SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT: ORANGE COUNTY

----------X In the Matter of CINDY L. BOOTH, Petitioner, - against – VILLAGE OF TUXEDO PARK, Respondent, For a Judgment Pursuant to Article 78 of the CPLR and other Relief, ----------X	To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties. Index No. 7359/2013 **DECISION, ORDER and JUDGMENT** Motion Date: February 5, 2014

The following papers numbered 1 to 18 were read and considered on: (1) a motion by Petitioner for a preliminary injunction; (2) a cross motion by Respondent to dismiss the petition and; (3) a motion by Petitioner to strike Respondent's cross motion and supporting papers.

Order to Show Cause- Exhibits A & B	1-2
Affidavit in Opposition- Neuhauser- Exhibits 1-13- Memorandum of Law	3-5
Amended Notice of Petition and Petition- Exhibits A-C	6-7
Notice of Cross-Motion to Dismiss- Golden Affirmation- Rinaldi Affidavit- Ledwith Affidavit- Memorandum of Law	8-12
Notice of Motion to Striek- McCartney Affirmation- Exhibits A-C- Memorandum of Law	13-16
Reply Affirmation– Golden- Reply Memorandum of Law	17-18

Upon the foregoing papers, it is hereby,

ORDERED, that the motion for a preliminary injunction is granted to the extent set forth herein; and it is further

ORDERED, that Petitioner's motion to strike Respondent's cross motion and all supporting papers is denied; and it is further

ORDERED, ADJUDGED and DECREED, that the cross motion is granted in part and denied in part, as set forth herein, and, in conformity therewith, the relevant portions of the petition are hereby dismissed.

Introduction

Petitioner Cindy Booth owns a home and property in the exclusive gated community of Respondent Village of Tuxedo Park (hereinafter sometimes referred to as the "Village"). Immediately to the west of her property is a road (Tuxedo Road a/k/a the Causeway a/k/a East Lake Road). A stone wall runs along the east side of the road, very close to the road. A section of the wall approximately 200 feet long running along the road in front of Booth's property leans noticeably toward the road. In early March of 2013, a stone (approximately 12" x 16" x 5") fell out of the wall and onto the road. As a result, the Village closed the road and made inquiries. Ultimately, the Village concluded that Booth owned and/or was responsible for the wall, that the wall was adversely affecting the safety, health and welfare of the adjacent road, and that Booth needed to remedy the same by dismantling and rebuilding the wall. Subsequently, the Village, apparently concluding that Booth was not acting with sufficient alacrity, commenced dismantling the wall on the Friday afternoon before the Labor Day weekend. However, that work was stopped by a temporary restraining order issued in this proceeding (Freehill, J.).

Booth now moves for an injunction preventing any further work on the wall pending resolution of the issues of ownership of the wall and the appropriate remedial measures to be taken. Booth alleges, *inter alia*, that she does not own, and is not responsible for, the wall, and that the Village's determination to dismantle and rebuild the wall was arbitrary and capricious, and was not supported by substantial evidence in the record. Booth further asserts that the wall

is of historical significance, and that her engineers have recommended various alternative remedies to repair and secure the wall that will cost considerably less and be less disruptive. Further, she alleges, the Village's actions and proposed actions concerning the wall violate the State Environmental Quality Review Act ("SEQRA") and several Village Code provisions.

The Village cross moves to dismiss the petition in its entirety.

Booth further moves to strike the cross motion and all supporting papers.

Factual/Procedural Background

The facts, insofar as they are relevant to pending motions, reveal the following sequence of events.

By letter dated March 7, 2013, the Building Inspector for the Village of Tuxedo Park (John Ledwith IV) notified Booth that, on March 5, 2013, "it was reported that a large stone had fallen out of [her] wall along Tuxedo Road" (Opposition, Exhibit 7). Ledwith noted that the Village was looking into the matter and would get back to Booth when it had more information.

Thereafter, and by letter dated March 11, 2013, Weston & Sampson ("W & S"), engineers for the Village, provided a preliminary assessment of the wall (Opposition, Exhibit 1). W & S noted that the wall was purported to be over 100 years old, although its actual age was not known. They opined that, based on the stones and mortar used, the wall appeared to have been built in sections. Further, that it appeared that there was an original, shorter wall (approximately three feet tall), that had been added onto it. The section of the wall at issue was approximately 8 feet tall and 180 to 200 feet long. It was reported to have been bulging for a long period of time. Currently, it leaned noticeably toward the road, and was approximately 8 to 10 inches over vertical. Upon inspection, the bulging portion of the wall appeared severely distressed, which

resulted in the opening of joints and the loosening of stones from their mortar beds. Thus, it was noted, in the absence of friction, stones would fall out. W & S identified several stones that appeared to be "close" to falling out. Further, water flow from the property behind the wall [Booth's] had resulted in sinkholes and erosion, and water was heard flowing behind the wall, which suggested the possibility of a natural spring, which would add to the water condition behind the wall. There were also no weep (drainage) holes in the section of the wall at issue, although there were weep holes in sections of the wall to the south, which remained intact. W & S noted that the lean of the wall had been the subject of concern for a while, and that "it appears likely that at some point in the near future that the wall could exceed its natural stability and fail suddenly." Based upon the foregoing, W &S concluded that, based on all of the facts and circumstances, "there is minimal to no factor of safety in the walls [sic] current condition," and the wall posed a threat to public safety. W & S recommended that the adjacent road remain closed, and that the Village dismantle and reconstruct the wall.

Thereafter, and by letter dated March 14, 2013, O'Brien & Gere ("O & G"), additional engineers hired by the Village, reported on their visual inspection of the wall on March 13, 2013 (Opposition, Exhibit 2). O & G noted that the wall, which was about one foot from the adjacent roadway, had "rotated out of plumb about 12 inches and the upper 6 feet of the structure had shifted about one inch toward the road." The lower two feet of the wall was damp, and there was "significant mortar loss throughout." The sloping ground behind the wall was depressed about two inches and there were several small, shallow sinkholes. O & G opined that the rotation and horizontal displacement of the wall "clearly indicates that it has failed." Further, that the loss of the stone at issue indicated that the mortar had deteriorated to the point that it

could no longer hold masonry in place. O & G stated that this appeared to be due to several factors, including the lack of drainage behind the wall, and seepage, which had exposed the mortar to excessive freezing and thawing cycles.

Ultimately, O & G concluded, the wall would collapse onto the road, although there was no reasonable method to predict when that would happen. However, they noted, even a modest increase in the load condition of the wall, including an elevated groundwater level due to a heavy rain, or vehicular traffic by the wall, could initiate such a collapse. O & G recommended that the section of the wall at issue be demolished and replaced.

By letter dated March 28, 2013, Thomas Wilson, then Mayor of the Village, advised Booth that the Village had obtained the two opinions *supra*, and that both engineering firms had concluded that "[her] wall [was] significantly deformed in its geometry, and in danger of collapse onto Tuxedo Road" (Exhibit 10). Further, that the dangerous condition needed to be remedied because the road was a "main arterial roadway." Consequently, he advised Booth that she was being notified, in accordance with the Village Code sections 75-22 through 75-25, and sections 83-10 through 83-12, that the wall on her property was adversely affecting the safety, health and welfare of Tuxedo Road, and that she needed to either submit a timely plan for remediation of the wall, or request a hearing before the Village Board of Trustees ("Village Board") within 7 days, after which the Village Board would determine the proper course of corrective action. If Booth failed to take such action, Wilson noted, the Village would enter upon her property and perform the work itself at her cost.

Subsequent thereto, and by letter dated April 17, 2013, Wilson noted that Booth had requested a hearing before the Village Board, which had been scheduled for April 29, 2013, at

6:00 p.m. (Opposition, Exhibit 11).

By letter dated April 22, 2013, engineers hired by Booth– Brooker Engineering, PLLC ("Brooker")– responded to the reports *supra* from G & S and O & G (OSC, Exh A). In relevant part, Brooker noted that the stone at issue, which measured approximately 15" x 16" x 5", had been replaced and re-mortared at the time of their visit on March 29, 2013. In general, Brooker noted, it had observed no evidence of any recent or sudden movement in the wall (*e.g.*, displaced capstones, cracked or missing mortar). Rather, although there was deterioration throughout, and the wall was in need of general maintenance, all deterioration appeared to have occurred gradually over time. Brooker further opined that the wall did not provide support for Booth's property or home, and was not needed for the same. Thus, Brooker asserted, removal of the wall would have no affect on the stability of Booth's property.

Brooker also noted that it had observed truck tire marks on the road close to the wall (*i.e.* less than 5 feet from the wall), and opined that it was possible that the wall had been struck by the same, which could have damaged the wall and/or dislodged the stone at issue. Brooker also heard water running behind the wall. Upon inspection, Brooker noticed a storm drain that deposited water from behind the wall to the gutter line in front of the wall.

In sum, Brooker opined, there was no basis to declare an emergency concerning the wall, and there were many ways to remedy the issues with the wall. These included, *inter alia*, removing stones to reduce the height of the wall to 3 feet, or keeping the wall the same height and securing the same by using "soil nailing" or "dead men," or concrete fill behind the wall.

In a memorandum submitted to the Village Board by Booth, dated April 29, 2013, Booth raised several issues (OSC, Exhibit A). First, she contended, the notice provided to her was

defective, to wit: The Village was purporting to be acting pursuant to cited provisions of the Village Code which require notice to a property owner of a condition on private property adversely affecting the safety, health and welfare along, on or adjacent to any Village road or right-of-way. However, she noted, according to such provisions, notice of such a condition must be provided by certain designated officials, to wit: the Police Department, the Board of Trustees, the Planning Board, the Building Inspector or the Public Works Superintendent. Here, she noted, the only "notice" she received was the letter *supra* from Wilson, who was then the Mayor of the Village, which is not one of the designated officials. Thus, she argued, such "notice" was ineffective and defective, and no decision flowing therefrom would be valid.

