SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT
---X

RICHARD A. BRUMMEL, JOSHUA DICKER
and DAVID GREENGOLD

Petitioners Pro Se,

For Judgements and an Order Pursuant to Article 78, Section 3001 (Declaratory Judgement), Section 6311 (Preliminary Injunction) and Section 6313 (Temporary Restraining Order) of the Civil Practice Law and Rules ("CPLR")

-against-

THE TOWN OF NORTH HEMPSTEAD TOWN BOARD a/k/a TOWN COUNCIL, THE NASSAU COUNTY LEGISLATURE, NASSAU COUNTY EXECUTIVE EDWARD P. MANGANO, and THE ROSLYN WATER DISTRICT

Respondents and Necessary Parties

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Affidavit in Support of Order to Show Cause

Appellate Division Docket Number:

____

Supreme Court Index No.:

6150 / 14

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Overview

1. The Petitioners, who are across-the-street neighbors and/or frequent users of the recreational-forest in a 100-acre Nassau County park, filed an article 78 special proceeding on June 24, 2014 seeking to enjoin three local government agencies from continuing the preparation of a project to construct a water-treatment building, a fenced compound, and a roadway in the recreational-forest.
2. The project was planned to commence in September, 2014, but has upon information and belief been delayed by the unexplained delayed-approval of a parkland-alienation law by the Governor.
3. The Petitioners have challenged the project on the grounds that the agencies involved violated provisions of the State Environmental Quality Review Act ("SEQRA") at multiple steps in the process of moving the project to reality.
4. Petitioners filed a petition and a supplemental petition, two memoranda of law, two replies and a sur-reply. Respondents filed affirmations opposing the initial order to show cause, two sets of answers, a motion to dismiss, and memoranda of law.
5. After two interlocutory rulings, the Court, The Hon. Acting Justice James P. McCormack presiding, on September 19, 2014 signed an order granting Respondent Nassau County's motion to dismiss the special proceeding, on the grounds that Petitioners lacked standing to sue.
6. Petitioners timely filed a notice of appeal of that determination, and now

seek injunctive relief to prevent any destruction of the forest-land or transfer of property-rights while that appeal is being decided.

7. The lead agency had planned to begin construction in September, 2014, after expedited and Petitioners would say hasty action had been taken by Nassau County and the State Legislature to approve parkland-alienation laws to permit the construction.

8. Despite approval of the parkland-alienation bill by the State Legislature in June, 2014, the Governor's approval has not been obtained and upon information and belief, the approved bill has not yet been transmitted for the Governor's approval as of November 16, 2014, based on information on the state Senate website.

9. The Nassau County Legislature deferred several votes on the issue beginning September 8, 2014, pending the unexpectedly-delayed action by the Governor.

10. Despite the delays, the necessary approval by the Nassau Legislature and commencement of construction is expected quickly to follow the Governor's action, whether the Governor signs the bill or allows it to become law without his signature.

11. It is possible the Governor would veto the law, but there has been no indication that is his intention.

12. At least some construction contracts were, upon information and belief, already approved by the lead agency, the Roslyn Water District ("Water District"), in order quickly to commence construction.

13. The earliest phase of the construction would involve destroying part of the forest, which is the irreparable harm Petitioners seek to prevent.

14. The County's enabling legislation -- a lease or title-transfer -- can be expected to follow quickly based on the lead-agency's and the County's expressed wishes, and on the authority of the County, upon information and belief, to promulgate contracts by a simpler vote of its Rules Committee.

15. Despite the objections Petitioners have raised to the violations of law in the SEQRA process at issue, the County could be expected to 'rely' on the Water District's purported SEQRA findings as lead agency if the Court does not enjoin it from doing so.

16. All approvals to date by the Town of North Hempstead ("the Town") and County have been urgent and unanimous, confirming an aggressive rush to undertake the project which has been claimed to involve an "emergency".

17. At this point the "emergency" has occupied almost 12 months with no perceptible effect on the local water supply, upon information and belief.

18. No such "emergency" has been declared under the provisions of SEQRA, nor has the purported "emergency" resulted in any substantial conservation or supply activities, as Petitioners documented in their Petition (¶ 19 ff.) and Reply (¶ 19 ff.).

19. Petitioners thus find the situation fraught, and seek both review of the trial Court's ruling on standing, and a preliminary injunction to preserve the status quo and prevent irreparable harm, while the appellate Court decides the issues.

Preliminary Remarks

20. In order to present to the Court the extensive factual and legal record and arguments of their case, Petitioners incorporate their verified petition, supplemental verified petition, replies for both petitions, and the memoranda of law in support of the petition and the reply in support of the petition as attachments to this affidavit.

21. Petitioners will attempt to summarize the important facts and issues.

22. The Roslyn Water District serves about 18,000 customers in western Nassau County.

23. Upon the finding of a water-contamination problem in one of its eight wells in late 2013, the District decided to build a treatment-facility called an "air stripper" to remove contaminants from the water by releasing them into the air.

