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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERNCLIFF CEMETERY ASSOCIATION,

Plaintiff,

*-against-*

THE TOWN OF GREENBURGH, NEW YORK,

Defendant.

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Case No. 18 Civ. ()

COMPLAINT

Jury Trial Demanded

Plaintiff FERNCLIFF CEMETERY ASSOCIATION (“Plaintiff” or “Ferncliff”), by and through its attorneys, Bleakley Platt & Schmidt, LLP, for its Complaint against the above-named Defendant, hereby alleges as follows:

A. Introduction

1. This case involves the gross abuse by defendant Town of Greenburgh (the “Town”) of its municipal land use, zoning and taxing powers. The Town, acting by and through its officers, elected officials, appointed officials, employees, agents, boards, agencies and commissions, conspired with a local civic association and civic activists in a multi-decade campaign to deny Ferncliff the most basic right to use its property for the only purpose allowed by law: cemetery use. Ferncliff was granted the unconditional right to use its property for cemetery purposes in 1902. The Town’s actions have threatened and continue to threaten

Ferncliff's operational viability as well as the sacred trust that communities place in their cemeteries.

2. There is a tortured, well documented history leading to the current controversy, involving related litigation, which must be considered and addressed. The Town and local civic association conspired to use their best efforts, sometimes successful, to: (a) from 1989-1996, stop the construction of a third mausoleum on the cemetery property; (b) in 1994, pass local legislation specifically aimed, *inter alia*, to violate the substantial, vested and inalienable rights of Ferncliff by restricting the height of buildings on its property, limit the space between its buildings and structures and property lines, reduce by 50% the maximum allowable amount of coverage of land on its property by such buildings or structures and restrict building footprint, length, width and depth; (c) from 2006-2016, ignore the clear and unambiguous terms of a 2005 Stipulation and accompanying Order and Judgment mandating the classification of a portion of the property as cemetery property; (d) in 2016, to ignore not only the terms of the above-referenced 2005 Court documents, but to fail to assure the publication in its 2016 Comprehensive Plan of maps depicting the entirety of its property as a cemetery despite the mandated correction earlier in the same year in Town records to classify the property as a cemetery; followed shortly thereafter by (e) the publication in March 2017 of a tentative tax assessment roll classifying the property as "residential" as opposed to "cemetery" which assessment has carried forward through the June 1, 2018 tentative assessment roll; (f) in July 2015, to deny the application to secure a building permit for the construction of a caretaker's cottage on a portion of its property in order to continue its historic use of such property to aid in the proper maintenance of the entirety of its cemetery land; the matter remains in appellate litigation in New York State Court

but this matter is necessarily filed in consideration of certain statute of limitations time constraints.

3. The most recent chapter of this tortured history began in December 2013 when Ferncliff applied to build a caretaker's cottage on its South Parcel (defined *infra* at ¶ 19). The Building Inspector immediately denied Ferncliff's application and forced Ferncliff to appeal to the Town's Zoning Board of Appeals. In March 2014, the Town released a first draft Comprehensive Plan which proposed to strip future cemetery rights from Ferncliff's South Parcel. Despite frequent and vehement objections from Ferncliff in 2014, 2015 and 2016, the Town ignored these requests and, in fact, stripped Ferncliff of all development rights on the South Parcel. The Town then revoked Ferncliff's tax-exempt cemetery classification of Ferncliff's South Parcel. Thus, the Town has initiated a war of attrition against Ferncliff on multiple fronts, then employed dilatory tactics, by making meritless motions to dismiss (all were denied) and seeking judicial stays of Ferncliff's litigation challenges.

4. By deliberately engaging in such wrongful conduct, Defendant has violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Taking without Just Compensation Clause of the Fifth and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment, as well as the corresponding Clauses of the New York State Constitution. Defendant's conduct has damaged and continues to damage Ferncliff, its existing clientele and potential customers who seek the finest possible final resting grounds for their loved ones. Ferncliff brings this action pursuant to 42 U.S.C. § 1983 to prohibit Defendant from any additional offensive and unlawful conduct and to recover monetary damages, attorneys' fees and expenses for the deprivation of its rights.

B. Jurisdiction and Venue

5. This Court has jurisdiction of this action pursuant to 28 U. S. C. §§ 1331, 1343 (a)(3), 1343 (a)(4), and 1376 (a), 42 U.S.C. §§ 1983 et seq., 42 U.S.C. §1988, and the Fifth and Fourteenth Amendments to the United States Constitution.

6. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391 (b), because Defendant and the real property that is the subject of this action are located within this judicial district.

C. The Parties and Involved Non-Parties

7. Ferncliff, whose principal place of business is located at Ferncliff Cemetery, 280 Secor Road, Hartsdale, Town of Greenburgh, New York, 10530, was organized on or about February 13, 1902 as a “Cemetery Corporation” pursuant to Article 3 of the former “Membership Corporations Law,” precursor to the present day Not-for-Profit Corporation Law Section 1502 (a). Ferncliff has operated a cemetery at the subject premises continuously since approximately 1903.

8. Defendant Town of Greenburgh is a New York municipal corporation and a political subdivision of the State of New York, with its principal office at the Greenburgh Town Hall, 177 Hillside Avenue, Greenburgh, New York. The legislative powers of the Town are vested in the Town Board which has five members, including four elected Town Council members and an elected Town Supervisor. At all times hereinafter mentioned, the Town acted under color of law.

9. Non-Party Town Board of the Town of Greenburgh (“Town Board”) is the duly elected governing legislative body of the Town and is authorized to adopt zoning regulations, comprehensive plans, and official zoning maps, and to approve special permits and site plans in

connection with land-use applications. The Town Board's principal office is located at the Greenburgh Town Hall.

10. Non-Party Planning Board of the Town of Greenburgh ("Planning Board") is an independent land-use board charged with reviewing all proposed development projects within the Town. The Town Board appoints the seven members of the Planning Board. The Planning Board's principal office is located at the Greenburgh Town Hall.

11. Non-Party Zoning Board of Appeals ("ZBA") is an administrative arm of the Town of Greenburgh that is vested with, among other things, the final power (subject to judicial review) to interpret and apply the Town's zoning ordinance, including appeals from decisions rendered by the Greenburgh Building Inspector. The ZBA's principal office is located in the Greenburgh Town Hall.

12. Non-Party Comprehensive Plan Steering Committee ("CPSC") was established by The Town Board on March 14, 2007, consisting of nine members. The CPSC was to serve as an advisory body and community "sounding board" to develop a new Comprehensive Plan for the unincorporated area of the Town and to provide a vision for the Town's growth and development over the ensuing several decades.

13. Non-Party Paul Feiner is the Supervisor of the Town and a Member of the Town Board. His principal office is located in the Greenburgh Town Hall.

14. Non-Party John Lucido is the former Greenburgh Building Inspector, the chief code enforcement officer and the sole public officer vested with authority to enforce the Greenburgh Zoning Code.

15. Non-Party Francis Sheehan is an elected member of the Town Board. Mr. Sheehan is also the Town Board liaison to the ZBA and Planning Board, the chair of the CPSC

and the Zoning Task Force discussed hereafter. He also has owned since 1983 a residential lot located at 1 Essex Place directly opposite from Ferncliff's North Parcel (defined *infra* at ¶ 19) and less than 600 feet from Ferncliff's South Parcel.

16. Non-party Zoning Task Force is an ad hoc committee which consists of Town officers, including the Town Engineer, Building Inspector, Commissioner of Public Works, Commissioner of Community Development and Conservation (Planning Dept.) and Town Attorney. The Zoning Task Force meets every week to discuss zoning issues in the Town, including zoning applications filed for approval or which are pending before the Town Board, Planning Board or ZBA.

D. Background and History of Ferncliff Cemetery Association

17. Shortly after its organization in February 1902, Ferncliff applied to the Westchester County Board of Supervisors to use certain lands in the Town of Greenburgh "for Cemetery purposes." In response, that Board approved a Resolution granting Ferncliff authority for such use on April 7, 1902, which described such land as "about one hundred and one acres of land be the same more or less, and being the farm formerly owned by Norman Secor, in the Town of Greenburgh, Westchester County, New York" (the "Resolution"). By issuing such Resolution the County granted Ferncliff a perpetual, unconditional and inalienable franchise over and perpetual property right in the lands so designated.

18. A Special Committee of the Board which reviewed Ferncliff's application, described the land as "rough, wild, unoccupied and it would be difficult to select a spot less objectionable for a cemetery than the land selected."

19. Ferncliff currently consists of a total area of ±75 landscaped acres. Approximately 63.48 acres of Ferncliff's property lies on the north side of Secor Road (the

“North Parcel”). Approximately 12.52 acres lies on the southern side of Secor Road (the “South Parcel”). All such acreage is tax exempt as a Cemetery (bearing Code 27350) and it has never been disputed that the North and South Parcels lie within the approximately 101 acres which were designated for “Cemetery purposes” by the 1902 Resolution. Such designation for use which established Ferncliff’s cemetery franchise has remained intact for over a century and is inviolable.

20. When Ferncliff began operations in 1903, title to the land was held by Ferncliff Realty Company (“Ferncliff Realty”), a New York corporation, a company whose corporate charter included cemetery development.

21. At the Annual Meeting of its Board of Directors in New York City on January 12, 1904, the President of Ferncliff Realty reported to its shareholders that the company had “fully paid for and now holds the title in fee to the Norman Secor Farm, upon which Ferncliff Cemetery Ass’n has a franchise for cemetery purposes” and that it had paid in cash “the sum of \$30,000 which it now holds and owns free and clear of all indebtedness.”

22. On April 8, 1907, Grove Hill Realty Company (“Grove Hill”) was incorporated. As with Ferncliff Realty, Grove Hill was a related entity to Ferncliff and the corporate purposes of Grove Hill included cemetery development.

23. Grove Hill initially acquired title of the entire ±101 acre cemetery on December 28, 1907, by deed from Ferncliff Realty; the Deed was “subject to the rights of Ferncliff Cemetery Association” and conveyed “all the property rights privileges and franchises . . . of whatever sort, nature or description.”

24. Grove Hill sold approximately 33.5 acres on the south side of Secor Road (including the South Parcel) in 1908 and then reacquired title to the South Parcel in 1950.

Immediately thereafter, Ferncliff, with the knowledge, acquiescence and approval of the Town, commenced cemetery operations on the South Parcel and has continued using the South Parcel for cemetery purposes ever since.

25. On November 22, 1910, Grove Hill conveyed all the cemetery land on the north side of Secor Road, *i.e.*, the North Parcel, to Ferncliff which has owned the North Parcel ever since.

