SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
SAVE THE PINE BUSH Inc.; LYNNE JACKSON; REZSIN ADAMS; JOHN WOLCOTT; LUCY CLARK; SANDRA CAMP; DAVE CAMP; LARRY LESSNER; and ANNE SOMBOR,

Petitioners;

For a judgment pursuant to Article 78 of the CPLR

- Against -

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

Respondents.

MEMORANDUM OF LAW

This is an action, pursuant to Article 78 of the CPLR, to vacate a Final Environmental Impact Statement that approved the rezoning of a parcel of land in the Pine Bush to allow the construction of a 124 unit hotel. Section 7803 of the CPLR allows the courts to review and set aside a decision by a body or officer where the body or officer: 1) failed to perform a duty enjoined upon it by law; 2) proceeded without, or in excess of, jurisdiction; 3) made a determination that was in violation of lawful procedure, or in violation of law, or was arbitrary and capricious, or an abuse its discretion; or 4) made a determination, following a hearing, that was unsubstantiated by the evidence. As set forth in the Petition, the FEIS contains numerous omission, errors, and mistakes; makes determinations in excess of its jurisdiction; and makes findings that are arbitrary and capricious, and which are unsubstantiated by the evidence produced.

VENUE

Pursuant to CPLR 506(b), venue for an Article 78 proceeding against the City of Albany is proper in any county in the Third Judicial District, including Albany County, because

the principal offices of the Respondent City of Albany is located in Albany County and Albany County is located in the Third Judicial District.

FACTS

As set forth more fully in the attached affidavit of Lynne Jackson, on December 19, 2005 the Common Council of the City of Albany, as lead agency, filed a Final Environmental Impact Statement (hereinafter FEIS) and Statement of Findings, pursuant to the State Environmental Quality Review Act, Article 9 of the Environmental Conservation Law (hereinafter SEQRA), 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, notwithstanding that the land 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.

As a result of numerous court decisions of lawsuits brought by the Petitioner, Save The Pine Bush, the City of Albany has claimed to have set aside several thousand acres in the Pine Bush as a Pine Bush Preserve for the protection of the Karner Blue butterfly and its habitat. (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 population of Karner Blue Butterflies south of the Thruway does not live in the Preserve itself but over 1000 meters outside the Preserve on Butterfly Hill next to Crossgates Mall, in a "Butterfly Management Area". The long term goal of the Pine Bush Preserve is to induce the butterflies to spread west from Butterfly Hill into the Preserve, 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. **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 site is within 200 meters of Butterfly Hill and so whether development happens there 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 on the other side of the hill, 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, varying in numbers from a low of 5 butterflies to a high of 30, and it remains a critically small and fragile population.

Point 1 (First Cause of Action)

THE COMMON COUNCIL IMPROPERLY DETERMINED THAT NO "TAKING" OF AN ENDANGERED SPECIES WOULD OCCUR UNDER THE FEDERAL ENDANGERED SPECIES ACT, NOTWITHSTANDING THAT USFWS HAD ASSERTED ITS EXCLUSIVE AUTHORITY TO MAKE SUCH A DETERMINATION. USFWS WAS NOT EVEN PERMITTED TO INVESTIGATE THE HOTEL PROJECT SITE.

As alleged in the First Cause of Action, experts from the United State Fish and Wildlife Service wrote to the Common Council that they had concluded that Karner Blue butterflies **presently** occupy 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).[1]. The Common Council did not grant permission for a visit, and instead found in the FEIS (Section II(E) of the Findings) that no "taking" would occur because the developer's expert believed that without blue lupines, the butterflies would not visit the site, (contrary to the opinion of the neutral experts). USFWS has exclusive jurisdiction, pursuant to the ESA, 16 USC 1531 et seq., to determine whether the Hotel project would result in a "taking" of a federally

[1] 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

endangered species. The Findings of the FEIS, that a "taking" will not occur, are 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 is preempted from making a determination under the ESA as to whether the Hotel project will result in a "taking" of a federally endangered species. That determination is for the USFWS alone, and the USFWS, having declared that the Karner Blue butterfly's present occupation of the Hotel site requires a determination of possible "taking", cannot be displaced by the Common Council in making this determination. SEQRA does not alter the jurisdiction between or among state agencies. Ames v. Johnson,169 AD2d 84, 571 NYS2d 831 (3rd Dept. 1991)