Second, she asserted, at the time of the letter, Wilson was not residing in the Village. Thus, by operation of the Public Officers Law, the office of mayor was vacant. Consequently, she argued, any action taken by Wilson was null and void.

On the merits, she asserted, there was no evidence that the wall was in imminent danger of collapse, or that any emergency situation existed that necessitated quick action. Rather, she contended, from various correspondence between the parties, it was clear that the wall had a noticeable lean and had been described as unsafe since at least 2001. Moreover, she argued, the correspondence did not suggest either that she owned the wall, or that the Village believed that she did, or that she was responsible for the same. In sum, she contended, at best, the Village was overreacting. Indeed, she opined, it was "perhaps merely a coincidence" that the Village closed Tuxedo Road just when the road was needed for construction at the private Tuxedo Club Boat House, which would have necessitated the closing of the road for private purposes.

In any event, Booth argued, the alleged dangerous condition of the wall did not occur on

or emanate from her property, which was required by the Village Code to impose liability upon her for the same. Rather, she asserted, none of the deeds for her property, which dated back to 1887, make any mention of the wall. Moreover, she contended, a 1990/1991 site plan for the property, approved by the Village, depicts the wall outside of her property line. Further, she noted, there was a 1981 topographic survey of her property which indicated all structures on the property, including walls, and the wall at issue was not indicated.

In addition, Booth noted, in 1953, the Village accepted the dedication of numerous private streets and roads in the Village, including the road at issue. Pursuant to New York State Village Law, as it existed at that time, all public roads needed to be at least two rods (33 feet) in width. Here, she asserted, measuring 16.5 feet from the center of the section of the road at issue, the wall is within the required dedication. Moreover, she noted, the 1953 dedication was not limited to the paved portion of the street and roads, but expressly included "all appurtenances."

In addition, Booth asserted, under New York State Highway Law § 319, which is applicable to Villages, a municipality may assess the costs of the removal of an obstruction on a public roadway as against a property owner only if the obstruction was placed there by or with the consent of the property owner. Here, she argued, to the extent that the Village Code may be read to allow the imposition of such costs upon an adjacent property owner without such a finding, it was unconstitutional and unenforceable.

In sum, Booth argued, she does not own the wall and is not responsible for the same, and the Village has not otherwise demonstrated any basis upon which to impose the costs of remediating the same on her.

In any event, Booth asserted, even if she did own the wall, it appeared that the Village

was then considering only two remediation options, to wit: Either dismantle and rebuild the wall as is, or reduce the wall to the alleged original height of three feet and re-grade her property. However, she noted, she had submitted a report from Brooker (*supra*) outlining equally effective and less costly alternatives, all of which will cause less of an impact upon her property and the road. Thus, she argued, if the Village insisted on pursuing its own chosen remedies, she should not be compelled to pay for the same. Further, she asserted, she should be compensated for any damage to her property.

In sum, she contended, the proceeding before the Board should be terminated, and the Village should pay all costs for the repairs to the wall, and compensate her for any damage they cause to her property.

The record contains the following correspondence between the parties:

(A) A letter dated November 19, 1999, from Paul Sutton (then Building Inspector for the Village) to Booth, informing her that he had noticed "that some of the stones that make up your retaining wall appear to be loose," which presented a hazard to vehicular and pedestrian traffic (Neuhauser Opp., Exhibit 7).

(B) A letter dated September 29, 2000, from Sutton to Booth, informing her that he had noticed "that some of the stones that make up your retaining wall appear to be loose," and that such a condition violated section 83-10 of the Village Code (Neuhauser Opp. Exhibit 7).

(C) A letter dated November 9, 2001, from Booth to the Village, informing the Village of "two serious issues concerning damage to [her] property" during recent work on Tuxedo Road (Neuhauser Aff., Exhibit 8). First, she asserted, a truck had destroyed two brass lamps and the stone columns of her driveway. Second, she contended, she had observed trucks or tractors slamming "into the large retaining wall along" Tuxedo Road. She described the collisions as sounding like "explosions," and having been forceful enough to have knocked china off of her shelves. She stated that such collisions did not constitute "normal wear and tear" and inquired what steps the Village intended to take to reinforce the wall.

(D) A letter dated December 10, 2001, from C. Kent Kroeber (then the Mayor of the Village), responding to Booth's letter *supra* (Memorandum dated April 29, 2013, Exhibit A). Kroeber noted that the issue concerning the brass lights had been addressed by the contractor. However, he asserted, neither he nor any village inspector had observed any damage to the wall

that would indicate that it had been struck by a truck or a tractor. Kroeber stated:

> While on the subject of your retaining wall, I'm reminded that some time ago you were notified by the Village that the wall was in a dangerous condition. Specifically, there were some loose stones and that the wall itself has been dangerously slanted for many years. You have an obligation to repair and maintain the wall in a safe and satisfactory condition, as do all residents who have a roadside wall. It does not appear to me that the necessary repairs have been made. Since however, I am not an expert on such things, I will have our new Building Inspector review the situation in relationship to current Village codes.

(E) A letter dated December 18, 2001, from Steve Secon (then Building Inspector) to Booth, noting that violations on file concerning her property included "an unsafe retaining wall that fronts a public street."

(F) A letter dated January 8, 2002, from Secon to Booth, thanking her for having her masons relocate the loose stones that had been identified in the wall (Memorandum dated April 29, 2013, Exhibit A). After expressing his understanding that Booth's masons would return in the warmer weather to replace and re-mortar the stones, Secon concluded:

> It should be noted at this time, that portions of the wall have a noticeable lean. Perhaps this is due to the height and amount of earth being retained, and the lack of small slots or holes, called weepholes, to alleviate the hydrostatic (water) pressure behind the wall. It would be prudent while this matter still has our attention, to have a professional engineer inspect this wall and verify in wring, that this wall in its current condition poses no threat to passersby or determine if repairs are in order.

(G) A letter dated May 13, 2003, from Ledwith (*supra*), stating that no violations had been found on Booth's property (Memorandum dated April 29, 2013, Exhibit A).

(H) A letter dated September 25, 2006, from Ledwith to Booth, discussing several matters, including the "condition of the stone wall" in front of her home (Memorandum dated April 29, 2013, Exhibit A). Ledwith stated that, as the current building inspector, he agreed that the wall "needs attention." He asked that Booth provide an engineer's report concerning the structural stability of the wall within 60 days of receipt of his letter.

(I) A letter dated June 4, 2007, from the Village to an abstract title company, stating that no violations of the New York State Building Code had been found on Booth's property (Memorandum dated April 29, 2013, Exhibit A).

By letter dated May 3, 2013, O & G analyzed the report of Brooker (*supra*) for the

Village (Opposition, Exh 12). Regarding Brooker's contention that the wall might have been struck by a truck, O & G noted that it had observed no scars or scratches on the wall that would evidence such contact. Regarding Brooker's contention that the storm drain behind the wall connected to a sewer line in the front, O & G opined that, without test pits, there was no way to determine whether that was the case or, if so, whether the system was working. Finally, O & G opined, several of Brooker's arguments miss the point, as a gravity wall is designed to resist loads without rotation or sliding, which is occurring here. Indeed, O & G contends, no party knows, or can know, the exact cause of the wall's failure without further investigations and testing.

By resolution dated May 6, 2013, the Village Board summarized the background and reports *supra*, and noted that a title search had been conducted concerning the wall, which had revealed that the wall was "coincident" with Booth's property line (Booth's Motion, Exhibit B). Based on such, the Village Board found as follows:

First, that the wall was in danger of collapse and was adverse to the health, safety and welfare of the Village and its residents and guests.

Second, that Booth had not established that the wall was safe, but only that there had been no recent, sudden movement.

Third, that Booth owned the wall and was responsible for its repair and maintenance.

This conclusion was based on (i) a 1974 and 1983 survey which showed the wall coincident with Booth's property line, (ii) the lack of any evidence that the Tuxedo Park Association (which used to own the roads in the Village) owned the wall and deeded it to the Village as part of the road dedication in 1953; (iii) prior correspondence between the Village and Booth, dating back to 1999, which indicated that both parties believed that Booth owned and was responsible for the wall; (iv) Booth's prior removal and modification of the wall for a driveway without seeking permission from the Village as owner of the wall; and (v) the fact that, at the time of the road dedication in 1953, the Village could have accepted a road that was less than 33 feet wide.

Consequently, after considering all reasonable and feasible alternatives, the Village Board resolved that:

(1) Within 15 days, Booth needed to dismantle 200 to 220 feet of the wall (to be identified by the Village Engineers) down to the "horizontal seam" approximately three feet above the road line; and

(2) that, within 3 months after the completion of the dismantling, Booth needed to rebuild the wall to approximately its former height, and back-grade and fill the soil behind the wall to its previous height, and install such drainage as was needed to ensure the long term structural integrity of the wall.

Finally, it was resolved, Booth was to be notified of such findings and told that, if she failed to take such corrective action within the time frames stated, the Village would enter upon her property and perform the same at her expense.

For the purpose of implementing its Resolution, and by letter dated May 7, 2013, the Village (by Deborah Matthews, Clerk-Treasurer) notified Booth of the Village Board's determination (Opposition, Exhibit 13).

