SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU
PRESENT THE HON. GEORGE R. PECK, J.S.C.
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GLENN K. DENTON and
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KATHLEEN J. DUVAL,
1251 Round Swamp Road
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1 Locust Road
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Petitioners pro se,

Index Number

5290/15

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED REPLY

For Judgements and an Order Pursuant to Article 78, Section 6313 (Temporary Restraining Order), and Section 6311 (Preliminary Injunction) of the Civil Practice Law and Rules ("CPLR")

-against-

TOWN OF OYSTER BAY TOWN BOARD BY
SUPERVISOR JOHN VENDITTO,
Town Hall
54 Audrey Avenue
Oyster Bay, N.Y. 11771

BEECHWOOD POB LLC,
200 Robbins Lane
Jericho, N.Y. 11753

PLAINVIEW PROPERTIES SPE LLC,
1600 Old Country Road, Suite 101
Plainview, N.Y. 11803

Respondents and Necessary Parties

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Introduction

Respondents' memoranda of law aggressively attack the foundations of Petitioners' case in terms of their basic ability to prosecute this matter and the subjects the court may lawfully consider. Yet their assertions have no basis in law and are flatly contradicted by the controlling cases.

The logic Respondents push on this Court to apply the "exhaustion of administrative remedies" doctrine to reject Petitioners' claims was squarely rejected by the Court of Appeals in 1986 (below).

The claim that case-law requires the Court to find Petitioners lack standing on proximity grounds is contradicted even by the case the Respondents cite, among others.

Other grounds for standing are equally misrepresented or misinterpreted, and if properly understood clearly sustain Petitioners' legal standing before the Court.

Case-law also supports Petitioners' assertions regarding both the Court's jurisdiction over the 'hard look' issue and the nature of the tests to be applied that demonstrate the woeful shortcomings of the SEQRA Review in this case (pursuant to the State Environmental Quality Review Act ("SEQRA"), 6 NYCRR 617).

With regard to the unlawful 'segmentation' the case presents, case-law with clear parallels similarly sustains Petitioners' claims in this matter (below).

The tactic of Respondents to create a massive legal assault -- a campaign of legal 'shock and awe' -- that is nonetheless founded on unsupported legal argumentation is similar to the tactic of the Respondents' overall case.

In fact the SEQRA review itself was built on a paper edifice that was factually and

legally flawed -- which papered-over critical environmental questions, and engaged in fast-and-loose sidestepping of rules for a complete review, covering all connected actions.

Whether the Court wishes to see the Respondents' deceptions in this case as deliberate cynical manipulations or as clumsy innocent error, the case cannot be defended as a proper discharge of public responsibilities to protect the environment and the community.

But in numerous instances the law is transparently misused in Respondents' legal arguments.

Exhaustion of Administrative Remedies

Respondents argue that Petitioners are prohibited by law from making any arguments to the Court that they personally did not make before the administrative hearings of the Town Board.

But with respect to both prongs of this argument, Respondents are indisputably in error as a matter of law.

Petitioners make this statement not as a rhetorical flourish, but with true dismay that they waste the time of both the Court and the Petitioners in such a blatant and indefensible manner.

Case law firmly establishes (1) that is sufficient for *any party* to have raised an issue before an agency for the Court to enjoy complete jurisdiction on review; and (2) that in any event, whether an issue was raised or not, the doctrine of exhaustion of administrative remedies does not act as a bar to the Court's authority in environmental

matters.

Respondents cite Aldrich v. Pattison, 107 AD 2d 258 (Second Dep't, Dept. 1985), other cases, including Jackson v. UDC, 67 N.Y.2d 400 (1986), in support of their argument that if an issue or argument is not raised in the administrative process it is barred from review.

But those cases are not availing for the argument the Respondents submit. In fact, Jackson refutes it specifically. In both cases the courts in fact did hear the arguments thus supposedly foreclosed (Aldrich at 269; Jackson at 427).

Respondents' theory has in fact been squarely dismissed by the courts:

> "At the outset, this Court notes that in response to the Petitioner 's allegation, that the Village failed to take a hard look at several environmental aspects of the proposed action, the Municipal Respondents, in relying on the Second Department's decision, (Aldrich v. Pattison, , 107 A.D.2d 258, 486 N.Y.S.2d 23) argue that the Petitioner's claims are barred by the doctrine of exhaustion of administrative remedies.
> .....
> Although the Municipal Respondents correctly cite the Second Department's 1985 decision in Aldrich v. Pattison for the principle that "the doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather than to the courts, and...to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts'" where environmental matters are involved, the Respondents have failed to take into consideration the Court of Appeals subsequent decision in Jackson v. New York State Urban Development Corp., N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298.
> .....
> The Court of Appeals disagreed with the lead agency, finding that the doctrine of exhaustion of administrative remedies did not foreclose judicial review. (id p.427). Instead, the Court found that the petitioners' failure to raise the issues at the administrative level was merely a factor to be considered in determining whether the lead agency acted reasonably in failing to consider the issues in its environmental review of the proposed action.

> Thus, even assuming that the Petitioner failed to raise its SEQRA objections during the proceedings before the Municipal respondents, such a failure does not foreclose judicial review of those objections herein. Therefore, this Court is left to determine whether the Municipal Respondents acted reasonably in failing to consider the numerous environmental issues associated with the rezoning."

Waldbaum v. Village of Great Neck, 10 Misc. 3d 1078(A), 2006 N.Y. Misc. LEXIS 160 (Supreme Court, Nassau County, Bucaria, J., 2006) (emphasis added, internal quotations and citations omitted in places) (where the Court held the Village failed to take a 'hard look' and segmented its consideration of waterfront development)

Another decision makes the same point:

> "It is well settled that the doctrine of exhaustion of administrative remedies does not foreclose judicial review of SEQRA issues (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 503 NYS2d 298 [1986]). Instead, a petitioner's failure to raise issues at the administrative level is merely a factor to be considered in determining whether the lead agency acted reasonably in failing to consider the issues in its environmental review of the proposed action (Matter of Jackson v New York State Urban Dev. Corp., id.). Accordingly, the Court will consider the issues raised by the respondents' in the context of its determination of the allegations set forth in the petition.

Committee to Stop Airport Expansion v. Wilkinson, 2012 NY Slip Op 31914 (Supreme Court, Suffolk County, 2012, Jones, J.)(emphasis added, internal quotations and citations omitted in places) (where the Court considered the petitioners causes of action despite their allegedly not having been raised administratively, but rules against the petitioners on the merits)

The Court of Appeals ruled in Jackson:

> "Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS ["Draft Environmental Impact Statement"], yet failed to mention any impact on archaeology. While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners' silence cannot be overlooked in determining whether the agency's failure to discuss an issue in the FEIS ["Final Environmental Impact Statement"] was reasonable. The EIS ["Environmental Impact Statement"]process is

> designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing a FEIS and approving a project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush.
>
> The record here establishes that early in its review UDC considered the project's possible archaeological impact and concluded that there would be none...."

