To be argued by; Stephen F. Downs
Time Requested: 15 minutes

New York State Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT
Docket No. 503697

SAVE THE PINE BUSH Inc.; LYNNE JACKSON; REZSIN ADAMS; JOHN WOLCOTT; LUCY CLARK; SANDRA CAMP; DAVE CAMP; LARRY LESSNER; RUSSELL ZIEMBA; and ANNE SOMBOR,

Respondent - Appellant;

For a Judgment Pursuant to Article 78 of the CPLR

— against —

THE COMMON COUNCIL OF THE CITY OF ALBANY; and THARALDSON DEVELOPMENT CO.,

Appellant - Respondents.

RESPONDENT - APPELLANT'S BRIEF

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1. Whether the Common Council, as lead agency, look a "hard look" at the impacts that a development would have on certain rare plant and animal species in the Albany Pine Bush, when the specific plant and animals species were identified by several interested agencies during scoping as requiring a "full ecological evaluation", and the Final Environmental Impact Statement (FEIS) contained no information at all about the specific identified rare species.

The Lower Court found that the Common Council did not take a hard look at the identified rare species, and that the FEIS in this respect was "deficient". (R. 31)

2. Whether the Petitioners had Standing to challenge the FEIS based on the diminished use and enjoyment of public resources they would suffer if a public resource - the rare species of the Pine Bush, including the Karner Blue butterfly – was harmed as a result of the development project.

The Lower Court found that Petitioners had Standing based on their potential diminished use and enjoyment of public resources, and their long advocacy on behalf of the Pine Bush, and its rare species

The Cross-Appeal

3. Whether the Common Council took a "hard look" at whether the development site was "occupied Karner Blue butterfly habitat" when the Council concluded that the site was not "occupied habitat", and no "taking" of the butterfly would result, notwithstanding that the United States Fish and Wildlife Service (USFWS), the agency

with exclusive jurisdiction to make this determination, made a preliminary determination that the site was "occupied", and requested permission to enter onto the private property of the site to make further studies, which permission was not granted until after the FEIS had been completed. The USFWS, an interested agency, specifically requested the Common Council to delay filing the FEIS until its inspection of the site was completed, but the Common Council refused to wait.

The Lower Court found that the Common Council had taken the requisite "hard look" by relying on observations of the developer's expert at the site, and noted that USFWS had not visited the site for some 7 months after requesting that the FEIS be delayed, without the Court considering that USFWS had not been given permission to enter onto the private site until after the FEIS was finalized, and that when it was permitted to enter (after the FEIS was completed), it determined the site was "occupied", and that the contrary finding of the Common Council was wrong. (R.28).

4. Whether the Common Council delegated or deferred the "taking" decision by USFWS to a time period after the FEIS was filed, when the Common Council, as lead agency would not have an opportunity to take a hard look at the conclusions of the USFWS, and the information on which the USFWS relied would not be in the FEIS. The USFWS, which the Common Council acknowledged had exclusive jurisdiction to make this decision, studied the project site after the FEIS was filed, and determined that the site was in fact "occupied Karner Blue habitat", in contradiction to the findings of the Common Council. (R. 3907)

The Lower Court did not consider this issue.

PRELIMINARY STATEMENT

This is an appeal and cross-appeal of a decision by Supreme Court (Judge McNamara dated February 7, 2007) (R.24), which vacated and annulled a determination of the City of Albany Common Council, pursuant to the State Environmental Quality Review Act, (Hereinafter SEQRA) [1], that a parcel of land should be rezoned to permit the construction of a 124 unit hotel in the ecologically sensitive Albany Pine Bush within 100 meters of the largest surviving population of federally endangered Karner Blue butterflies south of the Thruway. On July 9, 2007, Judge McNamara amended the judgment as to form but did not change the substance of the decision. (R. 7)

A decision by Judge Farradino, dated September 1, 2006, that granted Standing to the Petitioners in this action is also being appealed. (R. 118)

The Appeal

Supreme Court found that the Final Environmental Impact Statement (hereinafter FEIS) filed by the Common Council failed to adequately consider the effect of the proposed hotel on rare, threatened and endangered species of plants and animals that live on or near the parcel of land. (The Third Cause of Action of the Complaint)(R. 29-31). Appellant-Respondents are appealing this decision, and also the decision of Supreme Court to grant standing to the Respondent-Appellants.

The Cross-Appeal

[1] Article 8 of the New York State Environmental Conservation Law, and 6 NYCRR Part 617, hereinafter SEQRA

Respondent-Appellants are appealing the lower Court's dismissal of the First Cause of Action, which alleged that the Common Council improperly determined that the site of the proposed hotel was not "occupied Karner Blue butterfly habitat", and would not result in a "taking" of the endangered butterfly, notwithstanding that the United States Fish and Wildlife Service (USFWS) had exclusive jurisdiction to make this determination, and had made a preliminary decision that the site was "occupied". (R. 4318). The USFWS requested that the Common Council "withhold any final approval for the project" until the concerns of the USFWS had been resolved by a visit. (R.4318). Instead, the Common Council disregarded the request of USFWS and made its own finding that the site was not "occupied", and no "taking" would result. (R. 4057; 4067). After the FEIS was filed, the USFWS completed its studies of the area and determined that the hotel habitat was in fact "occupied". (R. 3903; R. 3907). **The Common Council was wrong in its determination, which in fact it had no jurisdiction to make. When the Council learned the USFWS had definitively established that the site was "occupied", it should have vacated the FEIS, or ordered that a Supplemental EIS (SEIS) be filed so it could consider this new information.**

Supreme Court found the Council took a "hard look" at the impact of the hotel project on the Karner Blues, without considering that the Council had no jurisdiction to overrule the USFWS, and never considered the final USFWS conclusion concerning occupation by the Karner Blues, which was totally opposite to the one reached by the Council. (R. 27)

Respondent-Appellants filed a notice of appeal on February 28, 2007 to Judge McNamara's decision dated February 7, 2007 (R 4214)

STATEMENT OF FACTS

On December 19, 2005, the Common Council of the City of Albany, as lead agency, filed an FEIS and Statement of Findings, approving the rezoning of a plot of land for the construction of a 124 unit hotel by the applicant, Tharaldson, at 124-128R Washington Avenue Extension. This action was approved notwithstanding that the hotel site is adjacent to the Crossgates' "Butterfly Hill", the home of the largest sub-population of Federally endangered Karner blue butterflies to reside south of the Thruway. (R. 4149-50). The project's approval was made over the strong opposition of the Albany Pine Bush Preserve Commission, (hereinafter "APBPC"), which warned the Common Council that its conclusions in the FEIS were so wrong as to "raise concerns about integrity of this project's environmental review within the SEQRA process" (R.4304; 4148-9) The APBPC said that the FEIS Findings:

> "...appear unsubstantiated and contradictory to the on-site information presented, as well as information provided by state and federal wildlife agencies, and that FEIS and Findings Statement analysis of potential impacts is therefore inconclusive and/or inaccurate. (R. 4295-7)

Background

As a result of numerous court decisions of lawsuits brought by Save The Pine Bush, the City of Albany has been required to set aside several thousand acres in the Pine Bush as a Pine Bush Preserve for the protection of the Karner Blue butterfly, its habitat and the other rare species that live in the Pine Bush. (See for example, Save The Pine Bush v. City of Albany, 70 NY2d 193, 518 NYS2d 943; Save the Pine Bush, Inc. v. Common Council of the City of Albany, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992), Save The Pine Bush v. City of Albany, 141 AD2d 949, 530 NYS2d 295). The Preserve is bisected by the Thruway which is an almost compete barrier to butterfly migration. The

largest significant population of Karner blue butterflies south of the Thruway does not live in the Preserve itself but in a cul-de-sac over 1000 meters outside the Preserve on Butterfly Hill next to Crossgates Mall, in a "Butterfly Management Area". (R.4149-51)