By letter dated June 10, 2013, counsel for Booth (J. David McCartney) noted that Booth had been fully cooperating concerning the wall and had hired her own engineers (Brooker) to assess the situation (Order to Show Cause, Exhibit B). However, he asserted, despite efforts to resolve the matter, the Village, by email sent the afternoon of Friday, June 7th, had notified Booth that it intended to dismantle the wall the following day, working from the adjacent road. McCartney noted that Booth objected to such dismantling, and to anyone entering onto, or excavating or grading, her property. Further, he asserted, any work performed by the Village would be in violation of various (identified) Village Code provisions and SEQRA. McCartney noted that Booth's engineers had concluded that the wall was not in imminent danger of collapse. Indeed, he asserted, he had been informed that the Village had tested the stability of the wall by

placing a bottle of water on top of the same and ramming it with a backhoe. McCartney stated that it was his understanding the water in the bottle had "not even rippled." Further, he asserted, inspection of the wall had revealed no cracked mortar or missing cap stones, which indicated that the wall had remained at the same angle since it was built.

In sum, he argued, there was no reason to dismantle the historic wall, especially in haste and without a plan. Rather, he noted, Booth's engineers believed that all issues with the wall could be remedied by various means, including excavating behind the wall and filling it in with concrete. Finally, McCartney asserted, the Village had not put the proposed work on the wall out for public bid, and had not inquired whether any assistance was available from the federal or state government, in that the entire Village was on the National Register of Historic Places.

At a meeting of the Village Board held June 11, 2013, the wall was discussed (Amended Notice of Petition, Exhibit C). After the discussion, which included comments from McCartney, the Village Board voted to declare the wall project a Type II action under SEQRA. Further, the Village Board voted to declare that the initial dismantling of the wall down to a height of two to three feet required the specialized services of a stone mason, thereby exempting it from public bidding requirements.

The Request for a Preliminary Injunction

By order to show cause dated August 30, 2013, Booth moved for a preliminary injunction restraining the Village from demolishing the wall, or touching or damaging her property, pending resolution of this proceeding.

In support of the motion, McCartney (counsel for Booth) argues that an immediate temporary restraining order was needed to stop the dismantling of the wall by the Village, which

was scheduled to commence that very afternoon.[1] As relevant background, McCartney asserts the following:

The whole of the Village of Tuxedo Park is listed in the National Registry of Historic Places, including the wall at issue, which was built by Italian masons in the late 1800s at the behest of Mr. Lorillard, the creator of Tuxedo Park. The portion of the wall at issue, which runs along Booth's property, had been leaning toward the road for as long as anyone can remember. However, starting in early March 2013, Booth began receiving the letters (*supra)* warning that the wall was in danger of imminent collapse, and that she needed to remedy the same. The problem, McCartney argues, is that Booth does not own the wall. In any event, he contends, there is no evidence that the wall has moved in over a century, or that it is in danger of collapse, or that, even if it was, demolition is necessary. Rather, he asserts, at the Village Board meeting held April 29, 2013, (*supra*) to discuss the wall, Booth presented various documents (appended as exhibits) which definitively proved that she did not own the wall, and which demonstrated that the wall was not in danger of imminent collapse. Further, he notes, she also presented an engineering report (from Brooker) which set forth alternatives to dismantling the wall. Despite such evidence, McCartney asserts, and the lack of evidence to the contrary, the Village concluded not only that Booth owned the wall, but also that she needed to dismantle the wall within10 days and to re-build it within three months. McCartney further argues that these conclusions are arbitrary and capricious, and that the Village failed to properly consider Booth's proposed alternatives to demolition.

McCartney further notes that, in early June of 2013, Booth allowed the Village to conduct

[1] As noted *supra*, a temporary restraining order was issued.

further excavation and inquiry concerning the wall. Further, that, thereafter, there was no action taken on the matter for 2 ½ months. However, he noted, at the most recent scheduled meeting of the Board, which was held that past Tuesday, the Board stated that it had obtained specifications for the work on the wall, which it was putting out for bid. At that meeting, McCartney asserts, he warned the Board that, if it took action, he would be compelled to commence a CPLR article 78 proceeding to resolve the issues of ownership of the wall and of the alternatives to dismantling the wall. McCartney notes that, on that very morning, which was the Friday before the Labor Day weekend, the Board, without notice to Booth, held an emergency meeting to discuss the wall. At the meeting, it was resolved that the dismantling of the wall would begin that very afternoon and would continue into the night, and that such work would be performed by the Village Department of Public Works, with the other aspects of the work being put out to bid. McCartney argues that no emergency or other change precipitated such hasty action, in that the road remained closed and the condition of the wall had not changed.

By contrast, he asserts, tearing down a 200 foot section of the wall will cause irreparable damage to Booth's property, and will expose her property to damage from rainstorms and hurricanes in what will no doubt be a lengthy delay in completing the rebuilding work. In addition, he notes, the Village intends to compel Booth to pay for the work, which will be much more costly than her proposed alternatives to dismantling and reconstructing the wall. In sum, he argues, the Village should be restrained from acting until the issues raised *supra* can be litigated.

In further support of the motion, Kenneth DeGennaro (of Brooker) avers that he is a professional engineer who visited the site on March 29, 2013, and again in early June 2013.

DeGennaro notes that the wall is a gravity wall, which means that it relies on its own weight for stability. Thus, DeGennaro asserts, any significant movement of the wall would have a pronounced effect on the capstones, which were installed and mortared decades ago. However, he states, upon inspection, he observed that the capstones were intact. Further, he opines, although the mortar in the wall has deteriorated and is in need of general repair and maintenance, the deterioration had occurred over time. For example, he observed no cracking, which would indicate sudden movement. DeGennaro opines that, based upon his observations, an emergency dismantling and replacement of the wall is not necessary. Indeed, he notes, according to the Village's own engineers, the conditions at issue had existed for many years. Moreover, he opines, there are feasible and cost-effective alternatives to dismantling and rebuilding the wall, including the use of "soil nailing," "dead men" and the placement of concrete fill behind the wall to reinforce the wall; all of which would be less costly and would cause less damage.

In further support of her motion, Booth avers that the wall at issue was present when she purchased her property in 1981. Further, she asserts, since that time, she had never observed any changes to the wall. Booth notes that she did not receive notice of the emergency meeting of the Village Board, held that very morning, but rather learned about it from a neighbor.

In opposition to the motion, Lili Neuhauser, Mayor of the Village, notes that the total length of the wall at issue is approximately 500 feet in length, and that it varies in height from several feet to approximately 12 feet. Neuhauser asserts that, when the stone at issue was dislodged on March 5, 2013, it was unclear whether the event indicated the need for a simple repair or implicated a larger issue concerning the structural integrity of the wall. Thus, the adjacent road was closed and inquiries were made, which included the commissioning of the

reports *supra* from W & S and O & G. W & S concluded that, viewing the materials and mortar used in the wall, it had been built in different sections, possibly over a period of 100 years. Further, that it appeared that there was a lower section of the wall that had been built upon. W & S determined that years of incremental movement of the wall had resulted in the opening of joints and the loosening of stones from the mortar. Further, W & S noted that there were sinkholes behind the wall. Thus, W & S concluded, the wall posed a threat to public safety.

Similarly, Neuhauser notes, O & G determined that the wall had rotated out of plum, and that there was significant mortar loss throughout. O & G concluded that the wall had failed and could collapse if exposed to an increase in load, such as an accumulation of water from a heavy rain, or vehicular traffic.

From these opinions, Neuhauser asserts, the Village concluded that the wall constituted a danger and needed to be remedied. Neuhauser denied that the Village allowed continued use of Tuxedo Road for the benefit of the private Tuxedo Club Boathouse. Rather, she contends, the Village merely allowed continued use of the road by property owners who needed access to their property, which included Booth and the club.

During the investigations of the wall *supra*, Neuhauser asserts, the Village ordered a title search for the wall. Pursuant to Village Law, Booth may be held accountable for the wall if she owns the same and/or if the cause of the wall's instability emanates from Booth's property. The Village also inspected, *inter alia*, various deeds and documents from the 1953 dedication of all roads in the Village, including the road at issue. The Village found no evidence that the Tuxedo Park Association (which dedicated the roads) owned the wall at the time of the dedication, either outright or as an appurtenance to any road. By contrast, Neuhauser asserts, surveys conducted

by Booth and her predecessor "clearly show that the stone retaining wall lies on Ms. Booth's property line." Further, Neuhauser notes, the Village engineers opined that the wall appeared to have an original three foot base. Consequently, she asserts, "the upper 5 feet [is] not being used as a retaining wall beneftiting [sic] the roadway, but only [as] benefiting [sic] the Petitioner's private property." In sum, she argues, although there is "no clear and definitive single document establishing ownership of the stone retaining wall, the available indicia of ownership all point to ownership of the wall by the adjacent property owner, now [Booth]."