24. Objections from residents to the placement of the "air stripper", which is a building-size device, in an existing Water District compound near residences led the Town, of which the water district is a special improvement district, to extract a commitment from the Water District to make a strenuous effort to obtain necessary authorizations to build the "air stripper" in the wooded area of the County park nearby instead.

25. With that agreement in hand the Town approved funding in February, 2014.

26. This 'mid-stream correction' appeared to be the source of the many errors in the SEQRA process undertaken by each of the three agencies

involved, which Petitioners have thoroughly catalogued.

27. After the parkland-alienation process appeared to be in place, the Water District's governing commissioners voted in May 2014 to change the location of the proposed "air stripper" from their own compound to the Park location.

28. The vote split the Board two-to-one in favor of the new plan, with one commissioner, the chairman, opposed to the move as an unwarranted surrender to public over-reaction, because the "air stripper" was not dangerous to neighbors, and the Park was a protected resource.

29. Users of the park and environmental groups opposed the new plan and held rallies and submitted testimony to the Water District and Nassau County, the owner of Christopher Morley Park, the park at issue ("the Park").

30. Except for the split-vote by the Water District, the other local entities, the Town and Nassau County, voted by unanimous votes, with an urgency incited by the Water District's entreaties, to place the facility in the Park.

31. Petitioners and others clearly pointed out the lack of compliance with SEQRA in testimony to the Water District and Nassau County. The Town vote occurred without a prior announcement of the plan to place the facility in the Park, thereby catching Petitioners and the other users of the Park unaware of the plan, or of the SEQRA violation that it entailed, at the time it was approved.

Legal History

32. Petitioners brought the Petition by order to show cause on June 24,

2014 and were granted a temporary restraining order by a special term judge as a statute of limitation to challenge the action of the Town was set to expire.

33. The request for a preliminary injunction at a hearing July 2, 2014 was denied by the presiding judge whose later decision is being hereby challenged, on the grounds that aside from the potential favorable balance of equities and likelihood of success, in view of the schedule for anticipated construction work by Water District the harm was not 'imminent enough' to warrant a preliminary injunction.

34. The judge based his determination on the assurance of the attorney for the Respondent Water District that no work would begin until about two months later, during September, 2014, based on the expected timing of the various pending approvals.

35. The judge said he would seek submissions from the parties quickly and planned to expeditiously issue his decision before the September construction date. At least one of the Petitioners articulated an objection to the denial of the preliminary injunction.

36. The Respondents all filed affirmations in opposition to the order to show cause; and the Town and Water District filed answers and memoranda of law; and Nassau County filed a motion to dismiss and a memorandum of law.

37. The Respondents challenged among other issues the Petitioners' standing to sue, the ripeness of the decisions being challenged, the alleged inadequacy of the SEQRA filings, the appropriateness of the hybrid article 78

and declaratory judgement action, and the standard of review.

38. Petitioners responded at length and with a reply, sur-reply and memorandum of law to the arguments presented.

39. On September 19, 2014, Justice McCormack issued his decision, entered September 22, 2014, granting Nassau County's motion to dismiss based, on the adjudged lack of standing of Petitioners.

40. Petitioners filed a notice of appeal on October 21, 2014.

41. To date, November 16, 2014, upon information and belief no physical work that would alter or disturb the Park has begun on the "air stripper" project.

42. It is Petitioners' understanding that the Nassau County Legislature is unable to legally-convey the necessary land to the Water District because the parkland-alienation bill has not become law in Albany, as it must under the mandate of Municipal Home Rule.

43. The alienation bill was approved in the state Senate on June 10, 2014 and in the state Assembly on June 17, 2014, and has, upon information and belief, based on the state Senate website, not yet been transmitted to the Governor for approval, veto, or pocket-approval as of November 16, 2014.

44. Petitioners seek both review and a preliminary injunction in this proceeding of the appellate Court.

Point I: Petitioners Have Standing, The Nassau Court's Decision To The Contrary Is In Error

45. In the proceeding before the appellate Court, Petitioners argue the merits of their case to have Court reverse the lower court's denial of standing and to institute preliminary relief to protect their rights and interests while the case is being decided.

46. Petitioners have provided extensive and repeated evidence to the Court in their Petition, Reply, and Memoranda of Law that they "use and enjoy" the forest at Christopher Morley Park in a sustained, frequent manner.

47. In addition, two Petitioners live in close proximity to the forest, Petitioners Dicker and Greengold, and they have affirmed that their pristine forest-view would be damaged by the proposed facility.

48. Petitioners have argued that the alien semi-industrial buildings, fenced and lighted compound, and cleared 320-foot access road through the forest would substantially alter their enjoyment of the wild character of the forest and the view of the forest that two of them enjoy.

49. Petitioners have further argued that these matters are clearly sustained as elements of standing, particularly in Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297 (2009), and Society of the Plastics Industry v. County of Suffolk, 77 N.Y.2d 761 (1991).