26. On November 30, 1971, Grove Hill conveyed the South Parcel to Ferncliff.

27. Currently, Ferncliff is graced by the presence of three distinct Mausoleums on its North Parcel. The Ferncliff Mausoleum (a.k.a. the Cathedral of Memories), was constructed in 1929. The Shrine of Memories Mausoleum (“the Shrine”) was erected in 1957 and Rosewood Mausoleum was finally constructed in 1999 (see discussion, *infra*). Maintenance facilities for the entire cemetery grounds presently occupy approximately 3,275 sq. ft. at the rear of the Shrine of Memories. Maintenance of cemetery grounds are mandated by New York State law (NPCL §1501) and accordingly the right to use land for maintenance facilities has been recognized as a valid cemetery use.

E. The Town’s Efforts to Obstruct the Construction of the Rosewood Mausoleum (1989-1996)

28. On March 21, 1989 Ferncliff met with the Greenburgh Director of Planning to review site plan requirements for its proposed Rosewood Mausoleum. At that time, the two existing mausoleums and other structures and buildings accounted for coverage of 5.9% of the total site area. Rosewood’s footprint would increase total land coverage by .9% to 6.8%.

29. On January 4, 1990, Ferncliff filed an application for site plan approval with the Planning Board to use 1.44 acres on the North Parcel for Rosewood, was designed in full compliance with zoning requirements and required only site plan approval and a building permit.

At the time, Article IV §285-36 of the Zoning Ordinance of the Town of Greenburgh (the “Zoning Ordinance”) which permitted cemeteries, provided that cemetery buildings “shall be limited to three (3) stories or forty-five (45’) feet in height.” As originally filed, the proposed building had a constant height of three stories (44 feet, 3 inches) along its 376-foot length.

30. On February 21, 1990, the Planning Board considered the application at a regular meeting during which Ferncliff was asked, among other things, to reduce the height of the proposed Mausoleum. Two days later the Town Attorney advised Ferncliff that pursuant to the provisions of the Town Zoning Ordinance, since the cemetery’s total area exceeded five acres, the application should have been filed with the Town Board. The application before the Planning Board was deemed withdrawn.

31. After presentation in March, Ferncliff formally submitted its application with the Town Board in May 1990, having made substantial revisions and modifications as a result of the prior meeting and comments received from the Planning Board, including the requested change in height of the building by reducing both “wings” or ends of the building, on either side of the center, from three stories to two stories and 33 feet in height, leaving only the centermost 108 feet at the original height. Although the gross square footage of the building was reduced, its footprint remained the same.

32. The revised site plan was considered by the Planning Board on September 5, 1990. On October 17, 1990 the Planning Board voted to recommend that the site plan request be denied and that the maximum height of the building be two and one-half stories not to exceed 25 feet, allowing for a parapet not to exceed three feet in height on the condition that a maximum of 15% of the roof line may project an additional ten feet in height, or up to 35 feet.

33. On November 28, 1990, a public hearing was held by the Town Board to consider the site plan at which Ferncliff made further concessions, in order to mitigate alleged concerns about the visual impact of the building, by raising the finished grade at the rear of the building by raising the driveway and providing for entry to the building from the rear at the second floor. These modifications closely resembled the recommendations of the Planning Board.

34. Despite Ferncliff's efforts, the Town Board nevertheless denied the application on January 23, 1991. Ferncliff commenced an Article 78 proceeding (Index No. 02872/91, Supreme Court, Westchester County), seeking to vacate, set aside and annul the denial and directing the Town Board to approve the submitted site plan which was opposed by two parties, namely the Town Board and the Hilltop Civic Association ("Hilltop"), an unincorporated association of adjoining and neighboring property owners, which had been granted leave to intervene.

35. A decision was subsequently rendered by the Hon. John R. La Cava on August 9, 1991 ("*La Cava I*"). After a thorough review of the underlying record and every aspect of the review process, Justice La Cava noted: "The Court finds it significant to note at the outset that Ferncliff Cemetery as it currently exists and operates is permitted in this otherwise residential zoning district (Zoning Ordinance § 285-36 [B])" and that; "[T]he inclusion of a use in the ordinance is a per se finding that it is in harmony with the neighborhood." (citations omitted.) Further, he found that Ferncliff "has been in continuous operation since 1903" and noted the cemetery had been described as possessing a "park-like setting." In conclusion, the Court determined that the Town Board's findings were "conclusory in nature" and "appear to be predicated upon neighboring property owners' generalized objections, speculation and conjecture without adequate consideration of Ferncliff's efforts to minimize the impact of this otherwise

permissible use of the conforming structure.” The Court noted the inter-office memorandum dated February 27, 1990 of the Town Building Inspector concerning the results of his inspection of the cemetery at the request of the Planning Board:

In my fifteen plus years in this department, I have found the owners of Ferncliff to be very responsive to all of our requests and they have always endeavored to keep their buildings and grounds in excellent condition.

36. The Court vacated the Town Board’s decision as “arbitrary and capricious and contrary to law” and remanded the site plan back to the Town for approval. The Town filed a Notice of Appeal on August 29, 1991, thus invoking an automatic stay of the decision. During the pendency of that appeal, the matter was selected to be processed through the Civil Appeals Management Program (“CAMP”) procedures, under the auspices of Hon. Isaac Rubin. In compliance therewith, but with the understanding that Ferncliff was under no legal obligation to undertake any additional work in light of *La Cava I*, and hoping to forge a new relationship with the Town and, in particular, with its surrounding neighbors, to compromise the pending appeal and settle the matter amicably, the then new administration at Ferncliff offered a new site plan concept with extensive new landscaping which was presented at a CAMP conference on or about June 29, 1993.

37. After waiting two months for neighbors to accept Ferncliff’s offer to redesign its site and landscape plan, Ferncliff began to develop final construction drawings which included screening of the triangular building site area with 50 evergreen trees, all but four of which would range between 20-30 feet in height, as well as 60 deciduous trees, all 5-inch caliper, for a total of 110 large trees in or immediately adjacent to the mausoleum site.

38. On September 15, 1993, Ferncliff received a list of “Items for inclusion in proposed FERNCLIFF settlement” from Hilltop which not only included items outside the scope

of the Rosewood building site but also included a demand for attorney's fees. Ferncliff performed a feasibility study of the items outside the building site but rejected any payment of legal fees. Among other things, Ferncliff agreed to plant an additional 83 evergreen trees 10-20 feet tall in order to achieve a settlement and end the litigation.

39. Correspondence with Hilltop's attorney and CAMP conferences through the end of 1993 continued. At the third CAMP conference, Hilltop dropped the issue of financial compensation recognizing the absurdity of the request. At the fourth such conference held on December 14, 1993, "Progress Points" of detailed construction drawings were presented which had previously been provided to several Hilltop members. As a result of what Ferncliff had believed to be fruitful discussions with Town technical staff, including Messrs. Lucido and Stephen Lopez, then the Commissioner of Community Development & Conservation (Planning Dept.), from January through March 8, 1994, as well as comments made by Feiner in a February 23, 1994 meeting with Ferncliff President, Kevin M. Boyd and again at a Town Board meeting on March 8, 1994, Ferncliff believed the modified plans for Rosewood would be acceptable.

40. On March 11, 1994, Boyd invited all residents within 500 feet of the entire cemetery site, approximately 350 homes, to a private meeting on March 22 to explain and display the new site and landscape plans. On March 17, six days before the Town Board's expected vote on Ferncliff's amended application, letters were received from four of the five neighboring families comprising the Hilltop "Executive Committee" demanding up to \$50,000 in financial compensation and miscellaneous other requests such as free cable TV and ceding of property by Ferncliff. On March 22, 12-15 people appeared at the meeting which Boyd had scheduled, including only one neighbor from the Hilltop Executive Committee, Mr. John Cendali.

41. In short, in approximately one year, Ferncliff, in the hope of resolving all outstanding differences, developed its site and landscape plans for Rosewood, anticipating the planting of 193 trees, 10-30 feet in height, at an estimated cost of \$250,000, in addition to the \$100,000 in planning and development costs associated therewith, believing that the additional screening would render the proposed mausoleum virtually invisible to the neighbors across the northern property line.

42. On March 23, 1994, the day the Town Board was to meet to vote on the revised Ferncliff site plan approval, a letter was received from Hilltop's attorney, Katharine P. Burgeson, supporting the modified site plan proposed by Ferncliff. Yet, at the meeting, Mr. Cendali demanded that the height of the proposed mausoleum be lowered. Despite efforts by Town officials, particularly Mr. Lopez, who recognized that the application was "as-of-right," to resolve the neighbor's misunderstanding, Town Supervisor Feiner directed the Town staff to review the issue in time for a scheduled April 12, 1994 Town Board work session. Ms. Burgeson advised by letter dated April 4, 1994 to Mr. Feiner, (copy to Francis Sheehan), that her earlier letter was written in her "personal capacity" as opposed to her authority on behalf of Hilltop and that she had understood Ferncliff's plans "were in conformity with the plans as previously described" to her by Ferncliff but that she now understood that the new plan "dramatically increases the size of the building to over 50 feet from the original maximum height of 45 feet" and, if her understanding were correct, that she "personally adamantly oppose the plan."

43. This was the first time in this laborious and costly process of proposing a new mausoleum that a height restriction was raised as an issue. Prior to the initial CAMP meeting on June 29, 1993, Ferncliff had made it clear to the Town and Hilltop that while site and landscape

plans were open for discussion, the height of the proposed Rosewood Mausoleum was not negotiable as it had already been lowered in 1991 in an earlier unsuccessful attempt to resolve the matter, had always conformed with zoning regulations, as confirmed in *La Cava I*, and no such charge had been made in nearly five years of hearings, litigation and negotiation.

44. Yet, on April 12, 1994 a bizarre “new interpretation” of the Town zoning ordinance provisions by staff members was communicated to Ferncliff which suddenly restricted the height of the proposed mausoleum by approximately seven feet. Lucido both privately and in a memorandum dated April 11 to Lopez, confirmed that the “new interpretation” was inconsistent with his standard practice. The “new interpretation” had no basis in law or in fact, was arbitrary and capricious, and was implemented simply to deprive Ferncliff of its rights under the Town Zoning Ordinance. A special meeting was scheduled for April 19 in an attempt to settle the matter prior to an April 25 deadline set by Judge Rubin for a negotiated settlement.

45. Incredibly, Mr. Boyd was notified upon his arrival at home the very next evening, April 13, 1994, at approximately 7:00 p.m. that his counsel had just called to advise that the Town had decided to vote on the issue that night, at 7:30 p.m. At approximately 7:15 p.m. the Town attorneys called Mr. Boyd and began to read the three-page Resolution over the telephone. Mr. Boyd requested an adjournment and his attorney went to Town Hall and received a promise from Mr. Feiner that since no Ferncliff representative had ever even seen the Resolution, it would receive an adjournment to examine the document and evaluate its legal implications. However, less than two hours into the meeting, the Town Board went into executive session and emerged to pass the Resolution without allowing either any further discussion, public comment or even a request an adjournment.