The long term goal of the Pine Bush Preserve is to induce the butterflies to spread west from Butterfly Hill into the Preserve, (R. 4149-51; R 4312 (map)), but at best this will take many years to achieve because Karner blue butterflies typically spread only about 200 meters a year. In the meantime the preservation of the Karner blue butterflies on Butterfly Hill is critical because if this population should die out, the best chance to bring a significant population of Karner blue butterflies into the Preserve south of the Thruway will have been lost. (R. 4149-51). **The Preserve, which was establish at great expense to save the Karner blue butterfly, may well find itself completed, but without any Karner blue butterflies in it at all.**

The Hotel project is within 100 meters of Butterfly Hill and so will have a critical bearing on whether the Karner blue population survives long enough to populate the Pine Bush Preserve. Around 1998, when Crossgates expanded its theater next to Butterfly Hill, and illegally cleared and bulldozed portions of the Hotel site, the population of Butterfly Hill fell approximately 75% from 157 butterflies observed during a hatching to around 37 the next year. The population has not significantly recovered since 1998, and has varied in numbers from a low of 5 butterflies to a high of 30. It remains a critically small and fragile population. (R. 4150-51; R 4314 (Chart)). Preserving the Hotel project site from development is essential for strengthening the Karner Blue population on Butterfly Hill,

since USFWS has determined that the Karner Blues utilize nectar sources on the site for food to survive. (R. 3903; 3907)

The state-listed Frosted Elfin butterfly (threatened) inhabits the area around Butterfly Hill. Other rare species that inhabit the Pine Bush include the Hognosed Snake (Special Concern), the Worm Snake (Special Concern), the Eastern Spadefoot Toad (Special Concern), and the Adder's Mouth Orchid. (R. 4158-4161; R.4330). There are no findings about these other rare and threatened species in the FEIS at all, notwithstanding that several interested agencies requested a "full ecological evaluation" for these species in connection with the hotel project's environmental review (R. 4319; 4330; 4321-8).

First Cause of Action (Cross-Appeal)

On or about April 18, 2005 the United States Fish and Wildlife Service (USFWS) wrote to the Common Council its conclusion that Karner blue butterflies were likely to use the Hotel project site.

> The proposed project area is approximately 100 meters from wild blue lupine patches that are known to be occupied by the Karner blue butterfly. Therefore the proposed project area may be considered occupied by Karner blue butterflies if there is suitable habitat present; we conclude that Karner blue butterflies are likely to use the proposed project area. (emphasis added) (R. 4318)

USFWS stated that it needed to visit the site to determine if the site was "occupied" by the Karner blue butterfly, and if the development of the site would result in a "taking" of a federally-listed endangered species under the Endangered Species Act. (R 4318). The letter stated:

> If agreed to by the applicant, we would like to visit the site to examine potential nectar resources both within the existing NYSDEC management area and within the proposed project area. (Emphasis added) (R. 4318)

The letter also stated:

> We request that the City withhold any final approval for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner Blue butterfly. (R 4318)

The Common Council never required that the applicant grant the USFWS permission to enter onto private property to study the Hotel project site, prior to filing the FEIS, notwithstanding protests from the Albany Pine Bush Preserve Commission (APBPC) that no permission for an inspection had been given. (R. 4154; 4296-7). Instead the Council made a finding in the FEIS that the hotel site was not "occupied habitat" of the Karner blue butterfly, and so no "taking" of the endangered butterfly would result. The FEIS Findings state:

> In response to the comments of the USFWS, the Applicant provided detailed analysis and expert opinion [by the Applicant's hired expert Dr. Futyma] contained in the FEIS. The expert report concluded that no taking would occur as a result of the Project taking into account, among other things, the Federal Recovery Plan and application of the terms "occupied habitat", critical habitat" and suitable habitat" to the Site. (R. 4278)

In making this finding of "no taking", the Common Council disregard the advice of the scientists at the APBPC, the New York State Department of Environmental Conservation (NYSDEC) and USFWS who have had more than 15 years of study and experience managing the recovery plan of the Karner blue butterfly in the Pine Bush, whose expertise in the field of Karner blue butterfly recovery is well recognized. (R. 4152-54; R. 4147). The Findings relied exclusively on the opinion of Dr. Futyma, a botanist hired by the developer. Dr. Futyma's resume indicates that he holds no academic position, has not published any independent scientific articles on the subject of Karner Blue butterflies,

and has not undertaken any formal educational courses or training with respect to the Karner Blue butterfly, or the recovery of endangered species (R. 4147; R 3685). Dr. Futyma claimed that since the Karner blue butterfly needs the blue lupine flower to reproduce, any site that does not have blue lupine flowers would not be suitable habitat for the butterflies.[2] In this simplistic theory he was wrong, because Karner blue butterflies will feed on other plants and flowers.(R. 4296) Thus the hotel site was providing food for the butterflies on Butterfly Hill less than 100 meters away, even if they were not able to reproduce there because of the absence of blue lupine. (R.3907)

The Common Council also stated in the FEIS Findings that:

> "..the USFWS may exercise its authority in its discretion"… "if a site visit is deemed necessary, the Applicant will be required to cooperate in such efforts as required by law", (R 4278-9,)

This finding had the effect of delegating the final decision on the "taking" issue to the USFWS, and deferring the USFWS's decision until after the FEIS was filed. As a result, the information and decisions of USFWS would not in the public record (FEIS) and the Common Council would not have an opportunity to take a "hard look" at the USFWS' determination, as required by SEQRA (6 NYCRR 617.9). The Common Council would have no opportunity to consider, in light of the later USFWS determination, what environmental impacts the project would generate, or what alternatives should be examined, or what mitigation measures should be undertaken, or whether the project should proceed at all.

[2] As Dr. Futyma stated in his July 8, 2005 report on the hotel site, "It is clear that the project site does not meet the definition of "suitable habitat" in the Karner Blue Butterfly Recovery Plan because it does not possess larval resources, i.e, the wild lupine plants on which the larvae feed." (R. 2791). See also Dr. Futyma's May 26, 2000 letter in which he states that the site is "incapable of supporting a breeding population of Karner blue butterflies" because he could not find any blue lupine on it. (R. 3958)

As it turned out the Common Council was completely wrong in its finding that the Hotel site was not occupied Karner Blue habitat. After the FEIS was filed on December 19, 2005, the USFWS eventually was able to visit the hotel site and determined that the hotel site was in fact "occupied" Karner Blue habitat. (R. 3886-38; R. 3908). On September 18, 2006, the USFWS sent a letter to the Common Council confirming the USFWS findings and indicating that the applicant (Tharaldson), could either apply for a "take" permit, or redesign the project to avoid a "take" of Karner Blue butterflies. The letter concludes:

> We are currently waiting for a response from the applicant or their representatives with respect to which alternative is preferred. **Therefore we continue to request that the City withhold any final approvals for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner blue butterfly.** (Emphasis Added) (R. 3908)

A similar letter dated September 8, 2006 was sent to the Common Council from the APBPC, noting the USFWS's determination that the hotel site was "occupied Karner blue butterfly habitat", and requesting that a Supplemental Environmental Impact Statement be required to assess this new information. (R. 3903)

On September 21, 2006, the Planning Board of the City of Albany, ignored the concerns of the USFWS, and APBPC, and voted to approve the Hotel project, (site plan approval) without apparently considering any public report or written statement from USFWS, and without requiring a Supplemental Environmental Impact Study (SEIS) concerning the newly discovered information from the USFWS that the Hotel site is an "occupied" Karner Blue habitat. (R. 3887). This new information from USFWS directly contradicted

the earlier finding made by the Common Council in the FEIS that the Site was not occupied habitat and that no "taking" would result. (R. 4268; 4278).

