

Ray Tartaglione
101 Westmoreland Avenue
White Plains, NY 10606
914-948-1100

April 28, 2014

United States Attorney's Office
300 Quarropas Street
White Plains, NY 10601-4150

Re: Attorney Ira Goldenberg

To Whom It May Concern,

I am hereby submitting a complaint to your office regarding the professional conduct of Westchester Attorney Ira Goldenberg. My complaint involves his numerous attempts to intentionally mislead and misinform public officials about a 2012 investigation commenced by the NYS Department of Environmental Conservation at the request of then Assemblyman, now NYS Senator, George Latimer into the numerous health and safety code violations on the City of Rye's Kuder Island Colony (AKA Hen Island).

It is my belief that Attorney Goldenberg may in fact be a party to a secretly negotiated bargain between certain current high ranking Westchester County and former City of Rye legislators to consciously turn a blind eye to dangerous violations of the municipal health and safety codes as a reward to politically connected individuals. If your office would commence an investigation the sun-lighting effect of that activity could uncover an even wider network of Westchester County municipal malfeasance.

As the attorney for Kuder Island Colony, Attorney Goldenberg wrote the attached letter presenting false and defamatory statements and, in a subsequent meeting, attempted to mislead the DEC attorney and impede a multi-office New York State investigation. Involved in that meeting on May 22, 2012 were officials of the NYS Department of Health, NYS Department of State, and the NYS Department of Environmental Conservation. (Please see attached letter dated April 12, 2012.)

Written False Assertions to the NYS DEC

In this pre-meeting letter dated April 12, 2012 to John Parker Esq. (Office of General Counsel Region 3 of the NYS Department of Environmental Conservation) from Attorney Goldenberg, he begins his deception by stating "Kuder is proud that it is in compliance with environmental laws and regulations." Attorney Goldenberg is very well aware that Kuder Island Colony was not at all in compliance with environmental laws and regulations when he wrote his letter.

In fact, Attorney Goldenberg was well aware that his clients at that time were entrenched in Rye City Court defending and losing a violation appeal concerning "building a wall without a permit" along the shore of Long Island Sound. That violation was issued in 2007 and to this date Kuder Island Colony has not rectified the same illegal construction. Attorney Goldenberg was also aware that his client had official notice that this same illegally constructed wall "violates other federal, state or local regulations." This finding was determined February 2, 2010 by means of a resolution from the City of Rye. (See attached e-mail dated 4-30-2009 and the Rye City Planning Commission Resolution dated 2-2-2010.)

In Attorney Goldenberg's letter he also misleads opposing Counsel and officials by stating, *"In almost every instance the inspections resulted in findings that there are no violations on the Island..."* Attorney Goldenberg was once again well aware that on April 9, 2009 his clients were issued three pages of additional violations which cited property maintenance, illegal propane storage violations, electrical violations, major structural foundation violations, wetlands violations and a notice referencing mosquito infestation violations including a referral to the County Department of Health for possible potable water and sewage violations. (See attached violation letter dated 4-8-09.)

And again, on June 17, 2009, Attorney Goldenberg was aware his clients were cited by the Westchester County Department of Health for safety and fire code violations as well as an open sewage pit and two sewage systems that were improperly covered. (See attached letter dated 6-17-2009.)

In that same paragraph claiming "no violations," Attorney Goldenberg once again misleads DEC counsel by stating *"At present, even though no agency obligated that Kuder do so, Kuder is requiring its shareholders to install environmentally friendly composting toilets ("EFT") in each cottage. Installation of the EFT's will be completed during this occupancy season which commenced on April 1, 2012 and will end on October 31, of this year. The County and the City have embraced Kuder's plans."* It was known to Attorney Goldenberg at that time that according to the Rye City code, below, Westchester County did not approve the installation of composting toilets on Hen Island. To quote from the attached letter the Westchester County Health Department stated:

"Further, this department does not approve nor disapprove such installation with the understanding that the installation of composters or incinerator toilets must be in compliance with all applicable laws, rules and regulations." A reasonable person would not consider, "not approving nor disapproving such installation" as an "embrace" of these plans. Attorney Goldenberg was well aware that the Rye City code cited below requires written approval from the County Commissioner of Health, among other approvals which are necessary for the installation of 34 sewage disposal systems along the shores of the Long Island Sound. (See excerpts of the Rye City code and attached letter dated 3-30-12.)

From the Rye City Code: 161-1

"Where a public sanitary sewer is not accessible, a building permit shall not be issued without submission of a copy of the written approval of the Westchester County Commissioner of Health, indicating that the premises may be adequately sewered by a separate sewage disposal system."

Deadly Explosive Hazards Created

As Attorney Goldenberg wrote his inaccurate letter prior to the meeting he was also well aware that he has been assisting his clients, Kuder Island Colony, Inc., in avoiding health, safety and environmental code compliance in addition to many other unsafe and illegal conditions that exist on Hen Island. Those conditions exist to this day due to Attorney Goldenberg's misrepresentations and untruths.

As a result of the illegal, non-permitted and/or uninspected installations, Attorney Goldenberg's actions and deceptions enabled a number of composting toilets to be installed in a manner that could have catastrophic deadly consequences from gas explosions. Please see our video linked below depicting their deadly actions.

https://www.youtube.com/watch?v=NCOcMOvfTEU&list=UUSKIv_k38Xqk1FmYNjQDnzA

Written Warnings from Official Suppressed

Attorney Goldenberg was also well aware of the attached advisement issued by James Carnecelli (a 20-year member of the Westchester County Board of Health and a licensed environmental engineer) dated August 9, 2011. In that letter Mr. Carnecelli addressed the serious health and environmental hazards related to the lack of sewage, potable water and maintenance, which, in turn, creates Westchester County's largest known mosquito infestation zone. This seasonal mosquito infestation coupled with the proven presence of West Nile Virus on Hen Island, threatens the health of all in Rye and the neighboring communities on a daily basis. After Mr. Carnecelli's letter was issued to the Rye City Council, he was contacted and told not to get involved with the Hen Island controversy. Please see attached letter from Board of Health Member James Carnecelli dated August 4, 2011 and view the 2013 Public Service Video here –

“Rye Vector Bourne”: <https://www.youtube.com/watch?v=VT2F1IXxz8xg>

False and Misleading Assertions About Court Findings

At the bottom of page one of his letter, Attorney Goldenberg identifies me as *“a disgruntled Kuder shareholder and cottage owner who has been the source of almost every environmental accusation concerning the Island.”* Once again he is well aware of my concerns for the health and safety of my family and my long-time commitment to the environment. He is also well aware that a number of Hen Island homeowners share these same views and concerns and we have in our files many supporters' letters and e-mails from nearby Rye and Mamaroneck residents. Please see letters from fellow Island homeowners Iodice, Santangelo and Barotz.

In the first paragraph of page two, attorney Mr. Goldenberg states, *“Mr. Tartaglione has a long history of unjustified animosity toward Kuder and its shareholders; Mr. Tartaglione sued Kuder (or third parties acting in connection with Kuder, such as the city of Rye) numerous times and lost every litigation.”* Attorney Goldenberg intentionally omits many facts and factors in an effort to mislead the officials involved.

“RAY TARTAGLIONE, individually and as a shareholder of KUDER ISLAND COLONY, INC. suing on behalf of himself and on behalf of all the shareholders thereof similarly situated”

In 2007 I was forced to commence a legal action against the corporate owners of Hen Island (Kuder Island Colony, Inc.) for allowing a multitude of serious health, safety and environmental problems to continue uncorrected. Attorney Goldenberg fails to describe the facts of the case where Kuder was sued for, among other issues, a failure to supply potable water to homes on Hen Island, allowing the pollution the waters of the Long Island Sound by the untreated sewage discharges, and a failure to protect the residents and residents of surrounding towns from the horrific seasonal mosquito infestations.

This suit was not in fact “lost” but was dismissed based on the business judgment rule of law, whereby courts refuse to be involved in disputes between stockholders and corporations. The courts never ruled on the sewage, potable water and mosquito issues even though Attorney Goldenberg, through his writings, clients, and press releases, led the public to believe otherwise.

Additionally in the case against the City of Rye in 2011, Attorney Goldenberg either did not read the decision or he chose to intentionally misstate the relevant sections of Supreme Court Justice Barbara Zambelli's well-reasoned decision. I have attached a copy of State Supreme Court Justice Barbara Zambelli's January 20, 2011 Decision. The following are examples of the City of Rye claims that were, in fact, **rejected by the Court**:

On Page 4: The City argues that its motion to dismiss should be granted because the Westchester County Department of Health ("DOH"), as opposed to any City entities, has jurisdiction over the private sanitary sewer systems in the City.

On Page 6: The City simply alleges that, "essentially", the Department of Health is the City's Health Department and is the enforcement agency over the applicable County health regulations.

And the Court's answer is:

*"The City's conclusory contentions herein are an insufficient basis upon which to grant dismissal of the parties claims. Moreover, while it is true that the County has enacted regulations regarding sewage systems, the County has clearly not usurped local municipalities rights to pass their own regulations regarding such systems, as the County Sanitary Code, of which the sewage regulations are a part, specifies that nothing herein contained in this code shall be construed to restrict the power of any city, town or any village to adopt and enforce additional ordinances or enforce existing ordinances relating to health and sanitation, provided that such ordinances are not inconsistent with the provisions of the Public Health Law, the Environmental Conservation Law or the State Sanitary Code. (Westchester County Sanitary code, §873.102(4)). While respondents' claim that Code §161 has been pre-empted by County Legislation, they do not argue that it is inconsistent with it, and indeed, this Court finds nothing inconsistent in the inspection required by Code §161 and the County's regulations. Accordingly, respondents' motion to dismiss on this basis must **also be denied**." Emphasis added.*

Therefore, the New York State Supreme Court found that the City clearly has the right to pass its own regulations and there is nothing in the County Sanitary Code to restrict the Power of the City to adopt and enforce additional ordinances or enforce existing ordinances relating to health and sanitation provided that such ordinances are not inconsistent with the provisions of the Public Health Law. Section 161 of the Rye City Code is not inconsistent with the Public Health Law and, accordingly, the City is not restricted by the County Health Law from enforcing this important chapter of the Rye City Code to further protect the important, environmentally-sensitive area of Milton Harbor.