46. The Town Board adopted Resolution 94-28 which required the implementation of Ferncliff's new site and landscape plans but also included the following Condition:

A. SPECIAL REQUIREMENTS AND MODIFICATIONS

FERNCLIFF shall:

10. follow and adhere to Town of Greenburgh, ORDINANCE height requirements, to wit, that the building shall not exceed a 461' elevation as calculated by the Town Building Inspector and the Town Engineer.

As noted, this restriction would force Ferncliff to lower the height of the Mausoleum by approximately seven feet.

47. On April 28, 1994, the Town Board unanimously approved Local Law No. 2/94 implementing a Town wide moratorium on the construction of Cemetery buildings and structures for a period of six months during which the Town staff was directed to review all Ordinance provisions pertaining to the construction of mausoleums and determine what, if any, changes would be made.

48. On the same day, the Town Attorney sent Ferncliff a letter setting forth his opinion that:

The above stated regulation shall not apply to any Building or Use Permit which have already issued by the Town or complete applications approved or pending.

yet simultaneously warned that:

Any deviation from the Site Plan approved on April 13, 1994 might trigger a new review process and hence might fall into the moratorium's prohibition.

49. On May 9, 1994, Ferncliff received a letter from the Town Attorney and Hilltop's attorney urging Ferncliff to accept Resolution 94-28 because:

you should be aware that, even if Ferncliff prevails in the currently pending litigation, Ferncliff will not be able to build a mausoleum on this site that exceeds 461' in altitude. This is because the Building Inspector of the Town of Greenburgh has determined that this is the maximum permissible height for any building on this site under the Ordinance of the Town of Greenburgh. This determination is not subject to be overruled by the present litigation.

and added that:

the mausoleum, as so approved, is the maximum height that Ferncliff will be able to build in any event.

50. Ferncliff responded to this utterly irrational, arbitrary, capricious and bad faith reduction in the height of the building by filing a second Article 78 Notice of Petition and a Verified Petition seeking to annul that singular specific condition with an unambiguous direction to the Town Board to issue site plan approval without the imposition of such condition. (Index No. 08384/94).

51. Ferncliff's second lawsuit over Rosewood was again assigned to Justice La Cava, who on December 16, 1994 issued *La Cava II* in which he referenced his earlier "rather lengthy Decision and Order" and noted: "An appeal ensued. Extensive settlement negotiations followed" and that as a result thereof, Ferncliff had submitted a revised site plan to the Town Board for consideration. He alluded to the fact that an issue had been raised during the course of one of the particular public hearings (see ¶ 42, *supra*) regarding "allowable elevation restrictions" in the context of otherwise permissible height requirements.

52. The Court concluded that the Town Board, in its capacity as an "approving agency" exceeded its site plan authority by imposing that certain Condition 10 to the extent that it provided "that the building shall not exceed a 461' elevation as calculated by the Town Building Inspector and the Town Engineer" and thereupon struck Condition 10 from the Town Board Resolution and again remanded the application to the Town. Thus, the Court struck down

the irrational, arbitrary and capricious “new interpretation” of the definition of building height and its application to Ferncliff.

F. The Enactment of Local Law No. 5/1994

53. Prior to the issuance of *La Cava II*, opposition to Rosewood continued to manifest. In fact, Mr. Sheehan was a prominent spokesman for residents opposing Rosewood. In addition to enacting a “moratorium” on all cemetery development, on or about June 1, 1994, five days after Ferncliff had filed its second Article 78 proceeding, a memorandum was sent to Mr. Lopez by Elizabeth Marrinan, Director of the Town’s Department of Community Development & Conservation (Planning Dept.), attaching a completed Environmental Assessment form (EAF) relating to a proposed amendment to Chapter 285-36 (B) of the Town Zoning Ordinance.

54. The proposed revisions would limit the size and location of structures on cemetery properties, reducing the maximum height from three stories or 45 feet to two stories or 28 feet. Required distance between various structures and property lines were specified. The proposed amendment would also reduce the maximum percent of coverage of land by all buildings and structures from 10% to 5% and restrict chapels or mausoleums (except those for individual families) to lots of 50 acres or more. Ms. Marrinan reported that she had reviewed the Assessor’s records to determine the size and type of existing structures on the Town’s eight cemeteries, only three of which contained over 50 acres and that Ferncliff’s buildings (including the proposed Rosewood) covered 5.47 acres with a total coverage of 6.8% and that Ferncliff, with the new mausoleum, was the “only” cemetery that could be considered “built out.” Thus, the proposed amendments would eliminate any future buildings and structures on the North

Parcel and public mausoleums on the South Parcel or development on Ferncliff's property, but not on any other cemeteries in Town.

55. Thereafter, a public hearing was held by the Town Board on September 8, 1994 to consider the proposed amendment. Greenburgh Local Law No. 5/1994 was enacted the next day rendering all Ferncliff's existing buildings non-conforming and all future development precluded. Of the eight cemeteries existing in the Town, Ferncliff was the only one for which the new Code provisions would render all existing buildings non-conforming and eliminate any future development of its core product, community mausoleums, its primary revenue source.

56. In response, for the third time in six years, Ferncliff was again forced to file yet another lawsuit (Index No. 95-00248) in order to protect both its immediate interest in developing Rosewood as well as all its future interests. Ultimately, the matter was resolved by Stipulation of Settlement dated January 6, 1995, under the terms of which a "Grandfather Clause" was agreed upon by which the Rosewood site plan was approved and excepted from the provisions of Local Law 5/1994. Significantly, the parties also agreed that Ferncliff "preserves its right to challenge Local Law 5/1994 at such time as it deems necessary in order to challenge the provisions of said law as they may be asserted to apply to any development, construction or use of the subject premises for cemetery or burial purposes sought by Ferncliff" and the Town defendants "explicitly agree to waive, extend, and not to plead the statute of limitations, laches or the doctrines of res judicata or collateral estoppel as a defense in any such future action commenced by Ferncliff, ... and it is explicitly agreed that this Stipulation will not be asserted as a bar or defense to such action."

57. Rosewood Mausoleum was finally constructed and completed in 1999.

58. In 2000, Mr. Sheehan was appointed to the ZBA.

G. Ferncliff's Efforts to Obtain Tax-Exempt Status for its Cemetery (2003-2006)

59. As further evidence of the Town's historical bias against Ferncliff and the development of its Cemetery property since it was granted its franchise to operate a cemetery in Greenburgh in 1902, in 2003 and 2004 Ferncliff was forced to commence actions against the Town arising from the Town's failure and subsequent refusal to grant tax exemptions relative to Ferncliff's cemetery property.

60. On or about May 27, 2003, Ferncliff filed with the Greenburgh Town Assessor and Board of Assessment Review ("BAR"), an application seeking an exemption from real property taxes pursuant to New York Real Property Tax Law (RPTL) § 446 pertaining to the real property then known and designated on the tax map of the Town of Greenburgh as Sec. 26, Sheet 03B, Block 1800, Lots 4,5,6,7,8 and 9, (Lots 4-9, or the "Mausoleum Parcel") and Sec. 26, Sheet 4, Blk. 00000, Lot P&C ("lot P7C" or, as referenced above, the "South Parcel").

61. In support of its application, Ferncliff submitted an Affidavit dated May 22, 2003, from Cornelius F. Bastable, who served as President from March 1967 until February 1976, and sat on the Ferncliff Board of Directors from February 1954 until his retirement in 1993, serving as Chairman of the Board from February 1976 until June 1992. After noting the franchise granted by the 1902 Resolution, authorizing operation of a cemetery over some 101 acres of land, which indubitably included the South Parcel, Mr. Bastable affirmed that during his career with Ferncliff, "the Board used tax lot P7C to facilitate cemetery operations with the intent that the parcel would eventually be used for interments." He noted his understanding that "lot P7C is improved with a caretaker's cottage and used for disposal of cremated remains" and that it was "always the Board's intent that tax lot P7C would someday be used for burial purposes." He explained that during his term on the Board "the intent to develop tax lot P7C for burials was

verbalized on many occasions, but this area was never utilized because there was sufficient interment space without it” and that, the use of the South Parcel “to complement existing cemetery operations seemed a reasonable interim use.” In fact, the South Parcel has been used for the disposition of unclaimed cremated remains since approximately 2002.

62. The Assessor denied the application in its entirety. Ferncliff appealed the denial to the Town’s Board of Assessment Review (“BAR”) as required by law. Ferncliff’s appeal included an affidavit from Mr. Boyd dated June 16, 2003 which affirmed that the Mausoleum Parcel was used as a parking area for the Ferncliff Mausoleum, Crematory and Chapel and the South Parcel had “historically” been used “to complement, supplement and fulfill daily and seasonal cemetery operations.” It was pointed out that “Landscaping and grounds maintenance is a major, on-going activity” and that excess leaves and grass clippings were routinely taken there for composting. The parcel also served as a storage area for surplus soil arising from grave excavations. Mr. Boyd stated that “Ferncliff is presently in the process of completing construction of a residence for a full-time caretaker on the parcel, as permitted by Greenburgh Zoning Code §285-36(B) (1) (b)” as “RPTL § 446 (3) expressly recognizes that cemetery property may be used for ‘cemetery purposes,’ including the residence of a full-time caretaker.” Additionally, he noted that the South Parcel was “also used for the disposition of cremated remains and has been held in reserve to provide Ferncliff future development capacity.”

63. Notwithstanding the application and appeal, on or about June 1, 2004, the Town Assessor filed the tentative 2004 tax roll and the subject parcels were not only erroneously classified as “taxable,” but also the Town Assessor actually raised their assessment. Two weeks later, on June 14, 2004 Ferncliff protested the classification and again applied for relief before the BAR. Despite the incontrovertible evidence that the Mausoleum Parcel and South Parcel

were not only included within the boundaries of the franchise established in 1902 and fully integrated into overall cemetery operations of Ferncliff Cemetery, the Town BAR, by letters dated September 15, 2004, denied the request (1) for an exemption of the 2004 tentative assessed valuation and (2) to classify the parcels as cemetery property, on the grounds that Ferncliff had failed to meet its burden of proof “in demonstrating that your property has been inequitably assessed, and as such a reduction in your assessment is not warranted.”

64. As a result of the perfunctory denial of its application, Ferncliff commenced a proceeding in October 2004 in Supreme Court, Westchester County (Index No. 15776/04) pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) challenging the classification of the parcels as taxable on the assessment roll of the Town on or about September 15, 2004 (“the 2004 Roll”).

65. Ultimately, under the terms of a Stipulation of Settlement, the parties agreed “to compromise and settle all issues” in the proceeding and that Ferncliff’s property “**shall be classified as cemetery property exempt from taxation** pursuant to Section 446 of the Real Property Tax Law (RPTL) on the 2004 assessment roll of the Town.” (emphasis added).

