COURT OF APPEALS
STATE OF NEW YORK
----------X

In the Matter of Richard A. Brummel *et al*.,

Appellants,

v.

Town of North Hempstead Town Board etc., *et al.*,

Respondents
----------X

Nassau
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6150 / 2014

BRIEF IN SUPPORT OF MOTION TO APPEAL TO THE COURT OF APPEALS

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Exhibits

Exhibit 1 Decision of the Second Department in the present matter
Exhibit 2 Decision and Order of the Supreme Court in the present matter
Exhibit 3 Notice of Entry of Respondent Roslyn Water District
Exhibit 4 Notice of Entry of Respondent Nassau County
Exhibit 5 Notice of Entry of Appellants (to Town of North Hempstead)

Procedural History

1. Appellants filed a hybrid article 78 special proceeding and action for declaratory judgment on June 24, 2014, seeking to nullify the official determinations of the Respondents and enjoin them from acting pursuant to them.

2. The case was brought with respect to alleged violations of the Environmental Conservation Law ("ECL") Article §8-0101 *et seq.*, the State Environmental Quality Review Act ("SEQRA"), as implemented by 6 N.Y.C.R.R. 617.

3. A temporary restraining order was granted to Appellants on June 24, 2014 by Supreme Court, Nassau County.

4. The temporary restraining order was vacated and the application for a preliminary injunction was denied by the IAS judge, The Hon. then-Acting Justice James P. McCormack, on July 2, 2014.

5. Appellants filed a Supplementary Petition on or about July 25, 2014.

6. Respondent Nassau County's motion to dismiss the special proceeding was granted by Supreme Court, Nassau, by a Decision and Order of September 19, 2014 (Exhibit 2).

7. Appellants timely filed a notice of appeal on October 21, 2014.

8. Appellants were granted a temporary restraining order from the Appellate Division, Second Department on November 19, 2014.

9. The temporary restraining order was vacated and the application for a preliminary injunction denied by the Second Department on December 5, 2014.

10. Appellants made a motion to the Second Department for preference in the hearing of the appeal which was denied on May 21, 2015.

11. After oral arguments, the Second Department issued a Decision and Order (Exhibit 1) affirming the decision of the trial Court on December 21, 2016.

12. Appellants were served by overnight delivery Notices of Entry of the order of the Second Department dated December 22, 2016 from both the Respondent Roslyn Water District (Exhibit 3) and the Respondent Nassau County (Exhibit 4).

13. Appellants on January 23, 2017 served upon Respondent Town of North Hempstead a Notice of Entry of the order of the Second Department, having failed to receive one from them.

14. This motion for leave to appeal is being served on all the Respondents on January 23, 2017.

15. The motion is timely served because counting from the date of the Notices

of Entry from the Roslyn Water District and Nassau County -- December 22, 2016 for both -- the thirty-day period for service of this motion expires on that day -- January 23, 2017 -- because the thirtieth day fell upon a Sunday, and January 23, 2017, is the next business day.

16. The motion for leave to appeal is timely served on Respondent Town of North Hempstead because the thirty-day period will expire on approximately February 22, 2017.

17. Petitioners have not applied for leave to appeal from the Appellate Division.

Jurisdiction

18. This Court has jurisdiction because the Decision and Order of the Second Department (Exhibit 1) disposes of the matter with finality, by dismissal of Appellants appeal and affirming the trial Court Order granting the motion to dismiss the special proceeding (Exhibit 2).

Questions Presented for Review

19. The issues for this Court to decide are as follows:

A. Did the Appellate Division err in finding the Appellants lacked standing?

20. Appellants demonstrated they possessed standing to sue because, among other things, they 'used and enjoyed' the natural resource to be altered, to wit: a thirty-three-acre recreational forest in a public park known as “Christopher Morley Park” (hereinafter “the forest”).