50. Petitioners explored both of those cases and other relevant ones in their memoranda of law (Petitioner's Memorandum of Law in Support of the Verified Petition, pp. 25 ff., and Petitioner's Memorandum of Law in Support

of the Verified Reply, pp. 40 ff.)

51. The issues of usage, enjoyment, visual impact and view as elements of standing and injury by and for Petitioners were all substantiated for the trial Court in fact and law by the Petitioners' submissions.

52. Respondent Nassau County introduced a recent trial-court decision that the Nassau Court relied on in its opinion despite the detailed analysis by Petitioners which disputed the arguments of Respondents Nassau (Petitioners' Memorandum of Law in Support of the Reply, pp. 44 - 46).

53. The decision at issue had been reviewed by the appellate division but only in narrow questions inapplicable to the issues raised by Nassau or relied on by the Nassau decision. Petitioners pointed this out in their discussion of it (Petitioners' Memorandum of Law in Support of the Reply, pp. 45-46).

54. Otherwise, the Nassau Court in its decision cited well-established case-law setting out the rules and tests of environmental standing, which Petitioners had also fully discussed to substantiate their standing to sue, but the Nassau Court misconstrued and misapplied the law and denied Petitioners such standing.

55. The decision of the Nassau Court can be summarized as follows: (1) Despite the Petitioners' recitation of the ways in which enjoyed the Park, "...none of the Petitioners have proven that they use or enjoy the Park more than most other members of the public," (Decision of Justice McCormack, September 19, 2014, p. 9); and, (2) Petitioners did not show "that their injury is real and different from most members of the public" (Decision of Justice

McCormack, *ibid.*).

56. Petitioners Dicker and Greengold each affirmed that they individually live close enough to the Park to have a view of the forest and a view of the proposed construction site from their homes.

57. They stated that they valued the current view of a pristine forest free from man-made constructions.

58. They argued that their view would be degraded by the project.

59. They also affirmed, as did Petitioner Brummel, that they directly used and enjoyed the forest regularly and intensively by physically walking through it and enjoying it as a special refuge from the surrounding developed areas.

60. The trial Court was unconvinced by these arguments for standing, despite strong authority for the Petitioners' position.

61. Petitioner Dicker in his affidavit recited how he regularly traversed the main trails of the forest (Verified Petition, Exhibit 2, Dicker Affidavit, ¶5), the principal ones of which pass the "air stripper" site, and how he was able to see the proposed "air stripper" site from his residence (Dicker Affidavit, *ibid.*, ¶17). Petitioner Greengold wrote "I live across from the Park" (Verified Petition, Exhibit 3, Greengold Affidavit, ¶3).

62. He described his appreciation for the forest in its present state as an "undisturbed wooded area" (Dicker Affidavit, *ibid.*, ¶4) with "serenity", "natural woodlands", and "sanctuary" (Dicker Affidavit, *ibid.*, ¶19), which he felt would be inevitably be marred by the 30-foot tall "alien commercial structure ... with lighting" and emitting "noise" (Dicker Affidavit, *ibid.*, ¶15).

63. The Court found this unavailing. The Court dismissed his claims of injury as "supposition" (the view from his house), or failure to "explain" or lacking in "evidence" with respect to the "use and enjoy" test and substantiation of injury established in Save the Pine Bush (Decision of Justice McCormack, p. 10).

64. As for the view, the courts have firmly held that a degraded view -- in the eye of the beholder -- accords standing, and Petitioners cited one such case, Save Our Main Street Buildings v. Greene County Leg., 293 AD2d 907 (Third Dep't 2002) at 908-909, (Reply Memorandum of Law, p. 41).

65. To repeat the Court's holding:

> ...[W]e have recognized standing when a party alleges an adverse impact on a scenic view from his or her residence [but] the record here supports Supreme Court's findings that the individual petitioners would not sustain the alleged visual impacts because their residences are not within sight of the Project and, as a result, any adverse effects on scenic view would be no different for them than for the public at large.
>
> Save Our Main Street Buildings, *ibid.* (emphasis added) (internal quotations and citations omitted)

66. Obviously in the present case, since Petitioners Dicker and Greengold are "within sight of the project," a fact uncontested by Respondents, they are parties with standing to proceed based on this decision and by the law of standing as established.

67. The trial Court did not even directly address this argument by Petitioners, despite its materiality to the Court's decision.

68. The Court simply stated, obviously contrary to the holding in Save Our Main Street Buildings, "None of the Petitioners live close enough to the

project to result in an injury in fact," (Decision of Justice McCormack, September 19, 2014, p. 11).

69. In a case before the Second Department not previously cited by Petitioners, Matter of Shapiro v Town of Ramapo, 98 AD3d 675 (Second Dep't, 2012), the Court held that a Petitioner who lived "across the street from the site" (¶4 of appellate decision) was entitled to standing in a SEQRA and zoning case:

> 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
>
> Matter of Shapiro, *ibid.*, ¶6

70. Standing was also uncontested for parties "who live near" a public park at issue and who sought to protect the park from unauthorized alienation for other purposes by the local municipality, Capruso v. Village of Kings Point, NY Slip Op 4228 Court of Appeals (2014), at ¶ 4.