Point 2 (First Cause of Action)

THE COMMON COUNCIL DEFERRED A DECISION BY THE USFWS UNTIL AFTER THE FEIS WAS COMPLETED, AND SO THE COMMON COUNCIL COULD NOT TAKE A 'HARD LOOK' AT THE ENVIRONMENTAL IMPACTS REVEALED IN THE PUBLIC RECORD AS REQUIRED BY SEQRA

Finding II(E)(4) of the FEIS, held that since "SEQRA does not change the jurisdiction of other agencies…the USFWS may exercise its authority in its direction"… and if the USFWS required a site visit, the applicant would be required to cooperate pursuant to law. This finding, in effect, delegated and deferred to the USFWS, the decision on the "taking" issue to be made 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 a EIS, and then take a hard look at the environmental impacts disclosed in the public record. 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 other 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 for 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 of 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. This is exactly the error found by the court in the Penfield case. Obviously if the Common Council had waited until it received the determination of the USFWS before taking its "hard look", it might have reached very different conclusions. 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, and as a result, the FEIS is fatally incomplete and deficient.

Point 3 (Second and Third Causes of Action)

THE FEIS FAILED TO MAKE FINDINGS AS TO THE IMP ACT OF THE HOTEL PROJECT ON BUTTERFLY HILL, AND THE FEIS IGNORED THE NEUTRAL SCEINTIFIC EXPERTS WHO RECOMMEND AGAINST THE PROJECT

As stated more fully in the present Petition (Second and Third Causes of Action), and the attached affidavit of Lynne Jackson, the FEIS failed to address or consider the environmental impacts of the proposed Hotel on rare and endangered species including the Karner Blue butterflies on Butterfly Hill only a few hundred feet from the Hotel project. Experts from the endangered species units of the New York State Department of Environmental Conservation (NYSDEC), the United States Fish and Wildlife Service (USFWS), and the Pine Bush Commission, with more than 15 years of experience in managing the Karner Blue Butterfly Recovery Plan, as well as independent experts and scientists familiar with the Karner blue butterfly (hereinafter the "neutral experts") all recommended against proceeding with the project. Instead, their advice was disregarded in favor of the developers "expert" who had little training or education with respect to the Karner Blue butterfly as compared with the neutral expert's extensive experience. The entire focus of the FEIS Findings was directed at the conclusion of the developer's "expert" that because he could not find any blue lupines during his six examinations of the "open" portions of the Hotel property site, the site would not be attractive to Karner Blue butterflies who rely exclusively on blue lupines to breed.

The neutral experts and scientists by contrast presented evidence, which was ignored in the FEIS, that Karner Blue butterflies **presently** occupy the Hotel project site, that the Karner Blue butterflies forage on plants other than the blue lupine for food, that the developer's expert is apparently unfamiliar with Karner Blue habits and ecology, and that he has drawn incorrect conclusions that may lead to serious harm to the butterfly. By relying only on the developer's expert in the FEIS Findings, virtually no hard

consideration or analysis was given to whether the Hotel project would have any impact on the critical Karner Blue butterfly population **on Butterfly Hill** just a few hundred feet away, or on any of the other rare and threatened species known to live in the area, such as the Frosted Elfin butterfly the Hognosed Snake, the Worm Snake, the Eastern Spadefoot Toad, and the Adder's Mouth Orchid, notwithstanding that the New York State Department of Environmental Conservation (NYSDEC), and other agencies requested that such an analysis be conducted.

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 lead agency did not do any of its three requirements. It failed to identify other rare or endangered species in the area; 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.

In Tonery, v. Planning Board of the Town of Hamlin, 256 AD2d 1097; 682 NYS2d 776, (4th Dept. 1998), Opinion amended on reargument 703 NYS2d 762, the Court held that:

> "[L]ead agency must provide a reasoned elaboration for its determination of [environmental nonsignificance]. Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance."

In the present case, vague generalities, unscientific speculation, lack of analysis and reasoned elaboration require a finding that the FEIS is deficient and incomplete.

