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VILLAGE OF ASHAROKEN

ENVIRONMENTAL REVIEW BOARD

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In the Matter of the Applications of,
Philip Giunta,
Request for a Seasonal Recreational
Dock Facility at 241 Asharoken Avenue,
Northport, New York 11768

Daniel Akeson,
Request for a Seasonal Recreational
Dock Facility at 255 Asharoken Avenue,
Northport, New York 11768.

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October 24, 2016
7:00 p.m.

HEARING, in the above-captioned
matter, was held on the 24th day of
October 2016, 7:00 p.m. at Asharoken
Village Hall, One Asharoken Avenue,
Asharoken, New York and before
Charmaine DeRosa, CSR.

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3 A P P E A R A N C E S:

4 DOUGLAS VAUGHN, Chairman

5 MICHAEL ELSAS
6 MARTY COHEN
7 PATRICK CLEARY
8 DOUG ADIL

9 ALSO PRESENT:

10 Albanese & Albanese, LLP
11 Village Attorneys
12 150 Franklin Avenue
13 Garden City, New York
14 BY: BRUCE MIGATZ

15 McCARTHY & REYNOLDS, PC
16 7 East Carver Street
17 Huntington, New York 11743
18 BY: MICHAEL L. McCARTHY, ESQ

19 CAMPOLO, MIDDLETON & MCCORMICK, LLP
20 4175 VETERANS MEMORIAL HIGHWAY
21 SUITE 400

22 RONKONKOMA, NEW YORK 11779
23 BY: FREDERICK EISENBUD, ESQ

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[CALLED TO ORDER]

[TIME NOTED: 7:00 P.M.]

CHAIRMAN VAUGHN: Welcome everybody to the continuation of the ERB meeting, Monday, October 24th. If you would just rise for the pledge of allegiance.

[PLEDGE OF ALLEGIANCE]

Okay, we're continuing with the hearing for the Giunta and Akeson dock applications. Since we last got together, we received quite a bit of information from both Mr. McCarthy and now Mr. Eisenbud, who is representing Mr. Holmes. It's quite a lot of reading and quite a lot of information from both sides, which is good information for us and you. Can you start out, Mr. McCarthy, with what you're going to say?

MR. McCARTHY: What I'd like to say is we have in fact received a lot of information since we were here back in July. Thank you for your patience and your continued interest. The information, I think, speaks for itself.

At the conclusion at the July 25th

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2 meeting I asked for an opportunity to have
3 our environmental consultant, Land Use and
4 William Bowman, is here to respond to the
5 report that Mr. Abrams prepared and that
6 this Board took notice of back in July.

7 Since that time we had correspondence
8 with Mr. Eisenbud. I know this was a letter
9 that came in on October 10th and I responded
10 on October 17th, and received Fred's letter
11 today. The documents speak for themselves.

12 I have nothing more to add, but I would
13 like an opportunity to speak at the end.
14 I think it's my right and prerogative as
15 counsel to Mr. Giunta and Mr. Akeson to
16 maybe rebut anything more Mr. Eisenbud or
17 Mr. Abrams wanted to put into the record.
18 I'm in receipt of an email communication
19 and I think Fred wants to speak to the Board,
20 and if that's the case we'll reply to his
21 remarks, and I think I'll wait until the end.
22 I'll rebut the same. If that's okay with
23 the Board, that's the way I'd like to
24 proceed.

25 CHAIRMAN VAUGHN: Thank you. Is

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2 that good?

3 MR. EISENBUD: Sure.

4 MR. McCARTHY: Thank you.

5 MR. EISENBUD: I believe there may

6 be other people that would like to speak as

7 well --

8 MR. MIGATZ: Give them your name and

9 appearance.

10 MR. EISENBUD: My name is Fred

11 Eisenbud and I'm the attorney for Mr. Holmes.

12 I believe there are other people here besides

13 Mr. Holmes representatives that would like to

14 speak. Perhaps when they do we can wait and

15 eliminate some of the things we will say as

16 we would go and we would leave it to the

17 order of the presentation.

18 CHAIRMAN VAUGHN: Okay. Is there

19 anybody that would like to speak either for

20 or against the dock applications at all?

21 Do you want to come up to the mic please?

22 MR. SARSER: 200 Asharoken Avenue.

23 I'd don't want to take a lot of your time

24 because I know you have a lot to talk about.

25 When we were here back in July I had made a

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2 comment that we had one of the most beautiful
3 evenings we could have possibly had, and we
4 could take another look out these windows and
5 see just natural beach line, which I would
6 love as a resident down here to retain that.

7 Even though we can't see it now, I
8 think the docks are a little bit ugly as
9 far as what a natural habitat we've had
10 here and that is my opinion. Thank you.

11 CHAIRMAN VAUGHN: I want to make a
12 note that we did receive some letters; Ken
13 Murphy who is in opposition, from Dunzer
14 [PHONETIC] the same, the Polacci's, and from
15 Christin Wenderoth. We did receive your
16 letters. Tony?

17 MR. WENDEROTH: My name is Tony
18 Wenderoth and I live at 211 Asharoken Avenue,
19 in Northport. I am vehemently opposed to
20 the docks, and I have a letter which I will
21 give to Nancy so the Board can look at it.

22 In 1925 my grandfather put a trust
23 so that he can have better control of
24 them, and he looked for a place on the water
25 somewhere on the North Shore, with one

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2 requirement, when he worked his way out, it
3 had to face south, and the first beach he
4 could come to facing south on the North Shore
5 was Asharoken. They looked at Bayville, it
6 faces north.

7 We have been here ninety-one years, in
8 the same house, I'm the third generation
9 and my son will be the fourth. We value it.
10 We love it. It represents just a gorgeous
11 view. It's unimpeded by anything except the
12 boats at anchor. For all the reasons that
13 are elucidated in the ERB ordinance those are
14 all the considerations, that the debris on
15 the tide line, which this week was terrible,
16 which would be rotted in between each home,
17 in the docks. But it moves on, it moves
18 out and it didn't deteriorate to smell and
19 impediments. We did have the fish moving
20 back and forth within five feet from the
21 shore. Many times the snappers drive them
22 in. There's a lot of people like myself who
23 fish, surf-cast, and to me the only way to
24 fish is by surf-casting, and the people drift
25 up and down the beach, and follow the fish,

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2 and this will all be lost.

3 In addition, a huge amount of people walk
4 every day and walk in front of the house with
5 no objection at all. They are very pleasant.
6 They would not be able to get from one owner
7 to another owner if indeed there were docks
8 to impede progress. It means that they would
9 have to go up higher than mean high water
10 onto where the people are sitting, and that
11 would be very uncomfortable to go up and
12 around and really you close off people's
13 ability to walk the beach. I don't know
14 how I can time this because a lot of people
15 want to talk, but all the items listed in
16 the ordinance are very important to Ida
17 Smith, particularly how it looks now
18 without any man-made structures impeding
19 the view. Thank you.

20 MR. COHEN: Can I ask you a
21 question?

22 MR. WENDEROTH: Sure.

23 MR. COHEN: You were around in 1994?

24 MR. WENDEROTH: Yes.

25 MR. COHEN: Do you know why the

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2 ordinance was written with specifications on
3 how to build a dock?

4 MR. WENDEROTH: I was on that
5 committee with Tony Sbarro. Miner Crary
6 was the Chair of that Committee and they
7 covered everything on there. It was long
8 meetings and lots of sessions until we put
9 everything together. Basically, I never
10 thought anybody was going to ask -- It's so
11 impossible to think that anyone wants a dock.
12 I think the committee members never felt
13 there would be a request for a dock.

14 They put everything in there to try to --

15 MR. COHEN: Did you feel they put it
16 in there because they didn't want anyone to
17 request a dock?

18 MR. WENDEROTH: I'm not sure of
19 that. I'm not sure of that. There are so
20 many other places you can access a boat from
21 a dock, Northport and Centerport and so
22 forth, that it really was not considered that
23 it would be something that would arrive in
24 Ida Smith.

25 MR. COHEN: Okay.

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MR. ADIL: I'd like to mention relative to that Code also applies to reconstruction or repairing the docks. Sometimes when somebody has the ability and needs to repair, so they can check with the Code for what is required.

CHAIRMAN VAUGHN: Anyone else?

MR. McCARTHY: Good evening. My name is Joseph McCarthy. I live at 257 Asharoken Avenue. I have letter to submit to the Board, and I'd like to read it. I'm speaking on behalf of my wife, Joann and I, homeowners and residents at 257 Asharoken Avenue. This pertains to the two pending dock permit applications. I've spoken on two occasions previously and submitted written statements outlining our objections.

Regardless of the arguments in favor of these permits and however one spins this, it is inarguable that there are adverse impacts, and more docks equal more adverse impacts. There will be a cumulative negative effect on, as the Code states, collection of flotsam and decaying matter, pollution from increased

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2 boating and maintenance, adverse impacts on
3 swimming, navigation, aesthetics, security,
4 potential damage from docks breaking loose
5 during storms to other structures.

6 In addition, docks virtually eliminate
7 the traditional pleasure of walking the
8 beach. Which is a right we all have. It is
9 important to note that along the Asharoken
10 strip it is not safe to walk along the road.
11 The beach has been the only safe place to
12 walk, if you wish to walk off of your
13 property. You may argue that one can
14 still do this, but this either would involve
15 climbing over the dock or walking around it,
16 which in both cases involves trespassing and
17 not something that is comfortable to do.

18 If you have mobility issues, one may
19 not be able to climb up and over the dock
20 at all. Approving these permits will result
21 in a decrease in property values due to the
22 impacts stated in our Village Code. Many
23 prospective buyers will view proliferation
24 as a negative.

25 In addition, as time passes and docks

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2 proliferate the permit process may become
3 more onerous at a minimum. If you market
4 your property and the prospective buyer
5 wants a dock, they may, they may infer they
6 have a lesser chance for a permit due to the
7 increase of docks in the Village or perhaps
8 the proximity of a dock to the property in
9 question. This would create the situation
10 where both the potential buyers, the one
11 wanting the dock and the one adverse to docks
12 would be equally put off.

13 The Code speaks to the need to find
14 appropriate balance between property owner's
15 desires to access the water and the public
16 enjoyment of water and the foreshore in the
17 Village.

18 Our family has lived here over fifty
19 years. We have been boat owners this entire
20 time. There is ample access to water without
21 having a dock. The aggregate of negatives
22 which would apply to the overwhelming
23 majority of non-dock owning residents
24 that the aforementioned balance is only
25 achieved by denying these permits.

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2 Thank you.

3 CHAIRMAN VAUGHN: Thank you.

4 [DOCUMENT MARKED AS EXHIBIT 1]

5 MR. WIDOM: My name is Steve

6 Widom. My wife is with me tonight, Ms.

7 Peterson. We have been here in Asharoken for

8 over thirty years. I'm at 167 and 169

9 Asharoken. We have approximately 150 feet

10 of frontage in Carter's Bight. Carter's

11 Bight is not in question in this action

12 because it's not on the outside of the

13 harbor-side. It's a small inlet.

14 We decided to build on Asharoken

15 thirty years ago because the nature and

16 pristine nature of it. There were no docks

17 anywhere in our area. I bring this to your

18 attention because the town did allow docks to

19 be built in Carter's Bight, and because of

20 that I think we ran a little bit of a

21 different direction to what you're hearing

22 today, because we see the collection of

23 debris. It's right in our Backyard. We see

24 the fish that get caught up in the docks.

25 It's allowed, but we don't

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2 want that happening outside in the harbor.
3 Over the last couple of years we've seen
4 fish kill within our area that we had to
5 clean up. On the outside, that's going to be
6 even worse. When it comes to docks, my son
7 grew up here, you know. He moved in when he
8 was two years old, and we were building at
9 that time.

10 When the docks started becoming being
11 built in the bight, we had to walk over
12 the docks. We had to walk over, and above
13 them or below them, he couldn't get across.
14 We are now lucky to have three grandchildren
15 and we're hoping to have them enjoy Asharoken
16 also, and go above and below docks at least
17 in the Bight. We wouldn't want that
18 happening outside the Bight because we walk
19 the beach all the time and we kayak the beach
20 all the time.

