UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EAST END ERUV ASSOCIATION, INC., MARVIN TENZER, MORRIS TUCHMAN, CLINTON GREENBAUM, ALAN H. SCHECHTER, CAROL SCHECHTER, JEFFREY LEAN, ALEXA LEAN, DEBORAH POLLACK and SIMCHA POLLACK,

Plaintiffs,

-against-

THE VILLAGE OF WESTHAMPTON BEACH, THE VILLAGE OF QUOGUE, and THE TOWN OF SOUTHAMPTON

Defendants.

Index No. CV 11-0213 (LDW)(ETB)

DECLARATION OF ROBERT G. SUGARMAN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT WESTHAMPTON BEACH'S MOTION TO DISMISS

I, ROBERT SUGARMAN, hereby declare under penalty of perjury:

1. I am an attorney licensed to practice in New York and in this court. I am a partner in the law firm of Weil, Gotshal & Manges LLP, attorneys for Plaintiffs East End Eruv Association, Inc., Marvin Tenzer, Morris Tuchman, Clinton Greenbaum, Alan H. Schechter, Carol Schechter, Jeffrey Lean, Alexa Lean, Deborah Pollack, and Simcha Pollack, (collectively "Plaintiffs") in this action. As such, I am familiar with the facts and circumstances set forth herein, which are provided solely to apprise the Court of developments with regard to Westhampton Beach since the filing of Plaintiffs' Amended Complaint on February 3, 2012. Had these developments occurred by the time the Amended Complaint was filed, they would have been included therein.

2. I submit this Declaration in support of Plaintiffs' Opposition to Defendant Westhampton Beach's Motion to Dismiss. The relevant facts as to the merits of the opposition

are set forth in the accompanying Plaintiffs' Memorandum of Law in Opposition to Defendant Westhampton Beach's Motion to Dismiss.

3. Attached as Exhibit A is a true and correct copy of the March 14, 2012 letter from Michael Wiles to Brian Sokoloff.

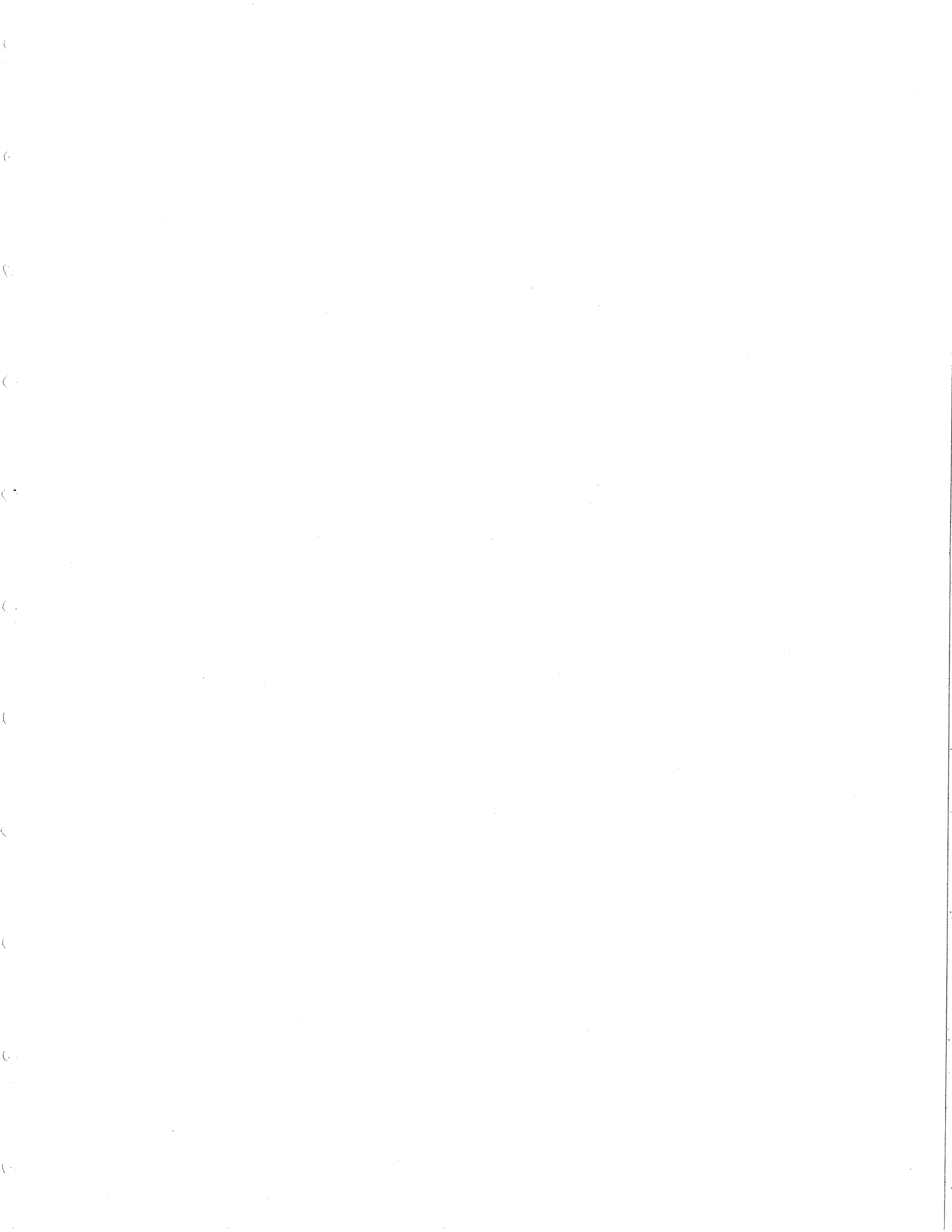
4. Attached as Exhibit B is a true and correct copy of the March 20, 2012 letter from Brian Sokoloff to Michael Wiles.

