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 REPLY BRIEF

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REPLY TO APPELLANT –RESPONDENT'S PRELIMINARY STATEMENT

This brief is submitted as a reply in Respondent-Appellant's cross appeal, and to comment on the case of Save The Pine Bush v. Planning Board of the Town of Clifton Park that was decided by this court after Respondent-Appellant's answering brief was filed on the issue of Standing. The Clifton Park case was discussed in Appellant-Respondent's brief that was filed on April 14, 2008.

As to the cross-appeal, Appellant Tharaldson objects that Repondent-Appellants rely on materials which are outside "the Common Council record". (Tharaldson Brief p.v-vi). [1] This material concerned the USFWS study which determined the hotel site was presently occupied Karner Blue habitat, and which was made after the FEIS was closed. It should be clear that this material was submitted to the court below, and is contained in the present record on appeal. It is entirely appropriate that this court consider it. (R. 3887, 4297). The material is clearly relevant on the issue of whether the Common Council insulated itself from a proper consideration of environmental factors, ignored USFWS preliminary findings that the site was occupied Karner Blue habitat, unreasonably refused to keep the record open for USFWS's site visit information, refused to require the applicant to grant a site visit, and refused to consider the implication of USFWS' findings after they studied the site.

Appellant Tharaldson also complains that the actions of the Common Council should be judged by the Record before it at the time of its FEIS decision (Tharaldson Brief p. vi).

[1] In making this argument and citing Grogan v. Zoning Board of Appeals, 221 App Div. 2d 441 (2nd Dept. 1995) Appellant Tharaldson has apparently confused the Common Council record with the Record on appeal which is what the Grogan case relates to.

In fact the record before the Common Council at the time of its decision indicates that USFWS had already made a preliminary decision that the hotel site was "occupied", and requested that the FEIS be held open until the site could be visited, and that permission to visit the site had not been granted by the applicant, or required by the Common Council. The Common Council should be judged on the basis of what was discovered after the FEIS was filed, since the Common Council deliberately isolated itself from critical environmental information at which it was required to take a hard look. (Penfield Panorama Area Community v. Town of Penfield, 253 A.D.2d 342 (4th Dept. 1999).

REPLY TO APPELLANT – RESPONDENT'S ARGUMENT

Appellant Tharaldson cites 6 NYCRR 617.3(a) for the proposition that an involved agency (such as USFWS) may not issue its findings until after a FEIS has been filed Tharaldson brief p. 4). The "findings and decisions" referred to in Section 617.3 concerns the official permitting decisions or other final acts. The finding and decisions referred to in Respondent-Appellants brief are the factual decisions that USFWS had to make as to whether the hotel site was occupied Karner Blue habitat. Obviously these factual issues had to be resolved by USFWS before any sensible conclusions could be reached in the FEIS or in the permitting matters concerning "taking". The lead agency may not file an FEIS until it has identified the areas of environmental concern and taken a hard look at the issues, and the lead agency cannot do that if it disregards the preliminary factual findings of an involved agency (such as USFWS), and refuses a reasonable request to wait for more definite factual information to be received from the agency with the expertise and jurisdiction before coming to its own uninformed conclusion about the facts. The lead agency (such as the Common Council) cannot insulate itself from factual

information which it must consider in order to take a hard look at the environmental issues identified. (See Riverkeeper v. Planning Board of the Town of Southeast, 9 N.Y.2d 219 (2007), page 234, footnote 2)[2]

An involved agency such as USFWS may make its permitting determination after the FEIS is completed, but there has to be a congruity between the factual information in the FEIS and the factual information on which the involved agency bases its permitting determination. Otherwise, as here, the environmental review will splinter into two proceedings – a public proceeding based on the FEIS which reaches one conclusion, and a private permitting proceeding in which the involved agency (such as the USFWS) reaches a completely opposite conclusion. This is exactly what SEQRA was designed to avoid. Clearly when such a situation occurs, as here, the solution is to vacate the FEIS as incomplete based on the jurisdiction and expertise of the involved agency, or to require an SEIS so that the lead agency can consider the same factual information as that of the involved agency.

Appellant Tharaldson claims that the Common Council had no authority to grant USFWS access to the private hotel project site. (Tharaldson Brief, p. 10) This is true but this problem is normally handled by having the lead agency require the applicant to grant access to the proposed site. This was not done by the Common Council. Tharaldson also

[2] Appellant Tharaldson cites Riverkeeper v. Planning Board of the Town of Southeast, 9 N.Y.2d 219 (2007) for the proposition that the Common Council was required to issue its FEIS and findings before USFWS made its determination, but Riverkeeper concerns the decision of the lead agency to require a Supplemental EIS (SEIS) after an FEIS has already been filed. (The Court found that the decision to file an SEIS was an issue within the lead agency's discretion which it could make after giving the issue a hard look and a reasoned elaboration.) Riverkeeper affirmed that the lead agency may not file an FEIS however without first receiving from involved agencies (such as USFWS) information necessary to take a hard look at the environmental issues identified.

complains that USFWS was aware of the project for over 2 and a half years and did nothing to investigate the site. (Tharaldson Brief p. 10). In fact USFWS commented on the lack of information in the DEIS on April 18, 2005, and requested an opportunity to visit the site to confirm its preliminary conclusion that the site was occupied Karner Blue habitat.. (R.4316). Only 8 months later the FEIS was closed without the requested information or opportunity for a visit. There was no delay of $2^1/_2$ years.

