To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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CHESTNUT RIDGE ASSOCIATES, LLC,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 14674/10
Action 1

30 SEPHAR LANE, INC.
and STEVE'S LAWNS, INC.,

Defendants.

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30 SEPHAR LANE CORP. and STEVE'S LAWNS, INC.,

Plaintiffs-Petitioners,

-against-

Index No.: 456/12
Action 2

VILLAGE OF CHESTNUT RIDGE ZONING BOARD OF APPEALS, RICHARD MILLER, Individually and as Chairperson of the Zoning Board of Appeals, and STEPHEN LEIBMAN and KATHLEEN GALLO, Individually and as Members of the Zoning Board of Appeals and the VILLAGE OF CHESTNUT RIDGE, NEW YORK by its Board of Trustees Consisting of JEROME KOBRE, JOAN BROCK, HOWARD COHEN, ROSARIO PRESTI, JR. and MARISSA STEWART,

Defendants-Respondents.

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LOEHR, J.

The following papers numbered 1-4 were read on the motion of Plaintiff-Petitioners in Action 2 for a Default Judgment against the Defendants-Respondents in Action 2 and for sanctions and the cross-motion of the Defendants-Respondents in Action 2 to file a late Answer.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1
Notice of Cross-Motion - Affirmations - Affidavits- Proposed Answer	2
Affidavit in Opposition to Cross-Motion - Exhibits	3
Reply Affirmation - Exhibits	4

Upon the foregoing papers, Chestnut Ridge Associates, LLC ("Chestnut Ridge") owns a largely vacant 14.6 acre parcel across the street from 30 Sephar Lane, Chestnut Ridge, New York (the "Property"). Chestnut Ridge has been trying, unsuccessfully to develop its parcel for some 20 years. Why it has not been able to was not set forth. Steve's Lawns, Inc. and 30 Sephar Lane Corp. (collectively "Steve's") purchased the Property in 2007. The Property lies in a LO (laboratory-office) zoned district. What operated there before was not set forth but Steve's purchased the Property after satisfying itself that the operation of a landscaping business was a permitted use. This was based in large part on some 15 other landscaping business that were operating in what Steve's believed was the LO District. Actually, it appeared that two of these business operated in a PI District and/or were granted variances. Be that as it may, there was considerable evidence that numerous landscaping businesses had and were operating in the LO District without municipal interference based on the zoning code having been interpreted to allow landscaper storage as an accessory use to the permitted office use. That notwithstanding, it appeared that Chestnut Ridge, which had invested some $90 million to develop the cross-street property, either wanted Steve's Property or for Steve's to cease its landscaping operations as interfering with Chestnut Ridge's development plans, and put pressure on the Mayor of Chestnut Ridge to that end. As a result, in a letter dated March 6, 2008, the Board of Trustees of Chestnut Ridge directed Richard Mitzner, the Code Enforcement Officer of the Village of Chestnut Ridge to issue an appearance ticket to Steve's for operating its business at the Property without site plan approval. Mitzner did so under protest while informing the Mayor and Board of his

belief, for the reasons stated above, that the landscaping operation was a permitted use. After multiple court appearances, the Village of Chestnut Ridge withdrew the Summons. Why was not set forth. Be that as it may, during the prosecution, Steve's filed an application for site plan approval. Although it was not submitted, the Court understood that Steve's sought to construct a structure to house the stored, and apparently objectionable, material and which application recognized the possible need for variances. On October 13, 2009, Paul Baum, the Village Planning Board Attorney, opined that while Steve's might need an *area* variance it did not need a *use* variance based, again, on the history of the way the zoning had been interpreted with respect to landscapers, and the Planning Board apparently concurred. Accordingly, on an unspecified date, Steve's filed an application (again not submitted) with the ZBA for an *area* variance with respect to setback requirements for the new structure. On December 17, 2009, the Village enacted Local Law No. 1 (which has not been submitted) but which apparently now made explicit that landscaping was a permitted use in a LO District. Mitzner avered that the purpose of the Local Law No. 1 was to codify – while fine tuning – the criteria for office buildings with storage in LO Districts. Be that as it may, apparently as a result of Chestnut Ridge's input, the Law also provided that it "shall not apply to any properties that are [the] subject of applications filed with the Chestnut Ridge Planning Board prior to December 17, 2009."[1] It appears that the exception applied only to Steve's and it appeared incontrovertible that it was enacted for no other reason than to benefit Chestnut Ridge at Steve's expense. Additionally, it appeared that the ZBA indicated its intention to review whether Steve's use of the Property was permitted based on opposition Chestnut Ridge had submitted in connection with Steve's area variance application. To this point, Steve's had been proceeding pro se. Steve's then retained counsel and, on September 2, 2011, served a Notice of Claim on the ZBA predicated on its handling of Steve's area variance application and, on September 11, 2011, requested that its application for an area variance be withdrawn. The ZBA refused the request, notifying Steve's of same by letter dated September 19, 2011, while also requesting that Steve's address the issue the ZBA's jurisdiction to consider the use issue. Steve's did not respond nor further appear before the ZBA. On September 20, 2011, Chestnut Ridge filed a request for an interpretation of whether Steve's landscaping/storage at the Property was a permitted *use*, which request the ZBA entertained apparently as related to Steve's *area* variance application which the ZBA had refused to let Steve's withdraw. A public hearing on