.....

Again, on Page 4: The City claims that Code §161 is no longer applicable or enforced in the City, to which the Court answered:

*"The City's motion to dismiss based upon their contention that Code §161 is no longer applicable or enforced in the city, and that the Department of Health has preempted the regulatory field in regard to private sewer systems, **is also denied**. As with respondents' allegations regarding the Common Council and the Sanitation Committee, only insufficient, conclusory statements are offered in support of their allegation that Code §161 is no longer applicable. Respondents fail to point to any evidence the Code §161 has been repealed or superseded; indeed, Code §161 still appears "on the books" today and its history, while reflecting that the ordinance was originally adopted on September 20, 1950 and that certain parts were amended in the 1980's fails to reflect any such repeal (Respondents' Exhibit B). Moreover, while it is true that the County has enacted regulations regarding sewage systems, the County has clearly not usurped local municipalities rights to pass their own regulations regarding such systems, as the County Sanitary Code, of which the sewage regulations are a part, specifies that "nothing herein contained in this code shall be construed to restrict the power of any city, town or any village to adopt and enforce additional ordinances are not inconsistent with the provisions of the Public Health Law, (Westchester County Sanitary Code, §873.102(4)). While respondents' claim that Code §161 and the County's regulations. Accordingly, respondents' motion to dismiss on this basis must **also be denied**." Emphasis added.*

The Court found that §161 of the Rye City Code is still "on the books" today and that the City has the right to pass its own regulations regarding septic systems and that *"there is nothing in the County Code that shall be construed to restrict the power of any city to adopt or enforce additional ordinances"*. Fortunately, the predecessors of this Rye City Council had the foresight to provide even greater protection to Milton Harbor than the requirements of the County Health Department.

.....

On Page 3: The City of Rye moved to dismiss my Petition, arguing that I lack standing to maintain the proceeding, to which the Court answered:

*"Addressing the issue of petitioners' standing, it appears to this Court that at least petitioner Tartaglione and possibly petitioner HTH **would have standing** under the analysis of the Court of Appeals in Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany, 13 N.Y.3d 297 (2009), as petitioner Tartaglione, the president of petitioner HTH, asserts that he uses and enjoys the affected natural resource of Milton Harbor in a way different from the public at large (Tartaglione Affidavit ¶¶ 14-17) and alleges that the municipal action (or in this case, inaction) directly harms his use and enjoyment of the harbor."* Emphasis added.

In reality, the New York State Supreme Court found that I [Raymond J. Tartaglione] and possibly Heal the Harbor have standing to bring action against the City with regard to matters pertaining to Hen Island.

.....

On Page 7: The only issue that the Court did not resolve in favor of the Petitioner was the request of the Petitioner that the Court compel the City to enforce its own City code, where the Court wrote:

"The decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and is not a proper subject for relief in the nature of mandamus to compel."

The New York State Supreme Court found that the decision whether the City of Rye should enforce its own Code (§161) lies with the City Council, as the Court is not, as a matter of law, empowered by the City Council to do so.

.....

The Truth Has Consequences

Although the courts did not mandate enforcement, everyone in the City of Rye came to know the truth and they were just as appalled as I was that the Mayor and the City Council would outright refuse to enforce a code put in place for the protection of the very people who elected them. Who had ever heard of a modern municipality in a place like Rye, New York, refusing to enforce its own basic household sanitary code? While Attorney Goldenberg claimed this decision was a loss for me, this was clearly not the case.

Attorney Goldenberg is quoted at the end of paragraph two stating, *"After an investigation determines that his concerns are unfounded he has accused the officials of a cover-up, corruption or some other improper behavior."* Attorney Goldenberg once again fails to state that as a result of my efforts and scrutiny of the public official in question – Rye's Mayor Douglas French – the facts surrounding Mayor French's corruption in office were uncovered. Mr. French was forced to admit to collecting *two* STAR tax exemptions for 10 years (a felony for which he was not charged) and to rebuilding an entire residential house he owned without any required permits or inspections. **This resulted in Mayor French personally paying over \$16,000.00 in restitution to Westchester County's taxing authority and a**

\$1,000.00 fine to the Rye Building department. This exposure of malfeasance and corruption and the related Rye ethics reviews prevented Mr. French from ever seeking reelection.

My exposure of the way in which Mayor French assisted Attorney Goldenberg and his clients in code avoidance also contributed to his loss of public trust. Similarly former Deputy Health Commissioner Leonard Meyerson was terminated by the County as a result of his letters and actions about unsanitary conditions existing on Hen Island.

Senator Latimer

Perhaps Attorney Goldenberg's most egregious statement to mislead the public officials occurs here:

"Indeed, the very complaint before you now illustrates his pattern of behavior in which he initially complained to New York State Assemblyman George Latimer who, believing the complaint to be in good faith, forwarded it to your office for investigation. Subsequently when Mr. Latimer learned more about Mr. Tartaglione, he publicly withdrew his support which resulted in personal attacks by Mr. Tartaglione against Mr. Latimer on the 'MyRye' website."

If you contact State Senator Latimer he will confirm that he has never withdrawn his support for the investigation. In fact, if you read the article and the comment section of the articles in question, you will see that it is an anonymous person ("Internet troll") attacking the Senator for his request to open an investigation on Hen Island.

Attorney Goldenberg is well aware that his statements regarding the article and the Senator's position are false, but he injects these scurrilous libelous personal attacks in an effort to trick public officials into believing that the State Senator is no longer interested in supporting the investigation.

Mr. Floatie

Lastly Attorney Goldenberg makes reference to our mascot, Mr. Floatie, and once again attempts to mislead the public officials involved into believing that Mr. Floatie is a prop used to harass public officials. Mr. Goldenberg is well aware that our organization, HEALtheHARBOR.com, received full United States exclusive rights for the use of Mr. Floatie as long as he is: (1) used in the course of exposing unethical politicians who allow pollution of the waterways; and, (2) not used for profit. Attorney Goldenberg is well aware that Mr. Floatie was very successful in drawing attention and rectifying pollution control in Victory, British Columbia. Attorney Goldenberg is also well aware that our organization obtained the use rights from the Canadian environmental organization People Opposed to Outfall Pollution.

Please See For Yourself

Attorney Goldenberg's claims that I have used falsehoods to embarrass him and his client (Kuder Island Colony Inc.) are not accurate. I am doing my best to expose all that has been done improperly, illegally and unsafely. I have also set up a website and developed a corporation named HEALtheHARBOR.com in an effort to expose the fact that Hen Island, with the help of Attorney Goldenberg, allows health, safety, building and environmental codes to be overlooked and violated.

I invite members of your committee to visit the web site – especially the **Photo/Video** section where videos will show you the nature of water, sewage, building, safety, and environmental problems I've spoken of. This will give you a clear picture as to what Mr. Goldenberg's legal maneuverings have

allowed to exist in Rye over the years. Those interested could begin by viewing our full length video here:

“Rye’s Failure to Protect”: <https://www.youtube.com/watch?v=uqDyca5UwcY>

HEALtheHARBOR.com has the support of Long Island Soundkeeper, its Director, Mr. Terry Backer, and Environmental Attorney Robert F Kennedy, Jr., lead council for the Hudson Riverkeeper. Mr. Kennedy and Mr. Backer not only have given permission to use their pictures and quotes on our website but Mr. Kennedy has also given us invaluable access to some of the top environmental experts at the environmental division of the Pace Law School to advise our legal counsel.

Request for Investigation

Attorney Ira Goldenberg’s legal ethics, wording and actions are deplorable. His misleading statements, outright lies and illegal advice to his clients serve only to increase his wealth and do not serve to enforce and uphold the present laws in the State of New York. Those laws exist to protect the health and safety of the public. His advice on some cases and issues has caused Kuder Island shareholders (of which I am one) to pay increasing legal fees to him with no resolution in sight for the many health and safety violations on the Island. Attorney Goldenberg’s continued inappropriate legal tactics jeopardize the health and safety of Westchester’s Sound Shore residents year after year, while he uses false and malicious statements – exemplified in the correspondence above – to continue his personally-profitable charade. I respectfully request that the US Attorney’s office investigate his professional conduct and activities.



Ray Carabaggio
President, HEALtheHARBOR.com, Inc.

GOLDENBERG & SELKER, LLP

ATTORNEYS AT LAW

Ira S. Goldenberg
Diane E. Selker

399 Knollwood Rd., Suite 112
White Plains, NY 10603
914-682-4015 • 914-997-0999 • Fax 914-682-1512

Jasmine Gurreri
Paralegal

April 12, 2012

VIA FAX (845) 255-3042 &
FIRST CLASS MAIL

John Parker, Esq.
Regional Attorney
Office of General Counsel, Region 3
NYS Department of Environmental Conservation
21 South Putt Corners Road
New Paltz, NY 12561

APR 13 2012

Re: Kuder Island Colony, Inc.

Dear Mr. Parker,

Our office is general counsel to Kuder Island Colony, Inc. ("Kuder"), owner of Hen Island, which is located in Milton Harbor in the City of Rye. Kuder is a cooperative corporation whose shareholders own and use seasonal cottages on the island.

We were advised by the Rye City Manager that Ronald Gatto, an investigator from your office, requested marine transportation to the island to conduct an inspection. The City Manager suggested that Mr. Gatto contact our office to arrange for the inspection.

Our client will fully cooperate with your department to conduct an inspection. Please contact us at your earliest convenience so that arrangements may be made.

However, so that our client may adequately prepare, please advise as to the substance of the complaint which led to the decision to conduct an inspection and the identity of the complainant.