21. Appellants preserved the issue of standing for appellate review as follows:

1. Standing Based on 'Use and Enjoyment' Apart From 'View':

Appellants Showed Regular 'Use and Enjoyment' of the Forest Apart From 'View'

22. In their arguments before the trial Court and Second Department, Appellants showed they had standing because they regularly walked or jogged on the forest trails adjacent to the proposed water stripper in the following papers and locations:

23. Appendix pp. 41-45 (Petition) ¶37, ¶45, ¶¶ 25-28:

> “Petitioner Dicker regularly jogs through the scenic wooded trails of Christopher Morley Park to reach, and then return from, the fitness stations and exercise course located in other portions of the Park.”
> ....
> “Petitioner Greengold uses the Park's nature trails which pass the proposed air-stripper site on a virtually daily basis for exercise and because the forested area provides moments of solitude. As the nature path is shrouded under a forest of trees, entering the park offers an instant transition to a natural serene and undisturbed

environment, which is unique in his community and which Mr. Greengold values."

....

"Petitioner Richard A. Brummel resides ... about 2.5 miles from the Park....

Growing up in East Hills and (sic) used the Park frequently as a youth, and rode there by bicycle.

Over the past three months he has been frequently visiting the forested area at issue, on approximately a weekly basis, for the purpose of enjoying the woods, surveying the woods, and monitoring the threat to the woods.

During his walk in the woods he goes to the furthest reaches of the forest on a trail that would be cut by an access road, and next to which the air-stripper would be built."

24. See also, Appendix Appendix pp. 109-121 (Affidavits in Support of the Petition); Appendix pp. 246-250 (Memorandum of Law in Support of the Petition); Appendix pp. 277-280 (Verified Reply); Appendix pp. 384-6 (Sur-Reply).

25. Appellants' Appellate Brief, ¶¶ 30-31:

"Moreover, all three Petitioners affirmed that they use and enjoy the forest regularly and intensively by walking or jogging through it.

Petitioners stated that they enjoy and value the forest as a special and locally unique 'natural refuge' from the surrounding developed areas, which are residential developments, shopping malls, highways, etc. The Petitioners affirmed that those natural characteristics would be severely impacted by the proposed project."

26. See also, Brief ¶¶16-17; ¶30; ¶32; ¶¶34-40; ¶41; ¶45; ¶¶46-7; ¶49; ¶59; ¶¶66-72; ¶¶96-7; ¶¶99-100; ¶¶102-104; ¶¶152-3; ¶¶189-190; ¶¶197-203; ¶206; ¶208; ¶211.

2. Standing Based On 'View':

Two Of the Appellants Showed That They Had a "View" of the Forest From Their Homes That Would Be Damaged

27. In their arguments before the trial Court and Second Department, Appellants asserted that two of them also enjoyed standing because they enjoyed a 'view' of the forest from their homes which would be damaged by the construction of the water stripper. They did so in the following papers and locations:

28. Appendix p. 276 (Verified Reply) ¶¶ 42-44:

> "Respondents Greengold and Dicker both reside directly adjacent to the forest at issue, and can see it from their homes (Greengold Affidavit, Petitioners' Exhibit 3, paragraph 3, Dicker Affidavit, Petitioners' Exhibit 2, paragraphs 3 and 4). Mr, Todaro provides measurements of the distances of the proposed project to the homes as 500 feet and 760 feet (Todaro Affidavit July 16, 2014, paragraphs 15 and 14, respectively).
>
> "Mr. Dicker states: 'Every day my family and I look out the windows of our home and enjoy the natural beauty of the undisturbed wooded area of the park (Dicker Affidavit, *ibid.,* paragraph 4).
>
> Mr(.) Dicker further states: 'The proposed location of the air stripper

in the wooded area of the park is directly in line with the front door of my home. If the water district's plan is allowed to proceed, my family and I will be unable to enjoy and use the wooded area of the park' (*ibid.,* paragraph 17)."

29. See also, Appendix p. 43 (¶¶34-5); p. 44 (¶44, ¶¶47-8); p. 114 (¶¶3-4); p. 115 (¶8); p. 116 (¶15); p. 117 (¶¶18-19); p. 119 (¶3a); p. 121 (Summary); p. 246 (Point III); p. 249 (Memorandum of Law (Petition); p. 365 (Memorandum of Law (Reply)); p. 385 ¶31 (Sur-Reply)

30. Brief, ¶18, ¶20:

"Petitioners Dicker and Greengold live directly adjacent to the forest at issue, and they asserted, both directly and indirectly, that their view of the forest would be damaged by the proposed facility.
...
...[B]oth Petitioners asserted firmly their proximity to the forest and to the project, which they asserted would grossly alter the forest, in their Verif. Reply, in answer to Respondents ' challenges (A276, A277, Verif. Reply, ¶¶ 42-44, 48-49)."