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3 This quote was taken from the Decision of Judge Jamieson in Action 1.

Chestnut Ridge's application was heard and concluded on December 8, 2011. Thereafter, it was averred without contradiction, the full ZBA met at least once, in a meeting not open to the public – but without properly going into executive session – to secretly discuss the merits of the Chestnut Ridge application. In a resolution issued January 17, 2012, and filed February 14, 2012, the ZBA ruled that prior to the effective date of Local Law No. 1 – December 17, 2009 – and which in any event did not apply to Steve's – Steve's use of the Property for landscaping storage was a non-permitted use.

On an unspecified date in 2010, Chestnut Ridge commenced Action 1. Although the Complaint was not submitted, it appeared that Chestnut Ridge was seeking a permanent injunction against Steve's operation of its landscaping business at the Property in alleged violation of the zoning. Chestnut Ridge had moved for a preliminary injunction which had been denied by Judge Jamieson in a Decision and Order dated March 29, 2011 based on a lack of likelihood of success on the merits based on the reasons stated above.[2]

On March 30, 2012, Steve's commenced Action 2. It is a hybrid action seeking both article 78 and declaratory relief as well as damages. The Action was removed to Federal court. On April 11, 2012, the Petition/Complaint, as amended, was remanded back to this Court. The First, Second and Eighth Causes of Action seek to set aside the January 2012 Resolution of the ZBA pursuant to article 78, the Open Meetings Law (and for attorney's fees with respect to such claim) and SEQRA, The balance of the claims allege violations of substantive due process, equal protection and a taking without due process and just compensation. While the Sixth Cause of Action seeks a declaratory judgment that Local Law No.1 is unconstitutional as applied to Steve's, it is unclear whether and to what extent the other claims are directed at, or predicated on, Local Law No. 1, the ZBA's handling of the applications before it, or both. Finally, damages were apparently sought from all of the Defendants/Respondents for the asserted constitutional violations.

Defendants/Respondents then moved, pre-answer, to dismiss all of the claims. While that motion was pending, Chestnut Ridge moved to enjoin Steve's from operating in violation of the

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2. Thereafter, in a Decision and Order dated August 20, 2012, Judge Jamieson granted Chestnut Ridge summary judgment on the issue of whether Steve's was operating in violation of the zoning – based on the ZBA's January 2012 Resolution but subject to a determination in this Article 78 proceeding that such Resolution was invalid.

zoning.[3]

All the Defendants/Respondents in Action 2 moved to dismiss the Petition/Complaint pursuant to CPLR 3211(a)(1), (a)(7) and 7804(f). As stated above, the First and Second Causes of Action seek to set aside the January 17, 2012 Resolution of the ZBA as arbitrary and capricious and made in violation of lawful procedure – that is without jurisdiction and in violation of the Open Meetings Law.[4] Defendants/Respondents moved to dismiss these claims for failing to join a necessary party – Chestnut Ridge – and failing to state a claim inasmuch as, they argue, they may not be estopped from enforcing the zoning code.[5]

In a Decision and Order dated June 17, 2013, this Court ruled as follows:

