction of BAR to review the proposed changes (none of which affected the front facing facades), individuals (most of whom were in any way affected by the project) were aggressively attacking Mr. Castaldi and turning what should have been a straight forward and ministerial meeting into a political forum. When it became clear that AVC could not get a fair hearing, Mr. Castaldi made the decision to withdraw the application before BAR.

39. During the ensuing days, Marc Castaldi met with the Building Inspector and Chairman of the BAR (Mr. Malte Stockhart) at the Grove Street Properties. Both agreed that the

Correction Items had nothing to do with BAR. Accordingly, the Correction Items were incorporated into the existing building permit.¹⁰

40. Addressing the Window Work, AVC returned them to what was shown on the original building plans in or about August 2016.

41. On July 28, 2018, the Building Inspector issued a certificate of occupancy for 1019 Grove Street.

42. AVC subsequently submits an application for a building permit (#17-0840) seeking to relocate include the powder room window (accidentally omitted from the elevation plan), add 2 side facing upstairs windows on the bedrooms for ventilation and light, raise the erroneously drawn stairwell window (also side facing) and lower the two side facing garage windows. The total cost of construction for the Window Work was less than \$10,000 and therefore does not meet the threshold for BAR review. The application was approved by the Building Inspector (since it was zoning compliant) and AVC commenced the Window Work shortly thereafter. All Window Work is thereafter completed at 1019 Grove Street in preparation for a French family relocating to Mamaroneck. That family, Mark and Muriel Leclercq (along with their two young children) took occupancy at 1019 Grove Street on August 15, 2017.

C. The Fence Bordering 1017 Grove Street

43. 1017 Grove Street is bordered by two (2) residences owned by Lividini and Colaneri. The pre-subdivided and developed property known as 1017 Grove Street had a border fence. Subsequent to development, it was apparent that poorly maintained areas in the rear yards of both adjacent property owners presented attractive nuisances and the difference in grade posed a significant risk of injury; especially to the young children. Accordingly, on March 30, 2017, AVC

¹⁰ For some reason, the Village held on to the amended plans and did not stamp them until July 2017. However, the building inspector was fully aware of the work which was part of periodic inspections including framing inspection.

submitted an application to install a 6 foot white PVC fence (the "Fence") along the side border of 1017 Grove Street. That permit was issued by the Building Inspector since the Fence was a permissible accessory use and fully compliant with all provisions of the zoning law, on April 24, 2017 and following completion and inspection, a certificate of compliance was issued on June 22, 2017.

D. Donat's Contemporaneous Knowledge of Construction & Failure to Maintain the *Status Quo*

44. At no point did Donat file for or seek an injunction to stop the work being performed on the Grove Street Project in order to preserve the *status quo*. Instead, Donat monitored, photographed and documented nearly every phase of the construction and was clearly aware of each step and stage in the construction process. In fact, she sent literally hundreds of e-mails to various Village of Mamaroneck officials expressing her purported concerns.

45. By e-mail dated June 28, 2016, Ms. Donat sent photos of the construction which clearly show framed houses with evident ceiling heights and the installed window wells. In this e-mail, she expresses numerous concerns with the Grove Street Project.

46. On July 14, 2016, Donat e-mailed Village of Mamaroneck officials (including Building Inspector Dan Gray, Village Manager Richard Slingerland and the Mayor and Board of Trustees) alleging complaints about construction that purportedly differs from building plans.

47. On July 25, 2016, Donat e-mailed the Building Department complaining of rear patios being constructed.

48. On July 31, 2016, Donat complained about basement windows, window wells and house heights.

49. On August 2, 2016, Donat again sends an e-mail outlining all of her various issues and concerns with the construction at the Grove Street Properties.

50. On August 16, 2016, Donat e-mails the Village of Mamaroneck asking for a stop work order and reiterating her numerous allegations.

51. On August 24, 2016, Donat sends pictures to the Village and Village Officials showing the window wells and patios.

52. Despite clear and contemporaneous knowledge of each and every allegation Donat made in both Donat 1 and the current application, she never filed for an injunction nor took any affirmative action to preserve the *status quo*.

53. As it relates to the items included in the amended building plans, Donat neither made an application to ZBA (despite her clear knowledge of the work) nor did she seek an injunction to preserve the *status quo*. Instead, Donat laid in wait until after the work was completed and the residences were issued certificates of compliance.

E. The Current Donat Applications

54. Before addressing the substance of the current Donat applications it is clear that she (along with Lividini and Colaneri) are not the "aggrieved persons" authorized to challenge certificates of occupancy (and to a lesser extent a fence permit). Donat has not and cannot demonstrate—to any extent—how she has been injured or damaged. More to the point, whether windows are raised or lowered, or some modifications and corrections are made during the course of construction, did not cause Donat any real or actual damage. While she purports to be the flag bearer against the "big bad developer" the provisions permitting an actually aggrieved party to challenge construction through the ZBA are not supposed to be about "it's not right" or "I don't like it." The ZBA ignored this distinction in its entirety.

55. Application 1 and Application 2 essentially allege that (a) AVC violated the resolutions of the Planning Board by putting in below grade window wells (to some extent outside

the area within which the primary residence must sit), (b) installing a border fence (which is 100% zoning complaint) since it is outside the "building envelope,"¹¹ (c) constructing steps leading to the rear of the premises, installing a patio to the rear of the residence, and (d) correcting architect errors/omissions on the original building plans covering first and second floor heights, window heights/location. The application seeks interpretation of Sections 342-3, 342-21 and 342-14 of the Village Code and also alleges that the construction violated the Landscape Plan and the approved BAR Building Plans.

56. Donat chose not to include 1021 Grove Street, which is essentially identical to 1019 Grove Street and all allegations would equally apply to that residence, and the allegations (with the exception of the Fence) for 1017 are null and void since they applied to a temporary certificate of occupancy which has now been replaced with a permanent certificate of occupancy which was filed on May 1, 2018.¹²

F. What the ZBA Resolution Says

57. The Resolution concedes that the Fence is an accessory use as defined in the Zoning Code (Section 342-21B(9)) and further concedes that as an accessory use it is zoning compliant. However, the ZBA then decides that the Fence is an "improvement" which although not mentioned or defined in the zoning code, has a common meaning which would include a "structure." The Resolution then determines that since the Planning Board had limited improvements including but not limited to accessory structures outside the building envelope (designated for the primary structure/residence)¹³ AVC was therefore not permitted to install the border Fence. This finding not only demonstrates that the ZBA ignored its own codes but also undertook to impermissibly expand

¹¹ In the Application I, Donat says that a fence is an accessory structure. Accordingly, the question before the ZBA should have been limited to determining whether a fence is an accessory structure (which it is not).

¹² Donat has now filed a new (identical) application against the certificate of occupancy for 1017 Grove Street which is currently pending before the ZBA.

¹³ The Planning Board resolution made no restriction on accessory uses.

its jurisdiction to include determining (through its Building Inspector) whether a property owner complied with a Planning Board provision.¹⁴

58. The Resolution's findings regarding the basement windows/window wells again creatively ignore its own codes. The window wells (all but one of which were covered under the original building permit which was the subject of Donat Petition 2 and the prior resolution of the ZBA and a determination by this Court that Donat Petition 2 was moot) are mandated means for egress from the basement which if removed would make the basement in violation of State Law. Again, the ZBA concedes that under its own code, these window wells are accessory uses and 100% zoning compliant. However, the ZBA contends that since the window wells (to some extent) may exceed the "building envelope" established by the Planning Board, they either have to be removed or the certificate of occupancy will be revoked.¹⁵ Once again, the ZBA in its quest to do what it wants rather than what it must, has decided to ignore the fact that window wells are accessory uses (not structures or non-defined "improvements") and as such this finding/determination is not only *ultra vires* but clearly arbitrary and capricious. Similarly, the requirement to rip it out or have the certificate of occupancy revoked must be annulled on the basis of mootness (something that the ZBA previously argued in connection with Donat Petition 2).

59. The Resolution also addresses the items which were included in the amended building plans to correct the architects drafting errors/omissions. This includes the heights of the first and second floors, the support beams, the rear steps and the patio area. The directive to go back to BAR would require BAR to make a determination that (a) is not part of their mandated

¹⁴ Should the Fence be removed, the property will be subject to violation of State Law since there is a significant grade difference between the properties and this represents a serious safety hazard. In addition, the yards of the neighboring properties are filled with dangerous debris which would constitute an attractive nuisance; especially to the several young children occupying the residences.

¹⁵ By letter dated May 22, 2018, Dan Gray, advised the ZBA that only the window well on the left side of 1019 exceeds the building envelope. This letter does not—in any way—contradict the prior determinations that the window wells are accessory uses and that since they are below grade, can project past the side yard setbacks. (See May 22, 2018 letter of Dan Gray annexed hereto as Exhibit "P").

authority and (b) would be moot and therefore futile. This was clearly an effort by the ZBA to artificially create a phantom issue of ripeness and therefore avoid the judicial consequences of its actions.¹⁶

60. The Resolution also determines that the certificate of occupancy must be revoked unless AVC gets BAR approval for the construction of the powder room window, lowering of the 2 side facing garage windows, adding the 2 side facing windows on the upstairs bedrooms and raising the height of the stairwell window (i.e., the "Window Work"). The permit to do this Window Work was filed after the certificate of occupancy was issued and therefore has nothing to do with the original building plans or BAR approval. Furthermore, since the Window Work involved less than \$10,000 and did not alter or affect—in anyway—the front façade of the structure, BAR has no jurisdiction over this permit. While the ZBA did not like the fact that AVC, when forced to go back to BAR despite the fact that the proposed changes did not fall under BAR jurisdiction, AVC withdrew those proposed changes and utilized the codes to his advantage, "we don't like what you did" is not a legal basis to make that finding/determination.

61. Collectively, the Resolution has made findings involving a residence that is fully constructed and currently occupied. It strains credibility to see how Donat is in anyway aggrieved by relocation of some windows and window wells that are below grade. Nor, how she (or anyone) is aggrieved by a standard PVC white border fence which protects against a grade differential and dangerous debris in neighboring yards.

62. Put more succinctly, the ZBA has utterly abandoned its legal mandate to act as an independent and impartial arbiter charged with interpretation and enforcement of zoning codes and regulations and instead allowed itself to become a complicit partner with Donat to punish AVC (and

¹⁶ It is telling that the ZBA denied that portion of Application 2 which challenged the Finish Basement Permit and concluded (in essence) that since it involved the house interior BAR review was not required.

its principal Marc Castaldi). Although the ZBA saw fit to buy into the fictional narrative of the “big bad developer”, this Court must restore the rule of law by annulling and dismissing the Resolution in its entirety.¹⁷

FIRST CAUSE OF ACTION

THE CLAIMS MADE IN THE APPLICATIONS ARE MOOT ON THE BASIS OF LACHES AND ARE AFFECTED BY COLLATERAL ESTOPPEL AND RES JUDICATA

63. Petitioner incorporates by reference all prior allegations set forth herein.

A. The Resolution, to the Extent it Involves Any Components of 1019 Grove Street Covered by the Original Building Permits, Including the Window Wells, Is Barred by Collateral Estoppel and Res Judicata.

64. The window wells (save one added as part of the Correction Items), were in existence as part of the substantially completed construction of 1019 Grove Street at the time the Donat Petition 2 was filed.

65. The ZBA, the Petitioner and Donat were all parties to the Article 78 Proceeding commenced by the filing of the Donat Petition 2 and had a full and fair opportunity to litigate the said Petition.

66. The Petitioner and the ZBA both moved to dismiss Donat Petition 2 on the grounds of mootness and laches.

67. Zambelli 2 dismissed Donat Petition 2 on the basis of mootness and laches because Donat failed to preserve the *status quo* by seeking injunctive relief, while the construction of 1019 Grove Street proceeded to substantial completion.

¹⁷ The Resolution specifically states that it does not apply to 1021 Grove Street which Donat specifically excluded from Application 1 and Application 2 since it is the only residence no longer owned by AVC. However, to the extent that the ZBA is alleging violations, these would equally apply to 1021 Grove Street since it is identical to 1019 (other than front façade). This again shows the arbitrary and capricious actions and intentions of the ZBA to make this about AVC and Marc Casataldi and not about the Grove Street Project.

68. The ZBA, in issuing the Resolution, failed to recognize that Donat's claims as to the window wells, and any other components of 1019 Grove Street that were completed at the time the Donat 2 Petition was brought, were barred by collateral estoppel and res judicata.

69. As such, to the extent that the Resolution granted relief to Donat regarding the basement window wells, and any other components of 1019 Grove Street that were completed at the time the Donat 2 Petition was filed, same must be annulled on the basis of collateral estoppel and res judicata.

B. To the Extent that the ZBA has Changed its Position Regarding any Aspect of 1019 Grove Street Covered by the Original Building Permits, Including the Window Wells, This is Barred by the Doctrine of Judicial Estoppel.

70. The doctrine of judicial estoppel is applied to bar a party who took one position in a prior litigation from changing that position in a subsequent litigation because their interests have changed.

71. The ZBA moved to dismiss Donat Petition 2 on the basis of mootness and laches.

72. The ZBA, in issuing the Resolution, failed to adhere to its position taken in the context of the ZBA motion to dismiss the Donat 2 Petition regarding the construction of 1019 Grove Street, on the grounds that the construction was substantially completed at the time the Donat 2 Petition was filed.

73. As such, to the extent that the Resolution granted relief to Donat regarding any component of the 1019 construction that was substantially completed at the time the Donat 2 Petition was filed, must be annulled on the basis of judicial estoppel.

C. The Resolution's Determinations regarding the Window Wells, the Correction Items and the Window Work Are Barred by the Doctrines of Mootness and Laches.

74. The decision in Zambelli 2 confirmed that in the context of land use cases involving construction projects, the doctrine of mootness is applied to dismiss a plea for relief where the

challenger, due to laches, fails to seek injunctive relief or otherwise preserve the *status quo* to prevent construction from commencing or continuing.

75. Donat was aware of the construction that formed the basis of Donat Application 2, including the Correction Items (which includes an additional window well) and the Window Work as evidenced by Donat's emails and Donat's photographs of the construction process.

76. Due to the dismissal by Judge Zambelli of Donat Petition 2 on the basis of mootness and laches, Donat was on notice that the law does not permit one to stand by and watch construction proceed, and only later demand to have already completed construction altered or torn down.

77. Nevertheless Donat once again took no action to halt the construction process and preserve the *status quo*.

78. The construction of 1019 Grove Street was complete (or nearly complete) at the time Donat brought the Donat Application 2.

79. As such, the Donat Application 2 is barred on the basis of mootness and laches.

80. To the extent that the Resolution granted Donat relief relative to the Construction Items (including the additional window well), and the Window Work, it must be annulled on the basis of mootness and laches.

SECOND CAUSE OF ACTION

RESPONDENTS DONAT, LIVIDINI AND COLANARI ARE NOT AN "AGGRIEVED PERSON"

81. Petitioner incorporates by reference all prior allegations set forth herein.

82. New York NY Village Law § 7-712-a (4), applicable to the ZBA, restricts the hearing by a zoning board of appeals to appeals brought by an "aggrieved party".

83. To have standing to bring a proceeding or legal action, a party must be "aggrieved."

84. In the context of a land use dispute before a zoning board of appeals, a party must demonstrate that he or she is aggrieved by establishing that he or she will suffer a harm that is in some way different from that suffered by the public at large.

85. In Donat Application 1 and Donat Application 2 to the ZBA, Donat failed to establish, or even allege, how she is or even could be harmed.

86. Donat's allegation that her property is adjacent to the 1017 Grove Street property is inaccurate. The rear of the Donat property abuts the left side of 1021 Grove Street, which property Donat excluded from Donat Application 1 and Donat Application 2. While Lividini and Colanari are adjacent to 1017 Grove Street it is clear that they have not been harmed—in anyway—by a border fence. In fact, the fence served to provide New York State mandated protection from grade differentials and the presence of dangerous debris which constituted an attractive nuisance and safety concern for the several young children residing in all three (3) residences.

87. The ZBA should have recognized that since there was a complete failure to establish any specific harm (not just "this is wrong") to the applicants or their property, these applicants were not "aggrieved" parties and the ZBA should have therefore dismissed Donat Application 1 and Donat Application 2.

88. As such, the Resolution must be annulled because the applications have not established standing by demonstrating that he/she/they are an "aggrieved party."