Supreme Court dismissed the First Cause of Action after finding that the Common Council had taken a "hard look" at the question of whether the Hotel site was occupied Karner blue habitat by relying on Dr. Futyma's erroneous understanding of Karner blue butterfly biology. The Court stated, "Moreover, in the absence of some contrary proof, its conclusion does not constitute error as a matter of law." (R.4203). The court apparently did not consider the "contrary proof" from the USFWS that the site was in fact "occupied habitat", that the Common Council did not have jurisdiction to make a "taking" determination, and that, by deferring the USFWS findings until after the FEIS was completed, the Council never had the opportunity to take a hard look at the opinion of the USFWS on this important issue. Moreover the Court failed to consider that the USFWS could not trespass on to private property to study the habitat to the Karner blue butterflies without permission of the owner (Tharaldson), and that there is no indication in the record that permission by the applicant was ever given. The APBPC protested that "the [USFWS] has apparently not received a response from the City to its request to visit the site". (R. 4297)

Third Cause of Action (Appeal)

On or about September 7, 2004, NYSDEC wrote to the Common Council to note that the NYSDEC was an interested agency "and may prove to be an involved agency pursuant to ECL Article 11-0535 (Endangered and Threatened Species)". In connection with the scoping checklist of "Terrestrial and Aquatic Ecology", the NYSDEC stated that the Pine

Bush was home to a number of rare and endangered species including the endangered Karner blue butterfly, the threatened Frosted Elfin butterfly, the Hognosed Snake (Special Concern), the Worm Snake (Special Concern), and the Eastern Spadefoot Toad (Special Concern), and requested that the "biological evaluation should include these other rare species as well." (Emphasis added)(R. 4330) . The NYSDEC stated,

> "Finally, it is important that biological evaluations and surveys of the site be conducted by qualified biologists at an appropriate time of the year to find the species in question." (Emphasis added)(R. 4330)

On April 18, 2005 the USFWS stated in a letter to the Common Council in connection with scoping for rare, threatened and endangered species present near the site, that the State-listed threatened Frosted Elfin butterfly occurs on NYSDEC management area adjacent to the Hotel project site. (R. 4318-9). The letter said that USFWS had previously requested that the Common Council "coordinate" with the NYSDEC and the NYS Natural Heritage Program to determine what impact the Hotel project would have on the Frosted Elfin butterfly, and what, if any, other threatened or endangered species living were living in the area, and what impact the Hotel project would have on them. The April 18, 2005 letter noted that the record did not reflect any effort by the Common Council to "coordinate" and reiterated their request that the Common Council coordinate with other involved agencies. The April 18, 2005 letter further stated the need to "evaluate the terrestrial and aquatic ecology of the proposed project area" (R.4319), and noted that Dr. Futyma's observations at the site were limited to the Karner blue butterfly and the blue lupine, and that these observation were limited (in Dr. Futyma's own words), to "open, non-forested part of the site".(R. 4319). The letter concluded, "We recommend that a full ecological evaluation of the proposed project area take place." (R.4319)

On April 26, 2005 the APBPC wrote to the Common Council and stated that the Albany Pine Bush is the home to 19 rare plant and Animal Species including the Karner blue butterfly, the Frosted Elfin butterfly and the endangered Adder's Mouth Orchid. (R. 4321) The letter sharply criticized Dr. Futyma's report, by giving example of his mistakes and saying, "…it appears that the consultant did not completely or appropriately evaluate the project site's contribution and significance as Karner blue butterfly habitat".(R. 4325) The letter concludes by saying:

> In closing, I believe that the Commission would not support the requested zoning change and development concept as proposed without a more complete evaluation of the projects potential short – and long-term, direct and indirect cumulative impacts <u>on rare and listed plant and animal species</u>, including the Karner blue butterfly and Frosted elfin butterfly.. (Emphasis added) (R. 4328)

Notwithstanding these letters, the FEIS Findings Statement does not mention the Frosted Elfin butterfly, the Adder's Mouth Orchid, the Hognosed Snake, the Worm Snake, or the Eastern Spadefoot Toad, or contain any analysis about their habitats, or the impact of the Hotel project on these rare species. (R. 4159). The only statement in the FEIS on the subject is a finding based on Dr. Futyma's observations that the site is not "utilized by a State or Federal endangered or threatened species. (R. 4278). The FEIS finding states:

> Dr. Futyma examined the issue in the DEIS and FEIS and determined that no state or federal permits is implicated or required because the Site is not utilized by a State or Federal endangered or threatened species, the Site does not contain any rare ecological community types, suitable habitat or other significant ecological features and there is no breeding habitat for Karner blue butterflies on the Site. (R. 4278)
>
> * * *
>
> "…[T]he Project site does not contain any endangered, rare or threatened species. (R. 4259)

This finding in the FEIS does not respond to the concerns of the NYSDEC and the USFWS concerning other rare, threatened and endangered species. Dr. Futyma, is a

botanist and there is no indication that he has any expertise to evaluate other rare animal species. Dr. Futyma does not claim to be qualified to evaluate other rare species and described his "qualifications" as "a PhD in botany, specializing in plant ecology, as well as numerous field studies of Karner Blue Butterflies and their habitat in the region between Albany and Glens Falls". (R. 3947).

Moreover, by his own admission, Dr. Futyma was not looking for other rare animal species when he visited the site, but was rather looking for Karner blue butterflies and blue lupine. Dr. Futyma noted in his December 8, 2004 report that he followed the "Protecol for monitoring Karner blue butterfly sites" (R.. 3947) which obviously was not designed to locate other rare species. Dr. Futyma wrote in his July 8, 2005 report to the Common Council:

> My visits to the project site were for the purpose of determining, among other things, whether it has any resources used by Karner blue butterflies. Therefore my observations of animals on the site were confined to butterflies. (Emphasis added) (R. 2787)

There is no indication that the days Dr. Futyma visited the site, (which supposedly were optimal for Karner Blues), would have been optimal for viewing other rare species. His observations were limited to the non-forested part of the site. (R. 3947) Moreover, his findings made no attempt to determine the impact of the Hotel on other rare species **near** the site or in the forested part of the Site, or to determine whether the ecology of the site was compatible with the various habitats of the rare species. His reports do not mention in any way the specific rare species for which an evaluation was requested by the NYSDEC and the other interested agencies (other than a brief reference to the Frosted Elfin butterfly). In short there was no information from which the Common Council

could have drawn any conclusions concerning the other rare species about which various interested agencies had requested evaluation during scoping. Indeed the FEIS does not mention these other rare species at all or discuss the effect of the Hotel project on them or their habitats in any way. (R. 4160)

Supreme Court found that:

> Missing from the Futyma reports are any discussion of animals, other than butterflies, which may be present on the site. And, though considerable attention was given to the impact the project may have on the off-site Karner blue butterfly population, and to a lesser extent the Frosted elfin butterfly, there is no evaluation, despite the contrary statement in the FEIS, of the impact the project may have on any of the "rare" plant and animal species known to be present in the Albany Pine Bush particularly those specifically identified by NYSDEC and the APBPC. Consequently, with respect to this issue the environmental impact statements are deficient. (R. 4206)

POINT ONE (CROSS APPEAL)

THE COMMON COUNCIL FAILED TO TAKE A HARD LOOK AT WHETHER THE HOTEL PROJECT SITE WAS "OCCUPIED" KARNER BLUE HABITAT, AND WHETHER A "TAKING" WOULD RESULT

A. The Common Council Improperly Assumed Jurisdiction From The USFWS To Decide Whether The Hotel Site Was "Occupied" Habitat And Whether There Would Be A "Taking."

The Karner blue butterfly is a federally listed endangered species. (R.4316). USFWS has exclusive jurisdiction, pursuant to the Endangered Species Act (ESA), 16 USC 1531 et seq., to determine whether the Hotel project would result in a "taking" of a federally endangered species. The Finding in the FEIS that a "taking" will not occur (R 4278), was therefore in excess of the Common Council's jurisdiction.

In National Audubon Society v. Davis 144 F. Supp 2d 1160 (N.D.Cal. 2000), the Court found that a state law which would put limits on federal conservation efforts under the ESA were preempted by the ESA. The Court stated:

> "To the extent that [the California statute] now prevents federal agencies from protecting endangered species under the ESA in situations where those agencies conclude that leghold trapping is necessary, the state statute conflicts with the ESA and is preempted." At 1181

In the same way, the Common Council was preempted from making a determination under the ESA as to whether the Hotel project will result in a "taking" of a federally listed endangered species. That determination was for the USFWS alone to make.

