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 BRIDGET K. DENTON,
KATHLEEN J. DUVAL, FRANCIS P. SCALLY and
FAY E. SCALLY,

Petitioners pro se,

-against-

TOWN OF OYSTER BAY TOWN BOARD BY
SUPERVISOR JOHN VENDITTO, BEECHWOOD POB LLC,
PLAINVIEW PROPERTIES SPE LLC,

Respondents and Necessary Parties

PAMELA A. SYLVESTER,

Intervenor,

Index Number

5290/15

AFFIRMATION IN SUPPORT OF MOTION TO INTERVENE

For relief per New York Civil Procedure Law and Rules ("CPLR") Section 1012 (a)(2) and CPLR 7802(d)

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Ghenya B. Grant, Esq., affirms the following under the penalties of perjury:

1. I am an attorney admitted to practice in the courts of the State of New York, with a practice located at 5 Penn Plaza, 23rd Floor, New York, N.Y. 10001.

2. I am fully familiar with the facts of this special proceeding.

3. I have been engaged to represent the Intervenor-Petitioner-Applicant (hereinafter "the Intervenor").

Introduction

4. This matter is a special proceeding, filed on or about June 10, 2015 and decided on December 2, 2015, with a Decision and Order entered December 16, 2015, which sought to vacate various actions by the Respondent Town of Oyster Bay with respect to the so-called

"Country Pointe at Plainview" real estate development project ("the Project") due to violations of the State Environmental Quality Review Act ("SEQRA").

5. Intervenor Pamela A. Sylvester, who owns a home and resides directly across from the Project site, seeks by this application to intervene and become a Petitioner in order to prosecute an appeal of the Court's Decision, among other possible actions.

6. As described in the accompanying affidavit (Exhibit 1), Intervenor both resides within several hundred feet of the Project -- whether its outer property line, buffer terminus, or construction envelope -- and also regularly walks in the area of the Project on publicly accessible roads and thus regularly enjoys and uses the natural resources at issue -- forests, brushland, stands of trees -- and thus Intervenor enjoys "standing" in environmental legal matters related to the property.

7. The facts as alleged herein with respect to the Project and the SEQRA review thereof are incorporated herein by reference from the Petition, Supplemental Petition, and Reply in the underlying special proceeding; and reference is further made to the Memorandum of Law in Support of the Reply in the underlying proceeding as to matters of law.

8. Environmental activist Richard A. Brummel has shared many of his factual understandings surrounding the project and the legal actions, and his information is incorporated by affidavit in Exhibit 2 .

9. Petitioners in this matter have told Brummel they will not pursue the matter to an appeal after an adverse decision was rendered by this Court over one month ago (Exhibit 2, Affidavit of Brummel), and Intervenor believes that therefore her interests are not being adequately protected absent her own intervention, under the rules of Civil Procedure Law and Rules ("CPLR") Sections 1012 (a)(2) and 7802(d).

Facts

Intervenor Enjoys Standing with Respect to this Challenge to the Project

10. As attested in the accompanying affidavit, Intervenor is a retired teacher who has for about thirty-two years lived in and owned the home at 1457 Round Swamp Rd., Old Bethpage, N.Y. 11804.

11. Intervenor's home is directly across from soccer fields that will, according to the plans of the Project, be converted into a 125-foot "visual buffer" and then sited with houses twenty-five feet further back. (Exhibit 3, "Findings Statement", p. 21 ¶ 7).

12. A satellite measurement (Exhibit 4) indicates that Intervenor's property line is about one hundred and twenty-five feet from the property line of the Project, across the two-lane Round Swamp Road (one lane in each direction at Intervenor's location).

13. Given the plan to construct homes within one-hundred and fifty feet of that property line, Intervenor's home is about two-hundred and seventy-five feet from the actual construction, a distance that the Courts have held gives Intervenor presumptive standing:

> "...[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])."
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> 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 (emphasis added) (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)

14. The immediate impact of the development on Intervenor's home along Round Swamp Road can readily be seen in the Final Site Plan which shows the heavy development on the eastern portion of the Project site just within the 125-foot "visual buffer" (Exhibit 5, Final Site Plan).

15. The Verified Petition in which Intervenor wishes to intervene (Exhibit 6) provides substantial critique regarding the lack of reliable, scientific, and/or transparent analysis of the purported effect of the "visual buffer" in shielding the homes along Round Swamp Road from the visual impact of the development (Verified Petition, ¶¶ 173-193, e.g.).