66. Under the terms of the Stipulation, an Order and Judgment of the Court (per Nicholas Colabella) was entered on January 21, 2005, under the terms of which (1) the classification of the subject real property “on the tax map and assessment roll of the Town of Greenburgh for assessment year 2004 be amended so **as to classify such real property as cemetery property exempt** from real property taxes pursuant to Section 446” of the RPTL; and further Ordered that “(2) the officer or officers having custody of the aforesaid assessment roll of the Town of Greenburgh shall make or cause to be made upon the proper books and records and upon the 2004 assessment roll of said Town the entries, changes and corrections **necessary to**

conform the assessment of Petitioner's said real property to such 'exempt' classification"; and it was further Ordered that Ferncliff be reimbursed for any taxes it had paid in accordance with the original taxable classification on the 2004 Roll in excess of what it would have been paid had the property been classified as "exempt" together with applicable interest. (emphasis added)

67. As discussed more fully, *infra*, despite the aforesaid Stipulation, Order and Judgment, it was discovered during the course of the ZBA hearings in 2014-2015, some nine years later, that the Town and its officers, members of its Assessor's Office or Board of Assessment Review, **never** undertook to amend the Town's assessment records to conform with the very specific terms of the Court Order and Judgment. The ZBA and neighbors would later use the Town's very refusal to classify the South Parcel as cemetery property in support of the neighbors' argument that the South Parcel was not in fact cemetery property. Despite the failure to reclassify the property as cemetery land, the subject property has been held "exempt" from taxation since 2007. As will be noted, Ferncliff was forced to initiate a special proceeding based upon the identical legal principle in 2017 that it had in 2003.

H. The Zoning Task Force

68. In November 2005, Francis Sheehan was elected as a Town Councilman. Sheehan took office on January 1, 2006.

69. Shortly after assuming his Councilman office, Mr. Sheehan met with Mr. Feiner to discuss Sheehan's responsibilities. Mr. Sheehan proposed that, given his decade of experience as a member of the ZBA, he take the lead on all zoning issues in the Town. Ultimately, Sheehan was appointed Town Board liaison to the Planning Board and ZBA. Feiner agreed to Sheehan's proposal.

70. Sheehan began convening weekly meetings of Town officers involved in zoning applications in the Town under the auspices of what would come to be known as the Zoning Task Force. Its members included the Building Inspector, Town Engineer, Commissioner of Community Development and Conservation, Commissioner of Public Works and Town Attorney. Sheehan has served as Chair of the Zoning Task Force since 2006.

71. Sheehan has been an active and vocal opponent of Ferncliff's development plans since 1990 and has been a neighbor of Ferncliff since 1983.

72. As will be seen hereafter, Sheehan abused his authority and acted in bad faith as Town Councilman, Planning Board and ZBA liaison, Chair of the CPSC and Chair of the Zoning Task Force to implement his private agenda and frustrate any future use by Ferncliff of its property.

I. The 2016 Town of Greenburgh Comprehensive Plan

73. On March 14, 2007 the Town formed a Comprehensive Plan Steering Committee ("CPSC") to develop a new Comprehensive Plan for the unincorporated area of the Town. The Chairman of the CPSC, not insignificantly, was Mr. Sheehan.

74. There had been at least two prior Comprehensive Plans approved by the Town of Greenburgh in 1970 and 2000, which identified Ferncliff's entire 75+ acres as cemetery property.

75. As early as November 13, 1999, the Secor Homes Civic Association, Inc., by and through its President, Carol A. Wielk, sent a letter to Mr. Feiner requesting that a "moratorium on development that the Town is considering" be applied to any possible development at Ferncliff and recommended that the "parcel be up-zoned from 7.5 to R-10, or even R-15."

76. The CPSC met on a regular basis between 2008 and 2013. The CPSC used 2000 Comprehensive Plan as the starting point for the new Town Comprehensive Plan being prepared by the CPSC. Despite meeting nearly every week, in an apparent effort to conceal its activities, the CPSC intentionally stopped preparing minutes of its meetings after March 2014 notwithstanding the legal requirement that minutes of public bodies must be taken and maintained.

77. In March 2014 the Town released the first draft of a proposed new Comprehensive Plan. That first draft recognized cemeteries as a “land use group” and showed the South Parcel as cemetery land on the “Existing Land Use” map (at Figure 12.3.1 thereof). However, maps reflecting “Future Land Use” did **not** show the South Parcel as cemetery land, but instead as “residential” land. According to the text accompanying the March 2014 draft:

Existing land uses, Figure 12.3.1, are broken down into 15 specific categories based on the property class code assigned to each parcel. The property class code is derived from historic data and ongoing monitoring that reflects the existing use of each lot. The map contains specific use designations and details the location of vacant parcels. The number and location of vacant lots are used for deriving approximate potential build-out figures under existing zoning district regulations.

The first draft Plan demonstrated that the Town planned to remove cemetery designation from the South Parcel in the future. A notation in the margin of the draft Plan also explained that property class codes used to ascertain and depict land use “originate [] from the New York State Office of Realty Property Service Assessor’s Manual.”

78. On June 12, 2014, Mr. Boyd sent a letter to Thomas Madden, Commissioner, Department of Community Development and Conservation (Planning Dept.), Town of Greenburgh, registering his complaint that although in the March 21, 2014 Draft Comprehensive Plan, Figure 12.3.1 entitled “Existing Land Use” correctly depicted all of Ferncliff’s land as

cemetery property, Figure 12.3.2 entitled “Future Land Use” as well as two other Figures relating to “Future Land Use,” erroneously identified the South Parcel for future residential – not cemetery – usage. Mr. Boyd referred Mr. Madden to the 1902 Resolution which designated the South Parcel as cemetery land and which, he asserted, should continue to be reflected on all land use maps so as “to avoid any confusion about its intended future use.”

79. The Town never responded to Mr. Boyd’s letter.

80. Mr. Boyd was particularly concerned about the unexplained depiction removing the cemetery identification or classification over the South Parcel since, in December 2013, Ferncliff had applied for the permit to construct the caretaker’s cottage on the South Parcel, an expressly permitted use of cemetery land under Greenburgh Zoning Code 285-36 (B) (1) (b) (discussed in more detail, *infra*). As discussed, that application had been denied by John Lucido, the Town Building Inspector, although Mr. Lucido approved a similar application to construct a caretaker cottage and garage on the same parcel in 2001, prior to Mr. Sheehan’s direct involvement in day-to-day zoning decisions in the Town.

81. In fact, during 2014, the Town had retained Tyler Technologies Appraisal and Tax Division (“Tyler”), a third party, “to oversee a Town-wide reevaluation.” Tyler’s responsibility was to value and classify real property throughout the Town.

82. On December 1, 2014, Frederick W. Turner, counsel to Ferncliff, sent a letter to the Town ZBA to “follow up on comments made at the November 20, 2014 meeting” of the Greenburgh ZBA “regarding the deed history of Ferncliff Cemetery Association.”

83. According to her email dated December 6, 2014 @ 1:05 p.m., which was addressed to the SECORHOMES Civic Association, Mr. Sheehan, Mr. Gosik and Doreen Livson, CPSC member Ella Preiser informed CPSC members of her claim of Mr. Turner’s

alleged “gross misuse of information about the draft Comprehensive Plan in his letter, dated December 1, 2014, to the ZBA.” Ms. Preiser continued, “All present agreed a response was necessary” and that Mr. Garrett Duquesne, Commissioner of the Department of Community Development and Conservation (Planning Dept.) said that he was “already working on a response.” She also expressed her desire that such letter be read “into the record at Thursday’s ZBA meeting” by either Mr. Duquesne or Carole Walker. At 2:28 p.m., Mr. Gosik forwarded to Sheehan, Preiser and Carol Wielk, neighbor and attorney, a “first draft” of a response to Mr. Turner’s letter. Ms. Preiser’s e-mail clearly evinced direct involvement of the CPSC, led by Sheehan, into the ZBA hearing process.

84. On December 9, 2014, Mr. Duquesne sent a Memorandum to the ZBA, while Ferncliff’s caretaker’s cottage application for the South Parcel was being reviewed by the ZBA (see detailed discussion *infra*). The Memorandum stated that while Mr. Turner’s reference to the Comprehensive Plan claiming that the CPSC had previously recognized the South Parcel as “bona fide cemetery property,” the Comprehensive Plan which he referenced was “a **draft** document released by the CPSC on March 21, 2014” and the existing “uses” noted on Figures in the Plan “may not be used for certification of use purposes.” Copies of the Memorandum were sent to CPSC members. Upon information and belief, that Memorandum attached the final copy of Mr. Gosik’s draft letter to the ZBA expressing opposition to the Ferncliff application.

85. As discussed more fully, *infra*, the ZBA denied Ferncliff its as-of-right application to construct a caretaker’s cottage on the South Parcel in July 2015 determining that construction of the cottage would result in an unlawful “expansion” of the cemetery property prohibited by local law. Ironically, on March 21, 2016, Ferncliff received notice from the Greenburgh Assessor’s Office that effective July 1, 2015, the South Parcel had been properly

reclassified to “695” signifying that it was “cemetery” property as well as exempt from taxation.

86. On March 27, 2015, the CPSC released the second draft Comprehensive Plan and, as stated, while the Existing Land Use map designated the current use of the South Parcel as cemetery, the Future Land Use map designated the future use as residential.

87. On April 6, 2015, Mr. Turner sent a letter to the ZBA to follow up on comments made at the February 26, 2015 public hearing. His letter largely addressed questions raised about the “franchise” given to Ferncliff in 1902. Among other points Turner sought to clarify, he noted that “the most recent iteration of the new Comprehensive Plan, released March 27, 2015, confirms the official designation of the 12 ½ acre parcel as cemetery property.”

88. At the April 16, 2015 public hearing before the ZBA on the caretaker cottage application, and while the CPSC was taking input on the second draft of its Plan, CPSC member Ella Preiser rose to address both issues. She stated, in part:

I’m going to start off by wearing the hat of a Comprehensive Plan Steering Committee member.

On the page Mr. Turner refers to, there is a map and it indeed shows . . . this 12 and a half acre parcel and lists it in the legend as a cemetery property. No question about it. However, when you read the narrative and when you read the legend on this page it clearly states that the map is based on the code classifications used by the Assessor’s office. And, you know, the Assessor was told by the court that this should be tax exempt cemetery property. So, that is in here.

... And Mr. Turner, by calling your attention to this, may have pointed out that we have made an error by ever showing this as cemetery property. Because when you check out the classification codes, it’s listed as code 250 where cemetery property is code 695. And that’s true for other cemetery parcels in the town as well as this one. So, it’s a good thing this is a draft plan. We will look at the plan and take another look at it. And if there is an error in here we will be sure to correct it.

89. On April 28, 2015 the CPSC held a public hearing on the second draft. Mr. Turner asked for an explanation as to how the CPSC could depict the South Parcel as cemetery property on the Existing Land Use map but removing the cemetery designation, without any explanation, from the Future Land Use map. Mr. Turner also cited the 2005 Court Order and Judgment directing the Town Assessor to classify the South Parcel as cemetery property as evidence that the South Parcel was cemetery land.

