To Be Argued, 30 Minutes, Richard A. Brummel, Joshua Dicker, David Greengold

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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MATTER OF RICHARD A. BRUMMEL, JOSHUA DICKER and DAVID GREENGOLD,
Petitioners-Appellants,

Appellate Division Docket No.: 2014-10641

-against-

THE TOWN OF NORTH HEMPSTEAD TOWN BOARD a/k/a TOWN COUNCIL, THE NASSAU COUNTY LEGISLATURE, NASSAU COUNTY EXECUTIVE EDWARD P. MANGANO, and THE ROSLYN WATER DISTRICT,
Respondents and Necessary Parties-Appellees

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Facts of the Case

1. Petitioners filed a hybrid article 78 special proceeding on June 24, 2014, seeking to nullify the actions of three local government agencies and enjoin them from continuing the preparation of a project to construct a water-treatment building, a fenced compound for it, and a roadway leading to it in the forty-acre recreational-forest of a county park, due to numerous critical 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.

2. Petitioners also sought a declaratory judgement that the proposed project was subject to a "positive declaration" under SEQRA and thus required completion of an Environmental Impact Statement ("EIS").

3. The water-treatment facility is intended to remove toxic chemicals from one of eight water-wells operated by the Roslyn Water District, which serves about 18,000 customers. The water-well was removed from service in late 2013 due to the presence of toxic chemicals.

4. Despite self-serving assertions by Respondents that an "emergency" existed with respect to the water supply, no emergency was declared

under SEQRA, and only minimal water-conservation measures were implemented, to wit: marginally controlling the use of lawn-sprinklers in the summer of 2014 (A271*ff.*, Reply pp. 8-13).

5. Petitioners challenged the existence of an emergency and argued that if a water-treatment facility were needed, it could be situated at the well-head -- on the district's own property, in its own existing compound -- as the district had originally planned to do before objections were registered from neighbors of the compound (A271*ff.*, Reply pp. 8-13).

6. As of March 25, 2015, the project has been approved by the Respondent parties involved and a "use and occupancy" permit was approved by Respondent Nassau County Legislature on February 2, 2015.

7. The project was planned to commence in September, 2014, but was apparently delayed by the failure of the Governor to approve "parkland alienation" legislation until December 17, 2014.

8. Petitioners challenged the project on the grounds that the agencies involved violated provisions of SEQRA in blatant ways at each step, essentially by failing to perform proper environmental review or to possess a lead agency's valid environmental findings at the time they performed actions related to the project.

9. A temporary restraining order was granted to Petitioners on June 24, 2014 by The Hon. Justice F. Dana Winslow in Supreme Court, Nassau County, sitting in special term.

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

11. After a voluminous exchange of submissions, Respondent Nassau County's motion to dismiss the special proceeding was granted by Justice McCormack on September 19, 2014, on the ground that Petitioners lacked standing to sue.

12. Petitioners timely filed a notice of appeal on October 21, 2014, and obtained a temporary restraining order from the Appellate Division, Second Department on November 19, 2014, by order of The Hon. Justice Sandra L. Sgroi.

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

14. To Petitioners knowledge, no work has begun on the ground in the park as of March 25, 2015, with the exception of the marking of some trees for inventory or removal .

Questions Raised

15. A single question is raised in this appeal: Whether Petitioners have legal standing to bring this hybrid article 78 special proceeding and action for declaratory judgment.

Point I: Petitioners Have Legal Standing

Preliminary Remarks

16. Petitioners supplied extensive evidence to the Supreme Court that each Petitioner "uses and enjoys" the forest at Christopher Morley Park ("the Park") in a sustained, frequent manner, more than the general public does, that the water-treatment project does "threaten that resource", and thereby the Petitioners would be injured by the project, and hence they qualify for legal standing to litigate under SEQRA, following the legal standards and the language of the Court of Appeals in the prevailing authority, Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297 (2009), at 301.

17. Petitioners demonstrated that the proposed quasi-industrial buildings, a fenced and lighted compound, a cleared three-hundred-and-

twenty foot access road through the forest, and the operation of equipment comprising the "air-stripper" as envisioned in the project would substantially alter the Petitioners' enjoyment of the 'wild' character of the forest in their use of it, and in the view of the forest that two of them enjoy from their homes adjacent to the park.

18. 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.

19. Petitioners Dicker and Greengold live on different sides of the park, however, and their views to the project site differ in quality. Petitioner Greengold suffers a more substantial impact, and Petitioner Dicker, being at both a greater distance and more screened from the project site by intervening trees, a lesser impact.