CPLR 1001(a) provides that a person or entity is a necessary party to a litigation if they are needed in order for complete relief to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action. Joinder is mandatory if the nonparty is subject to the jurisdiction of the court. If jurisdiction can be obtained only by consent or voluntary appearance, then the court may allow the action to proceed without joinder based on five enumerated factors (CPLR 1001[b]; *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543, 550-51 [2012]). Thus, where a necessary party – over whom the court had jurisdiction – was not joined within the statute of limitations, absent voluntary joinder, such as by intervention without assertion of the statute of limitations, the action must be dismissed (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726-27 [2008]; *Matter of East Bayside Homeowners Assn. v*

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[3] Actually, the motion was to enforce the "Court Ordered injunction prohibiting [Steve's] from using the property to operate a landscaping/contracting business." No evidence of a prior Court Ordered injunction was submitted. To the contrary, Judge Jamieson denied Chestnut Ridge a preliminary injunction. Accordingly, the Court treated the motion as one to renew its request for an injunction.

[4] The Eighth Cause of Action also sought to set aside the January 17, 2012 Resolution for the ZBA's failure to comply with SEQRA. As SEQRA is inapplicable to a ZBA interpretation of a local zoning ordinance (*Matter of Lindstrom v Zoning Bd. of Appeals of Town of Warwick*, 205 AD2d 690 [2d Dept 1994), the claim was dismissed as failing to state a cause of action.

[5] The Court notes that no objection was made that the Petition/Complaint was not timely filed. Moreover, Respondents' objection to Petitioner's submission of factual affidavits in opposition to the motion to dismiss are not well taken: as a special proceeding, article 78 proceedings are always decided summarily on factual affidavits (*see also* Village Law Section 7-712-c[3]).

Chin, 12 AD3d 370 [2d Dept 2004]; *Matter of Karmel v White Plains Common Council,* 284 AD2d 464, 465 [2d Dept 2001]; *cf Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals,* 5 NY3d 452 [2005]; *Jacoby Real Property, LLC v Malcarne,* 96 AD3d 747, 748-49 [2d Dept 2012]). Accordingly, if Chestnut Ridge were a necessary party, the Court, having jurisdiction over it but the statute of limitations having run (Village Law § 7-712-c), would have to dismiss the Petition.

An entity whose property rights were determined in an administrative proceeding is a necessary party when another brings an article 78 proceeding to review that determination (*see, e.g., Jacoby Real Property, LLC v Malcarne,* 96 AD3d 747 [2d Dept 2012]). Here, Chestnut Ridge's property rights were not determined by the ZBA, Steve's were. Moreover, that Chestnut Ridge might have had standing to intervene here (*see Sun-Brite Car Wash, Inc. v Board of Zoning and Appeals of Town of North Hempstead,* 69 NY2d 406, 413 [1987]) – a right it did not avail itself of – does not make it a necessary party. Accordingly, as Chestnut Ridge was not a necessary party, the motion to dismiss for failing to join it is denied (*see Transgas Energy Systems, LLC v New York State Board on Electric Generation Siting and Environment,* 65 AD3d 1247 [2d Dept 2009]).

As to the merits, the First and Second Causes of Action in the Petition seek to set aside the January 17, 2012 Resolution of the ZBA as arbitrary and capricious and made in violation of lawful procedure. Defendants/Respondents move to dismiss on the basis that the ZBA cannot be estopped from enforcing the zoning code or correcting incorrect determinations (*see Parkview Associates v City of New York,* 71 NY2d 274, 282 [1988]; *Town of Southold v Estate of Edson,* 78 AD3d 816 [2d Dept 2010]; *accord Matter of Oakwood Prop. Mgt., LLC v Town of Brunswick,* 103 AD3d 1067 [3d Dept 2013]). Steve's, however, is not relying on an estoppel but that its storage was a permitted use under the zoning code under prior interpretations and that the ZBA's Resolution was therefore arbitrary and capricious in that it failed to adhere to prior precedent without distinguishing it (*see Matter of Charles A. Field Delivery Serv. [Roberts],* 66 NY2d 516, 517 [1985]; *Matter of Waidler v Young,* 63 AD3d 953, 954 [2d Dept 2009]; *Matter of Halperin v City of New Rochelle,* 24 AD3d 768, 770-71 [2d Dept 2005]). Before the Court even gets to this issue, however, it must address the issue of whether the ZBA had the jurisdiction to address the question.