Neuhauser notes that, after ownership of the wall was determined, other records were reviewed concerning the wall's maintenance and repairs. The records demonstrated that, since at least 1999, the Village had consistently looked to Booth as the person responsible for repairing and maintaining the wall. For example, in a 2002 letter (*supra*), the Village Building Inspector thanked Booth for the efforts of her mason to mortar loose stones. In a 2001 letter (*supra*), Booth complained to the Village Board about persons damaging her property, including trucks hitting the wall. In addition, in the late 1990s, Booth cut away and modified a portion of the wall to build a driveway for her property without requesting permission from the Village as owner of the wall. Rather, Booth sought only the permission that would be sought by an owner of the wall. In addition, Neuhaser argues, Booth is getting special benefit from the wall, as it retains the soil and grade of her property. Based on all of the above, Neuhauser asserts, the Village notified Booth that she was responsible for the wall and had the right to demand a meeting concerning the repair of the same, which she exercised. Neuhauser contends that the subsequent hearing was neither a public hearing nor a quasi-judicial proceeding at which witnesses were sworn and evidence taken. Rather, it was a hearing akin to those typically held

by planning boards. At the hearing, Booth was allowed to speak and to present the report from her engineers (Brooker). Neuhauser notes that Brooker did not opine that the wall was stable and safe, but rather only that there had been no recent movement, and that there was no immediate threat.

At the next meeting of the Board, held May 6, 2013, the Village Board concluded that, on the evidence before it, Booth was the owner and/or responsible for the wall, and the wall posed a threat to public safety and needed to be repaired. Further, the Village Board concluded, among the alternatives, the dismantling and re-building of the wall was the most appropriate. Consequently, Neuhauser notes, by letter dated May 7, 2013, (*supra*) Booth was notified that she had 10 days to dismantle the wall, and three months to rebuild the same and install drains, or effectuate other needed repairs. However, Booth took no action. Neuhauser notes that the parties did continue to communicate, and that it was agreed that a test pit would be excavated behind the wall. After the excavation, W & S stated that their opinion as to the corrective measures needed remained the same. Thus, Neuhauser asserts, the Village resolved to dismantle the wall and rebuild it using the same stones. It was decided that the Village would perform the dismantling work, but that the rebuilding work would be accomplished by experienced stone masons, and would be put out to bid.

On August 30, 2013, the Village resolved to commence the dismantling of the wall, and began work that afternoon. However, the work was stopped by a temporary restraining order issued in this proceeding (*supra*). In sum, Neuhauser argues, Booth should not be granted a preliminary injunction stopping further work on the wall.

Appended as exhibits to Neuhauser's affidavit are, *inter alia*:

(A) The results of a title search and other documents related to the ownership and control of the wall (Exhibit. 3).

(B) The Village resolution from 1953 accepting the dedication of roads, and documents related thereto (Exhibits 4 & 5).

(C) Surveys of Booth's property (Exhibit 6).

(D) The contract specifications for the proposed work on the wall (Exhibit 14).

Petitioner's Amended Notice of Petition and Petition

By Verified Amended Petition dated September 4, 2013, Booth alleges that the Village's unexplained and inexplicable decision to destroy a historic wall when other feasible alternatives were available, was not rational nor reasonable. Rather, she alleges, the conduct of the Village is an overreaction to a single stone falling out of a wall that had been leaning for decades. Booth further argues that the stone falling out did not convert the wall into a dangerous condition that needed an immediate and drastic remedy. Indeed, she alleges, although the road had been closed since March due to alleged safety concerns, the Village had allowed the road to be used by vehicles, including heavy trucks, servicing the Tuxedo Boat House, which is a members-only private club. Booth opines that it is "interesting" that the Village commissioned a title report for the wall and her property in February 2013, which is before the stone fell into the road. Regardless, she notes, despite the search, the Village had not presented one document indicating that she owns the wall. Rather, at best, the Village has documentary evidence that the wall is "coincident" with her property line, which is not the same as owning the wall. Conversely, she noted, other documentary evidence reveals that the wall is part of the adjacent roadway, which was dedicated to the Village in 1953. In sum, she asserts, absent proof that the wall is on her property, the Village cannot charge her for the cost of the work on the same.

Moreover, she contends, while the Village has disclaimed ownership of the wall, it proposes to dictate the exact manner in which it must be repaired.

As a point of law, Booth notes that the March 28, 2013, letter/notice she received concerning the wall was sent by then Mayor Wilson; the Village mayor is not a person authorized under the Village Law to issue such notice. Thus, she alleges, the Village never obtained jurisdiction over her. This defect, she asserts, which renders the notice and hearing jurisdictionally defective, was raised and preserved at the hearing on the wall before the Village Board (*supra*).

Moreover, Booth alleges, at the hearing, she presented documentary evidence that the wall was owned by the Village (as part of the road dedication) and that there was no emergency necessitating removal of the wall. Indeed, she notes, the Village does not dispute that, at the time it accepted the dedication of the road, the Highway Law required roads to be at least 2 rods wide, which would encompass the wall at issue. Rather, she asserts, the Village merely argues that it was permitted to accept a road less than 2 rods wide; not that it actually did so.

Further, Booth asserts, she presented evidence of other remedies besides dismantling and removing the wall.

Thus, she alleges, the Village's conclusions that she owned the wall, and that it needed to be removed, are arbitrary and capricious, and affected by error of law, and are not supported by substantial evidence in the record.

In addition, she asserts, the Village proposes to tear down the historic wall and remove 20 to 30 feet of dirt. This work, which is to be performed right across the street from Tuxedo Lake, which is the primary source of potable water for the Village, has not been the subject of inquiry,

and is not in compliance with requirements of SEQRA. That is, the work has and will be performed without any environment impact review.

Further, Booth alleges, the Village did not comply with section 100-50 of the Village Code, which emphasizes the historic nature of the Village and the need to comply with SEQRA when applicable. Moreover, she asserts, the Village has not complied with other Village Code provisions, including, *inter alia*, sections that require approval for a proposed project from the Board of Architectural Review, notice of any proposed work to all affected property owners 48 hours prior to work being commencing, and the filing of detailed drawings prepared by a registered architect or professional engineer. In fact, Booth asserts, after being advised of these sections, the Village cancelled a planned meeting of the Village Board, and held a meeting on June 11, 2013. At the June 11th meeting, the Village Board decided to perform the work as a single project, and to classify the project as a Type II action under SEQRA. It also decided that the Village engineers would take a more careful look at the project. However, Booth asserts, the Village did not address the violations of the Village Code *supra*.

For the next 2 ½ months, Booth notes, the wall remained intact and the road closed. During that time, Booth alleges, the Village Board held various secret meetings in violation of the Open Meetings Law. Late in the evening on August 27, 2013, a proposed agenda for the regularly scheduled meeting of the Village Board the next day was posted and indicated that the wall would be discussed. At the meeting, the mayor announced that the Village engineers had drafted specifications for work on the wall and that the matter would be put out to bid in several weeks. When asked, the mayor was unable to state what alternatives to dismantling and re-building of the wall had been considered. Further, although the mayor stated that the bid

specification documents would be released to the public "as soon as possible," they had yet to be released. At the meeting, Booth notes, her attorney remarked that he would have no choice but to commence an article 78 proceeding because the four month statute of limitation was approaching to challenge the May 6, 2013, resolution *supra*. As a result of the same, she asserts, on Thursday, August 29, 2013, after business hours, the Village Board scheduled an emergency meeting for August 30, 2013, at 9:30 a.m. At that meeting, the Village Board summarily ordered the dismantling of the wall, with the work to begin that very day. The Village Board also determined to put out to bid : (1) the work for the construction of a foundation for a "cantilever" wall; and (2) the masonry work to be performed on the front of the wall. Booth asserts that, at the meeting, it was pointed out that the Village Board's new plan was still in violation of SEQRA and the Village Code. Particularly, she asserts, because the proposed wall was not a mere replacement of the old wall, to wit: the new wall was to be cantilevered, while the old wall is not cantilevered. Thus, she argues, the project should have been classified a Type I project under SEQRA. Further, she asserts, the Village Board took no steps to assure the preservation of the historic wall.

Based upon the foregoing, and as a first claim for relief, Booth alleges that the Village's determination of May 6, 2013, was arbitrary, capricious and affected by error of law, and should be vacated and set aside.

As a second claim for relief, Booth alleges that the Village's determination to dismantle and rebuild the wall was not supported by substantial evidence in the record, and should vacated and set aside.

As a third claim for relief, Booth alleges that the Board's June 11, 2013 declaration that

the proposed project was a Type II action under SEQRA was arbitrary, capricious and affected by error of law, and was not supported by substantial evidence in the record, and should therefore be vacated and set aside.

As a fourth claim for relief, Booth alleges that the Board's August 30, 2013, resolution was also arbitrary, capricious and affected by error of law, and was not supported by substantial evidence in the record, and should therefore be vacated and set aside.

The Village's Motion to Dismiss

By notice dated October 22, 2013, the Village moves to dismiss the amended verified petition, pursuant to CPLR §7804(f).

In support of its motion, the Village submits an affidavit from James Rinaldi, of the Hadenburgh Title Agency in which Rinaldi avers, in relevant part, that the Village first contacted his firm on March 12, 2013, to perform a title search for the wall at issue. Ultimately, his firm's title search went back to 1885. Contrary to Booth's contention *supra*, Rinaldi states, a title search was not conducted on February 7, 2013, which was prior to when the stone fell out of the wall. Rather, he asserts, that date was stamped on the title search papers by the County Clerk's office, and indicated the last effective date of the search; not the date it was requested or conducted.

In further support of its motion, the Village submits an affidavit from Ledwith (*supra*), the Building Inspector. Ledwith avers that, to his knowledge, no road in the Village, improved or not, is equal to or greater than 33 feet wide. Rather, according to his measurements, all ranged between 14 to 25 feet wide. To his knowledge, he asserts, Tuxedo Road is 25 feet wide, and is the widest improved road. Ledwith notes that he was not Building Inspector when Booth

removed a portion of the wall for a driveway. However, he asserts, it is obvious from mere observation that Booth used stones removed from the wall to create the "wing walls" to her driveway. (Appended to Ledwith's affidavit are photographs of the wall and various roads.)