Kuder is proud that it is in compliance with environmental laws and regulations. Over the last five years it has been the subject of repeated inspections by your department, the Westchester County Health Department, and the City of Rye.

In almost every instance the inspections resulted in findings that there are no violations on the island. At present, even though no agency obligated that Kuder do so, Kuder is requiring its shareholders to install environmentally friendly composting toilets ("EFT's") in each cottage. Installation of the EFT's will be completed during this occupancy season which commenced on April 1, 2012, and will end on October 31, of this year. The County and the City have embraced Kuder's plans.

Kuder would like to confirm that the complaint to your office was made by Raymond Tartaglione, a disgruntled Kuder shareholder and cottage owner, who has been the source of almost every environmental accusation concerning the island.

April 12, 2012

Mr. Tartaglione has a long history of unjustified animosity toward Kuder and its shareholders; Mr. Tartaglione sued Kuder (or third parties acting in connection with Kuder, such as the City of Rye) numerous times and lost every litigation.

Since his lawsuits have been unsuccessful, he has resorted to seeking redress against Kuder by complaining to elected officials and administrative agencies. These complaints are initially presumed to be legitimate as on first review Mr. Tartaglione's motives and history are unknown to the agency. In each instance, however, after an investigation determines that his concerns are unfounded, he has accused the officials of a cover-up, corruption or some other improper behavior.

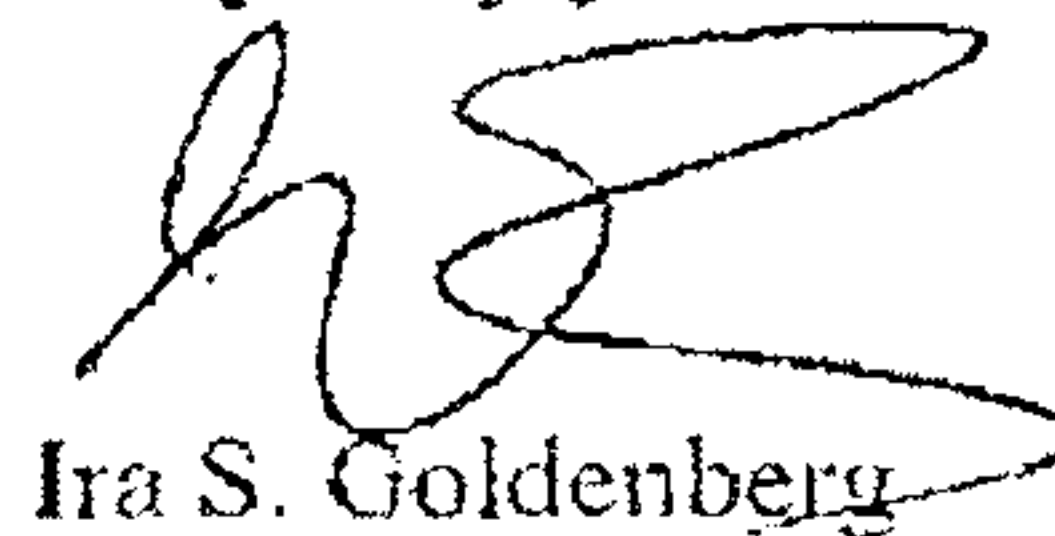
Indeed, the very complaint before you now illustrates his pattern of behavior in which he initially complained to New York State Assemblyman George Latimer who, believing the complaint to be in good faith, forwarded it to your office for investigation. Subsequently, when Mr. Latimer learned more about Mr. Tartaglione, he publicly withdrew his support which resulted in personal attacks by Mr. Tartaglione against Mr. Latimer on the "MyRye" website. (see http://www.myrve.com/my_weblog/2012/04/latimer-calls-out-anonymous-commenter-on-myrvecom.html.)

Prior personal attacks by Mr. Tartaglione against other government officials include the last two mayors of the City of Rye, Rye City council members, and officials in the Westchester County Health Department.

In addition to personal attacks, Mr. Tartaglione has resorted to various insulting and disgusting stunts to publicize his position, including attending Rye city council meetings accompanied by Mr. Floatie (a man dressed as excrement) and Mr. Jackass (a man dressed as a donkey), and adorning the sides of a van he calls the "Floatiemobile" with large posters of city council members sitting on toilets in front of City Hall.

Please advise if you would like us to provide additional information and/or documents.
Thank you.

Very truly yours,



Ira S. Goldenberg

Cc: Kuder Island Colony

Ray Tartaglione

From: "Miller, Christian K." <cmiller@ryeny.gov>
To: "Ray Tartaglione" <ray@rjtauto.com>
Cc: "Kristen K. Wilson" <KKW@ddw-law.com>; "Tamburro, Vincenzo" <vtamburro@ryeny.gov>
Sent: Thursday, April 30, 2009 5:06 PM
Subject: RE: Hen Island illegal wall construction

The Molloy Cottage wall is currently pending before the Rye City Planning Commission. The application involves a wetland permit to maintain a seawall that was constructed/reconstructed within a 100-foot regulated wetland buffer. The application was submitted to the Commission on March 6, 2009 and I believe the complete application file (including plans, forms and other related materials) was provided to you in response to your March 26, 2009 FOIL request.

Kuder Island Colony, Inc. was issued a notice of violation by the City for the wall in question on May 29, 2007. There was no response to that notice. A second notice of violation sent on June 24, 2008.

The Commission discussed the application at its March 24, 2009 meeting. Minutes of that meeting are available online (www.ryeny.gov). This matter will be on the Commission's May 5, 2009 agenda. All meetings of the Commission are open to the public, however public comment is limited to the public hearing, which has not yet been scheduled by the Commission. Prior to the hearing, you can submit comments in writing to me and I will forward them to the Commission. All agenda of the Commission are published on the City's website in advance of every meeting.

-----Original Message-----

From: Ray Tartaglione [mailto:ray@rjtauto.com]
Sent: Monday, April 27, 2009 3:18 PM
To: Miller, Christian K.
Cc: Kevin Plunkett; Otis, Steve; Gamache, Paula; Sack, Joe; Pratt, George; Parker, Catherine; Ball, Andy; Cunningham, Matt; Mike Clay Johnson; Joann Molloy; Jason Anderson; Helen Cunningham; Ed & Lorraine Volpe; Ben & Sue Minard; Gary Ederer; Steven Gaines; Cossu, Denise; Culross, Frank J.; rhlandarch@aol.com
Subject: Hen Island illegal wall construction

Dear Mr. Miller,

Can you please inform me of what committee(s) the Hen Island illegal wall construction permit is in front of at this point. Can you also supply me with a brief synopsis as to what has transpired with relation to the application and the violation to date? Can you also supply me with a time line as to what transpired between May 29, 2007 when the violation was issued and today April 27 2009.

4/15/2014

Barbara Cummings, Chairman
Martha Monserrate, Vice Chair
Carolyn Cunningham
Nick Everett
Hugh Greechan
Peter Jovanovich
Peter Larr



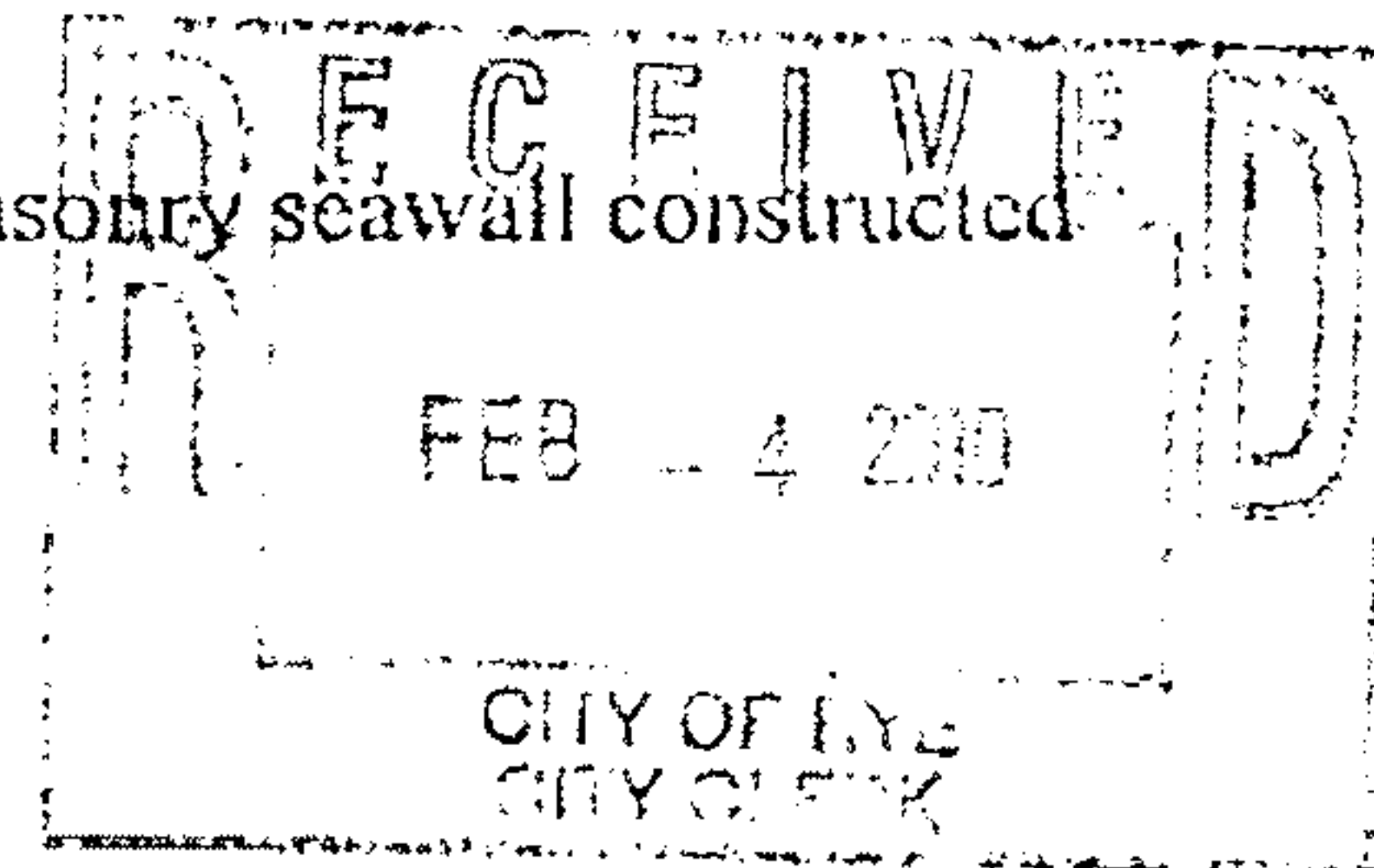
Planning Department
1051 Boston Post Road
Rye, New York 10580
Tel: (914) 967-7167
Fax: (914) 967-7185
<http://www.ryeny.gov>