THIRD CAUSE OF ACTION

THE ZBA EXCEEDED ITS AUTHORITY IN THAT THE RESOLUTION COVERS ISSUES OUTSIDE OF THE JURISDICTION OF THE ZBA

89. Petitioner incorporates by reference all prior allegations set forth herein.

A. The Fence.

90. Subject to local law, the ZBA is governed by New York Village Law § 7-712-a (4), which limits the jurisdiction of a board of appeal to hearing and deciding appeals relative to, and reviewing the orders and determinations made by, the Building Inspector.

91. The jurisdiction of the ZBA is further governed by Chapter 342 of the Village of Mamaroneck Code, which further limits the authority of the ZBA to hearing appeals and reviewing orders of the Building Inspector to the extent that he is charged with the implementation and enforcement of Chapter 324, i.e., the Village of Mamaroneck Zoning Code.

92. Specifically, the ZBA may not exceed its authority by determining matters outside of the purview of Chapter 342, for example, matters under the jurisdiction of the Planning Board.

93. When determining an appeal, the ZBA is required to rule on the application before it.

94. The Fence is zoning compliant pursuant to the Zoning Code as an "accessory use."

95. In Donat Application 1, Donat requested that the ZBA interpret provisions of Chapter 342 as they relate to a fence as an "accessory use."

96. The ZBA declined to interpret those provisions of Chapter 342 as they relate to a fence as an "accessory use" pursuant to Donat's request..

97. In failing to interpret provisions of the Zoning Code, the ZBA failed in its duty to interpret the statutory provisions within the scope of its authority, i.e., Chapter 342.

98. Instead, despite the clear zoning compliance of the Fence, the ZBA ruled the Fence non-compliant with the Final Plat approval issued by the Planning Board. The ZBA based this bogus determination on an interpretation of an undefined term, "improvement", inserted into the Final Plat by the Village attorneys, and defined that term to include a "structure", i.e., a home or

other permanent structure like a pool, restricted by Planning Board Resolution to the confines of the building envelope.

99. In ruling that the Fence violates the Planning Board's Final Plat approval, and ordering that the Petitioner either apply to the Planning Board for an amendment of the Final Plat or remove the Fence, the ZBA exceeded its statutory jurisdiction which restricts the ZBA to matters covered by Chapter 342.

100. In defining an undefined term, "improvement" in a Planning Board document, the Final Plat, the ZBA exceeded its authority which is limited to Chapter 342.

101. In defining an undefined term, "improvement", the ZBA exceeded its authority as an administrative body, by engaging in unauthorized legislation of terms and definitions.

102. As such, to the extent that the Resolution concerns the Fence, it must be annulled.

B. The Window Wells.

103. Below grade window wells in the Village of Mamaroneck are in general zoning compliant as below ground accessory uses and exempt from the setback provisions of the Zoning Code.

104. In addition, window wells are also zoning compliant as retaining walls, classified as "accessory uses" pursuant to Village Code §342-21B (9).

105. As such, window wells, even those on the left side of 1019 Grove Street which project (below grade) past the "building envelope" for main use and accessory structures, are 100% zoning compliant.

106. The Resolution clearly states that basement window wells are permitted uses and therefore rejects Donat's claim that the window wells were not zoning compliant.

107. Nevertheless, to circumvent the admitted zoning compliance of the window wells, the ZBA exceeded its authority by ordering in the Resolution that the Building Inspector conduct an inspection and confirm that all basement window wells associated with 1019 Grove Street—not just the one window well which was added after the building permit was issued as part of the Correction Items—were within the building envelope delineated in the Planning Board Resolution.

108. Nowhere in Chapter 342 is the ZBA authorized to direct the Building Inspector to perform an inspection falling outside of the jurisdiction of the ZBA under Chapter 342, i.e., involving matters within the jurisdiction of the Planning Board.

109. The Resolution further ordered, that in the event window wells exceeded the building envelope on the Final Plat based on the Building Inspector's inspection, that Petitioner must either remedy the condition, i.e., tear out the window wells (which are otherwise required by New York State codes for egress) or the Certificate of Occupancy will be revoked, requiring removal of the home from the property.

110. The Resolution further directed that the additional window well (part of the Correction Items) has to be approved by BAR despite the fact that BAR has no jurisdiction over below grade side facing window wells.

111. The Building Inspector conducted the ZBA's *ultra vires* inspection and determined that the window wells (already determined to be accessory uses that are zoning compliant) on the left side of 1019 Grove Street exceeded the building envelope.

112. To the extent that the Resolution now directs Petitioner to either remove the window wells or have the certificate of occupancy revoked, the ZBA lacks jurisdiction to make such determinations since it is based on the determinations of another agency, i.e., the Planning Board, or

the actions of the Building Inspector acting within the authority of the another agency, i.e., the Planning Board.

113. As such, all determinations in the Resolution regarding the window wells associated with 1019 Grove Street must be annulled.

FOURTH CAUSE OF ACTION

**THE ZBA ACTED ARBITRARILY AND CAPRICIOUSLY, ILLEGALLY,
AND IN ABUSE OF DISCRETION**

114. Petitioner incorporates by reference all prior allegations set forth herein.

A. The 1017 Grove Street Perimeter Fence.

115. The Fence is zoning compliant as an "accessory use."

116. The evidence in support of this Petition establishes that there multiple similar six foot white vinyl fences in the same neighborhood, further highlighting the irrationality, and arbitrary and capricious nature of the ZBA's determination relative to the Fence.

117. The ZBA acted arbitrarily and capriciously, illegally, and in an abuse of discretion in refusing to confine itself to the matters associated with zoning compliance, including interpretation of sections of the Zoning Code demanded by Donat in Donat Application 1.

118. The ZBA acted arbitrarily and capriciously, illegally and in an abuse of discretion, by exceeding its authority under Chapter 342 of the Village Code, and invading the province of matters reserved by the Village Code to the Planning Board, by evaluating the compliance of the Fence in relation to the building envelope established in the Planning Board Resolution.

119. The ZBA acted arbitrarily and capriciously, illegally, and in an abuse of discretion, by defining an undefined term, "improvement" inserted into a Planning Board document, the Final Plat, an act beyond the authority of the ZBA, which is circumscribed by Chapter 342.

120. The ZBA acted arbitrarily and capriciously, illegally, and in an abuse of discretion in its legislation of a definition for the undefined term "improvement."

121. The ZBA acted arbitrarily and capriciously, and in an abuse of discretion by singling out the Fence for alleged non-compliance when there are multiple similar six foot vinyl fences in the vicinity of 1017 Grove Street.

122. By bowing to the demands of Donat regarding the Fence, and acceding to community pressure regarding real estate development, the ZBA acted arbitrarily and capriciously, and abused its discretion.

123. As such, to the extent that the Resolution concerns the Fence, it must be annulled.

B. The Patio, Rear Steps, Floor Heights & Support Beams.

124. The Resolution provides that AVC must apply to the BAR for a review of the patio, rear steps, floor heights and support beams relative to 1019 Grove Street, and if AVC fails to do so, that AVC must remedy the condition, or the Certificate of Occupancy will be revoked.

125. The floor height adjustments and support beams, both added as part of the Correction Items, are located in the interior of 1019 Grove Street.

126. The ZBA, in the Resolution, denied the Donat appeal of the Finish Basement Permit, because it authorized interior construction, which as stated in the Resolution, does not implicate BAR approval (or for that matter Final Plat approval).

127. Yet inconsistently, the Resolution requires that AVC return to the BAR for a determination of the floor heights and support beams, also interior to 1019 Grove Street.

128. As a matter of law, pursuant to Chapter 6 of the Village Law applicable to BAR, and conceded in the Resolution regarding the Finish Basement Permit, BAR lacks jurisdiction to evaluate and issue determinations relative to the interior of a structure or building.

129. The ZBA acted arbitrarily and capriciously and in an abuse of discretion in ordering the AVC to apply to the BAR for approval of interior features of 1019 Grove Street, to wit, the floor heights and the support beams, which interior features are not subject to the jurisdiction of the BAR as a matter of law.

130. The patio and rear steps, both added as part of the Correction Items, are located in the rear of 1019 Grove Street.

131. As a matter of law, pursuant to Chapter 6 of the Village Law applicable to BAR, BAR lacks jurisdiction to evaluate and issue determinations relative matters not associated with the front facing façade of a building or structure.

132. The ZBA acted arbitrarily and capriciously and in an abuse of discretion in ordering AVC to apply to the BAR for approval of features of 1019 Grove Street, to wit the rear steps and patio, which features are located to the rear of 1019 Grove Street, and as such are beyond the jurisdiction of the BAR.

133. By bowing to the demands of Donat regarding the patio, rear steps, ceiling heights and support beams, and acceding to community pressure, the ZBA acted arbitrarily and capriciously, and abused its discretion in ordering AVC to apply to the BAR for approval which is not required because of the lack of jurisdiction of the BAR.

134. As such, to the extent that the Resolution concerns the patio, rear steps, ceiling heights, and support beams, it must be annulled.

C. The Window Wells and Egress.

135. Window wells in the Village of Mamaroneck are zoning compliant as below ground accessory uses and exempt from the setback provisions of the Zoning Code.

136. In addition, window wells are also zoning compliant as retaining walls, classified as "accessory uses" pursuant to Village Code §342-21B (9).

137. As such, the basement window wells on the left side of 1019 Grove Street (the ones now determined to project past the "building envelope" which solely restricts the placement of main structure and accessory structures) are fully zoning compliant.

138. Window wells are also required by New York State codes to provide egress.

139. The Resolution clearly states that basement window wells are permitted uses pursuant to the Zoning Code, and rejects Donat's claim that the window wells were not zoning compliant.

140. Nevertheless, the ZBA acted arbitrarily and capriciously, illegally, and with an abuse of discretion, by succumbing to community pressure regarding real estate development and to placate Donat, by providing in the Resolution that the Building Inspector must determine whether all of the window wells exceeded the building envelope in the Final Plat for 1019 Grove Street, and if they are found to exceed the envelope, to order that non-compliance must be remedied, i.e., the window wells must be removed, or the Certificate of Occupancy must be rescinded. This provision of the Resolution exceeded the authority of the ZBA, by involving the ZBA in matters reserved to the Planning Board and outside of the jurisdiction of the ZBA under Chapter 342, and by affecting window wells required for egress.

141. The Building Inspector, at the apparent direction of the ZBA, issued a letter dated May 22, 2018 (not received by AVC until just recently) which establishes that the below grade window wells on the left side of 1019 project past the building envelope.

142. In light of the arbitrary and capricious, and illegal acts of the ZBA regarding the provisions in the Resolution regarding the window wells, including abuse of discretion, all

determinations in the Resolution regarding the window wells associated with 1019 Grove Street must be annulled.

D. Window Additions and Alterations (i.e., the Window Work)

143. The Resolution requires BAR approval of moved/added windows which were the subject of a post Certificate of Occupancy stand alone permit issued by the Building Inspector.

144. The stand alone permit for post Certificate of Occupancy work is no different than a permit covering additions and modifications to an existing home located in the Village of Mamaroneck, a type of permit issued on a regular basis by the Building Inspector.

145. The affected windows are not located on the front façade of 1019 Grove Street.

146. The cost of moving and adding the windows to the sides and rear of 1019 Grove Street, the Window Work, is less than \$10,000.00, and thus not subject to BAR approval pursuant to Chapter 6 of the Village Code.

147. Pursuant to Article 6 of the Village Code, the BAR does not have jurisdiction to review matters unless they are associated with the front facing façade of a structure or building.

148. Pursuant to Article 6 of the Village Code, the BAR does not have jurisdiction to review matters having a cost of less than \$10,000.00.

149. It was arbitrary and capricious, and abuse of discretion, for the ZBA to differentiate between a stand-alone permit for the Window Work, and other stand-alone permits issued on a regular basis to Village homeowners who wish to make modifications to their homes long after the original Certificate of Occupancy was issued.

150. It was also arbitrary and capricious, and abuse of discretion and illegal, for the ZBA to provide in the Resolution that AVC must seek approval of the Window Work from the BAR, when the BAR did not have jurisdiction to hear the matter pursuant to Chapter 6 of the Village

Code, and when the cost of the Window Work was below \$10,000.00 and also did not affect the front façade of the home, and thus were not within the jurisdiction of the BAR under Chapter 6 of the Village Code.

151. The ZBA also acted arbitrarily and capriciously, illegally, and with an abuse of discretion, by succumbing to community pressure regarding real estate development and to placate Donat by requiring that AVC submit the Window Work to the BAR, when it the Window Work is clearly beyond the jurisdiction of the BAR under Chapter 6 of the Village Code.

152. As such, to that the extent the Resolution concerns the Window Work, it must be annulled.

CONCLUSION

153. Based upon the foregoing, it is respectfully submitted to the Court that:

- a) The Resolution must be annulled in its entirety for the reasons stated above;
- b) The Resolution must be annulled to the extent that Donat Application 1 and Donat Application 2 is/are moot and barred by laches, and also collateral estoppel and res judicata;
- c) The instant matter is ripe for judicial review or is subject to one or more exceptions to the finality requirement relieving Petitioner from establishment of ripeness;
- d) The Resolution relative to the Fence for 1017 Grove Street must be annulled as *ultra vires*, arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;

- e) The Resolution relative to the window wells for 1019 Grove Street must be annulled as *ultra vires* arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;
- f) The Resolution relative to the demand that Petitioner must submit the patio, rear stairs, ceiling heights and the structural beams relative to 1019 Grove Street to the Board of Architectural Review must be annulled in that the resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and/or an abuse of discretion;
- g) The Resolution relative to the demand that Petitioner must submit window additions and modifications (the Window Work) and windows/window wells relative to 1019 Grove Street to the Board of Architectural Review must be annulled in that the resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and/or an abuse of discretion;
- h) The Resolution must be annulled relative to incorrect, arbitrary, irrational, and *ultra vires* interpretation of law, including the New York Village Law and the Village of Mamaroneck Zoning Code and the Village of Mamaroneck Code provisions regarding the BAR;
- h) The Resolution must be annulled because Donat (and the co-applications) is/are not an "aggrieved" party pursuant to New York State Law; and that
- i) The Resolution must be annulled in the entirety as it was issued and imposed on Petitioner solely in response to the community pressure and is therefore *ultra vires* and impermissible as a matter of law.

WHEREFORE, Petitioner respectfully requests that this Court issue an order/judgment:

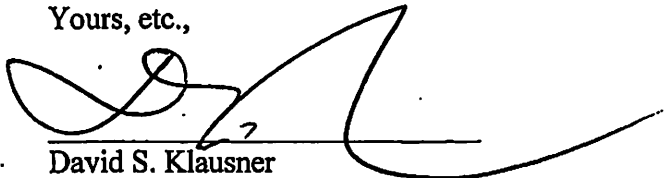
- A) Annuling the ZBA Resolution in its entirety;

- B) Annuling the Resolution to the extent that the Donat Application is moot and barred by laches, and also collateral estoppel and res judicata;
- C) Annuling the Resolution relative to the Fence for 1017 Grove Street as *ultra vires*, arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;
- D) Annuling the Resolution relative to the window wells for 1019 Grove Street as *ultra vires*, arbitrary and capricious, affected by an error of law, and an abuse of discretion;
- E) Annuling the Resolution relative to the demand that Petitioner must submit the patio, rear stairs, ceiling heights and the structural beams at 1019 Grove Street to the Board of Architectural Review in that the Resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and an abuse of discretion;
- F) Annuling the Resolution relative to the demand that Petitioner must submit window additions and modifications (the Window Work) and windows/window wells relative to 1019 Grove Street to the Board of Architectural Review in that the Resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and an abuse of discretion;
- G) Annuling the Resolution relative to incorrect, arbitrary, irrational, and *ultra vires* interpretations of law, including the New York Village Law, the Village of Mamaroneck Zoning Code and the Village of Mamaroneck Code provisions regarding the Board of Architectural Review;
- H) Annuling the Resolution because Donat is not an "aggrieved" party pursuant to New York State Law;
- I) Annuling the Resolution in the entirety as it was issued and imposed on Petitioner solely in response to community pressure and is therefore *ultra vires* and impermissible as a matter of law; and

J) For such other and further relief as to this Court may seem just and proper.