In a memorandum of law, the Village argues that the correct standard of review is whether the challenged action by the Village is arbitrary and capricious and affected by error of law, not whether it is supported by substantial evidence. Here, the Village asserts, none of the challenged actions were arbitrary, capricious or affected by error of law, or violated SEQRA or the Village Code.

Booth's Cross Motion to Strike the Village's Motion to Dismiss and All Supporting Papers

In response, Booth moves to strike the Village's motion to dismiss and all supporting papers. In so moving, Booth notes that the Village has not yet answered the Amended Verified Petition. Rather, it made the pre-answer motion at bar, which is supported by various affidavits and documentary evidence purporting to present factual material. However, she argues, it is wholly improper to submit any evidence on pre-answer motion to dismiss a CPLR article 78 petition on points of law. Rather, the motion must be addressed to the allegations on the face of the pleadings, which must be deemed true. Thus, she asserts, the motion must be denied and the supporting papers struck.

If the court nonetheless intends to consider the motion and supporting papers, she argues, it should not do so until she is allowed to submit evidence in opposition thereto, which will include, *inter alia*, (1) an affidavit from an expert in New York State Highway law who will opine that the wall is owned by the Village; (2) proof that the Village's own surveyor concluded

that the wall is appurtenant to the road and not owned by Booth; (3) evidence that the Village failed to consider reasonable, feasible alternatives to dismantling and rebuilding the wall; (4) evidence that the Village abandoned its initial determination as to scope of the work to be performed; and (5) evidence that the Village's hasty commencement of the work to demolish the wall was intended to circumvent SEQRA and the Village Code.

Discussion/Legal Analysis

As a threshold issue, Booth presses her arguments that all of the proceedings at issue and, consequently, all of the challenged actions taken by the Village, are void *ab initio* and defective because the only "notice" she received concerning the same was the letter *supra* from then Mayor Wilson, who was then, she contends, not living in the Village. However, the court does not find that these argued defects render the proceedings void *ab initio* or otherwise defective.

In his March 28, 2013, letter to Booth *supra*, then Mayor Wilson cited Village Code sections 75-22 through 75-25, and 83-10 through 83-12.

Sections 75-22 through 72-25 of the Village Code are found under Article IV, entitled, "Construction and Site Safety." (Golden Affidavit, Exhibit A). Section 75-22 provides:

> Any property upon which there exists ruins, ditches, open trenches, inactive construction, foundations, open wells or retaining walls or the like and whose unimpeded vertical drop exceeds five feet shall be considered hazardous.

Section 75-23 requires property owners, within 60 days of enactment of the section, to "provide a temporary cover, railing, barricade or other protective means for excluding both adults and small children," and then to apply for a building permit proposing a "permanent method of eliminating the hazard or securing the site."

Section 75-24 provides that such conditions "may be cited by the Police Department,

Board of Trustees, Planning Board, Building Inspector or Public Works Superintendent." Further, that upon written notice to the property owner of the same, the property owner had seven days to either request a hearing or submit a plan for the timely correction of such conditions.

Section 75-25 provides that, if the property owner fails to do either, the Village may enter onto the property and perform the work itself, at the property owner's expense.

Sections 83-10 through 83-12 of the Village Code are found under Article IV, entitled, "Roadside Conditions." (Golden Affidavit, Exhibit B).

Section 83-10 provides:

> Any roadside condition occurring or emanating from private property, but adversely affecting the safety, health and welfare along, on or adjacent to any Village road or right-of-way shall be corrected by the subject property owner at his sole expense.

Such conditions expressly include "deteriorating road walls."

Section 83-11 provides that such conditions "may be cited by the Police Department, Board of Trustees, Planning Board, Building Inspector or Public Works Superintendent." Further, that upon written notice from the same, the property owner has seven days to either request a hearing or submit a plan for the timely correction of such conditions.

Section 83-12 provides that, if the property owner fails to do either, the Village may enter onto the property and perform the work itself, at the property owner's expense.

As a threshold issue, it is noted, sections 75-22 through 72-25, on their face, are not applicable to the facts. That is, the identified defect in the wall is not that it has an unimpeded vertical drop that exceeds five feet, and the Village is not seeking to compel Booth to provide a cover, railing, barricade or other similar protective device for the wall. Thus, those sections do not provide a basis for any of the challenged actions by the Village.

By contrast, sections 83-10 through 83-12 are expressly applicable to the facts by their plain terms.

Further, Booth is correct that the mayor of the Village is not one of the officials identified as authorized to provide notice of a violation. However, on the facts presented, the court does not find this to be a defect fatal, regardless of whether the mayor was then living in the Village.

Booth has not cited, and research has not revealed, anything in the nature of a legislative history for the Village Code provision at issue. Nor has Booth cited, nor research revealed, any case law or statute, that would support a conclusion that the failure to strictly adhere to the code provision warrants the drastic remedy of finding all of the proceedings herein void *ab initio* or otherwise defective. Indeed, it is noted, section 83-10 uses the word "may" (not "shall" or "must") when describing the persons authorized to issue violations. Further, there can be no genuine dispute that then Mayor Wilson, when he sent the letter, was acting with the knowledge and consent, and at the behest of, the Village Board of Trustees (which is authorized to issue citations), in that Booth expressly raised her jurisdictional arguments before the Village Board, which rejected the same. Moreover, it is noted, the alleged dangerous condition of the wall had been the subject of prior correspondence between Booth and the Building Inspector (who is also authorized to issue citations) for a number of years. Indeed, it appears that, at one point, the Building Inspector in fact issued a citation concerning the wall (*supra*).

Finally, and significantly so, Booth does not allege that she was deprived of any due process or other right or advantage that she might have otherwise enjoyed had she been provided with notice by a designated official, or that the notice provided violated the purpose underlying section 83-10. Rather, not only did she exercise her right under the Village Code to demand a

hearing, but also, she actually attended the hearing (at least through counsel) and submitted an extensive memorandum and evidence in support of her position.

Given such, the court does not find the Village's failure to have served the notice required by section 83-10 by a person or entity designated under section 83-11 to have rendered the notice of the proceedings thereunder void *ab inito* or otherwise defective, regardless of whether Mayor Wilson was then living in the Village. *CPLR* §2001.

Petitioner's Request for Injunctive Relief

Petitioner Booth's request for injunctive relief is granted to the extent set forth herein.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, the following: (1) a likelihood of success on the merits; (2) irreparable injury absent a preliminary injunction; and (3) a balancing of the equities in the movant's favor. *In re Rice*, 105 A.D.3d 962, 963 N.Y.S.2d 327 [2nd Dept.2013]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc*., 50 A.D.3d 1072, 857 N.Y.S.2d 648, [2nd Dept.2008]; *CPLR* §6301;*CPLR* §6311. Economic loss, which is compensable by money damages, does not constitute irreparable harm. Thus, where a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue. *In re Rice*, 105 A.D.3d 962, 963 N.Y.S.2d 327 [2nd Dept.2013]; *EdCia Corp. v McCormack*, 44 A.D.3d 991, 845 N.Y.S.2d 104 [2nd Dept.2007]. The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072, 857 N.Y.S.2d 648 [2nd Dept.2008]; *Ying Fung Moy v Hohi Umeki*, 10 A.D.3d 604, 781 N.Y.S.2d 684 [2nd Dept.2004]. The decision to grant or deny a preliminary injunction rests in the sound discretion of the court. *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50

A.D.3d 1072, 857 N.Y.S.2d 648, [2nd Dept.2008].

Subject to exceptions not relevant here, "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction . . . ." *CPLR* §6311(b)*; Ying Fung Moy v Hohi Umeki,* 10 A.D.3d 604, 781 N.Y.S.2d 684 [2nd Dept.2004]. The amount of the undertaking, which is fixed in the court's discretion, must be rationally related to the amount of potential damages that might be sustained. *S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 A.D.3d 642, 868 N.Y.S.2d 322 [2nd Dept.2008].

The demonstration of a *prima facie* entitlement to the relief sought is sufficient to demonstrate a likelihood of success on the merits. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 498 N.Y.S.2d 146 [2nd Dept.1986]. In the presence of widely divergent allegations, and credibility issues, actual proof of the case is left to further court proceedings. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.,* 114 A.D.2d 165, 498 N.Y.S.2d 146 [2nd Dept.1986].

Finally, even if the evidence of the likelihood of success on the merits is less than compelling, injunctive relief may still be granted if a plaintiff or petitioner demonstrates both irreparable harm and that the balancing of the equities are in their favor. *Schlosser v. United Presbyterian Home at Syosset, Inc*., 56 A.D.2d 615, 391 N.Y.S.2d 880 [2nd Dept.1977].

Here, Booth has not demonstrated a likelihood of success on the merits on the issue of the proper remedy for the wall. The issue of ownership of the wall also presents a question of fact.

Initially, it is noted, a determination concerning whether the wall adversely affects the

safety, health and welfare along, on or adjacent to the road, and, if so, the appropriate remedial action to be taken, are clearly matters within the scope of the authority of the Village Board. Pursuant to section 4-412 of the Village Law:

> "In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, [and] the preservation of peace and good order . . . . ."