Point 4 (Fourth Cause of Action)

IN 1998 THE HOTEL SITE WAS ILLEGALLY CLEARED IN VIOLATION OF A PRIOR PERMIT FROM NYSDEC; THE COMMON COUNCIL IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF NYSDEC AS TO WHETHER THE PERMIT APPLIED TO THE SITE

In connection with a prior expansion of a movie theater at Crossgates Mall, the NYSDEC in 1994, gave Crossgates a SPDES Permit that require site plan approval by NYSDEC for any development of land "**adjacent"** to the Karner Blue Butterfly Preserve (Butterfly Hill). In connection with the Hotel project, NYSDEC submitted a letter stating that it had determined that the 1994 SPDES Permit applied to the Hotel site and requiring that the developer obtain site plan approval of NYSDEC. NYSDEC also suggested to the Common Council that the land had been cleared by Crossgates in 1998, in violation of the SPDES Permit.

The FEIS Findings (I)(4) initially determined that the Permit did not apply to the Hotel project site, because the land was not "adjacent" to the Butterfly Hill Preserve. **Then the Common Council contradicted this Finding by determining in Finding II(2)(B)(15) that a portion of the Hotel site actually was adjacent to the Butterfly Hill Preserve – thus by the Council's own logic the Permit should have applied to the site.** In fact, as shown more clearly in the affidavit of Lynne Jackson, the entire Hotel site is adjacent; the Common Council's determination otherwise was based on an impermissibly narrow reading of the permit and the word "adjacent". But even under the most restrictive reading of the word "adjacent", the Common Council determined in Finding II(2)(B)(15) above that approximately half of the Hotel project site is adjacent to the Butterfly Hill Preserve, including most of the area that is sought to be developed, and so logically the Permit would still apply. The Common Council was simply wrong in finding that the Permit did not apply, and in ignoring the Permit issue.

But more to the point, the Common Council was in excess of its jurisdiction when it overruled a determination by the NYSDEC that a prior permit given by the NYSDEC applied to the Hotel project site. It was for the NYSDEC and not the Common Council to interpret the NYSDEC's permits, just as the Common Council had no jurisdiction to interpret USFWS regulations on the "taking" of endangered species.

In Ames v. Johnson, 169 AD2d 84, 571 NYS2d 831 (3rd Dept. 1991), the Court vacated the approval of a construction project under SEQRA because the sewer system did not

conform to health regulations but noted, in response to complaints that the lead agency did not impose the correct standards:

> "It is [the Department of Health] not a town planning board that is statutorily directed to supervise and regulate the sanitary aspects of sewage disposal…SEQRA does not alter the jurisdiction between or among state agencies."

In the same way, the Common Council may not usurp the jurisdiction of the NYSDEC to determine the meaning and application of NYSDEC SPDES Permit. By doing so, the Common Council failed to take a "hard look" at the issue of illegal clearing being presented to them by the NYSDEC. (See also Penfield v. Planning Board, supra,)

Point 5 (Fifth and Sixth Cause of Action)

THE HOTEL SITE WAS ILLEGALLY CLEARED AND BULLDOZED IN VIOLATION OF THE CITY CODE; THE SITE SHOULD HAVE BEEN CONSIDERED AS IT WAS BEFORE CLEARING

As alleged in the Petition's Fifth and Sixth Causes of Action, all of the neutral experts requested findings as to whether a significant portion of the Hotel project site had been illegally cleared, bulldozed in or about 1998, and made into a parking lot in violation of City ordinances. Moreover, the neutral experts wanted the land evaluated as it was before the illegal clearing, as opposed to the applicant's expert, who only viewed the "open" and primarily cleared land of the parking lot and, not surprisingly, determined that no lupines were present to support a butterfly population. The Findings ignored the neutral experts and made illogical, inconsistent, and erroneous findings to determine that the land was not cleared in violation of any law because no enforcement proceedings were ever commenced.

Article VI, Section 375-33, and Section 375-35(D)(2) of the Albany City Code, require that site plan approval be obtained for all "Proposed Development" including:

> (2) The location and design of all uses not requiring structures **such as off-street parking, loading and storage areas.**

Crossgates never submitted a site plan application for its construction of the parking and storage lot on the Hotel site in 1998, and so it's clearing, bulldozing and construction on the lot was illegal. Had the Common Council properly found that the land had been cleared in violation of the Code it would reasonably have had to consider whether the land should have been restored to its former condition, and whether, in its former condition, it would have contributed to the survival of the Karner Blue butterflies on Butterfly Hill.