71. The trial Court's holding is thus indefensible with respect to Petitioners Dicker and Greengold, if only because they live close enough to view the project area in the Park, would suffer an injury to their view, and are distinct from the general public in that regard.

72. Petitioners Dicker and Greengold should have been found to have standing to proceed on that point alone.

73. The trial Court wrote that it sought some kind of "evidence" of the environmental harm that Petitioners will suffer from the Project.

74. The Court wrote that with respect to Petitioner Dicker:

> While he claims the area will be 'destroyed' he offers no evidence to support that assertion. He does not explain how the use of a half acre of the woods will ruin his entire walk and jog. Further the assertion that the view from his home will be impacted is supposition.
>
> (Decision of Justice McCormack, September 19, 2014, p. 10)

75. But in the history of environmental standing, the courts have not asked for more "evidence" or explanation of injury than what is readily apparent as a logical extension of the planned activities, in contrast with the apparent demands and requirements of the Nassau Court.

76. Petitioner Dicker's feelings are clearly based on facts as presented: to wit, the "air stripper" and its appurtenances, fencing and new road-way, would undeniably alter the natural woodland, and negatively impact how Petitioner Dicker, as well as Petitioners Greengold and Brummel, and other Park users of whom they might be representative, perceive and enjoy the recreational-forest.

77. The trial Court asks for more "evidence", but the higher courts have not, once environmental impairment is objectively established.

78. For example in the decision of the <u>Society of the Plastics Industry</u>, the Court took as a given that various impacts would arise from substituting paper for plastic bags and it would cause "more trucking traffic...and additional air and noise pollution...." <u>Society of the Plastics Industry v. Suffolk</u>, 77 NY 2d 761 (1991), at 767.

79. The Court further intuited that regarding the environmental impact of such traffic, "To the extent that manufacture of paper substitutes threatens

environmental harm, again it would be residents close to those facilities that would directly suffer the alleged harms," Society of Plastics *ibid.* at 779.

80. The Court of Appeals did not opine that even with additional traffic, air emissions and noise, perhaps those effects would not truly be bothersome or adverse or harmful, thus requiring still more 'proof' of injury.

81. Some things are self-evident, no less to the courts than to the layman. The clearly-described and logically-inferable environmental impacts in the present case are in that class.

82. Similarly, the Second Department recently held that the construction along a shoreline that involved some clearing of vegetation created a sufficient inference of harm in and of itself to establish injury, and thereby conveyed proper standing to a party that resided along the same shoreline, at a distance of half-a-mile away.

83. Said the Court:

> "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 AD 3d 901, 2nd Dept. 2013, at 906.

84. Clearly, when the courts are presented with a disturbance to the environment or the status quo, which presents logically-inferable impacts which the Petitioners assert in a reasonable fashion, the Courts do not dismiss such assertions out of hand, but accord them due respect.

85. But where each of the Petitioners claimed the totality of the proposed

roadway, fenced compound, security lights, and thirty-foot tall building would disturb their forest-view, their enjoyment of the pristine forest in their walks, or their serene natural refuge, the Nassau Court was unconvinced.

86. It would seem beyond question that cutting down woods to build a road and placing a semi-industrial facility in a forest, visible from two of the Petitioners' homes and from the walking trails they all use, would degrade the visual character of the undeveloped woods they had come to enjoy.

87. To assert otherwise would seem to make a mockery of the entire endeavor of open-space conservation.

88. The encroachment described by the Court in Capruso, *supra*., may have been different in degree but not in kind, and the Court found it to be compelling:

> A project involving the construction of a DPW facility measuring some 12,000 square feet in area, regrading, paving of access roads, destruction of numerous mature trees, and removal of hiking trails is not merely a change in the nature and scope of a road salt storage facility.
>
> Capruso, *ibid*., ¶ 10

89. The issue the Court was analyzing was not the nature of the view in Capruso, but the character of the encroachment. In that sense it is a relevant detail for this case.

90. Beyond the logical basis of their perception, Petitioners also submitted expert testimony about the negative impact of the proposed construction.

91. In response to new material submitted in Respondents' Answers, a water-resource engineer's purported judgement that the new facilities would

not have an impact on the aesthetics of the Park, Petitioners submitted the testimony of a certified arborist who works with people and their landscapes on a daily basis.

92. The arborist found that "the project as proposed would bother many, though not all, users of the forest who were accustomed to and...who valued and enjoyed the uninterrupted natural-woods experience...." (Petitioners' Verified Reply, Exhibit 51. Affidavit of Richard Oberlander, p. 2).

93. These findings were uncontested by the Respondents, who could have asked for an opportunity to respond by Sur-Reply but did not, and thus tacitly accepted the argument of Petitioners.

94. But the Court, which demanded "evidence", made no reference to Petitioners' professional analysis of injury in its decision, despite its materiality to the issue of standing that it found to be dispositive in this case.