90. Mr. Turner then sent a letter on April 30, 2015 to the CPSC following up on his comments at the hearing two nights earlier and repeated that although the “Existing Land Use” map correctly depicted Ferncliff’s cemetery boundaries, the map depicting “Future Land Use” omitted the cemetery designation, which was the same issue raised by Mr. Boyd in his aforementioned June 12, 2014 letter to Mr. Madden. Mr. Turner requested the CPSC and the Town Board to carefully review the pertinent facts and applicable law before considering any action to “alter” the cemetery designation of the South Parcel, they, especially in light of the fact that Ferncliff had a permit application pending relating to the development of the Parcel (see discussion, *infra*). Turner reminded the CPSC that “[A]ll existing municipal records, except the (Draft) Comprehensive Plan show the 12 1/2 acre parcel as cemetery land.”

91. No one ever responded to Mr. Turner’s comments to the CPSC or to his letter.

92. On May 4, 2015, Turner followed up with a letter to the Town’s Assessor, Edye McCarthy, reminding her to “correct all assessment records to comply with the enclosed Judgment and Order (Index No. 15776/04)” regarding the South Parcel. He specifically requested that she “correct all municipal assessment records . . . as directed by the Court to reflect the 695 cemetery property code classification.” The Assessor never responded to Mr. Turner.

93. However, the Assessor did not ignore Mr. Turner's letter. On May 7, 2015, Ms. McCarthy sent an email to Mr. Sheehan asking: "When are you going to be in Town Hall? I would like to ask you about Ferncliff. We can chat on the telephone if that is more convenient. Thanks." Thus, Sheehan was exerting influence over the tax assessment of Ferncliff's properties.

94. At the May 21, 2015 ZBA meeting Ms. Preiser indicated that the Existing Land Use map in the draft Comprehensive Plan **would be changed** to reflect the current use as residential:

I want to speak tonight as a member of the Comprehensive Plan Steering Committee.

...

At last month's ZBA meeting I indicated that the map on page 12.5 of the 2015 comprehensive plan may contain an error regarding the designation of the 12 and a half acre parcel. Mr. Turner was the one who actually brought this to the attention of the Comprehensive Plan Steering Committee.

Subsequently we were advised that the classification code assigned to this parcel is not 695, which is used for cemetery land, but rather code 250. Since the map is based on the code classification assigned by the Assessor's plan, this error will be corrected in the plan.

95. On July 16, 2015, the ZBA held its final hearing on Ferncliff's application for a building permit for its proposed caretaker cottage and the following day issued its Decision denying the application. On August 7, 2015 a certification of Decision was filed with the Town Clerk. As discussed more fully, *infra*, Ferncliff timely filed its Article 78 Petition challenging the ZBA Decision and the matter is pending on appeal in the Appellate Division, Second Department.

96. In August 2015, the CPSC released a third draft of the Comprehensive Plan. Unlike previous drafts, the cemetery designation was removed from the Existing Land Use map. As a result, all maps in the Comprehensive Plan designated the current and future use of the

South Parcel as residential, not cemetery, property. It was therefore clear that the CPSC was attempting to support the ZBA's decision because the CPSC knew or reasonably should have known that Ferncliff would challenge the decision.

97. In response to the third draft Comprehensive Plan, Mr. Turner sent a letter to Mr. Duquesne, now the Commissioner of Community Development and Conservation (Planning Dept.), on September 18, 2015, objecting, *inter alia*, to the fact that the CPSC refused to acknowledge the 1902 cemetery franchise and, in addition, had ignored the 2005 Court Order and Judgment. He requested that the final Plan depict the 12.5-acre parcel as cemetery land.

98. On October 1, 2015 the CPSC held a public hearing at which Mr. Turner appeared. During the course of his comments, he alluded to what he perceived as the ZBA's confusion "by the lack of Town records and the manipulation of Town records." Councilman Sheehan noted that on account of Mr. Turner's allegation at the last public hearing that Future Land Use map was incorrectly coded on the draft Plan, the CPSC checked the Assessor's records and the CPSC changed the classification to estate to conform to the Assessor's records. Mr. Turner reminded him of the 2005 Court Order mandating a change to cemetery classification, and that the erroneous classification "represents a loss of tens of millions of dollars to a nonprofit entity, and its something that deserves some explanation . . ."

99. In December 2015, the CPSC adopted a resolution referring the third draft Comprehensive Plan to the Town Board with a recommendation that the Town Board adopt it.

100. In December 2015, the Town Board referred the third draft of the Comprehensive Plan, showing no cemetery designation over the South Parcel on any map, to the Planning Board for review and comment.

101. In anticipation of the Planning Board hearing, Mr. Turner sent a letter dated March 3, 2016 to the Planning Board, reiterating that the CPSC had ignored documentary evidence showing the South Parcel to be cemetery land and had refused to recognize the 1902 cemetery franchise. The Planning Board did not respond to Mr. Turner's letter or address the issues raised in Mr. Turner's letter.

102. Nevertheless, on April 7, 2016, the Planning Board recommended that the Town Board approve the proposed Comprehensive Plan, ignoring all of Ferncliff's registered objections. The Town Board scheduled a public hearing to consider adoption of the Plan for June 22, 2016.

103. In contrast, the CPSC was advised by officials from Mt. Hope Cemetery, also located within the Town of Greenburgh, in April 2014 that the same Future Land Use map erroneously depicted its cemetery parcels east of the N.Y.S. Thruway and south of Jackson Avenue as single family residential. Mt. Hope advised that such parcels were designated by Westchester County Legislature as "Cemetery" prior to January 1, 1963, which remained their intended future use. Mt. Hope requested the maps be corrected. As opposed to its failure to respond to Ferncliff's similar request, the CPSC virtually immediately reacted to the Mt. Hope request by reviewing and correcting the map.

104. On June 1, 2016, the Town's 2016 Tentative Tax Roll was published acknowledging the South Parcel was classified as cemetery property (695).

105. On June 9, 2016, Mr. Turner served a formal protest upon the Town Clerk to the adoption of any land use map that fails to recognize the South Parcel as cemetery property as it was so designated in 1902. He followed with a letter dated June 15, 2016 to the Town Supervisor urging an amendment to the Existing and Future Use Maps in the proposed

Comprehensive Plan which fail to depict the South Parcel as cemetery land in line with the 1902 County Resolution establishing the franchise over the property as well as all other evidence reflecting that fact, including the Town's own 2000 Comprehensive Plan.

106. On September 15, 2016, the reclassification for the final 2016 assessment roll became final as a matter of law.

107. The public hearing before the Town Board was continued until September 28, 2016.

108. Prior to the adoption of the Comprehensive Plan, Mr. Turner sent a letter dated September 26, 2016 to the Town advising "that the confusion over the assessment codes has been resolved" as a result of the investigation and analysis by Tyler (see ¶ 81, *supra*) who had completed their reevaluation of the Town's real property and determined that the South Parcel should be classified as "695 – Cemetery" (see ¶ 115, *infra*). He further advised that it was "incumbent" upon the Town officials Board "to correct the error" whereby the CPSC had removed the cemetery designation from Existing and Future Use Maps depicting the 12.5-acre parcel and showing that parcel as non-cemetery property. He cited three (3) prior letters to the CPSC (dated 6.12.14, 4.30.15 and 9.18.15) and one (1) to the Planning Board (dated 3.3.16) making similar requests which had gone "unanswered." On September 28, 2016, the Greenburgh Town Board adopted a final version of its Comprehensive Plan. It should be noted that at §12.3.2, p. 12-4 of the Plan, in reference to Figure 12.3.1 Existing Land Use Map, the fact is referenced that such uses are broken down into 15 specific categories "based on the property class code assigned to each parcel by the Assessor's Office" and further that the "property class code is derived from historic data and ongoing monitoring that reflects the existing designation of each lot."

109. Despite Ferncliff's history and the most recent classification of the 12.5 acre South Parcel as cemetery property by its independent outside contractor, Tyler, the Town and CPSC connived to deliberately remove the cemetery designation from all maps in the final 2016 Comprehensive Plan mapping it as "One-Family Residential."

110. On October 26, 2016, Ferncliff filed a Petition pursuant to CPLR Article 78 for an Order and Judgment, annulling, voiding and vacating the Resolutions of the Greenburgh Town Board (a) adopting a negative declaration of environmental significance under the State Environmental Quality Review Act ("SEQRA") in connection with its proposed Comprehensive Plan, as arbitrary and capricious, an abuse of discretion and made in violation of law, as well as well as (b) adopting the new Comprehensive Plan pursuant to Town Law § 272-1. Ferncliff also sought to enjoin further publication and distribution of any land use maps depicting Ferncliff Cemetery, directing that all land use maps depicting Ferncliff Cemetery show the entire ±75 acre cemetery.

111. In March 2017, the Town moved to dismiss the Petition on the grounds that it failed to state a cause of action, was controverted by documentary evidence and was barred by "issue and claim preclusion and res judicata." (Lieberman Aff. Par. 18). By Decision dated January 8, 2018, the lower court denied the Town's motion in its entirety. Specifically, the Court found that the November 15, 2016 Court Decision (Thorsen, J., Index No. 2868/15) which refused to disturb the July 26, 2015 ZBA Decision (discussed *infra*,) denying Ferncliff's application for a permit to construct the caretaker cottage, "only found that the ZBA, in that instance, had a rational basis for finding that Petitioner was not granted a cemetery franchise bearing the scope advanced by Petitioner." It further found that "[T]he court did not make any determination about how the subject parcel should be classified for land use purposes or whether

its classification in the 2016 Comprehensive Plan was arbitrary and capricious, an abuse of discretion or in violation of the law.” The Court also found that the SEQRA issues identified in the Petition had not been raised or addressed in the ZBA proceeding. Thus, “the identical issue was not decided, nor did Petitioner have a ‘full and fair’ opportunity to contest it.”

112. The Town filed its Answer to the Petition on or about March 22, 2018. It repeats its primary defense that merely because the Comprehensive Plan contains maps that show the use of the South Parcel as residential, rather than cemetery, this does not, by itself, restrict the use of the Parcel and does not constitute a “de facto rezoning” so as to prohibit Ferncliff from using its South Parcel for cemetery purposes as alleged by Ferncliff in its Petition. The Town further averred that it was not on notice of the content of its own tax assessment roll and that it was incumbent upon Ferncliff to notify the Town of the change to the Town’s tax roll. This alleged defense alone accentuates the hypocrisy and shallowness of the Town’s position in all respects – the very notion that the Town had not been on notice of the change in classification made in its own records by its own independent contractor 6 months before the record closed before the CPSC on September 19, 2016 is preposterous on its face. Equally preposterous is the notion that a property owner is obliged to notify the Town of any change made by the Town in its own records.