21 On Sunday we went to Vanderbilt. The
22 one thing that struck me as the most amazing
23 thing was the stretch of beach that we saw
24 that was uncluttered. It will really be a
25 dis-service to everybody here to start seeing

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2 docks built. It is probably the one stretch
3 of land that is still pristine in my mind.
4 That's why we came here to begin with. It's
5 our hope that the Board and the Village will
6 consider that and maybe decide not to do it.
7 Thank you.

8 CHAIRMAN VAUGHN: Thank you.
9 Anybody else in the audience?

10 MR. STEINLAUF: Ron Steinlauf,
11 106 Asharoken Avenue. My family has been
12 here for over thirty-five years. I'm sorry
13 to say to you folks that I am for the
14 dock for a couple of reasons. It comes down
15 to property rights. It comes down to what
16 the law has decided from 1994. There are
17 people that will buy a home and put millions
18 of dollars into it, to build a dock. It's
19 not going to degrade the property values and
20 it's not going to obstruct your ability to
21 walk on the beaches.

22 As a matter of fact, I think the
23 properties in question goes into low tide
24 as well. So, at any given time technically
25 you are a trespasser on this young man's

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2 property. I would like to remind people,
3 we take for granted something called
4 property rights, and it's -- and everyone
5 has an opinion. There comes a point that
6 everyone has a right as to what everyone
7 can and can not do with their properties,
8 when there is a law on the books. Maybe
9 that law shouldn't have been there but it is.
10 People bought down here with that in mind.
11 In 1994, Mr. Wenderoth couldn't really answer
12 why they allowed for it, but it was allowed.

13 So we're in this quagmire now, not to
14 be offending anybody that's against it, but
15 these are our rights. I get offended when
16 people are taking my rights away. I just want
17 to remind everybody on the Board that if
18 they are inclined to go by the code that's
19 in the Village law books and live by that.
20 Otherwise it becomes a much messier
21 situation. Thank you.

22 CHAIRMAN VAUGHN: Thank you.

23 MS. AKESON: Hello. Cathleen
24 Akeson. I'm the owner at 255 Asharoken
25 Avenue, applicant for the dock. I just

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2 want to take a few minutes to say that my
3 husband and I applied for this dock. Our
4 family has been here over thirty years. It
5 has been our dream to live here and have our
6 beautiful home here, and have a dock to be
7 able to go boating. We have been to many of
8 these hearings. We've changed the plans to
9 our dock, based on some of what was heard at
10 these hearings.

11 It's not intended to offend anybody or
12 certainly not change anything in terms of
13 walking on the beach. We like to walk on
14 the beach as well. In fact there's a dock
15 shortly down from us that we have to
16 walk around. We did change to the plans
17 based on that. We have complied with
18 everything and have done everything that
19 we can to make this accommodating.

20 We've been to hearing after hearing
21 and really, you know -- It's not fair at
22 this point. We've complied with everything.
23 The DEC has approved it, and the law is the
24 law as it's written down. I understand
25 people are saying that they don't like

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2 docks but there is no law saying you can't
3 have a dock. We bought this home with the
4 intention of having a dock and we've done
5 everything we can to make it accommodating
6 to everybody else.

7 CHAIRMAN VAUGHN: Mr. Murphy?

8 MR. MURPHY: Thank you. Kevin
9 Murphy, 263 Asharoken Avenue. I sent in
10 a letter. I won't go through the letter.
11 You guys have it. It goes through some
12 things that I had mentioned before. I
13 grew up at 89 Asharoken, down in the area
14 that now has a lot of docks. I remember
15 when, in 1976 we bought our first Sunfish,
16 and I just remember sailing from my area of
17 Asharoken and coming around Carter's Bight,
18 and coming to the Ida Smith parcel, which was
19 like stepping back a hundred years, in the
20 background, the clarity and openness and
21 beauty of it.

22 I'm thrilled to say, as a homeowner
23 there now, it's still like that today.
24 I'm almost surprised at something like that.
25 I really attribute it to the foresight of

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2 the Village and the foresight of the
3 residents to be able to hold onto something
4 that is so unusual and so special. I won't
5 go through each of the pieces, but Jim
6 summarized it and you've seen the docks,
7 and while it's getting late in the
8 season we invite the committee to kayak
9 the area that now has five or six docks.

10 While there may be studies and there
11 may be minutia, there may be engineers and
12 there may be lawyers. You have to kayak the
13 area and see what's up close and personal of
14 just what does get trapped between docks.
15 How -- When you kayak the area, you can't
16 get close to the shore. You have to kayak
17 way outside and not go in. The fact that
18 these docks become really repositories of
19 flotsam and other junk, not to mention that
20 they become the prime landing point for
21 seagulls and cormorants and we know what the
22 prime production of seagulls and cormorants
23 is, and walk these docks and they become
24 essentially floating piles of bird excrement.
25 That's kind of what happens to the docks.

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2 So, when you talk about somebody saying
3 that there's no impact, it's minimal impact
4 and nothing is going to change -- That is a
5 fiction that can not be sustained. If you
6 actually live in the area of Ida Smith.

7 We have also been boat owners this whole
8 time. We've always had a boat, para-sailed
9 and never applied. Northport, I have to say,
10 is one of the easiest towns on Long Island,
11 New York State or perhaps even the country to
12 own and maintain a boat. There are so many
13 different options to have. In fact an
14 Asharoken tradition to me is the ability to
15 row, paddle in and even the best part to
16 swim to the boat. It's part of what makes
17 Asharoken so special. This particular
18 stretch, and I showed a picture last time,
19 is truly unique to the North Shore of Long
20 Island.

21 So, while we're talking about one dock,
22 and I understand the desire of an individual
23 homeowner to have one dock. How much of a
24 big deal can one dock be? But you know,
25 the Board of Trustees knows, we all know

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2 that this is not about one dock or two docks.
3 This is about opening up this section to
4 docks, and before you can say a word there's
5 going to be seven, nine, ten docks, and you
6 will have taken something there, and because
7 of decisions made today, you've basically
8 lost something that can't be replaced.

9 I want to say and glad that you're in
10 the room today, that there isn't a more
11 simpler resolution to this issue, and that
12 is after all this and after a year of
13 dialogue, to this year of discussion and
14 year of conflict, to have the applicants
15 respectfully withdraw their applications.

16 Mr. Giunta has already made a major
17 contribution to the Village of Northport,
18 the creation of his beautiful food market,
19 located on 25A. I urge him now to join in
20 the common cause of his neighbors on the
21 beach in preserving this cherished strand
22 and set aside the request in the service
23 of the larger good.

24 Mrs. Akesson, I understand the desire.
25 You've heard people talk about ninety years,

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2 fifty years, thirty years. It's a lot of
3 history that goes back in Asharoken.

4 I'm not sure if you're in the house
5 yet or if you'd had the chance to fully
6 experience what it is that makes this part
7 of Asharoken so special, and why it is also
8 so very vulnerable to the type of destruction
9 that this dock will pose. Set aside that
10 need, live in it, move in it, walk the beach
11 and understand it and get a feeling for it,
12 and get acquainted with why that undisturbed
13 stretch of sand is so special.

14 Should they not, we urge the ERB to
15 reject this and in fact set straight the
16 law from 1994, and correct this so that this
17 is not an area of the zoning that is open for
18 docks. Thank you.

19 CHAIRMAN VAUGHN: Thank you.

20 Anybody else have anything? Mr. Holmes?

21 MR. HOLMES: My name is Rob Holmes.
22 I reside at 205 Asharoken Avenue. I am a
23 member of the Asharoken Bayside Association.
24 I reiterate my opposition to these dock
25 applications. I'd like to hand these out,

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2 if I may. These are a copies of my remarks
3 to make it easier. There is one there for
4 Charmaine, and for Bruce as well.

5 I also have two photographs to share.

6 MR. MIGATZ: Do you want this
7 marked as an Exhibit?

8 MR. HOLMES: Please.

9 MR. MIGATZ: Just one second.

10 MR. HOLMES: This will be a few
11 photographs that we'll be discussing in a
12 few minutes.

13 MR. MIGATZ: Do you want this marked
14 also?

15 MR. HOLMES: Yes, please.

16 [PHOTOGRAPHS WERE MARKED AS
17 EXHIBIT 3]

18 If anyone would like a copy of this,
19 I'll pass them along. Is there anywhere I
20 can set this up where everyone can see?
21 Basically, it's a larger representation of
22 what you're all looking at.

23 By the way, Nancy, since I had to bring
24 this easel from my garage, it is now a
25 gift to the Village. So, when I'm done for

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2 tonight, count that one.

3 MR. MIGATZ: We need a resolution
4 to accept that.

5 MR. HOLMES: I guess I'll wait for
6 the next Board meeting. I wasn't planning
7 on doing this but I was asked by the
8 Scarangellos to read into the record, well
9 an email that they sent me that is very brief
10 and then submit that into the record.

11 "Hello Rob, we'll be away and
12 unfortunately we will miss ERB meeting.
13 We're astonished even though with all of the
14 evidence of the damage to the environment the
15 docks will do, that the applicants are still
16 going forward with no regard to the special
17 place we live. We stand there with all of
18 those opposed and will continue to do so.
19 Marie and Pat Scarangelo."

20 At present there is not a single legal
21 dock in the Ida Smith territory. All of
22 the docks constructed prior to the 1994 law
23 were required to be re-permitted within
24 twelve months or face a fine of up to \$250
25 per day. With four pre-existing docks,

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2 that's \$1,000 per day. At 7,822 days, more
3 than enough to meet the Village budget for
4 many years. Some of these pre-existing docks
5 have mysteriously grown dozens of feet
6 without any approvals.

7 At some point we have to enforce the
8 Code, and recognize it's intent, which was
9 to -- which was to set a threshold to the
10 permit process sufficiently high to protect
11 the Ida Smith territory, especially when free
12 and open access to the water already exists.
13 The attorney for the applicants, Michael
14 McCarthy, asserts that history is
15 irrelevant to this discussion. I believe
16 he's wrong.

17 For years the Village Board believed
18 that it had regulatory dock authority
19 throughout the entire Village and not just
20 in the Ida Smith territory. In 1986, Trustee
21 Patricia Rittenhouse, proposed a total ban on
22 all docks in the Village. She proposed a
23 total ban on all docks in the Village, and
24 that the Zoning Board can provide a variance,
25 if the ban presented a hardship, such as

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2 those living in Duck Island and Carter's
3 Bight. Six years later, recognizing the
4 unique nature of the Ida Smith property, the
5 Village Board banned of all docks in 1992,
6 but the Board failed to protect this law with
7 Suffolk County. Two years later, and using
8 the verbatim language, near verbatim
9 language, the Board of Trustees implemented
10 the existing 1994 documents, which is the law
11 that governs these applications today.

12 The intent was never to open up Ida Smith
13 to dock proliferation, but to shift the
14 burden of it's protection from the Board to
15 the applicant. It forced the applicant to
16 demonstrate both the need for a dock and
17 the ability to meet all of the requirements
18 laid out in Section 125-22 of the Code.

19 This exhibit, Picture 1, is a portion of
20 the Ida Smith Beach that we're talking about
21 today. It begins at Beach Plum Avenue and
22 terminates at 277 Asharoken Avenue.
23 I hope you walked it. I've offered you to
24 do so from my property. The attorney for the
25 applicant suggests that they have fully met

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2 the requirements of the Code, but the facts
3 disagree.

4 Nothing in the submissions or those
5 from Land Use Ecological Services come
6 close to the standards laid out by the Code
7 and this has been true since the beginning of
8 this process. The original dock applications
9 were so deficient that it is dubious that the
10 ERB should have even been forced to convene.
11 The measurements were off. The guidelines
12 were contradictory, and the aesthetics and
13 ecological impacts were ignored, and the
14 Environmental Application Form was so
15 full of mis-statements that Land Use it self
16 concurred that it required both correction
17 and re-submission.