Dated: White Plains, New York
June 11, 2018

Yours, etc.,



David S. Klausner
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White Plains, New York 10601
Tel: (914) 288-8706

To:
THE VILLAGE OF MAMARONECK ZONING BOARD OF APPEALS
(Comprised of Barry Weprin, David Neufeld, Kelly Wenstrup, Robin Kramer, and Meg Yergin)
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

DAN GRAY
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

JOCELYN DONAT
617 Hampshire Road
Mamaroneck, New York

ANTHONY LIVIDINI
645 Wood Street
Mamaroneck, New York

KAREN COLANERI
649 Wood Street
Mamaroneck, New York

BRIAN GELLMAN
1021 Grove Street
Mamaroneck, New York

STACEY GELLMAN
1021 Grove Street
Mamaroneck, New York

CORPORATE VERIFICATION

STATE OF NEW YORK:

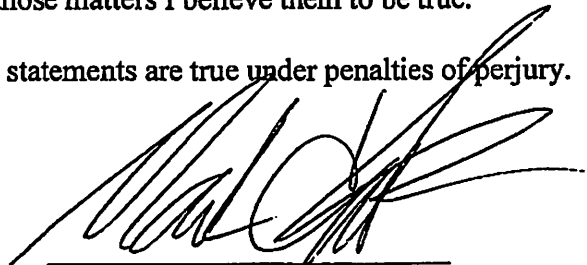
SS:

COUNTY OF WESTCHESTER:

I, MARK CASTALDI, the undersigned, am the sole owner of AVC PROPERTIES LLC, the Petitioner in this matter. I have read the annexed PETITION, know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

I affirm that the foregoing statements are true under penalties of perjury.

Dated: June, 10, 2018



MARK CASTALDI

On June 10, 2018, before me, the undersigned, a Notary Public and for the State of New York, personally appeared MARK CASTALDI, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Notary Public

DAVID S. KLAUSNER
Notary Public, State of New York
No. 02KL8135738
Qualified in Westchester County
Commission Expires October 24, 2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents

Index No.

**AFFIRMATION IN
SUPPORT OF
PETITIONER'S
ARTICLE 78 PETITION**

David S. Klausner, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am the owner of the Law Office of David S. Klausner, PLLC, attorneys for AVC PROPERTIES LLC ("AVC"), and I am fully familiar with the facts and circumstances of this matter based upon my personal knowledge along with a review of the files maintained by my office which includes my review of the administrative proceedings of the Zoning Board of Appeals of the Village of Mamaroneck (hereinafter "ZBA") relative to Petitioner's three (3) lot subdivision at what was originally 1017 Grove Street, Mamaroneck, NY (hereinafter "Grove Street") the subject of this action.

2. This Affirmation, with accompanying legal arguments, is submitted in support of Petitioner's application brought pursuant to Civil Practice Law and Rules (hereinafter "CPLR") Article 78 which seeks an order/judgment annulling a Resolution of the ZBA filed on May 10, 2018

(the "Resolution"), on the grounds that a) the issues covered by the Resolution are moot, b) the Resolution is affected by material errors of law, c) that the Resolution is *ultra vires* in that it sets forth conditions beyond the statutory authority of the ZBA, and d) in that the ZBA acted in an arbitrary and capricious manner in adopting the Resolution. This submission will also demonstrate that the matter is "ripe" for judicial determination as a matter of law.

PRELIMINARY STATEMENT

3. Due to a four year campaign waged by property owner and Respondent Jocelyn Donat against Petitioner AVC's three house residential development on Grove Street (the "Grove Street Project"), the ZBA caved in to community pressure and issued the Resolution. The Resolution departs so significantly from the standards set by the Village Code for zoning enforcement, and the principles which require that administrative determinations be rational instead of arbitrary and capricious and free from abuse of discretion, that it almost shocks the conscience.

4. The Verified Petition challenges a resolution issued by the Zoning Board of Appeals ("ZBA") on May 10, 2018 ("Resolution"). The Resolution covered multiple features of two of the Grove Street Project Properties, 1019 Grove Street and 1017 Grove Street.¹

5. While the Resolution is somewhat confusing and challenging to follow, it essentially addresses a series of corrections, modifications and changes that occurred during the construction of the Grove Street Project (and more particularly 1017 and 1019 Grove Street). Each house is long since complete and currently occupied by families with young children (including AVC principal Marc Castaldi who lives with his wife and three (3) young children at 1017 Grove Street).

¹ With the exception of a perimeter fence located on 1017 Grove Street, the provisions of the ZBA Resolution for that property are null and void since they applied to a temporary certificate of occupancy which has now been replaced with a permanent certificate of occupancy. Donat has now filed a new (identical) application against the certificate of occupancy for 1017 Grove Street which is currently pending before the ZBA.

6. The Resolution finds that a border fence (on the property of 1017 Grove Street) must be removed or alternatively AVC has to go back to the Planning Board. This finding was made despite the clear fact that the Fence is 100% zoning compliant and based on a "cooked up" definition of an undefined term in the Final Plat for the property filed on July 14, 2015 (the "Final Plat"), and notwithstanding that the ZBA is not authorized to "legislate" definitions, and has no authority with respect to matters in the purview of the Planning Board pursuant to the Village of Mamaroneck Code (the "Village Code").

7. The Resolution also granted the appeal by Donat challenging common building permit and building plan amendments made during the course of construction to address errors made by the architect and other omissions in the plans originally submitted by AVC. These items (designated as Correction Items in the Petition) include: correction of the floor heights (the architect accidentally listed them as 8 feet instead of 9 feet), the addition of missing structural support beams, steps leading to the rear yard, a rear yard patio (at ground level) and two (2) additional basement windows (one with a window well to provide New York State mandated egress) to the left side of 1019 Grove Street. None of the Correction Items violate a provision of the Village of Mamaroneck Zoning Code (the "Zoning Code"). Instead, the ZBA concludes that these long since completed Correction Items (with the exception of the basement window wells) have to be approved by the Board of Architectural Review ("BAR"), despite the fact that BAR has no authority to deny any of the Correction Items.

8. The Resolution also required the Building Inspector to determine which of the basement window wells (which are below grade accessory uses) goes past the "building envelope" created by the Planning Board Resolution. That has been done (See Dan Gray Letter at Exhibit P) and three basement window wells on the left side of 1019 Grove Street project beyond the building

envelope. As such, the Resolution requires AVC to either rip them out or have the Certificate of Occupancy revoked.

9. The Resolution also addresss the Window Work (defined in the Petition as the addition of a powder room window, the raising of a stairwell window, the lowering of two (2) garage windows and the installation of 2 windows (one on each side of the upstairs bedrooms), which all involve windows on the sides of the home. The Window Work was done after the Certificate of Occupancy was issued for 1019 Grove and involves work that costs less than \$10,000. Here, despite the clear fact that the BAR does not have jurisdiction to hear (nor does the ZBA have the authority to require) approval for the Window Work permit, AVC has been directed to go back to BAR or the Certificate of Occupancy will be revoked.

10. This Court must consider the Petition in context and in conjunction with the supporting affidavits to explain why the ZBA refused to interpret the Village of Mamaroneck Zoning Code and/or apply it correctly, one if its principal duties, and instead concocted opposition to features of the Grove Street Project based on matters within the exclusive domain of the Planning Board, rendering the Resolution *ultra vires*.

11. Furthermore, without information regarding the four year history of administrative proceedings resulting in a variety of Court actions brought by Donat relative to the Grove Street Project, this Court would not understand that the Resolution should never have been issued, because the matters addressed by Respondent Donat in her application to the ZBA were already barred by mootness and the doctrine of laches, and to certain matters covered by a 2017 decision made by The Hon. Barbara Zambelli, A.J.S.C., subject to collateral estoppel and res judicata.

12. Moreover, the Court also might not understand why Donat (or the co-applicants) was allowed to pursue applications to the ZBA, when there has been no demonstration that he/she/they

are aggrieved parties—a requirement imposed by Section 7-712-a (4) of the New York Village Law—without any proof or even an allegation of the specific harm to the individuals or the individuals properties relative to the matters covered in the Resolution and the AVC Grove Street Project.

13. The instant Affirmation will demonstrate, in support of the Petition, that the Resolution must be annulled a) due to legal principles of preclusion and mootness, b) because the ZBA acted far outside of its authority and jurisdiction, which are circumscribed by Chapter 342 of the Village Code, c) that legal interpretations on which the Resolution is based are incorrect, arbitrary and capricious, and irrational, and require Court review and intervention, d) that the ZBA should have denied Donat's application because she has neither established or even alleged injury, e) that this matter is ripe for review, because of the clear injury suffered by Petitioner AVC, which cannot be ameliorated by further administrative proceedings, or alternatively because Petitioner AVC is the beneficiary of exceptions to the finality rule, and f) because the Resolution is inarguably so arbitrary and capricious, irrational, and abusive of discretion, that it cannot stand.

STATEMENT OF FACTS

14. The factual basis of the instant application is set forth in the Verified Petition submitted herewith (the "Petition"), and also in the following affidavits: a) Affidavit of Marc Castaldi (the "Castaldi Affidavit" at Exhibit C), Marc Castaldi being the principal and sole owner of Petitioner AVC; b) an affidavit of Benedict Salanitro, P.E., a professional engineer with thirty years experience in land use (the Salanitro Affidavit, Exhibit D; c) an affidavit of Steven Marchansanti AIA, the architect for the Grove Street Project (the "Marchansanti Affidavit", attached hereto as Exhibit F), and d) an affidavit of George Mottarella P.E., LS, the surveyor who prepared the layout

plans and final plat for the Grove Street Project (the "Mottarella Affidavit", Exhibit E).² Those facts are incorporated herein by reference and made a part hereof.

LEGAL ARGUMENT

STANDARD OF REVIEW

15. This proceeding is brought pursuant to Article 78 of the CPLR.

16. The legal basis for the Petitioner's challenge to the actions of the ZBA in issuing the Resolution is based on CPLR § 7804. Pursuant to that section, a petitioner may raise a question in a proceeding as to whether the body or officer is proceeding or is about to proceed without or in excess of jurisdiction, and/or whether a determination made by that body or officer was in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.

17. Caselaw confirms that judicial review of a determination of a zoning board of appeals is limited to determining whether the action taken was illegal, arbitrary and capricious, or an abuse of discretion. See Ogden Land Development, LLC v. Zoning Board of Appeals of Village of Scarsdale, 121 A.D. 3d 695, 696-697 (2d Dept. 2014).

18. In addition, when a zoning board of appeals exceeds its lawful jurisdiction, its determination will be annulled. See Eccles v. Zoning Bd. of Appeals of Village of Irvington, 200 A.D. 2d 570 (2d Dept. 1994).

19. Although a zoning board's interpretation of a zoning code is entitled to deference, its interpretation is still the ultimate responsibility of the Court. Ogden Land Development, supra, 121 A.D. 3d at 697 and Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y. 2d 451 (1980). Where the interpretation of a regulation like a zoning code provision is irrational or unreasonable, the zoning

² All defined terms in the instant Affirmation, with the exception of terms exclusively defined herein, have the meaning(s) stated in the Verified Petition.

board's determination will be annulled. New York SMSA Limited Partnership v. Town of Islip Planning Board, 300 A.D. 2d 307, 309 (2d Dept. 2002).

20. . Because zoning ordinances are in derogation of common law, it is well established that any ambiguity must be resolved in favor of the landowner. New York SMSA Limited Partnership, supra, 300 A.D. 2d at 309. *See also* Brancato v. Zoning Bd. of Appeals of City of Yonkers, N.Y., 30 A.D. 3d 515, 516 (2d Dept. 2006).

21. It is also a general principal that when reviewing a zoning code provision, a zoning board is required to rule on the narrow issue before it. BBJ Associates, LLC v. Zoning Bd. of Appeals of Town of Kent, 65 A.D. 3d 154, 154 (2d Dept. 2009).

POINT I

THE RESOLUTION MUST BE ANNULLED BECAUSE THE INSTANT DONAT APPLICATIONS ARE MOOT AND BARRED BY LACHES AND IN THE CASE OF THE WINDOW WELLS ON THE LEFT SIDE OF 1019 GROVE STREET ON THE BASIS OF COLLATERAL ESTOPPEL & RES JUDICATA

22. The Resolution completely fails to determine that Donat Application 1 and Donat Application 2 (as defined in the Petition) are barred by mootness and laches and should have been denied as such.

23. As explained in the Petition and the Castaldi Affidavit, the Donat Applications 1 and 2 are not the first time that Donat has challenged certain aspects of the Grove Street Project. In fact, when her application to have the building permits revoked was denied by the ZBA (see ZBA Resolution on Donat 1 at Exhibit D), Donat brought an Article 78 proceeding to this Court. The Court, by decision and order of Judge Zambelli determined that since Donat was aware of the ongoing construction, yet failed to take legal action to preserve the *status quo* (instead allowing the

to that which he or she took in a prior proceeding, simply because his or her interests have changed.⁴

27. Since AVC is now asserting the same legal doctrines of mootness and laches on which the Zambelli 2 was based, this Court must once again grant the same relief to Petitioner on the same grounds, as to any construction substantially completed at the time Donat made her Application 1 and Application 2 to the ZBA. Included would be the Correction Items including ceiling height corrections, addition of structural beams, rear exit steps, and the patio, in addition to the window wells.⁵

28. As represented in the Verified Petition and in the Castaldi Affidavit, and as evidenced by multiple Donat emails, Donat was aware of the construction of the conditions of which she now complains, yet took no legal action to halt the work until long after the work was completed, and never applied to preserve the *status quo*. In fact, Donat monitored, photographed, and documented nearly every phase of the construction process. For a time, Donat even had the Grove Street Property under 24 video surveillance, until she was required to remove the camera following the passage of a 2017 law prohibiting surveillance across property lines. Nevertheless, at no point did Donat seek an injunction stopping any of the work in progress. See Castaldi Affidavit, Exhibit C.

29. As demonstrated by her emails to the ZBA and the Village, Donat was clearly aware of most if not all of the matters included in her instant applications to the ZBA. The basement windows and window wells of which she now complains were evident on the construction plans

⁴ In the cited cases the respective Courts determined that the party potentially charged with "judicial estoppel" either did not take a position clearly contrary to the position taken in the prior proceeding, or had taken no position at all in the prior proceeding.

⁵ The items covered by the terms "Correction Items" (defined in the Verified Petition), resulted from drafting errors acknowledged by Steven Marchansanti AIA in the Marchansanti Affidavit, and also from AVC's request for modifications. In his affidavit, Mr. Marchandanti represents that the corrections and minor changes were incorporated into as built and updated plans filed with the Building Department in or about July of 2016, i.e., well before Zambelli 2 was issued.

submitted to the Building Inspector on March 30, 2016 as part of the applications for building permits for all three residences, 1017, 1019, and 1021 Grove Street.

30. The Correction Items and the Window Work (as defined in the Verified Petition) were also obvious to Donat based on her stream of emails to the Building Department and other Village officials.

31. Among Donat's almost daily e-mails were the following emails: email sent on June 28, 2016 (enclosing photos clearly showing the framed houses and installed window wells); email on July 14, 2016 (making complaints that the construction differs from the building plans), email on July 25, 2016, complaining of the rear patios, email on July 31, 2016 (complaining about basement windows, window wells and house heights), email on August 2, 2016, summarizing all of her complaints about the project, email on August 16, 2016 (asking for a stop work order, which was not issued) and email on August 24, 2016 (enclosing pictures showing the window wells and patios). The referenced emails are attached as Exhibit Z to the Verified Petition.

32. Clearly, the application to the ZBA was also too little and too late and Donat once again failed to preserve the status quo. Oddly, the ZBA ignored this (despite its prior position). More to the point, the failure of Donat to contemporaneously seek an injunction to stop construction and her choice to instead ignore Zambelli 2 and wait until all construction was completed once again constitutes laches rendering her application and by extension the Resolution moot.

33. Accordingly, this Court must annul the Resolution to the extent that it affects the construction changes referenced above, i.e., the basement windows, window wells, rear exit stairs, back yard patio, changes in window heights, and addition of additional windows, support beams, and ceiling heights, on the basis of mootness, and the doctrine of laches.

34. Furthermore, since the construction of the subject homes is now fully completed, and families are living in all of the residences, failure to grant the instant Petition on the basis of mootness, would cause substantial prejudice to AVC. This is the fundamental principle behind the doctrine of mootness as applied to land use cases involving construction projects, and the legal basis of *Zambelli 2*. Accordingly, the Petition should be granted and the Resolution annulled on the basis of mootness.