113. The Town also filed a Certified Record of Proceedings which omitted many critical, relevant documents. This caused Ferncliff to bring an Order to Show Cause dated April 20, 2018 that the Town file a corrected and complete Certified Record of Proceedings before the CPSC, as the filed Record was woefully disorganized and essentially inadequate, and limited additional discovery. Rather than simply produce the documents and correct the Certified Record, on June 12, 2018, the Town filed a motion to stay the proceeding on the grounds that

“virtually identical” (the ZBA decision) litigation between the parties remains pending in the Appellate Division, Second Department (even though the Court already rejected the argument that the issues between the ZBA and Comprehensive Plan cases were identical), and that a third proceeding (the BAR proceeding discussed *infra*) has previously been stayed by Justice Tolbert.

J. The 2017 Tentative Tax Roll Assessment

114. As discussed in ¶ 67 *supra*, the Town and its officers, members of its Assessor’s Office or Board of Assessment Review, **never** undertook to amend Ferncliff’s property *classification* to cemetery under the very specific terms of the Court Order and Judgment. While the Town has accorded tax-exempt status to the Cemetery since 2007, as required, it utterly failed to address the “classification” issue and continued to ignore Ferncliff’s cemetery status, according the South Parcel a Code of “250” signifying “Estate” status rather than the mandated “695 - Cemeteries.” In fact, the Town’s own failure to change the single-family classification from one-family residential to cemetery became (a) a major point used by Sheehan and a local civic association to oppose Ferncliff’s caretaker cottage application and (b) the basis for the CPSC in creating the Current and Future Use Maps in the Comprehensive Plan.

115. By letter dated March 14, 2016, over the signatures of the Town of Greenburgh Assessor McCarthy and Salim Serdah, Assistant Project Director, Tyler, Ferncliff was notified that “The Town of Greenburgh’s reassessment project is now complete” and that as of July 1, 2015, the valuation date of the 2016 assessment roll, assessment records would classify the 12.5-acre South Parcel as “Property Class: 695-Cemeteries.”

116. Virtually overnight, inexplicably and paradoxically, while maintaining the Tax Exemption Code “27350-Cemetery,” **changed** the classification of the property from “695-Cemeteries” on the 2016 assessment roll to “250-Estates” on the 2017 tentative assessment roll,

and recently maintained that classification on the 2018 tentative assessment roll.

117. Ferncliff filed an appeal to the BAR in June 2017 to correct the classification of the South Parcel to conform to the 2005 Judgment and Order as well as the 2016 assessment roll. In support of its application, much as it had in 2004, Ferncliff submitted an array of documentary evidence to establish what it had established a decade earlier – to the satisfaction of the Court – that the South Parcel was properly not only granted “tax exempt status” but should properly be “classified” as cemetery property- Code 695-not residential property- Code 250.

118. The BAR decision was fully consistent with the Town’s long history of denying Ferncliff’s development plan particularly given Mr. Sheehan’s extensive influence over the Town’s zoning and tax assessment processes.

119. The BAR, consistent with its decades long negligence and dishonor of the Supreme Court Order, denied the appeal on September 15, 2017. Ferncliff responded – as it always has – to its mistreatment. It filed a special proceeding on October 11, 2017 in Supreme Court, Westchester County (Index No. 67201/2017) under CPLR Articles 4 and 78, as well as Article 7 of the RPTL to annul, void and vacate the BAR denial. The matter was subsequently stayed by Justice Tolbert in late November and Ferncliff moved to vacate the stay on April 23, 2018 which motion was returnable on June 22, 2018.

K. The ZBA’s Denial of a Building Permit for a Caretaker Cottage – July 2015

I. Pertinent Background

120. As referenced above, Ferncliff, in its continuing efforts to fulfill its duty to provide the community with the most professional cemetery services available, applied in December 2013 for a building permit for the caretaker’s cottage with attached garage on its 12.5-

acre Southern Parcel – which has indisputably been part of the property which it has had the right to use for cemetery purposes since April 7, 1902-over 116 years ago.

121. Upon information and belief, within days of Ferncliff filing for a building permit to construct the caretaker's cottage, Town Building Inspector, John Lucido, notified Mr. Sheehan and other members of the Zoning Task Force. On December 16, 2013, after conferring with Mr. Sheehan, Mr. Lucido denied the building permit application.

122. Due to Mr. Sheehan's ownership of property within 600 linear feet of the South Parcel and diagonally across the street from Ferncliff's North Parcel, Mr. Sheehan would be directly affected by any zoning decisions regarding Ferncliff's properties.

123. Thereafter, Ferncliff appealed from such denial by the Building Inspector to the ZBA. While Ferncliff's appeal was pending, the Zoning Task Force met each week to discuss zoning applications in the Town. Upon information and belief, the Zoning Task Force, at Sheehan's request, organized the Town's opposition to Ferncliff's caretaker cottage application. Ferncliff's appeal was denied on July 22, 2015. Such denial was fatally defective on several bases: (1) it sought to impose onerous restrictions upon Ferncliff in violation of the cognizable, vested and inalienable rights it possesses as a permitted use; (2) it violated the Constitution of the State of New York and the Constitution of the United States because it deprived Ferncliff of its property and the use of its property without due process and equal protection of law; and (3) it was arbitrary and capricious, lacked any rational basis whatsoever and was wholly without legal justification.

124. The Town of Greenburgh, through the determinations of Mr. Sheehan, the Building Inspector and ZBA, acted arbitrarily and capriciously in denying Ferncliff the building permit to construct a caretaker cottage knowing that its very own Town Zoning Ordinance

(Section 285-36 (B) (1) (b)) covering “Supplementary use regulations” pertaining to cemeteries and crematories expressly provides that: “A caretaker’s cottage shall conform to requirements of the district in which said cemetery is located.”

125. The proposed facility satisfies the requirements of the R-7.5 Single Family Residence District in which it is located. New York State Real Property Tax Law § 446 expressly recognizes that real property which is actually and exclusively used for “cemetery purposes” includes “land and buildings actually used and essential to the providing of cemetery purposes including, but not limited to, the on-site residence of a full-time caretaker and a storage facility for necessary tools and equipment.”

126. In fact, Ferncliff cannot use its real property for any purposes other than cemetery purposes. New York State Real Property Tax Law § 446 (3) expressly states: “The term ‘cemetery purposes,’ as used in this section shall mean land and buildings, whether privately or publicly owned or operated, used for the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle. Such term shall also include land and buildings actually used and essential to the providing of cemetery purposes, including, but not limited to, the on-site residence of a full-time caretaker and a storage facility for necessary tools and equipment.”

127. In short, Ferncliff has a readily cognizable property interest and no valid or acceptable factual or legal justification can be made for the denials and Greenburgh must pay for its actions.

128. The 12.5-acre South Parcel was included in the 1902 Resolution. This was confirmed in the March 28, 2005 Affidavit of Harold F. Campbell, a professional engineer and land surveyor licensed by New York State, who has performed various land survey tasks for

Ferncliff over a period of the last fifty years. Mr. Campbell is fully familiar with the land and real property records of Ferncliff and was asked in 2005 to review various deeds and maps describing the boundaries of Ferncliff and compare such descriptions to the real property description contained in the aforesaid County Resolution. He concluded, based upon his research, that the real property description contained in the Resolution designating certain property for use as a cemetery includes the 12.5-acre South Parcel.

129. In fact, Mr. Campbell's Affidavit was prepared in connection with Ferncliff's aforesaid 2003-2004 application that the South Parcel be declared as tax exempt, consistent with the undisputed tax exemption status historically accorded to the approximately 63.48 acres owned by Ferncliff and located on the "Northern Parcel." Such application culminated in a Judgment and Order of the Supreme Court, County of Westchester dated January 21, 2005 which held that the tax map and assessment roll of the Town of Greenburgh for assessment year 2004 be amended so as to classify the parcel as "cemetery property exempt from real property taxes pursuant to § 446 of the Real Property Tax Law of the State of New York ("RPTL")."

130. As stated, under the provisions of Section 285-36 (B) (1) (b) of the Town of Greenburgh Zoning Ordinance concerning Cemeteries and Crematories, "A caretaker's cottage shall conform to requirements of the district in which said cemetery is located."

131. The residential portion of the proposed building was intended to provide adequate accommodations for a family and New York State law specifically recognizes the "mixed use" character of sharing residential facilities for a caretaker with related maintenance space.

132. The proposed building complied in all respects with zoning standards governing the R-7.5 district.

133. At the present time, most of Ferncliff's routine maintenance work, *i.e.*, soil storage and "yard waste" management, currently exists on the 12.5-acre South Parcel on a regular and on-going basis and will not increase as a result of developing the new structure.

134. The South Parcel has been an essential component of Ferncliff's maintenance operation for many years as vehicles and maintenance personnel have routinely crossed between the North and South Parcels on a regular basis without incident.

135. Thus, on December 11, 2013, Mr. Turner sent a letter to Mr. Lucido seeking an interpretation pursuant to NYS Town § 267-a (5) and Greenburgh Zoning Code §§ 285-44 (D) and 285-48 (A) that such a structure may be built pursuant to a building permit.

II. The Proposal

136. Mr. Turner's letter set forth the outline of the proposal advising that Ferncliff proposed to remove an existing one story single-family cottage and detached garage on the parcel and constructing a new 5,000 sq. ft, 2 ½ story combined caretaker cottage and garage capable of accommodating the caretaker's vehicles and supplies as well as equipment, materials, and supplies used to maintain the ±75 acre cemetery property. The proposed cottage would comply with all R-7.5 bulk and setback requirements. Pursuant to Greenburgh Town Code § 285-10 (A) (3) (j) a portion of the cottage would be used to store equipment, materials and supplies associated with the caretaker's duties.

137. Mr. Lucido had previously approved a building permit for that cottage in 2001.

138. Mr. Turner included architectural drawings showing how the cottage would appear and represented the proposal "is an effort to create a very high-quality structure that provides a visual and architectural amenity to the surrounding neighborhood, as well as those traveling along Secor Road."

139. The appropriate Application for Building Permit with requisite attachments were delivered to Mr. Lucido. As Mr. Turner phrased the issue: “Given that a caretaker’s primary function is maintenance and, moreover, given that a caretaker cottage is permitted as-of-right,” Ferncliff sought advice as to whether the proposed cottage designed in compliance with all R-7.5 regulations might be built pursuant to a building permit.

III. The Denial by The Building Inspector

140. Upon information and belief, despite the express permission of the Greenburgh Zoning Code and compliance with R-7.5 standards, the Building Inspector, after consulting with Mr. Sheehan, denied Ferncliff’s request via a “LETTER OF PERMIT DENIAL” on December 16, 2013.

IV. The Application to the Greenburgh Zoning Board of Appeals for an Interpretation of the Zoning Code

141. Ferncliff timely filed an appeal with the Greenburgh ZBA (ZBA Case No. 13-39) from the decision of the Building Inspector denying its application for a building permit by seeking an interpretation of the pertinent Greenburgh Zoning Code provision, *i.e.*, Section 285-36 (B) (1) (b), namely that a “caretaker’s cottage,” as referenced therein, could be constructed “as of right.”