CITY OF RYE
Planning Commission

Resolution

No. 02-2010

Application Name:	Molloy Cottage
Approval Type:	Wetland and Watercourses Permit
Application Number:	WP# 261
Project Description:	Violation: Request to maintain a masonry seawall constructed without required permits
Street Address:	Kuder Island
Tax Map Designation:	Sheet: 159.5 Block: 1 Lot: 1
Zoning District:	R-2 Residence District
Date:	February 2, 2010



WHEREAS, a Notice of Violation dated May 29, 2007 was sent from the Rye City Building Inspector to Kuder Island Colony for building a stone wall, which occurred without a building permit as required by Chapter 68 of the Rye City Code or a wetlands and watercourses permit as required by Chapter 195 of the Rye City Code; and

WHEREAS, since there was no response by Kuder Island Colony to the May 29, 2007 Notice of Violation, a second Notice of Violation dated June 24, 2008 was sent from the Rye City Building Inspector to Kuder Island Colony for building a stone wall, which occurred without a building permit as required by Chapter 68 of the Rye City Code or a wetlands and watercourses permit as required by Chapter 195 of the Rye City Code; and

WHEREAS, on March 6, 2009, Benjamin R. Minard, Jr., President of the Kuder Island Colony, Inc. Board of Directors, (hereinafter "Applicant") submitted an application for Wetland and Watercourses Permit approval pursuant to Chapter 195, *Wetlands and Watercourses*, of the Rye City Code for a property, located on Kuder Island; and

WHEREAS, the application sought to maintain a "repaired and reconstructed" seawall located within 100-feet of Milton Harbor, which is a regulated watercourse; and

WHEREAS, on March 13, 2009 the application was referred to the Conservation Commission/Advisory Council (hereinafter "CC/AC") for their review and recommendation; and

Applicant Signature

Date



CITY OF RYE
CITY HALL • RYE, NEW YORK 10580
TELEPHONE (914) 967-5400

NOTICE OF VIOLATION

April 8, 2009

Kuder Island Colony, Inc.
P.O. Box 766
Rye, NY 10580

Premises: Hen Island
Tax ID#:159.05-1-01

Date of Investigation: April 1, 2008 and continues to this day

VIOLATION:

Piles of branches, limbs and shrubs were placed too close to structures (cottages and sheds) throughout the island. Cottages 29, 30, 32, 26, 27, and 21 were the most notable. This is a violation of the Property Maintenance Code of New York State, Section 307.1.1 - Dry vegetation, combustible waste and refuse. Combustible waste, refuse and large quantities of dry vegetation which by reason of their proximity to buildings or structures would constitute a fire hazard or contribute to the spread of fire shall be removed.

The storage of propane tanks throughout the island needs to be addressed. Cottages 30, 29, 21, 24, 16, 11, sheds behind cottages 10, 11 and 12 are most notable. This is a violation of the Fire Code of New York State – Section 3804.1 - The storage and handling of LP-gas and the installation and maintenance of related equipment shall comply with NFPA 58 and be subject to the approval of the code enforcement official, except as provided in this chapter. Section 3809.12 - Storage outside of buildings, for containers awaiting use, resale or part of a cylinder exchange program shall be located not less than 20 feet (6096 mm) from openings into buildings, 20 feet (6096 mm) from any motor vehicle fuel dispenser and 10 feet (3048 mm) from any combustible material and in accordance with Table 3809.12 and NFPA 58, Chapter 8, Section 8.4.2 .1 – Cylinders at a location open to a public shall be protected by either of the following. (1) An enclosure in accordance with 6.16.5.2 (2) A lockable ventilated metal locker that prevents tampering with valves and pilferage of the cylinders.

is not consistent with §195-5.D(1)(c) and (d) of the City's Wetlands and Watercourses law.

- The application is not consistent with §195-5.D(1)(f) of the City's Wetlands and Watercourses law because the wall was constructed without required federal and state permits and therefore not consistent with their regulations.
- The application is not consistent with §195-5.D(2)(a) of the City's Wetlands and Watercourses law, which requires the Commission to deny the wetland permit if certain conditions are met. The structural integrity of the wall has not been confirmed, which creates the potential that the activity may "threaten public health and safety" or "cause nuisances" if it fails. The reports of the applicant's engineers provide a number of qualified statements and assumptions since the wall was constructed without the benefit of plans, required permits or construction inspections. The wall also "violates other federal, state or local regulations" since it was constructed without required permits.

AND, BE IT FURTHER RESOLVED, that the above renders moot any consideration of consistency with the LWRP pursuant to 75-5.D of the Rye City Code, as well as any necessity to determine whether State and Federal permit applications and progress reports, as opposed to actual permits from those agencies, is sufficient for this application.

I certify that the foregoing resolution is a correct copy of Planning Commission Resolution #02-2010, which was duly adopted on February 2, 2010.



Christian K. Miller, AICP
City Planner

02/04/10

Date

WHEREAS, Pursuant to Chapter 73 of the Rye City Code, the Planning Commission is required to consider the policies and purposes contained in the Local Waterfront Revitalization Program when reviewing applications such as this for actions located in the coastal area and to ensure that such actions are consistent with said policies and purposes;

NOW, THEREFORE BE IT RESOLVED, that pursuant to §195-5.B.(2)(b) the Planning Commission finds that the less-detailed description of the project in the Project Plans meets the minimum standards for plans and estimates;

AND, BE IT FURTHER RESOLVED, that the Planning Commission finds based on its review of the Environmental Assessment Form (EAF) and the criteria listed in Section 617.7(c) of SEQRA, that the proposed action will not have a significant adverse environmental impact;

AND, BE IT FURTHER RESOLVED, that the Rye City Planning Commission hereby denies Wetlands and Watercourses Permit #261 since it does not meet the following *Standards for Permit Decisions* pursuant to §195-5.D of the Rye City Code:

- The Planning Commission conducted a site walk of the property and considered competing testimony and information in the public hearing regarding the need for the seawall. The applicant stated that erosion of an existing slope adjacent to the Molloy Cottage required the construction of the seawall. Since the wall was constructed without the required permits the Commission was unable to assess the pre-development condition and extent of possible erosion. The Commission was unable to determine whether an alternative, non-structural measure could be implemented to address possible erosion concerns and potentially meet the applicant's needs. In addition, the Commission was unable to determine whether a lower stone wall or some other alternative design could meet the reasonable needs of the applicant and address possible erosion concerns. Given these conditions and circumstances the Commission could not fulfill its obligation under §195-5.D(1) of the City's Wetlands and Watercourses law to determine that impacts and losses were avoided to the maximum extent practicable or, if they cannot be avoided, that they were minimized to the maximum extent practicable. Constructing a substantial 16-foot high wall that resulted in a 230% increase in the length of the existing wall and then seeking permission from the Commission after-the-fact denies the Commission the opportunity to consider alternatives as required by law and sets an undesirable precedent.
- The applicant's engineers have prepared reports attesting to the assumed structural conditions of the wall and its response in coastal storm events. This analysis, however, is based on a number of assumptions and qualified statements by the applicant's engineers since the wall was constructed without the benefit of plans, required permits or construction inspections. The Commission therefore cannot reach conclusions regarding the constructed wall's impact on "storm barriers" or the "safety of the proposed activity from flooding, erosion, hurricane winds, soil limitations and other hazards and possible losses to the applicant and subsequent purchasers of the land." Therefore, the application

WHEREAS, the CC/AC noted in its March 20, 2009 letter to the Planning Commission that they found the application "Unacceptable in present form" and recommended "removal of the newly constructed portions of the seawall without further documentation as to its need"; and

WHEREAS, the Planning Commission conducted an inspection of the subject property on May 2, 2009; and

WHEREAS, a noticed public hearing was held on July 28, 2009 and all members of the public wishing to be heard were given the opportunity to be heard; and

WHEREAS, the public hearing was continued to the Planning Commission's August 11, 2009 meeting date; and

WHEREAS, at its August 11, 2009 meeting the Planning Commission continued the hearing and determined that the wetland permit application is an "Unlisted Action" under New York State Environmental Quality Review Act (SEQRA) and required the applicant to amend its application to provide the applicable environmental assessment form and application for coastal consistency pursuant to Chapter 73, *Coastal Zone Management*, of the Rye City Code and that a new hearing notice be prepared and circulated as required by law reflecting the additional required Planning Commission approvals; and

WHEREAS, on November 30, 2009, the applicant submitted an amended application including a new Wetlands and Watercourses Application, a Coastal Assessment Form, a LWRP Coastal Consistency Application, an Environmental Assessment Form and related reports, studies, permits and other documentation; and

WHEREAS, a new notice of public hearing on the amended application was prepared by the City Planner, which notice was provided to the applicant for circulation to property owners and published in the City's Official Newspaper in advance of the Planning Commission's January 12, 2010 meeting; and

WHEREAS, a public hearing was held and closed on January 12, 2010 and all members of the public wishing to be heard were given the opportunity to be heard; and

WHEREAS, pursuant to §195-5.B.(2)(b) of the City of Rye Code, the Planning Commission "shall evaluate wetland functions and the role of the wetland in the hydrologic and ecological system and shall determine the impact of the proposed activity upon public health and safety, rare and endangered species, water quality and additional wetland functions." In addition to any materials expressly required in the Code and the Rules and Regulations of the Planning Commission ("Regulations"), the Commission may require additional information as needed; and

Solar panels were installed on sheds and cottages throughout the island. A wind mill was also installed on the island. These installations are subject to a permit and inspection process. This is a violation of the Code of the City of Rye, Chapter 81, and Section 81-2

A. It shall be unlawful for any person, firm or corporation to install electric wiring or equipment, or to alter or extend any existing electrical wiring or equipment, without first having obtained a permit from the City Clerk, who shall issue such a permit upon approval of the Building Inspector, except that no permit shall be required for a replacement of lamps or fuses, the connection of portable devices to suitable permanently wired receptacles or for any maintenance or emergency repair work, nor shall any permit be required for any electrical installation which is an integral part of a system under the control of a public utility in rendering its duly authorized service, nor shall a permit be required for any electrical work costing less than \$500, except that contracts for such work shall not be split to avoid the requirements of this section.