5. Attached as Exhibit C is a true and correct copy of the April 5, 2012 letter from Michael Wiles to Brian Sokoloff.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 2012

Robert G. Sugarman /JS
ROBERT G. SUGARMAN



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March 14, 2012

Brian S. Sokoloff
Sokoloff Stern LLP
355 Post Avenue, Suite 201
Westbury, New York 11590

East End Eruv Association

Dear Mr. Sokoloff:

As you know, my client, Verizon New York Inc. ("Verizon"), has entered into an agreement with the East End Eruv Association (the "EEEA") to permit the attachment of lechis to certain of Verizon's utility poles in order to create an eruv within the Village of Westhampton Beach.

Verizon previously understood that the Village of Westhampton Beach believed that its approval was required before Verizon could issue licenses to the EEEA and before the lechi staves could actually be installed on Verizon's utility poles. For that reason Verizon delayed the issuance of licenses pending a court determination of the parties' rights. Verizon also joined with LIPA in seeking a court ruling as to whether the attachment of the lechis may proceed.

In the federal court proceedings, however, Westhampton Beach has argued that it has no official position as to the attachment of the lechis. During the hearing on EEEA's request for a preliminary injunction you confirmed that Westhampton Beach has no laws that deal with the attachment of lechis and that Westhampton Beach has no application procedure that is relevant to the attachment of lechis. (Tr. 278:23-279:23, 548:12-16, 556:18-560:6). You argued that "a license is a nonassignable privilege" and that "[t]he village law that I cited says that the roadway is controlled by the board of trustees of the village." *Id.* However, you refused to state whether Westhampton Beach intends to take any action based on this issue or on any other theory, and you took the position in Court that there are no issues that needed to be litigated. (Tr. 556:18-560:6).