142. In a six-page letter dated July 3, 2014 to the ZBA in support of its application, Mr. Turner represented that the proposed “caretaker’s cottage” which was depicted on plans prepared by Michael Molinelli, dated December 12, 2013, could be constructed “as of right” pursuant to a building permit. He also highlighted the fact that Ferncliff had designed the proposed facility to comply with the underlying bulk regulations of the R-7.5 zone as evidenced by the bulk table appearing on CC-1 of the site plan prepared by Tim Miller Associates, Inc. As evidenced by the design and materials to be used in the proposed cottage, Ferncliff was

purposefully proposing a cottage in an architectural style intended to complement and enhance the surrounding neighborhood. Mr. Turner added that Ferncliff had gone to extraordinary lengths to reconcile its needs with its neighbors' desire to preserve the residential character of the neighborhood.

143. Mr. Turner pointed out that as a caretaker's cottage was expressly permitted by the applicable zoning code and Ferncliff's plans were fully compliant with the underlying R-7.5 standards, the Building Inspector had erred in his denial of the building permit.

144. Mr. Turner supplied the ZBA with pertinent "Background & History" of Ferncliff, namely, as noted above, its incorporation on February 26, 1902, and provided a copy of the referenced Resolution of the Westchester County Board of Supervisors dated April 7, 1902. He explained that Ferncliff's current maintenance facility for the entire cemetery was housed in approximately 3,275 square feet located at the rear of its Shrine of Memories, the second of Ferncliff's three Mausoleums, which was constructed in 1956. As with its original Ferncliff Mausoleum, aka "The Cathedral of Memories" constructed in 1928, and Rosewood, constructed in 1999, it is located on the approximately 63 acres of the North Parcel. The existing facility had clearly become inadequate to meet the demands placed upon maintenance personnel as it did not provide sufficient space to store equipment and supplies or to perform routine maintenance functions. The need for additional space was nothing new as Ferncliff had previously submitted an application to construct a "maintenance facility" in 1993 (ZBA Case. No. 94-06) on the 12.5-acre parcel, which was withdrawn in response to neighbors' concerns about the commercial appearance of the proposed facility- in stark contrast to the current application which is designed to be visibly and architecturally amenable with the existing neighborhood. It "will provide a residential facility for a caretaker as well as essential

maintenance facilities, all housed in an aesthetically designed structure, consistent with, and sensitive to, the surrounding residential neighborhood.” Further, Ferncliff was “committed to ensuring the improvements will be adequately, and professionally, landscaped.”

145. Mr. Turner also referenced the broad definition of cemetery purposes in NYS RPTL §§ 446 (3).

146. Further, as noted above, he noted that the interpretation of a caretaker’s cottage sought on the appeal was entirely inconsistent with the referenced 2001 decision by the Building Inspector to grant a prior application for a caretaker’s cottage on the same parcel. That existing one story single family cottage and detached garage was to be demolished in the process of constructing a 5,000 square foot, two and one-half story caretaker cottage and garage capable of accommodating the caretaker’s vehicles and supplies as well as equipment, material and supplies used to maintain the ± 75 acre cemetery.

147. The public policy of New York State is expressed in Article 15 of the New York Not-for-Profit Corporation Law (“N-PCL”) which succeeded The Membership Corporation Law (under which Ferncliff was incorporated in 1902) in 1970. Under Article IX of the former Membership Corporation Law cemetery corporations such as Ferncliff were required to maintain cemeteries and cemetery structures in a proper condition and appearance. The policy today is expressed in § 1501 of the N-PCL which provides that: “The people of this state have a vital interest in the establishment, maintenance and preservation of public burial grounds . . . and to prevent cemeteries from falling into disrepair and dilapidation and becoming a burden upon the community . . .”

148. It is thus entirely to be expected, indeed mandated by New York Law, that a cemetery “must maintain a staff of workmen and furnish them with materials, tools, and

machinery. To adequately care for the equipment, structures must be erected and a portion of the cemetery land set aside for the storing of the equipment and supplies. The 'use' of the land in this manner is necessary and incidental to the proper maintenance of the cemetery and for carrying out the purposes or which it was organized." *People ex rel. Woodlawn Cemetery v. Chambers, et al*, 91 N.Y. S. 2d, 774,777 (Sup. Ct., Bronx Co. 1949). Ferncliff is entitled to construct a caretaker's cottage together with an accompanying maintenance facility which are incidental to and customarily found in connection with the principal use of the Ferncliff land which it has had the right to use for cemetery purposes since 1902.

V. The ZBA Hearings

149. Thus, it is evident that Ferncliff has a clear and federally protectable property interest in the approval of its building permit application. Mr. Lucido's original denial of the building permit application was illegitimate and so arbitrary as to constitute outrageous conduct or a gross abuse of authority. Similarly, the Zoning Board of Appeals failure to correct such an abuse constitutes yet another gross abuse of authority by Town of Greenburgh official. Such denials are irrational, arbitrary and capricious, made in bad faith, based on improper considerations and are final decisions of the Town thus subject to judicial review.

150. Mr. Sheehan regularly discussed Ferncliff's ZBA application at his weekly meetings with the Zoning Task Force. Mr. Sheehan used his status as Chair of the CPSC, Chair of the Zoning Task Force and Town Board liaison to the ZBA and Planning Board to prepare a Town government strategy to employ all means available to cause the defeat of Ferncliff's ZBA application. Mr. Sheehan also worked with a local civic association, encouraging the civic association to oppose the ZBA application, and provided to the civic association suggestions on how to oppose the ZBA application.

VI. The ZBA Decision

151. In effect, the Decision of the ZBA erroneously determined that the South Parcel was indeed not “cemetery property” as it was not “owned” by Ferncliff on January 1, 1963, which is a misinterpretation of the pertinent zoning ordinance. The ZBA knew or should have known that under New York law zoning is concerned only with the use to which land is put or proposed to be put, not with ownership and specifically refers to cemeteries “in existence” on January 1, 1963.

152. While the ZBA conceded that Ferncliff would definitely be granted a building permit “to the extent that the proposed building contains a residence, whether for a proposed caretaker or otherwise” as “single-family residences are permitted in the R-7.5 District,” the ZBA further found that “the garage/maintenance/storage portion of the proposed structure, which is much larger than what could be described as an accessory garage for the use of the occupant of the residential portion of the proposed structure, is more appropriately described as a maintenance facility, storage facility or commercial garage, which are not permitted in the R-7.5 District either as principal or accessory uses, and therefore such proposed uses would require a use variance.” On or about August 20, 2015, Ferncliff filed a Petition seeking to overturn the ZBA denial of the building permit. Ferncliff filed an Amended Petition on September 4, 2015. Defendant filed a motion to dismiss which was denied. Defendant filed an Answer and Certified Record of Proceedings before the ZBA. Defendant also moved to strike portions of Ferncliff’s reply papers, but the Supreme Court, Westchester County erroneously struck Ferncliff’s entire Reply and denied the Petition essentially on the grounds that the ZBA had “thoroughly considered all of the issues as alleged in the four causes of action set forth in Ferncliff’s Amended Petition” and “had a clearly-stated rational basis.”

153. As stated above, the matter is on appeal in New York State Court and Ferncliff is constrained to file this action at the present time based upon statute of limitations concerns.

FIRST CLAIM FOR RELIEF
Violation of 42 U.S.C. § 1983 (Equal Protection)

154. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 153 of the Complaint.

155. The Town's Zoning Ordinance, Comprehensive Plan and tax roll are rules, policies, practices and procedures of the Town.

156. All eight cemeteries in the Town are located in residential zoning districts. The Town has never historically designated cemeteries as a separate and distinct cemetery zone in the Zoning Ordinance.

157. Ferncliff is similarly situated to all other cemeteries in the Town.

158. In the first two drafts of the Comprehensive Plan, all eight cemeteries had all their properties classified as cemetery property in the Existing Land Use map. Two cemeteries, Mount Hope and Ferncliff, had portions of their property classified as residential on the Future Land Use map.

159. Both Mount Hope and Ferncliff requested that all their properties be classified as cemetery property on the Future Land Use map.

160. The Town responded to Mount Hope's request and re-classified Mount Hope's property so that Mount Hope's entire properties were classified as cemetery properties.

161. The Town's only reaction to Ferncliff's request was to change the classification of the South Parcel from cemetery to residential in the Existing Land Use map of the third draft Comprehensive Plan.

162. When the Town was preparing a summary of comments on the Draft Comprehensive Plan, the Town Planner Garrett Duquesne summarized all comments and prepared draft responses to the comments. However, after summarizing Ferncliff's requests, Mr. Duquesne prepared no draft response to Ferncliff's comment. The Town's refusal to respond to Ferncliff established that the Town's agenda was to strip Ferncliff of any development rights on the South Parcel.

163. The final adopted version of the Comprehensive Plan classified Ferncliff's South Parcel as residential on both the Existing and Future Land Use maps. No other cemetery in Town had any portions of their properties designated as residential land in the final adopted Comprehensive Plan.

164. None of the other cemeteries in the Town have had to endure the following abuses by the Town:

(a) The deliberate change in the classification of its properties in the Comprehensive Plan from cemetery to residential;

(b) The unreasonable, irrational and vindictive refusal to classify the existing and future use of its properties as cemetery property;

(c) The involvement of the CPSC in a pending land use application;

(d) The refusal to allow for the construction of a caretaker's cottage;

(e) The refusal to allow the construction of a garage to house modern grounds maintenance equipment, including the repair and maintenance of such equipment;

(f) The arbitrary change to the property tax classification of its properties;

(g) The denial of a building permit application for a permitted principal use (caretaker's cottage) which meets the dimensional requirements of the zoning district.

165. The Town not only ignored Ferncliff's request, but, acting by and through the CPSC and, upon information and belief, the Zoning Task Force, knowingly, intentionally, and with malicious bad faith intent to injure Ferncliff for invidious reasons, and in order to punish Ferncliff for the exercise of its constitutional rights, (1) changed the classification of Ferncliff's South Parcel from cemetery to residential on the Existing Land Use map and (2) refused to change the classification of the South Parcel from residential to cemetery in the Future Land Use map.

166. The Town's actions in treating Ferncliff differently from all other similarly situated cemeteries in the Town were based upon improper motives and considerations, including but not limited to, Sheehan's long history of opposition to Ferncliff's activities and his status as a neighbor of Ferncliff.

167. The Town's violations of the Equal Protection Clause are a product of the Town's longstanding policies and procedures, and the Town's Planning Board, ZBA, Assessor, BAR and Town Board were acting as final policy-makers in violating the Equal Protection Clause.

168. The Town's actions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

169. As a result of the foregoing, Ferncliff is entitled to an award of damages and attorneys' fees.

SECOND CLAIM FOR RELIEF

Violation of 42 U.S.C. § 1983 (Equal Protection-Class of One)

170. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 169 of the Complaint.

