

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,

AFFIRMATION

- Against -

Index no.

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

Respondents.

STEPHEN F. DOWNS, being an attorney duly admitted to practice in the State of New York, hereby affirms under the penalty of perjury pursuant to CPLR 2106:

1. I am the attorney for the petitioners in the above entitle action; I make this affirmation, pursuant to Article 78 of the CPLR, in support of the within Petition to: 1) vacate a Final Environmental Impact Statement, prepared by the Respondents to justify the construction of a 124 unit hotel in the Albany Pine Bush, on the grounds that the FEIS is arbitrary and capricious, unsubstantiated by the evidence, in excess of jurisdiction, incomplete, erroneous and illogical, 2) grant a preliminary injunction preventing any further work on developing the Hotel pending a final decision in this matter, and 3) enjoin the City of Albany from approving any development in the Pine Bush until it has established a plan, approved by the Court, for ensuring that land dedicated to the Pine Bush Preserve will not be later removed by the City and used for its own purposes.

2. As set forth more fully in the attached affidavit of Lynne Jackson, on December 19, 2005 the City of Albany by its Common Council, 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 at 124-128R Washington Avenue Extension by respondent Tharaldson, 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.

3. 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 within Petition, the FEIS filed by the Common Council contains numerous omission, errors, and mistakes; makes findings in excess of its jurisdiction; and makes findings which violate SEQRA, are arbitrary and capricious, and unsubstantiated by the evidence.

BACKGROUND

4. As a result of numerous court decisions of lawsuits brought by the Petitioner, Save The Pine Bush, the City of Albany was required to set aside two thousand "fire manageable" acres in the Pine Bush as a Pine Bush Preserve for the protection of the endangered Karner Blue butterfly and other rare and endangered plants and animals that live in this habitat. See, Save The Pine Bush v. Common Council, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992). The Preserve is bisected by the Thruway which is an almost complete 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.**

5. The Hotel project site is within 200 meters of Butterfly Hill and so any development 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 observed to a high of 30, and it remains today a critically small and fragile population.

VENUE

6. 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.

THE PETITION

7. As alleged in the First Cause of Action of the Petition, experts from the United State Fish and Wildlife Service (hereinafter, “USFWS”) were not permitted to examine the Hotel project site to make their own evaluations and determination as to whether the Hotel project would result in a “taking” of a federally endangered species in violation of the Endangered Species Act, 16 USC 1531 et seq. The USFWS has exclusive jurisdiction to make such a determination of a “taking”, and the Common Council was preempted from making the decision. The findings of the FEIS are therefore incomplete and in excess of the Common Council’s jurisdiction.

8. Moreover, the Common Council stated that the USFWS had independent jurisdiction to make a determination of a “taking”, and that if the USFWS wished to do exercise its jurisdiction, the applicant Tharaldson would have to cooperate as provided by law. (Finding II(E)(4)). The Common Council could not delegate to another agency such as USFWS its authority to determine if the project should be disallowed for “taking” an endangered species, because that would abrogate the Common Council’s responsibility to take a “hard look” at all the environmental consequences of the project, and would allow the decision to be based on information not in the public record. Penfield v. Planning Board, 253 AD2d 342, 688 NYS2d 848 (4th Dept. 1999), Tonery v. Planning Board, 256AD2d 1097, 682 NYS2d 776. And the Common Council could not make the “taking” decision itself instead of the USFWS because SEQRA does not alter the jurisdictions of different agencies. Ames v. Johnson, 169 AD2d 84, 571 NYS2d 831 (3rd Dept. 1991). Rather the Common Council should have considered the determination of the USFWS as to whether a “taking” would occur, so as to be able to take the requisite “hard look” at all of the environmental consequences involved in the project. Penfield v. Planning Board, 688 NYS2d 848 (4th Dept. 1999). In this way all of the information on which the decision would be based would be in the public record, and the Common Council could take a “hard look” at all of the information at one time. Had the Common Council waited for the USFWS’s determination, it might well have affected the Common Council’s FEIS and conclusions, For example, a determination by the USFWS that a “taking” would occur, might well have caused the Common Council to reconsider its conclusions, or consider other alternatives to the project, or to request additional information, or to consider other cumulative impacts.