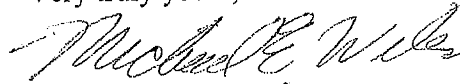
We sought clarification of the Village's position in a letter that I sent to you in June 2011 (a copy of which is enclosed), and I made similar requests on January 25, 2012 in a telephone conversation with Leo Dorfman of your offices. However, we have never received a straightforward answer as to what the Village's position is and whether or not

it objects to Verizon's issuance of the licenses. Mr. Sugarman (counsel to EEEA) sent a letter to you dated February 29, 2012 (with copies to all counsel in the federal court cases), asking the Village once again "whether it contends that Westhampton Beach's approval is required or that its ordinances restrict the attachment of the lechis, and whether it will take any action against Verizon and LIPA for issuing licenses for the attachment of lechis . . ." However, we understand that you did not respond to Mr. Sugarman's letter.

If the Village has an objection to the issuance of the licenses, it has always been Verizon's preference to give the parties the opportunity to obtain a court determination as to the merits of that objection before actually proceeding with the attachment of the lechis. Given your stated position that Westhampton Beach has no law that deals with the attachment of lechis, and the Village's refusal to tell us whether it has any other objection to the attachment of the lechis, Verizon has no choice, under its contract, but to issue the licenses and to allow the EEEA to proceed with the attachment of lechis to Verizon's utility poles.

We ask you again please to let us know if the Village objects to the issuance of the licenses and, if it so objects, to let us know the grounds on which the Village does so. Please respond by no later than March 26, 2012. If you do not inform us of any objection, then Verizon will issue the licenses as its contract with EEEA contemplates.

Very truly yours,



Michael E. Wiles

cc: All counsel of record

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June 2, 2011

Brian S. Sokoloff
Sokoloff Stern LLP
355 Post Avenue, Suite 201
Westbury, NY 11590

Licenses to Attach Lechis to Verizon Utility Poles in Westhampton Beach

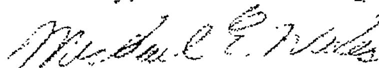
Dear Mr. Sokoloff:

As you know, Verizon New York ("Verizon") has entered into an agreement to permit the East End Eruv Association ("EEEA") to install lechi staves on utility poles owned and operated by Verizon, some of which are located in the Village of Westhampton Beach (the "Village"). I represent Verizon in connection with lawsuits that are pending in connection with the proposed eruv.