B.

No permit shall be issued except to a licensed master electrician. Except as otherwise provided herein, a master electrician shall have passed an examination conducted by at least one other Westchester or Putnam County municipality, to determine his or her competence to perform the functions of a master electrician properly. In case of a firm or corporation, said organization may be represented by one or more members of said firm or by an officer of the corporation.

C.

An application for a permit shall be made to the Building Inspector on forms supplied by him/her.

The electrical breakers cabinet cover is missing on cottage 19. This is a violation of the Property Maintenance Code of New York State, Section 605.1 - All electrical equipment, wiring and appliances shall be properly installed and maintained in a safe and approved manner.

The exterior walls of cottage 18 need to be repaired and /or restored. This is a violation of the Property Maintenance Code of New York State, Section 304.6 - All exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration.

Accessory structures (sheds) throughout the island are in need of maintenance. This is a violation of the Property Maintenance Code of New York State, Section 304.6 - All exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration.

Wood piles of near cottage 3 and wood piles/leaf compost between cottages 30 and 34 are placed in the wetlands and/or wetlands buffer. This is a violation of the Code of the City of Rye, Chapter 195, and Section 195-4 and 195-4 C. (3) . No regulated activity shall be conducted in a wetland, watercourse or wetland/watercourse buffer without a written permit from the Planning Commission and full compliance with the terms of this chapter and other applicable regulations. All activities that are not permitted as of right or by permit shall be prohibited. The City Planner, City Engineer and City Building Inspector shall, in the course of reviewing any application before them, advise the applicant of the existence of this chapter and refer information regarding such applications to the City Naturalist.

Regulated activities. Except as specified in § 195-4D, the following are regulated activities when within a wetland, watercourse or wetland/watercourse buffer and may be granted a permit upon written application to the Planning Commission:

(3)

Any form of dumping, filling or depositing of material either directly or indirectly.

Cottages 8, 14, 2 and 1 appear to have possible structural questions. The foundations and/or piers appear to be out of plumb. A design professional should inspect the condition. This could be a violation of the Property Maintenance Code of New York State, Section 304.4 - All structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads and Section 304.5 - All foundation walls shall be maintained plumb and free from open cracks and breaks and shall be kept in such condition so as to prevent the entry of rodents and other pests.

Please be aware that Chapter 108- "Housing Standards", Section 108-40- "Infestation and screening" and 108-43- "Responsibilities of Owners" of the Code of the City of Rye exist and that you are required to conform to them.

You are hereby notified of the above conditions and are directed to correct them immediately. A follow up inspection will be necessary.

It is sincerely hoped that further action by this department will not be necessary and that you will cooperate in correcting these conditions.

Vincenzo Tamburro
Building Inspector

August 4, 2011

To: Rye City Council

From: James E. Carnicelli, C.E., Managing Engineer, Carnell Engineering, P.C.

Re: Public Health and Safety, Hen Island, Rye, N. Y., Westchester County

Dear Council Members:

I have asked that this letter be read before the August 10th. Rye City Council

As a civil/environmental engineer, I have managed and directed four companies concerned with environmental assessments, testing and consultations for over 35 years, serving the Hudson Valley and particularly Westchester County.

I am currently a member of the Westchester Board of Health having served as Vice President of the Board for over 20+ years. As a current and active member I am one of the longest serving members of the Westchester Board.

I have visited Hen Island on numerous occasions and I am aware of environmental issues which I refer to in this correspondence.

The existing conditions at Hen Island are of concern to me because there are occurrences of sewerage pollution affecting both the site and Long Island Sound. In addition to these unacceptable conditions, the homeowners do not have access to potable drinking water usually provided. Water is collected by water cisterns which allow for contamination and encourages mosquito larvae breeding.

With the present threat of West Nile Virus the mosquito infestation is of serious concern. The mosquito infestation is intensified due to the lack of maintenance in the north and rear sections of the north island facing the Greenhaven community and north section of the center island also facing Greenhaven. These mosquito breeding sites are increased due to the storing of washed up debris and leaves placed in the high reed areas. The remedy to minimize the infestation is compliance with a standard mosquito control program which would include removing all cisterns storage use in conjunction with regular maintenance of the reed areas.

Some of the reasons why composting toilets are not acceptable are:

- Soil and rock and topography
- Odors produced by these systems.

Re: Public Health and Safety, Hen Island, Rye, N. Y., Westchester County

Composting Toilets – Cont'd.

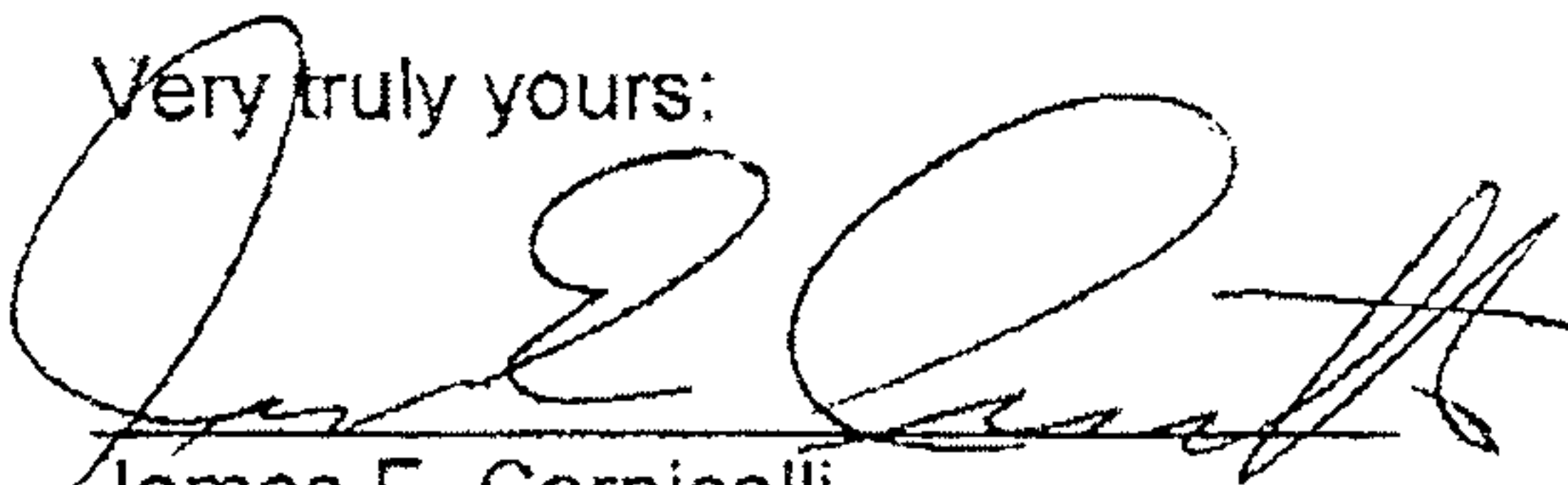
- Systems do not accept gray water (showers, bathtubs, kitchen and bathroom sink drainage). A separate septic or holding tank system would be required.
- Proper mainland certified septic type service is usually required. This would be difficult in servicing an isolated island
- Limited, improper or non- maintenance by site owners
- Non-disposal of composting waste
- State and County code restriction for their use.
- Increasing mosquito infestations due to proximity of marsh lands of the island

After researching all aspects of the sanitary waste and water systems, it is my opinion as well my employed engineers, that composting toilets and open cistern collection of gray water is not an acceptable solution.

The only reasonable solution for public health and safety is municipal land line connection from the mainland to Hen Island for both sanitary waste and potable water.

In the best interest of public health and safety, I am hopeful that the Rye City Council will agree that this is the only means to achieve this goal.