Appellant-Respondent Tharaldson attempts to defend the qualifications of Dr. Futyma. (Tharaldson brief p. 14-16). It is significant that nowhere in this defense does Appellant-Respondent suggest Dr. Futyma had any qualifications to evaluate snakes or toads or any animals other than butterflies. As to his qualification to evaluate butterflies, Respondent-Appellants rely on their Answering brief, and the finding by the USFWS that Dr. Futymas conclusions about Karner Blues not occupying the hotel site were wrong.

SAVE THE PINE BUSH AND ITS MEMBERS HAVE STANDING

On April 11, 2008, after Respondent-Appellants brief was filed, this Appellate Division decided Save The Pine Bush v. Planning Board of the Town of Clifton Park, Docket No. 503595, _A.D.2d _, (3rd Dept. April 11, 2008), which held that neither Save The Pine Bush nor any of its members had standing to challenge a negative declaration which permitted development of habitat critical for the federally endangered Karner Blue butterfly on land in Saratoga County. This court determined that "the interest that they [Petitioners] seek to protect (i.e., the viewing of a portion of private property from a public byway) is no different that the interest enjoyed by the public at large". The Court held that standing could have been based upon residing in "close proximity" to the

property to be developed, but that none of the petitioners lived close enough to "distinguish any of them as having a 'legally protectable interest'", and that none had shown that they would be affected by the development "different in kind or degree from that of the public at large".

The present case is completely different from the Clifton Park case. Here the Petitioners are not suing to protect a personal or private right different from the public at large to view a butterfly. Rather standing here is based on protecting from harm the public right to use and enjoy public lands and public resources. The present law suit seeks to prevent development from destroying wild species, including a critical population of Karner Blue butterflies, which is intended to be used to repopulate the Albany Pine Bush Preserve – a public preserve and a public natural resource. The Albany Pine Bush Preserve was created specifically for the Karner Blue butterfly (and less specifically for other rare and endangered species that reside in the Pine Bush) as a result of extensive past litigation by Save The Pine Bush. The present law suit seeks to preserve various wild species, including the Karner Blue butterfly long enough to permit its migration into the public preserve that has been prepared for it. Standing in the present law suit is thus not based a personal right of the petitioners to view the butterfly or other wild species. Rather standing in the present law suit is based on protecting the public interest in the Albany Pine Bush Preserve, and the right of all members of the public to use and enjoy public resources and the wild species of the Pine Bush.

Where, as here, Petitioners seek to the protect public interest in public lands and in wild species, the Petitioners' interest, by definition, cannot be different from that of the public

at large, and so the rules for standing set out in the Clifton Park case, and in the cases cited therein do not apply. This was specifically held to be so in Society of Plastics Industry, v. County of Suffolk, 77 NY2d 761 (1991), where the Court of Appeals stated:

> **"[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"** at 779.

The court also said, "**We explicitly do not reach the question of standing to challenge actions that apply indiscriminately to everyone**" at 781.

Instead the Court of Appeals in the Plastics case held that in cases where the Petitioners were suing to prevent harm to the public interest, and public natural resources, standing would be based on the indirect harm that Petitioners would receive to their use and enjoyment of the affected natural resources. The Court 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)

Although standing in the present case is based on completely different facts and theory than that found by this court in the Clifton Park case, it needs to be said that the Clifton Park case is poorly reasoned and mixes up concepts to produce a nonsensical result – the nullification of SEQRA as to wild species and natural resources. The Court of Appeals in the Plastics case created a well reasoned distinction between two kinds of cases – those in which the harm falls directly onto humans, and those in which the harm falls indirectly on

humans - for example, by harming the environment, its natural resources, or wild species. With respect to standing in cases involving direct harm to humans, the court required that plaintiffs show that the harm to them is greater than to the public at large, as for example by showing that the plaintiffs lived near the site of the harm.(geographic based cases). As to standing where the harm is to the public interest and to the environment (indiscriminate cases), the court in the Plastics case, recognized that by definition, a plaintiff cannot show harm different than to the public at large because the plaintiff is representing the public interest in the environment. Instead, in indiscriminate cases the plaintiff must show actual use and enjoyment of the affected natural resources. The Court in the Clifton Park case mixed these two concepts up and in the process produced an interpretation of the Plastics decision in which no plaintiff will have standing to protect the public interest in the environment, natural resources or wild species.