18 Even now we have drawing modifications
19 that border on nonsense with one dock
20 beginning below mean high tide, both docks
21 ignoring the four foot width requirement,
22 and no one having given serious consideration
23 to the negative ecological, aesthetic and
24 economic impacts that these docks would
25 create.

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2 The applicants admitted that the original
3 submissions were deficient. Yet they were
4 the basis for the submissions to both the
5 Army Corps of Engineers and the DEC. Now
6 the current proposals and revised forms are
7 barely recognizable versus those originally
8 approved by those agencies. It is worth
9 contemplating whether they would be approved
10 again.

11 To date the submissions have failed to
12 recognize the impact of even a single dock,
13 let alone many. Land Use and Attorney
14 McCarthy have used the existing dock at
15 the Orofino residence as proof that existing
16 docks are no big deal.

17 Mr. Orofino, who has impressed me as
18 a good and Asharoken-loving man, and with
19 whom I have no quarrel, has stated that
20 "There has never been a negative issue
21 associated with this dock from my neighbors."
22 While no one may have addressed him directly,
23 his neighbors have written letters to this
24 Board repeatedly about many unfortunate and
25 unforeseen issues this single dock creates.

2 As you continue walking the beach, you
3 start to approach this dock, where there is
4 purportedly no impact. You see the algae
5 pattern, in this Picture 2. This picture
6 was taken the morning of September 11th
7 and note all the algae accumulations on the
8 southeastern side of the dock.

9 One month later on October 21st, climbing
10 over the dock, which is nearly impossible,
11 thanks to handrails and the length of the
12 beach, reveals a different picture.
13 Thousands of shells, detritus and garbage
14 and litter over one foot deep are abutting
15 the dock.

16 Looking backward, this is the Picture 4,
17 shows the pile now occurs on the northwest
18 side of the dock. If, as the applicants'
19 scientist claims, the only force to be
20 analyzed, when considering potential
21 negative impacts on the foreshore, is the
22 perpendicular action of the tide how then
23 is the accumulation at the dock changing
24 sides? It does not take a PHD to recognize
25 the obvious. It is the combination of the

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2 tide and the wind. And this is the result
3 of a single dock.

4 It is beyond debate that additional
5 docks; whether it is one, two or twenty,
6 will destroy the character of this community,
7 and the damning ecological impact is
8 incalculable.

9 Attorney McCarthy's suggests in his
10 recent summation it is incorrect to assume
11 other docks will follow these two, arguing
12 that there haven't been any applications in
13 over twenty-one years. While all that math
14 is wrong, so is the assumption.

15 If you consider the Burns family at 251
16 Asharoken Avenue between the two proposed
17 docks, each of which will generate the
18 pollution and effluvia at a level similar to
19 that already seen at the single existing
20 dock, existing dock, then you have
21 economically damaged the Burns family.

22 You've now forced them to find other
23 means to swim or enjoy their own beach.
24 These docks have diminished the right of open
25 access and one of the only options available

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-ERB-

31

2 to them for a simple swim in clean water
3 would be to build their own dock. Docks
4 will follow docks, and proliferation is a
5 foreseeable Domino effect.

6 We, the neighbors of the applicants
7 have chose to purchase, maintain and improve
8 our homes for both aesthetic and economic
9 benefit. Docks diminish both and offers
10 nothing in return. It is the convenience for
11 two versus the economic and lifestyle cost to
12 many. Attorney McCarthy is correct in terms
13 of saying it's been a long time that an
14 applicant was determined by ERB hearings.
15 He assumes that is because no one is
16 interested in owning a dock. Many, myself
17 included, have considered the dock option.

18 In fact the most recent application
19 before the ERB, was Mark Polacci who in 2003
20 determined: A) The mountain was too high.
21 B) He withdrew his permit request. I am
22 also one of those people. I began the
23 expeditor process, went through the DEC,
24 read through the code and dealt with all of
25 the issues. I spoke with attorneys involved

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-ERB-

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2 and the Tony Wenderoths and others of my
3 neighbors and realized, not only was the
4 mountain too high, but the cost to my
5 community was to high as well.

6 When confronted with the list of adverse
7 impacts that docks can be expected to create,
8 was clearly set out in the Village Code, as
9 well as the requests of their neighbors not
10 to proceed. Yes, in twenty-one years no one
11 has had the level of self-interest to ignore
12 the beauty of this beach and the desire of
13 most of its residents to preserve the
14 character of the community, until now.

15 This Board can not address the impact a
16 single dock may have by simply looking at
17 these dock applications. You have to assess
18 the impact of multiple docks, many and not
19 just two.

20 MR. COHEN: Rob, before you put
21 that up there, can I ask you a question?

22 MR. HOLMES: Certainly.

23 MR. COHEN: Does the Orofino dock
24 meet the present dock specifications?

25 MR. HOLMES: I'm not an expert. To

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2 my knowledge, no.

3 CHAIRMAN VAUGHN: It's wider and a T
4 on the end.

5 MR. HOLMES: That's correct. The T
6 is wider and I think the floatation devices
7 are different. It pre-exists --

8 MR. COHEN: I understand that.
9 You can't say that the new docks that are
10 built would do exactly the same.

11 MR. HOLMES: No, as a scientist I
12 can't say that. But I can say that it's a
13 float, and I can say that's evidence from
14 the pictures before of just the algae and
15 certainly the accumulation here. I can also
16 say that it certainly interrupts the ability
17 to walk on the beach.

18 MR. COHEN: The new one isn't
19 bigger?

20 MR. HOLMES: It's still two feet
21 above. It's still a climb, and this is how
22 many of them there would be. Imagine that
23 single existing dock's accumulation of
24 detritus and disruption of the littoral
25 flow magnified by twenty-two others.

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-ERB-

34

2 That number of twenty-two is just the
3 dock proliferation potential in the
4 immediate and contiguous neighborhood,
5 twenty-two docks. Imagine trying to
6 exercise the legal right to walk that beach.
7 Imagine the flies. Imagine the stench and
8 the inability to swim. Imagine those docks
9 proliferate, you now need to build a dock to
10 enjoy the water you once had at your finger
11 tips.

12 In an earlier meeting dozens of lawyers
13 purported supporters of the applicants were
14 presented. Under questioning, it became
15 clear that the vast majority of those letters
16 were from people having nothing to do with the
17 Ida Smith territory. In fact, only a few
18 of those letters proved out. The contiguous
19 Ida Smith properties include about
20 thirty-three acres of land, of which about
21 thirteen acres is under water.

22 We polled the entire population of this
23 area. These are not from shills from other
24 regions. They would not insist on overseeing
25 Duck Island Dredging, or insist on an equal

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2 vote for public access to the Sound.
3 They are your neighbors, and the people
4 that are directly affected by these
5 applications, and who actually have the
6 right to a voice.

7 These property owners have written,
8 texted, called and voted. Excluding the
9 applicants, 77% of the tax-paying owners in
10 this area oppose docks, and they are willing
11 to go on the record as such.

12 The percentage of acreage that these
13 people own is even greater than 80%. The
14 overwhelming majority, no matter what basis
15 is used, or used for calculation purposes,
16 opposes docks, any docks.

17 I believe the code precludes, as written,
18 that all docks in the Ida Smith territory,
19 perhaps I'm wrong or perhaps not, but it is
20 indisputable that the Village Code calls for
21 the ERB find an appropriate balance. It's
22 80% or two applicants. To me the balance
23 you're charged to uphold is clear.

24 If you ignore the vast majority of
25 tax payers and take away their economic

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-ERB-

36

2 value, their freedom of peaceful enjoyment,
3 and the simply ability to walk the beach
4 they own, and change the character of their
5 community for worse, and forever, they will
6 not quietly disappear. Thank you.

7 CHAIRMAN VAUGHN: Thank you.

8 DR. ABRAMS: I'd like to pass these
9 around.

10 MR. MIGATZ: Would you like them
11 marked as an exhibit?

12 DR. ABRAMS: Yes.

13 MR. MIGATZ: How many pictures do
14 you have?

15 DR. ABRAMS: There are three
16 pictures. I have nine sets.

17 MR. MIGATZ: Give one to the
18 reporter.

19 DR. ABRAMS: Dr. Ron Abrams, Dru
20 Associates for Mr. Holmes.

21 MR. MIGATZ: Hold on one second.

22 DR. ABRAMS: Sure. I submitted
23 on October 10th an extensive response to the
24 September 12th letter from Land Use and their
25 revised Environmental Assessment Forms.

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MR. MIGATZ: Can you give your name and address for the court reporter?

DR. ABRAMS: Dr. Ron Abrams, Dru Associates for Mr. Holmes. On October 10th I submitted an extensive response to the September 12th letter from Land Use and their revised Environmental Assessment Forms.

I'm not going to read the whole twelve pages or whatever. I'm sure you all made yourself familiar with what you need. The main point of what I'd like to bring out, the initial long form EAF was incomplete, and it wasn't until public comment and a report by myself and others that lead to an admission of this and a revision.

So, as was said earlier, all decisions leading up to September were based on incomplete and false information. Before September, the LEAF assumed certain, or told you that certain impacts wouldn't happen. The revised LEAF still comes to the same concludes the same conclusions but provides you with information which makes the case look much more sensitive, and provides

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-ERB-

38

2 no additional substantiation.

3 The one point that I think is most

4 important, a technical issue, is about the

5 flow of waters. The September 12th letter

6 claimed that Dru Associates submitted no

7 plausible mechanism to support our concern

8 for the accumulation of debris, algae etc

9 and adverse impacts of the water quality,

10 which is just absolutely false. I've

11 repeated my plausible mechanism on Page 8

12 of the letter, of my October 10th letter, in

13 which I show the potential interruption of

14 long shore flow and the movement of the water

15 and cleansing of the beach, and flushing of

16 the beach that would occur, and the

17 interruption of such by putting linear

18 obstructions, whether they are to code or

19 not. A linear obstruction will block off

20 long shore flow. It will create swirling

21 and swirling of water on the upstream side

22 and Photo 1, which I handed out, is this.

23 So, it's logical, it's a plausible

24 suggestion by me that upstream and down

25 stream are different. The down stream effect

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-ERB-

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2 was to bring up the long shore and clean the
3 beach upstream, and let the accumulation of
4 debris shown in linear pattern, which is the
5 tidal action, but that wasn't enough to clean
6 the beach. You need the long shore flow and
7 all of the different dynamics that come
8 with it as well as the tide, and Land Use's
9 reliance simply on tide is smoke and mirrors.
10 It's just not real.

11 If you want the question that we're
12 dealing with, this technical question
13 answered, the only real mechanism is a study
14 by an expert, which you have not had. It's
15 not my job to meet the burden of proof for
16 the application. It's the applicant or the
17 Board who would own the DEIS and be in the
18 position ensure independent experts analyzing
19 this question, so there's no back and forth
20 between people who have a bias. That's, in
21 my opinion your only answer here.

22 Why is it so important? Because this
23 is precedent setting. There's no question
24 about it. Anyone who denies that this is a
25 precedent setting action, is going against

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-ERB-

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2 everything the Village did in the 90s to try
3 and protect the beach. You've heard from
4 the residents, and if you look at Photo 2,
5 you can see again the situation but further
6 down the beach.

7 The effect of the accumulation due to
8 this obstruction of this linear structure
9 fades as you go down the beach. In the near
10 ground of Photo 2, that's less of the
11 accumulation material. Now, if you start
12 putting linear obstructions every few hundred
13 feet, and you're going to get a beach that
14 looks like Photo 3 all the time.

15 What's more with this excess organic
16 material sitting in the shallow waters,
17 waters which have slowed down and are subject
18 to greater solar heating in August and into
19 September, you're going to get an
20 accumulation of bacteria and other organisms.
21 You're going to change the ecology of this
22 beach, and that had to be admitted in the
23 submission to you because that is a truth.