Very truly yours:



James E. Carnicelli
28 Inverness Road
Scarsdale, New York



Robert P. Astorino
County Executive

Sherlita Amler, M.D.
Commissioner of Health

March 30, 2012

Mr. Gary Ederer
Board of Directors – Kuder Island Colony, Inc.
P.O. Box 766
Rye, NY 10580

Re: Hen Island
Rye, NY

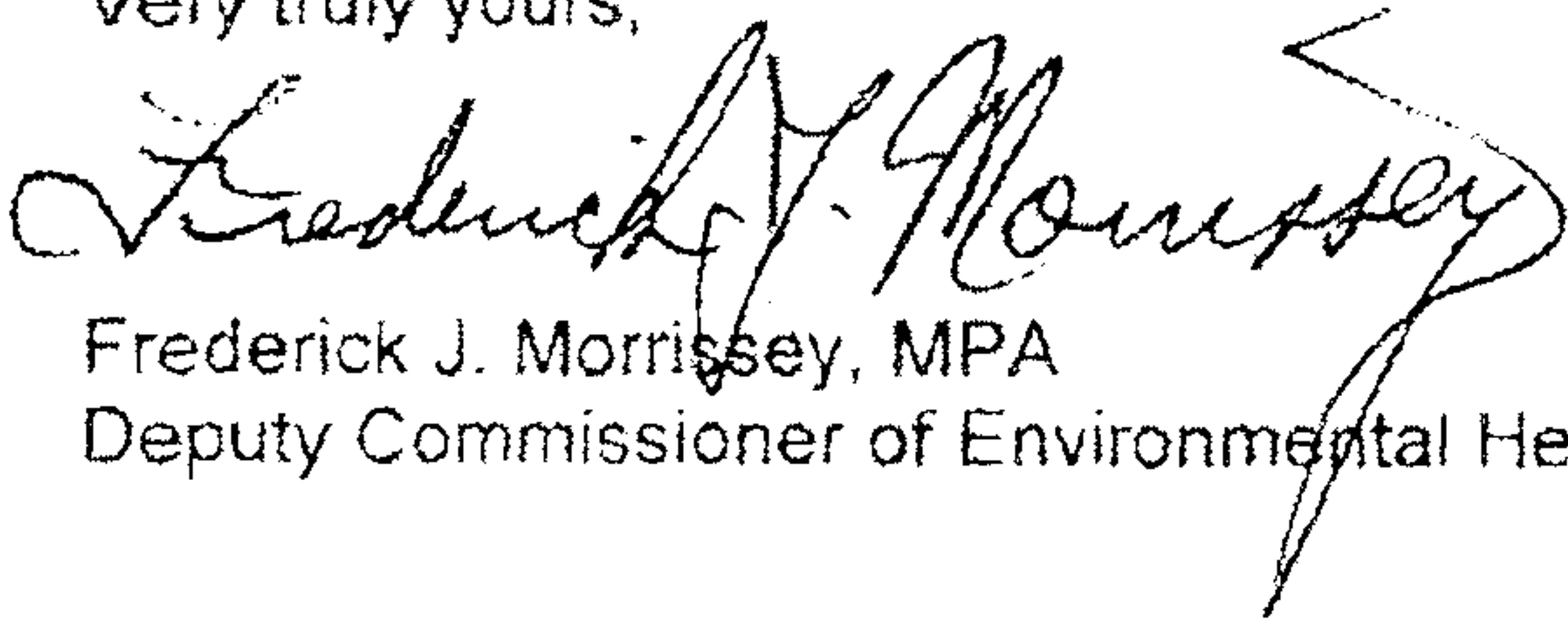
Dear Mr. Ederer:

We are in receipt of your letter of March 21, 2012, regarding the Kuder Island Colony, Inc. installation of composters or incinerator toilets as referenced in your letter, "in accordance with the New York State Sanitary Code Appendix 75-A Wastewater Treatment Standards Other Systems". Please be advised in response to your letter that such installation of composters or incinerator toilets does not require a permit from this Department.

Further, this Department does not approve nor disapprove such installation with the understanding that installation of composters or incinerator toilets must be in compliance with all applicable laws, rules and regulations.

Should you have any questions, I can be reached at (914) 813-5172.

Very truly yours,



Frederick J. Morrissey, MPA
Deputy Commissioner of Environmental Health Services

cc: Ms. Maureen Eckman, City of Rye
Ms. Kristen Wilson, Harris Beach PLLC
Mr. Ira Goldenberg, Goldenberg and Selker PC



Department of Health
145 Huguenot Street
New Rochelle, New York 10801

Telephone: (914) 813-5600

Fax: (914) 813-5160

Barbara and Claudio Iodice
834 Haverstraw Road
Suffern NY 10901
845-354-5211

September 30, 2009

Ben Minard Pres.
Kuder Island Colony Inc.
PO Box 766
Rye N.Y. 10580

Dear Mr. Minard,

I would like to go on record that we have not used our cottage for the past two summer seasons, due to the ongoing mosquito infestation on Hen Island. That infestation this past summer was once again unbearable. The infestation has increased tremendously for the past few years. It is presently at the point where we can no longer spend time on the Island. As we have mentioned in the past, our granddaughter was severally bitten on several occasions and is no longer allowed to visit Hen Island as a result. I find this very disturbing that I should have a summer home and cannot use it or if I do my family is subjected to this inhumane treatment.

In June of 2007 the Board of directors issued directives asking us to treat our domestic water system with Mosquito dunks. After reading the material safety data sheets, it has specific instructions not to allow contact with the eyes and open wounds. There is no way we can avoid this contact should we follow your instructions as we bathe daily and also use this water daily for personal hygiene.

We would also like to draw your attention to the violation notice from the City of Rye dated April 9, 2009 where the City of Rye has specifically pointed out chapter 108 dealing with infestations and chapter 108-43 addressing the responsibility of the owner with reference to infestations and treatment. At this time I would again request effective mosquito control so we may once again enjoy our family, friends and our investment in our summer home on Hen Island. Please take note; we have copied the Rye building department as this will be our second advisement to them. Our original letter to the building department was sent in 2007, the last year we were able to use our cottage.

Sincerely Yours,

Barbara and Claudio Iodice

CC: Rye building inspector
Vincenzo Tamburro

NATHAN M. BAROTZ, PLLC
ATTORNEY AT LAW

52 Vanderbilt Avenue
Tenth Floor
New York, NY 10017-3899

212.905.6536
nbarotz@barotzlaw.com
www.barotzlaw.com

July 15, 2013

Mr. Peter DeLucia
Assistant Commissioner, Bureau of Public Health Protection
Westchester County Department of Health
25 Moore Avenue
Mount Kisco, New York 10549

Re: Hen Island, New York

Dear Mr. DeLucia,

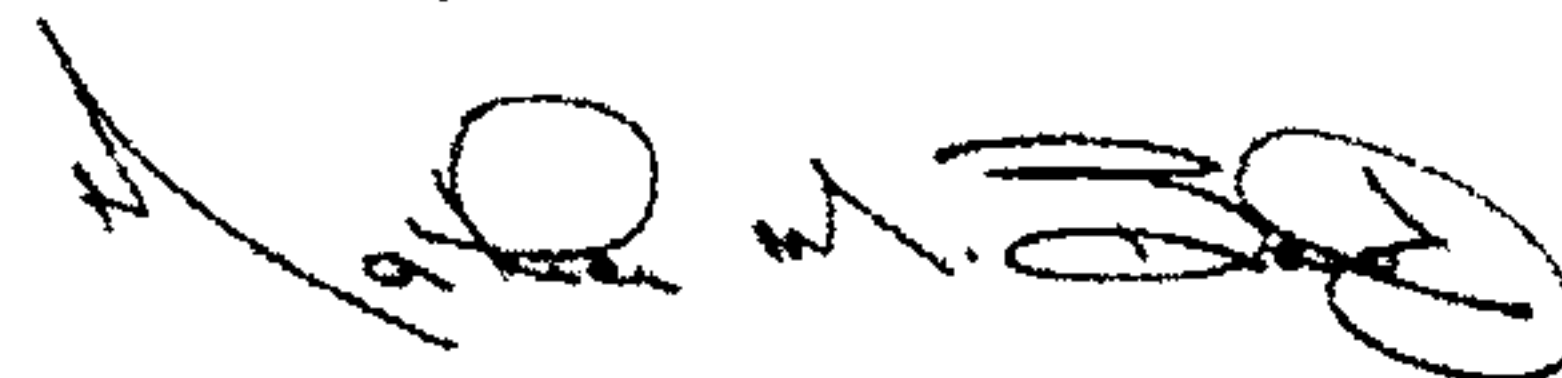
My family has owned a cottage on Hen Island in Rye, New York for over 30 years; I am writing to inform you of the overwhelming mosquito infestation on Hen Island and about my concerns for the health and safety of the residents of Hen Island and, more broadly, Westchester County.

Due to the failure of Hen Island to implement a mosquito control program (and, I believe, from the uncovered storage of water and below code handling of sewage), the population of mosquitos has precipitously increased. Based on personal experience, Hen Island has an arm landing count on the northern part of Hen Island of over 50 mosquitos a minute. This is the same number that they have in the Florida Keys, an area that is bordered by mangroves and tidal marshes and are considered to be prime breeding grounds for mosquitoes.