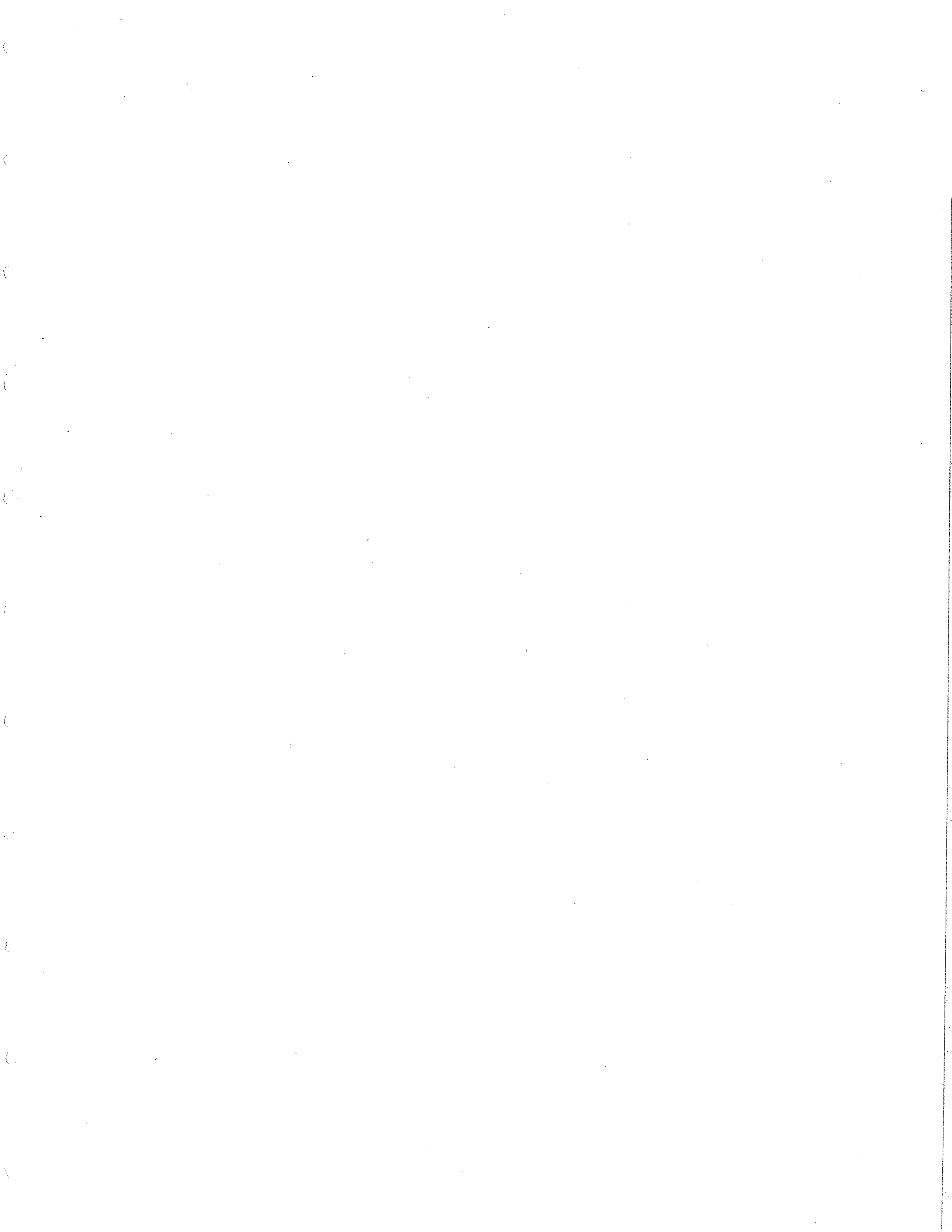
Verizon has understood that the Village of Westhampton Beach believes that its approval is required before Verizon may issues licenses to the EEEA and before the lechi staves may actually be installed on Verizon's utility poles. However, the papers that you have filed on behalf of the Village in the pending litigation, and comments made by you during oral argument on May 18, 2011, suggest that Westhampton Beach does not take the position that its sign laws or other ordinances apply to the attachment of lechis or that the prior approval of the Village is required before the installation of the lechis may occur.

Please clarify your position. If the Village believes that its approval is required before the lechis may be installed or that its laws or rules restrict the attachment of lechis to Verizon's utility poles, please let me know which laws or ordinances require such approval or impose such restrictions. If our prior understanding was incorrect, and if the Village does not contend that its approval is needed or that its ordinances restrict the attachment of lechis, then we will be happy to issue the licenses with respect to the poles located within the Village and to dismiss, without prejudice, our pending action against the Village.

Sincerely,



Michael E. Wiles



355 POST AVENUE, STE 201 WESTBURY, NEW YORK 11590 PHONE (516)334-4500 FAX (516)334-4501 WWW.SOKOLOFFSTERN.COM

BRIAN S. SOKOLOFF
BSOKOLOFF@SOKOLOFFSTERN.COM

March 20, 2012

Michael E. Wiles, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

VIA EMAIL

Re: East End Eruv Association
Our File No. 110004

Dear Mr. Wiles:

I have received your letter of March 14, 2012. I have been authorized by my client to respond to it as follows.

Your letter seems to be a well-calculated attempt to swat the ball over the net after you failed to respond to the issues that I mentioned in my papers and during the preliminary injunction hearing. The issues I raised logically precede the questions you put to me. The issues that I have raised demonstrate that Verizon's very questions to me are *ultra vires*.

In response to our demand for franchise and licensing agreements between Verizon and the Village of Westhampton Beach, you have indicated that Verizon's authority to contract with the EEEA was based upon New York State Transportation Corporation Law, § 27. Had you undertaken the requested review of records held by Verizon and its predecessor, New York Telephone Company, which we demanded, you would have found that the Village granted a franchise to New York Telephone Company with respect to the utility poles on Dune Road. This agreement is binding upon Verizon, is not subject to the Transportation Corporation Law, and precludes Verizon from entering into sublicensing agreements with private entities for private purposes. A copy of this agreement is attached. Section 27 also precludes Verizon from entering into sublicensing agreements with private entities for private purposes.