20. However, both 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).

21. Furthermore, the standard of review on a *motion to dismiss* should allow the "inference" of injury to "use" and damage to "view" even where it may not have been fully stated, where the evidence presented

otherwise establishes those facts in a Petitioner's favor. Petitioners discuss this issue *infra*, ¶¶ 52*ff.*

22. Moreover, even if Supreme Court were to not afford the Petitioners the favorable inferences to which they were entitled, given that fundamental factual issues around injury to use, and damage to view, were in dispute, the Court should have held a hearing or trial to form a reasonable conclusion as to the parties conflicting claims. Petitioners discuss this *infra*, ¶¶ 60*ff*.

23. The "uses and enjoys" standard, and damage to a view, are both firmly established criteria that sustain legal standing.

24. Petitioners made extensive reference to the established law of environmental standing under both Save the Pine Bush, *ibid*., and Society of the Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761 (1991).

25. Petitioners extensively explored the case law in their two memoranda of law: A246, Petitioner's Mem. of Law in Support of the Verif. Petition, pp. 25 *ff.,* and A261, Petitioner's Mem. of Law in Support of the Verif. Reply, pp. 40 *ff.*

Facts Presented By Petitioners

26. Petitioners asserted that two of them would suffer damage to the "view" from their homes, and that all three would suffer damage based on their 'use and enjoyment' of the trials in the forest.

27. Petitioner Dicker specifically discussed his view of the proposed project (A44, Verif. Petition, ¶ 41; A116, Dicker affidavit ¶ 17-18*ff.*).

28. Petitioner Greengold did not fully articulate in his affidavit his view of the project site, however such view impact is reasonably to be inferred from the statement that he lives across from the forest, that his home is approximately five-hundred feet from the project (A276, Verif. Reply, ¶ 42), and that his enjoyment of his home would be degraded by the project (A119, Greengold affidavit ¶ 3(a)).

29. Petitioner Dicker also stated that the proposed project would degrade the enjoyment of his home (A116, Dicker affidavit ¶ 17-18).

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

31. 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.

Facts Supporting Petitioner Dicker's Standing

32. Petitioner Dicker recited in his affidavit that he regularly uses the main trails of the forest (A114, Dicker affidavit, ¶5), the principal ones of which will pass the proposed project site on no fewer than *three sides* of the project; he stated that the proposed location of the air stripper in the wooded area of the park is directly in line with the front door of his home (A116, Dicker affidavit,¶17); he stated that he and his family see the woods from his windows daily (A114, Dicker affidavit, ¶4); and he stated that if built "the scenic view" he and his family "have come to love will be gone" (A117, Dicker affidavit,¶18).

33. Petitioner Dicker's statement of injury to "view" is thus manifest: he will see the structure when built and the evidence before the Supreme Court should have been read with "every possible favorable inference," as required by law on a motion to dismiss (see ¶¶ 52*ff., infra*). As the issue could only be, at best, only facts in dispute, it was incumbent on the Supreme Court to elicit dispositive facts in a hearing (see ¶¶ 60*ff., infra*).

34. Petitioner Dicker described his appreciation for the forest in its present state as an "undisturbed wooded area" (A114, Dicker affidavit,

¶4) with "serenity", "natural woodlands", and "sanctuary" (A117, Dicker affidavit, ¶19), which he felt would be blatantly marred by the proposed water-treatment facility, a 30-foot tall "alien commercial structure...with lighting" and emitting "noise" (A116, Dicker affidavit, ¶15).

35. Said Petitioner Dicker:

> "I deeply value the sights, smells and serenity that the natural woodlands of Christopher Morley Park so graciously provide to me and the many walkers I see from my home each day, walking through the wooded trails enjoying this sanctuary. These benefits will be permanently damaged to significant degree, if not completely, by the construction and operation of the air-stripper. "
>
> (A117, Dicker affidavit, ¶19)

36. Further:

> "I regularly jog through the scenic wooded trail of Christopher Morley Park.... I take particular satisfaction and enjoyment from ... the wooded section of Christopher Morley Park... soaking up the earthy perfumes and magnificent landscapes of nature. It is a rare delight that cannot easily be found in our developed suburban environment...."
>
> (A114 Dicker affidavit, ¶5)

37. Further:

> "A significant part of the woods will be impacted by the construction and operation of the air stripper. A pathway to the air-stripper will be cut through the forest and a significant section of forest will be cleared to build this remediation facility.

(A116, Dicker affidavit, ¶12)

38. Further:

> "Locating the air stripper in this area will decimate the forest and result in the removal of many aged and magnificent trees. I recently noticed that at least 40 large native oak trees already have been marked for removal, with more to follow, no doubt."

(A116, Dicker affidavit, ¶13)

39. Further:

> "The scenic view of the beautiful wooded park I have come to love will be gone and replaced with an ugly commercial structure. The ability to walk and jog in the woods at Christopher Morley Park will be forever taken away from me and my family...."