35. In addition, collateral estoppel and res judicata are available to bar subsequent litigation based on a determination of the same issue, between the same parties, in a previous litigation or administrative proceeding involving a determination by a municipal board, like a zoning board of appeals. See *Town of Wallkill v. Lachmann*, 27 A.D.3d 724, 725 (2d Dept. 2006).

36. Here, the original building plans which were challenged as part of Donat Petition 1, included window wells. On the left side of 1019 Grove Street, there were two (2) window wells shown on the plans that were part of the building permit challenged by Donat. A third window well (for egress) was added as part of the amended and corrected building plans. All three (3) window wells are on the left side of 1019 Grove Street. Since the question of mootness as to the two left sided window wells that were clearly shown on the original building plans attached to the building permit challenged by Donat in Donat Petition 2 has already been decided in *Zambelli 2*, to the extent that the Resolution makes determinations regarding those window wells, that portion of the Resolution must be annulled.

POINT II

**THE ZBA EXCEEDED ITS
AUTHORITY TO THE EXTENT
THAT THE RESOLUTION COVERS ISSUES
OUTSIDE OF THE STATUTORY
JURISDICTION OF THE ZBA**

37. Relative to its determinations regarding the perimeter Fence installed on 1017 Grove Street, and the below ground window wells on 1019 Grove Street, the ZBA acted in excess of its jurisdiction, in so far as the ZBA based the Resolution on Village Code provisions outside of ZBA's specific statutory authority, Village Code Chapter 342.

38. The jurisdiction of the Zoning Board of Appeals is limited by the New York Village Law and the Village Code.

39. As cited in the Resolution, New York Village Law §7-712-a (4) provides that "unless otherwise provided by local law" the jurisdiction of a board of appeals is appellate and is limited to hearing and deciding appeals from and reviewing orders, requirements decisions, interpretations or determinations made by the administrative official charged with enforcing any local law "adopted pursuant to this article", i.e., Article 7 of the New York Village Law.

40. What the Resolution essentially ignores, and excludes from consideration of the effective limits on its jurisdiction, is the opening phrase of New York Village Law §7-712-a (4), "*unless otherwise provided by local law*". Additional limits are placed on the ZBA jurisdiction by local law, to wit Village Code Chapter 342 9 ("Chapter 343"). Chapter 342 lists the powers and duties of the ZBA, relative to appellate jurisdiction, which are contained in §342-90. That section states:

§342-90 Powers and duties.

The Board shall hear and decide appeals from and review from any order, requirement, decision, interpretation or determination made by any administrative official or board *charged with the implementation or enforcement of this chapter* and may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and make such determination and order as, in its opinion, ought to be made in the premises. *[emphasis supplied]*

41. Under §342-90, the ZBA is limited to consideration of matters explicitly covered in Chapter 342, which is concerned exclusively with zoning compliance. Relative to interpretation and construction of provisions, the ZBA is limited by § 342-91, which provides in pertinent part, that on appeal, the ZBA may decide the following questions: "A. Determination of the meaning and applicability of any portion of the text *of this chapter* or of any condition or requirement specified or made under or pursuant to the provisions hereof." Once again, the authority and jurisdiction of the ZBA is limited to Chapter 342 of the Village Code, which does not authorize ZBA interpretations or construction of provisions outside of that limited purview.

42. Limits regarding the authority of the ZBA to enforce and implement the Zoning Code as carried out by the Building Inspector are expressed in Village Law §342-90, relative only to those powers of the Building Inspector "to enforce, *literally the provisions of this chapter and of all rules, conditions and requirements adopted or specified pursuant thereto* *[emphasis supplied]*." Further language in that section, directs the Building Inspector acting within the confines of Chapter 342, to maintain records, *inter alia*, of site development approvals of the Planning Board, and to enforce the observance and performance of the same.

43. However, in the instant matter, because the Grove Street Project involved only three single family residences, as a matter of law, no site plan was required or issued by the Planning Board, and thus the Building Inspector is not authorized under Village Law §342-90 to enforce other approvals of the Planning Board. See Affidavit of Benedict Salanditro, Exhibit D.

Consequently, in the case of the Grove Street Project, the ZBA lacks authority to review Building Inspector determinations or require Building Inspector actions that fall outside of zoning compliance, i.e., the specific authority granted in Chapter 342.

44. Accordingly, the claim in the Resolution that the ZBA has broad (and purportedly limitless) authority to review Building Inspector determinations is incorrect, as the authority for review is limited to determinations made pursuant to Chapter 342 and relative to Planning Board approvals, exclusively to site plans, inapplicable here.

A. The Perimeter Fence.

45. The border fence (the "Fence") installed by AVC pursuant to a "stand alone" building permit is the subject of ZBA action taken through the Resolution. The ZBA claims that it has authority to determine that the Fence, which is in all ways zoning compliant pursuant to Section 342, is somehow not permitted based on its interpretation of the Planning Board's provisions related to the Grove Street Project. Donat, in the application to the ZBA (Donat Application 1, Exhibit G to the Petition), argued that the border Fence (something that is common throughout the surrounding neighborhood) is an accessory structure and therefore not permitted since it is outside the designated building envelope. The later phrase refers to the area within which the primary structure (the house) or an accessory structure (such as a pool) could be constructed. The purpose of that restriction (found in the Planning Board Final Plat) was to keep the primary structure more towards the front of the properties and to preserve more open space in the rear yard.

46. What the ZBA did in regards to the border Fence is astounding. The Resolution ignores its own codes (and the position taken in public hearings by the Building Inspector), declines to consider whether the Fence is zoning compliant, and instead turns to the Final Plat for the project, claiming that the Fence is an "improvement", an undefined term, and then defining that term to

equate the Fence with a permanent structure, like a house. Put more succinctly, the ZBA determined that the border fence (an accessory use under its own codes) was actually an "improvement" (a term found nowhere in the building codes) and therefore not permitted since it was outside the building envelope.

47. To accomplish this feat of creative *de facto* legislation, the ZBA gets crafty in its selective use of language. Although the ZBA wants the Court to equate the language "specific site development features" in the Resolution with term "site development approvals" (i.e., site plans), the latter were not required or issued relative to the Grove Street Project because it involved only single family homes. See Salanitro Affidavit at Exhibit D. What the Resolution is actually referring to is a negotiated provision in the Final Plat for the Grove Street Project, in which AVC voluntarily agreed to certain limitations affecting the location of the proposed primary residences within a specific building envelope (designed to move the residences forward on the lots to preserve more backyard space) and that no *accessory structures* (a term defined in Village Code § 342-3 through the definitions of "Building, Accessory" and "Structure", such as an in-ground pool, detached garage or a guest/pool house) could be constructed outside of the building envelope (essentially an imaginary line drawn around the primary residence). These restrictions are denoted on the final layout plans which were part of the Planning Board Resolution dated May 27, 2015. (See Exhibit R showing map C2). However, there were no restrictions imposed on accessory uses such as installation of a border fence, window wells, putting in a swing set or any other common accessory uses which would be handled in accordance with the Village Zoning Codes. See Castaldi Affidavit for an expanded explanation of the Final Plat at Exhibit I).

48. Regarding the Fence, the Resolution determines that the Fence violates the Planning Board's Final Plat approval, and orders the Fence removed, essentially based on the ZBA position

that it has the authority to extend its jurisdiction outside of Chapter 342, i.e., the Zoning Code, into the purview of the Planning Board. The ZBA admits in the Resolution that the Building Inspector considers the Fence an *accessory use*, and not an *accessory structure*, and zoning compliant. However, the ZBA then declares the issue of "accessory use" versus "accessory structure" (an interpretation sought by Donat in her application to the ZBA), academic and/or denied, substituting instead an unauthorized legal interpretation of the undefined term "improvement" to order AVC to remove the Fence or to or go back to the Planning Board for an amendment to the Final Plat approval. The ZBA acknowledges that the word "improvement" which appears in the Planning Board's Final Plat, is not defined in the Zoning Code or in the Village's subdivision regulations (i.e., Chapter 58 and Chapter A348 of the Village Code applicable to the Planning Board). The ZBA then continues to provide, *ultra vires* of Chapter 342, its own interpretation of the undefined term "improvement" to render the Fence a purported "permanent structure" allegedly in violation of the Final Plat.

49. Throughout the entire Planning Board approval process there was no mention of the word "improvement." The word "improvement" which was added by counsel after the Preliminary Plat approvals and resolutions of the Planning Board were finalized, is associated with primary or accessory structures. Yet, the ZBA in its zeal to appease community activists rather than follow its mandate to provide an objective and impartial review, acted as a law maker rather than an appellate board. See Castaldi Affidavit, at Exhibit C.

50. Mr. Castaldi in his Affidavit attests that the word "improvement" was never discussed or even mentioned throughout the process of negotiating the layout plan, the Preliminary Plat, and the Planning Board Resolution, and appeared in the Final Plat, which was drafted by the Village attorneys, well after Planning Board approval of the Grove Street Project was granted.

Additionally the word "improvement" does not appear in the PB Resolution approving the subdivision. See Castaldi Affidavit at Exhibit C. Parenthetically, the Village attorney's insertion of the term "improvement" related to accessory structures was not authorized by §A 388-10 of the Village Code applicable to Subdivision Regulation.

51. Despite Donat's extensive involvement in the Planning Board approval process, she never once requested any restriction on the installation of a border fence. Instead, she was only concerned with main house construction and location along with the protection of a maple tree on her property. See Castaldi Affidavit.

52. The interpretation by the ZBA of the word "improvement" to bar the Fence flies directly in the face of the clear zoning compliance of the Fence, as Mr. Gray represented. Thus, the ZBA is not only shirking its duty in failing to interpret the Zoning Code to that effect, but is also clearly engaged in an *ultra vires* activity to somehow circumvent the real issue, that there is no basis within their jurisdiction to order removal of the zoning compliant Fence.

53. In the Salanitro Affidavit (Exhibit D), Mr. Salanitro, a licensed professional engineer with thirty years of experience with land use and zoning, opines that the Fence is an "accessory use" and not an undefined "improvement", and that based on the Village Code and the standards in the industry, there is no legal basis for the ZBA to find that the Fence was not 100% zoning compliant and a clear permissible use on 1017 Grove Street.

54. Mr. Mottarella, a professional engineer and licensed land surveyor with many years of experience, also confirms in the Mottarella Affidavit (Exhibit E) that the Fence is zoning compliant as an accessory use, and does not violate in any way the restrictions placed on 1017 Grove Street.

55. Legally, it has already been established that the ZBA has no authority to become involved in Planning Board matters, and certainly no authority to legislate undefined terms like "improvements". In fact, in its prior resolution (addressing Donat 1), the ZBA already determined that it had no authority to review property owner compliance with Planning Board resolutions. (See prior ZBA Resolution at Exhibit L).

56. Making orders outside of the purview of the zoning code has been determined to be off limits to a zoning board of appeals. For example in Siegert v. Luney, 111 A.D. 2d 854, 855 (2d Dept. 1985), the Second Department determined in the context of an Article 78 proceeding, that a zoning board was without authority to consider the petitioner's requests if they did not relate to a prima facie violation of the village zoning ordinance. The strict separation of the authority of a zoning board of appeals to apply the zoning code (in the cited case to grant a variance), and the separate authority of the planning board to approve a subdivision plat, is illustrated in Eccles v. Zoning Bd. of Appeals of Village of Irvington, 200 A.D. 2d 570 (2d Dept. 1994). In Eccles, the Second Department ruled that an area variance granted by the zoning board of appeals in such a way as to effectively approve a subdivision plat is clearly in excess of the statutory jurisdiction of the zoning board of appeals. It is this type of mixing of agency function that is explicitly beyond the jurisdiction of the ZBA in the instant matter.

57. "When reviewing an interpretation of a zoning code provision a zoning board is required to rule on the 'narrow issue' before it [*citation omitted*]...." BBJ Associates, LLC v. Zoning Board of Appeals of Town of Kent, 65 A.D. 3d 154 (2d Dept. 2009). In other words, the ZBA should not have refused to interpret the provisions sought to be interpreted by Donat Application 1, i.e., Sections 342-3, 342-14, and 342-21, all concerned with interpretation of Zoning Code provisions relative to definitions, accessory structures, and permitted accessory uses (like a

fence) for a single family home. Instead, the ZBA went far afield into the unauthorized territory of legislating a definition of the undefined term "improvement" in the context of a Planning Board document.

58. In addition, principles of statutory construction applicable to interpretation of regulatory codes demonstrate that the ZBA exceeded its authority in essentially making up a definition for an undefined term, and then applying that definition in a manner favoring the municipality rather than the landowner, AVC. Because land use ordinances are in derogation of common law, it is well established that any ambiguity must be resolved in favor of the landowner. New York SMSA Limited Partnership, supra, 300 A.D. 2d at 309. See also Brancato v. Zoning Bd. of Appeals of City of Yonkers, N.Y., 30 A.D. 3d 515, 516 (2d Dept. 2006). For all of these reasons, that portion of the Resolution directing the removal of the border Fence at 1017 Grove Street must be annulled.

B. The Window Wells.

59. The "window well issue" essentially boils down to a claim that the below-grade wells associated with the basement windows (which provide egress and act as retaining walls to keep out the dirt from the windows) extend (below grade) beyond the "building envelope." As already explained, the building envelope is the area within which the primary structure (key here is the word structure) is to be built. The ZBA found that although window wells (in general) are accessory uses and below grade projections beyond zoning mandated setbacks (i.e. the distance between the structure and the property line) are permitted, it applied completely different standards to AVC, and strayed well beyond the limits of its authority in a different, but equally unauthorized manner.

60. The Resolution clearly states that basement window wells are permitted uses, and rejects the Donat claim that the window wells were not zoning compliant, supporting the Building Inspector's construction of the Zoning Code that setbacks do not apply to below ground structures. It was telling that the Resolution unnecessarily comments that any issues concerning below ground construction which encroaches on setbacks would be appropriately addressed through legislated amendments to the Zoning Code.

61. The window wells are also zoning compliant as retaining walls, classified as "accessory uses" pursuant to Village Code § 342-21B (9), and are not subjected to any mandated setbacks which apply to structures, whether main or accessory. See Salanitro Affidavit (Exhibit D), in which Mr. Salanitro also affirms that the window wells are fully compliant with Section 342 of the Village of Mamaroneck Code. It is notable that Mr. Salanitro also affirms in his Affidavit that a building envelope is nowhere restricted by setbacks to accessory uses, but only to main structures or accessory structures.

62. Mr. Mottarella, a licensed professional engineer and land surveyor for many years practicing in Westchester County and in the Village of Mamaroneck, confirms in the Mottarella Affidavit (Exhibit E), that the window wells are retaining walls to prevent surrounding soil from overtaking the basement windows, and to permit egress from the below grade basement, and are accessory uses. He also confirms that there is no prohibition attached to the Grove Street Project on the construction of accessory uses. Mr. Mottarella also confirms in his Affidavit, that the window wells, as below grade, are not subject to mandatory property line setbacks under the Zoning Code. Although not germane here due to the lack of jurisdiction of the ZBA over the Planning Board process, Mr. Mottarella further opines that the ZBA contention that below grade window wells cannot project beyond the building envelope is false.

63. Having concluded reluctantly that the window wells are compliant with zoning, a determination within the authority of the ZBA, the ZBA then concocts an unauthorized, illegal, and arbitrary and capricious scheme to frustrate, inconvenience, and cause expense to AVC.

64. In a clear attempt to circumvent the admitted zoning compliance of the window wells, and at the same time to satisfy and placate Donat and her army of anti-development soldiers, in a dictate far exceeding its authority the ZBA essentially ordered the Building Inspector to confirm that all basement window wells and egress(es) —not only the isolated window well which was added after the building permits were issued as part of the Correction Items—were constructed within the “approved building envelope” on the Final Plat. However, nowhere in Chapter 342 is the ZBA authorized to direct the Building Inspector to perform such an inspection relative to compliance with a Final Plat issued pursuant to the May 27, 2015 PB Resolution, a direction completely without connection to zoning compliance.

65. Putting aside the lack of authority to order the Building Inspector to inspect the window wells for compliance with a provision of another administrative entity, only a few days prior to the filing of the Verified Petition, a memo drafted by the Building Inspector, Daniel Gray was forwarded to Petitioner (see Exhibit P). The memo indicates that Mr. Gray performed the *ultra vires* inspection of the window wells demanded in the Resolution (although the memo does not explicitly so state). The memo finds that the window wells on the right side of 1019 Grove Street are within the building envelope, the specific issue covered in the inspection ordered in the Resolution. However, Mr. Gray opines that the window wells on the left side of 1019 Grove Street (actually only one window well is so located), exceeds the building envelope.