9. As alleged in the Second Cause of Action, the FEIS failed to address or consider the environmental impacts of the proposed Hotel on the Karner Blue butterflies on Butterfly Hill only a hundred meters from the Hotel project. The entire focus of the Findings is directed at the conclusion of the applicant’s “expert” that because he could not find any blue lupines on “open” portions of the Hotel property site, the site would not be attractive to Karner Blue butterflies which rely exclusively on blue lupines to breed.

The conclusions of the applicant's hired expert, conflicts with the opinions of numerous neutral experts and scientists from various governmental and quasi-governmental agencies which have been working for the last 15 years to save the Karner Blue butterfly from extinction. These experts and scientists 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 Applicant'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. Because the neutral experts were ignored, virtually no hard consideration or analysis was given in the FEIS Findings as to whether the Hotel project would have any impact on the critical federally endangered Karner Blue butterfly population **on Butterfly Hill** a few hundred feet away.

10. As alleged in the Third Cause of Action, the FEIS Findings do not mention or analyze in any way the impact of the Hotel project 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.

11. As alleged in the Fourth Cause of Action, the Common Council exceeded its jurisdiction when it overruled a determination by the NYSDEC that a prior permit given by the NYSDEC applied to the Hotel project site. The determination by the NYSDEC as to the meaning and application of its own Permit was definitive, and the Common Council could not overrule it, any more than it could overrule the USFWS on the issue of a "taking". Moreover the Common Council made inconsistent findings in its decision to overrule the NYSDEC and its findings are clearly illogical and erroneous factually. Instead of erroneously overruling the NYSDEC decision, the Common Council should have given a hard look to the history of the Hotel project site, whether the site was illegally cleared in violation of the permit, what remedies should flow from the illegal clearing, and how the site, if restored to its original condition and planted with blue lupines would contribute to the survival of the Karner Blue butterflies on Butterfly Hill.

12. As alleged in the 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 and made into a parking lot in violation of City ordinances, and an earlier permit issued by NYSDEC. 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 or permit

13. 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. In particular the FEIS identified "Dedication to the Preserve" as an alternative, but then failed to mention this alternative again or give any reason for rejecting it, and gave no alternatives that considered the potential impact of the project on the nearby Karner Blue butterflies. The Common Council should have considered purchasing the Hotel project site for the Butterfly Management Area, or imposing a conservation easement on the property, or at least delaying the project until the Karner Blue butterflies had strengthened sufficiently to spread down the corridor and into the Preserve as the recovery plan envisioned.

14. 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 as required by a series of Court decisions. Save The Pine Bush v. City of Albany, 70 NY2d 193, 518 NYS2d 943 (1987); Save The Pine Bush v. Common Council of the City of Albany, 188 AD2d 969, 591 NYS2d 897 (3rd 1992). 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 yet been filed. **In fact an application was filed over a month before the FEIS was completed and the FEIS is**

thus incomplete, erroneous and indeed disingenuous. A lead agency may not identify a significant environmental concern and then refuse to consider its impact. Penfield v. Planning Board, *supra*.

15. With respect to the Ninth Cause of Action, in applying to expand the landfill, the City of Albany was seeking to use the same land, Fox Run, that the City had included in the Pine Bush Preserve to conclude that the Preserve was now sufficiently complete to permit development to proceed in the Pine Bush. The City tried to use the same land twice for different purposes. In addition, the City of Albany now claims the right to withdraw land from the Pine Bush Preserve whenever it needs the land for its own purposes, notwithstanding that the City in numerous prior court cases had claimed that it had protected sufficient land in the Pine Bush as a preserve, so that further development in the Pine Bush would not interfere with the court ordered goal of a 2000 fire manageable preserve to protect the Karner Blue butterfly. The City's claims to have protected enough land for a Preserve are thus shown to be false and a misrepresentation to the court. As a result, the City of Albany should be enjoined from approving any further development in the Pine Bush until it has adopted a plan, approved by the courts, ensuring that any land represented to be dedicated to the Preserve will not later be withdrawn and used for the City's purposes.