24 You're going to have the ecology of this
25 beach changed by allowing a series of linear

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-ERB-

41

2 obstructions of the flow. It's your job to
3 decide if this practice is acceptable.
4 It's the applicant's job to admit to the
5 impact, which they haven't done, in spite
6 of revising the EAF. I think you're only
7 solution is to go to the independents offered
8 through a proper SEQRA review. Thank you.

9 CHAIRMAN VAUGHN: Mr. Eisenbud.

10 MR. EISENBUD: Thank you.

11 My name is Fred Eisenbud and of Counsel to
12 Campelo, Middleton and McCormack. I'm here
13 for Mr. Holmes. May I inquire? This
14 afternoon I emailed about a letter dated
15 today with exhibits, and I was told they
16 would be printed and handed out. If they
17 weren't I have hard copies. Have you
18 received what I sent?

19 CHAIRMAN VAUGHN: Yes.

20 MR. EISENBUD: You have. Then I
21 don't need to do that. There were a few
22 comments from the public today, which I'm
23 glad were made because I kind of anticipated
24 them in what I gave you today. One was a
25 question by the Board member, why they allow

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-ERB-

42

2 permits here if the intent was perhaps to
3 deny them? Attached to the October 24th
4 submission today is a copy of local law of
5 1992, which was a law which prohibited any
6 new docks, but had a section for permits for
7 those who already had docks, who may want to
8 fix them up or repair them. That's why it was
9 in there.

10 In 1994 after having to go through
11 litigation, they took out the prohibition but
12 they put the burden on the applicant to show
13 all of the reasons set out in 1992 as to why
14 docks were not desirable would not be met,
15 would not be a problem. The burden is on the
16 applicant. I don't know why they didn't ban
17 them outright, but they did shift the burden
18 to the applicant. I don't think it's
19 possible given the aesthetics of at least one
20 of the things that they had to prove that
21 they can meet that burden. I think that is
22 why the permit section is in there, they just
23 carry it over from 1992 for those people who
24 already had docks.

25 Next, I was really a little bit pleased

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-ERB-

43

2 to hear the gentleman talk about private
3 property rights. Private property rights
4 are not implicated by this law.

5 Notwithstanding the fact that the people
6 who own property along Ida Smith beach own
7 the land under water. Why? For one thing,
8 I attached to my October 24th submission
9 today, a copy of the Ida Smith deed from
10 1890, and it contains the following language:
11 This is a deed that was transferred, the land
12 along this beach from the Town of Huntington,
13 who acquired it, to Ida Smith, and it
14 included this language: Subject to the
15 public easement for travel between high
16 and low water lines of Northport Bay or
17 Harbor extending in a northwesterly direction
18 to other lands of the Town of Huntington.

19 So, even when the Town transferred it,
20 they expressly said, you can't keep people
21 off the beach, between mean and high and low
22 water, even though you own that land.
23 You can't do it. Why? Well, I explained that
24 as well in my submission. It goes back to
25 where the rights became to all this water,

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-ERB-

44

2 and I quoted from a decision from 1904,
3 Trustees of Brookhaven vs. Smith. It was
4 reversed on other grounds by the Court of
5 Appeals, but here's what they said. It's
6 very informative. The title to land under
7 tide waters, within the realm of England
8 whereby the common law deemed to be
9 vested in the King as a public trust to
10 subserve and protect the public right
11 to use that as common highways for commerce,
12 trade and intercourse, the King by virtue
13 of proprietary interest can grab the soil
14 so that it could become private property,
15 but is subject to the paramount right of
16 public use of navigable waters, which you
17 could neither destroy nor abridge.

18 In every such grant there was an implied
19 reservation of the public right in so far as
20 it is assumed to interfere with it, or confer
21 a right to impede or obstruct navigation or
22 to make an exclusive appropriation of the use
23 of the navigable waters, the grant is void.

24 So, the assumption that because the
25 people along Ida Smith beach, and the people

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-ERB-

45

2 who own the land under water, you can't tell
3 them they can't build a dock simply it's not
4 so -- It's never been the case. So, if you
5 look at the law, the historical common law,
6 even the King couldn't elevate the land in
7 such a way so that the public could no
8 longer access and have the use of those
9 under water lands.

10 So, if the Village chooses in its
11 discretion to say no docks, it's in the
12 public interest to have clean beach and,
13 to have clean water and not have interest
14 with people that are going to swim. They
15 have a right to do it. Do they right to say
16 you don't have the right to have docks?
17 Absolutely. That is not what this Village
18 did.

19 So, lastly I just want to address
20 what Mr. McCarthy said in his letter of
21 October 17th, where I explained why the claim
22 that this was a Type II Action, that the DEC
23 treats it when they have their own
24 application as a Type II action, was simply
25 not the case. One of the things that

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-ERB-

46

2 happened in 1994 when this Article 4 was
3 adopted, is they changed the Code to say that
4 dock applications were Type I actions.
5 Nobody has the power to change that. That
6 is what the Village has set and nobody has
7 the power to change that. This is a Type I
8 SEQRA action. It can't be changed. It was
9 also suggested by Mr. McCarthy that it
10 doesn't matter because this Board only has to
11 make a recommendation, and the SEQRA
12 determination is for the Trustees.

13 Well, I agree that's right, but not
14 completely. Here's why; you have the
15 obligation -- You have the obligation to
16 make a determination and a recommendation.
17 If you don't have sufficient information,
18 the Code requires that you get that
19 information from the applicant. We are now
20 at a point where we have experts testifying
21 in different ways as to whether this is the
22 result of a docks, or it's not the result of
23 docks, what the cumulative impact would look
24 like.

25 You clearly don't have sufficient

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47

2 information to make a recommendation
3 as to whether or not the adverse impacts
4 that are in the Code will be a problem or
5 not. Clearly you are obligated to say
6 there shouldn't be approval if any of
7 those adverse impacts exist.

8 Frankly, I think there's no other
9 conclusion that you can reach to that, so
10 you should recommend denial. But at the very
11 least, the only way to get information at
12 this point, that you don't have, is to
13 require an Environmental Impact Statement.
14 You can't do that, but you can say to the
15 Board: A) We recommend that you deny this
16 because they clearly haven't met their burden
17 that show none of the adverse impacts set out
18 in the Code exists, or we just don't have
19 enough information and the only way to get
20 that is to require an Environmental Impact
21 Statement, and to recommend that they do
22 that. But I don't see any basis in this
23 record for you to recommend approval, and I
24 ask that you either recommend denial or that
25 there be an Environmental Impact Statement.

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-ERB-

48

2 I thank you very much.

3 MR. MIGATZ: Can I ask a question?

4 Mr. Eisenbud, how in your opinion does the
5 law of upland owner's repairing rights
6 factor into this dock application, and then
7 the Village Code.

8 MR. EISENBUD: There is absolutely
9 Village Code, the common law suggests the
10 upland owners, who own land on the water,
11 have a right to access it. So, if this
12 beach were covered with thick wetlands
13 vegetation and it was extended out to the
14 water, and there was no way to walk from
15 the house into the water, they would have
16 an absolute right to build a catwalk over
17 the wetlands vegetation and if need be even
18 a dock over that wetlands vegetation to get
19 to where the water is so they can have
20 access. Absolutely, they could do that.
21 That's not this case. There is no
22 obstruction. Everybody living on this beach
23 has easy access to the water. There is
24 nothing obstructing that right.
25 So, I think that question is an excellent

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-ERB-

49

2 one, but that simply does not apply to the
3 facts in this Ida Smith beach.

4 MR. MIGATZ: Haven't the courts
5 held that the upland owner's repairing rights
6 include the right to build a dock out
7 to the water that is navigable, usually
8 three feet?

9 MR. EISENBUD: As I indicated that
10 right only exists in an absolute form, if
11 they can't get to the water. If the only
12 way they can get there is to go over wetlands
13 vegetation, which they are not permitted to
14 disrupt, then they have the absolute right
15 to build 4 feet over and four feet wide,
16 with a light going through the
17 boards, and all of that stuff. They have
18 the absolute right to do that, if they are
19 blocked, but they are not blocked here.

20 MR. MIGATZ: Do you have case law
21 required for that --

22 MR. EISENBUD: I believe there
23 is case law that suggests that is the
24 reason for having the requirement.
25 The DEC --

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50

2 MR. MIGATZ: Do you have case law
3 that supports what you just said, that if you
4 have access to the beach, that you don't have
5 the right to build a dock?

6 MR. EISENBUD: I have case law
7 that says that it is in the police powers of
8 municipalities to regulate just as they do
9 in the Zoning Laws, and in this particular
10 case they have the absolute right to make it
11 difficult to have a dock, because there is
12 no reason for it to access the water. It
13 does not impact the right bearing rights
14 of the property owners.

15 MR. MIGATZ: I'm going to ask the
16 same question of Mr. McCarthy, but are you
17 familiar with the Court of Appeals holding
18 the Town of Oyster Bay versus Commander Oil?

19 MR. EISENBUD: That was a case
20 involving the Commander Oil's right to, I
21 believe, what do you call it? To dredge,
22 so they can continue to get boats in and out.
23 They were already there. They had a right
24 to continue access to that property, and
25 the Court of Appeals said you have a right

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to do that. That's not this case. It's a completely different case.

MR. MIGATZ: In that case, the Court stated that either the Town that holds title to lands under water in trust for the public good or upland owner, may exercise it's rights in a manner under reasonably intrusive upon the other's rights. The Town rights are all times subject to the public rights of the right of the repairing owner access to the water.

Conversely, the repairing owner's right of access is not absolute but qualified by other rights of the owner of the under water land. Neither the repairing owner nor the under water owner has an unfettered veto over reasonable land uses necessary to the other's acknowledged rights. Where the rights conflict, the courts must strike the correct balance. It seems to me that what you're saying is that the rights conflict and not the Court but this Board must strike the correct balance.

MR. EISENBUD: This Board has to

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-ERB-

52

2 make the initial balance but ultimately
3 it's the Board of Trustees.

4 MR. MIGATZ: They are making a
5 recommendation.

6 MR. EISENBUD: They did that
7 balancing in 1994 when they adopted the Code.
8 They concluded in this area, where upland
9 owners have the ability to easily access the
10 water, and there are lots of alternatives
11 for their boats and they don't have to have
12 them right there. On balance we think it
13 best that the public be able to continue to
14 access this water and the beach clear and
15 clean as it is now. So, there's nothing in
16 that case that you read, and that I saw that
17 contradicts with what I said.

18 MR. MIGATZ: Thank you.

19 CHAIRMAN VAUGHN: Thank you.

20 MR. EISENBUD: Thank you very much.

21 MR. MIGATZ: Mr. McCarthy, would you
22 like to address those questions?

23 MR. McCARTHY: I'd like to address
24 that. Thank you Mr. Migatz and Members of
25 the Board. I was going to ask Will Bowman to

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-ERB-

53

2 follow up, given that Bruce brought it up in
3 the discussion of what Mr. Abrams had to say,
4 given that poignant point. What I ask you,
5 Board Members and Mr. Migatz as Counsel to
6 the Village, is it possible that in 1992,
7 when the Village of Asharoken enacted its
8 ordinance prohibiting docks, that in 1994
9 when they revisited the issue to regulate
10 docks, they understood the distinctions of
11 blocking the repairing rights of property
12 owners. Is that possible? I think it's very
13 very possible. As a matter of fact, I think
14 it's almost the reason why it happened.

15 If you look at your own ordinance
16 as it is contained in your books, you'll see
17 the 1992 ordinance that Mr. Eisenbud supplied
18 you with today, described in Section 2, the
19 basis for the prohibition of the docks, and
20 then gives you the litmus test of what the
21 basis of what the prohibition was, meaning no
22 docks at all.

23 If you look at your current ordinance,
24 as it's contained in your book, there is an
25 editor's note on the bottom that says: This

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-ERB-

54

2 local law also provides for the repeal of the
3 former law of 1992 law, and then it states,
4 and this is very very important, very
5 important. It says, in Section 125-22.2 the
6 basis for the regulation of docks, not the
7 prohibition of docks but the regulation of
8 docks.