Since the Common Council erroneously found that no violation of law occurred, it failed to consider whether the Hotel project site, in its former condition, offered significant habitat to the Karner Blue population on Butterfly Hill, and whether the illegal clearing in 1998 contributed in any way to the sharp decline of the butterfly population in 1998. This issue was simply not address at all, and so the FEIS was fatally incomplete.

Point 6 (Seventh Cause of Action)

THE FEIS FAILED TO INCLUDE ANY REASONABLE DISCUSSION OF ALTERNATIVES AS REQUIRED BY SEQRA; THE MOST REASONABLE ALTERNATIVES – A CONSERVATION EASEMENT OR A DELAY IN THE PROJECT – WERE NOT CONSIDERED.

As alleged in the Seventh Cause of Action, although the neutral experts objected that the Draft Environmental Impact Statement (hereinafter "DEIS") failed to contain any reasonable discussion as to alternatives, as required by Section 8-0190 (d) of the Environmental Conservation Law, virtually no consideration or analysis of alternative was included in the FEIS Findings. The FEIS stated that it would discuss a number of alternatives including "Dedication to the Preserve", and then failed to mention this option again at all. The FEIS failed to consider applying a conservation easement to the property or delaying action of the project until such time as the Karner Blue population on Butterfly Hill had strengthened and spread as significant distance toward the Pine Bush Preserve, although there two options were the most important with respect to protecting the butterflies. The only significant discussion of alternatives in the Findings (Section III) concerned the no-action alternative which the Common Council was required to

include pursuant to 6 NYCRR 617.9(b)(5)(v). The Common Council dismissed this required section by stating that if adopted it would "result in a lost opportunity to achieve public benefits in the form of increase jobs and first class hotel accommodations".

Section 8-0109(d) of the Environmental Conservation Law states that the FEIS is required to contain, among other things, "Alternatives to the proposed action".

In Webster Ass. v. Town of Webster, 59 NY2d 220; 464 NYS2d 431, (1983) the Court of Appeals held that, Section 8 of the Environmental Conservation Law requires discussion, in both draft and final environmental impact statements, of alternatives to proposed action, containing description and evaluation of reasonable alternatives to action which would achieve the same or similar objectives. The Court added, "Furthermore, omission of a required item from a draft EIS statement cannot be cured simply by including the item in the final EIS statement".

The lack of any discussion about alternatives that would help the Karner Blue Butterflies survive on Butterfly Hill, indicates how completely the Common Council failed to identify the important environmental issues, or take a "hard look" at how environmental damage could be avoided. No catastrophic impacts are mentioned in the present EIS, but there is one very obvious catastrophic impact that should have been considered. If the pressure of development, and loss of habitat from the Hotel project should cause the population on Butterfly Hill to decline further until it fails completely, the best chance to populate the Preserve south of the Thruway with Karner Blue butterflies will have been lost. The development of the corridor to lead the butterflies from Butterfly Hill to the Preserve will have been in vain. And the species will be one large step closer to extinction. Surely such a possibility should merit some mention in the EIS Findings somewhere. The absence of such alternatives and analysis speaks volumes about the FEIS' concern for the Karner Blue butterfly and the alternatives for keeping it alive.

Point 7 (Eighth Cause of Action)

THE FEIS FAILED TO CONSIDER THE CUMULATIVE IMPACT OF THE NEARBY LANDFILL EXPANSION, AND FALSELY CLAIMED THAT THE

APPLICATION TO EXPAND THE LANDFILL HAD NOT YET BEEN FILED AND WAS SPECULATIVE, WHEN IN FACT IT HAD BEEN FILED FOR OVER A MONTH PRIOR TO THE FILING OF THE FEIS

As alleged in the Eighth Cause of Action, the FEIS made virtually no consideration of the potential cumulative impacts of other development projects in the area. In the FEIS Findings II(F)(8), the expansion of the neighboring City of Albany Landfill was identified as a potential cumulative impact, but its impact was disregarded as "speculative" because, according to the FEIS Findings, no application to expand the landfill had been filed.[2] **In fact an application was filed over a month before the FEIS was completed, and the FEIS in this respect is incomplete and erroneous and indeed disingenuous.**