31. See also, Brief, ¶¶17-23; ¶¶26-9; ¶¶32-33; ¶¶34-35; ¶¶37-40; ¶¶42-44; ¶¶46-7; ¶50; ¶59; ¶93; ¶¶109-114; ¶125; ¶128; ¶131; ¶¶189-192; ¶206; ¶207; ¶211

3. Harm Per Se To Appellants' 'Use And Enjoyment':

Appellants Showed the Proposed Project Would Cause 'Damage' Per Se To Their Use and Enjoyment of the Forest

32. In their arguments before the trial Court and Second Department,

Appellants asserted that the construction of the water stripper, its appurtenances, its 320-foot access road, and its half-acre security compound would damage the experience of primitive nature they enjoyed both on their walks an in the view enjoyed by two of them from homes. The arguments were made in the following papers and locations:

33. Appendix p. 116 (Petition, Affidavit of Petitioner Dicker), ¶¶ 15-17:

> "The water stripper will be an alien commercial structure, large in size, with lighting around it. It will emit noise from the processing. It will be totally incompatible with the pristine nature in which it will be dropped, completely nullifying the natural habitat in which it will be built.
>
> Furthermore, the chemicals being removed from the water by this structure are exhausted into the air and will end up being deposited back on the ground, polluting other areas of the woods and the creatures that call it home.
>
> The proposed location of the air stripper in the wooded area of the park is directly in line with the front door of my home. If the water district's plan is allowed to proceed, my family and I will be unable to enjoy and use the wooded area of the park."

34. And, Appendix pp. 282-3 (Verified Reply), ¶¶70-72:

> "The proposed RWD air-stripper presents a proposal to construct a road as long as a football field (320 feet) cut through an otherwise well-preserved forest traversed by walking paths and used for camping; the clearing of an indeterminate compound to be surrounded by fencing and motion-sensing lights; the construction of two buildings, one of which will be about 30-feet-tall; and continuous noise and emissions (Todaro Affidavit, *ibid.,* paragraphs 19-20, p. 4). This facility will be visible from trails, roads, and homes (Todaro

Affidavit paragraph 40, p. 9)

The project will be so substantial that its construction will require the removal of 1,200 tons of 'natural material'. (RWD Exhibit N, page 11) Such material will presumably include trees, earth, and plants."

35. See also, Appendix: p. 278 (Verified Reply) ¶52, p. 279 ¶55.

36. Brief, ¶140:

"It would seem beyond question that cutting down woods to build a road and placing a quasi-industrial facility in a forest, visible from two of the Petitioners' homes and from the walking trails they all use, would degrade the visual character of the undeveloped woods they had come to enjoy. To assert otherwise would seem to make a mockery of the entire endeavor of open-space conservation, which is a major public-policy goal throughout New York State."

37. See also, Brief, ¶¶ 139-146.

4. Definition of "The General Public":

Appellants Showed That By Their 'Use and Enjoyment' of the Forest They Were Distinguished From the "General Public" for Standing Purposes

38. In their arguments before the trial Court and Second Department, Appellants disputed the incorrect reinterpretation of the term "general public" -- as used in the established tests of standing in environmental matters -- to incorrectly denote a 'subset' of the overall population – those who also 'used and enjoyed' a natural resource -- instead of the aggregate mass of the overall population who inhabited an area, which latter definition this Court's decisions

clearly favor. That argument was made in the following papers and locations:

39. Appendix, pp. 365-369 (Memorandum of Law (Reply))

> "...[S]ome parties -- and indeed some courts relied upon by some parties -- persist in trying to parse the concept of 'general public' to somehow deny complainants the specific enough element of injury required to assert legal standing. (See e.g. Nassau Motion to Dismiss, p. 4).
>
> But close examination, certainly in this case, shows it to be merely a disingenuous argument.
>
> Pine Bush (2009), supra is clear in stating that the comparison is with the public in general -- "most other members of the public" -- and Society of Plastics, framing it as "the public at large", is even clearer.
> .....
>
> Nassau County quotes a section of the decision [Matter of Tuxedo Land Trust v. Twn of Tuxedo, NY Slip Op 50377(U), Supreme Court, Orange County] that appears to ask of plaintiffs that they not only use a resource more than other members the public, but that they use it more than even other members of the public who use it.
> That reading appears to be an issue of clumsy composition by the court...
> ....
> In any event the trial court does not trump the Court of Appeals."