9 Then the ordinance goes on to describe
10 in precise detail what it is that a property
11 owner in the Ida Smith portion of Asharoken
12 needs to do to build a dock. So, Mr. and
13 Mrs. Akesson come along and Mr. and Mrs.
14 Giunta come along. They don't write the rule
15 book. They don't consult the Code and say,
16 give me a variance, and give me something I'm
17 not supposed to have. They consult the rule
18 book and they design it to meet the
19 specifications.

20 Mr. Migatz, just to ask you a question,
21 and I'm glad you brought up the case, a case
22 decided by the New York State Court of
23 Appeals in 2001 by the Chief Justice, Chief
24 Judge, of the New York State Court of
25 Appeals, Judith Kay, talking about repairing

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-ERB-

55

2 rights because repairing rights are very very
3 important. Mr. Eisenbud, and I say
4 this very respectfully, he's injecting
5 arguments into this application which never
6 came into it. It was never a suggestion by
7 Mr. and Mrs. Akeson, who by the way own the
8 land under water, and own the land upon which
9 the anchors and chains would be affixed,
10 never made the suggestion that people
11 couldn't walk the beach or anything like
12 that. That's never been the suggestion.
13 They know what the obligations are, either
14 by the Ida Smith deed that was granted to
15 Ida Smith by the Town of Huntington or by
16 Common Law. I don't mean to be dismissive
17 when I say that it doesn't matter what the
18 history was. I'm saying that because I'd
19 like to get to the point. I think Mrs.
20 Akeson said it best, which she said to all of
21 you tonight, the law is the law. We just
22 need to have the law applied as the law is
23 written today.

24 I can argue with you about the three
25 conditions of patents, and tell you all about

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-ERB-

56

2 Governor Donahue. I can tell you all about
3 Governor Clinton, not our current Clinton.
4 I can tell you all about Governor Fletcher.
5 I can tell you all about the Supreme Court
6 cases that have determined and why it
7 was written into the New York State
8 Constitution, and those patents had to be
9 recognized by the towns and villages of the
10 North Shore of Long Island. I didn't make
11 it up.

12 I come to the Village of Asharoken
13 and you have a regulatory scheme and you
14 tell the citizen, this is what you need to
15 do to have a dock, and apply by the rules.
16 Mr. Holmes is very clear. He says, we just
17 don't like it and we don't want to set a
18 precedent. We just don't want you to have
19 it. So, basically what we're going to
20 do is we're going to torment you to
21 the point that she'll simply go away.
22 Quite frankly, Mr. and Mrs. Akesson aren't
23 going away, and neither is Mr. Giunta.

24 Now, if the Village of Asharoken conducts
25 a Public Hearing and makes a determination

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-ERB-

57

2 that all docks in the Ida Smith area should
3 be prohibited they do it by quantifiable and
4 scientific evidence, and guess what, Mr.
5 and Mrs. Akeson don't get a dock. That's
6 just the way we live in a democratic society.

7 So, you go back in this case Oyster Bay
8 versus Commander Fuel, another thing that the
9 court said, very very important, accordingly
10 Commander, like any repairing owner, like
11 Mr. and Mrs. Akeson and Mr. and Mrs. Giunta,
12 has the right of access to navigable water,
13 and the right to make this access a
14 practicable reality by building a pier.
15 Nothing about whether there was grass or
16 obstructions or this or that. That's
17 fantasy. That's not what repairing
18 rights are all about.

19 Anyone that studies the issue will tell
20 you, if you have waterfront property, the
21 standard that will apply is reasonableness
22 and it's the same standard that you apply
23 when you look at the Long Environmental
24 Assessment Form or whether you want to make
25 and assessment pursuant to SEQRA or whether

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-ERB-

58

2 you're going to analyze the scientific
3 evidence that you've been charged to analyze.
4 What is reasonable. So, the Village comes
5 up with an ordinance that says the reasonable
6 access to the Ida Smith property should be a
7 seasonal floating dock assembly. Okay.
8 Put it in and take it out because we don't
9 want to interfere with some of the things
10 that document Dr. Abrams was discussing,
11 during the winter months.

12 What else should be reasonable? We
13 don't want it to be overly obtrusive so
14 we're going to let it lay on the beach
15 and we're not going to block access, and
16 they're all going to have to be four feet
17 wide, and all of those other requirements
18 that are going to go with it. I just think
19 it isn't fair to cast Mr. and Mrs. Akeson
20 and Mr. and Mrs. Giunta as insensitive to
21 the environment of Asharoken or as being bad
22 citizens or greedy or self-interested because
23 they want to enjoy the waterfront property
24 the way they want to enjoy their waterfront
25 property. They didn't write the rules, you

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-ERB-

59

2 wrote the rules. Well, not you. The Village
3 of Asharoken did.

4 I say all of these things very very
5 respectfully but there really is a really
6 easy solution to it, allow the docks. I
7 don't think the Village can quite frankly
8 because I think someone figured out in
9 1992, and you all know the people and the
10 players that were around at the time.

11 I believe, and I don't know this,
12 but I strongly suspect that the people
13 that were writing the rules in 1992 when
14 they prohibited all docks, someone said,
15 you can't do that. You can't do that. You
16 can regulate them, but you can't prohibit
17 them.

18 So, they came with a system of
19 regulations and these are the regulations.
20 You are an advisory capacity to the Board of
21 Trustees. You're not making the decision.
22 You're making the decision whether to advise
23 or not, which I hope you do. You can
24 make an advisory decision against it and
25 the Board of Trustees can still approve it.

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-ERB-

60

2 We all know that.

3 I'm just trying to get on to the next
4 aspect of the application process. I didn't
5 mean any disrespect to Mr. Eisenbud but I
6 was only repeating what we discussed at the
7 Board back in June and back in July, and
8 Mr. Migatz and I had a spirited conversation
9 in a public forum about the role of SEQRA in
10 this aspect to this application. I never
11 once said that the scriptures indicate State
12 Environmental Review Act don't apply.

13 Mr. Eisenbud, I have a great respect
14 for you but I've been doing this for thirty
15 years of my life. I know how to apply the
16 rules and the standards. What I did indicate
17 was, I thought it was greatly significant
18 that the New York State Department of
19 Environmental Conservation, that writes
20 the rule book, that's charged with the
21 mandate of applying SEQRA in the whole
22 State of New York, made a determination that
23 Mr. and Mrs. Akesson's dock and Mr. and Mrs.
24 Giunta's dock, is considered a Type II
25 action. I didn't make the decision. They

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-ERB-

61

2 made the decision. I don't write the rules.

3 They write the rules.

4 So, I come to the Village of

5 Asharoken that says, notwithstanding

6 the fact that the DEC says it's a Type II

7 action, you know applicant, complete a full

8 Environmental Assessment Form. So, what do

9 they do? They get a consultant, PHD, and

10 they prepare an Environmental Impact

11 Statement, let me complete the EIF.

12 Mr. Abrams comes along and reviews it

13 and says, hey you made some mistakes. You

14 know what our consultant says, you're right,

15 we made a few mistakes and we corrected them.

16 Thank you. Okay. Thank goodness we got them

17 corrected in time, and we can now give a

18 document that they all agree is accurate that

19 we can give to the Board of Trustees and make

20 a decision.

21 So, all I ask you tonight, and

22 it's unfortunate that these things become

23 so divisive, you know -- I also said in my

24 letter with Mr. Eisenbud that I'm just trying

25 to drive the point home that the law was

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-ERB-

62

2 enacted in 1994, and there hasn't been a
3 floodgate of applications. I didn't say that.
4 Mr. Eisenbud said that. I just took it from
5 his letter and he said "Upon information and
6 belief, I believe the only two applications
7 the Environmental Review Board has reviewed
8 since the enactment of the 1994 ordinance,
9 has been Akeson and Giunta." I guess he's
10 right. I'm just reading back to you what I
11 read. I don't think that makes a difference.
12 They have a right to make an application,
13 and they have a right to have this Board make
14 a recommendation. I just don't know how much
15 more information we can give you, but I think
16 we covered it. Will, do you have anything
17 you want to add?

18 MR. BOWMAN: Yes, I would like to.
19 William Bowman, Land Use Ecological
20 Services. I have a PHD in Ecology and
21 Evolution from Columbia University.
22 I've worked for Land Use for about ten
23 years. Prior to that also work at Cornell
24 Cooperative Extension Program, NYSDEC and
25 Riverhead program for marine research and

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-ERB-

63

2 preservation.

3 A lot of issues have been raised,

4 probably too many for me to go through.

5 To kind of headline by item, I'd like to

6 cover a few salient points. Feel free

7 and I'd be happy to, pleased to, answer

8 any questions that the Board may have.

9 I would address them.

10 Regarding the SEQRA issues that were

11 brought up, the DEC did classify these as

12 a Type II action. The Village Code specifies

13 them as a Type I. I'd just like to make the

14 first point, the Village requires that we

15 submit the NYS DEC permit with our

16 application to the Village.

17 So, if the DEC is going to do it's own

18 SEQRA review, and name it as a Type II as

19 they always do, and close their SEQRA review

20 and move on, and we are required, because

21 the Village requires the DEC permit, we

22 are required to do is that before coming to

23 the Village first. I just thought I should

24 mention or clarify that point about the

25 Village's Dock Applications.

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-ERB-

64

2 I'd like to make a couple of points
3 just about ecology. First, I agree that
4 the burden is on the applicant, but after
5 a reviewing literature on the environmental
6 impacts of docks, scientific studies from
7 universities, looking at regulatory
8 guidance documents prepared by State
9 regulatory agencies enumerating the potential
10 impacts of docks and suggesting ways of
11 minimizing or mitigating those impacts.

12 There is not anything about circulation
13 type impacts from docks resulting in
14 decreased water flow, such as increased
15 nutrient levels, decreased oxygen levels
16 or increased temperature. It's correct
17 that the burden is on us, however the
18 mechanisms provided by Ron Abrams don't fit
19 in with the prevailing scientific literature.
20 They just don't.

21 It does not seem to make any sense
22 that you have water with higher nitrogen
23 concentrations, lower oxygen and
24 higher temperatures on one side of these
25 docks versus another, considering the

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-ERB-

65

2 variable impacts of the wind, considering
3 the large tidal range. That mechanism for a
4 potential ecological impact is not supported,
5 in the scientific literature, whatsoever.

6 I will agree that a dock is a physical
7 structure. It is not possible to put a
8 dock in the water and have it not interact
9 with the wind or the water, or in this case
10 low tide with the substreams. It's that --
11 It would not be reasonable for the Village
12 to require a dock to have no interactions
13 with the water, the wind and the substreams.

14 Because the dock is a physical structure
15 it's going to cause the water to flow
16 somewhat differently in it's presence.
17 As wind and water push water through the
18 dock, there could be, as these photos show,
19 changes in the deposition of algae or fine
20 sediments or detritus near the dock. If
21 I look at this, I see, I do not see an
22 ecological impact here. Yes, the pattern
23 of algae, or the flotsam, is different
24 than here, but this dock and the recreational
25 boating activity do not cause an increased

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-ERB-

66

2 production of any of the seaweeds you might
3 see here in codium. If the dock can not
4 cause an increase in production of this
5 material, it can only change its
6 distribution over a very small and variable
7 scale, and is subject to change the next time
8 the wind shifts or if the wind blows out of
9 the north instead of the south or the east
10 versus of the west, that does not seem to
11 be a significant environmental impact.

12 When we look at this algae here,
13 think about how much algae is actually here.
14 I've seen algae that has settled in dense
15 concentrations with potential ecological
16 impacts. There are times when you get in
17 very nutrified waters like Jamaica Bay, where
18 you get mats of algae that settle on
19 seagrasses, vegetative tidal wetland grasses
20 and smother it. That is not, in my opinion,
21 would be an adverse impact. We do not have,
22 from the photos shown by the neighbors, we do
23 not see a resource, a biological resource,
24 that's being adversely impacted by this
25 algae. Second, nothing is being produced,

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-ERB-

67

2 nothing is growing here. Second, if we took
3 this algae, and say we got a five gallon
4 bucket and tried to pick up all this algae,
5 maybe we'd fill the bucket, maybe. Then we
6 would dry it out. Half of this is probably
7 water weight. You know. So, then we have a
8 bit of dried seaweed. How much of that is
9 actually the nitrogen that they attribute
10 to being an algae womb. The nitrogen seaweed
11 concentration of general plant material ends
12 up being about 2%.

