

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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Application of  
FIREPLACE HISTORY CLUB,  
and MARTIN VAN LITH, Chairman,

Verified Petition

Petitioners,

For a Judgment Pursuant to  
CPLR Article 78

Index No.

-against-

TOWN BOARD OF THE TOWN OF  
BROOKHAVEN

Respondents.

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Petitioners allege:

1. Petitioner, Fireplace History Club (hereinafter "History Club"), is a non-for profit association that intends to make these cemeteries an educational resource of Brookhaven's Historic Heritage.
2. Petitioner, Martin Van Lith, is the chairman of the Fireplace History Club.
3. Respondents, Town Board of the Town of Brookhaven, are elected officials of the Town of Brookhaven, a municipal corporation duly organized and existing pursuant to the laws of the State of New York.
4. New York State Town Law section 291 in relevant part states:  
  
"It shall be the duty of the Town Board to remove the grass and weeds from any such cemetery or burial ground in any such town at least three times in each year, and to erect and maintain suitable fences around such cemetery or burial ground."

FACTS

5. These cemeteries are in the Town's Fire Place Historic District and are included

in the Post Morrow Foundation Historic Tours. They are historically significant dating back to Revolutionary times. The lack of maintenance is essentially destroying these historic landmarks.

6. The History Club has recruited volunteers to help repair and restore these cemeteries but they are not able to provide the basic maintenance needed, such as cutting the grass and keeping the access route open. The Club obtained an \$11,000 grant to hire a stone mason to do some of the repairs but he is unable to gain access to the cemeteries because the cemeteries are overgrown and the paths, in some cases, are impenetrable.

7. On numerous occasions Petitioners have presented the Town Board and the Parks Department with explicit information about the location of these historic cemeteries and advised the Town of the lack of maintenance. We have had meetings with Town officials who have been supportive but the Parks Department, who does the actual work, has simply not performed.

8. Our last attempt to have the cemeteries maintained was a meeting on June 3, 2009 with a Deputy Parks Commissioner who assured us that the cemeteries would be mowed.

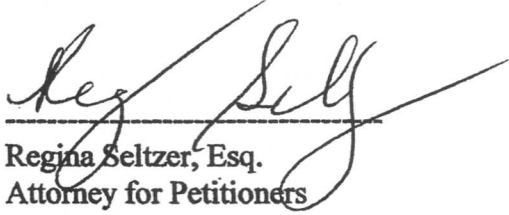
9. We provided her with a list of the cemeteries that were historically significant. The cemeteries were : Rose, Hulse, Corwin, Azel Hawkins, Barteau, Miller, David Hawkins, South Haven Presbyterian and Carmans. We also provided maps, GPS and tax map locations of the cemeteries Unfortunately, as of this date, most of the cemeteries have not been mowed.

10. Despite our reluctance to commence litigation, after three years it appears that only by court order will the Town comply with the express mandates of New York State Town Law Section 291.

11. No previous application has been made for the relief requested herein.

WHEREFORE, Petitioners respectfully ask for a judgment pursuant to CPLR 7803 directing that the Town Board comply with Town Law Section 291 and remove the grass and weeds from the above referenced historic cemeteries and maintain access to these cemeteries, for costs and for such other and further relief as the Court deems just, proper and equitable.

Dated: Bellport, New York  
July 16, 2009



Regina Seltzer, Esq.  
Attorney for Petitioners  
30 Brewster Lane  
Bellport, New York 11713  
(631) 286-8849

VERIFICATION

STATE OF NEW YORK

:ss.:

COUNTY OF SUFFOLK

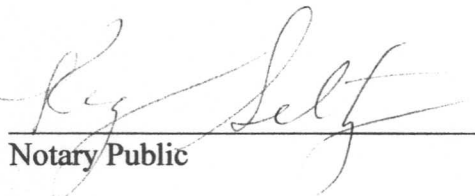
MARTIN VAN LITH, being duly sworn deposes and says:

That deponent is the Chairman of the FIREPLACE HISTORY CLUB, a  
Petitioner in the within proceeding; that I have read the foregoing Verified Petition and  
know the contents thereof; that the same is true to deponent's own knowledge, except as  
to the matters herein stated to be alleged upon information and belief, and that as to those  
matters, deponent believes it to be true.