This is especially so where experts from the United State Fish and Wildlife Service wrote to the Common Council that they had preliminarily concluded that Karner blue butterflies **presently** occupied the Hotel project site, and requested permission from the developer to visit the site to determine if a "taking" of Karner Blue butterflies would occur under the Endangered Species Law (ESL).[3]. The Common Council did not require that the applicant permit a visit, and instead found in the FEIS that no "taking" would occur, relying solely on the developer's expert who erroneously believed that without blue lupines, the butterflies would not visit the site, contrary to the opinion of endangered species experts. (R. 4278). The Common Council without any jurisdiction to do so essentially overruled the preliminary finding of the USFWS, that the Karner Blue butterfly was present occupying the Hotel site., notwithstanding that SEQRA does not

[3] The USFWS's determination of present occupation results from their definition of "occupied habitat" as being any habitat within 200 meters of blue lupine plants which Karner Blue butterflies are likely to utilize. The Hotel project site in this case is less than 100 meters from such blue lupine plants

alter the jurisdiction between or among state agencies. Ames v. Johnson,169 AD2d 84, 571 NYS2d 831 (3rd Dept. 1991)

B. The Common Council Delegated the Decision on the Karner Blue "Taking" to the USFWS, to be made after the FEIS was Closed, which precluded the Common Council from Considering the Determination of the USFWS

In a coordinated SEQRA review, all the interested agencies must be given an opportunity to be heard by the lead agency before the lead agency can make its findings based on the public record compiled by all the participants. (6 NYCRR 617.6 (b)(3); 617.9 (b)(1)) Only by obtaining information from all interested agencies on the issues identified during scoping can the lead agency take the requisite "hard look." at the public information in the EIS and reach its final conclusions. After the Common Council in the present case made the determination in the FEIS that the hotel project would not result in a "Taking" of the Karner Blue butterfly, the Council went on to state:

> "SEQRA does not change, or otherwise diminish, the jurisdiction of other agencies and the USFWS may exercise its authority in its direction.… [i]f a site visit is deemed necessary, or other obligations are imposed by other involved agencies, the applicant will be required to cooperate in such efforts as required by law. (R. 4278)
> .

This FEIS Statement, in effect, delegated and deferred to the USFWS, the decision on the "taking" issue to be made at a later date, away from public scrutiny, after the FEIS was complete and the Common Council could no longer take a "hard look" at the environmental consequences of the USFWS' determination. This approach profoundly violated the basic principles of SEQRA, that the lead agency must first assemble all of the relevant information from all the concerned agencies into an EIS, and then take a hard

look at the environmental impacts disclosed in the public record before making the EIS final.

In Penfield v. Planning Board, 253 AD2d 342, 688 NYS2d 848 (4TH Dept. 1999), a Planning Board, in its FEIS, identified an issue of hazardous waste as a primary area of concern, and approved the project conditioned upon the applicant's obtaining a remediation plan from the NYSDEC. The Court vacated the approval because this would result in a determination that was not based on information in the public FEIS, and because the Planning Board would not have taken a hard look at the information before completing the FEIS. The Court stated:

> In our view, however, deferring resolution of the remediation was improper because it shields the remediation plan from public scrutiny…Although a lead agency without environmental expertise to evaluate a project may rely on outside sources and the advice of others in performing its function…it must exercise its critical judgment on all of the issues presented in the DEIS…Thus, by deferring resolution of the hazardous waste remediation issue, the Planning Board failed to take the requisite hard look at an area of environmental concern." at 854

In the present case, the Common Council not only improperly assumed jurisdiction from the USFWS and made a determination that only the USFWS could make, but it compounded the problem by deferring the site visit of the USFWS until after the FEIS was completed, knowing that the USFWS had requested a site visit which had not been granted. In effect, the Common Council determined that any findings made by the USFWS would be shielded from public scrutiny and kept out of the FEIS, and so the Common Council would not have an opportunity to take a "hard look" at what the USFWS found. As the City delicately expressed it in its Answering papers:

> The Common Council did not attempt to thwart the USFWS's exclusive jurisdiction over federally protected species. The Common Council

> simply provided a caveat to Tharaldson that their Finding Statement may not be the last word on the matter of the Karner blue butterfly. (R. 3773)

This is exactly the error found by the court in the Penfield case – the lead agency insulating itself and refusing to consider information from an interested agency with exclusive jurisdiction and expertise.

The error is especially clear here where the USFWS actually did a study after the FEIS was filed, and determined that the hotel site was in fact "occupied" Karner Blue butterfly habitat, (R.3908), completely contrary to the finding in the FEIS that the hotel site was not "occupied" habitat.(R. 4278). Obviously if the Common Council had waited until it received the determination of the USFWS before taking its "hard look", it would in all likelihood have reached very different conclusions, and gone through a very different analysis. The Common Council might had decided that it needed to consider more alternatives, or it might have decided that it needed more information, or it might have decided that the project created too much risk for the fragile population of Karner blue butterflies only a short distance away, or it might have reached some other conclusion. But by deferring the "taking" issue to a later date after the FEIS was complete, the Common Council failed to take a hard look at all the environmental impacts including the opinion of the USFWS, and as a result, the FEIS is fatally incomplete and deficient. Penfield v. Planning Board, 253 AD2d 342, 688 NYS2d 848 (4th Dept. 1999), Tonery v. Planning Board, 256AD2d 1097, 682 NYS2d 776.

It should be noted here, that in its letter of April 18, 2005 the USFWS requested that the Common Council delay closing the FEIS until it had time to study the Hotel project site (R. 4316). The Lower Court found that USFWS did not visit the site during the seven

months between its letter to the Common Council and the closing of the FEIS, but failed to consider that the USFWS could not trespass on the private property of the Hotel site without permission. There is no indication in the record that permission was ever given, and indeed the APBPC complained to the Common Council that permission was not given, and the Council had not required that the applicant give permission. (R. 4154). The Common Council thus permitted the applicant Tharaldson to block the USFWS from visiting the property. The Council effectively acknowledged that USFWS had been blocked in its attempt to visit the site when it wrote in the FEIS, "…if a site visit is deemed necessary, or other obligations are imposed by other involved agencies, the Applicant will be required to cooperate in such efforts as required by law" (R. 4279)

C. Finalizing the FEIS Without Knowing The Decision Of The USFWS, And Without an SEIS Prevented The Public From Knowing The Basis On Which Environmental Decisions Were Made.

Since the FEIS was filed, there have been continual negotiations between the USFWS and Appellant-Respondents on how the Hotel project must deal with the "taking" issue. All of this negotiation has been conducted outside the public record in clear violation of SEQRA. Indeed it may well be said that the final decision about the "taking" issue may well occur without the public having any idea as to the basis of the decision.

In the letter dated September 18, 2006, (R. 3683-4), ten months after the FEIS was closed, USFWS continued to provide information to the City and the developer, and various interested agencies, but this critical information – that the site is in fact "occupied habitat" of the Karner Blue butterfly is not available to the public. The letter refers to negotiations between the USFWS about alternatives. Yet none of these negotiations are

found anywhere in the public record. See Penfield v. Planning Board, *supra,* in which the court stated that, "deferring resolution of the remediation was improper because it shields the remediation plan from public scrutiny." at 854.

Clearly, the Common Council should have vacated the FEIS or asked for a Supplemental EIS (SEIS) when it became aware that the USFWS had reached a conclusion completely opposite of what the Council had found in the FEIS. The APBPC asked that an SEIS be filed. (R.3905). Instead the Council ignored the USFWS findings and the APBPC request for an SEIS, and proceeded to approve the project. The result has been a split proceeding in which the public FEIS filed by the lead agency with no jurisdiction or expertise as to Karner blue butterflies has declared that the hotel site is not "occupied" and that no "taking" will occur, while privately the agency with jurisdiction to make this determination, the USFWS, has reached just the opposite conclusion. This is exactly the result that SEQRA was designed to avoid. In correcting this situation the court must support the agency with jurisdiction and expertise, either by voiding the FEIS as incomplete, or by ordering an SEIS.