16. As set forth more fully in the attached Memorandum of Law, the nine causes of action outlined above, represent serious breaches of the law under SEQRA that require the FEIS to be vacated, annulled, and set aside.

STANDING TO SUE

17. Save The Pine Bush is an environmental organization that was formed more than 28 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), and Save The Pine Bush v. City of Albany, 141 AD2d 948, 53 NYS2d 295 (3rd Dept. 1988). **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.

18. Various members of Save The Pine Bush, including Petitioners Sandra and Dave Camp and Larry Lessner, live close to the Pine Bush Preserve and Butterfly Hill. All of the members regularly recreate on Pine Bush lands by hiking, skiing, bird watching and other activities. Members of Save The Pine Bush have led more than a hundred hikes, ski trips, and other excursions into the Pine Bush, and have held numerous educational programs pertaining to Pine Bush ecology, and have been well-know litigants and advocates, challenging many proposed developments which would negatively impact Pine Bush habitat. Its members over the years have spent thousands of hours attending hearings on proposed development, giving testimony and statements to lead agencies, reading Environmental Impact statements, attending fund raisers to raise money to hire lawyers to protect the Pine Bush from unwarranted development and in general advocating on behalf of the Pine Bush. As stated more fully in the attached Memorandum of Law, 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.

PRELIMINARY INJUNCTION

19. Petitioners have moved for a Preliminary Injunction, pursuant to Article 63 of the CPLR, to prevent the Respondents from continuing to take any action to develop the Hotel project during the pendency of this proceeding. For the reasons set forth in the accompanying affidavit of Lynne Jackson and the accompanying memorandum of law, Petitioners are likely to succeed on the merits of the Petition.

20. The potential harm to the Karner Blue butterfly from building the Hotel could well lead to the complete collapse of the fragile population on Butterfly Hill and the extirpation of this population of butterflies. The loss of this population would create serious doubt as to whether Karner Blue butterflies could be induced to inhabit the Pine Bush Preserve which is being prepared for them, and it would have grave implications for the survival of the butterfly as a species. The harm would truly be irreparable.

21. The balance of equities favors the Petitioners. The City has just approved the rezoning of the parcel and the site plan review has not yet begun. At most there would be a few months delay in a project that has been pending for a number of years. If the Petitioners are successful the City will have saved time and effort needed to approve plans that in the end cannot be built. Moreover the City of Albany created this situation by filing a manifestly incomplete and inaccurate FEIS that misrepresents whether an application for a landfill was filed, improperly assumes jurisdiction from USFWS and NYSDEC on matter uniquely within their competence, and fails to address significant issues or addresses them with obvious illogic.

SERVICE OF PROCESS ON RESPONDENT THARALDSON

22. According to the FEIS, Tharaldson Development Co has its office and principal place of business at 1202 Westrac Drive, Fargo, North Dakota, 58103. Tharaldson is represented in this rezoning proceeding by Shanley, Sweeney, Reilly & Allen, PC., 10 Thurlow Terrace, Albany, New York, 12203. In the interests of giving prompt notification of this present proceeding to Respondent Tharaldson, it is requested that service be made by hand delivery of a copy of these papers to Tharaldson's local counsel, Shanley, Sweeney, Reilly & Allen, and a copy of the papers be mailed to Tharaldson Development Co. by registered mail, return receipt requested.

WHEREFORE, Petitioners request that this court:

- 1) Grant a Preliminary Injunction to prevent any further steps from being taken to develop the Hotel project site during the pendency of this proceeding;
- 2) 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;
- 3) Enjoin the City of Albany from approving any more development projects in the Pine Bush until the City has adopted a plan, approved by the courts, ensuring that land

dedicated by the City to the Pine Bush Preserve will not be withdrawn and used for other purposes; and

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

Dated: Albany, N.Y.

March 12, 2006

Stephen F. Downs