Jackson v. UDC, 67 NY2d 400 (1986), at 427 (emphasis added, internal quotations and citations omitted in places) (where the court ruled that arguments not raised before the administrative hearing could still be considered by the courts)

The quotation of the "ambush" concept by Respondents was 'selective', and the law as established by the courts is diametrically opposite what the Respondents claimed.

But this Court should not, in any event, adopt the 'rule' from Jackson that the alleged failure of Petitioners to raise an issue should prejudice their argument, because (1) the arguments and issues were in fact raised at the appropriate time; and (2) the fact the arguments were made by parties other than Petitioners has been judicially determined to be completely irrelevant as a matter of law.

Respondents made much of the fact that an environmental advocate, among others, raised many of the issues that the Petitioners are now asserting. On the contrary, there is no issue in the law.

The Second Department has held that as long as issues were raised, it is not important who raised them:

> "Contrary to the contention of the Village respondents and the Maddalonis, the Shepherds are not precluded from challenging the site plan approval on the ground that they did not actively participate in the

> administrative proceeding. The objections to the Planning Board's determination that they raise in this matter were specifically advanced by an attorney representing the three other petitioners/plaintiffs during the administrative proceeding (see Matter of Youngewirth v Town of Ramapo Town Bd., 98 AD3d 678, 680-681 [2012]; Matter of Shapiro v Town of Ramapo, 98 AD3d 675, 678 [2012]; cf. Matter of Miller v Kozakiewicz, 300 AD2d 399, 400 [2002]; Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack, 148 AD2d 130, 135 [1989]; Aldrich v Pattison, 107 AD2d 258, 267-268 [1985]). Moreover, the Shepherds established their standing to challenge the site plan approval by alleging 'direct harm, injury that is in some way different from that of the public at large' (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 774 [1991]). Their allegations that the approved construction project will harm their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property, are sufficient to confer standing."
>
> Matter of Shepherd v. Maddaloni, 103 A.D.3d 901 (Second Dep't, 2013) at 905 (emphasis added, internal quotations and citations omitted in places) (where the Court ruled that the petitioners, the Shepherds, had standing to sue and should not have been precluded by the Court because the issues they raised were raised by others in the proceeding, among other issues related to zoning and environmental impact on the waterfront that the Shepherds shared at a half-mile distance from the property under review)

In the Shepherd decision, the appellate court specifically determined that the lower court was in error to have attempted to disqualify the Shepherds from the Article 78 based on the alleged handicap that they themselves had not raised the issues at bar before the administrative bodies. The Court found that there was no handicap, because the matters had been raised by others.

In the present matter, thus, Petitioners are in no way prevented from raising the issues they have raised -- which were raised by themselves or others to the Town Board, as noted herein and in the Reply.

Furthermore, where once there was apparently a common-law bar to 'non-

participants' maintaining an Article 78 proceeding regarding an administrative proceeding, that bar was lifted and was so recognized by the courts, as noted here:

> "Respondents contended, and Supreme Court agreed, that the phrase 'because the person aggrieved was not a party to the original proceedings' affirmatively precludes petitioners from maintaining a CPLR article 78 proceeding because they were not parties in the underlying DEC proceedings....[W]e conclude that Supreme Court misconstrued the statute and found a prohibition where none was intended.
>
> ECL 19-0511...was derived essentially verbatim from Public Health Law § 1283...and also related to judicial review of administrative determinations concerning air pollution...[T]he unavailability of judicial review to nonparties to adjudicatory administrative proceedings when these sections were added leads us to conclude that the phrase merely recognizes a then-existing common-law bar to review by certiorari. ...Supreme Court erred in ruling that ECL 19-0511 (2) supplanted CPLR 217 (1) [statute of limitations for special proceedings]. Because the four-month limitations period of CPLR 217 (1) was applicable here, and there is no dispute that petitioners commenced their CPLR article 78 proceeding within four months of DEC's determination, we reverse the dismissal of this proceeding as to the DEC respondents."

Stop-The-Barge v. Cahill, 298 AD 2d 817 (Third Dep't, 2002) at 818-19 (emphasis added, internal quotations and citations omitted in places) (where the Court restored an Article 78 proceeding because the four-month statute of limitations period prescribed by CPLR Article 78 applied to the matter was applicable, and the petitioner enjoyed the right to pursue an Article 78 special proceeding, despite the fact the party had not participated in the earlier administrative process)

Thus, if at some point in time there was a bar to the non-party maintaining an Article 78 proceeding, that bar is no longer in effect, and similarly naturally the issues they raise are subject to judicial scrutiny.

Contrary to another element of the Respondents' argument, objections were in fact raised and referenced in the FEIS as to the Town's failure to account for contiguous habitat loss; failure to count wildlife in any way whatsoever; and the failure to provide a

robust and protective buffer.

Thus is the Court relieved of any obligation, however tenuous, to excuse in any manner deficiencies in the SEQRA Review. The Court should rule exclusively on the merits of the issues Petitioners have raised.

Respondents further allege that the issues of segmentation and lack of a 'hard look' were nowhere raised in the record, but the matters are not administrative issues but rather causes of action -- violations of law and judicial standards.

For example, in Aldrich, *supra*, the issues 'not raised' were substantive topics not legal or statutory matters. They were: (1) the impact of a project on wetlands; (2) the increase in sewage; and (3) the production of sewage sludge (Aldrich, *supra*, at 268-9).

Similarly, in Jackson, *supra*, the matter 'not raised' was the matter of archaeological artifacts on the site (*ibid*., at 427).

'Segmentation' and 'Hard look' are Statutory and Judicial Standards, Not Factual 'Issues' To Be Established by Fact-finding

By contrast the standards and rules covering 'segmentation' and 'hard look' are statutory and judicial requirements, respectively. They are not factual 'issues' to be established by agency fact-finding.

It would be contrary to principle of 'due process' to argue that an agency was immunized from a failure to obey state law by the failure of a citizen to raise the issue before seeking to enforce that law as it applied to themselves.

And the courts could hardly countenance a doctrine that would undermine their established criteria for reviewing an agency decision merely because a citizen had failed

to intone that judicial standard in the course of testimony before the agency.

In both cases the doctrine urged by the Respondents with respect to statutory or legal standards would lead to chaos.

Nevertheless the issues underlying the segmentation and hard look were in fact raised and on the record.

With respect to segmentation, the issue as raised before the agency was the fate of the forests (FEIS p. 60), and the segmentation was the result of the unreviewed plan to remove large tracts of forest supposedly dedicated for preservation buy instead intended to be 'cleared and graded' by the developer for athletic fields.