Martin Van Lith

Sworn to on the 16<sup>th</sup> day  
Of July 2009

  
Notary Public

Regina Seltzer  
Notary Public, State of New York  
No. 02 854 335003  
Expires 02 28 10

8/20

## REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (REV 1/2000)

R.J.I. FEE PAID  
Judith A. Pascale  
County ClerkSupreme COURT, Suffolk COUNTY INDEX NO. DATE PURCHASED:  
09-28006 July 16, 2009

## PLAINTIFF(S):

Fireplace History Club & Martin Van Lith, Chairman

## DEFENDANT(S):

Town Board of the Town of Brackhamen

For Clerk Only

IAS entry date

Judge Assigned

**HON. MELVYN TANENBAUM**  
RJI Date8-18-09Date issue joined: \_\_\_\_\_ Bill of particulars served (Y/N): [ ] Y [ ☒ ] N**NATURE OF JUDICIAL INTERVENTION** (check ONE box only AND enter information)

- [ ] Request for preliminary conference
- [ ] Note of issue and/or certificate of readiness
- [ ] Notice of motion (return date: \_\_\_\_\_)  
Relief sought \_\_\_\_\_
- [ ] Order to show cause  
(clerk enter return date: \_\_\_\_\_)  
Relief sought \_\_\_\_\_
- [ ] Other ex parte application (specify: \_\_\_\_\_)

- [ ☒ ] Notice of petition (return date: Aug 20, 2009)  
Relief sought \_\_\_\_\_
- [ ] Notice of medical or dental malpractice  
action (specify: order & judgment)
- [ ] Statement of net worth
- [ ] Writ of habeas corpus
- ART 78  
OSPNT**
- [ ] Other (specify: \_\_\_\_\_)

**NATURE OF ACTION OR PROCEEDING** (Check ONE box only)**MATRIMONIAL**

- [ ] Contested -CM
- [ ] Uncontested -UM

**COMMERCIAL**

- [ ] Contract -CONT
- [ ] Corporate -CORP
- [ ] Insurance (where insurer is a party, except arbitration) -INS
- [ ] UCC (including sales, negotiable instruments) -UCC
- [ ] \*Other Commercial -OC

**REAL PROPERTY**

- [ ] Tax Certiorari -TAX
- [ ] Foreclosure -FOR
- [ ] Condemnation -COND
- [ ] Landlord/Tenant -LT
- [ ] \*Other Real Property -ORP

**OTHER MATTERS**

- [ ] \* -OTH

**TORTS****Malpractice**

- [ ] Medical/Podiatric -MM
- [ ] Dental -DM
- [ ] \*Other Professional -OPM
- [ ] Motor Vehicle -MV
- [ ] \*Products Liability -PL
- [ ] Environmental -EN
- [ ] Asbestos -ASB
- [ ] Breast Implant -BI
- [ ] \*Other Negligence -OTN
- [ ] \*Other Tort (including intentional) -OT

**SPECIAL PROCEEDINGS**

- [ ] Art. 75 (Arbitration) -ART75
- [ ] Art. 77 (Trusts) -ART77
- [ ☒ ] Art. 78 -ART78
- [ ] Election Law -ELEC
- [ ] Guardianship (MHL Art. 81) -GUARD81
- [ ] \*Other Mental Hygiene -MHYG
- [ ] \*Other Special Proceeding -OSP



Index No.