(A117, Dicker affidavit, ¶18)

40. Clearly Petitioner Dicker spoke in terms of the degradation of the woods, and the loss of his enjoyment of the woods for that reason. It is obvious that he was speaking about that portion of the woods he views, uses and enjoys. He thus clearly presented facts substantiating his 'use and enjoyment' of the Park, and the negative impact on those activities that would arise from the proposed project. His standing to sue under SEQRA should therefore have been well established.

Facts Supporting Petitioner Greengold's Standing

41. Petitioner Greengold wrote that he frequently used the trails in the park and stated further "I live across from the Park" (A45, Verif. Petition ¶44, 45; A119, Greengold affidavit, ¶3).

42. The close proximity of Petitioner Greengold's home to the project site was acknowledged in writing by Respondent Roslyn Water District ("RWD") as approximately five hundred feet in a direct line (A437, RWD affidavit of engineer Todaro ¶15).

43. Had the Supreme Court possessed all the facts required, based on a thorough inquiry such as a trial of facts in contention would have afforded, it would have recognized that the distance from Petitioner Greengold's home to the nearest road-clearing portion of the project is more like two-hundred feet, if not less.

44. Petitioner Greengold specifically noted his strong objection to the loss of the trees connected with the clearing aspect of the proposed project, which would occur only a few dozen yards from his property, stating: "The construction will require the removal of many oak [and] tulip trees that have been part of Long Island for a very long time" (A119, Greengold affidavit ¶3(c)).

45. Petitioner Greengold attested to his intensive use of the park where he would "walk in this area many days per week" and valued it as "one

of the last nature preserves in our community" (A119, Greengold affidavit ¶3 (a)). He described his sense that "[e]ntering the park offers an instant transition to a natural serene and undisturbed environment" (A119 Verif. Petition, Exhibit 3, Greengold affidavit, ¶3 (b)).

46. The proposed project, Petitioner Greengold wrote, would "significantly ruin an area that is one of the last nature preserves in our community" (A119, Greengold affidavit, ¶3 (a)).

47. Further:

> "I object to the installation of an air-stripper for this facility to be located in Christopher Morley Park, a park in which I walk most days. The air stripper will negatively impact the character of this park, as a preserve and a nature trail. The proposed location will significantly ruin an area that is one of the last nature preserves in our community. ... I live across from the park, and walk in this area many days per week... I and many others enjoy this nature trail for both exercise and to provide moments of solitude. My family also uses the nature path on a regular basis. The nature path is shrouded under a forest of trees. It is a one of a kind natural preserve within our community. Entering the park offers an instant transition to a natural serene and undisturbed environment. The proposed air stripper will destroy this nature trail with a new access road from the street into the forest area. This road will bisect this nature trail. There will be many months of construction while they dig trenches to install feed and return water lines, electrical lines, and a gas main to power back-up generators. The access road will lead to two buildings, with 24/7 water pumps and air blowers operating. The construction will require the removal of many oak [and] tulip trees that have been part of

Long Island for a very long time. All of this construction [will cause the] decimation of the park's preserve character...."

(A119, Greengold affidavit, ¶¶2-3, emphasis added).

48. Although Petitioner Greengold, a *pro se* litigant, wrote an affidavit that is wide-ranging, it is nevertheless readily apparent that the necessary elements of injury were alleged sufficiently to justify standing.

49. Petitioner Greengold could as easily have written, based on the facts to which he attested, that: (i) He uses the forest paths many days each week, (ii) The paths he uses will be crossed by a road and bordered by construction and new buildings that do not belong in a forest-preserve, and (iii) That his enjoyment will thus be degraded. That he did not provide such a pat recitation should not count against him, particularly as the special proceeding is being pursued *pro se*.

50. Petitioner Greengold could also have written: "(i) I live across from the Park and less than five hundred feet from the proposed project; (ii) Many trees that I value across from my home will be cut down; (iii) Thus the project will cause me injury in that the view from my home will be degraded."

51. Again, as a *pro se* litigant, he may have failed to carefully frame the

testimony, but the facts were present, and should have been recognized by the Supreme Court -- particularly on a *motion to dismiss*, as was here applied, A24, Decision of Justice McCormack, p 11; see ¶¶ 52*ff., infra*.

Standard Of Review On Motion To Dismiss

52. In determining a motion to dismiss under Civil Practice Law and Rules ("CPLR") §3211, as Supreme Court did (A24, Decision of Justice McCormack. p. 11), the Court must look to "the four corners" of the submissions for the evidence needed to permit the matter to proceed, and give the plaintiffs the benefit of "every possible favorable inference."

53. The Court of Appeals has stated:

> "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)

54. The Court in Leon v. Martinez actually described the complaint and affidavit at issue as *"inartfully drafted"*, which characterization might apply equally to the present circumstances, in some respects.