ZBA's have only appellate jurisdiction (Village Law § 7-712-b[1]; *Anayati v Board of Zoning Appeals of Town of North Hempstead,* 65 AD3d 681, 683 [2d Dept 2009]; *Silvera v Town of Amenia Zoning Board of Appeals,* 33 AD3d 706, 708 [2d Dept 2006]; *Baron v Getnick,* 107 AD2d

1017, 1018 [4th Dept 1985]). Here, Steve's invoked the jurisdiction of the ZBA by filing its *area* variance application. It then withdrew it. The ZBA purported to disregard the withdrawal. Other than evidencing the ZBA's bad faith, such refusal had no legal effect. Defendants/Respondents cite no authority pursuant to which they could compel Steve's to pursue an area variance it no longer desired. Thus, when Chestnut Ridge filed its application there was nothing pending to review – except perhaps the Village's long standing interpretation that landscaper storage was a permitted accessary use – something way beyond the statute of limitations of the ZBA to hear (Village Law § 7-712-a[5][b]; *Clarke v Town of Sand Lake Zoning Board of Appeals,* 52 AD3d 997, 999 [3d Dept 2008]; *Spandoff v Building Inspector of Incorporated Village of East Hills,* 193 AD2d 682, 683 [2d Dept 1993]) – and a basis for jurisdiction the Defendants/Respondents have not even relied on. Rather, the Defendants/Respondents hang their jurisdictional hat on Steve's refused-to-be-withdrawn *area* variance application. Assuming Steve's application were still appropriately pending, however, the result would be the same. Steve's sought an *area* variance. Chestnut Ridge sought an interpretation of whether Steve's *use* was permitted. This was a different issue from that before the ZBA and did not seek to appeal any pending determination. The ZBA was therefore without jurisdiction to make the January 17, 2012 Resolution (*Matter of McDonald's Corp. v Kern,* 260 AD2d 578 [2d Dept 1999]).

Additionally, article 7 of the Open Meeting Law requires that every meeting of a public body at which a quorum is present – whether formal or informal, whether "work sessions' or "agenda sessions," where matters of substance are addressed – shall be open to the public unless conducted in executive session properly initiated at a public meeting in accordance with the statute (Public Officers Law § 103; *Matter of Orange County Publs., Div. of Ottaway Newspapers v Council of City of Newburgh,* 60 AD2d 409, 414-16 [2d Dept 1978];[6] *accord Goodson Todman Enterprises, LTD. v City of Kingston Common Council,* 153 AD2d 103, 105-06 [3d Dept 1990]). Where the statute has been violated, sanctions, within the Court's discretion, including annulling the determination, costs and attorney's fees may be imposed (Public Officers Law § 107; Village Law § 7-712-c[2]; *Cunney v*

[6] While the Second Department in *Orange County* (60 AD2d 409, 417) originally made a distinction between meetings and quasi-judicial proceedings, holding that the latter were not subject to the Open Meeting Law, the Second Department effectively overruled *Orange County* with respect to such distinction in *Matter of Halperin v City of New Rochelle,* 24 AD3d 768, 770 [2d Dept 2005]).

Board of Trustees of Village of Grand View, 72 AD3d 960, 961-62 [2d Dept 2010]).

Here, the uncontroverted evidence is that the full ZBA held at least one meeting, not open to the public, at which the substance of Chestnut Ridge's application was discussed. This violated the statute. Moreover, Defendants' bad faith is apparent: having decided to put Steve's out of business at Chestnut Ridge's behest, it is not surprising that Defendants/Respondents did not want to discuss same before the public. Based thereon, the Petition is granted and the January 17, 2012 Resolution of the ZBA is annulled as having been issued without jurisdiction, in violation of the Open Meetings Law and as arbitrary and capricious based on the ZBA's failure to adhere to prior precedent or distinguish same. Moreover, based on the bad faith of the Village and ZBA, costs and attorney's are awarded (*Matter of Oshry v Zoning Bd. of Appeals of Inc. Vil. of Lawrence*, 276 AD2d 491, 492 [2d Dept 2000]; *Matter of Goetshius v Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552, 554 [2d Dept 1997]). Steve's shall submit evidence of its attorney's fees incurred with respect to the Open Meeting Law claim for relief.

Chestnut Ridge's motion to enjoin Steve's from using the Property for landscaper storage is denied as based on the Januaary 17, 2012 Resolution that has now been set aside.