Year 2009

Fireplace History Club,  
and Martin Van Lith, Chairman

For a judgment Pursuant to  
CPLR article 78  
-against-

Petitioners

Town Board of the Town of Brookhaven  
Respondents

## Notice of Petition + Verified Petition

**REGINA SELTZER**

Attorney for Petitioners

Office and Post Office Address, Telephone

30 SOUTH BREWSTER LANE

BELLPORT, NEW YORK 11713

(631) (444) 288-8849

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:—Please take notice

☐ NOTICE OF ENTRY

that the within is a (certified) true copy of a  
duly entered in the office of the clerk of the within named court on

19

☐ NOTICE OF SETTLEMENT

that an order  
settlement to the HON.  
of the within named court, at  
on

of which the within is a true copy will be presented for  
one of the judges

19

at

M.

Dated,

Yours, etc.

**REGINA SELTZER**

Attorney for

Office and Post Office Address

30 SOUTH BREWSTER LANE

BELLPORT, NEW YORK 11713

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X  
In the Matter of

FIREPLACE HISTORY CLUB, and  
MARTIN VAN LITH, Chairman

Petitioners,

VERIFIED ANSWER WITH  
OBJECTIONS IN POINT OF LAW

- against -

Index No. 09-28006

TOWN BOARD OF THE TOWN OF BROOKHAVEN

Respondents.

-----X

The Respondents, the Town Board of the Town of Brookhaven by its attorney, Robert Quinlan, Town Attorney, by Barbara M. Wiplush, Senior Assistant Town Attorney, answering the Verified Petition, hereby allege upon information and belief as follows:

1. The Respondents deny knowledge or information sufficient to form a belief as to the allegations contained within the paragraphs 1 and 2.
2. As to the allegations raised in paragraph 4, the Respondents respectfully refer the Court to New York State Town Law Section 291 for the complete text.
3. Upon information and belief as to the allegations contained in paragraph 5, the Respondents deny that the Barteau Cemetery, David Hawkins Cemetery, South Haven Presbyterian Church Cemetery, Carman Family Cemetery and Nathaniel Hawkins Cemetery are in the Town's Fireplace Historic District. Respondents further deny information or knowledge sufficient to form a belief as to the remaining allegations set forth in paragraph 5.

4. The Respondents deny knowledge or information sufficient to form a belief as to the allegations contained within the paragraph 6.
5. Upon information and belief, the Respondents deny and deny knowledge and information sufficient to form a belief as to the allegations in paragraph 7, but admit that the Petitioner met with representatives of the Town Parks Departments, and thereafter the Town Parks Department commenced mowing services.
6. The Respondents upon information and belief denies the allegations in paragraph 8, but admits that the Deputy Parks Commissioner advised the Petitioners that the Town Parks Department would begin to remove the grass and weed the required cemeteries.
7. The Respondents deny and deny knowledge and information sufficient to form a belief as to the allegations in paragraph 9, but admits that Petitioners submitted information consisting of a list and map to the Town Parks Department.
8. The Respondents deny the allegations contained in paragraph 10.

**AS AND FOR A FIRST OBJECTION IN POINT OF LAW**

**THE RESPONDENTS HAS NO LEGAL OBLIGATION UNDER TOWN LAW SECTION 291  
TO MAINTAIN PRIVATE CEMETERIES**

It is established that a proceeding for mandamus can only be invoked where there is a clear legal right to the relief sought. (See, Maurer v. State Emergency Management Office, 13 A.D.3d 751, 786 N.Y.S.2d 620 (3<sup>rd</sup> Dept. 2003)) Burch v. Harper, 54 A.D.3d 854, 863 N.Y.S.2d 780 (2<sup>nd</sup> Dept. 2008); Petitioners have failed to establish their clear legal right to the requested relief.