16. In the supporting affidavit (Exhibit 1, ¶¶ 5-8), Intervenor makes a firm claim for special injuries even though they are not required

17. Intervenor alleges she will be harmed both by the visual impact that can be anticipated from the Project, as well as from the impact on her direct "use and enjoyment" of the extensive natural resources on the Project site.

18. Intervenor attests that she enjoys the view from her home of the open space of the fields and the sunsets in the distance, both of which will which will both be removed by the Project, consisting of homes up to three stories in height.

19. The Courts have held that such visual vistas if threatened create "standing":

> "...[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) (emphasis added) (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)

20. Further Intervenor attests that she regularly enjoys walking through the open roads of the Project site and has done so for about thirty years. She values the peace tranquillity and nature, all of which will be substantially altered by the Project.

21. The courts have held that when one specifically alleges regular use and enjoyment of a natural resource -- trees, woods, birds etc. -- that person is to be accorded standing:

"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."

.....

Here, petitioners allege that they "use the Pine Bush for recreation and to study and enjoy the unique habitat found there." It is clear in context that they allege repeated, not rare or isolated use. This meets the Society of Plastics test by showing that the threatened harm of which petitioners complain will affect them differently from "the public at large."

Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), at 301, 305 (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)

22. As to the alleged doctrine of 'exhaustion of administrative remedies', Intervenor has attested that she attended a hearing on an earlier incarnation of the present Project, and believed that the matter was settled and would not be revived (Exhibit 1, Affidavit of Sylvester, ¶9).

23. But the courts have held that standing may not be denied a party to raise questions in the

context of an environmental challenge under the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law Chapter 8, 6 NYCRR 617, when the issues have otherwise been raised:

> "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)

24. In the present matter the issues raised in the Verified Petition were raised during the SEQRA review process by various parties, including, as alleged in the Verified Petition, by the environmental activist Brummel (Exhibit 6, Verified Petition exhibit 20).

25. Furthermore it has been held that even were the issues to have not been raised before, such is not a bar to their being raised in a SEQRA review, due to the overarching public policy concerns at stake:

> "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)

26. For the foregoing reasons it is clearly established that Intervenor should be granted standing in this matter.

Petitioners Are Not Moving to Reverse The Adverse Decision

27. As attested in the accompanying affidavit of Richard Brummel, an environmental activist who was involved in the underlying special proceeding and has been in contact with the Petitioners, by their own statements the original Petitioners have said they do not plan to pursue an appeal (Exhibit 2). Upon information and belief no such appeal has been filed in this matter.

As the thirty-day statute of limitations for such filing is fast approaching, given the Decision and Order was entered on December 16, 2015, it appears that in the absence of an Intervenor appeal no such appeal will occur and the matter will be lost. .

Reasonable Basis for Reversal of Decision

28. The apparent decision of the Petitioners not to proceed constitutes a failure to adequately pursue the case because the grounds cited in the Decision and Order were fully addressed in the Petition, Supplemental Petition, Reply and Memorandum of Law in Support of the Reply such that the Court's determinations lacked a basis in fact and law.

29. Among other issues, (1) the legal claim that absence (arguably so) of testimony by the Plaintiffs at the hearing stage of the SEQRA review denied them "standing" was an issue firmly refuted in the Reply and Memorandum of Law. Furthermore (2) strong evidence was presented to the Court that the SEQRA review was "segmented" and decisions were concretely taken outside the scope of the review (e.g. the planned athletic fields in the current fifteen acre forested area) and furthermore the Court failed to hold a "hearing of fact" as requested by Petitioners on that issue if it their allegations were in question. Finally (3) it was clear on the record that the purported "visual buffer" was not analyzed in any reliable way and was subject to substantial modification (e.g. the "fitness trail") that was in no way analyzed for its impact on the buffer.

30. Additionally the recent report that the Town Supervisor now believes the SEQRA review was not adequate (Exhibit 7, News Article and Exhibit 8, Letter from Brummel) should provide a basis for the Court to re-open its inquiry into the legal sufficiency of the SEQRA review -- the entire question before the Court in this Article 78 proceeding -- since Supervisor Venditto was the senior Town official ultimately responsible for the SEQRA review.

31. Thus the Petitioners' apparent failure to pursue <u>any</u> of the legal avenues open to all the opponents of the destruction of the environment on the Site as currently planned and approved effectively abandons Intervenor's legal defense of his interests as outlined in this affidavit, and provides grounds for intervention as provided by CPLR Sections 7802(d) and 1012.