13 So, we took a bucket and dried it
14 out and now only about 2% of that is
15 actual nitrogen. That is a very little
16 amount of actual nitrogen that is sitting
17 right here. Then the question is, where
18 did that nitrogen come from? This wasn't
19 produced here. This nitrogen was taken up
20 by this algae from the waters, sequesetered
21 here, for a short time. Maybe the wind
22 shifts and it moves off shore. Maybe it
23 decomposes in place. Like I said,
24 that is a very small amount of nitrogen.

25 Second, it is not nitrogen that is

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-ERB-

68

2 not new to this system. It's just a
3 redistribution. Some places get more.
4 Some places get less. I want to make that
5 point. Impacts to water circulation and
6 changes to water quality has no basis for
7 this in the scientific evidence. It was not
8 presented to any studies to me or the Board
9 saying that such and such researcher from
10 such and such university or wherever found
11 small recreational docks to have these water
12 quality impacts. When I look at something
13 like this, I frankly just don't see an
14 environmental impact. I see nothing
15 different from the variability and the rapid
16 accumulation that you might find anywhere.

17 I wanted to make those two points.
18 I'm happy to elaborate on any further
19 discussion on impacts or anything else the
20 Board would like.

21 CHAIRMAN VAUGHN: Do you have
22 any questions? Anybody else? Thank you.

23 MR. MIGATZ: Typically the applicant
24 gets the last word, unless you want to go
25 back and forth. It's up to you.

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CHAIRMAN VAUGHN: Do you have something to add?

DR. ABRAMS: From Dr. Bowman's discussion he starts one of his points that docks might change the distribution of materials along the beach. In his opinion that would be with no resources impacted.

But there would be no accumulation of this without the docks. You can see that.

There would be some accumulation with the docks, and he uses maybe and small and how the nitrogen is not new. No, the nitrogen is not new, but it is redistributed, which he had acknowledged. He's gone in a circle.

This is Article 4(a), right? Section 125-22.2, basis for regulation of docks. Docks tend to impede the tidal and littoral flow of waters thereby increasing the collection of flotsom and decaying marine and plant-like on and along the shore where insects breed. That's my point I made. He's actually made it to. He said it's part of the system so it doesn't matter that it's now changed the pattern. It does matter

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-ERB-

70

2 and it will make a change when you put in a
3 whole series of these linear obstructions.

4 He also says that I didn't provide any
5 evidence or scientific literature, and I turn
6 your attention to my Page 3 where I site from
7 a basic oceanography text book how my
8 proposed mechanism is actually what goes on
9 with a longshore flow.

10 CHAIRMAN VAUGHN: Anyone want to add
11 anything?

12 DR. BOWMAN: One point. In trying
13 to provide the Board with a scientific
14 discussion, I provided real science and
15 literature, I provided documents from the
16 State of Massachusetts, from South Carolina.
17 I'm not quoting an undergraduate text book,
18 talking about general flow of ocean currents.
19 Yes, the wind does move water. I stated in
20 my letter that the circulation of water in
21 Northport Bay and Ida Smith territory is
22 very complex. I acknowledged the impact of
23 wind. It's also shaped by the tidal change,
24 the bathymetry of the bottom, bottom water
25 flows, which are probably not applicable

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-ERB-

71

2 here, and other factors. The mechanism that
3 they provide for the water quality are not
4 based on anything. They don't show up in
5 guidance documents. I'll just leave it at
6 that.

7 MR. ELSAS: I understand the
8 grass and the difference between this side
9 and the other side of the dock along this
10 picture, there's a lot of something over
11 there. I'm not sure if it's organic but
12 it's a lot of something. This is one dock.
13 To me this is precedent setting. What is
14 your opinion if there were fifteen docks?

15 MR. BOWMAN: In terms of the raft
16 -- Again, I've seen places where accumulated
17 algae is an ecological problem. This does
18 not seem to be that level. Ultimately, these
19 docks are trapping material that is out in
20 the bay. So, if you have algae collecting
21 here, that means it's just not deposited
22 someplace else. If you have more docks, the
23 patterns of algae distribution might become
24 more complicated but they should not be
25 increasing the overall amount of seaweeds

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-ERB-

72

2 or raft.

3 MR. ELSAS: Your argument in
4 terms of a bucket, a five gallon bucket,
5 which says it's one of these and you compress
6 it and then there is a certain percent that
7 you talk about, and if you multiply that by
8 ten, fifteen, twenty, twenty-five, thirty,
9 thirty-five, forty. You'd have a series of
10 these. What do you think would be the impact
11 of that would be?

12 DR. BOWMAN: I think the amount you
13 add up that, if you add up all that seaweed
14 that you see in this bathtub ring around the
15 tub here, here that bathtub ring is more
16 spread out. I think that total amount of
17 seaweed for this area is fixed at some
18 amount, and so I don't think that you're
19 increasing that amount at all. I think you're
20 changing around where the different
21 patches are, and where the patches were.
22 I don't think that total amount of raft is
23 altered by the dock.

24 MR. ELSAS: This other thing that
25 struck me was in terms of the tide. This

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-ERB-

73

2 appears to be at low tide. I don't know
3 if it's high tide, three hours before low
4 or two hours before high. The question about
5 this picture is what happens when the tide
6 comes up? Okay. In other words, does it
7 adhere, does it ring beyond the dock.
8 That can be an interesting question in
9 terms of watching the progression.

10 DR. BOWMAN: I guess it really
11 depends on what the conditions are at that
12 time. If you have the wind in the right
13 direction maybe this material would get
14 pushed out higher. If the wind is in a
15 different direction, maybe it would get
16 swept out.

17 MR. MIGATZ: Mr. Bowman, if this
18 Board, and I don't know what it's about to
19 do, if this Board were to recommend approval,
20 is it feasible as a condition of approval
21 that the upland owner is required to remove
22 any accumulation of seaweed or debris? Is
23 that something that is feasible?

24 DR. BOWMAN: I think it would be
25 quite hard having, knowing kind of how fine

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-ERB-

74

2 sometimes how these things are. Some of
3 these things look like little green fingers,
4 that seems like something easy to pick up.
5 Some of the stuff like at low tide is like
6 green cellophane. I think that would be
7 quite difficult to pick up. It's pretty hard
8 and what if these are kind of trapping algae
9 in one place and an accumulation at one
10 place, means there should be some deficit
11 someplace else. I don't think that would
12 be definitely justified. I think it would
13 be quite hard.

14 CHAIRMAN VAUGHN: I have no
15 questions.

16 MR. McCARTHY: I don't want to
17 beat this thing to death. Although I
18 respect Dr. Abrams, my recommendation stands.
19 We're not requesting a variance. We're not
20 requesting a meeting, and there's nothing
21 in the law that says this Board has to take
22 into consideration the cumulative impact.
23 It speaks for itself. People have been
24 living in the Ida Smith beach property
25 since 1994. The regulations have been in

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-ERB-

75

2 effect since 1994. The regulation is
3 entitled the basis for the regulation,
4 describes these things, that's why
5 these regulations are in effect because of
6 these things that we're discussing now.
7 And as a result of that regulation, because
8 of those concerns, the Village Board of
9 Trustees of 1994 saw fit to impose specific
10 requirements on how you then build a
11 seasonal floating pier, to address these
12 concerns.

13 This dock right there does not
14 represent the image of what Mr. and Mrs.
15 Akeson and Mr. and Mrs. Giunta are proposing.
16 We gave you images. We were asked to
17 super-impose them. We met the requirements
18 to the letter. I think it's very very
19 important that if the Village puts into
20 effect a regulatory scheme and the citizen
21 meets the regulatory scheme, this individual
22 would have to get their permit.

23 I thank you for your time and
24 consideration. I'm hoping that the Board
25 would please close this aspect of the

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-ERB-

76

2 deliberations. It's going on a year now.

3 I know I'm late to it, going back to June.

4 I say this respectfully to everybody

5 involved. I think you've got enough

6 information to make a determination.

7 That's my opinion. Thank you.

8 CHAIRMAN VAUGHN: Thank you.

9 MR. MIGATZ: You can't talk among
10 yourselves.

11 [INDICATING TO BOARD MEMBERS]

12 MR. COHEN: Can I ask Bruce a
13 question? I asked you this at the end of the
14 last Trustees meeting but, if you think that
15 the Village could pass this ordinance and
16 would it hold up?

17 MR. MIGATZ: No. The Court of
18 Appeals decision that I read a part of to
19 you says you have to strike a balance between
20 the repairing rights of upland owners and the
21 town, for this case the Village's, right to
22 regulate docks for or in exercise of their
23 police power. I don't think you can ban
24 docks outright. You can deny a dock
25 application if the balance requires that,

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-ERB-

77

2 and that's what the Village Code is

3 attempting to do.

4 I agreed with Ken Savin at the first

5 meeting he said that it's a poorly drafted

6 code and I agree with that. You have to

7 deal with the hand you're dealt. You have to

8 interpret the Code in relation to other laws

9 that also apply. You have to draw a balance.

10 MR. COHEN: Speaking about before

11 the drafted law, we hear and I've heard,

12 over these months, two interpretations.

13 One from the applicants that if you meet

14 the requirements, then doing what it says,

15 that's the law. The other from those opposed

16 saying, you not only have to meet those

17 requirements you have to prove that you're

18 not doing any of the negatives. Which of

19 those interpretations do you think is right?

20 MR. MIGATZ: I think -- Neither one.

21 I think it's in the middle, is what I would

22 interpret it. The Code talks about -- One

23 of the speakers said that the Code states

24 docks tend to impede, and the emphasis there

25 I think is on the word tend, and all

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-ERB-

78

2 of the other potential adverse impacts,
3 are potential adverse impacts, and that
4 is the reason for the Code setting forth
5 the types of docks to minimize those impacts.
6 It does state that the Board of Trustees
7 must define an appropriate balance, must
8 achieve the property owner's desire to access
9 the water and the public enjoyment of the
10 water in the foreshore of the Village.

11 I think what the Code is saying, not
12 quite as precise as Judge Kay may have said,
13 but it's saying the same thing, that you have
14 to balance the rights of the upland owner
15 and the rights of the Village, and the rights
16 of the public to protect from adverse impact.
17 I think it's somewhere in between, in my
18 opinion, of what the applicants are saying
19 and what the objectants are saying.

20 I think at this point the Board has
21 to determine if it has enough information
22 for you to render an opinion to the Board
23 of Trustees. Now, again, you've got to play
24 the hand you're dealt. So, if SEQRA review
25 is an exclusive providence of the Board of

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-ERB-

79

2 Trustees, this Board can not recommend
3 that the Board adopt a positive declaration.

4 This Board can, if it doesn't have
5 enough information to make its decision,
6 the Board can ask the Board of Trustees to
7 impose upon the applicant the burden of
8 retaining, as was suggested, an independent
9 expert to analyze what the applicant has
10 presented and what the objectants have
11 presented and give the Board its opinion.

12 This Board can not require that
13 and only the Board of Trustees can.
14 So, you have to ask the Board of Trustees
15 to require the applicant to do that. Or you
16 may feel that with the expertise that you
17 have on the Board that you do have enough
18 knowledge to draw your own conclusions.

19 MR. CLEARY: Bruce, I have another
20 point with respect to that. What I'm trying
21 to find out is what our role is with respect
22 to this in each of these applications. We
23 serve in an advisory capacity to the Board
24 that will make a decision. With respect
25 to the dock and also with respect to SEQRA.

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-ERB-

80

2 We constitute as an environmental board.

3 I'm going to presume we have knowledge or

4 expertise to offer the Board of Trustees.