55. The Fourth Department stated:

> "It is well settled that on a motion to dismiss a court must 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. The court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint.
>
> D'Amico v. Correct'l Med. Care, 2014 N.Y. App. Div. LEXIS 5663 (Fourth Dep't, 2014) (internal citations and quotations omitted, emphasis added)(where the Court overturned dismissals for alleged failure to state a cause of action in a case alleging libel and abuse of criminal process)

56. There are distinctions between determining the presence of a cause of action and determining standing, but the fact that both issues arise in the course of a motion to dismiss requires application of the same standard as established, which is to "accord plaintiffs the benefit of every possible favorable inference," as stated in Leon v. Martinez, *supra*., particularly since a trial is also available, see ¶¶ 60*ff., infra*.

57. Petitioners acknowledge "The burden of establishing standing...is

on the party seeking review," Society of Plastics, *ibid.,* at 769. But the issue here is how the facts as submitted are 'read and interpreted' in determining if that goal is reached, and in that process the "favorable inference", *supra*, is to be afforded to Petitioners.

58. In the present case the Petitioners' affidavits and other submissions established that standing existed.

59. In particular, according "the benefit of every possible favorable inference" as the law requires, Petitioner Greengold's affidavit states a clear case that both from his home, and from his walks in the woods of Christopher Morley Park, the proposed project would cause substantial injury to his enjoyment of the natural settings he values, thus according him legal standing in this matter.

Trial Of Fact In An Article 78 Special Proceeding

60. 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)).

61. 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.

62. Threshold issues no less than core issues should be subject to trial in an article 78 proceeding when the facts are at issue -- see, e.g., Seniors for Safety v. N.Y.C. Dept. of Transp., 101 AD3d 1029 (Second Dep't, 2012), *lv. den.,* 21 NY3d 859 (2013) (where the appellate court ordered a trial of facts related to the disputed commencement of the four-month period of the statute-of-limitations).

63. There should have been no need to question the facts, as the Petitioners each substantiated their standing based on use and enjoyment, or view, or both. But if the Supreme Court had doubts, it should have held a hearing to obtain clarity as to competing factual assertions, rather than adopting in blanket fashion the Respondents' erroneous assertions.

Facts Supporting Petitioner Brummel's Standing

64. Petitioner Brummel would not be injured in exactly the same way as the other two Petitioners, but he presented to the Court a clear basis of the ways in which he would be injured by the proposed project.

65. Like the majority of Park users, Petitioner Brummel is not among the fortunate (and affluent) handful of residents who live on the Park's periphery, and thus he suffers no view-based injury at his residence.

66. But he demonstrated that as a County resident -- in whose interest the Park was established and is maintained -- he frequently "uses and enjoys" the forest for its natural beauty and sanctuary, in the language of Save the Pine Bush (*ibid*., at 301), and he stated that the project would damage that enjoyment (A111, Brummel affidavit ¶ 9).

67. Said Petitioner Brummel:

> "The air-stripper project would significantly diminish the organic wholeness of the forest: it would eliminate the fantasy that one is in a largely untouched piece of nature. In addition its likely fencing, signage, lighting and other security features would remove the ability to explore the woods deeply, as the construction would occur in the center of the woods, in an area that due to a large tree-canopy is very accessible due to the limited [g]round growth. I[n] other words it is one of the nicest areas of the forest, and the most accessible I have seen."
>
> (A111, Brummel affidavit, ¶ 9).

68. Petitioner Brummel stated that since March, 2014, he resumed visiting the forest and made "numerous visits" in the approximately four

months preceding his affidavit (A42, Verif. Petition, ¶27; A111 Brummel affidavit ¶ 9). Since the lawsuit was filed he continues to visit the forest.

69. Petitioner Brummel noted his connection to the Park ran back to his childhood growing up about two miles away from it (A41, Verif. Petition, ¶26; A111, Brummel affidavit, ¶9).

70. In the language of the Court of Appeals, Petitioner Brummel alleged *"repeated, not rare or isolated use"* which *"meets the Society of Plastics test by showing that the threatened harm"* would *"affect [him] differently from 'the public at large'"* Save the Pine Bush, *ibid.*, at 305.

71. Petitioner Brummel affirmed that the main trail that he uses, leading from the parking lot to the furthest point away from there, passes the proposed construction site, that the project would be built in the center of the forest in a deeply-canopied area he particularly enjoys, and that the man-made facilities and cleared-road would "eliminate the fantasy" of being in an untouched forest (A42, Verif. Petition, ¶30; A112, Brummel affidavit, ¶ 9).

72. The necessary elements of standing were thus present in Petitioner Brummel's assertions: (1) he "uses and enjoys" the forest, (2) in a manner distinct from "the public at large" -- those in the general public

who would not be directly affected by the alteration of the forest; and (3) the injury he will suffer, an environmental injury subject to SEQRA, is clearly stated as the intrusion of alien structures in an otherwise natural forest, albeit one crossed by some paved trails.