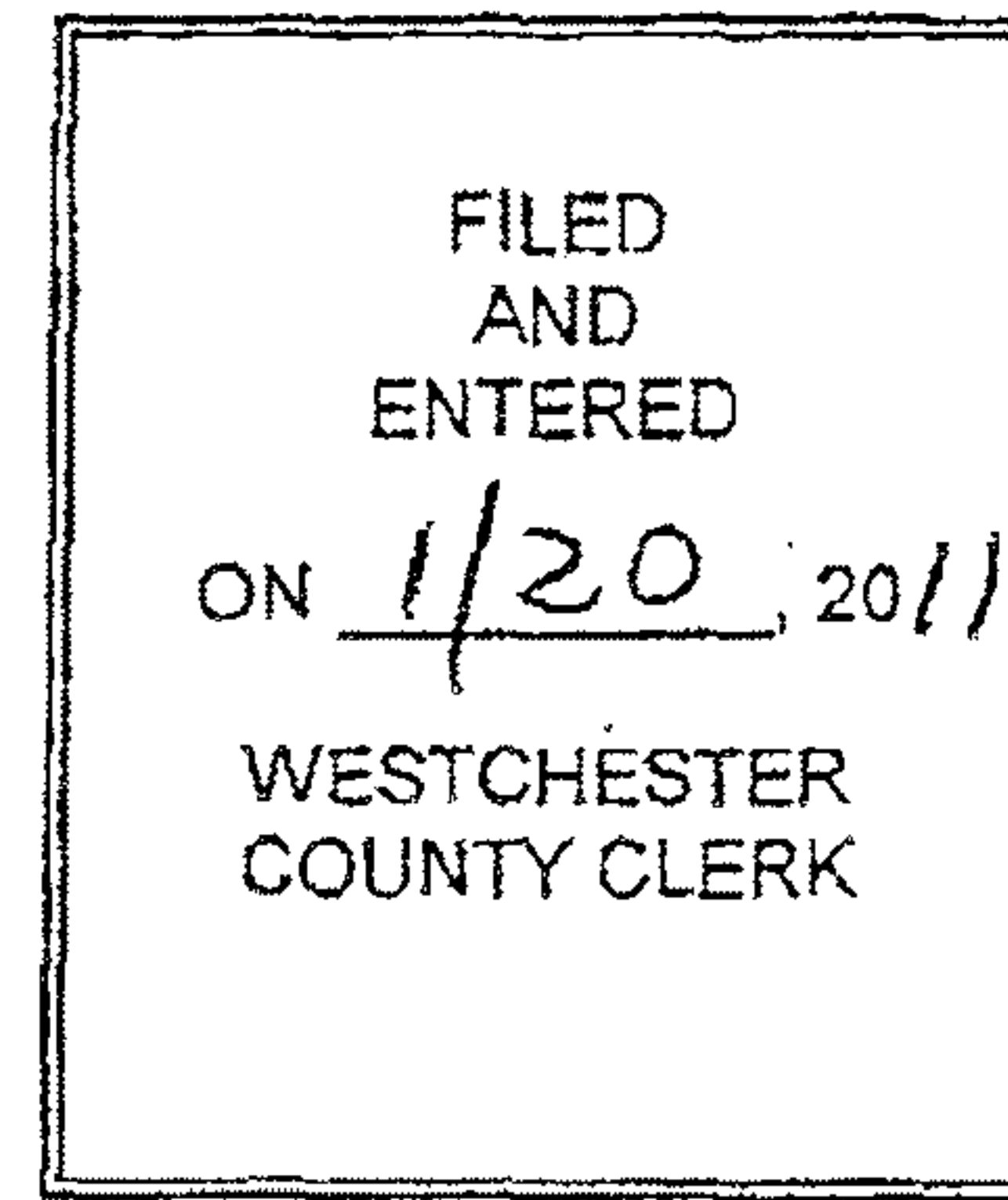
While a large mosquito population is a problem unto itself, the fact that mosquitos are prime carriers of West Nile Virus makes the infestation even more urgent.

I ask that Westchester County take active approach towards the mosquito infestation on Hen Island because this problem and the health dangers that accompany it are not limited to just Hen Island residents and visitors but, in fact, put all of the children, elderly and other residents of Westchester County's coastal communities in danger. The mosquitos on Hen Island do not stay on Hen Island. The mosquitoes are not limited by the few thousand feet of water between Hen Island and the Rye and Greenhaven coastal areas. As I am sure that you know, these mosquitos will travel up to 25 miles and by doing so create a danger to the health and safety of all Westchester residents.

Sincerely,



Nathan M. Barotz



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of
HEAL THE HARBOR.COM and RAYMOND J.
TARTAGLIONE,

Petitioners,

DECISION, ORDER &
JUDGMENT

Index No. 10/14742

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE CITY OF RYE, THE COMMON COUNCIL OF
THE CITY OF RYE AND THE SANITATION
COMMITTEE OF THE COMMON COUNCIL OF THE
CITY OF RYE,

Respondent.

-----X
ZAMBELLI, A.J.S.C.

The following papers numbered 1-10 read on this hybrid CPLR Article 78
proceeding and action for declaratory relief:

PAPERS NUMBERED

Notice of Petition, Verified Petition & Exhibits A-B	1-3
Notice of Motion to Dismiss, Tamburro Affidavit with Exhibits A-B & Memorandum of Law in Support of Motion to Dismiss	4-7
Constantine Reply Affirmation & Memorandum of Law, Tartaglione Affidavit in Reply with Exhibits A-H	8-10

Upon the foregoing papers it is ordered and adjudged that this petition is disposed of as follows:

Petitioner Raymond J. Tartaglione ("Tartaglione") is one of 33 shareholders of Kuder Island Colony Inc. ("Kuder"). Kuder owns real property in the City of Rye which is commonly referred to as Hen Island, which is located in Milton Harbor, and Tartaglione occupies a seasonal cottage on that island which he uses for nine months of the year. Tartaglione is also the president of petitioner Heal the Harbor.com ("HTH", collectively with Tartaglione, "petitioners"). According to HTH's "mission statement" on their website (www.healtheharbor.com/home.asp), their goal is to "reduce pollution effluent from Hen Island"; "keep the shores of Hen Island clean from trash and floating debris"; "ensure that the Hen Island Board of Directors and individual cottage owners take responsibility for past actions and create a new environmentally friendly and safe atmosphere in Milton Harbor"; "require politicians, commissioners and municipal employees to hold Hen Island (Kuder Island Colony Inc.) and its cottage owners to the same, health, safety and building codes as every other community in Westchester County. **This is to be accomplished by education, cooperation, public exposure, and/or any other legal measures possible, until all issues are addressed in an acceptable manner.**" (Bold in original) (Petitioners' Reply Exhibit A).

Petitioners commenced this hybrid Article 78 petition and request for declaratory judgment seeking to compel the City of Rye, its Common Council and Sanitation Committee (collectively "respondents") to "forthwith" complete the inspections mandated by Rye City Code ("Code") §161-1, which provides, in relevant part, that "there shall be an

annual inspection of all private sewage disposal systems by a contractor duly approved by the Westchester County Commissioner of Health on all properties bordering on all watercourses, including Long Island Sound, Milton Harbor and all tributaries thereto, and wherever else directed by the Sanitation Committee of the Common Council. A written certificate of such inspection shall be submitted to said Committee for such action thereon as it may direct.” Petitioners contend that Code §161 creates a non-discretionary duty which requires respondents to perform the inspections referred to therein. On April 19, 2010, petitioners wrote to the City Manager referencing Code §161 and requesting that petitioner Tartaglione be provided with a copy of the certificate of the required inspections for all private sewage disposal systems located on Hen Island for the past two years; if such written certificates of inspection were not submitted, petitioners requested that “appropriate action, as described in §161-3 A, be taken by the City, to ensure compliance with the Code.” (Petitioners’ Exhibit A). Petitioner Tartaglione avers that the sewage disposal system issue was also raised by him at the City Council meeting of May 5, 2010, and was addressed again in the May 19, 2010 letter sent to the City’s Mayor (Petitioners’ Exhibit B). As respondents never acted in regard to petitioners’ letters, petitioners commenced this petition seeking to compel them to act.

Respondents oppose the petition and move to dismiss it. They argue that, as an initial matter, that petitioners lack standing to maintain this proceeding. They also argue that the Common Council of the City of Rye and the Sanitation Committee of the Common Council of the City of Rye are not proper parties to this proceeding because, they submit, these entities no longer exist and thus the Court is unable to provide any relief to petitioner

as it relates to those parties. Substantively, respondents argue that their motion to dismiss should be granted because the Westchester County Department of Health ("DOH"), as opposed to any City entities, has jurisdiction over the private sanitary sewer systems in the City; they further submit that Code Chapter 161 is no longer applicable or enforced in the city. In any event, even if Code Chapter 161 is applicable, respondents argue that petitioners have failed to state a cause of action because petitioners are seeking to compel the City to enforce its Code and the City has discretion over code enforcement.

In reply, petitioners argue that the petition must be granted because respondents failed to file an answer and a certified record in accordance with CPLR §7804(d) and (e). Petitioners also assert both individual standing on the part of Tartaglione and organizational standing on the part of HTH. Petitioners also dispute that the Common Council or Sanitation Committee of the City of Rye are not proper parties herein, as petitioners note that the current version of the City Code contains numerous references to the Common Council and respondents failed to offer any proof that these organizations are defunct. As to respondents contentions that the DOH and not the City has jurisdiction over private sewer systems, petitioners note that pursuant to the express language of the Westchester Sanitary Code, the DOH's jurisdiction over private sewers is not exclusive and as Code §161 has never been repealed or superceded, it is still in effect. Lastly, petitioners reiterate their arguments that Code §161 imposes a non-discretionary duty upon respondents to perform inspections and issue the required certificates.

As an initial matter, as regards the petitioners' contention that the respondents have, in essence, defaulted by moving to dismiss instead of filing an answer and the certified

Robert Santangelo

12 Island Dr

Rye Ny 10580

Dear Mr. DeLucia,

I am writing to ask that the health department to take action on Hen Island to save the residents and neighbors from the inevitable health dangers that come along with it's large mosquito population.

Action must be taken soon before we have our first case of West Nile Virus. My family has two cottages on Hen Island . We have been enjoying this wonderful paradise since 1987. But now in 2013 , I fear for the safety of anyone who braves this mosquito infested island and chooses to play Russian roulette.

We as a family no longer feel comfortable in the peaceful community called Hen Island. I believe that Westchester County must take an aggressive approach to solve the mosquito infestation currently existing on the Island.

Please make this a safe place for Grandparents, Parents and Children to enjoy again.