I ask again, in view of the franchise agreement between New York Telephone Company and the Village, how you can reconcile your position that Verizon is empowered to issue a sublicense to the EEEA with the holding in Greenwood Lake & Port Jervis Railroad Company v. New York & Greenwood Lake Railroad Company, 134 N.Y. 435, 440 (1892), where the Court of Appeals stated: "A

license is a personal, revocable and non-assignable privilege ... to do one or more acts upon land without possessing any interest therein."[1]

In Rochester Tel. Corp. v. Village of Fairport, 84 A.D.2d 455, 456 (4th Dep't 1982), the court held that a Village acting pursuant to N.Y. Village Law § 4-412(3)(6) in granting a franchise to a utility "grants the utility no property interest in the right of way, only a license to maintain its facilities there." Verizon has not cited any authority for the proposition that, as a public utility, it has the power to do anything other than "to maintain its facilities" on site of its licensed property.

Finally, you have failed to explain how Verizon can contract with the EEEA when Village Law § 6-602 and Attorney General Opinion 1953-35 instruct that the public highways are held in public trust for the benefit of the public in general and cannot be devoted to a private use. Neither Verizon nor the EEEA has the power to amend or repeal a statute. That power belongs only to the Legislature and the Governor.

If LIPA, your co-plaintiff, had not rejected our demand for copies of franchise and license agreements with the Village, the research would have found that franchise agreements for providing electricity to the Town of Southampton (including Westhampton Beach) were entered into with the Town of Southampton and Riverhead Lighting Company in 1910, with Patchogue Electric and Lighting in 1911, and with Southampton Electric and Lighting in 1903. The franchise agreements with these predecessors-in-interest of LIPA are still in force and effect. They preclude LIPA from granting a sub-license to a private entity for private purposes. A copy of the franchise agreements is attached.

You made reference to Mr. Sugarman's letter of February 29, 2012. I am copying you on a response that I am sending to him simultaneously. It points out that there is a fundamental defect in his letter. It makes reference to a Westhampton Beach-only eruv but it describes an eruv that encroaches into – and involves one or more poles located in – the Town of Southampton. That municipality has given its position on a proposed eruv that is located in its borders. One would have thought Mr. Sugarman would have finalized these types of details before bringing a lawsuit or writing accusatory letters to counsel.

I look forward to either your demonstration of where in the law your clients obtained a right to sublicense to the EEEA for non-telephonic, private purposes or your admission that it has no such power. I am sure that we both agree that your client cannot create such power *ipse dixit*.

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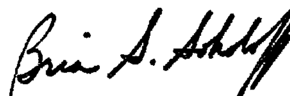
[1] That language has withstood the test of time and is still rock-solid law. See e.g. Kohman v. Rochambeau Realty & Development Corp., 17 A.D.3d 151, 153 (1st Dep't 2005).

Thank you for your attention to this matter.

Very truly yours,

SOKOLOFF STERN LLP



Brian S. Sokoloff

BSS/--
Encl.

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April 5, 2012

Brian S. Sokoloff, Esq.
Sokoloff Stern LLP
355 Post Avenue, Suite 201
Westbury, New York 11590

East End Eruv Association

Dear Mr. Sokoloff:

I am writing in response to your letter dated March 20, 2012. We sent our March 14 letter to obtain a clear statement as to whether the Village has any legal objection to the issuance of licenses to attach lechis to Verizon's utility poles, so that we could give the parties the opportunity to resolve any such objection before we actually issue the licenses. Your letter seems to raise an objection based upon a contention that Verizon does not have authority to issue licenses to the EEEA. While I do not recall your previously having asked me to address the issues mentioned in your letter, we are happy to address them now.