THE CEMETERIES LISTED IN THE VERIFIED PETITION ARE NOT "PUBLIC"  
CEMETERIES

The Respondents respectfully submit that they are cognizant of the sensitive nature of this proceeding and the respect to be given such matter. The Court stated in *Hunter v. Trustees of Sandy Hill*, 6 Hill 407 (1844), "[w]hen these graves shall have worn away; when they who now weep over them shall have found kindred resting places for themselves; when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a grave yard...". *Id.* However, under Town Law Section 291 the Town's legal obligation to remove the grass and weeds arises if the cemeteries are "public" cemeteries. Respectfully, the cemeteries listed in the Verified Petition are not "public" cemeteries, but rather are "private" cemeteries; and, therefore, the Town has no legal obligation to remove the grass and weeds.

The Rural Cemetery Act, (Laws of 1847, Chapter 133) authorized the incorporation of rural cemetery associations. (See, Rural Cemetery Act (Laws of 1847, annexed hereto as Exhibit A)). Pursuant to the Rural Cemetery Act, a number of persons, not less than seven, were authorized to form an association for the purpose of "procuring and holding lands to be used exclusively for a cemetery". *Id.* The certificate of association had to be filed in the county clerk's office in order for the association to be incorporated. {In this matter, there is no record of any certificates of association being filed in the Suffolk County Clerk's Office, (see, Exhibit B, Letter from Sharon Pullen, Archivist Suffolk County)}. Upon the certificate of association being duly filed in the county clerk's office, the Laws of 1847 authorized the incorporated

rural cemetery associations to purchase land, not to exceed 200 acres, to be used "exclusively for a cemetery...", and after filing a map in the county clerk's office, the incorporated association may have conveyed lots or plats on the map. (Exhibit A, Laws of 1847); (See, In the Matter of the Petition of the Deansville Cemetery Association to Acquire Title to Lands of Isaac C. Miller and Wife (21 Sickels 569, 66 N.Y. 569 (1876))).

It is the sale and purchase of such mapped lands or plots to the public that renders a cemetery "public". (See, Conn v. Boylan, 224 N.Y.S.2d 823 (Sup. Ct. Suffolk Cnty. (1962)); (See, Opns. St. Comp. No. 63-456(1963); (See, Exhibit C copies of State Comptroller's Opinions referred to in this Verified Answer).

Pursuant to Town Law Section 291 title will vest in the town where that cemetery "possessed a public character". (See, Opns. St. Comp. No. 63-456 (1963)); (See, Opns. St. Comp. No. 4738 (1950)). It is the "public character" of the burial grounds that imposes upon a town the obligation to provide maintenance. (See, Opns. St. Comp. No. 63-456 (1963.)); (See, Opns. St. Comp. No. 60-382 (1960)). The provisions of Town Law Section 291 are not applicable to "private cemeteries". (See, Opns. St. Comp. No. 60-616 (1960)); [Opns. St. Comp. No. 59-1121 (1960)].

#### THE CEMETERIES IDENTIFIED BY PETITIONERS ARE "PRIVATE" CEMETERIES.

Where the cemetery is a "private" one, the Town has no obligation to maintain that cemetery. (See, Opns. St. Comp. No. 60-616 (1963)); Opns. St. Comp. No. 46-443 (1959)); (See, Opns. St. Comp. 1406 (1946)). The New York State Cemeteries Name/Location Inventory, 1995-1997, as compiled by the Association of Municipal Historians of New York State (Exhibit D; pages 814-835), specifies the cemetery type for

each of the ten cemeteries identified in the Verified Petition, which is summarized below:

Azel Hawkins Private Graveyard: Type: Family;  
Barteau Private Graveyard: Type: Family;  
Corwin Private Graveyard: Type: Family  
David Hawkins Private Graveyard: Type: Family  
King David Hulse: Type: Other; Note: Private Graveyard  
Miller Private Graveyard: Type: Family; Note: owned by (1939) George  
Miller;  
Nathaniel Hawkins: Type: Family; Note: Private Graveyard;  
\*Rose Private Graveyard: Type: Family;  
Samuel Carman & Nathaniel Miller (identified as Carman Family  
Cemetery on  
GIS information): Type: Family; Note: Private Graveyards; and  
So. Haven Presbyterian Church & Cem.: Type: Religious.