At the heart of the error in the Clifton Park case are the requirements that in order to achieve standing to protect wild species or natural resources a litigant needs to be, 1) living in "close proximity" to the harm, and 2) "adversely affected" by it, 3) in a way different from the public at large. In the first place wild species, especially small isolated populations of endangered species such as the Karner Blue butterfly, often do not live in "close proximity" to human habitation. That is the situation here. Enforcement of SEQRA should not depend on whether a wild species happens to live in close proximity to a human population. **SEQRA should protect all wild species and all natural resources, not just those in close proximity to humans.**

Secondly, even in those cases where there are humans living in close proximity, it is frequently the case that the harm is to the wild species or natural resource, rather than to any human. [3] Those people living in close proximity may not even be aware that an endangered species is living close by, or may be completely indifferent to protecting the species because it is so small and insignificant that it has no affect on humans.[4] Where the harm is to the species not to the humans it is usually impossible to show that those who happen to live in close proximity are "adversely affected" by the harm to the species. **When the enforcement of SEQRA is limited to those who are directly adversely affected by the harm (as required in the Clifton Park case), no person has standing to enforce SEQRA where the harm does not affect any human being but only a wild species or natural resource.**

Thirdly, people who seek to protect wild species and natural resources are protecting a public interest not a private right. As the Court of Appeals in the Plastics case expressed it, the protection of the environment involves a person's "use and enjoyment of the affected natural resources". Because this right to use and enjoy natural resources is a public right available to everyone, it cannot, by definition, be greater than the public as a whole. Thus even if a person lived in "close proximity", and could somehow prove to be "adverse affected" by harm to a public wild species or natural resource**, it would always be impossible by definition to show that this adverse affect was different from that of the public as a whole.** In short, under the standing rules as interpreted by the Court in

[3] In the present case for example, the Karner Blue butterfly is threatened with loss of its food supply of nectar from herbaceous grasses and flowers. Humans do not eat this food supply and we do not share the butterfly's habitat. There is no direct harm to humans but a large harm to the butterfly.

[4] Many species, especially rare and endangered species, are hidden from sight or are reclusive. For all the publicity about the Karner Blue butterfly few people have ever seen one. Fewer still have ever seen the reclusive hog nosed snake, or the worm snake. These animals could be living in someone's back yard for years and the home owner might not know that these animals are even there.

the Clifton Park case, no person could ever have standing to enforce SEQRA rules as to wild species and natural resources. The Court of Appeals in the Plastics case set out an alternate set of considerations, quoted above, when the goal of the litigation was the protection of wild species and natural resources – in short the public interest. The rules set out in the Plastics case contrasted harm directly to the individual, from indirect harm to the public through the environment. The interpretation of these same rules in the Clifton Park case does not.[5] The Court, by misconstruing the Plastics case has nullified enforcement of SEQRA as it applies to wild species and natural resources.

The Court of Appeals in the Plastics case made clear that the purpose of standing restrictions was to guarantee that the courts had a justicable controversy involving real harm. Where the harm is to a wild or endangered species, what purpose is served by restricting standing to people who may live in close proximity to the species but may be completely unaware of it, or unaffected by it, or indifferent to it, or have no interest in preventing the harm? The harm after all is to the species – not to them. The preservationists who attempt to protect wild species and natural resources – the groups that use and enjoy natural resources - have the real interest in preservation and are the most articulate defenders of the public interest. They are the plaintiff who should be granted standing because they have the real interest. The Court of Appeals in the Plastics case recognized this and cited approvingly the "more common scenario of associations dedicated to the preservation of the environment". Under the rules in the Clifton Park

[5] The Court in the Clifton Park case apparently misunderstood the allegations concerning the plaintiffs use and enjoyment of the wild species, which are required to establish standing in indiscriminate cases, and believed that the allegations were some sort of claim to a direct personal harm that would have required it to be greater than the public at large.

case, such groups are barred from standing, although they receive the real harm through the loss of "use and enjoyment of the affected natural resources".

The Court of Appeals in the Plastics case described the "large pool of potential plaintiffs" who meet the Court's standing restrictions "with no compromise of the court's commitment to the enforcement of SEQRA." (Society of Plastics, supra at 779). Where is this large pool of plaintiffs in the present case under the Clifton Park rules? What potential plaintiffs are available in the Pine Bush to uphold the court's commitment to the enforcement of SEQRA? **If the plaintiffs in the present case do not have standing**, c**an the court identify even one such potential plaintiff who would? Or is this Court no longer committed to the enforcement of SEQRA?**

DATED: April 24, 2008

Respectfully submitted,

By _____

Stephen F. Downs