With respect to the 'hard look' violations, they involved the fate of the forest and other habitat (FEIS p. 58, p. 60); the lack of clear analysis of wildlife present (FEIS p. 62, p. 65); and the weakness of the analysis of the 'visual buffer' (FEIS p. 67; Testimony of Glenn Denton -- Affidavit John M. Ellsworth, ¶33; Testimony of Nassau County Planning Commission -- Petition, Exhibit 44).

Standing Based on 'Proximity' and 'Use'

Respondents' argument that Petitioners lack legal standing separate and apart from the issues they have raised in this special proceeding is also thoroughly rejected by case law.

Petitioners enjoy legal standing to sue based on two separate and distinct characteristics that attach to them: (1) they live in very close proximity to the land at issue; and (2) they use and enjoy the natural resources on the land as it exists now and

will suffer a clear injury if the land is developed as planned.

With respect to the "proximity" standard of standing to sue, the case-law is very clear that proximity, particularly in zoning matters, is sustained by close proximate residence.

> "The petition alleged that Griffith resided directly across from the 'main building complex of the Infirmary,' that the Bartons' property directly abutted the site of the proposed Project, and that they would suffer an adverse scenic view. Other proof in the record established that Griffith had a view of "[o]ne of the older structures and portions of others," and that the Bartons had a view of the Infirmary from a distance of 1,200 feet (see Matter of Parisella v Town of Fishkill, 209 AD2d 850 [1994]). Since Griffith and the Bartons alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA, they established the requisite standing to challenge the Legislature's resolutions."

Barrett v. Dutchess Co. Legisl., 38 AD 3d 651 (Second Dep't, 2007) at 654 (emphasis added, internal quotations and citations omitted) (Where the Court ruled that two petitioners lacked standing at an intersection that would face increased traffic, but two enjoyed standing because they could see the buildings that were being redeveloped, but the court ultimately sided with the municipality and affirmed its environmental review)

Respondent Beechwood, in its memorandum of law, p. 12, misrepresented the decision and its applicability to the present matter.

The principle of proximity as a clear indication of legal standing was further affirmed thusly:

> "...[T]he petitioners, who live across the street from the site, commenced this proceeding pursuant to CPLR article 78....
> ....
> Since the petitioners live in close proximity to the portion of the site that is the subject of the challenged determinations, they did not need to show actual injury or special damage to establish standing (see Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 687 [1996]; Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N.

> Hempstead, 69 NY2d 406, 409-410, 413-414 [1987]; Matter of Village of Chestnut Ridge v Town of Ramapo, 45 AD3d 74, 89-90 [2007]; Matter of Ontario Hgts. Homeowners Assn. v Town of Oswego Planning Bd., 77 AD3d 1465, 1466 [2010]). Further, the injuries alleged by the petitioners fell within the zone of interests to be protected by SEQRA (see Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d at 687; Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772-775 [1991]; Matter of Bloodgood v Town of Huntington, 58 AD3d 619, 621 [2009]; Matter of Village of Chestnut Ridge v Town of Ramapo, 45 AD3d at 94).

Shapiro v. Town of Ramapo, 98 A.D.3d 675 (Second Dep't, 2012)(Where the Court ruled that proximity was a solid basis for standing, further that the issues raised were in the zone of interest of SEQRA and therefore remitted the matter for full adjudication of SEQRA claims)

Petitioners in the present matter all live very close -- less than two hundred feet from the inner boundary of the proposed visual buffer (Petition, Exhibit 1, ¶ 9, 10, 11).

It has been argued that the common standard in NY law is five-hundred feet as the threshold for 'proximity' based inference of standing, based on the analysis in a dissenting opinion in the Save the Pine Bush decision:

> "...[C]ourts have held landowners or those who reside within 500 feet of a challenged project are close enough to remove the burden of pleading a special harm (see Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret, 286 AD2d 906, 906-907 [4th Dept 2001] [petitioners who owned property within 200 feet of a cellular tower had standing to challenge the replacement of an antenna on the tower]; but see Matter of Oates v Village of Watkins Glen, 290 AD2d 758 [3d Dept 2002] [petitioner residing 530 feet away had no standing]; Matter of Buerger v Town of Grafton, 235 AD2d 984 [3d Dept 1997] [petitioner 600 feet away lacked standing])."
>
> Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), concurring opinion of Justice Pigott, at 309 (where the Court sustained Petitioners' standing in a SEQRA case on the grounds of their 'use and enjoyment' of property nearby that under review, despite the fact Petitioners did not assert they lived in any proximity to it)

But the standard is not a fixed distance set in stone, and is a matter of judgement by

the courts based on the facts. In the present case, there is strong support for the proximity based injury, as attested by the Petitioners affidavits, the measurement of the distance and photo image included with the Petition (Petition, Exhibit 1).

A review of the cases cited by Respondent Beechwood demonstrates none of the cases concerns a distance so close as those of the Petitioners which are all under 200 hundred feet from the inner boundary of the 'visual buffer' set on Round Swamp Road in front of their homes[1].

Furthermore the Petitioners each alleged environmental injury -- degradation of their views and enjoyment of the nearby woods -- as the basis for their claims (Petition, affidavits, Exhibit 2).

For example, Petitioner Glenn Denton affirms:

> "My property line is approximately 160 feet from the farthest edge of the planned 125-foot buffer on the Country Pointe at Plainview property across Round Swamp Road from my property.
>
> My wife and I moved here because of rural feel of the area. The abundance of natural forestation across from our home in the former Nassau East Office Complex property provides a relief from overdeveloped feel of most of the areas my wife and I also looked at in Nassau County.
>
> My wife and I see the forest across the street from our front and side yards, living room, dining room, den, and our bedrooms. Given that I am retired now, and my wife works from home, my wife and I see the forest for most of our waking hours.
>
> The sight of the forest presents a feeling of serenity for me that helps offset the day-to-day stresses of life. The sight of the forested area helps my emotional health.

[1] The fitness trail is to be constructed within the confines of the buffer and will be even closer to their homes, along with its potential lighting and other features.

> The forest is a major contributor to the joy I get from my home. I feel like I'm in a relaxed, non-busy area, which enables me to have peace when I'm home.
>
> The forest certainly adds significant monetary value to my home as it provides a unique natural setting not found in most Nassau county homes, including most homes in the local Old Bethpage / Plainview area.
>
> Cutting the forest down to the proposed 125 ft width of buffer across from my home, with a bisecting lighted pathway, will destroy the current screening properties of forested area. During the summer, the forest is just enough to screen the small houses that currently exist behind the forest. During the winter, without leaves, the existing small houses are clearly visible but still mostly screened by the existing forest. Narrowing the forest, and adding the lighted pathway, will certainly result in the large new housing project being overbearingly visible, destroying the natural and serene characteristics of the forest, and providing a daily reminder that my wife and I have been encroached upon by a large development.
>
> Seeing the buildings, joggers, and lighting directly across the street from me will transform the feeling of serenity I cherish here, to a daily stress that I've been encroached upon."