171. The Town's Zoning Ordinance, Comprehensive Plan and tax roll are rules, policies, practices and procedures of the Town.

172. Ferncliff is uniquely situated when compared to other cemeteries in Town.

173. Ferncliff is the only cemetery in Town where a substantial portion of its final places of repose are in mausoleums as opposed to in-ground burials.

174. Ferncliff has long been a target of Sheehan who has spent nearly thirty years attempting to frustrate Ferncliff's attempt to conduct its cemetery business on land which has been designated for cemetery use for more than one hundred years.

175. None of the other cemeteries in the Town have had to endure the following abuses by the Town:

(a) The deliberate change in the classification of its properties in the Comprehensive Plan from cemetery to residential;

(b) The unreasonable, irrational and vindictive refusal to classify the existing and future use of its properties as cemetery property;

(c) The involvement of the CPSC in a pending land use application;

(d) The refusal to allow for the construction of a caretaker's cottage;

(e) The refusal to allow the construction of a garage to house modern grounds equipment, including the maintenance of such equipment;

(f) The arbitrary change to the property tax classification of its properties;

(g) Having all future development rights stripped and abolished.

176. The Town's actions in treating Ferncliff differently from all other cemeteries in the Town were based upon improper motives and considerations, including but not limited to Sheehan's long history of opposition to Ferncliff's activities and his status as a neighbor of Ferncliff.

177. The Town's violations of the Equal Protection Clause are a product of the Town's longstanding policies and procedures, and the Town's Planning Board, ZBA, Assessor, BAR and Town Board were acting as final policy-makers in violating the Equal Protection Clause.

178. The Town's actions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

179. As a result of the foregoing, Ferncliff is entitled to an award of damages and attorneys' fees.

THIRD CLAIM FOR RELIEF

Violation of 42 U.S.C. § 1983 (Procedural Due Process)

180. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 179 of the Complaint.

181. The Town's Zoning Ordinance, Comprehensive Plan and tax roll are rules, policies, practices and procedures of the Town.

182. In fact, the CPSC had made up its collective mind in April 2015, before the ZBA decision, that it would classify the South Parcel as residential, not cemetery property. The CPSC also deliberately interfered with the ZBA's separate administrative process in considering Ferncliff's application for a building permit to construct a caretaker's cottage on the South Parcel by suggesting to the ZBA that it must not rule in favor of Ferncliff.

183. A land owner must be afforded adequate process under state law to challenge arbitrary government action blocking the owner's intended use of property. Article 78 proceedings under New York law are inadequate when a defendant ignores court orders from those proceedings and imposes additional delays. See, e.g., *Koncelik v. Town of Hampton*, 781 F. Supp. 152, 158 (E.D.N.Y. 1991).

184. Ferncliff obtained a substantial property interest in the South Parcel by virtue of the unconditional franchise granted by the 1902 Westchester County Board of Supervisors Resolution and gained a further substantial property interest by incurring substantial expenses in the planning and development of the South Parcel.

185. The Town's actions have been without affording Ferncliff fair process under New York State law since the Town has frustrated Ferncliff's attempts to use the South Parcel for cemetery purposes, repeatedly made frivolous motions to dismiss, which have all been denied and repeatedly sought stays to delay Ferncliff's attempts to seek legal redress in New York State Courts.

186. The Town has repeatedly defied a Court order to classify the South Parcel as cemetery land and used its own refusal to comply with such Court order as a basis to strip Ferncliff's right to use the South Parcel for cemetery purposes.

187. The Town's violation of the Due Process Clause is the product of longstanding governmental policies, practice or custom and Sheehan and at least one of Defendant's employees was acting as a final policymaker in violating the Due Process Clause.

188. The Town violated Ferncliff's clearly established rights under the Due Process Clause of which a reasonable person should have known and is motivated by malicious intent and involves reckless and callous indifference to the federally protected rights of others.

189. As a result of the foregoing, Ferncliff is entitled to an award of damages and attorneys' fees.

FOURTH CLAIM FOR RELIEF
Violation of 42 U.S.C. § 1983 (Substantive Due Process)

190. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 189 of the Complaint.

191. The Town's Zoning Ordinance, Comprehensive Plan and tax roll are rules, policies, practices and procedures of the Town.

192. A plaintiff can establish a violation of Substantive Due Process by showing (1) "that [it] had a valid property interest" and (2) "defendants infringed on that property right in an arbitrary and irrational manner." *Cine SK8*, 507 F.3d at 784. The second element is satisfied when there is a "planning dispute ... tainted with ... racial animus or fundamental procedural irregularity." *Id.* at 785.

193. By virtue of the Westchester County Board of Supervisors Resolution, the County granted Ferncliff a perpetual, unconditional and infeasible franchise over and perpetual property right in the North Parcel and South Parcel. As a result, Ferncliff acquired and presently has a substantial property right in and to the cemetery designation of the South Parcel.

194. Ferncliff is prohibited by law from using its property for any purpose other than for cemetery purposes.

195. By adopting the 1994 amendments to the Town Code, the Town stripped away and abolished any building rights Ferncliff had on the North Parcel.

196. By issuing the ZBA decision and by adopting the Comprehensive Plan, the Town stripped away and abolished any building rights Ferncliff had on the South Parcel.

197. By adopting the Comprehensive Plan designating the future use of the South Parcel as residential, the Town established a formal policy of preventing any future cemetery use of the South Parcel.

198. The classification in the Comprehensive Plan of the South Parcel as residential land, which was based upon assessment codes applied by the Town's Assessor, was arbitrary,

capricious, irrational and without any basis in law and in fact since, on the date of adoption of the Comprehensive Plan the Town Assessor had classified the South Parcel as cemetery land.

199. The Town Assessor's change of classification of the South Parcel from cemetery to residential on the 2017 tentative and final tax roll was arbitrary, capricious, irrational and without any basis in law and in fact, and the Town BAR's refusal to grant Ferncliff's petition was arbitrary, capricious, irrational and without any basis in law and in fact.

200. The ZBA's decision to deny Ferncliff the right to use the South Parcel for cemetery purposes was arbitrary, capricious, irrational and without any basis in law and in fact since well-established New York law focuses on the use to which land was put, not the ownership of such land.

201. The Town's treatment of Ferncliff as set forth above constitutes a gross abuse of governmental power.

202. The Town's violation of the Due Process Clause is the product of longstanding governmental policies, practice or custom and Sheehan and at least one of Defendant's employees was acting as a final policymaker in violating the Due Process Clause.

203. The Town violated Ferncliff's clearly established rights under the Due Process Clause of which a reasonable person should have known and is motivated by malicious intent involves reckless and callous indifference to the federally protected rights of others.

204. As a result of the Town's actions regarding the South Parcel, Ferncliff is entitled to an award of damages and attorneys' fees.

AS AND FOR A FIFTH CLAIM FOR RELIEF
Violation of 42 U.S.C. § 1983 (Regulatory Taking)

205. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 204 as if fully set forth herein.

206. The Fifth Amendment to the United States Constitution also provides that “[N] or shall private property be taken for public use without just compensation.”

207. The Supreme Court of the United States, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) has articulated the general test for determining whether the application of a general zoning law to particular property effects a taking, namely, if either (1) the ordinance does not substantially advance legitimate state interests or (2) the ordinance denies an owner of economically viable use of his land. *Id.* at 260.

208. The South Parcel was within the boundaries of the 1902 franchise granted to Ferncliff by the Westchester County Board of Supervisors.

209. Ferncliff obtained a substantial property interest in the South Parcel by virtue of the unconditional franchise granted by the 1902 Westchester County Board of Supervisors Resolution and gained a further substantial property interest by incurring substantial expenses in the planning and development of the South Parcel.

210. By adopting the 1994 Amendments to the Zoning Ordinance, the Town deprived Ferncliff of the right to engage in any additional construction of buildings on the North Parcel.

211. Under the ZBA Decision, Ferncliff has no economically viable use of the South Parcel unless such property is used for cemetery purposes, not only including mausoleum burial purposes, but also for a maintenance facility, in order to function properly. New York State recognizes this, as does the Town, which specifically refers to a “caretaker’s cottage” in its own zoning Ordinance. It owns a “property interest” which it has lawfully sought to enhance a matter “of right.” The South Parcel has no other value because the laws of the State of New York preclude the use of the property for any other purpose other than for cemetery purposes.

212. The ZBA Decision denying the use of the South Parcel for cemetery purposes deprives Ferncliff of all economically viable use of the South Parcel.

213. The ZBA Decision, under its strained and erroneous interpretation of the Ordinance and the factual history behind Ferncliff's ownership and use of the South Parcel, arbitrarily, irrationally and unreasonably prevents Ferncliff from utilizing its property in connection with its sole and exclusive use and otherwise deprives Ferncliff of its property rights procured by the New York State Constitution Art. 9 §§ 2 (b)(c) and 3 (b) as well as the Fifth and Fourteenth Amendments to the United States Constitution and constitutes a taking without just compensation in violation of 42 U.S.C. § 1983."

214. As a result of the ZBA Decision denying Ferncliff the right to use the South Parcel for cemetery purposes, Ferncliff has suffered monetary damages in excess of Sixty Million (\$60,000,000.00) dollars."

WHEREFORE, Ferncliff demands a judgment against Defendant Town of Greenburgh, as follows:

1. Monetary damages of at least 60 million dollars (\$60,000,000), in an amount to be proven at trial, for the loss of use of the Property, from December 18, 2013, and expenses incurred due to Defendant's unlawful conduct;
2. Attorneys' fees pursuant to 42 U.S.C. § 1988;
3. A permanent injunction directing the Town, its officers, agents, employees, elected officials, appointed officials and consultants, to issue any and all permits, licenses, certificates or other documents needed for the

construction, use and occupancy of a caretaker's cottage on the South Parcel;

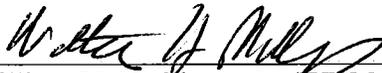
4. A permanent injunction restraining the Town, its officers, agents, employees, elected officials, appointed officials and consultants from taking any action to: (i) prevent the construction of a caretaker's cottage on the South Parcel, (ii) prevent the operation, use and maintenance of the South Parcel for cemetery purposes, including but not limited to storage of excavated earth, stormwater retention, interments, storage of maintenance equipment, mulching, landscaping, material storage, parking and any other purpose of Ferncliff Cemetery, and (iii) such other uses and purposes of Ferncliff as may from time to time arise;
5. A declaration that the Comprehensive Plan is null and void and of no further force and effect;
6. A permanent injunction directing that the South Parcel be forever classified as cemetery property (Code 695) and forever exempt from taxation; and
7. Such other and further relief that the Court deems just, proper and equitable, including statutory interest, costs and disbursements.

JURY DEMAND

Plaintiffs demand a jury trial for all claims stated herein.

Dated: White Plains, New York
July 16, 2018

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