66. Although the issue of the unauthorized direction to the Building Inspector to inspect the window wells is now academic, the ZBA is devoid of the power to order AVC to remove the

window wells. The ZBA does not have the appellate authority to review the actions of another agency or the actions of an individual authorized pursuant to another agency, i.e., the Building Inspector acting within the purview of the Chapter 58 of the Village Code relative to the Planning Board, and not the Zoning Code, Chapter 342. See Salantrino Affidavit in that regard.

67. A recent New York State Supreme Court decision illustrates this point. In People v City of Watervliet Zoning Board of Appeals, 2013 N.Y. Misc. Lexis 6853 (Supreme Albany 2013) (copy attached as Exhibit DD for the convenience of the Court), the Albany County Supreme Court was asked to consider the appellate authority of a zoning board. In Waterlivet, an application was filed asking the zoning board to review a decision of a building inspector. In reaching its decision, the Court found that since the actions of the building inspector were exercised under another provision of the municipal code the zoning board lacked the power of review.

68. In this case, the Building Inspector was not authorized by Chapter 342 to perform the inspection reported on in the May 22, 2018 memo, relative to compliance with a Planning Board restriction, although he may be authorized to do so by another provision of the Village Code (which is not conceded here). See in that regard, Salanitro Affidavit. In that situation, by application of Watervliet, the ZBA would not have been authorized within their Village Code enabling authority, Chapter 342, to take further action relative to the Building Inspector's inspection.

69. In brief summary, to the extent that the ZBA exceeded its jurisdiction in determining in the Resolution that the Fence and the window wells were non-compliant, by deciding that these two zoning compliant accessory uses were allegedly out of compliance with determinations made by another department, the Planning Department, the Resolution must be annulled by this Court.

POINT III

THE INSTANT MATTER IS RIPE FOR JUDICIAL REVIEW OR ALTERNATIVELY, SUBJECT TO ONE OR MORE OF THE EXCEPTIONS TO THE FINALITY DOCTRINE

70. For this Court to hear and determine the instant Article 78 proceeding brought by Petitioner, this Court will no doubt inquire into whether the Resolution is final and binding on the Petitioner, with no further avenue for review, i.e., whether the Resolution is “ripe.” Cor Route 5 Co. LLC v. Village of Fayetteville, 147 A.D. 3d 1432 (4th Dept. 2017).

71. The ZBA obviously also understood this and therefore created phantom issues of ripeness by requiring AVC to take further steps.

72. For the Fence, the Resolution requires that AVC must essentially return to the Planning Board, to obtain an amendment to the Final Plat approval to remedy alleged non-compliance with an undefined term, “improvement” which appears in the Final Plat. The ZBA defined the term “improvement” in the Resolution both incorrectly and in an *ultra vires* manner in such a way as to classify the Fence as an “accessory structure”, which may not be installed outside of the building envelope fixed in the Planning Board Resolution. The Resolution then goes on to state that the Fence must be removed or the Certificate of Occupancy will be revoked, requiring removal of the home from the property.

73. Regarding the Correction Items, to wit, the raising of the ceiling height by one foot, addition of structural beams, addition of rear steps, and installation of a small patio, the Resolution requires AVC to return to the BAR for approval of these features which are, actually completely outside of the jurisdiction of the BAR (see below). If AVC fails to do so, AVC then faces revocation of the Certificate of Occupancy or the destruction of the residence (or both).

74. Regarding the Window Work, which includes the addition of a powder room window accidentally omitted from the building plans, the raising of a stairwell window, the lowering of garage windows, and the addition of two side facing windows, the Resolution requires AVC to return to the Bar for approval of these issues which are also outside of the jurisdiction of the BAR (see below), or face revocation of the Certificate of Occupancy, which would require kicking out the family currently living there.

75. The “window well issue” is clearly already ripe within the terms of the Resolution. The Resolution ordered AVC to remove all window wells to the extent that they were not compliant with the Final Plat issued by the Planning Board, and issued an *ultra vires* order to the Building Inspector to confirm that all construction on the affected sites was constructed within the building envelope on the Final Plat. The Building Inspector already engaged in this exercise, and has found that the window wells (on the left side of 1019 Grove) exceed the building envelope delineated in the Final Plat, cutting off any avenue of further administrative review, and requiring AVC to remedy the condition, i.e., remove the window wells, or risk revocation of the Certificate of Occupancy. In other words, the “window well issue” is ripe for determination by this Court on the basis of issues raised in the Verified Petition and this Affirmation, to include mootness, lack of jurisdiction, and ZBA action which is arbitrary and capricious, irrational, and abuse of discretion.⁶

76. For a matter to be “ripe” for judicial review, two requirements must be satisfied. First, “the action must ‘impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process’”. See Ranco Sand and Stone Corp. v. Vecchio, 27, N.Y. 3d 92, 98-99 (2016) citing to Matter of Gordon v. Rush, 100 N.Y. 2d 236, 242 (2003). This

⁶ Additionally the Landscape Plan Compliance issue raised in the Resolution requires no further administrative action because Building Inspector Dan Gray, in his May 22, 2018 letter to the ZBA (the same letter which covered his inspection of the window wells), reports that the landscaping has been installed per the Final Plat Landscape Plan, which renders the Landscape Plan Compliance issue moot per the terms of the Resolution.

requirement is based on a pragmatic evaluation of whether the decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury. Id. Second, the key to ripeness, "is a finding that the apparent harm inflicted by the action 'may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" Id.

77. Petitioner contends that under the general standard enunciated in Ranco and Matter of Gordon, the Resolution is ripe for review.

78. Moreover, Petitioner also contends that relevant exceptions to the general rule on finality are applicable to relieve Petitioner of the burden of establishing ripeness.

A. Petitioner Has Satisfied the Test for Ripeness.

79. The matter is already ripe and must be determined by this Court to the extent that the matter is not considered moot by this Court. See POINT I above.

80. In the unlikely event that this Court does not find the matter ripe, due to mootness, laches, and collateral estoppel, the matters are ripe for other reasons pursuant to the principles for ripeness stated in the Ranco and Gordon cases.

81. Petitioner has already satisfied the first test for ripeness confirmed in Ranco and Gordon, in that the ZBA has inflicted a concrete injury in the manner in which it arrived at its decision. By studiously avoiding application of the principle of mootness to deny Donat relief [see Point I above], and by acting in excess of its statutory jurisdiction [see Point II above], the ZBA is doing more than just proceeding through the normal administrative process, but is engaging in unauthorized activity to prolong and block the issuance of a Certificate of Occupancy for 1019 Grove Street, and to deny Petitioner of the right to a zoning compliant perimeter Fence installed on 1017 Grove Street, effectively depriving Petitioner of its rights to legally justified approvals for

zoning compliant features, leading to the drastic consequences of a requirement to tear the homes down.

82. Sending the matter back to the BAR for review will not ameliorate the injury because the BAR lacks jurisdiction to review interior features and features not on the front façade of the building, and construction with a cost of less than \$10,000.00 (see below), rendering the BAR without authority to review the Correction Items and the Window Work, which fall within those jurisdictional exceptions.

B. Valid Exceptions to the Ripeness Test Are Applicable to Render the Instant Matter Ready for Court Review.

83. Caselaw establishes that when Court intervention is clearly required to resolve one or more legal issues which underlie the challenge to administrative action, finality and ripeness need not be established. For the reasons stated immediately below, the Petitioner is entitled to this exception.

84. In Friedhaber v Town Board of Town of Sheldon Zoning Board of Appeals, 16 Misc. 3d 1140(A), 851 N.Y. Sup. 2d 58 (Sup. Ct. Wyoming Cty. 2007) the petitioners commenced an Article 78 proceeding for a judgment annulling the actions of the defendant Town Board and Zoning Board of Appeals, which had approved land use requests of defendants Sheldon Energy to establish a wind farm. In connection with the development of the wind farm, the Board adopted a local law, the WECS law (standing for "wind energy conversion systems"), which law established application requirements, setbacks, safety standards, and a decommissioning procedure. The petitioners in Friedhaber asserted that neither the Town Board nor the ZBA had the authority to grant certain variances relative to the proposed wind farm, and that their approvals were affected by errors of law, were made in violation of lawful procedure, were arbitrary and capricious and/or were an abuse of discretion, by exceeding their authority under the WECS law and the laws of the State

of New York. The respondents asserted failure to exhaust administrative remedies by the property owner's failure to return to the ZBA for an interpretation of the WECS law.

85. The Supreme Court in Friedhaber dismissed respondents' argument, because the petitioners had contested the very power of the Board and the ZBA to act as they did, issues which were according to the Court, reserved to the Court itself to determine. In other words, without first determining the fundamental issues of errors of law, violation of procedure, arbitrary and capriciousness, and exceeding of authority, there was no point in making the petitioner exhaust administrative remedies that the Town Board and the ZBA may not have been authorized to order.

86. Like the Friedhaber petitioner, Petitioner AVC will not resolve its legal issues of mootness and laches, collateral estoppel, res judicata, exceeding the limits of jurisdiction, and arbitrary and capriciousness (see below) by submitting to a BAR review, the further steps that the Resolution claims are required.

87. Because the ZBA is the body to which an applicant denied by the BAR must appeal, the ZBA operates as the agency which has authority to interpret Chapter 6 applicable to the BAR, placing on the ZBA the responsibility to construe Chapter 6 consistently and resolve ambiguities in favor of the landowner. In other words, a determination by the BAR would only lead back to the ZBA on appeal. Court determination of the authority of the ZBA and the validity of the challenged Resolution provisions on the basis of the arguments made in this Affirmation is required to avoid a route leading directly back to the ZBA (which has already completely misinterpreted the role and jurisdiction of BAR in the context of the Correction Items and Window Work).

88. Troy Sand & Gravel Co., Inc. v. Town of Nassau, 18 Misc. 3d 1130(A), 859 N.Y.S. 2d 899 (Sup. Ct. Rensselaer County 2008) involves the same issue, i.e., the necessity for Court review of a legal issue outside of the administrative process; in that case the preemption of a local

law by state law. Relative to the necessity for Court determination of the preemption issue, the Rensselaer County Supreme Court ruled that the legal issue presented could not be resolved by the respondent zoning board, giving rise to the exception to the general rule of exhaustion of administrative remedies, relieving the petitioners from the obligation to seek a resolution of the legal issue through the administrative process.

89. The imperative for a Court determination of the Petitioner's challenges to the Resolution, without requiring the Petitioner to first engage in the futile exercise of submitting the Correction Items and the Window Work to the BAR is illustrated by the inconsistency and arbitrary and capricious nature of the Resolution, and warrants Court determination.

90. A clear example of arbitrariness, capriciousness, and abuse of discretion, is the ZBA's insistence on submitting the side and rear facing features, additional windows, moved windows, and the patio, to the BAR, when the Donat appeal of Finish Basement Permits and associated Certificates of Compliance for 1017 and 1019 Grove Street, was denied.

91. The Resolution states that the Donat appeal of the Finish Basement Permits was denied because it involved "interior improvements", which essentially do implicate BAR approval. The very same principle relieves AVC from returning to the BAR for review of interior features (which are excluded pursuant to Village Code Chapter 6, because they are not façade features), rendering the issue as to the structural beams and ceiling heights ripe.

92. Moreover a clear exemption for construction under \$10,000.00 in Village Code Chapter 6 restricts the jurisdiction of the BAR, applicable to bar further review of the Window Work, which has a cost of less than \$10,000.00. See Castaldi Affidavit.

93. The \$10,000.00 floor for BAR review of construction or alteration of a structure or building appears in Section 6-3 of the Village Code applicable to the BAR.

94. A list of the grounds for BAR disapproval of an application appears in Section 6-7, which excludes interior construction (as recognized by the ZBA relative to the Finish Basement Permit), and also side and rear exterior construction, because the relevant authority of the BAR to disapprove of construction and alterations is limited to issues which affect the front facing parts of the building.

95. If the ZBA is free to deny Donat's application challenging interior construction for basement work covered by the Finish Basement Permit, it is clearly arbitrary and capricious for the ZBA to refuse to recognize the other jurisdictional limitations of the BAR in Chapter 6, and insist that the side facing windows and rear patio and rear exit steps are subject to re-determination by the BAR to satisfy the finality rule. In other words, a Court determination of the irrational and arbitrary distinction made by the ZBA provides a basis for Petitioner to be excused from the exercise of submitting the Correction Items to the BAR first.

96. Another exception to the general rule of the requirement of exhaustion of administrative remedies lies in the "futility doctrine", clearly applicable here. The ZBA has ordered Petitioner AVC to take the issue of the Correction Items (rear exit steps, patio, window well, ceiling height, addition of a supporting beam, and the post Certificate of Occupancy separate permit application to move/add windows, i.e., the Window Work) back to the BAR.

97. The requirement of BAR review is nothing more than a Trojan Horse, designed to prolong administrative review and frustrate and delay the Petitioner's legitimate right to a permanent Certificate of Occupancy for 1019 Grove Street, and a post C of O building permit for the Window Work. What the Resolution neglects to state is that pursuant the statute regulating the BAR, Chapter 6 of the Village Code, BAR does not have jurisdiction over the matters the ZBA

insists must be reviewed, rendering any referral to the BAR for review totally futile. Although the limitations on BAR authority are mentioned above, they will be further explicated here.

98. As stated above, Section 6-3 of the Village Code, "Definitions" applicable to the BAR, denies BAR jurisdiction over structural alterations or additions, where the estimated cost is less than \$10,000. As such, the Window Work, with a cost of less than \$10,000.00 (see Castaldi Affidavit), is entitled to proceed without BAR review.

99. Section 6-7 of the Village Code, "Disapproval of Application; Standards", limits BAR review to features on the front facing side of a building. All of the items for which the ZBA has demanded a further BAR review involve features located on the sides or back of the home, or in the interior, including side windows, the rear steps, backyard patio, ceiling heights, and structural beams. In fact, Mr. Castaldi in his Affidavit relates that the Chairman of the BAR along with the Building Inspector visited the site in person, and both agreed that anything to do with the inside of the houses (the floor heights and beams), and features located on the exterior, but not on the façade (the rear exit steps the patio and the window wells), had nothing to do with the BAR.

100. Moreover, Mr. Marchansanti, in the Marchansanti Affidavit (Exhibit F), affirms based on his experience as an architect, that the items selected for BAR review in the Resolution, i.e., the additional window well for 1019 Grove Street and the adjustment of window heights and addition of two upstairs windows, do not alter, modify, or otherwise effect the frontage of the residence, and that as a result BAR lacks jurisdiction over these matters.

101. According to Second Department caselaw, a property owner will be excused from obtaining a final administrative decision if pursuing an appeal to an administrative agency like a zoning board of appeals, would be futile, for example when the agency has "dug in its heels", as did the ZBA, or lacks discretion to grant the purportedly required approval, as does the BAR here. See

East End Resources LLC v. Town of Southold Planning Bd., 135 A.D. 3d 899, 900 (2d Dept. 2016).

In fact the Second Department states in East End that the “finality rule” is not “mechanically applied”, and a further exception exists where the municipal entity uses “repetitive and unfair procedures in order to avoid a final decision”. Id.

102. In the instant matter, the switch of the ZBA from a position endorsing the concepts of mootness and laches in connection with an application to dismiss the Donat Petition 2, to a position which zealously supports Donat’s current attempts to block completion of the Grove Street Project, by providing *ultra vires* definitions for undefined terms (“improvements”), ordering the Building Inspector to inspect window wells for Final Plat compliance in excess of ZBA jurisdiction, and insisting on sending AVC back for an unnecessary BAR review outside of the authority of BAR, are solid evidence of repetitive and unfair procedures to support application of the futility exception.

103. An additional exception applies to excuse Petitioner from the finality rules. To the extent that a determination pursuant to Article 78 relies on statutory interpretation, it will be deemed ripe for Court review, without the requirement of exhaustion of administrative remedies. See BBJ Associates, LLC v. Zoning Board of Appeals of Town of Kent, 65 A.D. 3d 154 (2d Dept. 2009), n. 1, which footnote cites to Matter of McCrory v. Zoning Bd. of Appeals of Vil. of Mamaroneck, 40 A.D. 3d 649 (2d Dept. 2007).