Additionally, based on the list of cemeteries provided by Petitioner, Martin Van Lith, the Town Division of Planning was able to identify the Suffolk County Tax Map Parcel Numbers and ownership. (See, Affidavit of Kim Kramer-Romero, Planning Aide).  
\*The Town of Brookhaven is the owner of the parcel identified by SCTM Number for the Rose Family Cemetery. The remaining cemeteries are "private" and not owned by the Town of Brookhaven.

Pursuant to the Laws of 1847, the incorporated cemetery association after paying for the purchase of lands and debts was required to allocate the proceeds of

future sales to be applied to preserving the cemetery. (Laws of 1847). If the incorporated association for a public cemetery was subsequently dissolved and there are no funds or endowment, then the cemetery could be considered abandoned, where then the town would be responsible for the maintenance. (See, Opns. St. Comp. No. 4738 (1950)). However, this obligation does not arise if the cemeteries are neglected "private" ones.

Although the Petitioners state that the above cemeteries, private burial grounds, are neglected, the provisions of Town Law Section 291 do not apply to the above identified "private" cemeteries. [See, Op. St. Comp. No. 59-1121 (1960)]; [See, Op St. Comp. No. 65-917 (1966)].

**AS AND FOR A SECOND OBJECTION IN POINT OF LAW**

**PETITIONERS DO NOT HAVE STANDING TO MAINTAIN THIS PROCEEDING**

The Petitioners do not have standing to maintain this proceeding. In order to satisfy the requisite for standing Petitioners must show that they have or will "suffer an injury" and that their interest is "within the zone of interest to be protected by the law at issue", (see *Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1<sup>st</sup> Dept. 1997) citing *Stanton Corp. v. Department of Labor*, 166 A.D.2d 331, 333, 561 N.Y.S.2d, 6 (1990)). Petitioners failed to satisfy this requirement. The "zone of interest" to be protected under Town Law Section 291 are "public" cemeteries; however, Petitioners' "interest" is that of "private" cemeteries, which are not within the "zone of interest of the law at issue." (See, *Coast Oil New York*, supra.).

WHEREFORE, it is respectfully requested that this Court deny the relief sought

and dismiss Petitioners' Verified Petition in its entirety and grant such other, further and different relief this Court deems just and proper.

ROBERT QUINLAN  
BROOKHAVEN TOWN ATTORNEY  
Attorney for Respondents

By: 

Barbara M. Wiplush  
Senior Assistant Town Attorney  
Town of Brookhaven Law Department  
One Independence Hill  
Farmingville, NY 11738  
631(451-6500

TO: Regina Seltzer, Esq.  
Attorneys for Petitioners  
30 Brewster Lane  
Bellport, NY 11713  
(631)286-8849

## VERIFICATION

Barbara M. Wiplush, attorney at law of the State of New York affirms the following:

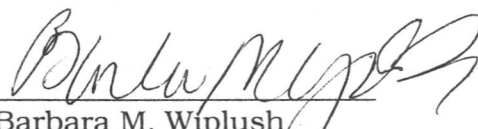
I am an Assistant Town Attorney for the Town of Brookhaven and attorney for the Respondents herein.

I have read the foregoing Verified Answer and know the contents thereof. The same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by affiant and not by the Respondents is that the Respondents are a municipal corporation and affiant is a person acquainted with the facts.

The source of my information and the grounds of my belief as to all matters not stated upon my own knowledge are documents and writings furnished to me by officers, employees and agents of the defendant.

Affirmed: Farmingville, New York  
January 13, 2010

  
Barbara M. Wiplush  
Senior Assistant Town Attorney



From: Carol Bissonette <cbissonette@BROOKHAVEN.ORG>  
Subject: **Fwd: CD #4 Cemeteries**  
Date: May 28, 2009 2:57:58 PM EDT  
To: vanlith@optonline.net

Martin,

The following e-mail is provided to you for your information, records and confirms our conversation and scheduled meeting of next week.