(Affidavit of Glenn K. Denton, Petition, Exhibit 2, ¶¶ 4-11) (emphasis added)

The other Petitioners made similar affirmations in their affidavits (Petition, Exhibit 2).

Thus the Petitioners' standing to sue is substantiated based on the law, and based on the proximity of their homes to the Subject Property and the nature of the injuries alleged, all environmental in nature.

Petitioners' enjoy additional standing to sue based on their 'use and enjoyment' of the natural lands directly across from their homes, supported by the most authoritative statement on standing to date, in Save the Pine Bush, *ibid*.

That decision by the Court of Appeals on a SEQRA challenge begins with a sharp statement on standing, which is meant to settle the issue once and for all:

> "We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource."

Save the Pine Bush, at 301.

While the Court's decision does include a 'caveat' that petitioners need to demonstrate for the court the nature of their 'injury', this is no longer the daunting challenge it once was.

In fact all the petitioners in Save the Pine Bush needed to show was that they were aficionados of a butterfly whose habitat might be impacted by a proposed new hotel, and they regularly visited a nearby habitat of the butterfly.

> "In recognizing that petitioners' alleged injuries are a sufficient basis for standing, we do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face. Standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case" and therefore "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof" (Lujan, 504 US at 561). Here, the City does not challenge the reality of the injuries petitioners assert—understandably so, since it seems highly likely that many members of an organization called Save the Pine Bush, Inc. are people who frequently visit and enjoy the Pine Bush."

Save the Pine Bush*, ibid*., at 306.

Petitioners in the present matter affirmed by affidavit that they frequently walk in and around the natural areas of the site, treasure the nature and wildlife present there (Petition,

Exhibit 2), and thus are squarely within the group of people "who frequently visit and enjoy" the natural resources there (Save the Pine Bush, *ibid*., p. 306) and would be injured by changes to the property.

The injuries that the Petitioners have alleged are environmental in nature, thus within the 'zone of interest' of SEQRA. Furthermore the injuries Petitioners alleged are concrete and specific, and correspond to the environmental impacts that were documented in the DEIS and other SEQRA materials:

(1) As the habitat will be largely removed, the animals Petitioners enjoy will be removed as well, killed or displaced (e.g., DEIS p. 224); (2) The visual impact from the project will intrude on Petitioners' homes due to a visual buffer not adequately analyzed (e.g., Positive Declaration, 2012, Record, Exhibit 9, p. 2[2]; also DEIS Figure 31, p. 346); (3) The natural areas of woods, meadows and shrublands will be removed in many places, thus depriving Petitioners of the pleasure they experienced from them (e.g. DEIS discussion of removal of various parcels, and illustration DEIS Figure 27A, p. 213).

Petitioner Bridget Denton affirmed in part:

> "With my husband I walk daily on the interior perimeter of the "NW Forest".
>
> With my husband I pass the 'SW Forest' on daily walks as well.
>
> I find being in the forest is a peaceful place to go. It feels like a sanctuary. The woods are so dense, each forest section providing something different. Some are very old growth, these trees are magnificent and beautiful to look at. I also take comfort in the fact that all the woods diminish the noise and car exhaust in our area.

[2] "Visual Resources -- The proposed development would significantly alter the visual character of the subject property...."

> In the forest I have encountered so many different animals and birds. Foxes and chipmunks, bunnies and guinea hens. Not to mention the abundance of other bird life. Pheasant, Hawks, wood peckers finch, literally countless numbers. I have even heard owls at night. We have also come across a moth the size of a lunch plate.
>
> I am sick over the thought of losing these beautiful woods and all the wildlife that lives there. We will no longer see them in the buffer with all that building.
>
> There are so few woods left in the surrounding area I can't imagine where all these animals will go when the woods are substantially reduced."

(Affidavit of Petitioner Bridget K. Denton, Petition, Exhibit 2)(emphasis added)

The other Petitioners made similar affirmations of their use and enjoyment of the natural resources on the Subject Property in their affidavits, Petition Exhibit 2.

Just as was the injury of the petitioners in Save the Pine Bush, the 'use and enjoy' prong of Petitioners standing is based on their being among the self-selected sub-group of the population at large "who frequently visit and enjoy" the natural resources on the Subject Property (Save the Pine Bush, *ibid*., p. 306, emphasis added).

The 'general public' does not identify as those who visit and enjoy the natural resources, or who live adjacent to them. Thus are Petitioners distinguished, as required for legal standing.

Parenthetically, SEQRA makes no distinction, as Respondents argue, that a "natural resource" is any less so because it is under private ownership. SEQRA in fact appears to be applied far more often to private property than public, judging from the case law.

Those resources, which had been property of Nassau County for decades, remained open and accessible to the public in recent years, especially because of the necessary

access to athletic fields used by some local teams. That matter is undisputed.

The Court in Save the Pine Bush also held -- contrary to additional arguments advanced by the present Respondents -- that the fact a rezoning affects private property not protected by law made no difference to the standing of the petitioners in Save the Pine Bush to seek to have its development reviewed:

> "In September 2003, Tharaldson Development Company, the owner of a 3.6 acre parcel of land located on Washington Avenue Extension in Albany, applied for a rezoning of the parcel to allow for construction of a hotel. Though zoned for residential use, the property was at that time a parking lot. Adjacent properties were occupied by shopping malls and commercial office buildings.
>
> Tharaldson's property is not part of the area protected by the Albany Pine Bush Preserve Commission, but it is near to protected areas, including Butterfly Hill, a habitat of the endangered Karner Blue butterfly. Butterfly Hill is said by petitioners to contain "[t]he largest population of Karner Blue butterflies south of the [New York State] Thruway," and, thanks in part to petitioners' efforts, significant Pine Bush acreage has long been set aside for the preservation of Karner Blues (see Matter of Save the Pine Bush v Common Council of City of Albany, 188 AD2d 969 [3d Dept 1992]). The effect of the hotel construction, if any, on Karner Blues was recognized from the outset as the principal environmental issue raised by the proposal."
>
> (Save the Pine Bush, *ibid*., at 301-2, emphasis added)

In the various SEQRA and standing cases cited, there is no exemption from SEQRA review, or distinction of the injury caused, whether property is public or private. The issue is whether it is natural land -- or other protected categories under SEQRA -- that will be impacted and thus have an impact on the parties seeking relief from the courts.

To argue otherwise would be at variance with the goals of SEQRA to protect the environment when government agencies act in their official capacity.