Supreme Court Decision

Summary of Nassau Supreme Court's Decision

73. The decision of the Supreme Court may be summarized as follows: (1) Despite the Petitioners' recitation of the ways in which they enjoyed the Park, "...none of the Petitioners have proven that they use or enjoy the Park more than most other members of the public," (A22, Decision of Justice McCormack, p. 9); (2) Petitioners did not show "that their injury is real and different from most members of the public" (A22, Decision of Justice McCormack, *ibid.*) and (3) Petitioners did not live close enough to the proposed project to give them standing (A24, Decision of Justice McCormack, *ibid.,* p. 11*).*

Purported Tests of Standing From *Tuxedo Land Trust*

74. The Supreme Court relied in part for its decision on Tuxedo Land

Trust Inc. v. Town of Tuxedo, 34 Misc.3d 1325(A), (N.Y. Sup., Orange County, 2012) (Lefkowitz, J.), *aff'd*, 113 AD3d 726 (Second Dep't, 2013), to disqualify Petitioner Brummel on 'use', and Petitioners Dicker and Greengold on proximity.

75. With respect to "use", Petitioners analyzed that decision and strongly disputed its meaning and authority *infra*, ¶167*ff.*, and A368-371, Petitioners' Mem. of Law in Support of Reply, pp. 44 - 46. (*Please note two pages out of sequence in the Appendix.*)

76. Tuxedo Land Trust was sustained by the Second Department on the question of standing and proximity *only* (*ibid*., at 728), but was relied on in part by Supreme Court on a separate unreviewed finding dealing with the distinction between a person with standing based on injury and an uninjured member of "the public at large".

77. That finding -- that a proper test of standing is the relative "enthusiasm" of a petitioner with respect to others who also have "physical access" to a resource (A22, Justice McCormack Decision, p. 9) -- is not supported by precedent, as shown by Petitioners, *infra*, ¶167*ff.*, and A368-371, Petitioners' Mem. of law in Support of the Reply, pp. 44 - 46. (*Please note two pages out of sequence in the Appendix.*)

78. Petitioners argued the supposed 'test' may have been stated by the Orange County Court in a moment of careless draftsmanship, as the preceding arguments in that Court's decision pointed to a standard analysis of standing, not a reach for a new 'test' of it (A368, Mem. of Law in Support of Reply, p. 45).

79. A reading of the Orange County Court's decision most favorable to Respondents here might suggest that Court manufactured an additional 'test' for standing, that petitioners needed to demonstrate use of a resource *greater than other users of the same resource*. The Court stated:

> "Each of the individual petitioners allege that she or he has often availed herself of himself of one or more of said resources. But they do not allege, much less submit evidence, that they do so any more frequently, or with greater enthusiasm, inquisitiveness or concern than any other person with physical access to the same resources. In short, petitioners allege at most interests in these resources which are not uncommon among other residents of the Village or other users of the resources...."
>
> Tuxedo Land Trust, *ibid*. ¶25, p. 12 (emphasis added)

80. Based on a close reading of the entire decision, it appears the Orange County Court may have had questions regarding the factuality of testimony, and relied on vagueness in the petitioners' assertions of 'use', or the clearly ambiguous and speculative nature of the alleged

'injuries' to reach its decision.

81. The Court seemed to suggest that even if the petitioners did use the wide-open resources at issue -- like a roadway or lake -- the level of usage was comparable to that of others who did not claim a special level of usage, i.e. those whose use of resources was essentially passive, such as that of passerby, hence indistinguishable from the 'general public' using a 'refined' test of standing based on "enthusiasm" (Tuxedo Land Trust, *ibid*.).

82. It appears the appellate division's decision did not reach those issues of 'use', finding the issue of proximity dispositive. The decision nevertheless opened a door to a 'disappearing act' -- applied improperly in the present case -- where the 'use' of a resource by a petitioner claiming standing could be seen as indistinguishable from non-use or casual-use by "the public at large."

83. It is a 'test' that creates a logical 'Catch-22': As stated on its face, the purported new standard -- no doubt urged on by respondents as in the present case -- creates a way for 'active users' to be lumped in with "the public at large", thus cancelling out the class of users with standing as established by the Court of Appeals in Save the Pine Bush and Society of Plastics. Under it, everyone becomes a 'user', none enjoying standing.

84. But this new standard is unsupported by the high court, as discussed below (see ¶¶167*ff.*, *infra,* discussing "the public at large").

85. Whatever its status, the alleged 'test' is inapplicable to the present case for several reasons: first, the facts here are markedly different, because 'use', 'damage' to the resources, and 'injury' are clearly drawn; and second, the Court of Appeals did not authorize another layer of proof beyond 'use and enjoyment' of a discrete resource and 'injury'. The Supreme Court's decision is thus flawed.

