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February 3, 2011

Douglas French, Mayor
Members of the City Council
Richard P. Filippi, Paula J. Gamache, Peter W. Jovanovich,
Suzanna S. Keith, Catherine F. Parker, Joseph A. Sack
City of Rye
1051 Boston Post Road
Rye, New York 10580

Re: Heal the Harbor.com and Raymond J. Tartaglione against the City of Rye, et al
Seeking to Compel Enforcement of §161 of the Rye City Code

Dear Mayor French and Members of the City Council:

I read with interest, your comments in the January 28, 2011 edition of the Journal News, regarding the above referenced matter. (A copy of the Journal News article is attached as Exhibit "1") To start with, your statement, "The decision is a validation of the city's position", is far from factual. The truth is, nearly the entire Decision was in my favor. You go on to say that, *"Westchester County government has long served as the city's health and environmental agency as they do for many local municipalities*" and *"The ruling affirms the city's position that these matters be handled by the respective county department".*

It appears that either you did not read the decision or you chose to intentionally misstate the relevant sections of Supreme Court Justice Barbara Zambelli's well reasoned Decision. To refresh your memory, I have attached as Exhibit "2", a copy of State Supreme Court Justice Barbara Zambelli's January 20, 2011 Decision for your convenience. The following is just a sample of the City's claims that were thrown out by the Court.

Found on Page 4 of the Decision - The City argues 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.

Found on Page 6 of the Decision - 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.

THE COURT'S ANSWER -

"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".***

Therefore, the New York State Supreme Court has found that the City clearly has the right to pass their 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. As you know, §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, Milton Harbor.

.....

Found on Page 4 of the Decision - The City claims that Code §161 is no longer applicable or enforced in the City.

THE COURT'S ANSWER -

"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.***

Therefore, the Court has found that §161 of the Rye City Code is still "on the books" today and that the City has the right to pass their 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 City Council had the foresight to provide even greater protection to Milton Harbor than the requirements of the County Health Department.

.....

Found on Page 3 of the Decision - The City of Rye moved to dismiss my Petition, arguing that I lack standing to maintain the proceeding.

THE COURT'S ANSWER –

"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".*

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

.....

Found on Page 7 of the Decision - 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 their own City code.

THE COURT'S ANSWER -

"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".

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

This was of course, a disappointment, yet, it is still a victory because now everyone in the City of Rye knows the truth and I am sure that they are just as appalled as I am that the Mayor and the City Council would outright refuse to enforce a code that was put in place for the protection of the very people who elected them. Who ever heard of a City refusing to enforce their own code? The shame is still on all of you.

Also regarding this particular issue, I would like to bring to your attention, a recent article published by "The Rye Sound Shore Review" which quoted City Attorney Kristen Wilson as saying that, *"The city has no reason to enforce §161 of the code. Also, the Rye City Council may look to revise the law and clarify language highlighted by the county as in health concerns"*. (A copy of the referenced "My Rye" article is attached as Exhibit "3"). I was not aware that the Corporation Council's responsibilities included setting policy. It would appear from Ms. Wilson's statement that the Council has without meeting, decided not to enforce their own code and intends to revise §161. The council should carefully consider this statement and their intentions. §161 was made law on September 20, 1950 by the Forefathers of this City Council, I am sure after much thought, to further protect Milton Harbor, one of the most precious resources of this city. It has remained law for over 60 years. And now we are told that this Council has *"no reason or intention to enforce this Chapter of the Code"*. I for one, would like to know why not. Something is very wrong here.

In the same "Rye Sound Shore Review" article, you, Mayor French claim to be pleased with the ruling and stated, *"It speaks to the fact that we've always believed the county is our health department and we look to them for that service"*. Incredibly, you also claim that the city was within its right not to enforce the code that is on its books and you go on to say, "*We don't have the level of expertise, it's part of a range of services that the county provides"*. These are blatant misstatements of fact, whether intentional or due to ignorance of the code of the City over which you preside. There is no expertise required, with regard to this issue and the County does not provide this service, nor is either necessary.