40. Brief ¶¶ 170-1:

> "Petitioners thoroughly demonstrated 'use and enjoyment' of the Park....
>
> "It is contrary to the analysis of Society of Plastics and Save the Pine Bush, and contrary to common-sense, to argue that those persons who specifically walk in and use some specific woodland are no different from "the public at large" (Society of Plastics, *ibid*., at 774) or "most other members of the public" (Save the Pine Bush, *ibid*., at 301),

absent *further* argument or proof of that fact. It creates confusion where the high court left no room for doubt."

Also, Brief ¶167-90; Reply-Brief ¶¶4-5; ¶¶113-14

5. Standard Of Proof On Motion To Dismiss:

Appellants Showed That The Trial Court Failed To Accord The Factual Assertions In Support of Their Petitions, Including Those Related To Standing, The Presumption Of Truth And Adequacy Required In A Motion To Dismiss

41. In their arguments before the Second Department, Appellants argued that in deciding a motion to dismiss, the trial Court was required to consider the asserted 'cause(s) of action' – or in the present case, the assertion of 'standing' – with the benefit of 'every favorable inference', and that such a practice was clearly not followed by the trial Court, and that the trial Court decision should therefore be reversed.

42. (The argument was not made to the trial Court because the standard is well-known as a principle of jurisprudence – as opposed to a fact or argument to be introduced into the record for the court's consideration; furthermore the Petitioners had no way of knowing the trial Court would fail to treat the Petitioners claims of standing in accord with that standard.)

43. The arguments were made in the following location:

44. Brief ¶154:

"Had Supreme Court fairly evaluated the evidence before it, giving Petitioners 'the benefit of every possible favorable inference' as required under a motion to dismiss (Leon v. Martinez, *supra*, ¶141), the Court would have found all the evidence it needed to find that standing existed. And at the very least, if there were factual issues in doubt, it should have sought a hearing to elicit factual evidence necessary to clarify any dispute (*supra*, ¶¶60 *ff.*)."

45. See also, Brief : ¶¶ 52-3, ¶¶58-59.

6. Absence of Trial of Fact Under CPLR §7804(h)

The Trial Court Should Have Convened A 'Trial Of Fact' To Address Disputed Factual Elements Of 'Standing'

46. Appellants argued in their papers below that certain issues of fact bearing on their standing should have been subject to a "trial of fact" pursuant to CPLR §7804(h) prior to the dismissal of the special proceeding – which was in part owing to disputes over the 'facts' establishing standing. The arguments were made in the following papers and locations:

47. Brief ¶¶ 60-61:

"Besides the rules established for determining a motion to dismiss, the Courts have also held that in an article 78 proceeding, no less than in a normal action, petitioners are entitled to a trial of facts where they are at issue: "If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith" (CPLR ¶7804 (h)).

If Supreme Court had real questions about the factual veracity of Petitioners' use or injury -- the various elements of which each propounded -- the proper procedure would have been a hearing, not a

dismissal."

48. See also, Brief ¶63.

49. (The argument was made at the appellate level only because it refers to a standard provision of the Civil Procedure Law and Rules ("CPLR"), §7804(h), which the Court could have invoked at its own discretion if the Court questioned about Petitioners' factual assertions in support of standing. Such factual assertions of the Petitioners should by law have received a presumption of truth in the determination of a motion to dismiss, as the trial Court acted under, and Petitioners had no way of knowing the Court would act as it did with respect to the factual assertions, prior to its decision.)

Argument For Granting Leave To Appeal

50. The lower court decisions in the present matter do serious harm to precedent in environmental law, as well as to several corollary instances of settled law.