95. In this regard Petitioners clearly met the burden of demonstrating use and enjoyment, and injury, and should have been accorded standing.

96. With respect to Petitioner Greengold, he also presented the Court evidence of various types of the clear environmental harm he would suffer from the project, which clearly demonstrated his standing to sue.

97. Petitioner Greengold's view-based special harm was discussed above.

98. Turning to Petitioner Greengold's standing based on his use and enjoyment of the forest, in a manner different from that of the general public, he described for the record his sense that "[e]ntering the park offers an instant transition to a natural serene and undisturbed environment" (Verified

Petition, Exhibit 3, Greengold Affidavit, ¶3 (b)).

99. That perception, he affirmed, would be marred by the industrial-type "air stripper" and its related road and compound. He affirmed that in his perception it would "significantly ruin an area that is one of the last nature preserves in our community" (Greengold Affidavit, ¶3 (a))

100. Petitioner Greengold spoke of his intensive use of the park where he does "walk in this area many days per week" and does value it as "one of the last nature preserves in our community" (Greengold Affidavit, *ibid.*, ¶3 (a)), which he asserts would be marred by the construction and the constructed facility.

101. Petitioner Greengold's use and injuries are clearly the elements of standing, were stated repeatedly in Petitioners' submissions to the Court, and are clearly sustained by the authoritative decisions cited by the Petitioners.

102. But somehow despite the facts of Petitioner Greengold's routine usage and view, the Court decided that Petitioner Greengold "barely describes a connection to the Park".

103. Rather than acknowledging Petitioner Greengold's standing based on his frequent walks, the Court twists around Petitioner Greengold's assertions to incorrectly conclude that if other members of the public also use the Park intensively, as he states, then Petitioner Greengold cannot assert a level of usage greater than most other members of the public, and thus his standing supposedly fails.

104. The Court in its decision concludes this description of his and others'

usage of the Park "undermines his standing argument." But the Court's logic cannot stand.

105. The fact that some other members of the public also use the park intensively does not deprive Petitioner Greengold of standing; rather, it establishes standing for those other members of the public as well.

106. Standing in New York is not some rare element to be parsimoniously bestowed on the unique individual who beats everyone else in their use and enjoyment of a resource.

107. Rather standing is a practical judicial judgment to be rendered carefully, but when the facts are established, it is to be recognized and affirmed in order that essential rights may be defended when the circumstances dictate.

108. SEQRA cannot enforce itself, it was designed to be enforced by an enlightened and motivated citizenry, and standing cannot be used as an impossible hurdle to frustrate conscientious and legitimate litigation.

109. The Court of Appeals was clearly concerned that excessively strict application of standing rules would have a negative public policy effect, and should be guarded against:

> The City asks us to adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site; that rule would be arbitrary, and would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury.
>
> Save the Pine Bush, *ibid.*, at 305

110. It is noteworthy in passing that the Court did not find that because

there were "many who suffered real injury" therefore no one had standing; on the contrary.

111. Petitioner Greengold did not assert that the typical member of the public at large typically walks and camps in Christopher Morley Park, and hence his activities are undifferentiated from them. He only asserted that groups of other individuals use the park, which his hardly a surprising assertion.

112. The Court of Appeals has not asked that a citizen be the exclusive user of the natural resource, or the member of a tiny and exclusive cabal, but only that he use it "more than most other members of the public" (Save the Pine Bush, *ibid.*, at 301), and therefore would be subject to an injury that is different from that of the general public who lack such a specific connection.

113. Petitioners fully explored the question of which 'general public' was to be considered in the test articulated in Save the Pine Bush. Petitioners relied on the extensive discussion of the question in Society of the Plastics Industry, which Save the Pine Bush sustained in its entirety but expanded upon.

114. Petitioners showed that the public at issue was the "public at large" meaning those not living near the gas station (or forest) and those not partaking of daily or weekly treks through the woods.

115. It is contrary to the analysis of Society of the Plastics Industry, and contrary to common-sense, to claim that those persons who specifically walk and use some specific woodland are in actuality no different from the "public at large" or "most other members of the public" absent some further

argument or proof.

116. No such argument was required of the petitioners in Save the Pine Bush.

117. It was enough for the Court of Appeals that they asserted that they used the Pine Bush area and studied the butterflies, not that the rest of the world did not do so, because that fact was logically presumed.

118. Said the Court of Appeals:

> 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, *ibid.*, at 305

119. Very clearly, the Court of Appeals has ruled that those persons who specifically allege their use of the resource are, by definition, different from those who do not allege their specific use, i.e. "the public at large" (Save the Pine Bush, above).

120. There is no requirement established by the Court of Appeals to analyze the habits of the public at large with respect to a discrete piece of woods or park. To the contrary, the Court said that those who visit it and use the resource are the unique population, by definition.

121. Thus, the Nassau Court's skepticism of the Petitioners' actual distinction from the general public is a misapprehension of the test established by the Court of Appeals, and must be overruled with respect to Petitioners and their standing sustained.