If you have any questions, please give me a call at 631-451-6112 or on my cell at 631-831-3291.

Thanks and regards,  
Carol

Carol A. Bissonette  
Deputy Commissioner, Parks, Recreation & Sports & Cultural Resources  
Office#: 631-451-6112  
Cell #: 631-831-3291  
[cbissonette@brookhaven.org](mailto:cbissonette@brookhaven.org)

||| Carol Bissonette 5/28/2009 2:54 PM >>>  
Not subject to foil

Good Afternoon Connie, Eva & Liz,

I just wanted to up date you regarding cemeteries in CD #4, and in particular those in Brookhaven Hamlet. On Monday 05/18/09 I started reaching out to each of the area foreman to remind them that all cemeteries in their wards need to be mowed, weeded, raked, etc. in advance of the holiday weekend. For Ward 4 I particularly stressed the importance in having the Brookhaven Hamlet cemeteries.

Regretfully, the information advising me they were done was incorrect. This morning, the Parks Maintenance Supervisor and I met with the area Foreman to review this situation. We have scheduled a meeting for Weds., 06/02/09 at 9:00 am to meet with Martin van Lith to physically go to each of the 9 Brookhaven Hamlet cemeteries and inspect them and confirm location. I also had a lengthy conversation this morning with Regina Seltzer on this very subject and advised her that a meeting would take place next week.

We are going to actively pursue positive resolution and on-going maintenance of these cemeteries, however, please note that due to excessive rain and rapid grass growth we are stretching thin and playing catch up in all wards on moving, weeding, weed wacking etc.

I am approaching this as a positive educational opportunity that will help us improve our maintenance scheduling for cemeteries and will use the 9 Brookhaven Hamlet cemeteries as our "test vehicle".

If you have any questions or if I can be of further help, please let me know.

Thanks and regards,  
Carol

Carol A. Bissonette  
Deputy Commissioner, Parks, Recreation & Sports & Cultural Resources  
Office#: 631-451-6112  
Cell #: 631-831-3291  
[cbissonette@brookhaven.org](mailto:cbissonette@brookhaven.org)

Exhibit E

From: Martin VanLith <vanlith@optonline.net>  
Subject: **Fwd: Brookhaven/South Haven Hamlets : Bellport High School Students Visit Wertheim...**  
Date: July 31, 2009 7:10:30 AM EDT



Begin forwarded message:

From: Carol Bissonette [<mailto:cbissonette@BROOKHAVEN.ORG>]  
Sent: Thursday, April 09, 2009 8:55 AM  
To: [deitzj@optonline.net](mailto:deitzj@optonline.net)  
Subject: Re: Brookhaven/South Haven Hamlets : Bellport High School Students Visit Wertheim...

John,

Thank you for your e-mail. I have forwarded it to my personal e-mail account as I am unable to access it from my office computer.

I am delighted that they are so interested and willing to assist us in our program of restoration and maintenance.

My team has finished their field assessment and I am currently pulling it all together and creating the inventory records as well as a project plan for maintenance and repair. We have already begun maintenance on some of the cemeteries and we are moving forward. I'm very excited that we are moving in the right direction and I look forward to the future weeks progress. A large part of this project moving in a positive direction has to do with the interest, support and partnering that I am delighted to have from you, Martin and your organization.

We have several cemeteries that we were unable to locate and will be going back out into the field to try and find them, catalog and mark them for inclusion in our program. Any thoughts of how we could do this more efficiently and expeditiously? Any help/guidance you can give would be greatly appreciated.

Thank you again and I am looking forward to reading the students blog when I get home later this evening.

My best to you for the holiday and regards, Carol

Carol A. Bissonette  
Deputy Commissioner, Parks, Recreation & Sports & Cultural Resources  
Office#: 631-451-6112  
Cell #: 631-831-3291  
[cbissonette@brookhaven.org](mailto:cbissonette@brookhaven.org)