86. Supreme Court also relied on Tuxedo Land Trust -- without elaboration -- when it pronounced Petitioners lacking in standing based on a 'proximity' standard (A24, Justice McCormack Decision, p. 11).

87. Petitioners dispute that application as well, and will discuss the issue further, *infra,* ¶¶ 106 *ff.*, and ¶¶180 *ff.*

88. Otherwise, for authority in denying Petitioners standing, Supreme Court cited only Save the Pine Bush, *ibid*., which Petitioners fully discussed in their submissions, but which the Court misconstrued and misapplied.

Respondents Acknowledged Petitioners' Usage Of The Park

89. Petitioners are puzzled that Supreme Court dismissed sworn assertions of fact substantiating standing that were, with one exception, uncontested by the Respondents or denied in a peremptory manner.

90. In the one exception, where an issue of fact was specifically challenged, the issue should have been put to trial as provided by CPLR 7804(h) (see ¶¶60 *ff.*, *supra*), not simply dismissed by Supreme Court.

91. Challenging Petitioner Dicker's assertion of damage to his view, Respondent Roslyn Water District ("RWD") asserted:

> "Petitioner Dicker resides approximately more than seven hundred and sixty feet away from the location of the air stripper...across the street from his home are *hundreds of tall tulip trees....located between [his] property and the location of the air-stripper*....[he] will continue to enjoy the undisturbed wooded area ... because the air-stripper will be constructed...nowhere near *the trees he allegedly views* outside his residence."
>
> (A413-14, RWD Mem. of Law pp. 7-8, italics added).

92. Contrary to RWD's assertions, there are only a handful of tulip trees in the entire forest at issue, probably fewer than fifty, and there might be about five-hundred mature trees in the entire forty-acre forest.

93. Further, Petitioner Dicker attested that he and his family enjoyed the overall natural view from his home which would be disturbed by the proposed project and its thirty-foot tower, lighting, and other features

("my family and I look out the windows of our home and enjoy the natural beauty of the undisturbed wooded area of the park", A114, Dicker affidavit, ¶4), *not* just "the trees he allegedly views" as the RWD claims, *supra*.

94. The RWD argument thus directly and factually challenges Petitioner Dicker's assertions. The facts in dispute should therefore have been put to test by trial, *not* by a peremptory decision on a motion to dismiss. Had Petitioners known the Court was considering this issue to be dispositive against all logic, they would have requested a trial of the facts. As there were factual questions in such sharp dispute, the Court had power to order *and should have ordered* a trial on its own.

95. Otherwise, the essential facts of the Petitioners' usage of the Park and trails *per se* were uncontested by Respondents. All three Respondents implicitly acknowledged that at least two of the three Petitioners used the Park regularly for an extended period of time, and that Petitioner Brummel used it as well, albeit for a lesser period of time.

96. For example, Respondent Roslyn Water District did not deny that Petitioners Dicker and Greengold jog or walk in the Park frequently (A411, RWD Mem. of Law in Opposition to Order to Show Cause, p. 5). The RWD just maintained -- incorrectly -- that the Petitioners must

assert their use was *greater* than that of "other visitors to the Park" (A412, Mem. of Law, p. 6), instead of greater than the 'general public' or "the public at large", as clearly established by the Court of Appeals (see, Save the Pine Bush, *ibid*. at 305; Society of Plastics, *ibid*. at 774).

97. Said the RWD:

> "Thus, none of the Petitioners has established that they use the park to jog and/or to run *more than other visitors* to the Park....Further while *they allege that they value the characteristics of the Park's solitude*, quiet and natural attributes, they have not demonstrated how they would suffer any injury different from the public if *a small number of trees were cut down*"
>
> (A411-12, RWD Mem. of Law pp 5-6, italics added).

98. (The RWD obviously distorted and misrepresented the issues in its description of the scope of the proposed project, which involves *not only* removing trees but also clearing a half-acre compound, building a thirty-foot-tall water-treatment facility, clearing a three-hundred-twenty foot road, installing lighting and fencing, creating noise, etc.)

99. Respondent Town of North Hempstead stated:

> "Their assertion that their general use and enjoyment of the Park differs in some way from the other members of [the] public is unsubstantiated. *All Petitioners state in their papers is that they use the Park* and possibly have some knowledge of the ecosystem contained within. That does not sufficiently establish a particularized injury,"
>
> (A658, Town of North Hempstead Mem. of Law p. 5, italics added).

100. Contrary to the Town's assertion, the Petitioners' use of the natural resource and the *prima facie* negative environmental impact of the project on the resource are indeed sufficient to establish standing.

101. Respondent Nassau County stated it incorporated the arguments of the other Respondents (A484, Affirm. in Support Motion to Dismiss, ¶ 4, p. 1).