122. Oddly the Nassau Court also took a stab at the issue of "proximity" with respect to Petitioners Greengold and Dicker, the Court citing the decision in Save the Pine Bush.

123. In that decision, the issue of proximity was discussed in a Concurring Opinion by one justice of the Court, in which the Justice concluded that a 500-foot standard was being observed by the lower courts for standing purposes.

124. Petitioners find that interpretation of the law helpful to their standing arguments.

125. The Court was incorrectly advised that Petitioner Greengold lives "approximately more than 500 feet" away from the project as proffered in the Affidavit of engineer Joseph Todaro (Exhibit 4), originally introduced by Respondents Roslyn Water District (Respondents Roslyn Water District, Verified Answer, Exhibit 2, p. 3) and cited in the Petitioners' Affidavit in Reply and Opposition, ¶42.

126. In fact Petitioner Greengold lives well under 500 feet away from the project (Exhibit 6).

127. Rather than sustaining the Court's decision, the proximity issue would in fact presumptively confer standing on Petitioner Greengold, using the logic of the Court.

128. Petitioners are aware of recent decisions holding that proximity does not confer presumptive standing in non-zoning cases "based solely on a party's proximity" Matter of Sierra Club v. Village of Painted Post, 2014 NY Slip Op 2166 (Fourth Dep't, 2014) at ¶ 5, accord Matter of Kindred v. Monroe

County, 2014 NY Slip Op 5069 (Fourth Dep't, 2014).

129. But in both cases the Fourth Department re-affirms the standards that are used when determining the injury that can indeed be sustained due to injuries caused by proximity or not:

> Where, as here, the proceeding does not involve a "zoning-related issue . . . there is no presumption of standing to raise" a challenge under the State Environmental Quality Review Act based solely on a party's proximity. In such a situation, the party seeking to establish standing must establish that the injury of which he or she complains falls within the zone of interests...and that he or she would suffer direct harm, injury that is in some way different from that of the public at large.
>
> Sierra Club, *ibid.*, ¶ 5

130. The trial Court did not cite those cases. By citing instead the "500-foot" rule, however applicable it might be, and then using it against the nearby Petitioners, especially Petitioner Greengold, suggests more an aversion by the Court to granting standing than a judicious application of the law.

131. In fact Petitioner Greengold, as well as Petitioners Dicker and Brummel, did sustain their standing argument under the standards re-affirmed in Sierra Club v. Painted Post and Matter of Kindred, to wit: (1) an injury in the zone of interest of the applicable law, and (2) a harm different from "the public at large" (Sierra Club, *ibid.*, at ¶ 5). SEQRA is concerned about the protection of the environment through the use of public and scientific review, and this case, brought under SEQRA, is about nothing less.

132. Petitioners have shown their injury is different from the public at large due to their "repeated, not rare or isolated" usage of the forest (Save the Pine Bush, *ibid.*, at 305), as well as Petitioners Dicker and Greengold's view-

based injury due to their status as "across the street" neighbors of the forest (Matter of Shapiro, *ibid.*, ¶ 4)

133. Proximity may not yield automatic standing in a non-zoning case, according to the recent holdings, but neither is it an irrelevant matter to be ignored. No court has stated that by proximity Petitioner cannot indeed suffer an injury, and clearly when it comes to view that injury has been substantiated by Petitioners Dicker and Greengold.

134. As one court said in reviewing the issue of standing after the Third Department's ruling:

> While the Third Department has taken the position that in cases where no zoning related issue is involved, there is no presumption of standing based upon proximity here, it is not solely proximity which gives rise to [petitioner's] standing, but, rather, the fact that her proximity results in allegations of direct harm which differs in degree, if not also in kind, from that experienced by the public at large. That difference in degree is a basis for standing here.
>
> Saratoga Lakes Prot. and Improvement Dist. v. Dept. Pub. Works of City of Saratoga Springs, 11 Misc.3d 780 (2006), Supreme Court, Saratoga County, at 788

135. The Court's analysis in Saratoga Lakes is equally applicable to Petitioners Dicker and Greengold.

136. Petitioner Brummel is not injured in exactly the same way as the other Petitioners but he presented to the Court a clear basis for understanding the manner in which he was injured.

137. Like many other Park users, Petitioner Brummel is not among the elect few who live on the Park's periphery, but he demonstrated that he does, as a County resident in whose interest the Park was established, frequently visit

the forest for its natural beauty and sanctuary.

138. Petitioner Brummel stated since March, 2014 he resumed visiting the forest and made "numerous visits" in the approximately four months preceding his affidavit.

139. He noted his connection to the Park ran back to his childhood growing up about two miles away from it.

140. In the language of the Court of Appeals, Petitioner Brummel alleged "repeated, not rare or isolated use" which "meets the Society of Plastics test by showing that the threatened harm" would "affect [him] differently from 'the public at large'" Save the Pine Bush, *ibid.*, at 305

141. Petitioner Brummel affirmed that the main trail that he used, leading from the parking lot to the furthest point away from there, led past the proposed construction site, that the project was proposed in the center of the forest in a deeply-canopied area he enjoyed, and that the man-made facilities and cleared-road would "eliminate the fantasy" of being in an untouched forest (Verified Petition, Exhibit 1, Brummel Affidavit, ¶ 9).