The present case is not similar to Riverkeeper Inc. v. Planning Bd of Town of Southeast, 9 NY 3rd 219 (2007). In that case, a decade after an FEIS had been filed, objections were raised that in the time since the FEIS was filed, environmental standards had risen, and information about the project had changed, which should be evaluated in an SEIS, before new development could proceed. The lead agency considered the new standards and information and decided that an SEIS was unnecessary since the information had already been taken into consideration in the original FEIS. The Court of Appeal agreed that a

lead agency could decide for itself whether an SEIS was necessary as long as it took a "hard look" at the issues raised and made a reasoned elaboration on whether an SEIS was necessary. In the present case however, the Common Council did not consider information from the USFWS that the hotel site was "occupied Karner blue butterfly habitat", nor did it ever issue any "reasoned elaboration" as to why this critical information should not be considered on the"taking" issue, especially since the information was directly contrary to the Council own findings.

The present case is more closely analogous to Sierra Club v. US Army Corp of Engineers, 701 F.2d 1011 (1983) in which the Court found that the Army Corp, (ACOE) had reached permitting conclusions based on insufficient EIS information and that when new information was presented which showed that the Corp was wrong, it nonetheless proceeded ahead without requesting an SEIS. The Court said:

> The record revealed that the authors of the FEIS had not made an adequate compilation of fisheries data, had not compiled information in objective good faith, had paid no heed to the expert's warning that they lacked needed information, and hence had reached the erroneous conclusion that the interpier area was a biological wasteland. This baseless and erroneous factual conclusion then became a false premise in the decision maker's evaluations of the overall environmental impact of the Westway.
>
> * * *
>
> We hold simply that a decision made in reliance on false information developed without an effort in objective good faith to obtain accurate information cannot be accepted as a "reasoned decision". At 1034

Similarly in County of Orange v. Village of Kiryas Joel, 44 AD 3d 765; 844 NYS2d 57 (AD 2 Dept. 2007), the court vacated an FEIS that failed to properly evaluate the various effects of a construction project. The Court stated:

> Where an agency fails or refuses to undertake necessary analyses, improperly defers or delays a full and complete consideration of relevant areas of environmental concern, or does not support its conclusions with rationally-based

assumptions and studies, the SEQRA findings statement approving the FEIS must be vacated as arbitrary and irrational. at 61

See also MYC NY Marina v. Town BD of East Hampton, 842 NYS2d 899 (2007)

In the present case it was error for the Lower Court to find that the Common Council could overrule USFWS preliminary determination that the hotel site was "occupied", and refuse to hold open the FEIS until USFWS was given permission to visit the site by the applicant. The eventual inspection of the property by USFWS was made after the FEIS was closed and so the Common Council, as lead agency in a coordinated review, had no opportunity to consider the views of an interested agency, the USFWS, that the site was in fact "occupied Karner Blue habitat". By failing to consider the USFWS opinion, which only the USFWS had jurisdiction to make, and by failing to vacate the FEIS or request a Supplemental EIS after the USFWS eventually made its decision, the Common Council failed to take a "hard look" at the impact of the project on the Karner blue butterfly. [4]

POINT TWO

THE COMMON COUNCIL FAILED TO TAKE A HARD LOOK AT THE EFFECT OF THE PROJECT ON OTHER RARE, THREATENED OR ENDANGERED SPECIES IDENTIED DURING SCOPING BY OTHER INTEREST AGENCIES IN THE COORDINATED REVIEW

[4] In County of Orange v. Village of Kiryas Joel, *supra* at page 62, the Court noted that an agency could only require an SEIS under certain circumstances such as "newly discovered information", and stated that where the FEIS was simply inadequate to begin with, the correct remedy was to vacate the FEIS rather than require an SEIS. Here the Respondent-Appellants contend that the FEIS was inadequate to begin with, but if the court finds that the final decision of the USFWS constituted newly discovered information, an SEIS would also be appropriate. (See 6 NYCRR 617.9(a)(7))

The lead agency must identify the relevant areas of environmental concern, take a "hard look" at them, and make a "reasoned elaboration in writing about the basis of its determination. Matter of NY City Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 348, 763 NYS2d 530 (2003). Here the Common Council as lead agency did not do any of these three requirements. The USFWS, the NYSDEC and the APBPC were all interested agencies within the coordinated review of the hotel project in which the Common Council was the lead agency. During scoping, all three agencies requested that a "full ecological evaluation" be done on the impact of the hotel project on rare, threatened and endangered species inhabiting the Pine Bush and specifically mentioned a number of such species of concern. However, the Common Council simply did not perform is lead agency function.

The Common Council failed to coordinate information among the agencies as USFWS noted in its letter of April 18, 2005. Instead, the Council relied on a report by a botanist, Dr. Futyma, hired by the developer, that on 5 visits to the site he had not seen any rare, threatened or endangered animals, notwithstanding that Dr. Futyma was not qualified to evaluate other rare species (R. 3947; 4259), and there is no information in the record about the habitats of these other rare species to determine whether his visits would have permitted him to observe other species. (ie. Were the other species nocturnal, or would they have been most easily identifiable during other seasons, or were they likely to reside in the forested part of the hotel site where Dr. Futyma did not observe?). Moreover, during his visits to the site Dr. Futyma claims to have been following the "NYSDEC: Protocol for monitoring Karner blue butterfly sites" (R. 3947), and has acknowledged that during his visits his observations were "confined to butterflies" (R. 2787), and were

limited to the "non-forested parts of the site" (R. 3947). Obviously such a protocol would not be appropriate to use for evaluating rare species other than the Karner Blue, and it is clear that Dr. Futyma made no such evaluation of other rare species, especially in light of the NYSDEC's request that "biological evaluations and surveys of the site be conducted by qualified biologists at an appropriate time of the year to find the species in question." (R. 4330). Clearly that was not done here.

It is important to note that not seeing any rare species on any particular day does not mean that rare species do not utilize the site. As APBPC noted:

> [Dr. Futyma] indicated in his letter that no Karner blue butterflies were observed. He further stated that in his opinion that "it is also reasonable to expect that I would have seen at least a few on the site if it were of any significance as a nectar source for the adult butterflies". Karner blue butterfly research in New York and throughout the range of the species indicates that it is indeed very reasonable to expect that he would <u>not</u> have seen butterflies at this site, given the extremely small source sub-population and that not finding butterflies within the span of a couple of visits can be rather common. In fact multiple sites in Saratoga and Albany Counties have had butterflies in one year, not in other, and subsequently found again in later years. (emphasis added)(R.4325)

What is true of butterflies, is true of any rare species whose population has dwindled to a few individuals. It may be difficult or impossible to determine how a rare species utilizes a site based only on a site visit of a few days, and a negative finding means nothing scientifically. What is necessary is to analyze the ecology of the site and determine if it provides the habitat for rare species, based on the particular needs of each species, which is something that Dr. Futyma did not and could not do. As the APBPC noted about Dr. Futyma:

> When considered cumulatively, the comments provided by nationally recognized Kbb experts, including experts from the APBPC, TNC, DEC, and FWS appear to significantly contradict the applicant's hired

> consultant, someone who may be a respected "Vegetation Ecologist" as described in his report, but who is not a Kbb expert, a lepidopterist, or even a wildlife biologist" (emphasis added)(R. 788)

Clearly the same may be said about Dr. Futyma's credentials to evaluate other rare species, something even Dr. Futyma does not claim to have done except to note that he did not see any rare species in his visits to the site.