I urge you and the City Council to review §161 of the Rye City Code, paying particular attention to 1 through 4. For your convenience, I have attached a copy of §161 as Exhibit "4". For now I will quote §161-1, *"There shall be an annual inspection of all private sewage disposal systems by a contractor duly approved by the Westchester County Commissioner of Healthy on all properties bordering on all watercourses, including Long Island Sound, Milton Harbor and all tributaries thereto"*.

The annual inspection would be the responsibility of the property owner. Accordingly, there would be no cost to the City to enforce the existing Code. In fact, as stated in §161-4, *"Any person violating any of the provisions of this article shall, upon conviction thereof, be punished by a fine not exceeding $500 or imprisonment not exceeding 15 days, or by both such fine and Imprisonment. Each day such violation shall continue shall constitute a separate offense"*. Rather than costing the City money, it would actually bring additional revenue, assuming the occasional violation.

While the City has claimed a victory with regard to this decision, this is clearly not the case and it appears the residents of Rye agree. Judging from the comments that followed the article in the Journal News, the consensus of the general population in Rye, seems to be in my favor as you will see on the following page.

LoHud.com
New York's Lower Hudson Valley

Comments for

Judge tosses Rye activist's Hen Island petition; both sides declare victory

1/28/2011 11:45:02 AM
DumpCountyGovt wrote:
Good for Mr. Tartaglione. Why is Mayor French not utilizing the laws already on the books in Rye to keep L.I. Sound clean and free of human waste from Hen Island?
Mayor French cannot hide behind the county any longer. The Judge told him Rye has the ability to enforce the law. Why isn't he? Does Mayor French have relatives who own a home on Hen Island?

1/31/2011 10:22:42 AM
ryedemocrat wrote:
No he doesn't have any relatives, just a neighbor.

1/28/2011 10:24:58 AM
georgefrancis wrote
It appears this is a victory for Mr. Tartaglione. I thought it was a county issue but Judge Zambelli ruled otherwise. I don't question her judgment. In light of this decision, the City of Rye probably should err on the side of enforcing health and sanitation codes. I do not approve of the personal attacks on Rye's former mayor Steve Otis or counsel Kevin Plunkett. there is nothing to indicate they acted in anyway other than in Rye's best interest as they saw it. Both men are highly intelligent and honorable.

1/28/2011 8:22:58 AM
SeniorCitizen wrote:
We should all be thankful there are people like Mr Tartaglione in Westchester, whether or not we believe in what he's fighting for. It's the activists/gadflies/loud-mouths (politely said, of course) that make the rest of us aware of what's going on. This man believed enough in his cause to keep The LI Sound clean that he took the time, and spent the money, to do something about it. His cause wouldn't help him ONLY; keeping the waterway clean is something that will benefit everyone. I find it extremely sad his local government tries to pass the buck. I applaud you, Mr Tartaglione, for your efforts in trying to help keep the LI Sound clean.

1/28/2011 7:04:30 AM
dondebar wrote:
Nice work! Maybe the next move should be to run Mr. Floatie for mayor or city council!

Mayor French, during your campaign, you promised to resolve the Hen Island issues and the Schubert matter. Not only did you not keep your promise, you have gone to great lengths at the expense of the Rye City taxpayer, to keep those matters unresolved. Had you taken the appropriate course, both these issues could have and should have been resolved at no expense to the City and ultimately to the taxpayers. I find your lack of concern, as well as the City Council's, to be reprehensible. I have remained silent for over a year now, while I waited for you to fulfill your campaign promises to resolve these significant problems, but since it is obvious at this point that you have no intention of doing so, it seems I must pick up where I left off and continue to do everything in my power to protect Milton Harbor and the Long Island Sound. Obviously, I have no choice, since you will do nothing. You could have made your mark as a decent, caring, "for the good of the people" mayor, with the resolution of these issues. Instead, and sadly, for the residents of Rye, you have accomplished nothing since taking office, which makes you just another politician. You will be hearing from me further.

Very truly yours,

Raymond J. Tartaglione

Exhibit 1

LoHud.com
New York's Lower Hudson Valley

Judge tosses Rye activist's Hen Island petition; both sides declare victory

By Andrew Klappholz • aklappholz@lohud.com • January 28, 2011

RYE — A state Supreme Court justice has thrown out a petition seeking to make the city enforce health codes on Hen Island, but the ruling has both sides declaring victory.