Hard Look

A "hard look" is the foundation standard for evaluating the SEQRA process, as quoted in Jackson v. UDC:

> "...[I]n a case such as this, courts may, first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination (Aldrich v Pattison, 107 AD2d 258, 265, *supra;* Coalition Against Lincoln W. v City of New York, 94 AD2d 483, 491, *affd* 60 N.Y.2d 805, *supra;* H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232). Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process."

Jackson v. NY UDC, 67 NY 2d 400 (1986) at 417 (emphasis added, internal quotations and citations omitted in places)(where the Court summarized the state of the law for SEQRA reviews, including reiterating the standard of 'hard look' as previously established, in a case where the Urban Development Corp. was determined to have met its SEQRA duties by the totality of its analysis)

But the term is borrowed from the case law surrounding the federal "National Environmental Policy Act" ("NEPA"), 42 U.S.C. §4321 et seq., enacted by Congress six years before SEQRA, in 1969, as recognized by the NY courts:

> "...[T]he judicial standard of review is the 'hard look' standard applied in H.O.M.E.S. v New York State Urban Dev. Corp. (69 AD2d 222, 232). Reviewing an agency's determination that the proposed project would not have a significant environmental impact sufficient to require the preparation of a FEIS, the court, in H.O.M.E.S., applied the standard developed by the Federal courts in construing the National Environmental Policy Act (NEPA) (see, 42 USC § 4321 et seq.), the statute upon which SEQRA is modeled. The court held that any agency's negative declaration would pass judicial scrutiny if the record showed that it identified the relevant areas of environmental concern, took a 'hard look' at them (Kleppe v Sierra Club, 427 US 390, 410, n 21; Maryland-National Capital

> Park & Planning Commn. v United States Postal Serv., 487 F.2d 1029, 1040) and made a "reasoned elaboration" of the basis for its determination (City of Rochester v United States Postal Serv., 541 F.2d 967, 973; H.O.M.E.S. v New York State Urban Dev. Corp., *supra*, pp 231-232; see also, Matter of Cohalan v Carey, 88 AD2d 77, 81). Recent decisions have applied the 'hard look' standard to the judicial review of the substance of a FEIS and the governmental determinations concerning the environmental impact of a proposed project based upon that document (see, Coalition Against Lincoln W. v City of New York, 94 AD2d 483, 491-492, affd 60 N.Y.2d 805; Matter of Environmental Defense Fund v Flacke, 96 AD2d 862)."

Aldrich v. Pattison, 107 AD 2d 258 2nd Dept. 1985 at 265; cited by Jackson v. UDC, 67 NY 2d 400, at 417. (emphasis added, internal quotations and citations omitted) (where the Court held among other things that the agency had in fact taken a 'hard look' as required at matters challenged in the Article 78 proceeding regarding an incinerator project)

This parallel between NEPA and SEQRA is further illustrated by a diversity case of state and federal jurisdiction dealing with environmental challenges to a highway interchange in Newburgh, N.Y., Stewart Park and Reserve Coalition, Inc. (SPARC) v. Slater, 352 F.3d 545 (USCA, Second Cir., 2003). The Court stated:

> "NEPA requires a federal agency to prepare an EIS before taking any major action "significantly affecting the quality of the human environment." ....The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences....Similarly, in reviewing an agency's SEQRA determination, a court's role is not to choose among alternatives or to substitute its judgment for that of the agency. ...Rather, it is to review the record to determine if the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and make a 'reasoned elaboration' of the basis for its determination."
>
> Stewart Park and Reserve Coalition, Inc., *ibid*., (emphasis added, internal quotations and citations omitted). (*ibid*. at 557-8)

In the absence of an explicit definition of 'hard look' from the state courts, it is instructive to reference the federal description of what a 'hard look' entails.

Notably the state courts have relied on federal environmental standards otherwise, for example regarding standing, where the Court of Appeals ruled:

> "In recognizing that injury of the kind petitioners here allege can confer standing, we adopt a rule similar to one long established in the federal courts. In Sierra Club v Morton (405 US 727, 734 [1972]), the United States Supreme Court held that a generalized "interest" in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's '[a]esthetic and environmental well-being' would be enough...."

Save the Pine Bush, *ibid.,* at 305

A federal case used as a benchmark for the 'hard look' standard by at least one textbook[3] is National Audubon Society et. al. v. Dept. of the Navy, 422 F.3d 174 (US Court of Appeals, Fourth Cir., 2005), defines it as follows:

> "What constitutes a 'hard look' cannot be outlined with rule-like precision. At the least, however, it encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail.
> .....
> We may not, of course, use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency. Robertson, 490 U.S. at 350, 109 S.Ct. 1835. However, this does not turn judicial review into a rubber stamp. '[I]n conducting our NEPA inquiry, we must `make a searching and careful inquiry into the facts and review whether the decision . . . was based on consideration of the relevant factors and whether there has been a clear error of judgment.' (at 185)
> .....
> Two further considerations guide us in assessing whether an agency has conducted a 'hard look'. First, given all the possible factual variations in NEPA cases, an agency's obligations under NEPA are case-specific. A 'hard look' is necessarily contextual. See Hodges, 300 F.3d at 445 (describing the court's role as "a searching and careful inquiry into the facts" and the agency's consideration of "relevant factors") (quotation

[3] "NEPA and Environmental Planning: Tools, Techniques, and Approaches for Practitioners," Charles H. Eccleston, Boca Raton, Fla.: CRC Press, 2008 p. 16.

> marks omitted); California v. Block, 690 F.2d 753, 761 (9th Cir.1982) ("The detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action."). (at 185-186)
>
> Second, as the Navy correctly contends, a court reviewing an EIS for NEPA compliance must take a holistic view of what the agency has done to assess environmental impact. Courts may not "flyspeck" an agency's environmental analysis, looking for any deficiency, no matter how minor. (at 186)
>
> .....
>
> By the same token, however, a totality of the circumstances approach means that a court must view deficiencies in one portion of an EIS in light of how they affect the entire analysis. See 40 C.F.R. § 1502.1 (requiring that an EIS "shall be supported by evidence that the agency has made the necessary environmental analyses"). The Navy does not dispute that defects in different forms of analysis that would not by themselves indicate NEPA non-compliance may nevertheless do so in combination. An agency may not, for example, paper over one inadequate mode of analysis by referencing another with shortcomings of its own. A reviewing court must therefore examine all of the various components of an agency's environmental analysis in order to determine, on the whole, whether the agency has conducted the required "hard look." (at 186)
>
> The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms. (at 187)
>
> National Audubon Society, *ibid*.

In that case, where the US Navy sought to build an air training facility next to a wildlife preserve, the Court ruled that the Navy had failed to conduct a 'hard look' because (1) its field studies were inadequate, in part because they chose the wrong seasons for some of them (at 188); (2) the methods it used to predict bird-strikes were incomplete (at 191); (3) its reviews of the literature were skewed and selective (at 192); (4) the reliance on comparative data from elsewhere failed to acknowledge important differences involved (at 195), and (5) the Navy failed to assess the cumulative impacts

from coexisting military use of the airspace (at 197).