The FEIS failed to discuss the specific habitats of the rare species, and how attractive or compatible the habitat of the hotel site would be to them; it failed to determine what impact the Hotel project would have on these rare species, and it gave absolutely no rational for its vague conclusions that there would be no impact. The specific rare species are not mentioned in the Findings at all in any way. There was no reasoned elaboration in the FEIS as to how the hotel would impact the other rare species identified by interested agencies during scoping, nor did the FEIS provide the "full ecological evaluation" of the other rare species requested by the interested agencies during scoping.

Arguments of Appellant-Respondents

A - Exhaustion of Remedies

Appellant-Respondents claim that no objection was made to the omission of an evaluation of the other rare species, and so the omission was "waived" for failure to exhaust administrative remedies. (Tharaldson's Brief p.33). This claim is clearly untrue. There were furious objections to the Council's reliance on the erroneous science of Dr. Futyma, and the erroneous conclusion drawn from it. For example, on December 15, 2005, Neil Gifford, the Albany Pine Bush Preserve Commission Conservation Director submitted a harsh critique of Dr. Futyma's conclusions and his competence to evaluate Pine Bush habitat, and stated that the Findings "**raise concerns about the integrity of**

this project's environmental review within the SEQRA process in the City of Albany" . (R. 4304). In the letter Mr. Gifford noted the advisory roll that the Albany Pine Bush Preserver Commission provides to the City and the extensive criticism which the APBPC had made of this project. He said that the FEIS and Finding Statement "**appear inadequate, misrepresentative and in error**", based on extensive comments provided to the City by the USFWS, the NYSDEC, the APBPC, and the public, and that those conclusions in the FEIS which were based on the reports of Dr. Futyma and contradicted the professional opinions of the USFWS, the NYSDEC, and the APBPC **"may be facilitating violations of the federal Endangered Species Law and New York State Environmental Conservation Law".** Mr. Gifford noted that conclusions in the FEIS, that the action "minimizes or avoid adverse environmental effects", and "adequately and thoroughly examines and evaluates the relevant identified environmental and other impacts including secondary and cumulative impacts" are in conflict with written comments submitted by the USFWS and the NYSDEC. Mr. Gifford then quoted a number of specific Finding sections that were in error including the following: (The APBP Commission's response in **bold**)]

> Subsection 2 "…confirmed that no Karner Blue Butterflies or any other State or Federal threatened or endangered species are located on the Site or likely to use the Site...**Not supported and contradictory to the information provided by state and federal wildlife agencies and the Commission.**
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> ***** ***** *****
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> Subsection 11 states that "The site does not contain ecologically significant vegetation, habitat or wildlife". **Not supported by on site botanical information provided by the applicant, and information provided by state and federal wildlife agencies and the Commission. In particular, information provided in the FEIS indicates that the site contains remnant pitch pine scrub oak barrens…On a scale of significance from 1-5 with 1 being the most significant, inland pitch pine scrub oak barrens currently hold a global rank of 2 and a state**

> **rank of 1 and are known to support a variety of habitats for ecologically significant wildlife**…
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> * * *
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> Subsection 13 states that "…a portion of the Site is undeveloped and consists of a closed canopy…but the species are invasive to the Pine Bush ecology – including white pine, maple, black oak, pitch pine, gray birch, black cherry, cottonwood and trembling aspen. **All of these species are native to inland Pine Barrens. The conclusion that these species are invasive to the pine bush raises concerns about the consultant's [**Dr. Futyma's**] understanding of basic inland Pine Barrens ecology. (**R. 4306**)**

Other similar harsh critiques of the Findings and Dr. Futyma's work were given to the Council by the Albany Pine Bush Preserve Commission on October 27, 2005 (R. 4300), and December 19, 2005 (R.4295).

USFWS also criticized the failure of the DEIS to "fully evaluate the terrestrial and aquatic ecology of the proposed project area", and recommended that a "full ecological evaluation of the proposed project take place" (R. 4319). [5]

Clearly then the Common Council was well aware that their conclusions concerning the absence of other rare species was being sharply questioned, as was their reliance on the developers "expert" Dr. Futyma. Not only was there no waiver, but the criticism of the

[5] A "full ecological evaluation" requires a habitat analysis. If a species has declined to a small population it may well not inhabit the site, but if the ecology of the site is compatible, the species could well expand its population onto the site as part of its recovery. This is an important issue identified during scoping by an interested agency that the Common Council as lead agency in a coordinated review was required to assess. There is not one word in all the Council's findings on the issue of the habitat of any of the rare species or how these habitats might or might not be compatible with the ecology of the site. Criticism by the APBPC of the deficiency of habitat information in the Findings is a criticism of the lack of information from which any meaningful conclusions could be drawn about the habitats of other rare species.

FEIS Findings was blistering, suggesting that the Finding – that there were no rare species to evaluate - was "inadequate, misrepresentative, and in error", and raised questions as to the "integrity" of the SEQRA process before the Council.

B- Lower Court Extended the Third Cause of Action to "All" Rare Species

Appellant-Respondents argue that the Third Cause of Action of the Amended Verified Petition was limited only to Threatened or Endangered Species, and that the Lower Court expanded the Cause of Action to "all rare plant and animal species in the Pine Bush. (Tharaldson Brief p. 19; City Brief p.22). . The Third Cause of Action of the Amended Verified Petition identified specific letters from interested agencies during scoping that requested a "full ecological evaluation" of various specific rare species. Paragraph 45 of the Amended Verified Complaint states as follows:

> Notwithstanding these letters [from interested agencies]…the Findings do not mention the Frosted Elfin butterfly, the Adder's Mouth Orchid, the Hognosed Snake, the Worm Snake, or the Eastern Spadefoot Toad, or contain any analysis as to the impact of the Hotel project on rare species known to be living in the management area near to the Hotel project area. (R. 134)

In the conclusory paragraph of the Third Cause of Action, where there is a reference to "any other listed species" that would be threatened by the Hotel project (R. 134), the reference is to species listed in the letters of the interested agencies to the Common Council, not to species listed on State or Federal Threatened or Endangered lists. [6]

[6] This meaning is obvious from the context of the Third Cause of Action. Petitioners would hardly have listed in the Complaint all of the rare species that were ignored in the Findings, and then deliberately omit them in the conclusory paragraph.

When the Lower Court referred to the failure of the Common Council to take a hard look at "any of the rare plant and animal species known to be present in the Albany Pine Bush particularly those specifically identified by the NYDEC and the APBPC", the court was clearly referring to the specific species identified in the Third Cause of Action. (R. 31). The Common Council in its Findings concluded that "the project site does not contain any endangered, rare or threatened species" (R. 4259), and so it was appropriate for the Court to note that the Findings did not evaluate "any" of the rare species (other than the Karner Blue), and so there was no basis for the Common Council to reach this conclusion. In using the word "any" the Court was simply tracking the language of the FEIS Finding Statement, and was not broadening the Cause of Action.

C- Other Arguments

1. Appellant-Respondents argue that the 2002 Management Plan was intended to protect "other rare species in the Albany Pine Bush". (Tharaldson Brief p. 11; City Brief p. 9), and that the 2002 Management Plan does not include the Hotel site in the Preserve, Tharaldson Brief p.12; City Brief p.9). Therefore Appellant-Respondents illogically conclude that there must be no rare species on the Hotel site. (Tharaldson Brief p.12). Simply because the Management Plan in 2002 decided not to include the Hotel site in the Preserve, does not mean that there are no rare species which utilize the site. Rare species can and do live outside the bounds of the Preserve. For example, the USFWS just recently concluded that the endangered Karner blue butterfly "occupies" the Hotel site (R. 3683) although it is not part of the Preserve; it is entirely possible that other rare species would also occupy the Hotel site. That was the reason why, during scoping (and long after the 2002 Management Plan was completed), the NYSDEC and the USFWS

requested a biological evaluation of the site and certain rare species in coordination with other agencies. There is no indication that any prior study was ever made of the Hotel site to determine whether any of the rare species listed in the NYSDEC's letter of September 7, 2004 were present (R. 4330).