51. This Court should hear this appeal for a simple reason: If it does not, it will be condoning a decision by the Second Department effectively overturning the Court's own holdings on 'standing'. Taken together with two other backward-looking it cites for support, this decision by the Second

Department case would re-establish a corrosive 'standing' regime that this Court appeared to have reformed by deliberate effort in recent years.

52. The Second Department decision attacks environmental jurisprudence in several ways:

53. First, it erroneously reinterprets the concept of "population at large" as it is used in determining standing in environmental cases in a way that would manufacture the type of 'insuperable hurdles' to standing that this Court clearly intended to remove.

54. Second, it endorses a skepticism that shades into obtuseness in denying the facial harm caused by a proposed construction project in public forest-land, and does so, remarkably, in sustaining a motion to dismiss - -wherein facts and causes of action asserted by plaintiffs are to be accorded robust benefit of the doubt.

55. Third, the Second Department cities for authority two of the most backward-looking environmental cases from the recent history of the State's appellate jurisprudence, two cases from the Fourth Department which both seek sharply to narrow standing by either misconstruing precedent or by carving out highly questionable loopholes to it[1].

[1] See *infra*: Matter of Niagara Preservation Coalition v. New York Power Auth., 121 AD 3d 1507 (Fourth Department, 2014) and Matter of Kindred v. Monroe County, 119 AD 3d 1347 (Fourth Department, 2014). In

56. This Court appears to be facing a rebellion from the Appellate Division on environmental matters, and the present case cries out for the Court's attention.

57. Eight years ago, this Court unanimously held that standing was to be accorded Petitioners in cases under the State Environmental Quality Review Act ("SEQRA") when they were able to show they regularly and repeatedly 'used and enjoyed' a threatened natural resource (*see*, Save the Pine Bush v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), at 301).

58. Two years ago, this Court again unanimously held that standing was not to be denied plaintiffs by excessively harsh standards, the Court reversing the Third Department where that Court undertook to define the "population at large" such that in the case decided no one would have had standing to seek judicial review (see, Sierra Club v. Village of Painted Post, 26 N.Y.3d 301 (2015), at 311).

59. Both cases were landmarks in environmental jurisprudence, clearly intended to remove unreasonable barriers that had bedeviled environmental litigants at least since SEQRA was adopted in 1975.

Niagara, the Fourth Department attempts to redefine the proper baseline 'population' that is meant by "public at large"; in Kindred, the Fourth Department creates a loophole based on skepticism of 'harm' that the Second Department transparently exploits and the Fourth Department narrows the 'proximity-based presumption of injury' in environmental matters to be limited to zoning issues, by using an excessively literal reading of this Court's precedent (e.g. Gernatt Asphalt v. Town of Sardinia, 87 N.Y.2d 668 (1996), at 687).

60. But the present case shows that those rulings notwithstanding, certain lower courts remain hostile ground for environmental cases, that those courts will continuously parse and create improper 'loopholes' to dispose of environmental cases, and they thus require additional 'guidance' from this Court for which the present case provides an important opportunity.

61. The present case encapsulates the failure of the courts to follow those principles, with the result being that a facially defective analysis under the State Environmental Quality Review Act ("SEQRA") – which was based on the completely wrongly presumed location of a proposed facility prior to key decisions to allocate funds and to seek state approval – escaped judicial review completely.

62. Compounding the impact of the errors in this case, the two prior courts invoked decisions of other courts which also improperly applied the decisions of this Court regarding standing, with the result that standing was improperly denied:

63. The Appellate Division cited favorably the case Matter of Niagara Preservation Coalition v. New York Power Auth., 121 AD 3d 1507 (Fourth Department, 2014), which contains a distinct mis-reading of the letter and spirit of Save the Pine Bush (*id.*).

64. In Niagara, the Fourth Department rejected standing for person who alleged he had an "interest in" (implicitly understood as 'use of') a hiking trail to be affected by a project (*id.* at 1510) because he failed to show, the Court said, that he used the trail more than others members of the public who used the trail:

> "...[P]etitioner failed to establish an injury distinct from members of the public who use the gorge trail to access the ruins of the former hydroelectric plant (cf. Save the Pine Bush, Inc., 13 NY3d at 305-306), and thus it lacks standing to contest the SEQRA determination"

(*id.* at 1510).