104. Accordingly, the interpretations of Chapter 342 sections requested by Donat but denied by the ZBA, the interpretation of the undefined word “improvements”, and the unauthorized interpretations relative to the Planning Board, are all ripe now for Court review.

105. This principle also applies to the issue of the jurisdictional authority of the BAR to decide anything other than the Correction Items (all in the interior, side, or rear of the residences)

and the \$10,000.00 jurisdictional limit excusing the Window Work from BAR review. The provisions in Chapter 6 of the Village Code relative to BAR jurisdiction are statutes, are ripe for construction by this Court.

POINT IV

**THE ZBA ACTED ARBITRARILY AND
CAPRICIOUSLY, ILLEGALLY,
AND IN ABUSE OF DISCRETION
RELATIVE TO
1019 GROVE STREET**

106. The ZBA acted arbitrarily, capriciously, illegally, and in abuse of discretion relative to 1019 Grove Street.

107. The provisions of the Resolution which require annulment pursuant to CPLR §7804 relating to 1019 Grove Street include the following, each of which is discussed separately below:

- a) The conditional requirement that the Building Inspector perform an inspection to determine whether that the basement window wells exceed the "approved building envelope on the Final Plat"⁷, and if they do, the window wells must be remedied or Certificate of Occupancy will be revoked.
- b) The requirement that Petitioner AVC must return to the BAR relative to increase in the number of basement windows, and size and location of window wells, floor height increase, addition of a structural beam, addition of a patio, and addition of rear steps (defined above as the "Correction Items") or the Certificate of Occupancy will be revoked.
- c) The condition that Petitioner AVC must return to the BAR relative to relocation and addition of windows (defined above as the "Window Work") for BAR re-approval, or the Certificate of Occupancy will be revoked.

⁷ As set forth above, the Building Inspector completed this "inspection" on May 22, 2018.

A. The Window Wells.

108. It was arbitrary and capricious and an abuse of discretion of the ZBA to have found the window wells zoning compliant and yet sought another means, albeit illegal and in excess of its authority and jurisdiction to issue orders and directions reserved to another agency of the Village, the Planning Board. See Point II above.

109. The ZBA acted arbitrarily and capriciously, illegally and in an abuse of discretion in ordering the Building Inspector to inspect the window wells relative to the building envelope, falling within the purview of the Planning Board and Chapters 58 and A348 of the Village Code, and in ordering AVC to remedy any alleged non-compliance, essentially requiring removal of zoning compliant below ground accessory uses, which are also required by New York State regulation for egress. See Point II above. At this point, only window wells (on the right side of 1019 Grove Street) were found to extend beyond the Planning Board's "building envelope." Requiring AVC to now rip out a zoning compliant accessory use (the window wells) or face permanent revocation of the certificate of occupancy is clearly arbitrary and capricious.⁸

110. Moreover the ZBA acted arbitrarily and capriciously irrationally, and in an abuse of discretion in requiring that basement windows and window wells must be returned to the BAR for review, when such issues are clearly moot under the doctrine of laches. See POINT II above.

B. Left Side Basement Window/Window Well, Floor Height Correction, Patio, and Structural Beams.

111. In the context of essentially arguing that features of 1019 Grove Street which the Building Inspector approved on June 20, 2017 as part of revised plans require BAR approval, in addition to the Correction Items, the Resolution again focuses on the zoning compliant below

⁸ It is also important to note that the removal of the basement window wells would create a serious safety issue due to the elimination of a New York State required means of egress.

ground window wells and basement windows which were present all along (implicated by the mootness and laches arguments in POINT I above). The Resolution requires that purported changes in the size and location of basement windows/window wells, and the increase in the number of basement windows (in truth by only one) compared to what was depicted on the original plans, now requires BAR approval.

112. This determination is arbitrary and capricious, irrational, and an abuse of discretion for multiple reasons.

113. First, the basement windows, as part of the building foundation, were clearly in existence from the beginning of construction, and thus are subject to the same mootness and laches arguments that the ZBA embraced in its motion to dismiss addressed in the Zambelli 2 decision and are also subject to the collateral estoppel and res judicata effect of Zambelli 2 (and also for that matter on the basis of judicial estoppel, referencing POINT I above).

114. Second, BAR approval is not required for the window wells, zoning compliant below ground accessory uses on the side of 1019 Grove Street, because they are not visible and do not affect the building façade, and thus excluded from BAR jurisdiction.

115. Third, the Resolution is further arbitrary and capricious, irrational, and an abuse of discretion for the ZBA to have ordered that the left side windows require approval of the BAR, when the ZBA already denied Donat's challenge to the Finish Basement Permits, because the same permits upheld by the ZBA cover the same three basement windows on the left side of 1019 Grove Street. What the ZBA has done is to approve the three left side windows in the context of the Finish Basement Permit, without requiring submission to the BAR, while elsewhere in the Resolution, arbitrarily sending the side facing basement windows back to the BAR for an unnecessary and

impermissible redetermination beyond the jurisdiction of the BAR, a sure example of arbitrariness and capriciousness, irrational decision making and abuse of discretion.

116. Regarding the Correction Items, i.e., the floor height increase (i.e., increase of a ceiling height from 8 feet to 9 feet due to a drafting error on the plans), addition of structural beams, and the addition of the patio and rear steps, the ZBA is acting arbitrarily and capriciously and irrationally, in requiring that AVC take these issues back to the BAR, when these features are outside of the purview of the BAR because they are interior (increase of floor height and addition of structural beams⁹), or behind the residence (the patio and rear steps), and do not implicate the front facing façade. The Castaldi Affidavit makes clear that even the BAR chairperson agreed that these features did not require BAR review.

C. The Window Work.

117. The Resolution requires BAR re-approval of moved/added windows which were the subject of a post Certificate of Occupancy permit issued by the Building Inspector. The ZBA claims that the Petitioner was somehow attempting to evade a required BAR review by manipulating the regulatory process and a scheme to "segment construction costs".

118. What the ZBA leaves out of its analysis is material covered in the Statement of Facts in the Verified Petition, which is summarized below.

119. Following the addition of windows and movement of windows (defined as the "Window Work") due to the need for corrections discovered during construction, the Building Inspector informed Mr. Castaldi that he was receiving pressure to have the additions and changes reviewed by the BAR.

⁹ The only "remedy" if BAR were to deny these changes would be to kick out the family living at 1019 Grove Street and tear down the house.

120. Mr. Castaldi accepted the Building Inspector's comments, prepared an application to the BAR, and appeared before the BAR, only to encounter an army of anti-development disciples rounded up by Donat. Seeing that he would be unable to get a fair hearing he withdrew his application for BAR approval, and removed the added windows and restored the moved windows to their previous heights, rendering the number of windows and their placement in congruence with the original plans on which the Certificate of Occupancy for 1019 Grove Street was based.

121. Because the cost of doing the Window Work was below the \$10,000.00, the jurisdictional limit of the BAR (explicated in POINT III above), Mr. Castaldi applied for a post Certificate of Occupancy permit for the Window Work, which did not require BAR approval. The Building Inspector issued the permit and Mr. Castaldi added the windows he had removed and moved windows he had restored to original heights.

122. Essentially AVC followed the same procedure for Window Work with a construction cost of less than \$10,000.00, that it would have followed in any previously built house in the Village of Mamaroneck, whose owner wished to make these changes after he or she had moved in and been living in the house for any period of time. AVC did something performed over and over in the Village, perform work under \$10,000.00 based on a post Certificate of Occupancy building permit not requiring BAR review.

123. As such, by holding AVC to a different standard, the ZBA was arbitrary and capricious, irrational and abused their discretion in essentially attacking AVC for finding a practical and fully legal solution for several changes to window heights that were not on the front facing façade of the residences.

POINT V

**THE ZBA ACTED ARBITRARILY AND
CAPRICIOUSLY, ILLEGALLY,
AND IN ABUSE OF DISCRETION
RELATIVE TO
1017 GROVE STREET**

124. There is no need here to address the issues relative to 1017 Grove Street other than the Fence, because the provisions of the Resolution for that property are null and void since they applied to a Temporary Certificate of Occupancy which has now been replaced with a permanent Certificate of Occupancy. Donat has now filed a new (identical) application against the Certificate of Occupancy for 1017 Grove Street which is currently pending before the ZBA.

125. However, the remaining issue of the Fence, unique to 1017 Grove Street, is covered here.

126. There is no doubt that the ZBA acted arbitrarily, capriciously, illegally, and abused its discretion in requiring that the Fence be removed or that the Petitioner must obtain an amendment to the Final Plat approval.

127. There is also no doubt that the Fence is zoning compliant as an "accessory use." See POINT II above. The Building Inspector considers the Fence zoning compliant as do Messrs. Salanitro and Mottarella, whose affidavits affirm the same. See Exhibits D and E.

128. The ZBA, in abuse of its discretion, strayed beyond the confines of Donat Application 1, in which Donat requested interpretation of Sections 342-3, 342-14, and 342-21 of the Village Code, all concerned with interpretation of Zoning Code provisions relative to definitions, accessory structures, and permitted accessory uses (like a fence) for a single family home. When reviewing an interpretation of a zoning code provision a zoning board is required to

rule on the 'narrow issue' before it [*citation omitted*]...." BBJ Associates, LLC v. Zoning Board of Appeals of Town of Kent, 65 A.D. 3d 154 (2d Dept. 2009). In other words, the ZBA essentially derogated its statutory duty to interpret the provisions of the Zoning Code, instead choosing arbitrarily and irrationally to interpret an undefined term in a Planning Board document and apply it to the Fence.

129. Legally, it has already been established that the ZBA has no authority to become involved in Planning Board matters, and certainly no authority to legislate undefined terms like "improvements".

130. POINT II above covers fully the lack of jurisdiction of the ZBA to involve itself with matters left to the Planning Board, governed by Chapters 58 and A348 of the Village Code, the incorrect and improper characterization of the Fence as an "improvement", an undefined term, and then in an unauthorized manner for an administrative agency to "legislate" a definition for improvement and apply it to the Fence.

131. The Second Department has already commented on substituting community opposition for interpretation of zoning restrictions, which must be construed narrowly, and in favor of the property owner when there is an ambiguity. See BBG Associates, LLC v. Zoning Bd. of Appeals of Town of Kent, 65A.D. 3d 154, 160 (2d Dept. 2009). ("In the instant case, the evidence adduced at the public hearing on the petitioner's application established that there was general community opposition to any further development, which would not constitute a basis for a factual determination against the petitioner [*citations omitted*].") In the instant case, bowing to community pressure should not substitute for adherence to statutorily granted administrative authority, in this case to apply rationally the Zoning Code to the issue before it, the compliance of the Fence with the Zoning Code.

132. Finally, review of Exhibit V, a diagram of the locations of multiple similar six foot white vinyl fences in the same neighborhood, further highlight the irrationality, and arbitrary and capricious nature of the ZBA's determination relative to the Fence.

POINT V

**THE ZBA SHOULD NOT HAVE
CONSIDERED THE DONAT APPLICATIONS
BECAUSE THE APPLICANTS ARE NOT AN "AGGRIEVED PARTY"
PURSUANT TO THE VILLAGE LAW**

133. Donat (along with the co-applicants on the Fence Permit) did not establish in her Application 1 and Application 2 how she was injured by the specific construction on the Grove Street Properties that she challenged, construction that is either below ground, behind or to the side of the residences, or inside. As such, she cannot be considered an "aggrieved party" with standing to challenge the Building Permits or other taken by AVC in alleged derogation of the Zoning Code.

134. The ZBA derives its authority not only from the local law, Village Code Chapter 342, but also from the "enabling law", the New York Village Law. NY Village Law § 7-712-a (4) restricts the hearing by a zoning board of appeals brought by an "aggrieved party", and states as follows:

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. *Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the village. [Emphasis supplied.]*

135. In other words, unless the party appealing a determination of the Building Inspector is a village official, the party bringing the appeal must be "aggrieved." There is no provision in Chapter 342 of the Village of Mamaroneck Code limiting the Village Law requirement that a person must be "aggrieved" to have their ZBA appeal heard, or defining "aggrieved."

136. A petitioner challenging an administrative action must demonstrate that it has standing to bring the challenge, i.e., that the administrative action will have a harmful effect on it. See Panevan Corp. v. Town of Greenburgh, 144 A.D. 3d 806, 806-807 (2d Dept. 2016). The petitioner must demonstrate that the action challenged will cause it direct harm or injury that is in some way different from that of the public at large. Id.

137. To have “standing” to bring a proceeding or legal action, a party must be “aggrieved.” See Society of Plastics Indus. v. County of Suffolk, 77 NY 2d 761, 773-774 (1991) [“Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the ‘zone of interests,’ or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.”]

138. Even though a party whose property is adjacent to the property that is the subject of the administrative action may rely on a presumption of direct injury for purposes of standing, the adjacent party must still demonstrate that it’s alleged injury falls within the “zone of interest” of the statute under which the agency is acting. Panevan, supra, 144 A.D. 3d at 807. The person must show that he or she will suffer a harm that is in some way different from that suffered by the public at large. See Eastview Properties, Inc. v. Town of Chester Planning Bd., 138 A.D. 3d 838 (2d Dept. 2016). Put differently, even though a party may be presumptively aggrieved due to the adjacency of his or her property, that person still must make a threshold showing of special damage, different from that suffered by the community generally. Mobil Oil Corp. v. Syracuse Indus. Development Agency, 76 N.Y. 2d 428 (1990).

139. Donat has failed to establish, even as a threshold matter how she is, or even could be, harmed by the below ground window wells, side facing windows, small back patio, rear exit stairs,

and interior beams, likely because these items cannot, by any stretch of the imagination harm her, especially since they are all compliant with the Village Zoning Code.

140. For the convenience of the Court, attached to the Verified Petition as Exhibit AA are photographs of the exterior features that Donat is challenging. Based on those photographs, it is impossible to determine what could conceivably cause Donat injury.

141. Donat's applications do not allege specific injury and just allege that her property is adjacent to the 1017 property, which is inaccurate. Since approval of the subdivision of the original 1017 Grove Street property, the rear of the Donat property abuts the left side of 1021 Grove Street, which property she mysteriously excluded from her current Application 1 and Application 2 to the ZBA (even though everything she alleges about 1019 would equally apply to 1021 Grove).

142. Caselaw states that conclusory and speculative allegations will not be accepted as the basis for aggrieved party status, and standing. See Panevan Corp., *supra*, 144 A.D. 3d at 808.

143. As for the Fence, it would be especially hard for Donat to claim injury, since her property does not abut the property line of 1017 Grove Street where the Fence is located. In fact, it could be more appropriately argued that the border Fence provided a clear benefit to Donat since it covered the poorly maintained rear yards of the properties bordering on 1017 Grove. The Court is referred to Exhibit W which shows the condition of the property line before the installation of the zoning compliant fence.¹⁰

144. As the Donat Application 1 and Application 2 do not provide proof of specific direct harm or injury to her, nor even allege it, the mere fact that Donat's residence abuts 1021 Grove Street, which is not even among the subjects of her applications to the ZBA, ZBA should have

¹⁰ The co-applicants on the Fence issue do border 1017 Grove. However, as this Court can see from the photographs showing the condition of the property line prior to the installation of the fence, the drop in grade and presence of dangerous debris (which would constitute an attractive nuisance) was actually remedied by the fence providing these adjoining neighbors with protection from possible litigation in case—for example—one of the many children living at the properties got injured.

rejected the Donat applications at the outset on the basis of lack of aggrieved party status pursuant to NY Village Law §7-712-a (4).

CONCLUSION

145. Based upon the foregoing, it is respectfully submitted to the Court that:

- a) The Resolution must be annulled in its entirety for the reasons stated above;
- b) The Resolution must be annulled to the extent that Donat Application 1 and Donat Application 2 is/are moot and barred by laches, and also collateral estoppel and res judicata;
- c) The instant matter is ripe for judicial review or is subject to one or more exceptions to the finality requirement relieving Petitioner from establishment of ripeness;
- d) The Resolution relative to the Fence for 1017 Grove Street must be annulled as *ultra vires*, arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;
- e) The Resolution relative to the window wells for 1019 Grove Street must be annulled as *ultra vires* arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;
- f) The Resolution relative to the demand that Petitioner must submit the patio, rear stairs, ceiling heights and the structural beams relative to 1019 Grove Street to the Board of Architectural Review must be annulled in that the resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and/or an abuse of discretion;
- g) The Resolution relative to the demand that Petitioner must submit window additions and modifications (the Window Work) and windows/window wells relative

to 1019 Grove Street to the Board of Architectural Review must be annulled in that the resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and/or an abuse of discretion;

h) The Resolution must be annulled relative to incorrect, arbitrary, irrational, and *ultra vires* interpretation of law, including the New York Village Law and the Village of Mamaroneck Zoning Code and the Village of Mamaroneck Code provisions regarding the BAR;

h) The Resolution must be annulled because Donat (and the co-applications) is/are not an "aggrieved" party pursuant to New York State Law; and that

i) The Resolution must be annulled in the entirety as it was issued and imposed on Petitioner solely in response to the community pressure and is therefore *ultra vires* and impermissible as a matter of law.