2. Appellant-Respondents argue that consideration was given to other rare species of the Pine Bush when the Common Council found that the hotel project was consistent with "all adopted management plans for this area" (Tharaldson's brief p. 32).[7] The specific findings made by the Council about these various prior plans and reports (listed on page 3-4 of Tharaldson's brief), relate only to the Karner Blue butterfly and make no reference whatsoever to other rare species including the Hognosed Snake, the Worm Snake, the Spadefoot Toad, the Adderr's Mouth Orchid, or the Frosted Elfin Butterfly, that were specifically identified by the NTSDEC during scoping as species requiring a "biological evaluation" (R. 4330). [8] Whenever the Findings refer to the absence of any rare, threatened and endangered species, it is clear that these Findings relied on the reports of Dr. Futyma, and it is equally clear that Dr. Futyma's reports related only to the Karner blue butterfly and to a lesser extent the Frosted Elfin Butterfly.

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[7] On page 9 of the City's brief the claim is made that "The 2002 Management Plan explicitly evaluated "rare" species in the Albany Pine Bush and included a resource map showing their locations". The City's brief cites to page 3478 of the Record, but this page is merely a map showing "Significant Cultural and Environmental Resources", and does not refer to any of the rare species in the Pine Bush at all.

[8] Indeed the "Givnish Report" (R 246); the 1993 Management Plan (R. 247); the EDR Report (R.248); the Hershberg Update (R.249); The Commission of the Department of Conservation (R. 250); and the Implementation Guidelines (R. 251), all relate to whether the size of the Pine Bush Preserve will be sufficient to meet the needs of the Karner blue butterfly and thus not only have nothing to do with the other rare species but do not have anything to do with the hotel site which is not at present in the Preserve.

3. Appellant-Respondents argue that the request by several agencies for a "biological evaluation" of the site and particularly of the various species listed in the NYSDEC's September 7, 2004 letter (R. 4330), give the Common Council "no indication where any such plants and animals might be located or how or why the Project might impact them", and suggested that the agencies were required to provide comments "in a timely manner". (Tharaldson Brief, p. 32-33; City Brief p. 7). The request for a "biological evaluation" of the various species was made by interested agencies in the course of "scoping", a process pursuant to 6 NYCRR Section 617.8(a) to "focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or non-significant". Scoping focuses on areas in which more information and analysis is needed, not areas in which the information is already known. If the agencies had known how the Project might impact the various animal and plant species, it would not have been necessary during scoping to request an evaluation. That is what scoping is supposed to do.

In addition it should be noted that none of the interested agencies, the USFWS, the NYSDEC, nor the Albany Pine Bush Preserve Commission are required to provide expert studies for a particular development proposal. They provided general information about the subjects raised during scoping, but it is always up to the developer – Tharaldson in this case – to provide expert studies to determine how this general information applies to the site. Tharaldson did not do this. Tharaldson hired an "expert" botanist, Dr. Futyma, to evaluate the Karner blue butterfly, but since Dr. Futyma was not qualified to act as an expert as to any other rare species, he did not evaluate them. It is certainly not up to the

NYSDEC or the USFWS or any other agency to supply the expert studies which the developer is unwilling to do. If the NYSDEC or USFWS were to do this they would be working full time for the developers providing studies and would have no time do their own jobs.

POINT THREE
PETITIONERS HAD STANDING TO MAINTAIN THIS LAWSUIT

Both respondents and appellants agree that standing in this case must be decided under the rules set down by the Court of Appeals decision in Society of Plastics v. Suffolk County, 77 NY2d 761 (1991). Appellant-Respondents argue that in order to have standing to sue, a petitioner must allege a special harm that is different from that of the population as a whole, and that this special harm can only be established by proximity to the geographic site of the action. Respondent claims none of the Petitioners reside sufficiently close to the Hotel project site to experience the harm in a way different from the public as a whole. (Tharaldson Brief, p. 21-24; City Brief p.16) The Plastics decision, however, imposes no such blanket requirement, and this reasoning completely misunderstands the holding of the Plastics case.

With respect to standing, the Plastics decision established two kinds of cases – those in which the harm ("aim and impact") of the action complained about has a specific geographic focus, (geographic actions) and those in which the harm applies equally to all members of the population ("indiscriminate actions"). The Court of Appeal in the Plastics case emphasized that it was the harm ("aim and impact") of the action, not the location of the action that was the determining factor in whether the action was

geographic or indiscriminate. (The regulation that provoked the law suit in the Plastics case – a requirement that everyone use paper garbage bags - applied equally to all members of the population, but the Court noted that the effect of it would be felt primarily by people near landfills, and so the harm had a geographic focus). Petitioners in geographic actions needed to show that they would suffer a special injury different from the public at large, as for example by showing that they live "near" the geographical focus of the effect. As to standing in indiscriminate actions, the Court placed no restriction, and stated, "**We explicitly do not reach the question of standing to challenge actions that apply indiscriminately to everyone". at 781**

The present action is one of the clearest examples of an indiscriminate action that the court will see. It is an indiscriminate action because the effect of the action would be to harm or extirpate a species of butterfly, a public resource, and the absence of a butterfly does not constitute a geographic harm to any individual; rather it is an indiscriminant harm to the public as a whole. In this case it would not make any difference if the plaintiff was the adjoining landowner and lived only a few feet from the hotel project. Even an adjoining landowner would not be able to show special harm different from the public at large, because there is no geographic harm at all to any person or property from the absence of a butterfly. The absent butterfly would not harm the adjacent landowner's health, or his property, or his possessions, or his economic interests. And the adjacent landowner could not claim a geographic loss of his butterflies (as he might of this cattle or his chicken) because nobody, including an adjoining landowner, owns a butterfly, or its species or its habitat. A butterfly species is a public resource, and loss of a species is a public loss that affects everyone equally. It affects everyone indiscriminately. Thus the

rules for geographically based actions cited by Appellate-Respondent in their briefs – that the Petitioners must show an injury different from that of the public as a whole – simply do not apply to the present case, which is an indiscriminate action.

As the Court in the Plastics case noted, where the action is indiscriminate and the harm applies equally to the whole public, it would be impossible, by definition, for a petitioner to show an injury different from the public as a whole. Rather the Court of Appeals in the Plastics case, noted that the traditional rule for standing in indiscriminate cases involving the environment is whether the action "will directly harm association members in their use and enjoyment of the affected natural resources". at 777. With respect to such environmentally based actions, the Court of Appeals in the Plastics case stated:

> Factually, this case presents a variation from the more common scenario of associations dedicated to environmental preservation seeking to represent the interests of persons threatened with environmental harm…In such instances, in-fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in the use and enjoyment of the affected natural resources. at 777 (emphasis added)

There is thus a parallel between geographic based cases and indiscriminate cases in terms of the need to show a real injury. In geographic based cases, the plaintiff must show a special harm different from the public at large, which is generally shown by proximity to the effect of the action. In indiscriminate cases (at least those involving public resources), the plaintiff must show significant use and enjoyment of the public resources involved. In both cases this showing by the plaintiff is necessary to guarantee that the courts have a real justicable controversy.

Subsequent court decisions have followed the logic of the Court of Appeals in the Plastics case, (although not always the specific language of the Court) when they granted standing to petitioners who were advocating a harm to the public interest as a whole (and thus could not logically show a harm different from the public as a whole), especially where, as here, the harm would occur to public lands, parks and natural resources. Thus in Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Comm'n, 259 AD2d 26 (1st Dept 1999), the court found that individuals who "use and enjoy" a park had standing to challenge construction that would negatively impact the park. The Court stated:

> The individual petitioners have met this burden. They have alleged in their affidavits that the concession will interfere with their use and enjoyment of the park, reduce the area of open space in the park, cause noise and traffic problems, cause contaminants to be released into the air and obstruct their views of the park from their building. These allegations constitute injury-in-fact. Further, since three of the individual petitioners live in close proximity to the park, and one uses it regularly, it is obvious that many of the alleged injuries would affect the petitioners in a manner wholly distinct from that of the public at large. (at 32)
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> *****
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> Standing principles, which are in the end matters of policy, should not be heavy-handed … it is desirable that land use disputes be resolved on their own merits rather than by preclusive restrictive standing rules. (at 33)

And in Wildmetro, Inc v. New York City Dept. or Parks & Recreation, 2004 NY Slip Op 51807(U), __NYS2d___ (Sup. Ct. NY County, 2004), (See, 6 Misc. 3rd 1019), the court upheld the standing of an individual who resided several miles from a park to challenge a negative declaration to the development of park land owned by the City. The Court stated:

> NRDC member Richard Buegler, one of the petitioners herein is a regular visitor to Kreischer Hill, whose motivation for his outings include appreciation of its unique environment. Respondent argue that, because NRDC presented a member whose residence is several miles from

> Kreischer Hill, standing cannot be maintained. Physical proximity is not, however, a dispositive factor in establishing injury-in-fact. Quality of life issues, such as use and enjoyment of a park, can sustain standing."