In general, where a Board of Trustees holds a public hearing before exercising such authority, as opposed to a quasi-judicial evidentiary hearing, judicial review is limited to whether the action taken is affected by an error of law, or is arbitrary and capricious or an abuse of discretion, or is irrational. *Board of Trustees of Inc. Village of East Williston v. Board of Trustees of Inc. Village of Williston Park,* 119 A.D.3d 679, 990 N.Y.S.2d 236 [2nd Dept.2014]. The scope of review of the court is limited to an examination of whether the action taken has a rational basis; it may only overturn action that is taken without a sound basis in reason or without regard to the facts, or that is arbitrary and capricious. *Kirkpatrick v. Wambua,* 117 A.D.3d 739, 985 N.Y.S.2d 151 [2nd Dept.2014].

A determination is quasi-judicial in character when it is rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law. *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 952 N.E.2d 463, 928 N.Y.S.2d 647 [2011]. Judicial review of an action taken after a quasi-judicial hearing is limited to whether the action is supported by

substantial evidence in the record. *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 952 N.E.2d 463, 928 N.Y.S.2d 647 [2011].

Here, it is noted, none of the determinations at issue resulted from a quasi-judicial evidentiary hearing. Thus, the "substantial evidence" standard of review, as Petitioner asserts, does not apply. Rather, the determinations must be upheld if they have a rational basis, and are neither arbitrary or capricious, nor made without a sound basis in reason or regard to the facts.

On the record presented, Booth has not demonstrated a likelihood of success on the merits concerning ownership of the wall. Conversely, the record does not support a finding that the Village will succeed on this issue either. Rather, on the record presented, this presents an issue of fact, resolution of which will, in this Court's view, require expert testimony.

Initially, it is noted, whether or not the wall is located on Booth's property would appear, on its face, a matter easily resolved. That is, the property is described in metes and bounds and occupies a physical space, and the wall is a fixed object that also occupies a physical space. Thus, unless there is some discrepancy or dispute concerning the metes and bounds of Booth's property, or the location of the wall (neither of which is alleged or argued), whether or not the wall is on Booth's property would appear a matter of fact easily resolved by an expert from an existing survey or from a new survey. However, neither party has submitted an affidavit from an expert based on an existing survey, nor expressed the intent or desire to obtain a new survey. Further, neither party has identified, and the court is unable to otherwise discern, a document or group of documents in the record, when cumulatively considered, which purports to set forth an express opinion by an expert concerning whether or not the wall at issue is located on Booth's property. Rather, both parties have proffered lay opinions about conclusions to be drawn from

documents made part of the record. However, the court does not find this to be an issue subject to resolution by lay opinion. Rather, the court's scrutiny of the proffered documents, some of which are handwritten and of ancient origin, reveals that many are not even legible or decipherable, at least by the court. Further, to the extent legible, the court does not find that any of the documents provide any information from which a layperson might reach a conclusion as to the ownership of the wall. Thus, on the record presented, whether or not Booth owns the section of the wall at issue (and, therefore, is likely to succeed on the merits on that issue) presents a question of fact.

In so holding, the court notes that the Village appears to be arguing that Booth owns the wall because it is coincident with her property line. However, although the court will entertain argument and evidence on the issue, if the wall is proved to be coincident with Booth's property line, this would appear to warrant the parties' sharing the cost of the repairs to the wall, not Booth paying the whole of the same. *See e.g.*, *Van Gorder v Eastchester Estates*, 207 Misc. 335, 137 N.Y.S.2d 789 [NY Sup.1955].

In addition, it is noted, at this juncture, the court does not find Booth's arguments concerning application of the Highway Law as it allegedly existed at the time of the 1953 road dedication to be particularly persuasive or determinative of the issue. Booth has not cited, and research has not revealed, any authority for a conclusion that the road dedication in 1953 intended to convert, or by operation of law converted, all private property with the 33 minimum road width to Village property. Indeed, such a conclusion would have immense consequences throughout the Village, as the Village submitted sworn assertions that none of the roads dedicated in 1953 are greater than 25 feet wide. Moreover, the Village submitted documents,

particularly prior correspondence between the parties, which indicates that Booth acted on prior occasion as if she owned and/or was responsible for the wall. This conduct includes making prior repairs to the wall, and opening and reconfiguring the wall for her driveway without seeking permission for the same from the Village as owner of the wall. However, again, the court will not preclude argument and evidence on this issue.

In sum, Booth failed to demonstrate a likelihood of success on the merits concerning ownership of the wall. Rather, on the record presented, this presents a question of fact that can only be resolved at trial or a formal evidentiary hearing.

In so holding, the court notes that it does not read the determinations of the Village Board to include a finding that Booth may be held responsible for the remediation of the wall because the issues with the same "emanate" from her property. Moreover, for example, although the court will entertain argument and evidence on the issue, the mere fact that Booth's property exists behind the wall, or that water may flow from the property into the wall, without more, would appear to be insufficient to support a finding that the issues with the wall "emanate" from her property such that she may be held liable for the remediation of the same.

Concerning the remedy for the wall chosen by the Village, Booth has not demonstrated a likelihood of success on the merits. To the contrary, on the record presented, there is no basis to annul and vacate the Village's determination.

Initially, it is noted, neither party accurately characterizes the conclusions reached by their own experts. For example, nothing in the reports prepared for the Village may be reasonably read to indicate that the wall is in a genuine danger of imminent failure. At a minimum, nothing in the reports supports a conclusion that the work dismantling the wall needed to begin on the

Friday before Labor Day.

Conversely, nothing in the report proffered by Booth may be reasonably read to indicate that the wall is in a safe and stable condition and does not require any remedial action. Rather, the Brooker report merely rebuts a conclusion that the wall is in imminent danger of failure.

However, this does not mean that nothing may be concluded about the wall from the record presented. Rather, setting aside the parties' disagreement about the extent and imminence of the danger presented, there is no genuine dispute that the wall needs remedial work. Indeed, the parties and their experts agree as to the same. Moreover, this is readily discernible to the court from the photographs made part of the record, which not only clearly show the wall leaning toward the road, but also reveal missing mortar and other deterioration throughout.

Further, although Booth makes much of the size of the stone that fell from the wall, it does not take an expert to conclude that a stone of that size (or even smaller) on a narrow road abutting a body of water presents a significant hazard to both vehicular and pedestrian traffic. Nor does the court see anything in the photographs made part of the record (some of which are quite clear), to indicate that a truck or other vehicle struck the wall or dislodged the stone at issue. Indeed, the correspondence between the parties concerning the wall (*supra*) indicates that loose stones and failing mortar had been a problem in the past that had been remedied by Booth's masons. In sum, there is not, and there cannot be, a genuine dispute that the section of the wall at issue requires work. Thus, the issue presented is whether Booth has shown a likelihood of success on the merits as to the remedy selected and she has not.

On the record presented, nothing about the Village's determination that the wall be

dismantled and rebuilt appears arbitrary or capricious or an abuse of discretion, or irrational, or affected by an error of law. Rather, it appears to have sound basis in reason and to accord due regard to the facts. Further, to the extent relevant, the Village Board's proposed remedy will do no offense to the historic nature or beauty of the wall, as it requires that the wall to be rebuilt as is, by qualified masons. The Village Board was not obligated to adopt Booth's suggestions for a remedy, even if less expensive and less disruptive.

In sum, Booth has not shown a likelihood of success on the merits as to either the issue of the ownership of the wall, or the remedial action be taken concerning in the wall.

However, Booth has shown some degree of irreparable injury if injunctive relief is not granted, to wit: If Booth is found the owner of the wall, she is afforded the opportunity under the Village Code to perform the work herself. This may be significant not only as to the cost of the same, but to the manner in which the work is performed, which will include substantial excavation on, and disruption to, Booth's property. This opportunity will be irretrievably lost if an injunction is denied and the work goes forward being performed by the Village.

Finally, the balancing of the equities favors Booth. Although, as discussed *supra*, there is no genuine dispute that the wall is in need of work, and as discussed *supra*, and as will be discussed further *infra*, the Village's determination as to the appropriate remedy must be sustained, there is no evidence that the danger presented by the wall is imminent. Thus, on the record presented, the harm to the Village that might result from a delay in the remediation work caused by litigation of the issue of ownership of the wall appears less that the harm that might result to Booth if the work is started or performed prior to the resolution of that issue.

In sum, Booth is entitled to a preliminary injunction. Thus, unless the parties agree to

voluntarily withhold further work on the wall pending determination of the issue of ownership of the same, the temporary restraining order granted in this action is ordered continued until the next scheduled conference, at which time the court will entertain evidence and arguments concerning the proper amount of the undertaking to be posted by Booth for the issuance of a preliminary injunction.

The Motion to Dismiss

The Village's cross motion to dismiss the petition pursuant to CPLR 7804(f) is granted in part and denied in part as set forth herein.

Pursuant to CPLR §7804(f), a party may make a pre-answer motion to dismiss an article 78 petition based on "objections in point of law." The statute does not define objections in point of law. However, they have been held akin to affirmative defenses (CPLR §3018[b]) that may be raised by a motion to dismiss (CPLR §3211[a]). That is, the type of threshold objections listed in CPLR §3211(a) that are capable of disposing of the case without reaching the merits. *Naranjo v. Commissioner of Dept. of Motor Vehicles,* 116 A.D.3d 859, 984 N.Y.S.2d 98 [2nd Dept.2014]; *Hop-Wah v. Coughlin*, 118 A.D.2d 275, 504 N.Y.S.2d 806 [3d Dept.1986] *rev'd on other grounds* 69 N.Y.2d 791, 513 N.Y.S.2d 115, *see also Book 7B, McKinney's Consol. Laws of NY, CPLR 7804 [Alex. Prac Comm. C7804:7]; Fourth Prelim.Rep., Legis.Doc.No.20, pp.180-81 (1960).*

A motion pursuant to CPLR §7804(f) must be determined solely on the allegations contained in the petition. *East End Resources, LLC v. Town of Southold Planning Bd.,* 81 A.D.3d 947, 917 N.Y.S.2d 315 [2nd Dept.2011]; *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City,* 62 A.D.3d 1004, 880 N.Y.S.2d 133 [2nd Dept.2009].