142. The Court challenged but did not state that it ruled on the duration of Petitioner Brummel's use of the forest.

143. Further the Court suggested that because during his visits he was monitoring the threat to the forest from the proposed construction project, the assertion that he had standing under the "use and enjoy" provision of Save the Pine Bush was undermined.

144. The Court suggested that his monitoring qualified as "work related"

even though he had indicated no 'employment' as such a monitor or advocate (Decision of Justice McCormack, p. 9).

145. It might more convincingly be argued that a person who does have a substantial work-related connection with a natural resource does in fact "use and enjoy" that resource more than the general public, and should be granted standing on that basis, not denied it.

146. It appears from this early part of the Court's analysis that the Court was simply bending over backwards to disqualify Petitioners.

147. Such a policy is not endorsed by the Court of Appeals, which has stated:

> Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules.....But we also recognize that permitting everyone to seek review could work against the welfare of the community by proliferating litigation....
>
> In the Matter of Sun-Brite v. Board of Zoning and Appeals of the Town of North Hempstead, 69 NY 2d 406 (1987) at 413 (internal quotations and citations omitted)

148. The Nassau Court in the present case ultimately decided that with respect to Petitioner Brummel, and relying on a the lower-court case cited by Nassau County alone, that he should be denied standing based on some supposed lack of intensity of "enthusiasm, inquisitiveness or concern" in his use of the forest compared with others who had "physical access to the same resource" (Decision of Justice McCormack, pp. 9-10).

149. But Petitioners had fully explored the errors in Nassau's argument against standing based upon that lower-court case, Matter of Tuxedo Land

Trust v. Twn of Tuxedo, NY Slip Op 50377(U), Supreme Court, Orange County (2012). See Petitioners' Memorandum of Law in Support of the Reply and Opposition, pp. 44 ff.

150. Petitioners' showed how the Orange County court directed all of its analysis of legal standing toward the question of how in that case the petitioners' use of the resources differed or did not differ from the use of the public at large. The court did not attempt to analyze how the petitioners' usage differed from the usage of other documented-users of the resources, as Nassau tried to argue.

151. The Orange County Supreme Court's passing reference to those with similar "physical access" (Matter of Tuxedo Land Trust, *ibid.*), did not appear intended, Petitioners concluded, to distinguish those petitioners from others who also used the resource. Nor is such a test supported by the Court of Appeals in Save the Pine Bush.

152. Nevertheless the Nassau Court ruled that based on an 'intensity of use doctrine' supposedly established by the Supreme Court in Orange County, Petitioner Brummel had not proven his standing.

153. For the reasons stated here and in Petitioners other submissions, Petitioners must strongly disagree.

154. Petitioner Brummel demonstrated that he used the 'resource' of the forest, and that he did so in a manner that reflected "repeated, not rare or isolated use" which "meets the Society of Plastics test" (Save the Pine Bush, *ibid.*, at 305).

155. That Petitioner Brummel did not demonstrate some marked

"enthusiasm" (Decision of Justice McCormack, p. 10) etc. to the Court's satisfaction is <u>not</u> a valid test for the purpose of establishing standing, according to the rulings of the Court of Appeals.

156. Petitioners have more than made their case for standing based upon: (1) their active use and enjoyment of the undeveloped woodland area; (2) the imperiled scenic view of woods from the homes of two of the Petitioners; (3) the obvious and substantiated harm and injury to their enjoyment of the un-developed woodlands that would logically be expected to occur were the project to go forward, and (4) arguably, the distance to the property of Petitioner Greengold at approximately <u>less than</u> 500 feet by the Respondents' own reckoning.

Point II: Petitioners Merit A Preliminary Injunction

1. Likelihood of Success on the Merits: Merits of the Underlying Special Proceeding

157. Petitioners have made a detailed argument for preliminary and final injunctions, as well as declaratory judgments and orders halting to process due to SEQRA violations, in their underlying article 78 proceeding, which they incorporated by reference.

158. Petitioners have presented facts and documentary evidence that the three government entities each continually violated essential and fundamental procedural requirements in SEQRA in facially apparent ways:

159. They relied on a lead agency that did not lawfully exist and an EAF that

did not address the project approved (the Town); they ignored SEQRA compliance altogether (the County); or they also made decisions based on an EAF that did not address the project they approved, or was only partially complete, or was insufficient and missing required elaboration and documentation (the District).

160. Given the detailed failings of the Respondents, the requirements of SEQRA, and the "strict compliance" standard applicable to SEQRA (Petitioners' Memorandum of Law in Support of Verified Petition, Point V), Petitioners have fully demonstrated their likelihood to prevail on the merits of this special proceeding.