32. Intervenor will file a Notice of Appeal if granted Intervenor-Petitioner status (Exhibit 9).

The Law

33. CPLR § 7802(d), governing the Article 78 special proceeding, states:

"(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene."

(emphasis added)

34. Further, CPLR Section 1012 provides:

" § 1012. Intervention as of right; notice to attorney-general, city, county, town or village where constitutionality in issue.
(a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
1. when a statute of the state confers an absolute right to intervene; or
2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment...."

(emphasis added)

35. The law has been construed to grant such permission as justified:

"CPLR 7802 (d) provides that the Court may permit 'other interested persons to intervene" in a proceeding pursuant to CPLR article 78. Whether to permit intervention is a matter addressed to the sound discretion of the Court (see Matter of White v Plandome Manor, 190 AD2d 854, 593 N.Y.S.2d 881 [2d Dept 1993]). Notably,' [CPLR 7802 (d)] grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action" (Elinor Homes Co. v St. Lawrence, 113 AD2d 25, 28, 494 N.Y.S.2d 889 [2d Dept 1985]; see Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Island Operating Corp., 291 AD2d 40, 48, 735 N.Y.S.2d 83 [1st Dept 2001]). The sole criteria for intervention in a CPLR article 78 proceeding is whether the person is 'interested' and, thus, a party seeking intervention need not necessarily show that 'the representation of [its] interest by the parties is or may be inadequate' (see CPLR 1012 [a] [2]; see e.g. Elinor Homes Co. v St. Lawrence, 113 AD2d at 28).

Toll Land v. Planning Board of the Village of Tarrytown, 49 Misc. 3d 662 (Supreme Court, Westchester County, Connolly, J., 2015) at 671 (where the Court granted intervenor status to an advocacy group in a land-use matter based on its members activities)

36. In the present matter Intervenor has demonstrated that she meets both criteria: she has standing and the current Petitioners have apparently decided to walk away from the case despite the availability of bases to appeal or otherwise reverse the Decision of the Court.

37. Intervenor submits the accompanying Verified Petition as a pleading -- as arguably required on the motion to intervene:

> "The instant application to intervene is governed, procedurally, [*6] by CPLR 1014, which provides as follows: "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought".....(see Zehnder v State, 266 AD2d 224, 697 NYS2d 347 [2d Dept 1999])."
>
> Raso v. Zoning Bd. of Appeals Village of Belle Terre, 2015 N.Y. Misc. LEXIS 3124; 2015 NY Slip Op 31592(U) (Supreme Court, Suffolk Co., Whelan J. , 2015)(where such a motion was rejected for failure to include a pleading).

38. Intervenor proposes to add to the Petition the following statement and exhibits regarding her own factual situation:

> "Petitioner Pamela A. Sylvester owns and resides at 1457 Round Swamp Rd., Old Bethpage, NY, 11804. As stated in her affidavit Exhibit 1 at ¶4, her property is approximately 150 feet from the property line of the Project (Exhibit 4), and thus about 300 feet from the buildings to be constructed (Exhibit 3, Findings Statement, p. 21 ¶7).
>
> Petitioner Sylvester also walks on the public roads that cross-cross the Project site and takes great pleasure in the nature and wildlife she finds there (Exhibit 1, Affidavit of Pamela Sylvester at ¶7)."

39. Inasmuch as Intervenor thus raises no issues apart from those already raised by the original Petitioners, the submission of the Intervenor Petition is governed by the relation-back rule for statute of limitations purposes:

> "Adding additional petitioners would not have resulted in surprise or prejudice to the respondents, who had prior knowledge of the claims and an opportunity to prepare a proper defense. Moreover, the cross motion, among other things, for leave to amend the petition was not barred by the applicable statute of limitations. The amendment relates back to the original petition, since the substance of the claims are virtually identical, the relief sought is essentially the same, and the new

petitioners, like the original petitioners, are residents of the respondent Town of Shelter Island (see CPLR 203 [f]; Fulgum v Town of Cortlandt Manor, 19 AD3d at 444; Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 458 [1988]; see also Bellini v Gersalle Realty Corp., 120 AD2d 345, 347 [1986])."

Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909 (emphasis added) (where in a matter involving permission to add tenants to a facility, the Court found that the matter was properly dismissed because neither the original petitioners nor the proposed new petitioners had standing, although the Court agreed that the new petitioners could otherwise have been added, were they found to have standing)

Similarly:

"Furthermore, contrary to the appellant's contention, the motion for leave to amend the complaint to add F & F as a party plaintiff was not barred by the applicable statute of limitations. The amendment relates back to the original complaint, since the substance of the claims of F & F and those of Fogarty and Fulgum are virtually identical, the ad damnum clause is the same in the proposed amended complaint as in the original complaint, and F & F is closely related to Fogarty and Fulgum (see CPLR 203 [f]; Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 458-459 [1988]; Schleidt v Stamler, supra)."

Fulgum v. Town of Cortlandt Manor, 19 AD 3d 444 (Second Dep't, 2005) at 446 (emphasis added) (where claimants in an action were permitted to replace individual names with a corporation name since the defendant had full notice of the circumstances both for the purpose of the action and the operation of the municipal law notice requirement)

Pleading

40. Intervenor had little time to prepare an original leading given the failure of the Petitioners to openly inform the community that they intended to essentially drop the case.

41. During the pendency of the case the Petitioners collected contributions from the community (Exhibit 10, website for fundraising) and represented to the community that they were pursuing the case for the benefit of the community.

42. Furthermore the legal pleadings were placed online as a public undertaking of the community, leading to the assumption the rights of others so situated were being adequately

protected (Exhibit 11, website for public information).

43. As such Intervenor could not reasonably have foreseen the need to engage in her own legal intervention until it became apparent that the Petitioners would not appeal or otherwise challenge the trial Court's adverse decision.

44. Given the urgent deadline for filing the Notice of Appeal -- in fact it is not clear when the Decision and Order was served and thus the Intervenor must assume the entry date of December 16, 2015 began the statute of limitations clock -- it is impossible for the Intervenor to replicate the legal challenge to the SEQRA process as would be required.

45. Thus in the interest of justice, Intervenor seeks leave to join the Petition as filed for a pleading, or alternatively leave to amend this motion at a later date once Intervenor status has been granted and a Notice of Appeal has been filed in a timely manner.

Conclusions

46. Intervenor has "standing" to intervene based on the proximity of her residence and the inevitable impact of the Project on her enjoyment of the view and other characteristics thereof, as well as her repeated, regular "use and enjoyment" of the Project site over a period of thirty years.

47. It appears on the merits this matter cannot be fully and fairly adjudicated without an appeal or other review of the Court's Decision and Order of December 15, 2015.

48. Inasmuch as the present Petitioners have indicated they do not intend to pursue such a course of action, it is clear that only by intervening can Intervenor be assured a timely and diligent defense of her interests in this matter.

49. Respondents interests would not be improperly prejudiced by Intervenor's intervention because they have been fully on notice of the issues raised in the original special proceeding and no further issues are being raised that are not part of the original action or are not

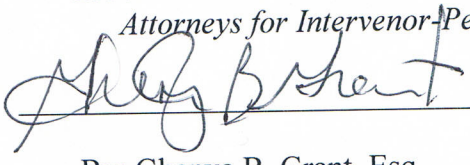
properly raised in relation to those issues -- e.g. Supervisor Venditto's change of heart, *supra*, which may properly be subject of a motion to renew based on the arguments already advanced regarding the insufficiency of the SEQRA review as a matter of law.

50. For the foregoing reasons the Court should grant Intervenor the status of Petitioner in this matter.

51. The relief sought herein has not been sought previously by this Intervenor before this or any other Court. Another Intervenor-applicant has however appeared before this Court seeking Intervenor status, upon information and belief, and was denied such relief on January 7, 2016. .

Nassau County, N.Y.
January 13, 2016

LAW OFFICE OF GHENYA B. GRANT
Attorneys for Intervenor-Petitioner



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Exhibits
Affirmation in Support of Intervenor Sylvester

Exhibit 1 Pamela Sylvester affidavit
Exhibit 2 Richard Brummel affidavit
Exhibit 3 Town of Oyster Bay SEQRA "Findings Statement"
Exhibit 4 Satellite measurement of distance to Sylvester home
Exhibit 5 Final "Approved" Site Plan
Exhibit 6 Verified Petition
Exhibit 7 Report of Supervisor Venditto Statement
Exhibit 8 Letter from Brummel
Exhibit 9 Notice of Appeal Sylvester
Exhibit 10 Fundraising site