The city had claimed that enforcement is solely the county's responsibility, and therefore the municipality doesn't have to do anything. Instead, Judge Barbara Zambelli found that the city had the authority to enforce the health codes, but that it was up to the discretion of municipal officials, and the municipality couldn't be forced to do anything.

Mayor Douglas French said the decision is a validation of the city's position.

"Westchester County government has long served as the city's health and environmental agency as they do for many local municipalities," the mayor said. "The ruling affirms the city's position that these matters be handled by the respective county department."

Raymond Tartaglione, who brought the application to court with the group HealTheHarbor.com, said he was pleased with the findings because it acknowledged that the city does have the authority to enforce health codes if it wishes. His lawyer, Jordan Glass, said the city should exercise this newfound authority "for the benefit of its residents and visitors."

Tartaglione, a resident of Purchase who has a cottage on Hen Island, has claimed for years that some summer residents allow sewage to seep into Long Island Sound and garbage to collect along the beach.

He has taken extreme measures to bring attention to his claims of health and environmental hazards around the summer cottages, including bringing an 8-foot-tall human waste mascot named "Mr. Floatie" to City Council meetings and driving around the "Floatie Mobile," a 1938 Chevy outfitted with "Floatie" decals.

Tartaglione hasn't taken these steps since the summer, but he attended Wednesday's Council meeting and asked what the city's response would be to the decision.

French said the board would have to review it with counsel.

Exhibit 2

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,

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.

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DECISION, ORDER & JUDGMENT

Index No. 10/14742

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 to 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

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
January 20, 2011

BARBARA G. ZAMBELLI
A.J.S.C.

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Rye, New York 10580

Nancy Barry, Esq.
Chief Clerk

Exhibit 3

The Rye Sound Shore Review

Both sides satisfied with Hen Island ruling

Written by CHRISTIAN FALCONE

Friday, 28 January 2011 15:27

The war between Hen Island resident Ray Tartaglione and the city, which elevated into a lawsuit, has left both sides sensing déjà vu.

On Jan. 20, the state Supreme Court in White Plains ruled in favor of the city, bringing an end to the suit initiated over alleged environmental and health wrongdoings that Rye allegedly turned a blind eye to.

But Tartalgione, a seasonal city resident who doesn't plan on appealing the decision, saw the ruling in a different light - claiming it was what he was looking for all along. "I think it's a great decision," he commented. "We knew all along they had discretionary enforcement. I'm happy with the decision, I think it's terrific."

Originally filed in court on June 7, 2010, the suit, through an Article 78, compelled the court to order the city to enforce its sewage laws as per its City Code. The city had long contested that the issues were under the direct jurisdiction of the county Health Department. The court findings leave the city with the right, if it so chooses, to enforce its law which was deemed applicable by the courts.

Issues grew out of Hen Island, a 26-acre privately owned seasonal island lying off the coast of Rye's Milton Harbor. The island, home to 34 summer cottages, has no electricity or running water and is only accessible by boat.

Tartaglione claimed the administration of former Mayor Steve Otis (D) was "derelict in its duty to act in accordance with its local law to require that all private sewage systems bordering all watercourses…be inspected annually." The petition also stated a complete failure to protect the ecology of the most environmentally sensitive areas of the city from raw sewage emitted from sewage systems. Tartaglione sought a declaration that the city had violated the law and be ordered to complete health inspections on the island and certify all structures.

The city filed a motion to dismiss the lawsuit on several grounds. Although the court found several of those without merit, it did dismiss the suit on the grounds that Tartaglione failed to state a cause of action.

Kristen Wilson, the city attorney who tried the case, said the city has no reason or intention to enforce Chapter 161-1 of the code. Also, the Rye City Council may look to revise the law and clarify language highlighted by the county as the lead in health concerns.

The court ruled that the section of the City Code in question falls on the property owner. Nowhere within that statute does it expressly state that the city has the duty to perform the inspection, instead that "the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement."

"We're pleased with the ruling," Mayor Douglas French (R) said. "[It] speaks to the fact that we've always believed the county is our health department and we look to them for that service."