The allegations are deemed true for purposes of the motion, and the petitioner is to be accorded the benefit of every possible favorable inference to be drawn from the same. *East End Resources, LLC v. Town of Southold Planning Bd.*, 81 A.D.3d 947, 917 N.Y.S.2d 315 [2nd Dept.2011]; *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004, 880 N.Y.S.2d 133 [2nd Dept. 2009]; *10 East Realty, LLC v. Incorporated Village of Valley Stream*, 17 A.D.3d 472, 792 N.Y.S.2d 606 [2nd Dept.2005]. No additional facts in support of the motion may be considered. *East End Resources, LLC v. Town of Southold Planning Bd.*, 81 A.D.3d 947, 917 N.Y.S.2d 315 [2nd Dept.2011]; *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004, 880 N.Y.S.2d 133 [2nd Dept.2009].

When a pre-answer motion to dismiss pursuant to CPLR §7804(f) does not seek dismissal based upon an objection in point of law, but instead seeks relief on the merits, it is proper to deny the motion. *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004, 880 N.Y.S.2d 133 [2nd Dept.2009]. Further, if such a motion is denied, it is error to dismiss the petition on the merits prior to the service of respondent's answer, unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer. *Council of Teachers v BOCES*, 63 N.Y.2d 100, 469 N.E.2d 511 [1984]; *Better World Real Estate Group v. New York City Dept. of Finance*, 992 N.Y.S.2d 247 [2nd Dept.2014]; *S & R Development Estates, LLC v. Feiner*, 112 A.D.3d 945, 977 N.Y.S.2d 377 [2nd Dept.2013]; *In re Shepherd*, 103 A.D.3d 901, 960 N.Y.S.2d 171 [2nd Dept. 2013]; *Bill's Towing Service, Inc. v. County of Nassau*, 83 A.D.3d 698, 920 N.Y.S.2d 377 [2nd Dept.2011].

Accordingly, where the court concludes that the papers submitted on a motion pursuant to CPLR §7804(f) are insufficient to render a determination, the proper procedure is not to convert the motion into one for summary judgment, but to deny the motion, direct the respondents to submit an answer without prejudice to their right to assert appropriate affirmative defenses, and resolve the issue presented by the motion as part of its ultimate disposition of the proceeding. *East End Resources, LLC v. Town of Southold Planning Bd.*, 81 A.D.3d 947, 917 N.Y.S.2d 315 [2nd Dept.2011].

A respondent may also move to dismiss a CPLR article 78 petition pursuant to CPLR §3211. *Williams v. Department of Sanitation*, 116 A.D.3d 873, 983 N.Y.S.2d 430 [2nd Dept 2014]*; MVM Const., LLC v. Westchester County*, 112 A.D.3d 635, 976 N.Y.S.2d 525 [2nd Dept. 2013]. Such a motion may be converted to one for summary judgment under general principles applicable to such motions, *e.g.*, the court provides prior notice of the intention to do so, or the parties have laid bare their proofs and deliberately charted a summary judgment course. *In re Shepherd*, 103 A.D.3d 901, 960 N.Y.S.2d 171 [2nd Dept.2013]; . *One Monroe, LLC v. City of New York*, 89 A.D.3d 812, 932 N.Y.S.2d 153 [2nd Dept.2011]; *Laurel Realty, LLC v. Planning Bd. of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 [2nd Dept2007]; *Ward v. Bennett*, 214 A.D.2d 741, 625 N.Y.S.2d 60 [2nd Dept.1995]; *Dashnaw v. Town of Peru*, 111 A.D.3d 1222, 976 N.Y.S.2d 288 [3rd Dept.2013]; *Phillips v. Town of Clifton Park Water Authority*, 215 A.D.2d 924, 626 N.Y.S.2d 865 [3rd Dept.1995].

Further, a CPLR article 78 proceeding is summary in nature. Thus, a motion for summary judgment addressed to the merits of the petition is unnecessary. *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004, 880

N.Y.S.2d 133 [2nd Dept.2009]. Accordingly, the court may properly address the merits of the petition without the need to convert a motion to dismiss the petition into a motion for summary judgment. *Matter of Laurel Realty, LLC, v Planning Bd. of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 [2nd Dept.2007]. However, where there are facts in dispute that must be resolved before a reviewing court may properly determine the outcome of the proceeding under the applicable standard of review, a hearing must be conducted forthwith by the court to resolve those factual issues. *1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004, 880 N.Y.S.2d 133 [2nd Dept.2009]; *Matter of Laurel Realty, LLC, v Planning Bd. of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 [2nd Dept. 2007].

In light of the above, Booth's motion to dismiss the Village's cross motion and strike all supporting evidence is denied.

On the merits, for the reasons discussed *supra*, it cannot be said that the facts concerning the ownership of the wall are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists, and that no prejudice will result from the failure to require an answer. Rather, as discussed *supra*, ownership of the wall presents a question of fact. Thus, that branch of the Village's motion which is to dismiss so much of the petition as challenges the Village Board's determination as to the ownership of the wall is denied.

Conversely, for the reasons discussed *supra*, the facts concerning the Village Board's determination concerning the proper remedy for the wall are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists, and that no prejudice will result from the failure to require an answer. Thus, that branch of the Village's motion which is to dismiss so much of the petition as challenges the Village Board's determination as to

the same is granted, and those portions of the petition are dismissed.

The SEQRA Issues

The Village also demonstrated entitlement to dismissal of so much of the petition as alleges violations of SEQRA.

As a threshold issue, Booth has standing to raise SEQRA issues. To establish such standing, a petitioner must show: (1) an environmental injury that is in some way different from that of the public at large; and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA. An injury in fact may be inferred from a showing of close proximity of the petitioner's property to the proposed work. *Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo*, 112 A.D.3d 726, 977 N.Y.S.2d 272 [2nd Dept.2013]; *County Oil Co., Inc. v. New York City Dept. of Environmental Protection*, 111 A.D.3d 718, 975 N.Y.S.2d 114 [2nd Dept.2013].

Here, at a minimum, Booth's property is immediately adjacent to the wall. Further, regardless of whether the wall is on her property, the proposed project will require entry onto and substantial excavation of her property. Thus, she has standing.

On the merits, SEQRA's primary purpose is to inject environmental considerations directly into governmental decision making. *City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 822 N.E.2d 339 [2004]. The Legislature's intent is reflected in the statute, which requires that "[s]ocial, economic, and environmental factors [ ] be considered together in reaching decisions on proposed activities." *ECL §8–0103[7]*. The procedures necessary to fulfill SEQRA review are carefully detailed in the statute and its implementing

regulations. *See ECL §8–0101—8–0117; 6 NYCRR part 617; see also Matter of New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 347–348, 763 N.Y.S.2d 530, 794 N.E.2d 672 [2003] . The Legislature has declared that, to the fullest extent possible, statutes should be administered by the State and its political subdivisions in accordance with the policies set forth in SEQR, and that environmental factors should be considered in reaching decisions on proposed projects. *City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 822 N.E.2d 339 [2004]; *ECL §8–0103[6]*. The Court of Appeals has recognized the need for strict compliance with SEQRA requirements. *Matter of Merson v. McNally*, 90 N.Y.2d 742, 750, 665 N.Y.S.2d 605, 688 N.E.2d 479 [1997].

Article 8 of the Environmental Conservation Law creates the procedural and substantive requirements for governmental entities to follow when reviewing the environmental consequences of proposed projects or "actions." The regulations classify actions as Type I, Type II or unlisted, depending on the potential effects on the environment. A Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS [environmental impact statement]." *6 NYCRR 617.4[a][1*]. A Type II action is not subject to SEQRA review because it has "been determined [by DEC] not to have a significant impact on the environment or [is] otherwise precluded from environmental review under Environmental Conservation Law, article 8." *6 NYCRR 617.5[a*]. All remaining actions are classified as "unlisted" actions (6 NYCRR 617.2[ak]). Type I and unlisted actions are subject to SEQRA review, with Type I actions "more likely to require the preparation of an EIS than Unlisted actions." *6 NYCRR 617.4[a]*. *See generally, City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 822 N.E.2d 339 [2004]; *Merson v. McNally*, 90

N.Y.2d 742, 688 N.E.2d 479 [1997]. A determination as to a SEQRA classification will be upheld if it is not arbitrary and capricious, and has a rational and substantial basis in the record. *Matter of Lahey v. Kelly*, 71 N.Y.2d 135, 518 N.E.2d 924; *Committee to Stop Airport Expansion v. Town Bd. of Town of East Hampton*, 2 A.D.3d 850, 769 N.Y.S.2d 400 [2nd Dept.2003].

Here, the Village's determination that the proposed dismantling and rebuilding of the wall is a Type II action under SEQRA and, therefore, not subject to SEQRA review, is not arbitrary and capricious, and has a rational and substantial basis in the record.

Under SEQRA, Type II actions include, *inter alia*, (1) maintenance or repair involving no substantial changes in an existing structure or facility; and (2) the replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site. *6 NYCRR 617.5[c][1][& [2]; see e.g., Groarke v. Board of Educ. of Rockville Centre Union Free School Dist.*, 63 A.D.3d 935, 880 N.Y.S.2d 535 [2nd Dept.2009][upgrade to athletic field by installing artificial turf, lighting and bleachers was a Type II action]; *Committee to Stop Airport Expansion v. Town Bd. of Town of East Hampton*, 2 A.D.3d 850, 769 N.Y.S.2d 400 [2nd Dept.2003][the repaving of an aircraft parking apron was a Type II action].