There are of course significant differences in the size of the Navy's proposed project and that of the Respondents in the present matter, as well as in the magnitude of natural resources involved.

Respondents here conducted none of the types of analyses performed by the Navy -- which included counting or tracking birds by radar (at 189).

However there are important parallels nonetheless, in that there is an impact on wildlife and habitat that required a complete 'hard look'.

The key missing "hallmark" of the 'hard look' (at 187) is the "forthright acknowledgment of potential environmental harms". In that sense the term 'hard look' appears to imply a level of 'brutal' honesty. What makes a 'hard look' hard is that it does not candy-coat the truth but is direct and clear.

Yet in the SEQRA review of the Beechwood Project, the Town has misrepresented the consequences for nature all around, this violating the 'hard look' requirement:

- The Town claims the habitat is not really any good because it is infested with invasive species -- yet it provides no quantitative analysis to support this repeated claim;
- The Town claims it will be preserving a certain number of acres while ignoring its approved plans to "grade and level" a large part of the 'preserved' acres;
- The Town claims that there is adequate protection of nature given the alleged large percentage preserved "forest", while ignoring the removal of large portions of natural meadows and shrubland; and finally
- The Town simply ignores altogether in its Findings Statement the impact on current

wildlife on the site, by making no mention of it whatsoever.

Those failures mean the environmental review does not meet the test of 'hard look' from the standpoint of forthright acknowledgement of the environmental harm the Project will cause.

The Town also fails to meet reasonable analytical standards established for the 'hard look' with respect to analyzing the impact on wildlife, the fate of habitat, and the usefulness of the proposed 'visual buffer' in masking the new development from their homes.

The Respondents refused to perform any counting of wildlife on the property in order to meet their obligations under SEQRA to fully analyze the environmental impacts.

Respondents even asserted that it was "impossible" to do so, although multiple legal records of which the Court may take judicial cognizance demonstrate it is far from impossible to count wildlife[4] and is commonly done or ordered by courts.

Failing to provide such basic information, which was requested during the review of the DEIS (FEIS p. 62, p. 65) does not meet the 'hard look' standard.

As noted, such an investigation "encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail" (National Audubon, *supra*, at 185).

Similarly the failure to perform a critical and systematic analysis, in both off-leaf conditions and otherwise, of the visual buffer, which is to be cut through with a 'walking/ fitness trail' that may or may not be lighted and may or may not be about five feet wide,

[4] See Reply e.g. ¶¶340 *ff.* on wildlife population counting.

likewise fails to meet a standard that calls for: "a searching and careful inquiry into the facts and the agency's consideration of relevant factors" (National Audubon, *supra*, at 185-6).

Where there is a failure to transparently catalogue in terms of acreage the several parcels of contiguous forest at issue -- as well as important habitat in meadows and shrublands -- and then part or all of one such parcel is slated for virtual immediate work that will 'clear and grade' it[5], the combination of failures reaches a threshold when measuring compliance with the 'hard look' standard.

As the federal court stated:

> "...[A] totality of the circumstances approach means that a court must view deficiencies in one portion of an EIS in light of how they affect the entire analysis.... The Navy does not dispute that defects in different forms of analysis that would not by themselves indicate NEPA non-compliance may nevertheless do so in combination.... A reviewing court must therefore examine all of the various components of an agency's environmental analysis in order to determine, on the whole, whether the agency has conducted the required 'hard look'."
>
> (National Audubon, *supra*, at 186, emphasis added)

It should be clear that the totality of the analysis of habitat in the present case is deeply flawed, based on the 'hard look' standard.

Legal Standard to Evaluate 'Segmentation'

'Segmentation' was raised in terms of the erroneous claim that Petitioners were foreclosed from making various arguments before the Court, above, but the issue also

[5] Record Exhibit 52, Town Zoning Resolution 279-201, Declaration of Restrictive Covenants, p. 6; Respondent Beechwood affidavit of Richard Rosenberg, ¶ 16. Reply ¶ 9, *et al.*

should be addressed as a substantive matter, whereby the law firmly supports Petitioners arguments.

In the Petition, Supplemental Petition and Reply, Petitioners noted the almost countless facts, quotations, and documentary evidence proving that there are concrete, overt plans by the Town to construct athletic fields on its dedicated tract, and that failing to review this issue amounts to illegal segmentation.

In fact whether or not the athletic fields per se are to be constructed, the land will be cleared for them by the Town's official approved zoning resolution, so at this point the argument over the plans for the fields is, from an environmental and SEQRA standpoint, a distinction without a difference:

> "...[N]o Certificates of Occupancy shall be issued unless and until the Declarants develop the athletic fields on the subject premises in accordance with the contemplated consensus plan, or, in the alternative, clear and grade for the athletic fields if plans for the athletic fields have not been completely formulated, or cannot be fully implemented in advance of the issuance of a Certificate of Occupancy for the shopping center."

(Record, Exhibit 52, Town Zoning Resolution 279-2015, Declaration of Restrictive Covenants, p. 6)

The Declaration of Restrictive Covenants also requires that the developer build at least four new traffic lanes on three different roadways, as indicated in Record Exhibit 52, Town Zoning Resolution 279-2015, Declaration of Restrictive Covenants, p. 4.

The creation of a traffic turning lane on the site, necessitating the removal of additional large trees, was also planned and discussed in the DEIS and FEIS.

These two matters of unreviewed action connected with the Beechwood Project

clearly constitute unlawful 'segmentation' by case law, statute and even by the criteria repeatedly quoted by Respondents from the state's "SEQRA Handbook" (Beechwood memorandum of law pp. 23-4; Elkowitz affidavit, ¶115). As quoted in Petitioners' Reply, all the answers demanded by the SEQRA Handbook in fact confirm that segmentation has occurred with respect to the clearing of the athletic fields:

> "As quoted by Ms, Elkowitz, the SEQRA Handbook asks "Is there a common purpose or goal for each segment?"
>
> In this case, the purpose is to allow the developer to proceed with the project by compensating the local sport club(s) for the destruction of their fields.
>
> Further, "Is there a common reason for each segment being completed at or about the same time?"
>
> Yes, in this case the point is as stated: to compensate the local sport club (s) and avoid any inconvenience to them.
>
> Further, "Is there a common geographic location involved?"
>
> The answer is again yes, the common location is the 143 acre property at issue here.
>
> Further, "Do any of the activities...share a common impact that may...result in a potentially significant adverse impact....?"
>
> Again the answer is yes, because the destruction of the roughly twenty acres of forest and woodland in the Town parcel for athletic fields will substantially reduce the forest and habitat left on the overall site.
>
> Further: "Are the different segments under the same or common ownership or control?"
>
> Again, 'yes' the entire site is at the present owned and controlled by the Respondent developers/owners.
>
> Further: "Is a given segment a component of an identifiable overall plan?"