5 I have no doubt and don't dispute the

6 applicant's right to advance this

7 application. That's not my issue at the

8 moment. My issue is figuring out how we

9 convey our appropriate recommendations

10 to the Board. If I default back to the

11 preamble of the law, and what it tells

12 us to do, and the first sentence of the

13 first paragraph of this law is to protect

14 the resource. My default or initial

15 position is one of protecting that

16 resource.

17 In that respect, the Board of

18 Trustees will make a decision as to

19 whether or not the application protects

20 the resource, do we aggregate our role

21 telling them our opinions with respect to

22 that? I don't think that's our job. I think

23 we're supposed to give them that advice.

24 So, in that regard I'm sitting here this

25 evening between two well credentialed PHDs

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-ERB-

81

2 who have two completely opposing positions
3 with respect to the applications. I'm not a
4 third PHD to render a decision between these
5 two smart guys.

6 At the moment I'm at a difficult position
7 because, frankly, I do not know who to
8 believe with respect marine ecology issues
9 that we've heard. With that being the
10 case -- We don't know what the Board of
11 Trustees need to do. I don't think we've
12 done our jobs.

13 MR. MIGATZ: No, no. That's not
14 what I'm suggesting. For the reason you
15 just said, Mr. Cleary, you can say to the
16 Board, we would like the Board to require
17 the applicant to pay for your expert to
18 give a report to you, so that this Board
19 can then make a recommendation to the Board.

20 MR. CLEARY: Is it easier for us
21 to punt to the Board of Trustees -- I think
22 it's our role to get into this?

23 MR. MIGATZ: I'm not saying punt to
24 them.

25 MR. CLEARY: We're asking the Board

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-ERB-

82

2 to provide us with the assistance to help us
3 make the decision is something you believe
4 we can do?

5 MR. MIGATZ: Absolutely.

6 MR. CLEARY: Unfortunately, I think
7 we need to do that. We are looking at two
8 guys, smarter than me, and I don't know who
9 is right here. The law tells us we are
10 supposed to be protecting this resource. I'm
11 confused how this is occurring with respect
12 to these applications. I'm at a loss on how
13 to convey that to the Board of Trustees. My
14 opinion is, Mr. Chairman, I think I need a
15 little more help in rendering that decision.

16 MR. ADIL: My question, are we
17 talking about presenting this to the Board,
18 is the Village paying for this consultant?
19 Is that what we're recommending?

20 MR. MIGATZ: No, no.

21 MR. CLEARY: If this then becomes
22 part of the Village Board SEQRA review, we
23 have the ability to set up escrow?

24 MR. MIGATZ: No. It has nothing to
25 do with SEQRA.

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-ERB-

83

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MR. CLEARY: Who would pay for that?

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Is that at the expense of the applicant?

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That's my point.

5

MR. MIGATZ: The Board of Trustees

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has the ability to make that decision.

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I'm reading from 125-22.6(V). The Board

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of Trustees may also impose a fee upon

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the applicant at the time of making the

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application, or thereafter, commensurate

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with any expense reasonably incurred or

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speculatively incurred by the Board in

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consideration of such application.

14

The fee or cost of retaining a environmental

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or other consultant as deemed necessary

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as ordered by the Board of Trustees.

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You'll be asking the Board of Trustees

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to make a determination that upon the

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application process, the applicant should

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pay for an environmental consultant, to

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report to this Board, so this Board can

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render its decision to the Board of Trustees.

23

MR. CLEARY: If this ordinance,

24

Bruce, was simply ministerial, and to

25

Mr. McCarthy's point, that there are five

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-ERB-

84

2 things that must be met, you meet them and
3 the permit is issued as just a matter of
4 course? Why would we then be asked to
5 render judgement. I think it's more than
6 what Mr. McCarthy said than simply meet
7 the standard. I think our judgement is
8 supposed to be superimposed on top of that.

9 So, if you can demonstrate to us that
10 you are protecting the resource
11 satisfactorily, and then you can clear that
12 hurdle and able to comply with the standards,
13 and we're able to tell the Board of
14 Trustees--

15 MR. MCCARTHY: Mr. Cleary, let me
16 speak to that point respectfully, I didn't
17 say that, or maybe you misunderstood what I
18 said.

19 MR. CLEARY: Maybe I misunderstood.

20 MR. MCCARTHY: What I said was,
21 that if the Akesons and the Giuntas meet
22 the standards, they're entitled to their
23 permit. That's what I said. I didn't say
24 that's your decision. That is a decision
25 of the Board of Trustees. I don't disagree

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-ERB-

85

2 with you. I agree that this Board is
3 empaneled and charged with making a
4 determination, or charged with making a
5 recommendation, to the Board of Trustees.

6 We believe we gave you all of the
7 scientific, engineering, photometric,
8 aesthetic, legal data that allows you to
9 make the decision. If you're feeling, and
10 I say that respectfully, Mr. Cleary, that
11 you're between two experts and two smart
12 guys as you say it, and you don't know
13 what to do, then you know selfishly and
14 to the interest for my client they had all
15 the answers to that, but if you're going
16 to tell me that you're going to go back to
17 your Board of Trustees and ask for more help
18 and resources and this, that and the other,
19 nobody in this room is suggesting to this
20 Board that you should aggregate your
21 responsibility.

22 So, whatever you need to do to
23 make you feel comfortable, legally
24 within your mandate or your charge to make
25 a recommendation, then obviously, you should

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-ERB-

86

2 do that. That would be the advice that
3 Mr. Eisenbud would give you as well.

4 I'd like to believe, and I do not know
5 it, that my expert, he's bigger and stronger
6 than your expert, but we all know how it
7 goes --

8 MR. MIGATZ: He's tall.

9 MR. MCCARTHY: Taller than me.

10 You're talking to me and I understand so I'm
11 just going to sit down. Don't misunderstand.
12 That's not what I'm suggesting.

13 MR. CLEARY: Thank you.

14 MR. COHEN: I'm getting confused
15 on this expert on how this plays into a draft
16 Environmental Impact Statement.

17 MR. MIGATZ: We're not involved
18 in the SEQRA process. You are making an
19 advisory, giving an advisory opinion.
20 SEQRA does not apply. You are not taking
21 an action as an action is defined under
22 SEQRA regulations.

23 MR. COHEN: We're not asking the
24 Trustees to require a draft Environmental
25 Impact Statement?

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-ERB-

87

2 MR. MIGATZ: They have to make
3 that determination themselves. They may or
4 they may not. At the end of the day, after
5 you make your recommendation one way or the
6 other, the Board of Trustees still has to
7 make a SEQRA determination.

8 MR. COHEN: So, this expert may
9 or may not be acceptable to the other side.

10 MR. MIGATZ: Neither side can,
11 unfortunately, have an opinion in that.
12 I've been down that road myself.

13 MR. CLEARY: It's going to be our
14 expert.

15 MR. MIGATZ: Your expert. You choose
16 who you want to choose, and unfortunately
17 they pay for it.

18 MR. COHEN: And if you're unhappy
19 with the results they can --

20 MR. CLEARY: If they're unhappy with
21 the result, they can pound salt --

22 MR. MIGATZ: At one point you
23 have to close the public hearing. If you
24 think you want either the applicant or the
25 objectants to give you more information,

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-ERB-

88

2 then you ask for it. If you think you have
3 sufficient information from them and from
4 the public, then you close the public
5 hearing.

6 If you feel you need an extra consultant
7 to help interpret what has been presented,
8 then you ask the Board of Trustees --

9 MR. CLEARY: I'm trying to
10 simplify things, Bruce, and move things
11 along here. I'm sort of putting the whole
12 SEQRA discussion on somebody else at this
13 point. I don't care. What I want to
14 find out is who's right, and is it good or
15 bad and that's all I'm trying to get to, and
16 the semantics of how it gets dealt with is up
17 to the Board of Trustees.

18 I would ask though the issue about the
19 procedure of timing. So, we would retain a
20 third smart PHD to come in here and review
21 what is going on. If we were to close
22 the public hearing tonight, our guy would
23 produce new relevant information, would Mr.
24 Holmes' guy then be able to comment or would
25 that be reserved for comment for the Board of

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-ERB-

89

2 Trustees, or do we keep this open because
3 we're now going to retain someone?

4 MR. MIGATZ: That's your decision.

5 MR. CLEARY: Which is a more
6 preferable course?

7 MR. MIGATZ: You have to bring
8 closure to it eventually. So, if you hire
9 an expert to interpret what has been done
10 before -- I think it's obvious that one or
11 the other are not going to agree with what
12 your expert has to say and that can go on
13 and on forever. If you want to let them
14 comment on your expert's report you can
15 but you don't have to.

16 MR. ADIL: I tend to be very
17 concrete as to the Code. In my
18 interpretation I have difficulty getting
19 beyond the statement that the ERB
20 shall adopt issuance on a dock permit only
21 when it is determined that structures will
22 not provide any of the adverse effects. A
23 lot of the adverse effects may be debatable
24 from one side to the other.

25 I have a hard time believing that the

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-ERB-

90

2 visual or the aesthetic impact of the dock
3 is debatable and that -- It does state in the
4 Code that the open vista would be destroyed
5 by the presence of docks. In my opinion I
6 think it's pretty straight forward that the
7 one area that it's not debatable on the open
8 vista of the beach.

9 Per Mr. Holmes' diagrams, he shows
10 the potential dock locations, and know you're
11 all familiar. If this is the application
12 where a dock is proposed at one end of Ida
13 Smith or the other, it may not obstruct
14 the open vista of the beach. You may still
15 have that open stretch of beach that is
16 relatively undisturbed. That's not the
17 case in these particular applications.
18 Just so you know, that's just my opinion
19 as to where this goes.

20 MR. COHEN: That brings up
21 this question of why did they put in the
22 specifications, only to rebuild old docks?

23 MR. ADIL: A lot of the Code is
24 worded in a way that could be interpreted in
25 many different ways. I deal with the Code

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-ERB-

91

2 everyday. It doesn't imply that because
3 there's language in there on how to
4 get a permit, that it's intended for a
5 new dock. It may be intended for repair or
6 reconstruction. It doesn't necessarily imply
7 that it would be approved.

8 MR. CLEARY: I view it as clearing
9 hurdles. If you clear those first hurdles,
10 you get to the point where you meet those
11 standards. You would clear the first
12 hurdle -- Does it impact the vista would be
13 the first hurdle.

14 MR. COHEN: Wouldn't you think
15 what they wrote down would clear the hurdles?
16 They wouldn't tell you how to build a dock
17 that impacts again.

18 MR. ADIL: I think that is you
19 build a dock north or south of the Ida Smith
20 area, you are effecting the aesthetic part of
21 the open beach. Open beach means the view of
22 the beach is a continuous flow. It's open
23 for foot traffic and your view of the beach
24 and that open-ness will go away.

25 MR. COHEN: Then what they do --

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-ERB-

92

2 I was going to say, if that's the way then
3 it's just a sneaky way of not adding docks,
4 because whatever you put down is going to
5 effect the vista.

6 MR. ADIL: We shouldn't be confused
7 by the water regulations. Maybe they're
8 prohibited at one point and then became
9 regulations of docks. Regulations are rules.
10 That's what regulation means, that it's a
11 permitted structure. It doesn't rule it in
12 or out. It's a vague approach. If only we
13 had some descriptive notes that guide us
14 through that, we don't.

15 MR. ELSAS: I don't think we should
16 be apologizing for what was written thirty
17 years ago. What was written thirty years
18 ago was based on a body of knowledge, and
19 a body of science that was very different
20 than it is today. And we're now in 2016
21 and we have a lot more information in terms
22 of the world and the environment and
23 everything else. That is what we're
24 faced with, what is the challenge today?

25 The issue here is not one dock or two

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-ERB-

93

2 docks. The issue is fourteen docks in terms
3 of setting precedent. No, there were no
4 docks since the 1994 application. There
5 could be more. Okay. That's our challenge
6 now, is to figure out what the science is
7 today that is different today than it was in
8 1994, and I think it's totally reasonable for
9 us to try and get an expert, okay, and in no
10 way demeaning the experts that are in the
11 room. Okay. They represent two different
12 opinions because they represent two different
13 sides of the argument.