102. While Respondent Nassau County argued against crediting Petitioner Brummel's recently-resumed usage of the Park as a basis for standing (A486, Affirm. in Support of Motion to Dismiss ¶ 14, A498, Affirm. in Further Support, ¶ 22, p.4), they did not dispute the other two Petitioners' usage of the Park: "Another of the petitioners, David Greengold, states that he 'and many others' enjoy the Park," "Joshua Dicker...also lives near...the Park..." (A486, Nassau Affirm. in Support of Motion to Dismiss, ¶ 14 p. 3).

103. Said Respondent Nassau County further :

> "Other than *re-asserting that they (like anyone else in the general public) use the [P]ark*, the only response [by Petitioners in their Reply]...states: 'Mr. Todaro provides measurements...to the homes as 500 feet and 760 feet'....This actually amounts to a concession which alone *eliminates standing*,"
>
> (A498 Nassau Reply Affirm.in Further Support, ¶¶23-24, italics added).

104. In no case did Respondent Nassau County dispute the attested usage of the Park resource by the two nearby Petitioners. Instead it focused exclusively on the issue of 'presumptive standing' based on proximity, as if Petitioners made no other argument for standing, and none existed (A498-502, Respondent Nassau Affirm. Further Support Motion to Dismiss p. 4-8).

105. (Nassau County thus misrepresents the fact that Petitioners asserted multiple prongs of standing, none of which was proximity *per se*. The Respondent's statement is illustrative of the tedious sophistry which characterized every single submission of the County's attorneys, and the outrageous, baseless legal theories they urged on the Court.)

Supreme Court Mistaken on 'Proximity' and 'View'

106. Supreme Court nevertheless found its own grounds for dismissing Petitioners' claims of standing.

107. Supreme Court dismissed Petitioner Dicker's claims of injury because it purported to find only "supposition" regarding the view from his house, and failure to "explain" or an absence of "evidence" with respect to the damage to his use and enjoyment of the Park (A23, Decision of Justice McCormack, p. 10).

108. Implicitly the Court also rejected Petitioner Greengold's view-based standing in finding "None of the Petitioners live close enough to the project to result in injury...." (A23, Decision of Justice McCormack, p. 11).

109. In contrast to the Supreme Court holding, the courts have firmly held that a degraded view in the eye of the beholder accords standing.

110. Petitioners cited Save Our Main Street Buildings v. Greene County Leg., 293 AD2d 907 (Third Dep't 2002) at 908-909, (A365, Reply Mem. of law, p. 41), which held:

> "...[W]e have recognized standing when a party alleges an adverse impact on a scenic view from his or her residence [but] the record here supports Supreme Court's findings that the individual petitioners would not sustain the alleged visual impacts because their residences are not within sight of the Project...."

Save Our Main Street Buildings, *ibid.* (emphasis added internal quotations and citations omitted)(sustaining a lower-court decision that petitioners lacked standing to challenge new construction in a historic district)

111. Other cases, not previously cited by the Petitioners, repeat that finding:

"The petition alleged that Griffith resided directly across from the main building complex of the Infirmary, that the Bartons' property directly abutted the site of the proposed Project, and that they would suffer an adverse scenic view. Other proof in the record established that Griffith had a view of one of the older structures and portions of others, and that the Bartons had a view of the Infirmary from a distance of 1,200 feet. Since Griffith and the Bartons alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA, they established the requisite standing to challenge the Legislature's resolutions."

Barrett v. Dutchess Co. Legisl., 38 AD 3d 651 (Second Dep't, 2007) at 654 (Internal quotations and citations omitted)(where the Court reversed the denial of standing to some petitioners but sustained the dismissal by crediting SEQRA compliance)

112. In Matter of Shapiro v Town of Ramapo, 98 AD3d 675 (Second Dep't, 2012), the Court held that a Petitioner who lived "across the street from the site" (¶4 of appellate decision) was entitled to standing in a SEQRA-and-zoning case:

> "Since the petitioners live in close proximity to the portion of the site that is the subject of the challenged determinations, they did not need to show actual injury or special damage to establish standing."
>
> Matter of Shapiro, *ibid.*, ¶6 (where the Court ruled that in a zoning and non-zoning challenge under SEQRA, the lower court improperly denied standing to nearby neighbors)

113. Standing was also implicitly sustained for parties "who live near" a public park and sought to protect it from improper 'alienation' by the local municipality, Capruso v. Village of Kings Point, NY Slip Op 4228, Court of Appeals (2014), at ¶ 4 (where the doctrine of continuing wrong allowed an illegal alienation of parkland case to proceed, and standing was not challenged).

114. Since Petitioners Dicker and Greengold are "within sight of the project" (Save Our Main Street Buildings, *ibid.,* at 909), and have "a view" of the project area (Barrett, *ibid*., at 654), assertions largely uncontested by Respondents, they are parties with standing based on the law as stated in those decisions.