Here, the proposed work concerning the wall falls within both the above provisions.

Booth argues that the wall project at issue is automatically a Type I project under to 6 NYCRR 617.4 [9], which encompasses, "any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places * * * , or that is listed on the State Register of Historic Places * * *. However, as noted by the Village, the wall project at issue is a Type II

action, not an "unlisted" action, which is defined as, "all actions not identified as a Type I or Type II action in this Part." *6 NYCRR 617.2[a][k]*. Further, it is noted, Booth's argument overlooks the express exception in 6 NYCRR 617.4 [9] for actions, as here, "designed for the preservation of the facility or site."

Finally, the court finds no merit to Booth's argument that the proposed "cantilevered" nature of the rebuilt wall brings this action outside of the purview of 6 NYCRR 617.5. *See e.g., Groarke v. Board of Educ. of Rockville Centre Union Free School Dist.*, 63 A.D.3d 935, 880 N.Y.S.2d 535 [2nd Dept.2009].

In sum, the facts concerning the Village's classification of the wall project as a Type II action under SEQRA are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer. Thus, that branch of the Village's motion which seeks to dismiss so much of the petition as alleges violations of SEQRA is granted, and those portions of the petition are correspondingly dismissed.

The Village Code

Finally, the Village is entitled to dismissal of that branch of the the petition which alleges violations of the Village Code.

As a threshold issue, Booth has standing to raise zoning code issues. To establish such standing, a petitioner must demonstrate that he or she would suffer direct injury different from that suffered by the public at large, and that the injury asserted falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted. Injury-in-fact may arise from the existence of a presumption established by

the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury. *Radow v. Board of Appeals of Town of Hempstead*, 120 A.D.3d 502, 989 N.Y.S.2d 914 [2nd Dept.2014].

Here, as noted *supra*, at a minimum, Booth's property is immediately adjacent to the wall. Further, regardless of whether the wall is on her property, the proposed project will require entry onto and excavation of her property. Thus, she has standing.

On the merits, Booth argues that the following code provisions are applicable to the proposed wall project, but have not been complied with.

Section 100-23, which provides: "Any project which involves blasting, demolition of a building or structure, soil mining or soil filling shall require an EAF review and Board of Architectural Review approval and a special permit from the Board of Trustees for that purpose as well as forty-eight hour prior notification to each adjacent property owner." The Village Code expressly defines "structure" to include a wall. *Village Code Section 100-2.*

Section 100-27, which provides:

> A. No building or structure shall be erected, altered, demolished or enlarged unless the owner, lessee or agent of either shall file with the Building Inspector, prior to the commencement of the proposed construction or demolition, a statement in triplicate, as set forth below, and such plans and structural detailed drawings of the proposed work as may be reasonable necessary to determine compliance with the provisions of the chapter.
>
> B. Plans involving structures or structural changes shall require the seal and signature of a New York State registered architect or professional engineer. The Board of Trustees may waive the requirements of this subsection for projects whose total value does not exceed $10,000.00.

Section 100-28 prohibits work on a project for the "erection, alteration or demolition of a building or structure" until a permit has been issued therefore. A permit is not to issue until the

Building Inspector certifies that the proposed building or structure complies with the Village Code.

Section 100-31, which provides that, "project which would alter the external visual elements of a land parcel, lot, structure or building, shall require the approval of the Board of Architectural Review prior to consideration by the Board of Trustees for a Building Permit".

Section 100-50, which requires the Board of Trustees, *inter alia*, to place special emphasis on SEQRA review, and to preserve the historic nature, beauty and property values of the Village.

The court notes that, with the possible exception of section 100-31, the cited sections, on their face, are applicable to the proposed wall project. Indeed, the Village does not argue that the sections are not applicable, or that they have or will be complied with. Rather, the Village argues that it is exempt from its own zoning code because it is acting in a governmental capacity, citing *Nerhbas v Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241 [1957].

In opposition, Booth argues that the standard used in *Nerhbas* was abrogated in *Matter of City of Rochester* (72 N.Y.2d 338, 530 N.E.2d 202 [1988]) in favor of the "balancing of public interests" test. In reply, the Village argues that the balancing of interests tests announced in *Matter of City of Rochester* is only applicable to inter-municipal disputes. In any event, the Village asserts, application of the test still supports a finding that it need not comply with its own zoning.

In *Nerhbas v Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241 [1957], the Court of Appeals held that, "a village is not subject to zoning restrictions in the performance of its governmental, as distinguished from its corporate or proprietary, activities."

Here, the Village is clearly acting in a governmental capacity concerning the wall. Thus, applying the *Nerhbas* standard, the Village need not adhere to its own zoning restrictions,

However, Booth is correct that, in *Matter of City of Rochester* (72 N.Y.2d 338, 530 N.E.2d 202 [1988]), the Court of Appeals abrogated that test in favor of a "balancing of public interests" test (at least in inter-municipal disputes over zoning). The *Rochester* case concerned the expansion and improvement of a county airport. The county sought a declaration that it was exempt from the zoning code provisions of the city in which the expansion and improvements were to be located.

In applying the new standard, the *Rochester* Court noted that no reliable and consistent test had been developed to distinguish between governmental, and corporate and proprietary acts by a municipality, and that the distinction had been abandoned in various other areas of the law. The *Rochester* Court held that the new balancing of public interests test approach subjected the encroaching governmental unit in the first instance, in the absence of an expression of contrary legislative intent, to the zoning requirements of the host governmental unit where the extraterritorial land use would be employed. Then, among the sundry related factors to be weighed, were the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests. Other relevant factors include any legislative grant of authority to the encroaching governmental unit, alternative locations for the facility in less restrictive zoning areas, and alternative methods of providing the needed improvement. Another important factor identified was the intergovernmental participation in the project development process and an opportunity to

be heard. Realistically, the *Rochester* Court held, although one factor in the calculus could be more influential than another, or might be so significant as to completely overshadow all others, no element should be thought of as ritualistically required or controlling.

Here, the parties have not cited, and research has not revealed, any controlling case to expressly hold whether the balancing of public interests test announced in *Rochester* is applicable to cases not involving a conflict between governmental entities. However, one Supreme Court cases has expressly done so. *Bruenn v. Town Bd. of Town of Kent*, 44 Misc.3d 1214 [NY Sup. 2014]. Further, the most reasonable inference to be drawn from the discussion of *Rochester* in the subsequent case law is that the balancing of interests test is to be applied in all cases. *See e.g., Crown Communication New York, Inc. v. Department of Transp. of State*, 4 N.Y.3d 159, 824 N.E.2d 934 [2005]; *Dunn v. Town of Warwick*, 146 A.D.2d 601, 537 N.Y.S.2d 174 [2nd Dept.1998]; *Board of Fire Com'rs of Tappan Fire Dist. v. Planning Bd. of Town of Orangetown*, 253 A.D.2d 875, 678 N.Y.S.2d 508 [2ndDept.1998]; *Armenia v. Luther*, 152 A.D.2d 928, 543 N.Y.S.2d 832 [4thDept.1989]; c*f., Town of Hempstead v. State*, 42 A.D.3d 527, 840 N.Y.S.2d 123 [2ndDept.2007]. This inference is supported by the rationale underlying *Rochester, i.e.*, that a test based on distinctions drawn between governmental, and corporate and proprietary acts by a municipality is untenable. Here, applying the balancing of interests test to the facts presented, the Village prevails.

First, the party seeking immunity from the Village Code is the Village Board itself, which is the body expressly charged with determining whether the wall is "adversely affecting the safety, health and welfare along, on or adjacent to any Village road," and, if so, the appropriate remedy. The use of land at issue is the proposed repair and remediation of an existing use, and

the public interest to be served is significant, *i.e.*, the safety, health and welfare of persons and vehicles using the adjacent road and area.

Further, the Village Code does not prohibit or otherwise limit the proposed project, and the impact upon local interests (other than the inconvenience caused by construction itself) will be positive for all persons and vehicles using the adjacent road and area. In addition, there is no alternative location for the wall project and, as discussed *supra*, although there are potential alternative methods of providing the needed repair and remediation, the method chosen by the Village Board is not arbitrary or capricious, etc. Finally, and significantly, Booth was afforded an opportunity to be heard and to participate in the wall project process.

In sum, applying the balancing of interests test, the Village is exempt from its own zoning. Consequently, that branch of the Village's motion which seeks to dismiss so much of the petition as alleges violations of the Village Code is granted, and those portions of the petition are correspondingly dismissed.

In closing, the court notes that it finds this entire litigation discouraging. Had the parties focused their efforts on resolving the ownership issue and an acceptable plan for remediating the wall, the project would have no doubt been long completed.

Accordingly, and for the reasons cited herein, it is hereby

ORDERED, that the motion for a preliminary injunction is granted to the extent set forth herein; and it is further,

ORDERED, that the motion to strike the cross motion and all supporting papers is denied; and it is further,

ORDERED, ADJUDGED and DECREED, that the cross motion is granted in part and

denied in part, as set forth herein, and that the relevant portions of the petition are dismissed accordingly; and it is further,

ORDERED, that the parties are directed to, and shall, appear, through respective counsel, for a Settlement/Pre-trial Conference on Wednesday January 8, 2015, at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: November 17, 2014
Goshen, New York

E N T E R

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