As to Local Law No. 1, the Complaint seeks a declaratory judgment that it is unconstitutional as a denial of, inter alia, substantive due process and equal protection. As stated above, the evidence is that Local Law No. 1 essentially codified the prior zoning interpretations that landscaper storage was a permitted accessory use in a LO District – then made it inapplicable to anyone (i.e. Steve's) who had an application then pending before the planning board. The Court assumes that Steve's is seeking to declare only that proviso unconstitutional.

The Due Process Clause of the Fourteenth Amendment embodies a substantive component that protects against certain government actions regardless of the fairness of the procedures used to implement them. Where, as here, the right is not fundamental, the regulation need only be reasonably related to a legitimate state objective (*Bryant v New York State Education Department*, 692 F3d 202, 218 [2d Cir 2012]; *Montgomery v Daniels*, 38 NY2d 41 [1975]). Similarly, the Equal Protection clause allows disparate treatment provided there is a rational relationship between the disparity and some legitimate governmental purpose. With the understanding that what is being challenged is the exception which would make Local Law No. 1's codification inapplicable to Steve's, the question becomes: what governmental interest is being advanced – and how is it being advanced – by denying the application of the Law to only those with applications pending before the Planning Board? As

alleged in the Complaint, the exception appears irrational – except, perhaps as a means to force Steve's out of business for the benefit of Chestnut Ridge. If the Village of Chestnut Ridge wants to acquire Steve's Property, it must do so appropriately pursuant to the power of eminent domain and pay just compensation. It may not do so by means of adopting zoning laws with no apparent purpose other than to force Steve's out of business. Accordingly, the motion to dismiss the Sixth Cause of Action (and the other Causes of Action to the extent they serve as bases for the Sixth Cause of Action) are denied.

The balance of the Complaint seeks damages. The claim for damages for a taking is dismissed as moot. The claim for damages against the ZBA, its members individually, and the Village of Chestnut Ridge and its Board of Trustees individually are dismissed as failing to state a cause of action as all are immune from damage claims (*Tarter v State of New York*, 68 NY2d 511, 518 [1986]; *Mertens v State of New York*, 73 AD3d 1376, 1377 [3d Dept], *lv denied* 15 NY3d 706 [2010]; *Matter of Moundroukas v Foley*, 99 AD2d 784 [2d Dept 1984]).

Thus, in the Decision and Order, with respect to the First and Second Causes of Action, the Court determined that the January 17, 2012 Resolution of the ZBA was arbitrary and capricious and issued without jurisdiction and in violation of the Open Meetings Law and was annulled on those bases. Moreover, based on the Village and ZBA's bad faith, costs and attorney's fees were awarded and Steve's was directed to submit evidence of it attorney's fees incurred with respect to the Open Meeting Law claim. The motion to dismiss the Sixth Cause of Action – for a declaratory judgment that Local Law No. 1 of 2009 was unconstitutional as applied to Steve's – was denied. All other claims were dismissed.

Thereafter, the Defendant-Respondents having failed to answer the Complaint, Plaintiffs-Petitioners now moves for a default judgment and for sanctions. In opposition, the Defendants-Respondents argue that no answer was necessary inasmuch as the only claim remaining in the Complaint – the constitutionality of Local Law No. 1 of 2009 as applied to Steve's – was rendered moot when the Court annulled the January 17, 2012 Resolution. A default judgment against a municipality with respect to an administrative decision is not proper unless it appears that the administrative body has no intention to have the controversy determined on the merits (CPLR 7804[c]; *Matter of Tanalski v New York State Div. of Human Rights*, 262 AD2d 117, 118 [1st Dept 1999]). Accordingly, Plaintiff-Petitioner's motion is granted to the extent that they may enter a declaratory judgment that Local Law No. 1 of 2009 is unconstitutional as applied to Steve's. The

cross motion to file a late answer is denied as moot. The Plaintiff-Petitioner's motion for sanctions is denied: the only sanctions Plaintiff-Petitioners are entitled to was awarded to them by the Court in the June 17, 2013 Decision and Order and, to date, Plaintiff-Petitioners have failed to submit any evidence of their attorney's fees. Accordingly, the Court finds that Plaintiff-Petitioners have abandoned such claim.

This constitutes the decision and order of the Court.

Dated: New City, New York
December 24, 2014

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