65. But the actual test of standing, clearly and repeatedly established by this Court, was not a comparison of one trail user with another trail user, as the Fourth Department did, but rather a comparison of a trail user who asserted standing with the "public at large", Save the Pine Bush, *id.*, at 304, and 305, quoting from Society of Plastics Indus. v County of Suffolk (77 NY2d 761 (1991)), at 774).

66. Such a "public" properly understood comprises those persons who do not directly and actively use the natural resource, and thus will not be 'harmed' in the way users will be harmed (Save the Pine Bush, *id.*, at 304-5, not a comparison of some users with others users.

67. Yet the Second Department cited the Fourth Department's erroneous test (Decision and Order, Exhibit 1, pp. 2-3), finding the Appellants "failed to establish that they use and enjoy [the affected area of the park] more than most other members of the public", notwithstanding the Appellants repeated affirmations that they regularly walked the affected trails and two of them 'viewed' the affected forest from their homes.

68. The trial Court was thus sustained in its identical mis-reading of what was properly signified by the term "public at large" when it held, for example:

> "[Petitioner Greengold] does state he walks in the Park 'many' days per week, though he undermines his standing argument stating 'I see many county residents use this park.' He can hardly set himself apart from the public at large when in his own affidavit he makes himself a part of it."
>
> (Judgement and Order, Exhibit 2, pp. 10-11)

69. This Court should correct the misapprehension of all three lower courts by taking this appeal and reiterating that the "public at large" is a baseline for the finding of the requisite harm for users of a natural resource (Save the Pine Bush, *id.*, at 304-5) not some 'challenge' to litigants that they achieve some exceptional level usage that sets them apart from 'mere mortals' who also use the resource.

70. The other Fourth Department case cited by the Second Department was

used to deny that the harm asserted by Appellants was any more than "speculative" (Exhibit 1, p. 3) notwithstanding the comprehensive pleading of all the specific ways in which clearing trees, constructing an air-stripper, creating a half-acre security compound, and building a 320-foot-long access road in the primitive forest would harm the Appellants ' enjoyment of the forest as an undisturbed natural preserve.

71. In citing the case, Matter of Kindred v. Monroe County, 119 AD 3d 1347 (Fourth Department, 2014), the Second Department reached for one of the more notorious cases in recent environmental jurisprudence, known in part for its questionable narrowing of the 'proximity-based presumption of injury' in standing cases (*cf.* Kindred at 348 with Gernatt Asphalt v. Town of Sardinia, 87 N.Y.2d 668 (1996), at 687).

72. The Second Department uses a different prong of the Kindred holding to label Appellants ' claims of the likelihood of injury as "too speculative and conjectural to demonstrate an actual and specific injury-in-fact" (Decision and Order, Exhibit 1, p. 3).

73. Yet not only were Appellants ' claims of the likelihood of injury facially of an entirely different character from those at issue in Kindred, but the claims were to be accorded robust presumption of truth because the trial Court was

ruling only on a motion to dismiss, where factual claims and assertions of causes of action are to be accorded "every possible favorable inference":

> "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."
>
> Leon v. Martinez, 84 NY2d 83 (1994) at 87-8 (emphasis added) (where the Court declined to dismiss a complaint because the Court chose to make a favorable reading of the pleadings) *acc'd* Graziano v. County of Albany, 3 N.Y.3d 475 (2004) (where a petitioner opposing a motion to dismiss was held have standing and capacity to pursue his claims based on a favorable reading of his petition) (See Brief, ¶53)

74. Where Kindred involved a temporary agricultural fair (*id.*, at 1347), the present matter involves the permanent, physical alteration of a public forest by land clearing, construction of structures, etc. In other words the case is simply facially inapposite.

75. In combination with its other erroneous findings, that the Second Department cited Kindred in the manner it did reflects a profoundly recalcitrant posture on environmental jurisprudence that is diametrically opposite to the recent posture of this Court – and should not be permitted to stand.

76. Without another clear statement from this Court with respect to this case, efforts by citizens and other public-spirited parties such as the Appellants to

assure that environmental laws are upheld in this state will be set back to an earlier time when environmental cases, however meritorious, were routinely thrown out over issues of statutes of limitations and standing.