Verizon disagrees with your contention that Verizon's rights over its utility poles are the subject of a "franchise" issued by the Village of Westhampton Beach. As Verizon stated in its responses to your discovery requests in June 2011, Verizon erects and maintains utility poles under the authority granted under Section 27 of the New York Transportation Corporation Law, which authorizes Verizon to "erect, construct and maintain" facilities "upon, over or under any of the public roads, streets and highways" in New York State. The New York Court of Appeals confirmed long ago that "telegraph and telephone companies derive the right to erect their poles and string their wires directly from the state." *See Village of Carthage v. Central New York Tel. & Tel. Co.*, 185 N. Y. 448, 451 (1906). More recently, the Court of Appeals confirmed that Section 27 granted Verizon's predecessor, the New York Telephone Co., an "unconditional right to erect and maintain poles for its lines upon public streets and highways." *See New York Tel. Co. v. North Hempstead*, 41 N.Y.2d 691, 693 (1977). The Court of Appeals rejected North Hempstead's attempted reliance on "franchise" theories because the right to install and use utility poles "came from the State of New York and not from" a franchise granted by the municipality. *Id.* at 698.

Verizon similarly disagrees with your statement that Section 27 of the New York Transportation Corporation Law "precludes Verizon from entering into sublicensing agreements with private entities for private purposes." This issue was decided by the courts in the *North Hempstead* case. The court in that case specifically rejected the contention (similar to that raised in your letter) that a telephone company "may only use its poles for telephone purposes and that the use of the poles for purposes other than that for which the plaintiff was granted a special franchise under section 27 of the Transportation Corporations Law is beyond its powers." Instead, the court confirmed that Verizon's predecessor had the

right "to enter into contractual arrangements with others for the use of space on its poles." *See New York Tel. Co. v. North Hempstead*, 86 Misc. 2d 487 (Nassau Co. 1975), *aff'd* 52 A.D.2d 934 (2d Dep't 1976), *modified* 41 N.Y.2d 691(1977).

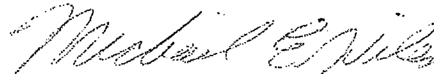
In fact, the Village of Westhampton Beach has previously executed license agreements with Verizon (copies of which were introduced during the preliminary injunction hearing before Judge Wexler), each of which contained an express acknowledgement by the Village of Verizon's rights "to grant, renew and extend rights and privileges to others not parties to this Agreement, by contract or otherwise, to use any poles and/or anchors covered by this Agreement."

Your letter refers to certain board resolutions authorizing the Coast Guard to replace telephone poles on Dune Road following a storm in the 1930s and, later, allowing the Coast Guard to transfer ownership of those poles to Verizon, which your letter characterizes as the grant of a "franchise" to Verizon. We do not believe those resolutions can accurately be described as such. Even if those board resolutions could be construed as a "franchise," however, Verizon notes that there is no express limitation in the resolutions as to the manner in which the utility poles may be used or as to the items that may be attached to them. When a franchise is granted, it becomes "property protected by the Constitution and, except for conditions attached to the consent, subject to regulation only under the police power." *See City of Olean v. Western New York and Pennsylvania Traction Company*, 214 N.Y. 526, 528 (1915). Here, the board resolutions cannot be construed as limiting the items that can be attached to telephone poles because "there was no such express reservation" in the resolutions themselves. *See New York Tel. Co. v. North Hempstead, supra*, 41 N.Y.2d at 698. Nor does the attachment of lechis raise any issues as to the Village's police powers, because you have acknowledged that the Village of Westhampton Beach has no ordinances or other "police power" laws or regulations that apply to the attachment of lechis to utility poles.

* * *

As I stated earlier and in my prior letter, it has always been Verizon's preference (if the Village has an objection to the issuance of the licenses) to give the parties the opportunity to obtain a court determination as to the merits of that objection before actually proceeding with the attachment of the lechis. If the Village of Westhampton Beach wishes to contest the matters discussed above, and agrees to submit the issue to Judge Wexler for decision, then Verizon will refrain from issuing the licenses to give the Court time to issue a decision. Otherwise, Verizon will issue the licenses. Please advise me of the Village's position no later than April 13, 2012.

Very truly yours,



Michael E. Wiles