> Again, 'yes' the destruction of natural habitat for the soccer fields is part of the overall compensation mechanism meant to allow the project to go forward while removed in existing athletic fields.
>
> Further: "Can any of the interrelated phases of the various projects be considered functionally dependent on each other?
>
> Again, 'yes' the Town has made very clear it considers the compensatory athletic fields essential and required for the overall project to proceed.
>
> Finally, "Does the approval of one phase or segment commit the agency to approve other phases?"
>
> The answer is again 'yes', as demonstrated by the very explicit provision in the resolution; cited by Mr. Rosenberg that explicitly requires the clearing of the athletic fields as a condition for the issuance of a Certificate of Occupancy for the massive Project itself."
>
> Reply, ¶¶176 *ff.*

Case law firmly supports a finding of segmentation. As stated in the following case, plans that are connected conceptually must be considered together under SEQRA:

> The respondents sought to acquire the petitioners' property for the purpose of, among other things, drainage and storm water management improvements (hereinafter the drainage plan) in connection with a larger project known as the West Nyack Downtown Revitalization Project. The record reflects that the drainage plan "is a key component to the overall revitalization plans for the Hamlet" of West Nyack. Even though the drainage plan was part of the larger revitalization project, the Town Board, acting as the lead agency, studied only the potential impact of the drainage plan during its SEQRA review. However, under SEQRA, the Town Board was obligated to consider the environmental concerns raised by the entire project (see 6 NYCRR 617.3[g][1]).
> .....
> Moreover, to the extent that the Town Board concluded that segmenting the environmental review of the drainage plan from that of the larger revitalization project was warranted under the circumstances presented here, it was required under the SEQRA regulations to "clearly state in its determination of significance . . . the supporting reasons[,]" "demonstrate that such review is clearly no less protective of the environment[,]" and to identify and discuss "[r]elated actions . . . to the fullest extent possible" (6

NYCRR 617.3[g][1]).

J. Owens Building Co. v Town of Clarkstown, 128 A.D.3d 1067 (Second Dep't, 2015) (where the Court ruled that the Town had improperly segmented the SEQRA review even though the matters before to were separate in time and place) (emphasis added, internal quotations and citations omitted in places)

A Nassau case resulted in a similar conclusion:

> "In this case, Petitioner contends that the Village improperly segmented its environmental review of the proposed rezoning by failing to consider the environmental impacts of a related project that is part of the Village's long term plan for the redevelopment of the rezoned area, mainly the proposed closure of two of the Village's sewage treatment plants in the rezoned area and the diversion of the Village's sewage to the south shore of Long Island for treatment and discharge.
>
> The Municipal Respondents counter Petitioner's contentions with the argument that "the sewer diversion project was part of a completely separate joint initiative that [is] not under the direct jurisdiction of the Village."The Respondents further state that "although at one time discussed as a potential intermunicipal initiative, the sewer diversion never was and still is not necessary to the Proposed Action." This Court finds Respondents' arguments to be entirely meritless.
> .....
> It is explicitly stated in the DGEIS [Draft Generic Environmental Impact Statement] that one of the "significant beneficial impacts" of the rezoning identified in the DGEIS was the "relocation of some existing Village sewage treatment facilities to more appropriate locations." Yet, the Village never gave any explanation as to why segmentation was permissible and no less protective of the environment. (See, 6 NYCRR 617.3(k)(1); see also, Teich v. Buchheit, 221 A.D.2d 452, 633 N.Y.S.2d 805).
>
> Respondents further argue that, as a matter of policy and law, segmentation does not exist where future actions are speculative.Specifically, Respondents argue that 'although at one time discussed as a potential intermunicipal initiative, the sewer diversion never was and still is not necessary to the Proposed Action.'
>
> Petitioners have, however, sufficiently established by submitting, inter alia, the statements by the Mayor of the Village, that a long range plan, one that is not speculative, existed for the development of Great Neck and that "the diversion process is the key to this development."...In fact, based

> upon a plain reading of the Village's own "conceptual site plan" for the redevelopment of the rezoned area, which site plan is set forth in the DGEIS, it is explicitly acknowledged that the location of the existing sewage treatment plants are redeveloped with residential units and retail space. The proposed redevelopment therefore involved the closure of the existing sewage treatment plants and the diversion of the Village's sewage to a new location for treatment.
>
> In addition, Petitioner's exhibits include a news article about the interrelationship between the two projects wherein the Mayor of the Village stated that the closure of the sewage treatment plants was the "linchpin" of the rezoning..Thus, clearly, the closure of the sewage treatment plants introduces additional possibilities for adverse environmental effects; those effects should have been properly considered in a cumulative review process prior to the adoption of the Local Laws.

Waldbaum v. Village of Great Neck, 10 Misc. 3d 1078(A), 2006 N.Y. Misc. LEXIS 160 (Supreme Court, Nassau County, Bucaria, J., 2006) (emphasis added, internal quotations and citations omitted in places) (Where the Court held the Village failed to take a 'hard look' and improperly segmented its consideration of waterfront development, despite its repeated assertions otherwise)

The Waldbaum case nears several similarities with respect to the athletic field segmentation in the present special proceeding: In Waldbaum, there was a site plan that appeared to show the removal of the sewage plants despite the claims of the Respondent Village that the plan to relocate the plants was only "speculative"; the relocation of the sewage plants was at some points said by the Mayor to be an important consideration in the redevelopment plan while the Village claimed the issue was separate from its plans and did not require consideration; there was no formal act of segmentation despite the clear connection of one action and the other.

In the present matter, the removal of forest in the Town parcel is literally part of the Covenant established by Town resolution of May 12, 2015; yet there was, as in Waldbaum, no formal decision for the 'segmentation' -- including an absence of specific

justification or affirmation it is no less protective of the environment.

Thus the present case warrants a finding of impermissible 'segmentation' under SEQRA, in the same way the action did in Waldbaum.

In the present matter it is abundantly clear that the Town has created a *quid pro quo* with the developer to assure the soccer teams are provided for on the Town's new property, and the Town further desires to assure it does not have to do the work itself.

The development and the athletic fields are inextricably interwoven as part of the same development; they are even explicitly connected by Town resolution (*supra*). Thus the present matter is parallel to the matter in the case cited.

The new traffic lanes are similarly directly connected and inter-dependent, and explicitly connected by Town resolution, *supra*.

Yet, in neither case did the Town undertake the required alternate procedure to legalize the segmentation, as further described in the Second Department's decision.