14 I think it's up to us to figure out what
15 is, first of all, the new designs of today
16 and apply it to this law. We shouldn't be
17 apologetic of what was written, because that
18 was thirty years ago. Okay, and we need to
19 move forward and figure out the situation and
20 preserve or set a value of that area, okay,
21 and what is the right of the home owner in
22 terms of their property, and what they should
23 be entitled to.

24 I don't think it's beyond or I don't
25 think it's unreasonable for us to request

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-ERB-

94

2 that, okay, and I don't think we should get
3 hung up in what was written thirty years ago.

4 CHAIRMAN VAUGHN: I've heard enough
5 personally, but if anyone else wants to hear
6 more, by all means.

7 MR. CLEARY: In terms of bringing an
8 expert?

9 CHAIRMAN VAUGHN: Sure. Then
10 that is what we present to the Board they
11 will have to go to get an expert for that
12 and then we will get an evaluation. We'll
13 start this process once we get that. I'm
14 sure it's going to take a little while to
15 happen, if not next month maybe a month
16 later, and with winter coming up. If that's
17 the majority of what we're looking for then
18 by all means then that's what we'll present.

19 MR. CLEARY: I don't think I can make
20 an informed recommendation to the Board of
21 Trustees, without somebody telling me what
22 are the -- I'm not a marine biologist and I
23 can't render that decision.

24 MR. COHEN: Yes. I'd like to discuss
25 an issue that was brought up in the beginning

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-ERB-

95

2 and it's continually brought up. It's the
3 issue of precedence on all of these docks and
4 is it right to put on these two applicants
5 the potential that there may be of a lot of
6 other docks?

7 AUDIENCE MEMBER: Yes.

8 MR. COHEN: I understand.

9 AUDIENCE MEMBER: Good for you.

10 I admire you, I really do. You're a stand up
11 guy.

12 MR. COHEN: Will our expert have
13 to look at the precedent or is it discussed
14 in the ecological aspect, looking at the
15 existing two docks?

16 MR. CLEARY: What I'm looking for is
17 ecological expertise. We've also got to
18 render an opinion with respect to precedent
19 setting, in my opinion. We've got to step up
20 to the plate. It does or doesn't.

21 AUDIENCE MEMBER: How do you --

22 MR. MIGATZ: Woah, woah. You are out
23 of order unless the Board recognizes you.

24 MR. STEINLAUF: Of course, I'm
25 sorry. Rob Steinlauf, 106 Asharoken Avenue.

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-ERB-

96

2 In respect to both sides here, you have and
3 expert and an expert. You have to have
4 the hutzpah, and that's a Chinese word,
5 to determine that they have given you
6 satisfactory information. I'm sure they
7 have. Just stand up and make a decision.
8 To go to another expert, how are you going
9 to determine if he's biased or unbiased.
10 I'm never going to be satisfied and I'm
11 sure they'll never be satisfied.

12 So, you have to have the fortitude, I
13 think, from this gentleman and that gentleman
14 to make a decision to both the Village and to
15 the applicants.

16 MR. CLEARY: I disagree. We're
17 talking about technical stuff for virtually
18 everything else, I agree with you. These
19 are --

20 MR. STEINLAUF: So, you're debating
21 this gentleman and this gentleman, and that
22 they're incompetent. That's basically what
23 you are saying, that they have not presented
24 you with enough evidence.

25 MR. CLEARY: What we see are two

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-ERB-

97

2 professionals that completely disagree with
3 one another. What other conclusion can I
4 draw?

5 MR. STEINLAUF: So, if you get a
6 third, is it a flip of the coin of whether he
7 is going to side with this gentleman or that
8 gentleman? That is what that does.

9 MR. CLEARY: The third will be our
10 decision. He's representing Mr. Holmes and
11 he is representing your client and --

12 MR. STEINLAUF: And that's going to
13 be the determining factor of that person's
14 right?

15 MR. CLEARY: Then who else do we
16 rely on?

17 MR. STEINLAUF: You have to use your
18 judgement. You're on this Board voluntarily.
19 You take this gentleman's information and you
20 take this gentleman's information. You've
21 assumed that responsibility. It stinks, I
22 agree. This is what you've got to do and
23 just make a decision.

24 MR. CLEARY: I'm looking forward to
25 making a decision. I'm just pointing out the

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-ERB-

98

2 fact that I don't know if we're ready --

3 MR. STEINLAUF: From what I
4 understand this gentleman has presented a lot
5 of information, as this one. You probably
6 have volumes of it.

7 MR. ELSAS: We do.

8 MR. STEINLAUF: And we get volumes
9 more of it. I mean, come on, this is
10 crazy. This really is. I mean they're not
11 putting up another power plant. They're
12 putting up a dock. It doesn't look anything
13 remotely like this, which is ugly. Their
14 dock is totally different from this. I
15 believe you have it in the record and keep
16 looking at this picture but maybe you have
17 not seen it but you have to look at this.

18 MR. HOLMES: I see it everyday.
19 It's bad.

20 MR. STEINLAUF: But it's a
21 matter of opinion. It's different than this.
22 That's your opinion. Just make a decision
23 please. To carry this on, it's a dock.
24 Everybody's got a legal opinion and we can
25 all be pontificating. You have property

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-ERB-

99

2 rights here and stacks of information.

3 He spend thousands and I'm sure he spent

4 thousands, and this gentleman over here.

5 Just decide. Thank you.

6 MR. CLEARY: Thank you.

7 MR. McCARTHY: May I respectfully

8 suggest that maybe there's still yet another

9 option, that you deliberate on what you have

10 and as read it if have inquiries and if you

11 need clarifications of what we submitted

12 then through Mr. Migatz or Nancy could let

13 Mr. Eisenbud go back and try to answer the

14 questions. I just want to get to the point

15 where this Board can make a recommendation.

16 You know the recommendation I'd like you to

17 make, obviously, but at the same point where

18 you feel comfortable to make a

19 recommendation.

20 Maybe chew on what we gave you, and get

21 to some point when you're deliberating you

22 can ask those questions and you respond to

23 them. At the same time I think the last

24 thing that the Giuntas and Akesons want to

25 do is incur the expense of another expert,

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-ERB-

100

2 and keep going at it. These are two highly
3 qualified individuals that have stellar
4 reputations.

5 MR. CLEARY: I think whether we ask
6 your client or Mr. Abrams, they're going to
7 bill for either way. It's a cost --

8 MR. McCARTHY: It's just a
9 suggestion.

10 MR. CLEARY: [CONTINUING] And I
11 hear you, and you're trying to get to that
12 point.

13 MR. McCARTHY: I know.

14 MR. WURZEL: Larry Wurzel, 6 Beach
15 Plum Drive. It's my first hearing, that I'm
16 hearing this all this live. I'm not
17 necessarily taking sides, I'm going to
18 clarify your concerns.

19 So, I see two issues and maybe you
20 blended them but one is; under the current
21 law would this be an improvement and the
22 second issue is are we going to change the
23 law. That's a separate issue, a long time
24 coming, and I don't think that's your
25 job. To worry about the dock setting

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-ERB-

101

2 precedent right or wrong, I don't think
3 that's your job at this hearing.

4 What I'm unclear about still is
5 the part about the environmental concern.

6 There's a law on the books now that says
7 now that you can have a dock if you
8 do x, y, z and you've done x, y, and z,
9 does that mean those two can have the dock?

10 Is this part about the environmental concern
11 then answered by if they did x, y and z or
12 is the environmental concern a whole separate
13 issue. I'm wondering is it, if you do the x,
14 y, z and you're done, instead of making it
15 into a whole separate issue when you
16 shouldn't?

17 MR. CLEARY: My opinion on this
18 if you answer x, y and z, there still could
19 be adverse impacts associated with docks,
20 even if you comply with x, y and z.

21 MR. HOLMES: Yes.

22 MR. CLEARY: It's the applicant's
23 burden to tell us no, and that by doing x, y
24 and z that they satisfactorily addressed the
25 whole thing.

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-ERB-

102

2 MR. WURZEL: It seems that all of
3 this, there has to be way to be able to have
4 a dock.

5 MR. CLEARY: If there is a way to
6 have a dock, but it requires all of these
7 things to satisfy concerns.

8 MR. WURZEL: What is the definition
9 of satisfying you concerns? I'm saying if
10 there's something written.

11 MR. ADIL: There is something
12 written. First, that you do not have any
13 adverse or negative impacts. Then, you
14 proceed to the point where you can evaluate
15 the application or determine other aspects
16 that have to be evaluated.

17 MR. COHEN: It's not that clear.

18 MR. WURZEL: They must have written
19 something to help you, guide you through
20 whether there's an impact or not. It's never
21 going to be black and white, obviously. Even
22 the vista -- If you're on the beach does it
23 block the vista? Probably not. If you're on
24 the water it might block the vista. So,
25 what's the definition of a vista?

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-ERB-

103

2 You're never going to get this.

3 You'll be doing this for the next twenty
4 years. Again, I'm not taking any sides but
5 just saying right now it's two people asking
6 for docks. What are the rules? And you
7 don't want fifteen docks, change the rules.
8 That's all I'm saying.

9 CHAIRMAN VAUGHN: I think after
10 that we're going to vote to go the Board
11 and ask them to look into getting and
12 expert.

13 MR. MIGATZ: You should have a
14 motion to see --

15 CHAIRMAN VAUGHN: We need a motion --

16 MR. CLEARY: I'll be happy to make
17 a motion, that we ask the Board of Trustees
18 to retain a suitably qualified expert, that
19 Bruce be the one to solicit that expert for
20 us --

21 MR. MIGATZ: No, no, no, no.

22 MR. CLEARY: Do you know the
23 names of marine --

24 CHAIRMAN VAUGHN: We should go to
25 the Board and say this is what we want,

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-ERB-

104

2 and they will then go and hire that person at
3 the applicants' expense.

4 MR. CLEARY: I'm okay with that.
5 That's fine. We recommend that the Board of
6 Trustees obtain a qualified expert to help us
7 review the submissions that have been made so
8 far.

9 MR. MIGATZ: Second?

10 MR. ELSAS: I'll second.

11 MR. MIGATZ: All in favor?

12 AUDIENCE MEMBER: Excuse me. What is
13 the cost?

14 MR. ELSAS: Aye.

15 MR. CLEARY: Aye.

16 MR. COHEN: Aye.

17 MR. ADIL: Abstain.

18 CHAIRMAN VAUGHN: Aye.

19 Are we going to have a regular monthly
20 meeting? Will we continue to have a monthly
21 meeting or not?

22 [4 AYES - 1 ABSTAIN]

23 MR. MIGATZ: You'll have a regular
24 monthly meeting, but only meet if there is
25 something on the agenda. If a new

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application is filed, then we have a meeting.
Right now -- Are you keeping this record
open?

CHAIRMAN VAUGHN: Yes.

MR. MIGATZ: Then you're going to
adjourn this --

MR. CLEARY: Bruce, can I amend my
motion? Can I ask the Board to acknowledge
the fact that we're looking for someone that
is willing to do this promptly and rapidly,
that it's factored in their retention
somewhere? I want to make that explicit to
them that we're not looking to delay the
process.

MR. MIGATZ: All were in favor except
Mr. Adil. It was 4-1.

[INDICATING TO COURT REPORTER]

CHAIRMAN VAUGHN: We'll close this
session. Thank you.

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CERTIFICATION

COUNTY OF SUFFOLK)

SS:

STATE OF NEW YORK)

I, CHARMAINE DEROSA,
Certified Court Reporter, in the
State of New York, do hereby certify:

THAT, the foregoing is a
true and accurate transcript of
my stenographic notes taken for
the Environmental Review Board, on
October 24, 2016.

I HAVE HEREUNTO set my hand on
this 24th day of October, 2016.

Charmaine DeRosa, CSR