77. Given a new public spirit of deregulation by certain elected branches of government, the courts may be even more important as guarantors that established environmental laws are obeyed. But the appealed decision of the Second Department, and the cited decisions of the Fourth Department undermine the judiciary by negating the letter and spirit of precedent set by this Court, and shutting the door of the courthouse to those who would seek the courts' help.

78. Such an improper reassertion of standing tests which are arbitrary, unpredictable and unreasonably-restrictive will both weaken protection of the environment at a particularly fraught moment in history and will also damage the judicial principles of *res judicata* and precedent.

79. There are also subsidiary questions also presented for review: The decisions of the lower courts flouted settled law with respect to motions to dismiss – i.e. that the courts must accord factual assertions the benefit of a presumption of truth, and accord the legal basis of the proceeding every favorable inference. Furthermore, the Second Department declined Appellants

request to find the trial Court erred by failing to hold a 'trial of fact' pursuant to CPLR §7804(h) to address issues of 'fact' in dispute, particularly related to Appellants ' standing.

80. Such references to settled law were repeatedly invoked by Appellants.

81. The present case has important ramifications both for environmental jurisprudence and protection of the environment.

82. The critical role of the courts in this state as 'safety-nets' for policy cannot be over-emphasized: The improper influence of money and influence in government policy is widely-recognized. No area of policy involves a closer nexus of 'money' and 'policy' than the choices to 'use' or 'conserve' environmental resources, especially land, as this case involves. The issue of 'political integrity' in this State is similarly under constant question as key players are brought under legal scrutiny.

83. Ironically, the County Executive who played a central statutory role in this case in permitting the contested actions to occur in the County park at issue was himself federally indicted on unrelated corruption charges while this case was before the Second Department.

84. Given the fraught contemporary context, it is critical for this Court to affirm the role of the courts in our system of government; the courts'

reasonable accessibility to conscientious members of the public, particularly defending issues of public interest; the consistency, predictability – and transparency – of rules of the courts; and the primacy of judicial hierarchy and precedent in establishing our laws and norms.

85. The present case presents such an opportunity and indeed such a need.

The Underlying Case Is Compelling

86. The underlying case is compelling: At issue was the deforestation of the center of a thirty-three-acre County-owned recreational forest and the construction therein, adjacent to walking trails and a public campground, of a fenced-in water-decontamination building and tower, along with a three-hundred foot access road across one of the principle trails in the forest.

87. For all the obvious potential impacts on the use and enjoyment of both users of the forest and adjacent homeowners, of an otherwise pristine forest setting, the environmental analyses conducted in advance of key approvals of the project were deeply flawed, as Appellants established by a series of records-access requests to the three Respondents.

88. The project was opposed by hundreds of park users who signed petitions against it, and by the local branches of the Sierra Club and the Green Party.

89. Opponents pointed to the fact that the water district was ready, willing and able to locate the water facility more economically, and with no need to destroy open-space, in its own nearby well-head, and was only deterred from doing so by some abutting neighbors who distrusted health studies showing the facility to be perfectly safe.

90. The Petitioners were able to show, through a series of Freedom of Information Law ("FOIL") disclosures from the Respondents, that the limited reviews conducted pursuant to the State Environmental Quality Review Act ("SEQRA") failed to even identify the county-forest as the proposed site for the facility when that SEQRA review was used as the basis for key municipal votes on the siting, funding, and officially requesting of State approval of the project (due to parkland 'alienation').

91. The Petitioners showed that the forest was not even identified as the planned location of the water facility in any environmental reviews until <u>after</u> the Project had already been approved for funding by one Respondents and for application to the State Legislature for alienation by another.

92. Substantive and procedural flaws also invalidated later iterations of the environmental review review which formed the basis for the Respondent water district to issue (after the various agency approvals had occurred) a

"negative declaration" under SEQRA with respect to the construction in the forest.

93. In an effort to excuse the errors and haste in the environmental review – which the Respondents attempted unsuccessfully to 'repair' as the special proceeding progressed -- the matter was portrayed by the Respondents as involving an "emergency", because one of the water districts nine water-wells was out of commission for the duration (over two years). However, as Appellants pointed out, , no such 'emergency' was formally declared for SEQRA purposes, and the water district enjoyed such abundant capacity that it permitted the copious watering of lawns throughout the district for the entire period under review, and no water restrictions were imposed except an odd-even day scheme to stagger only such lawn-watering.