In Save The Pine Bush Inc. v. City of Albany, 70 NY2d 193, 518 NYS2d 943 (1987), the Court of Appeals held that failure of the City to consider potential cumulative impacts of other pending projects on the Pine Bush in conjunction with consideration of application for zoning change, violated City's duties under SEQRA to identify the factors upon which the proposed action might have a significant effect. Again in Save The Pine Bush v. Common Council of the City of Albany, 188 AD2d 969; 591 NYS2d 897 (3rd Dept. 1992), the Court held that the EIS was arbitrary and capricious where it failed to determine whether parcels to be developed were needed to complete the Preserve. The requirement that the Common Council consider cumulative impacts of other projects stems from the recognition by the courts that development in the Pine Bush may impinge on land necessary to form the 2000 fire manageable acres which is the minimum Preserve necessary to sustain the Karner Blue butterfly.

Moreover, in the present case, the Common Council not only failed to consider the cumulative impact on the Preserve of the landfill expansion, but it failed to consider the

[2] This erroneous and misleading Finding was apparently made to avoid the issue of cumulative impacts, pursuant to Strathmore Hill Civic Ass'n v. Town of Huntington, 146 AD2s 783, 537 NYS2d 264 (2nd Dept. 1989), leave to appeal denied, 74 NY2d 614, in which the court held that the cumulative impacts a lead agency was required to consider only applied to rezoning applications **actually pending**. Commentary by Philip Weinberg to Section 8-0109 of McKiney's Environmental Conservation Law, p. 188, referred to the Strathmore decision as "an unduly restrictive result. The test should be whether rezoning applications by adjacent owners are 'reasonably predictable", in accordance with 6 NYCRR 617.9(b)(5)(iii). Here, of course, the City's application had been actually pending for over a month.

cumulative impact on the Preserve, of approving for development a parcel of land – the Hotel project site - so close to Butterfly Hill that the land might be necessary to keep the Karner Blue butterflies alive until the time that they are able to spread to the Preserve. Just as the courts have repeatedly reversed approval of construction projects by the City of Albany where it was shown that the City had no plan for obtaining enough land to sustain the Karner Blue butterflies in a viable preserve, so the courts should reverse this construction project where it is clear that the City of Albany has absolutely no plan for keeping the Karner Blue butterflies alive on Butterfly Hill until they spread to the Preserve. The FEIS completely failed to evaluate cumulative impacts in any meaningful way – either the impacts the FEIS identified such as the expansion of the landfill, or impacts that the FEIS failed to identify such as the relationship between the Hotel project and the butterflies on Butterfly Hill.

Point 8 (Ninth Cause of Action)

THE CITY OF ALBANY TRIED TO USE LAND, ALREADY COUNTED AS PART OF THE PRESERVE, FOR THE EXPANSION OF THE LANDFILL. THE CITY CLAIMS THE RIGHT TO USE PRESERVE LAND FOR OTHER PURPOSES THEREBY THREATENING A FRAUD ON THE COURTS

Pursuant to a series of cases including Save The Pine Bush v. Common Council, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992), the City of Albany is required to assemble a 2000 fire manageable acre preserve for the Karner Blue butterfly before further development can proceed on land that might otherwise be suitable for the preserve.

In the present case, the City of Albany counted the Fox Run land as having been permanently protected for the Preserve, **at the same time that the City of Albany was applying to use the Fox Run land as an extension of its Rapp Road Landfill.** If the City had not adopted the fiction that the City had not applied for a permit to expand the landfill on to Fox Run, it would have had to consider whether subtracting the Fox Run

land from the Pine Bush Preserve would leave the Preserve short of 2000 fire manageable acres.