WHEREFORE, Petitioner respectfully requests that this Court issue an order/judgment:

A) Annuling the ZBA Resolution in its entirety;

B) Annuling the Resolution to the extent that the Donat Application is moot and barred by laches, and also collateral estoppel and res judicata;

C) Annuling the Resolution relative to the Fence for 1017 Grove Street as *ultra vires*, arbitrary and capricious, affected by an error of law, and/or an abuse of discretion;

D) Annuling the Resolution relative to the window wells for 1019 Grove Street as *ultra vires*, arbitrary and capricious, affected by an error of law, and an abuse of discretion;

E) Annuling the Resolution relative to the demand that Petitioner must submit the patio, rear stairs, ceiling heights and the structural beams at 1019 Grove Street to the Board of

Architectural Review in that the Resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and an abuse of discretion;

- F) Annulling the Resolution relative to the demand that Petitioner must submit window additions and modifications (the Window Work) and windows/window wells relative to 1019 Grove Street to the Board of Architectural Review in that the Resolution is arbitrary and capricious, affected by an error of law, *ultra vires* and an abuse of discretion;
- G) Annulling the Resolution relative to incorrect, arbitrary, irrational, and *ultra vires* interpretations of law, including the New York Village Law, the Village of Mamaroneck Zoning Code and the Village of Mamaroneck Code provisions regarding the Board of Architectural Review;
- H) Annulling the Resolution because Donat is not an "aggrieved" party pursuant to New York State Law;
- I) Annulling the Resolution in the entirety as it was issued and imposed on Petitioner solely in response to community pressure and is therefore *ultra vires* and impermissible as a matter of law; and
- J) For such other and further relief as to this Court may seem just and proper.

Dated: White Plains, New York
June 11, 2018

Yours, etc.,



David S. Klausner
THE LAW OFFICE OF DAVID S. KLAUSNER PLLC
Attorneys for Petitioner AVC PROPERTIES LLC
150 Grand Street – Suite 510
White Plains, New York 10601
Tel: (914) 288-8706

To:

THE VILLAGE OF MAMARONECK ZONING BOARD OF APPEALS
(Comprised of Barry Weprin, David Neufeld, Kelly Wenstrup, Robin Kramer, and Meg Yergin)
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

DAN GRAY
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

JOCELYN DONAT
617 Hampshire Road
Mamaroneck, New York

ANTHONY LIVIDINI
645 Wood Street
Mamaroneck, New York

KAREN COLANERI
649 Wood Street
Mamaroneck, New York

BRIAN GELLMAN
1021 Grove Street
Mamaroneck, New York

STACEY GELLMAN
1021 Grove Street
Mamaroneck, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents

Index No.

AFFIDAVIT OF MARC
CASTALDI

STATE OF NEW YORK :
COUNTY OF WESTCHESTER :
SS.

MARC CASTALDI, being duly sworn deposes and says:

1. I am the Owner and managing member of AVC Properties, LLC ("AVC").
2. I make this Affidavit in support of the Petition of AVC pursuant to Article 78 of the C.P.L.R. seeking to set aside the various resolutions made by the Village of Mamaroneck Zoning Board of Appeals ("ZBA") which was filed with the Village Clerk on May 10, 2018. I am fully familiar with the facts and circumstances set forth herein based on my personal knowledge.

3. I have been involved with residential and commercial construction for over nineteen (19) years and during that period I have been involved in the development of more than 10 sub-divisions and my companies have built, reconstructed or worked on hundreds of residential and commercial properties throughout Westchester County. I also provide construction services to homeowners, builders and municipalities acting as both a general contractor and subcontractor throughout lower Westchester County.

4. Sometime in or about the Spring of 2012, I was approached by the former owner of 1017 Grove Street to purchase the property at 1017 Grove Street. Upon information and belief, the property was—at that point—owned by an estate of ten (10) heirs. After my review of the zoning code and what would be legally allowed to be developed on the property, I executed the purchase and prepared an application to the Planning Board of the Village of Mamaroneck for a code compliant 3 lot sub-division.

5. After the sub-division filing, Ms. Jocelyn Donat (she lives next to the former 1017 Grove Street property) approached me with interest in purchasing one of the new homes, specifically the one directly next to her existing house that would eventually be constructed on the lots upon approval. (Please see e-mails relating to the possible purchase of a home by Donat annexed hereto collectively as Exhibit "Q").

6. Ms. Donat maintained professional and friendly communication with me during from April through July 2014. In July of 2014, another neighbor who rented a condo adjoining the properties, Brian Gellman (current owner of Lot # 1 – 1021 Grove Street) approached me to purchase a home on the eventual approved lots. This offer as well as Ms. Donat's desire to purchase a property from me was kept confidential and I

specifically did not share the identity of each party's information. At that time, I was not aware that the Gellmans and Donats were friends nor that their kids attended school together. This may explain why Ms. Donat has decided not to challenge the certificate of occupancy issued for 1021 Grove Street which is currently owned and occupied by the Gellmans.

7. It was my understanding that Ms. Donat and Mr. Gellman did not know of the mutual interests of each to pursue a purchase of the potential home on lot 1 and I did not share their identities, interest or offers for the property. (Exhibit Q).

8. I subsequently learned (from Brian Gellman) that there was local opposition to the project and he was concerned that this would lead to delays in his eventual purchase and use of the planned residence. I was shown an e-mail sent on April 22, 2014 making disparaging claims against both me and the project. (Exhibit Q).

9. I was stunned to learn that the individual behind the efforts to oppose and frustrate the development was the same person who has only recently offered to purchase one of the constructed residence on proposed Lot 1: Jocelyn Donat. I let Ms. Donat know that I was no longer willing to sell her a house. During the public hearings before the Planning Board, Ms. Donat stated that she had attempted to purchase 1017 Grove Street property for personal and investment purposes including a planned two (2) lot subdivision of the property. I later learned from the former owner that since Ms. Donat had included a condition of approval for a two (2) lot subdivision (with acquisition of variances) as part of her offer, it was rejected.

10. Over the last 4 years, Ms. Donat has made it her mission to frustrate the development through misleading and often times inaccurate statements to neighbors and Village of Mamaroneck officials. For years, she also maintained 24 hour/day video surveillance on the properties until she was required to remove the camera following the passage of a 2017 law prohibiting surveillance across property lines. Ms. Donat has now sent literally hundreds of e-mails to nearly every Village of Mamaroneck official, successfully advanced the false narrative that I am the "big bad developer", filed numerous appeals to the ZBA, filed three (3) actions at law and continues her crusade despite the clear absence of any damage or injury to her personally and the fact that where a decrepit house and unkempt yard once existed, there are three (3) state of the art, immaculate residences occupied by three (3) families (including my own) and a beautifully landscaped and maintained yard.

11. Despite intense scrutiny (more so than any other development project in the history of development in Mamaroneck), I have not once been cited with a stop work order or received any other violation that I did not follow the plans and specifications of the project or the laws governing the creation and construction of these single family residences.

12. The Grove Street Project began on January 10, 2014 when I submitted an application for a three (3) lot subdivision to the Village of Mamaroneck Planning Board ("PB"). I personally attended every meeting.

13. As part of the PB approval process, I agreed to certain restrictions affecting the location of proposed primary residences within a specific building envelope (designed to move the residences forward on the lots to preserve more backyard space). I

also agreed that no accessory structures (such as an in-ground pool, detached garage or a guest/pool house) could be constructed outside of the building envelope. I obtained construction drawing approvals on October 22, 2014 followed by preliminary PLAT and subdivision approval on December 10, 2014. The final Planning Board Resolution is dated May 27, 2015. (Exhibit I). The Final PB resolution included Plan C-2 which graphically shows the restrictions. (See Plan C-2 annexed hereto as Exhibit "R").

14. The negotiated PB Resolution placed a clear restriction on where I could build a main use structure (i.e. the home) and where I could not build any accessory structures (outside the building envelope). However, there were no restrictions imposed on accessory uses such as installation of a border fence, window wells, putting in a swing set or any other common accessory uses which would be handled in accordance with the Village's zoning codes. Instead, any future proposed action that did not require a building permit under Section 124-4 Subsection B parts 1-4 would be permitted along with all accessory uses as defined by Section 342-21B as long as that accessory use was not considered an accessory structure

15. The word "improvement" which was never discussed or even mentioned throughout this process (and does not appear on the final layout plans or PB Resolution approving the subdivision) but was included (as an undefined term) in the final Plat and covenants and restrictions which were drafted by the Village attorneys well after approval by the Planning Board. The term "improvement" is exclusively associated with Primary and Accessory Structures (not uses).

16. At no time in these public negotiations on the planning board record did I offer to give up my right to a fence, window wells or any other common accessory uses related to my properties not substantiated by the zoning code. In fact, there was some limited discussion regarding a fence during the March 24, 2014 PB hearing. In the context of public comments and in response to a concern expressed by a neighbor, the minutes reflect that Planning Board Chairman Ianniello suggested that a small fence be put up. It is telling that the only mention of a fence during months of hearings was a statement that I could put up a fence.¹ (See March 24, 2014 Minutes annexed hereto as Exhibit "S").

17. In fact, despite her extensive involvement in the Planning Board approval process, Donat never once requested "any restriction on the installation of a border fence. Just weeks prior to the Planning Board Approval, Donat submitted a letter to the Planning Board setting forth what she wishes to have them address prior to final approval. Nowhere in that letter is a request to limit the installation of a border fence, a small patio in the rear behind each house or window wells. Instead, she was only concerned with Main House Construction and Location along with the protection of her Maple Tree. (Please see Donat Letter to the Planning Board dated May 8, 2015 annexed hereto as Exhibit "T").

18. Brian Gellman, who along with his wife Stacey purchased 1021 Grove Street from me submitted a letter addressing the claim by Donat that a fence was not permitted on the border of 1017 Grove Street; which would obviously affect his own rights to install a fence in the future. (See Letter of Brian Gellman annexed hereto as Exhibit "U").

¹ Donat filed a FOIL request seeking any references to the word "fence" during the ZBA hearings and this was the only responsive document.

19. There was existing fences around the Grove Property before any construction which served to protect the prior residents from falls due to the existing property elevation differences; which were greater than 30'' between 1017 Grove Street and the Lividini and Calonier properties. Accordingly a border fence is actually required under New York State Law and protects the young children who currently occupy not only 1017 Grove Street but also 1019 and 1021 Grove Street. This is based on the guard rail safety requirement found in New York State Residential Code §R312.1. In addition, there are similar fences on properties in the immediate vicinity of Donat and the Grove Street Properties. (See local map showing locations of other border fences annexed hereto as Exhibit "V").

20. The condition of the side yard border (before I installed the fence) show the dangerous conditions and grade differentials. (See photos of side yard before fence annexed hereto as Exhibit "W").

21. At no point did Donat appeal through an Article 78 Proceeding the Planning Board Resolution.

22. In January 2016, I submitted applications for building permits to allow for construction of single family homes at 1017, 1019 and 1021 Grove Street. (Please see application for 1019 Grove Street annexed hereto as Exhibit "X"). As part of the approval process, I appeared before the Village of Mamaroneck Board of Architectural Review ("BAR"). BAR is authorized, pursuant to Section 6-03 (Construction subject to review and approval) to review applications for construction exceeding \$10,000. The code (under Section 6-7) provides the grounds for disapproving an application when it would be so

detrimental to the desirability, property value or development of the surrounding area. BAR is further limited to the front facing facades. In order to maintain community character, although all three homes were essentially identical, I created differing front facing appearances using different materials. BAR approved these plans on February 18, 2016.

23. The Building Inspector, Mr. Dan Gray, issued Permit #16-0317 (for 1017 Grove Street) and #16-0307 (for 1019 Grove Street) on March 30, 2016 ("Building Permits"). (the Building Permits are attached to the Farrell Affidavit (Exhibit M)).

24. Donat appealed the issuance of the Building Permits to the ZBA. Donat challenged the legality of the lots created by the Planning Board Resolution (something she never did through a timely Article 78 Proceeding) and alleged that the Building Permits should not have been issued due to allegations that the building plans submitted by AVC were not complying with various provisions of the Planning Board Resolution.

25. Over the course of fifteen months (including twelve (12) months of public hearings), the construction of the single family residences (which began with 1021 Grove Street) progressed. During the course of construction, Donat had the properties under 24 video surveillance, took what appeared to be hundreds of photographs, and made countless complaints to the Building Inspector along with nearly every other Village official. At no point however, did Donat seek an injunction stopping any of the work in progress.

26. Shortly after I started construction, I realized that there were several architectural drawing and transposition errors on the plans submitted and approved by the Building Inspector. The specific architectural errors/omissions included: (a) the window on the right side of the powder room was show on the floor plan but not on the elevation plan, (b) an 8 foot ceiling

height was listed for each floor (it was supposed to be 9 feet)² which was merely a drafting error, (c) the stairwell window was improperly located at the level of the stairwell platform and should have been higher to provide adequate illumination to the stairwell, (d) the plans accidentally omitted some structural beams needed for support and (e) the two (2) side facing garage windows were located at a height that made them essentially unusable. This is not unusual when constructing homes and the process of identifying these issues involves submitting amended or as-built plans to the Building Inspector. When these changes do not affect or alter—in any way—the front facing façade, there is no requirement or indication to return to the Board of Architectural Review.

27. The amended plans submitted in connection with Permit #16-0307 (for 1019 Grove Street) are annexed hereto as Exhibit “Y”).

28. In response to pressure from Donat, the Building Inspector informed me that I would have to go back to BAR for the changes set forth on the amended and as-built plans. The Building Inspector insured me this would be a ministerial process. What happened at the BAR was anything but. I appeared with my architect on August 18, 2016 who was prepared to explain the changes and the errors he made on the original building plans. Donat and her allied community activists took over the meeting and tried to make it a referendum about the entire project.³ It quickly became clear that I was not going to get a fair hearing (or any hearing for that matter) and I withdrew the application.

29. I communicated with the Building Inspector the next day (August 19, 2016) regarding next steps. The Chairman of BAR (Mr. Malte Stockhart) also personally came out to the site. Both agreed that anything to do with the inside of the houses (the floor

² The 9 foot heights for the first and second floor are still well below what is permitted under the codes.

³ E-mails obtained through FOIL show how Donat worked to make the BAR a referendum about the entire project rather than a review of the amended plans (please see Donat e-mails re BAR annexed hereto as Exhibit “bb”).

heights and beams), the rear steps and patio and the basement window wells, had nothing to do with BAR. To avoid any further issues, complications or delays, I agreed to restore the framed windows (addressed to correct errors/omissions) to their original positions. I calculated that based on the total cost, the work on raising/lowering windows, adding two (2) upstairs windows and putting in the missing powder room window (collectively "Window Work") would cost less than \$10,000. As such, I determined that I could later seek to obtain a separate building permit for this work and that the permit application would not require BAR approval under Section 6-3.

30. After I received the certificate of occupancy for 1019 Grove on July 28, 2018, I sought an application for a new building permit for the Window Work. Since it was for less than \$10,000, there was no basis for the permit to be subject to BAR review and the permit was issued on July 28, 2018. The work commenced shortly thereafter. While Donat (who was aware of the work but once again did not seek to obtain an injunction to stop work) and the individual members of the ZBA may not like what I did, it was 100% legal and in compliance with the codes. (see Window Work Permit Application at Exhibit "bb").