94. The Petitioners brought the matter to court promptly by Article 78 special proceeding, and requested injunctive relief from both trial Court and the Second Department, thus preserving their right to demand reversal of the actions undertaken pursuant to the faulty processes. Both courts issued temporary restraining orders but denied preliminary injunctions.

Conclusions

95. This motion may be well summarized by quoting from Appellants ' words to the Second Department in their Reply Brief, appealing to their respect for the law and the ethical imperatives of the judiciary:

> "This Court is presented with three citizens who intensively use, enjoy, and -- in the case of two of them -- reside at the margins of a valuable publicly-owned natural resource they wish to protect by invoking the specific protections of state law.
>
> Petitioner-Appellants uncovered and documented repeated violations of environmental law that allowed a hastily concocted project to avoid reliable environmental review. They showed the public process was distorted by political pressure and a manipulation of the facts to create a false urgency.
>
> The Petitioner-Appellants respectfully submit that this case is a litmus-test of the ability of conscientious citizens to rely on the law when it matters most -- when it is sidestepped and violated under the cloak of expediency.
>
> Petitioner-Appellants seek only to have the merits fairly heard, instead of being swept under the rug by a wrongly drawn issue of standing."
>
> Reply Brief, ¶¶185-7.

96. Appellants – who in this appeal number only two, not three – have shown this Court what is at stake in leaving unchallenged the erroneous and backward-looking holdings of the Second Department with respect to the various issues raised: (1) standing -- and the subsidiary issue of 'harm' and

'public at large'; (2) the standard of proof on a motion to dismiss; and (3) the obligation of a trial Court to hold a 'hearing of fact' on disputed evidence per CPLR §7804(h).

97. A failure by the courts in the present case allowed a public resource to be damaged, Appellants to be harmed, and the role of the judiciary to be undermined.

98. But those results should not stand.

99. Beyond the specific mischief created by the Decision and Order appealed, the Appellants have shown how the Second Department has attempted to adopt and legitimize two decisions of the Fourth Department that are themselves highly corrosive to environmental jurisprudence, and also demonstrate a defiance toward the letter and spirit of this Court's recent holdings.

100. Appellants have as *pro se* litigants have expended significant efforts in attempting to "do the right thing" in this case, both for their own sakes and for the broader public good. This Court has the opportunity to meet conscientious citizens 'half-way' and finish the job they started.

101. By their diligence Appellants have exposed to the light not only the continued recalcitrance of local New York governments to properly implement SEQRA, but also the failure of certain courts to adopt a proper role in

guaranteeing compliance with environmental protection by the other branches of government.

102. Such failures undermine faith in our institutions, a phenomenon that is now having pronounced effects on the public sphere.

103. On a final note, inasmuch as Appellants are not afforded an opportunity to 'reply', Appellants wish to 'inoculate' our brief from what has been a pattern of what can only be described as 'calumny' from Respondent Nassau County. As is described in the Brief, ¶¶89-179, Nassau essentially has endeavored to turn the case into a 'mud-wrestling match'. Appellants thus wrote:

> "Nassau's arguments are gratuitously inflammatory and prejudicial, and also distort seemingly every issue they address. The Nassau brief drags this Court through the mud, vilifying the opposing parties, and repeatedly misdirecting the Court's attention to self-serving irrelevancies."

Reply Brief, ¶91.

104. In addition to rebutting erroneous facts and law Respondent Nassau County entered into the record, The Reply Brief devoted many pages, ¶¶148-179, to refuting *ad hominem* attacks on one of the Appellants -- who is a dedicated and regionally-recognized environmental advocate who has brought numerous environmental issues to light by legal challenges in the past several years, as great expense of time, effort, and his own limited finances.

105. Appellants hope this Court will not be improperly swayed by what are likely to be a repetition of the false, prejudicial and irrelevant assertions of Respondent Nassau County, which regrettably have until now obtained an peculiarly welcoming hearing by the trial Court and the Second Department, notwithstanding that the 'contributions' led both Courts far astray from established standards, as has been discussed, *supra.*

Dated: Nassau County, N.Y.

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signed
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