In January 2005, after Save The Pine Bush again sued the City over the landfill expansion, the City agreed to withdraw its application to expand the landfill onto Fox Run, but it claimed that it intended to apply to expand the landfill onto another parcel of land that had also been supposedly dedicated to the Preserve. And the City claimed the right at any time to withdraw land supposedly protected for the Preserve to develop for its own purposes. By taking such a position, the City's prior statements in numerous cases on the amount of land protected for the Karner Blue butterfly Preserve are essentially untrustworthy, false and amount to a fraud on the court. Those cases in which the court allowed development to proceed in the Pine Bush based on the City's representation that it had protected sufficient land, includes the following cases, listed in the Finding II(D)(3) of the FEIS: In the Matter of Save The Pine Bush, Inc. v. City of Albany Planning Board, slip op. (Alb. Co. Sup. Ct. 1994); Save The Pine Bush v. City of Albany, 281, AD2d 832 (3rd Dept. 2001); Save The Pine Bush v. Planning Board of the City of Albany, 298 AD2d 806 (3rd Dept. 2002); Save The Pine Bush Inc. v. Town of Guilderland Planning Board, 217 AD2d 767 (3rd Dept. 1995); Save The Pine Bush v. Town of Guilderland Zoning Board of Appeals, 220 AD2d 90 (3rd Dept. 1996); Save The Pine Bush v. Pyramid Crossgates Company, Index No. 6355-96 (Sup. Ct. Albany Co. 1997). If the City of Albany is permitted to withdraw land previously placed in the Preserve, the City has misrepresented to the courts in all of the above cases the amount of land actually preserved, and the court decisions were based on these misrepresentations.

By reason of the foregoing, the City of Albany should be enjoined from approving any more development in the Pine Bush until it has adopted a plan, approved by the courts, for ensuring that land dedicated to the Pine Bush Preserve is permanently protected and will not be withdrawn whenever the City feel the need to use the land.

Point 9

PETITIONERS HAVE STANDING TO SUE

Save The Pine Bush is an environmental organization that was formed more than 27 years ago for the specific purpose of protecting the unique ecology of the Albany Pine Bush. Through its pioneering advocacy and litigation, it literally created the Albany Pine Bush Preserve and the Albany Pine Bush Preserve Commission, and established important new law through its court decisions. (See for example, Save The Pine Bush v. City of Albany, 70 NY2d 193, 518 NYS2d 943 (1987); Save The Pine Bush v. City of Albany ,141 AD2d 948, 530 NYS2d 295 (3rd Dept. 1988) and Save The Pine Bush v. Common Council of the City of Albany, 188 AD2d 969; 591 NYS2d 897 (3rd Dept. 1992).

Save The Pine Bush has led more than a hundred hikes, ski trips, and other excursions into the Pine Bush. The organization has held numerous educational programs pertaining to Pine Bush ecology, and has been a well-know litigant and advocate, challenging many proposed developments which would negatively impact Pine Bush habitat. **The organization has never been denied standing to sue in any of its many actions brought to vindicate concerns with respect to proposed projects in the Pine Bush area.**

Various members of Save The Pine Bush live close to the Pine Bush Preserve and Butterfly Hill and regularly recreate on Pine Bush lands by hiking, skiing, bird watching and other activities. If anyone has standing to challenge development in the Pine Bush under SEQRA, it is Save The Pine Bush and its individual members; it would hard to conceive of a plaintiff with greater interest, connection or credentials.

The Law With Respect To Standing

In Society of Plastics v. Suffolk County, 77 NY2d 761 (1991), the Court of Appeals laid down the basic rule governing standing in SEQRA cases that in "**geographically based**" **actions** "**the plaintiff for standing purposes must show that it would suffer direct**

harm, injury that is in some way different from that of the public at large" at 774. Geographically based or local actions the court defined as actions in which the "**aim and impact of action**" (at 780-781) was directed at a particular geographic area, as opposed to "indiscriminate actions" which apply equally to everyone, and hence logically would permit no person to suffer injury that was different from that of the public at large. **As to indiscriminate actions, the Court stated, "We explicitly do not reach the question of standing to challenge actions that apply indiscriminately to everyone."** at 781.

The Court of Appeals found that in geographically based actions, persons who lived "**near**" or "**close to**" the geographic center of the action would tend to suffer injury that was greater than that of the public at large, and hence they would have the requisite standing to challenge the action. The Court noted that in determining the number of people available with standing to challenge a geographically based action there would be a "**large pool of potential plaintiffs whose interests satisfy the policy goals of SEQRA and of the standing doctrine"** (at 780), and emphasize this point by stating, "**This is not a case where to deny standing to this plaintiff would be to insulate governmental action from scrutiny**." (at 780). The Court thus made clear that it was not trying to prevent normal SEQRA cases from being heard, but rather was attempting to prevent industry groups with no interest in the matter except an economic interest similar to the public at large from delaying environmental decisions.[3]