Thanks in advance for your consideration,

Robert Santangelo



Andrew J. Spano
County Executive

Department of Health

Joshua Lipsman, M.D., J.D., M.P.H.
Commissioner

June 17, 2009

Kuder Island Colony, Inc.
PO Box 766
Rye, NY 10580

ATTN: Board of Directors

Re: Hen Island
(C) Rye

Dear Kuder Island Colony Board:

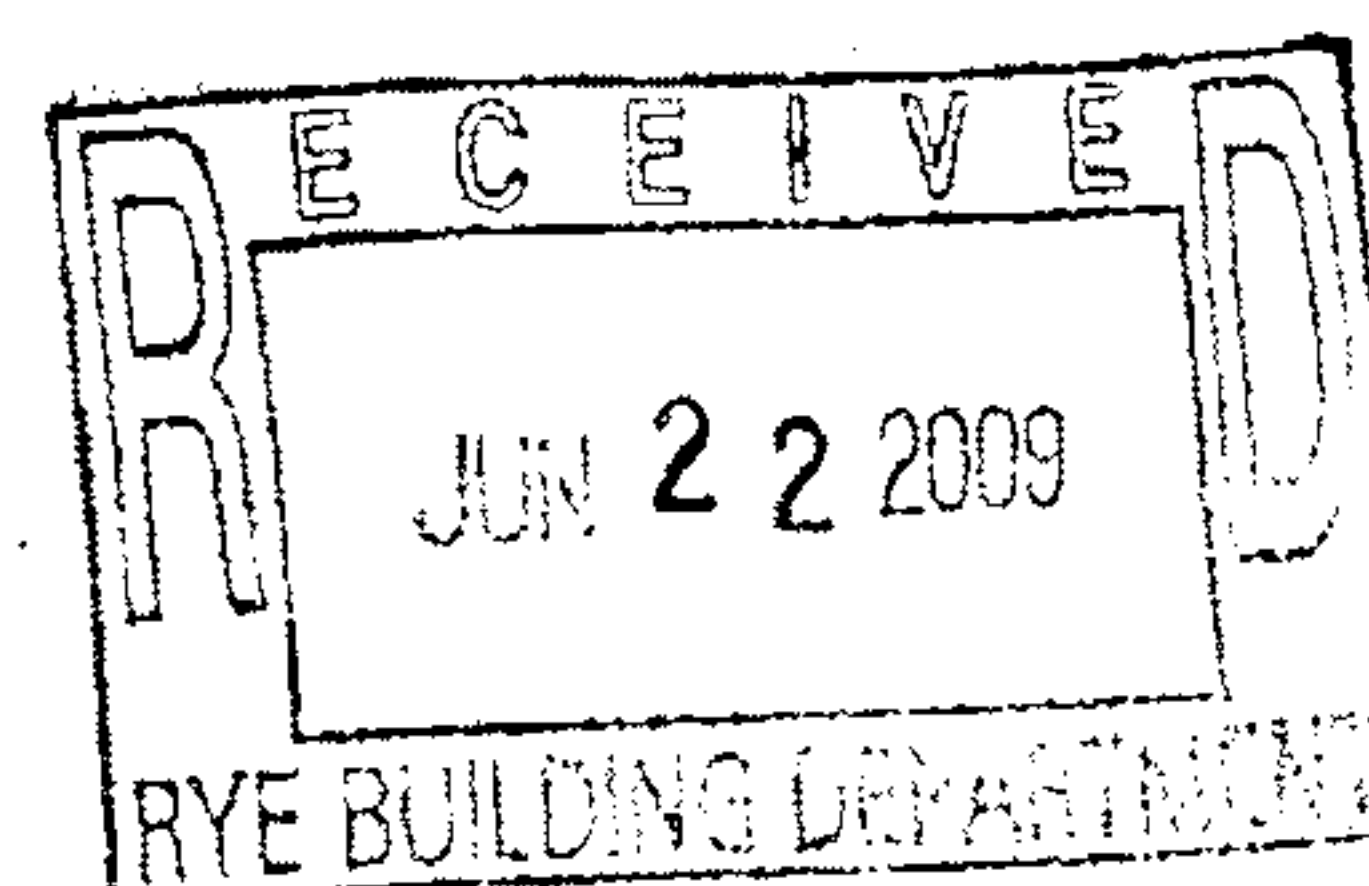
Please be advised that a potential safety issue at Cottage #18 has been brought to my attention. There is an open pit by the edge of this abandoned cottage. In addition the vacant building in disrepair and its debris may pose a fire hazard. Since building safety is a building department issue, Rye's Building Inspector is copied on this letter.

Also, please be reminded that there are two cottages that have pit covers made of plywood. By copy of my 5/8/09 response letter to the City of Rye, you were made aware that if the pits are part of a sewage disposal system, then the plywood covers would have to be replaced with covers made of a permanent material. I subsequently discussed this matter by telephone with Board member Mr. Gary Ederer who stated that the covers would be replaced before the end of June.

Very truly yours,

Leonard S. Meyerson, P.E.
Deputy Commissioner
Division of Environmental Health

cc: ✓ Vince Tamburro, Building Inspector, City of Rye



record, petitioners' contentions are without merit. CPLR §7804(f) provides, in relevant part, that a respondent "may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just". As noted by petitioners, CPLR §7804(e) provides that the certified transcript of the record of proceedings is to be filed with the answer. Accordingly, respondents are not in default because they moved to dismiss the proceeding in lieu of answering, as that procedure is expressly sanctioned by the CPLR.

In determining a motion to dismiss pursuant to CPLR §7804(f), a court is limited to examining the petition and all of the allegations contained therein are to be deemed true (Matter of Brown v. Foster, 73 A.D3d 917, 918 (2d Dept. 2010), lv. denied 15 N.Y.3d 710 (2010); Matter of 10 East Realty LLC v. Incorporated Village of Valley Stream, 17 A.D.3d 472, 473 (2d Dept. 2005); Matter of Long Island Contractors Assoc. v. Town of Riverhead, 17 A.D.3d 590, 594 (2d Dept. 2005)). Moreover, in the determination of such a motion, the petitioners are to be accorded the benefit of every possible inference (Matter of Brown v. Foster, supra; Matter of 10 East Realty LLC v. Incorporated Village of Valley Stream, supra).

As to respondents' motion to dismiss the Common Council of the City of Rye and the Sanitation Committee as improper parties herein, the motion must be denied as respondents offer only the most conclusory allegations in support of their contentions. While respondents contend that the Rye City Council replaced the Common Council "decades ago", respondents fail to note any particulars or point to any legislation as to

when this occurred. As to the Sanitation Committee, respondents simply allege that such committee no longer exists because "essentially" the DOH is the City's health department and is the enforcement agency over the applicable County health regulations (Tamburro Affidavit, ¶12). It may be that these entities no longer actually exist; however, respondents' conclusory contentions herein are an insufficient basis upon which to grant a dismissal of the parties from this proceeding.

Respondents' motion to dismiss based upon their contention that Code §161 is no longer applicable or enforced in the city, and that the DOH has preempted the regulatory field in regard to private sewer systems, is also denied. As with respondents' allegations regarding the Common Council and the Sanitation Committee, only insufficient, conclusory statements are offered in support of their allegation that Code §161 is no longer applicable. Respondents fail to point to any evidence the Code §161 has been repealed or superceded; indeed, Code §161 still appears "on the books" today and its history, while reflecting that the ordinance was originally adopted on September 20, 1950 and that certain parts were amended in the 1980's, fails to reflect any such repeal (Respondents' Exhibit B). Moreover, while it is true that the County has enacted regulations regarding sewage systems, the County has clearly not usurped local municipalities rights to pass their own regulations regarding such systems, as the County Sanitary Code, of which the sewage regulations are a part, specifies that "[n]othing herein contained in this code shall be construed to restrict the power of any city, town or any village to adopt and enforce additional ordinances or enforce existing ordinances relating to health and sanitation, provided that such ordinances are not inconsistent with the provisions of the Public Health

Law, the Environmental Conservation Law or the State Sanitary Code.” (Westchester County Sanitary Code, §873.102(4)). While respondents’ claim that Code §161 has been pre-empted by County legislation, they do not argue that it is inconsistent with it, and indeed, this Court finds nothing inconsistent in the inspection required by Code §161 and the County’s regulations. Accordingly, respondents’ motion to dismiss on this basis must also be denied.

Addressing the issue of petitioners’ standing, it appears to this Court that at least petitioner Tartaglione and possibly petitioner HTH would have standing under the analysis of the Court of Appeals in Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), as petitioner Tartaglione, the president of petitioner HTH, asserts that he uses and enjoys the affected natural resource of Milton Harbor in a way different from the public at large (Tartaglione Affidavit, ¶¶ 14-17) and alleges that the municipal action (or, in this case, inaction) directly harms his use and enjoyment of the harbor.

Nevertheless, even if petitioners have standing to maintain this proceeding, the motion to dismiss must still be granted because petitioners’ have failed to state a cause of action. The relief which petitioners seek in this proceeding is that the respondents be compelled to enforce their own zoning code; however, the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and is not a proper subject for relief in the nature of mandamus to compel (Matter of Saks v. Petosa, 184 A.D.2d 512 (2d Dept. 1992); Matter of Young v. Town of Huntington, 121 A.D.2d 641, 642 (2d Dept. 1986); Matter of Church of the Chosen v. City of Elmira, 18 A.D.3d 978, 979 (3d Dept. 2005), lv. denied, 5 N.Y.3d 709 (2005), cert. denied, Stephenson v. City of

Elmira, 547 U.S. 115 (2006)).

While petitioners argue that Code §161-1 imposes a non-discretionary duty upon the respondents to perform the inspections, the statutory language does not support petitioner's interpretation. Nowhere within that statute does it expressly state that respondents have the duty to perform the inspection, and the statute itself expressly refers to the inspections being performed by an approved contractor, which indicates that the burden to perform the annual inspection falls on the property owner. Moreover, Code §161-3, entitled "Performance of work; costs; collection", at subsection (A) thereof, provides, in relevant part, that "[i]f the provisions of the foregoing sections are not complied with, the City Manager or the Building Inspector shall cause written notice to be served personally upon the owner. . . ." which also indicates that the burden of complying with Code §161-1 is on the property owner. Indeed, in petitioner Tartaglione's own letter of May 19, 2010 to the Rye City Mayor, he writes, under "Septic Issues" that he is "requesting that the City of Rye enforce Chapter 161 and require Hen Island to report annually to the City of Rye on each and every private sewage disposal system along the shoreline of Milton Harbor." (Petitioners' Exhibit B). Thus, in this letter, it is expressly conceded that the burden of compliance with Code §161-1 falls to the property owner and that petitioners are seeking to have the City enforce the Code. The petition must therefore be dismissed, as petitioners seek relief that this Court, as a matter of law, is not empowered to grant.

Accordingly, respondents' motion to dismiss the Article 78 petition is granted and the proceeding is dismissed in its entirety.

This Decision constitutes the Order and Judgment of the Court.

Dated: White Plains, New York
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