2. Balance of Equities

161. Petitioners discussed the issue of balance of equities in their Petition, pp. 65-67.

162. Although an "emergency" condition was asserted by the Water District repeatedly to justify an accelerated schedule of deliberation and approval, the Water District has surpassed each of its supposed urgent deadlines with no known impact on its ability to provide water.

163. As Petitioners stated in their first Reply, pp. 8-13, the "emergency" was not declared under SEQRA for expedited approval, and the Water District attorney in fact confided in the Town board that the main purpose of the "emergency" declaration was to make the capital project proceed "in an expedited fashion".

164. In fact there was no water rationing or even enforced conservation during the summer the peak season, beyond an alternating sprinkling-schedule based on odd and even numbered homes throughout the week (Verified Petition, ¶¶ 332 ff.)

165. Furthermore the Water District had always and still does has the option of constructing the "air stripper" in its own compound as it originally planned and intended to do before community sentiment compelled them, in the face of their own chairman's opposition, to change the planned location of the facility.

166. Thus the balance of equities lies with Petitioners, and the urgency to preserve this dwindling resource of an intact piece of natural forest in Nassau County should be evident.

3. Irreparable Harm

167. Petitioners have described extensively both in this submission and in the others the irreparable harm that will occur from marring a 33-acre forest which is today simply traversed by walking paths into one that is home to a fenced, lighted semi-industrial compound accessed by a newly cleared 320-foot access road in the heart of the public forest (Verified Petition, ¶¶ 318 ff.).

168. Furthermore the evidence is that the Water District is ready, willing and able to commence the project as soon as the necessary approvals are received from Albany and the Nassau Legislature (Exhibit5).

169. In other words barring protection from this Court the harm is imminent.

170. The Roslyn Water District voted to appropriate $600,000 to obtain use of County land in Christopher Morley Park to place its proposed "air-stripper", according to the minutes of its July 3, 2014. And it voted at its August 7, 2014 meeting to accept the bid of $447,000 from the Layne Christensen Company to build the air stripper.

171. Further the Nassau Legislature has given plenary powers to its Rules Committee to conclude such massive County obligations as the privatization of its sewer facilities (Exhibit 1), and the Rules Committee is able to meet at the immediate direction of its chairman (Exhibit 2).

172. The Rules Committee also may have the authority to provide the Water District with a lease or other authority to begin construction in the forest at any time, according to a statement by the deputy chairman of the Nassau County Legislature (Exhibit 3, Legislature Transcript, August 4, 2014, p. 68).

173. The overwhelming local impetus is to approve and build this "air stripper," state law notwithstanding. No local agency has shown any willingness to follow the law of SEQRA to this point, and their intention to act as soon as the alienation law is signed is very clear. Thus the threat of irreparable harm is substantiated.

Conclusions

174. Petitioners Dicker and Greengold demonstrated their standing to sue based upon their proximity to the subject forest and the effects of the proposed "air stripper" project on the views from their homes which will be

marred.

175. All three Petitioners in addition demonstrated standing to sue by their routine use and enjoyment of the recreational-forest, and the harms they would suffer to their enjoyment of its natural character by the proposed construction.

176. Petitioners drew from a number of authoritative cases both in their submissions to the Nassau Court and in the present submission to substantiate the law as they assert it gives them standing.

177. Furthermore, Petitioners have provided the Court their prior submissions that demonstrate the strong merits of their case, as well as the irreparable harm they would suffer were the project to begin in the absence of injunctive relief, and the balance of equities that favors the granting of such injunctive relief.

178. In particular Petitioners have demonstrated that there is no actual "emergency" in law or fact that tilts the equities in favor of the Respondents, and that such as assertion as has been repeatedly made is self-serving and disingenuous. There is no water shortage, there have been no significant water restrictions, there is no contamination of the water supply in use, and there was no effort to invoke SEQRA provisions to deal with "emergency" situations.

179. Further, even if an emergency existed (which it does not), it could be rectified immediately if the RWD constructed the water stripper on its own compound, directly adjacent to the water well it will treat.

180. Petitioners are legally justified in seeking to have this Court both

reverse the lower Court's granting of the motion to dismiss based on the alleged lack of standing, and to grant injunctive relief to protect Petitioners' rights and interests as the appeal is being decided.

Relief Statement

181. The relief requested herein was not previously requested from any court except from the trial Court in this matter.

Prayer for Relief

182. Petitioners request that the Court enjoin the Respondents or their agents from in any way altering or damaging the forest in Christopher Morley Park pending the determination this appeal, and

183. Petitioners request that the Court reverse the lower Court's granting of the motion to dismiss based on alleged lack of standing of Petitioners, and

184. Petitioners request the Court to grant such other relief as is just and proper.

Dated: November ___, 2014
Nassau County, N.Y.

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(Affidavit in Support of Appellate Order to Show Cause, Brummel et. al v. Town of North Hempstead et al., Continued)

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Sworn before me this _____ day of

November, 2014

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NOTARY PUBLIC