The mayor felt the case was over and wouldn't be reopened. French believes the city was within its right not to enforce the code that is on its books. "We don't have the level of expertise," he added. "It's part of a range of services that the county provides."

But the court also ruled that the City Code is still applicable; it still appears on the books today and its history fails to reflect any such repeal. In addition, the court said that the county has not usurped local municipalities' rights to pass their own regulations regarding such systems.

"Rye has been pushing this off to the county for years," the plaintiff added. "Rye should be taking the lead in this and they're not."

The battle over Hen Island was one waged for years, often spilling over into the public spectrum and drawing a farcical spotlight on Rye.

In 2007, Tartaglione brought suit separately against Westchester County and Kudor Island Colony Inc., a corporation of seven shareholders who serve as the island's governing body; both cases were dismissed. He once served as president of its governing board – and one of 34 island shareholders – but was ultimately ousted by his fellow shareholders in a power play. Since that time, the two sides have been engaged in an ongoing dispute.

Three years later, in April 2010, the city conducted an inspection of the island under the direction of then-City Manager Frank Culross, following the controversial dismissal of former City Manager Paul Shew. Numerous violations were identified for improper storage of propane tanks, excessive debris, lack of maintenance and uninspected solar panels. However, any environmental or health-related concerns were simply forwarded to the county as the city turned a deaf ear.

But in Rye, Tartaglione may be known best for enlisting "Mr. Floatie," a human feces mascot, to aid his environmental crusade. The charade turned Rye City Council meetings through 2009-2010 into circus-like renderings with the critic pushing to unseat then-Mayor Otis from office during the 2009 election. He hoped new leadership would benefit his efforts. It didn't. In fact, the political turnover did little to change Rye's stance on the issue, with a new administration taking the same tact as its predecessor.

Tartaglione told The Rye Sound Shore Review on Wednesday night that he was shocked by the stance of the new administration. Particularly, since the plaintiff said one of French's campaign promises to him during the 2009 election was to take care of the problems on the island. "One of those promises was to install environmentally friendly toilets," he continued. "I haven't seen one yet."

Exhibit 4

Print

CHAPTER 161 SEWERS

[HISTORY: Adopted by the Council of the City of Rye: Art. I, 9-20-1950 as Section 4-3.5 of Ch. 4 of the General Ordinances; Art. II, 12-18-1963 as L.L. No. 9-1963. Amendments noted where applicable.]

GENERAL REFERENCES
Housing standards — See Ch. 108
Laundromats — See Ch. 121.
Sanitary regulations — See Ch. 157.
Excavations in streets — See Ch. 167, Art. II.
Surface water control — See Ch. 173.

ARTICLE I Use of Public Sewers (§ 161-1 — § 161-4)

[Adopted 9-20-1950 as Section 4-3.5 of Ch. 4 of the General Ordinances]

§ 161-1 Use required; exceptions; inspections.

Where a public sewer is available and accessible in a street, alley, easement or thoroughfare to a building or premises abutting thereon, the liquid wastes from any plumbing system in said building shall be discharged into the public sewer unless otherwise prohibited, except that where a place of residence is so located that a gravity connection from the plumbing above the first floor thereof to the street sewer is not possible or such place of residence is located more than 150 feet from the nearest public sewer, a separate sewerage system may be maintained which otherwise complies with city, county or state health laws, codes or regulations. Immediately after the construction of a sewer connection every sewage tank, cesspool or privy vault shall be emptied, cleaned, disinfected and filled with clean mineral soil, rock or gravel. 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. The further approval of the Common Council of the City of Rye is required for such separate disposal systems. In addition thereto 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.

§ 161-2 Duty of owner.

[Added 12-17-1980 by Ord. No. 6-1980
Editor's Note: This ordinance also renumbered former §§ 161-2 through 161-5 to become §§ 161-5 through 161-8, respectively.

Where an owner of any building is required to discharge sewage or other liquid wastes from any plumbing system into a public sewer as required by § 161-1 of this Code, he shall maintain such plumbing system within the building and from the building to the point of connection with the public sewer main, so as not to expose or discharge the sewage contents or other deleterious liquid or matter therefrom to the atmosphere, except through legally permissible vents, or on the surface of the ground, public or private, or into any storm sewer or drain or into any watercourse or body of water.