[3] In Ziemba v. City of Troy, 10 Misc3rd 531; 802 NYS2d 586 (2005), the Court found that residents living several blocks away from a historic structure that was scheduled to be demolished had standing under SEQRA to challenge the demolition. The Court noted that the Plastics case referred to a "large pool" of potential plaintiffs and stated,

> "Respondents are also mistaken in arguing that petitioners need to be immediately adjacent to [Respondents] property or directly view it or live some very short distance away from the property in order to have standing. As pointed out above, the Court of Appeals [in the Plastics case] did not limit standing to only those Suffolk County residents who were immediately adjacent to the landfill or the factories that would be creating paper products. It did not require that the plaintiffs be the closest residents in order to have standing.

The Court of Appeals in the Plastics case, emphasized the traditional rule of standing in environmental cases that proof of injury can be establish by showing loss of **"use and enjoyment of the affected natural resources"** by the plaintiffs. (at 777). The Court said;

> 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 their use and enjoyment of the affected natural resources."

Finally it should be noted that in zoning cases such as the present one, the Court of Appeals in Sun-Brite Car Wash v. Zoning Board of Appeals, 69 NY2d 406 (1987), held that "an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury." In HAR Enterprises v. Town of Brookhaven, 74 NY2d 524 (1989), the Court of Appeals held that an owner of property has an interest in the being assured that the decision makers have properly considered the matter and followed the law, even in absence of a clear injury. The court stated:

> "In deciding whether an owner has standing to ask the Court to review SEQRA compliance, the question is whether it has a significant interest in having the mandates of SEQRA enforced. An owner's interest in the project may be so substantial and its connection to it so direct or intimate as to give it standing without the necessity of demonstrating the likelihood of resultant environmental harm. For even though such an owner cannot presently demonstrate an adverse environmental effect, it nevertheless has a legally cognizable interest in being assured that the decision makers, before proceeding, have considered all of the potential environmental consequences, taken the required 'hard look', and made the necessary reasoned elaboration' on the basis of their determination." at 529

See also Lo Lordo v. The Board of Trustees of Munsey Park, 202 AD2d 506(2nd Dept. 1994; Patterson Materials Corp. v. Town of Pawling, 221 AD2d 608, 609 (2nd Dept. 1995) and Skenesborough Stone v. Village of Whitehall, 229 AD2d 780, 781 (3rd Dept. 1996), all of which cited HAR Enterprises after the Society of Plastics case was decided.

Individual Petitioners

Petitioners in the present law suit include Sandra and Dave Camp and Larry Lessner who live near the Pine Bush and Butterfly Hill. Their interest in this case comes from their proximity to the planned construction, their personal interest of being free to enjoy the rare and unusual plants and animals of the Pine Bush unharmed by excess development, their personal interest in a rational zoning code which protects their property from improper and harmful development, and from their interest in seeing that SEQRA is complied with. Clearly, as to these petitioners, the direct harm of an improperly changed zoning code, and the resulting excessive development, and their loss of the use and enjoyment of the Pine Bush and the rare species associated with it, is sufficient to confer standing. See, Town of Coeymans v. City of Albany, 284 AD2d 830, 728 NYS2d 797 (3rd Dept. 2001); McGrath v. Town Board of North Greenbush, 254 AD2d 614, 678 NYS2d 834 (3rd Dept. 1998), Center Square Ass'n Inc v. City of Albany Board of Zoning Appeals, _AD2s__; 780 NYS2d 203 (3rd Dept. 2004); Ziemba v. City of Troy, 10 Misc. 3d 531, 802 NYS2d 586 (2005).

Lynne Jackson, Rezsin Adams, John Wolcott, and Lucy Clark are officers of Save The Pine Bush who use the area for hiking and enjoyment of the natural resources, and they would suffer a personal loss and injury if the Pine Bush habitat were harmed, which under the Plastics decision is still an appropriate basis to gain standing. (The Plastics case at page 777; See also, Gerrard, Ruzow and Weinberger, Environmental Impact Review in New York, p. 7-96. "Use and enjoyment of the site at issue is clearly sufficient to establish standing under [the National Environmental Policy Act] and the same rule should apply under SEQRA, although the issue has not been extensively litigated.")