In Motor Vehicle Mfrs. Ass'n of US, Inc. v. Jorling, 152 Misc2d 405, 577 NYS2d 346 (Sup. Ct. Albany Co. 1991) the court granted plaintiff owners of real property in New York standing to challenge air pollution regulations stating:

> "[A]s owners of real property in this state, petitioners will be subjected to the effects of air pollution including increased rates of degradation of buildings and structures and the killing of landscaping and other plantings".

The court in the Jorling case specifically ruled that the petitioners did not have to show injury different that that suffered by the public generally, noting that the Plastics case had explicitly left open the question of standing where the plaintiff was asserting an injury to the community at large. See also Long Island Pine Barrens Society, Inc. v. Town of Islip, 261 AD2d 474, 690 NYS2d 95 (2nd Dept. 1999); Stony Brook Village v. Reilly, 299 AD2d 481, 750 NYS2d 126 (2nd Dept. 2002); Committee to Preserve Brighton Beach v. Council of City of New York, 214 AD2d 335, 625 NYS2d 134 (1st Dept.), leave to appeal denied 87 N.Y.2d 802 (1995). Duke& Benedict v. Town of Southeast, 253 AD2d 877 (2nd Dept. 1998)

It should be noted that three of the Petitioners in the present case Sandra Camp, Dave Camp and Larry Lessner, have alleged that they live near the proposed Hotel site, in the Pine Bush. (R. 125-6; 162; 4121) The effect of the Hotel project will not be felt by these petitioners at a distance, but rather directly, in so far as the Karner blue butterflies are extirpated, because these Petitioners live in the Pine Bush where the butterflies have their

habitat. One petitioner, Larry Lessner, resides at 26 Wilan Lane directly in the corridor through which the Karner blue butterflies must pass from Butterfly Hill in order to reach the Preserve that has been prepared for them by the APBPC and other governmental authorities. (R. 4121). Thus injury or extirpation of the Karner blue butterfly would have a special impact on Mr. Lessner different from that of the public at large.

It would be tempting to argue that Mr. Lessner meets the criteria for a geographic based action because he lives right at the point where the effect of the action will be felt – that is to say he resides at the point to which the Karner blue butterflies should have spread if they are not extirpated from Butterfly Hill by the action of the Hotel. [9] Unfortunately this is a bad argument, not because Mr. Lessner does not live close enough to the geographic center of the effect of the action, (he will live in the middle of it), but because he will not suffer a geographically based harm. The absence of a butterfly is not a geographic harm to him or to his property, or to his economic interests or his health or to anything else that is geographically focused. Nor does Mr. Lessner does own the butterfly. The harm is to the animal species, and is not a harm to any human, except as a loss of use and enjoyment of a public resource – a species of butterfly. (See Society of Plastics v. Suffolk County, *supra*, at 777).

[9] The Court of Appeals in the Plastics case gave an example of how the proximity which gave rise to standing was not proximity to the action, but proximity to the complained of harm. The Court said:

> "Similarly any alleged harmful effects of increases in trucking traffic to and from the landfills would necessarily fall directly on those near such traffic" at 779. (emphasis added)

The Court thus clearly emphasized that the harmful effects of truck traffic from a landfill would fall near the traffic, not near the landfill which might be miles away from the traffic impact.

Since Mr. Lessner actually uses and enjoys the public resource of the Pine Bush where he lives, and enjoys and uses the Karner blue butterfly, and the other rare species of the Pine Bush, he and other members of Save The Pine Bush who use and enjoy this public resource should have Standing to sue. (See the allegations of the Amended Verified Petition (R.125-26), and the Jackson Affidavit (R.162). The other Petitioners similarly use and enjoy the public resources of the Pine Bush, and have shown by their remarkable dedication, advocacy, and commitment to the Pine Bush, that they would also have an interest greater than the public as a whole to the loss of the Karner blue butterfly, and the other rare species in the Pine Bush habitat. (R. 125; 162). As a result they also should be given standing.

Most important, in the Plastics case, the Court of Appeals emphasized that it was not attempting to impede legitimate suits to enforce SEQRA. Even with the limitations of "special harm" the Court held that there would be "a large pool of potential plaintiffs" who could satisfy the standing requirements "with no compromise of the court's commitment to the enforcement of SEQRA". The Court said:

> In sum, the threatened environmental impacts of this particular law are such that certain Suffolk County residents can show a special or differentiating harm, **providing a large pool of potential plaintiffs** whose interests satisfy the policy goals of SEQRA and of the standing doctrine, with no compromise of the court's commitment to the enforcement of SEQRA. **This is not a case where to deny standing to this plaintiff would be to insulate governmental action from scrutiny…Thus, we need not and do not reach the issue whether, in instances where solely general harm would result from a proposed action, a plaintiff would have standing to raise a SEQRA challenge based on potential injury to the community at large.** Plaintiff itself makes no such claim." at 779 (emphasis added)

Compare this bold statement in support of enforcing SEQRA, with the claim made here that nobody would have Standing to challenge the extinction of a species unless they could somehow show a "specific, concrete injury-in-fact as a result of the project", different than the public at large (other than their use and enjoyment of the species). Since the direct harm would be to the species, not to any person, nobody could meet such a standard and nobody would have Standing. If the law has strayed so far that no person on earth has Standing to object to the extermination of a species, it no longer bears any resemblance to the decision in the Plastics case or the intent of the SEQRA legislation.

The Lower Court found that Respondent-Appellants had Standing to sue, based on their use and enjoyment of a threatened public resource.

> Respondents fail to properly recognize that the injuries petitioners cite fall within the ambit of "aesthetic or quality of life type injuries" which could serve as a basis for standing….Petitioners…have asserted claims of injury resulting from proposed disturbance of the unique and protected environment of the Pine Bush that will diminish their use and enjoyment of the area the respondents propose to develop. Courts have held that quality of life issues, such as use and enjoyment of a park can sustain standing. While the injury these petitioners allege may seem vague and conclusory to the respondents the alleged injuries are real to the petitioners who have a passion about the use and preservation of the Pine Bush. It is not for the Court to measure the worth of these allegations in assessing the petitioner's right to standing in this proceeding. (R. 121)

Arguments of Appellant-Respondents

Appellant-Respondents argue that the lower court erred when it found that the hotel project would diminish the petitioners use and enjoyment "of the area the respondents propose to develop". (R. 121). It was argued that since Petitioners never used or enjoyed the hotel property because it was private property, their use and enjoyment of it could not be diminished. (Tharaldson's brief p. 2). However, a fair reading of the Supreme

Court's decision as a whole indicates that it related to Petitioners' use and enjoyment of a public resource – the Karner blue butterfly – whose existence is threatened by the development of the site. Appellant-Respondents strain to create an issue that is not there.

CONCLUSION

This Court should affirm Supreme Courts decision granting Standing to the Respondent-Appellants (Petitioners), and should also affirm Supreme Courts decision to vacate the FEIS as a result of sustaining the Third Cause of Action of the Complaint. In addition this Court should reverse Supreme Court's decision, dismissing the First Cause of Action of the Complain, and find that the First Cause of Action was also a basis to vacate the FEIS.

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