§ 161-2.1 Sewer use.

[Added 11-2-1983 by L.L. No. 11-1983]
The City of Rye and all users of the city's sanitary sewer system shall be subject to all applicable rules and regulations contained in the Westchester County Environmental Facilities Sewer Ordinance No. 1, as amended. A copy of Sewer Ordinance No. 1, as last amended, is available for review in the office of the City Clerk of the City of Rye.

§ 161-3 Performance of work; costs; collection.

[Added 12-17-1980 by Ord. No. 6-1980
Editor's Note: This ordinance also renumbered former §§ 161-2 through 161-5 to become §§ 161-5 through 161-8, respectively.
]
A. If 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 or by mailing the same to the name of the last

known owner of the premises where the building is located as the same appears on the assessment roll of the City of Rye for the last calendar year. If the owner fails, neglects or refuses to correct the conditions and remove the violations so as to comply with the provisions of this article within 10 days after service of such notice, then in that event, the city may cause the plumbing system to be repaired or replaced so as to comply with the provisions of this article, and the cost or expense of doing said work, plus an administrative charge of $100, shall be ascertained, and a report thereof shall be forthwith filed with the City Comptroller and City Assessor. The total cost of the same shall be paid by the owner to the city within 30 days after demand. The owner shall have the right to a hearing before the City Manager with respect to the total cost of the work as set forth in said report within 10 days after service by mail of a copy of said report.

B. The total cost of said work, as the same shall appear from the report on file with the City Comptroller, may be sued for and recovered from said owner in a civil suit.

C. The total cost of said work shall become and be a lien on the property benefited by the work done on the plumbing system, and, if the owner thereof shall fail to pay the total cost of the work within 30 days after demand, the City Assessor shall, in the preparation of the next assessment roll, assess such amount upon such property, and the same shall be levied, collected and enforced in the same manner as taxes upon said property for city purposes are levied, collected and enforced.

§ 161-4 Penalties for offenses.
[Added 12-17-1980 by Ord. No. 6-1980
Editor's Note: This ordinance also renumbered former §§ 161-2 through 161-5 to become §§ 161-5 through 161-8, respectively.

Any person violating any of the provisions of this article shall, upon conviction thereof, be punished by a fine not exceeding $500 or by imprisonment not exceeding 15 days, or by both such fine and imprisonment. Each day such violation shall continue shall constitute a separate offense.

ARTICLE II Sewer Rents (§ 161-5 — § 161-8)
[Adopted 12-18-1963 as L.L. No. 9-1963]

§ 161-5 Imposition of sewer rent.
[Amended 4-20-1988 by L.L. No. 6-1988]
In addition to any charges provided by law, the owner of any real property within the City of Rye served by a sewer system maintained by a municipality other than the City of Rye shall pay to the City of Rye a sewer rent for the use of such sewer system. Such sewer rent shall be at the rate of $210 per connection thereto or shall be such pro rata amount allocable to such property as the City of Rye shall be required to pay for the use of such sewer system.

§ 161-6 Collection of sewer rent; lien.
All sewer rents imposed hereunder shall be levied, connected and enforced in the same manner and at the same time as provided for the collection and enforcement of city taxes. If such sewer rents are not paid when due, it shall be the duty of the City Comptroller to charge and collect interest thereon at the same rates specified for the collection of city taxes. Such sewer rents shall constitute a lien upon the real property served by such sewer system, and such lien shall be prior and superior to every other lien or claim except the lien of an existing tax, assessment or other lawful charge.

§ 161-7 Disposition of sewer rents.
Revenues derived from sewer rents, including interest, shall be credited to a special fund to be known as the "Sewer Rent Fund." Moneys in such fund shall be used for the payment of the charges the City of Rye shall be required to pay for the use of such sewer system.

§ 161-8 Applicable rules and regulations.
The owner and occupant of real property served by such sewer system shall be subject to the rules and regulations of the City of Rye and the municipality maintaining such sewer system relating to the use of such sewer system, insofar as applicable.