It would be impossible to do so in any case, because clearing and grading a large portion of the lands supposedly preserved would negate a key rationale contained in the Findings Statement, namely that "70 percent of the existing 53 acres of woodland" would be preserved (Findings Statement, p. 9, Record Exhibit 50).

The additional reduction of woodland/habitat would require simultaneous evaluation because its deferral could not possibly be equally protective of the environment, as the law requires an approved segmentation to be (6 NYCRR 617.3(g)(1))[6].

[6] "Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible." (6 NYCRR 617.3(g)(1))

All the cases cited by Respondents arguing against 'segmentation' rely on the finding that the plans were 'speculative' or otherwise disconnected. For example in one case Respondents highlighted[7], GM Component Holdings v. Town of Lockport IDA, 112 A.D. 3d 1351 (Fourth Dep't 2013), the Court wrote "there was no identified purchaser or specific plan for development at the time the SEQRA review was conducted" (at 1353) with respect to a parcel of land possibly slated for future development.

In the present matter there is no such mystery: the owner will be the Town of Oyster Bay and the 'business' will be to create athletic fields. There is no mystery here.

As Petitioners have noted if there is any remaining question of the reality of the plans to cut down the forests -- to "clear and grade" them as now provided by law -- the Court may hold a fact-finding trial under the rules of CPLR 7804(h). But it seems eminently unneeded as the facts are so conclusive, and hence the violation so clear.

Matters That May Be Incorporated By 'Judicial Cognizance'

Respondents have argued Petitioners had no right to include evidence not in the record. In answer Petitioners have noted that the purpose of the information was not to amend the record but to provide for the Court a context -- to clearly indicate what forests and other habitat was indeed at stake in the matter where the record failed to do so in effective ways (e.g. by providing acreage measures of the forest tracts at issue).

Further, Petitioners have stated elsewhere it was their intent to demonstrate by the parallel record what a proper 'hard look' would look like, and how it would properly account for the impacts of the proposed massive project.

[7] Beechwood memorandum of law p. 24.

Two items that did not fit into that category were items of testimony of a biologist who provided confirmation for the Court that (1) contiguous habitat is the correct metric or unit of measure for the protection of wildlife on the property; and (2) that recently planted vegetation is no suitable habitat for most species at issue here.

The second proposition seems intuitive and seems to Petitioners to need no further discussion.

However, whether contiguous habitat is the correct metric to judge the ecological effectiveness of the preservation of forest and other natural areas is a matter Petitioners have taken the opportunity to further support in the Reply by reference to certain public records: court decisions.

A separate matter was raised by Respondents in their answers and supporting affidavits, which was the assertion that it was "impossible" to count wildlife in the context of the environmental review.

As it turns out, that assertion is untrue and baseless, and Petitioners have also utilized court records to demonstrate that it is both possible and useful to count wildlife when the fate of wildlife and condition of its population is a matter relevant to public decision-making.

Petitioners have justified both their assertions -- that populations of wildlife may be counted and contiguous habitat is a key environmental metric -- by utilizing court decisions that affirm these issues. Case law has established that "judicial notice" may be taken of open court records.

> "...[I]t is well established that a court may take judicial notice of

undisputed court records and files (Matter of Khatibi v Weill, 8 AD3d 485 [2004])."

RGH Liquidating v. Deloitte, 71 AD 3d 198 (First Dep't, 2009) at 207 (where the court used open databases from a bankruptcy filing to establish that a threshold for eligibility to make certain securities claims was crossed in terms of the numbers of bondholders covered by the claim)(internal quotations omitted) acc'd Kinberg v. Kinberg, 85 AD 3d 673 (First Dep't, 2011) at 674.

Preliminary Injunction and Undertaking

Petitioners have discussed the issue of whether they have an 'adequate remedy at law' in the Reply.

The issues regarding the merits of the preliminary injunction have been fully explored in the Petition and Petitioners stand on that discussion.

As to the size of the undertaking required, Petitioners leave it to the discretion of the Court, while noting that asking the Petitioners to put up the alleged full value of the property seems wholly unwarranted as the property will hardly become worthless with the granting of a preliminary injunction.

Furthermore the process of reconsidering the SEQRA process is a matter of the Respondents' and Town's own making, and Petitioners should not be penalized for it.

Additionally, it is far from clear that performing a proper SEQRA Review would render the Respondents unable to obtain financing for a new project that properly accounted for the environmental impact it would cause to nature and to the surrounding community.

In the meantime however Respondents have no real impediment to seriously damage the property without protection under the auspices of this Court, and furthermore the

effect of the Court's ultimate decision may be tragically compromised without such guaranteed protection in place, one way or another.

Conclusions

There is no basis, nor was there ever an argument to be made, that Petitioners and this Court were unable to reach the merits of this case because of either issues of 'legal standing' or issues from the doctrine of 'exhaustion of administrative remedies'. The case law is abundantly clear on those points, and the facts of the case are also crystal clear.

The fact that case-law was so brazenly misrepresented by Respondents raises the same issue of 'good-faith' that Petitioners have been in essence raising in this entire special proceeding, to wit: that the SEQRA review was not done in good faith, but it was rather a farcical exercise with a pre-ordained conclusion that did not pay any effective attention to the environmental consequences of the development promoted by the Respondents -- the developers and their municipal partners.

The charade was reflected in the spectacle of the public hearing -- the only one single hearing on the massive SEQRA record -- that lasted until 3 AM because the Town leaders did not deem it a logical and prudent practice to adjourn the hearing for the benefit and convenience of the hundreds of residents who trudged out in a cold winter week-day night to an over-full school auditorium to learn about and comment on the massive and complex project, with major implications for their community, in a complicated legal process called a SEQRA hearing.

Petitioners believe it may be 'bad form' to raise to the Court's overt attention matters

of public record external to this case that are now dogging this particular municipality and its senior officials who led this SEQRA review, but Petitioners imagine the Court is not unaware of matters of common public knowledge.

But the character of the civic trust has been put into question, and this case is about the integrity of the SEQRA process -- viewed as an inconvenience by many government and business entities -- with respect to a highly lucrative local project, and its oversight on matters decidedly less lucrative, being the protection of the local environment and residents' quality of life.

Petitioners are pained by the apparent lack of good faith in the SEQRA review -- as well as in the unfounded legal assault they have had to repel -- and are pained by the potential consequences of that inadequate discharge of the public trust on a piece of land they value, as residents of some duration, which the Town itself characterized as follows:

> "The subject property is largely undeveloped, and contains extensive areas of natural habitat at the present time"
>
> (Record Exhibit 7, SEQRA Positive Declaration, 2012, p. 2).

Petitioners believe their robust exploration of the law as it applies to the SEQRA review -- with respect to the 'hard look' standard and 'segmentation' notably -- fully supports their request for relief from this Court.

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