31. Throughout the many months of construction, Donat kept my properties under 24 hour video surveillance and took literally hundreds of photos. She also sent nearly daily e-mails to the Building Department and other Village Officials making allegations and statements regarding the project. Putting aside the merit (or actually lack of merit) of her allegations, these e-mails show that Donat was contemporaneously aware of each and every step in the process. More to the point, the things she now claims in Application 1 and Application 2 were known to Donat at those times and yet she still failed

to take any legal action to preserve the status quo. E-mails were sent on June 28, 2016 (enclosing photos clearly showing the framed houses and installed window wells), July 14, 2016 (making complaints that the construction differs from the building plans), July 25, 2016, complaining of the rear patios, July 31, 2016 (complaining about basement windows, window wells and house heights), August 2, 2016, summarizing all of her complaints about the project, August 16, 2016 (asking for a stop work order) and August 24, 2016 (enclosing pictures showing the window wells and patios). (please see these e-mails (collectively "Donat E-mails") annexed hereto as Exhibit "Z").

32. The Grove Street Project was by far the most scrutinized residential development project in the Village of Mamaroneck. I have been subjected to blatantly false accusations both personally and professionally and the ZBA has allowed itself to be used to further the unsavory agenda of a small group of individuals and most notably Jocelyn Donat. The residences at 1021, 1019 and 1017 Grove Street (where I live with my family) are all complete and fully code compliant. The changes that I made to 1019 (both before and after the certificate of occupancy) were to address either mistakes in the original architectural plans or to address some minor improvements that were needed but did not—in anyway—alter or change what was approved by BAR. As such, it is clear that the Resolution was carefully and deceptively crafted to cause me aggravation rather than address anything of substance.

33. Since pictures are worth a thousand (or more words), on June 5, 2018, I took photographs of 1019 Grove Street, the border fence at 1017 Grove Street and of the

entire project. These photographs have been labeled to identify the specific external aspects of the Resolution. The photographs have been attached hereto as Exhibit "aa".

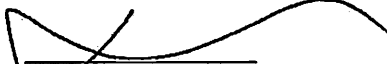
34. For all these reasons, I ask that the Petition be granted and the Resolution be annulled.

Dated: June 9, 2018



MARC CASTALDI

Sworn to this 9th day of June



Notary Public

DAVID S. KLAUSNER
Notary Public, State of New York
No. 02KL6135738
Qualified in Westchester County
Commission Expires October 24, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

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OF APPEALS (COMPRISED OF BARRY WEPRIN,
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DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents

Index No.

AFFIDAVIT OF
BENEDICT SALANTRO

STATE OF NEW YORK :
COUNTY OF WESTCHESTER :
SS.

Benedict Salanitro P.E., being duly sworn deposes and says:

1. I am a licensed Professional Engineer in the State of New York with over thirty (30) years of municipal engineering experience , including work for the Village of Mamaroneck, the Village of Tarrytown and the Village of Scarsdale .

2. I have reviewed the various applications made to the Village of Mamaroneck Land Use Boards including the Planning Board, Zoning Board of Appeals and Harbor Costal Zone Board and I am fully familiar with the Zoning Code of The Village of Mamaroneck with specific focus on Section 342 – Zoning.

3. I submit this Affidavit in support of the Petition of AVC Properties pursuant to Article 78 and I am fully familiar with the Grove Street property, including the properties currently designated 1019 and 1017 Grove Street, and have personally reviewed all associated applications, permits, plans, resolutions and approvals relevant to the construction of single family residences on those properties ("Properties"). I have also reviewed the May 10, 2018 Resolution of the Village of Mamaroneck Zoning Board of Appeals which makes certain findings regarding and relating to the Properties ("Resolution").

4. The duties of the Building Inspector for the Village of Mamaroneck are set forth under Section 126 of the Building Code Administration and Enforcement. This is the chapter of the Village of Mamaroneck Code that empowers and clearly defines the role of the Building Official (in this case the Building Inspector). §126-3 (Building Inspector) states in Section A that: "The Office of Building Inspector is hereby created. The Building Inspector shall administer and enforce all the provisions of the Uniform Code, the Energy Code and this chapter. The Building Inspector shall have the following powers and duties..." Those duties are delineated as follows: (1) to receive, review, and approve or disapprove applications for building permits, certificates of occupancy, certificates of compliance, temporary certificates and operating permits, and the plans, specifications and construction documents submitted with such applications; (2) upon approval of such applications, to issue building permits, certificates of occupancy, certificates of compliance, temporary certificates and operating permits, and to include in building permits, certificates of occupancy, certificates of compliance, temporary certificates and operating permits such terms and conditions as the Building Inspector may determine to be appropriate; (3) to conduct construction inspections, inspections to be made prior to the issuance of certificates of occupancy, certificates of compliance, temporary certificates and operating permits, fire safety and property maintenance

inspections, inspections incidental to the investigation of complaints, and all other inspections required or permitted under any provision of this chapter; (4) to issue stop work orders; (5) to review and investigate complaints; (6) to issue orders pursuant to §126-15A Compliance Orders of this chapter; (7) to maintain records; (8) to collect fees as set by the Board of Trustees of the Village as set forth in Chapter A347 of this Code; (9) to pursue administrative enforcement actions and proceedings; (10) in consultation with the Village Attorney and Village Prosecutor, to pursue such legal actions and proceedings as may be necessary to enforce the Uniform Code, the Energy Code and this chapter or to abate or correct conditions not in compliance with the Uniform Code, the Energy Code or this chapter; and (11) to exercise all other powers and fulfill all other duties conferred upon the Building Inspector by this chapter.

5. The duties of the Building Inspector relating to zoning compliance are set forth in §342-86 (Duties of Director of Building, Code Enforcement and Land Use Administration). The scope of review (as it relates to anything imposed by the Planning Board) is limited to site development plans which are issued under 342 Article XI Site Development Plan Approval.

6. AVC obtained a sub-division approval from the Planning Board to create three (3) lots along with conditions of approval. The PB Resolution did not include site plan approval (which is something entirely different). Village of Mamaroneck Zoning Code §342-75, requires a site plan for any buildings and structures other than one or two family dwellings.

7. The ZBA derives its authority from Section 342-90 (Powers and Duties). This enables the ZBA to hear and decide appeals from and review from any order, requirement, decision, interpretation or determination made by any administrative official or board charged with the implementation or enforcement of this chapter. Emphasis and of critical importance is that “of this chapter” solely refers to Chapter 342. As such, if the Grove Street Project included a site plan

(which it does not), the ZBA could review whether the Building Inspector properly enforced the site plan since it is covered under Section 342. However, the ZBA cannot review anything derived from another chapter (such as Chapter 348 which covers Planning Board action on subdivision applications). Accordingly, the ZBA could only review whether the Building Inspector, in making a decision to issue a permit (or a certificate of occupancy) ignored or misinterpreted some provision of Chapter 342.

8. Under the guise of reviewing the actions of its Building Inspector, the ZBA does not have the legal authority to consider or look beyond the zoning code (specifically Section 342) and determine compliance with the resolutions of a separate administrative entity. Similarly, the ZBA does not have the authority to direct the Building Inspector to take actions outside of Chapter 342.

9. I have reviewed the ZBA's findings and determinations as set forth in the Resolution and conclude that the ZBA has exceeded its legal authority and has also made findings and conclusions that are simply incorrect.

10. The Resolution makes specific findings regarding below grade window wells on the properties. In my opinion, to a reasonable degree of engineering certainty, a window well, which is not defined under Section 342 of the Village of Mamaroneck Code, is by definition a space maintained between a below grade window and the surrounding soil. The window well functions to retain the soil from inhibiting the use of the below grade window which also provide (New York State Building Code) mandated means of safe egress from a below grade area of the home. These walls could be made from wood, stone, cement blocks, plastic readymade wall systems, or plastic covers or any other building material that supports the soil and further acts as retaining walls for the surrounding surface; these walls that create the window well are best described as a "retaining wall" for the surrounding soil.

11. A wall, including a retaining wall, is classified as accessory use under the Village of Mamaroneck Code Section 342-21B which is defined as "a use of land or of a building or portion thereof which is customarily incidental and subordinate to the principal use of the land or building located on the same lot with such principal use. An accessory use may not be accessory to another accessory use." Section 342-21B (9) includes fences, walls or retaining walls. As such as an accessory use, the window wells are not subject to any zoning setbacks which apply to accessory structures (main or accessory).

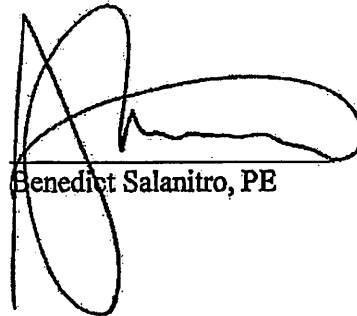
12. In my opinion, to a reasonable degree of engineering certainty, and based on my twenty-five (25) years of experience as a licensed Professional Engineer, the window wells referred to in the Resolution are accessory uses and are—in all ways—fully compliant with Section 342 of the Village of Mamaroneck Code.

13. The Resolution also finds that a fence installed on the border between 1017 Grove Street and neighboring properties is somehow not permitted and should be subject to minimum setback from the property line. A fence is an accessory use and not an undefined "improvement." According to the Village of Mamaroneck Code and the commonly accepted standards in the industry; in my opinion there is no basis for the Village of Mamaroneck Zoning Board of Appeals to find that the installed fences are not 100% zoning compliant and a clear, permissible accessory use on the properties. Fences are not considered or defined as a "structure" in the Village of Mamaroneck Code.

14. I have further reviewed the affidavit submitted by George Mottarella and confirm his findings relating to "no restriction of accessory uses associated with the plans and approvals of the Grove Street Project" and further, nowhere in my work experience in other municipalities in Westchester County is a "building envelope" inclusive of setbacks to accessory uses. Building

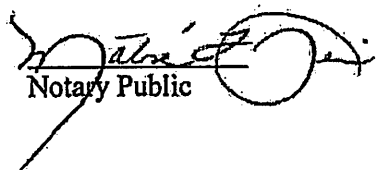
Envelopes are reserved and defined only to main structures or accessory structures (, i.e., pools, cabanas, decks, detached garages, etc.), not accessory "uses".

Dated: June 8, 2018



Benedict Salanitro, PE

Sworn to this 8th day of
June, 2018.



Notary Public

MATSE L. JENKINS
Notary Public - State of New York
No. 01JE6236317
Qualified in Bronx County
My Commission Expires 2/28/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents

Index No.

**AFFIDAVIT OF GEORGE
MOTTARELLA, P.E. L.S.**

STATE OF NEW YORK :
COUNTY OF WESTCHESTER :
SS.

George Mottarella P.E. LS, being duly sworn deposes and says:

1. I am a licensed New York State Professional Engineer for 38 years and the former head of the City of Rye Engineering and DPW Department.
2. I am also a licensed New York State Land Surveyor for 31 years practicing in Westchester County including The Village of Mamaroneck
3. I am the surveyor of record for the three lot subdivision now consisting of 1017, 1019 and 1021 Grove Street in the Village of Mamaroneck ("Grove Street Project") having been hired by AVC Properties LLC ("AVC") when the property was purchased pre-development.


Mamaroneck Zoning Code – Section 342-21B(9)) and there is no prohibition attached to the Grove Street Project on the construction of any accessory uses. These window wells are also completely zoning compliant as any projection below grade is not subject to mandatory property line setbacks.

7. I conducted the survey and submitted the as built surveys for the construction at 1017, 1019, and 1021 Grove Street homes (certified by me as true and accurate) denoting the setbacks of the primary structures (the main house) and confirm, to a reasonable degree of engineering and surveyor certainty, that the houses (including the window wells) do not violate the building envelopes nor any restriction on the remaining aspects of the properties.

8. The survey I submitted for the 1021 Grove Street completed home which I understand is not part of this ZBA resolution has all the same setbacks, uses and window wells built on the plan and not rejected as violating the building envelope.

9. I further confirm, again to a reasonable degree of engineering and surveyor certainty, that the property border fence at 1017 Grove Street is an accessory use, is 100% compliant with Village of Mamaroneck Zoning Code and does not violate—in anyway, the restrictions placed on the property.

Dated: June 7th, 2018


George Mottarella PE LS

Sworn to this _____ day of
June, 2018.

Notary Public

DAVID S. KLAUSNER
Notary Public, State of New York
No. 02KL6135738
Qualified in Westchester County
Commission Expires October 24, 2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
AVC PROPERTIES LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

Petitioner,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN ,

Respondents

Index No.

AFFIDAVIT OF
STEPHEN MARCHESANI

STATE OF NEW YORK :
COUNTY OF WESTCHESTER :
SS.

Stephen Marchesani AIA, being duly sworn deposes and says:

I. I am a licensed Architect in the State of New York with over 30 years of experience and I submit this affidavit in support of the Petition of AVC Properties, LLC ("AVC") pursuant to Article 78. This affidavit is made from my personal knowledge as well as my review of the documents pertaining to the Grove Street Project (and particularly 1017 and 1019 Grove Street) including all applications, permits, plans, resolutions and approvals relevant to the properties and construction of single family residences on those properties. I have also reviewed the May 10, 2018 Resolution of the Village of Mamaroneck Zoning Board of Appeals ("ZBA") which makes certain findings regarding and relating to the Properties ("Resolution").

2. I was hired by AVC to prepare all architectural designs and building plans regarding and relating to the Grove Street Project.

3. I am fully familiar with Chapter 342 of the Zoning Code Village of Mamaroneck and I based all my designs and plans for this or any project in the Village of Mamaroneck to be fully zoning compliant.

4. I prepared architectural building plans for the construction of three (3) single family residences to be built on 1017, 1019, and 1021 Grove Street which were incorporated by AVC into their application for building permits. These plans included both floor plans and elevation plans (collectively "Building Plans").

5. AVC discovered, subsequent to my preparation and submission of the Building Plans, several drafting errors. These include the following drafting errors related to 1019 Grove Street:

- a. The window on the right side powder room was shown on the floor plan but not on the elevation plan;
- b. In all the new homes I have designed for AVC, a 9 foot floor to ceiling height on the 1st and second floor is always required. I had the plans scaled to this height but made a drafting error in labeling the finished height as 8 feet on the Building Plans;
- c. The stairwell window was improperly located on the Building Plans (it should have been placed higher to provide proper illumination to the stairwell);
- d. The Building Plans omitted some structural beams that were needed for support of the structure; and

- e. The two (2) side facing garage windows were improperly located at a height that made them essentially unusable.

6. Mr. Castaldi, the owner of AVC, has built many custom homes I designed and due to his experience and practical knowledge of construction, he frequently catches design elements or errors that require modifications or revisions. This is very common when constructing custom homes designed for a specific project or lot and the Grove Street Project was no different.

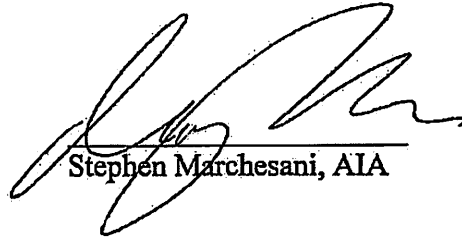
7. Mr. Castaldi contacted me within days of realizing the drafting and transposition errors and requested that I contemporaneously make plan updates and file amendments with the Building Department so the plans would be accurate. The modifications made were required to correct some human errors that if left unchecked would have greatly affected the value, use, and aesthetics of the custom home. None of the corrections that were made affected—in anyway—the front facades of either 1019 or 1017 Grove Street.

8. Some additional modifications were also requested by AVC including steps from the rear of the premises to the back yard (which were unintentionally omitted by me in the Building Plans), a rear patio area, and two (2) additional windows (one with a window well) on the below ground basement (one to be used to meet State Code for egress) on the side walls of 1019 and 1017 Grove and two (2) additional windows (also on the side walls) one for each of the upstairs bedrooms to provide better lighting and ventilation. All of these corrections and minor changes were incorporated into as built and updated plans which were then filed with the Building Department in or about July 2016.

9. The Resolution requires AVC to go to the Board of Architectural Review ("BAR") for hearings regarding and relating to the 2 additional basement windows (one with an egress window well) (for 1019 Grove) as well as the adjustment of the window heights and addition of two


(2) upstairs windows. In addition, the Resolution is requiring AVC to return to BAR for the internal floor heights, structural support beams, rear steps and rear patios. None of these changes alters, modifies or otherwise effects the frontage of the residence at 1019 Grove and therefore, in my opinion (to a reasonable degree of Architectural certainty), BAR has no jurisdiction over these issues.

Dated: June 8, 2018



Stephen Marchesani, AIA

Sworn to this 8th day of
June, 2018.



Notary Public
DAVID S. KLAUSNER
Notary Public, State of New York
No. 02KL6135738
Qualified in Westchester County
Commission Expires October 24, 2021