Moreover, the real question that has to be answered in the context of standing is whether the "action" here is "local" or "indiscriminate". In the Plastics case, the action in

question started with a law, applied to everyone equally, that required paper rather than plastic bags be used for landfill material. On the surface, the law appeared to be indiscriminate rather than local. But the Court in the Plastics case said that the analysis must be directed at the "**aim and impact**" of the action and concluded that the aim and impact would be on the landfills, thus making the case a local or geographically centered one. In the present case, the action initially presents as a rezoning of a particular lot, suggesting that it is a geographically centered matter. However, the aim and impact of the rezoning will potentially have a devastating consequence to the endangered Karner Blue butterfly, a species that is threatened with extinction. The extinction of a species is an impact that affects everybody equally, and thus an action causing such an extinction or even a significant loss to an endangered species, would be an indiscriminate matter, not covered by the Plastics case.

In another sense however, the extinction of the Karner Blue butterfly or significant loss of Pine Bush habitat would impact individual members of Save the Pine Bush disproportionably from the public at large. Individual members of Save The Pine Bush for years have recreated in the Pine Bush and become involved in the recovery efforts to save the endangered Karner Blue butterfly and the other rare and unusual species found in that habitat. Any loss or extirpation of the Karner Blue butterfly would be a great personal loss for these individual members - greater than the public as a whole – given the efforts that they have made for so long to ensure that the butterfly and its habitat are protected.

The "fight" to save the Karner Blue butterfly and the Pine Bush required the individual Petitioners, over a period of some 27 years, to attend hundreds of hearings, give testimony in countless cases, review piles of documents, environmental impact statements and plans, organize numerous fund raisers to obtain money to hire lawyers to bring law suits and appeals – all without any personal gain except the satisfaction of having preserved something unique and beautiful. It is safe to say that their involvement in and commitment to the Pine Bush is extraordinary, unlike that of members of the public at large, and their potential loss or injury is also unique and extraordinary

whenever the Pine Bush is threatened. Clearly, as the true defenders of the Pine Bush for over a quarter of a century, they have standing to protect its unique heritage.

Institutional Petitioner – Save The Pine Bush Inc.

In the Plastics case, supra, the Court held that with respect to institutional petitioners that the key factors were: 1) whether "one or more of its members would have standing to sue", 2) whether the institutional petitioner "could demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests", and 3) that "the asserted claim nor the appropriate relief requires the participation of the individual members". (77 NY2d 761, at 775). Save The Pine Bush with its years of advocacy on behalf of the Pine Bush and with individual members who have standing to sue, as explained above, clearly meets the institutional test for standing.

Point 10

PETITIONER ARE ENTITLED TO A PRELIMINARY INJUNCTION

As indicated in above memorandum of law and the attached affidavits, Petitioners here are likely to prevail on the merits of the case. They are entitled to a preliminary injunction, pursuant to Section 6301 of the CPLR, because any damage or loss to the Karner Blue butterfly population or other rare and endangered species by the construction of the Hotel project would be irreversible. The equities are in Petitioner's favor because the project is still in the early planning stages. Moreover, pursuant to Dreikausen v. Zoning Board of Appeals of the City of Long Beach, 98 NY2d 165, 746 NYS2d 429 (2002) and Citineighborhoods Coalition of Historic Carnegie Hill ex rel. Kazickas v. NYCity Landmarks Preservation Comm'n, 2 NY3rd 727, 778 NYS2d 740 (2004), failure to seek a preliminary injunction at the beginning of the case may well result in a finding later that the case is moot because substantial construction has taken place in the meantime.

RELIEF REQUESTED

Petitioners request that this court:

1) Vacate, set aside, and annul the present FEIS and Statement of Facts for the Hotel project at 124-128R Washington Ave. Extension, pursuant to Section 7803 (1)(2)(3) and (4) of the CPLR; and

2) Grant a Preliminary Injunction as to any development of the Hotel project site pending the determination of this proceeding; and

3) Enjoin the City of Albany from approving further development in the Pine Bush until it has adopted a plan, approved by the Courts for preventing any land dedicated to the Preserve from being used by the City for its own purposes; and

4) Such other and further relief as to this court may seem just and appropriate.

Respectfully submitted

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