115. As stated, *supra*, insofar as Petitioners' claims were in question, e.g. questions of fact raised by the Respondent Roslyn Water District, they should have been subject to trial (¶¶ 60*ff.*, *supra*.).

116. Despite the materiality of the question of damage to view in this

case, Supreme Court failed in any way to analyze the issue with respect to Petitioners Dicker and Greengold, except to dismiss Petitioner Dicker's injury as "supposition" (A22, Justice McCormack Decision, p. 9), a factual challenge, as noted, *supra,* ¶¶ 60*ff.,* that was susceptible to and appropriate for a trial of fact.

117. With so much in the record tending to validate the scenic injury to Petitioners Dicker and Greengold, the issue should not have been so peremptorily dismissed on a motion to dismiss, particularly in the absence of trial of the facts at issue.

118. In dismissing Petitioners' standing based on proximity -- though not "view" *per se* -- Supreme Court cited without discussion Tuxedo Land Trust and Save the Pine Bush (A24, Decision of Justice McCormack, p. 11).

119. Tuxedo Land Trust does not overturn any of the decisions cited by Petitioners regarding a 'view'. Tuxedo Land Trust only states that where a presumption of standing based on proximity is asserted, petitioners residing at distances far greater than in the present case, where large buffers and other intervening spaces separate petitioners' residences from the project, and where there has been no assertion otherwise of impact, then the petitioners lack standing based on proximity (Tuxedo

Land Trust, *ibid*., pp. 6-9).

120. If only because of those obvious distinctions from the present case, Tuxedo Land Trust is inapplicable to the standing of Petitioners Dicker and Greengold.

121. As noted, the Second Department sustained without factual discussion the lower court's holding in Tuxedo Land Trust with regard to proximity-based standing. But among the cases the Second Department cited approvingly was Barrett v. Dutchess County Legislature, *ibid*., which Petitioners also noted supports their claim of standing, *supra,* ¶111.

122. Supreme Court's citation of Save the Pine Bush as authority for its ruling on proximity-based standing is also questionable.

123. The majority of the Court of Appeals in the Save the Pine Bush decision clearly expressed disdain for proximity as an issue in standing, stating: "...[P]eople who visit the Pine Bush...seem much more likely to suffer adverse impact...[while] the actual neighbors...may care little or nothing about ... butterflies, orchids, snakes and toads...." *ibid*. at 305.

124. In a one-Justice concurrence, proximity was discussed in that the concurring Justice explored case-law findings regarding distance as the basis for 'presumptive standing', but his findings were not adopted by

the majority.

125. Were the concurring opinion to be credited as precedent, it would sustain Petitioner Greengold's presumptive standing based on the assertion of a 'five-hundred-foot rule' (Save the Pine Bush, *ibid*. at 309). But that 'rule' was not adopted by the Court of Appeals' majority.

126. Thus the Supreme Court purported to dispose of the two separate issues of the two Petitioners' degraded view *and* their possible presumptive standing based on proximity without a persuasive summoning of either the facts in this case or the established case law.

127. Petitioners discussed the issue of degraded view not only in terms of case law (A365, Mem. of Law in Reply, p. 41) but also in terms of a deficiency in the SEQRA-analysis, since the Respondents failed to complete a specific form, the "Visual Environmental Assessment Form Addendum", that is indispensable in evaluating a project that would impact a scenic resource like a forest preserve in a public park (A285-86, Reply, pp. 22-23).

128. The Supreme Court's holding is thus deficient with respect to standing for Petitioners Dicker and Greengold if only because they showed that they live close enough to *view* the project area in the Park, and they would suffer an injury to that view, and are also thereby

distinct from the general public as required.

Supreme Court Fails To Credit "Evidence" Put Forth By Petitioners

129. Another questionable element of the Supreme Court's decision is that it sought some additional "evidence" of the environmental harm that Petitioners would suffer.

130. The Court wrote that with respect to Petitioner Dicker:

> "While he claims the area will be 'destroyed' he offers no evidence to support that assertion. He does not explain how the use of a half acre of the woods will ruin his entire walk and jog. Further the assertion that the view from his home will be impacted is supposition."
>
> (A23, Decision of Justice McCormack, p. 10, emphasis added)

131. But in reality Petitioner Dicker clearly expressed his concerns and the factual basis for them. It is not for the Court to quibble about the choice of words used as long as the meaning is clear. For instance, Petitioner Dicker attested:

> "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....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. The scenic view of the beautiful wooded park I have come to love will be gone and replaced with an ugly commercial structure."
>
> (A116-17, Dicker affidavit, ¶¶ 15, 17, 18, pp. 3-4, emphasis added).

132. Petitioner Dicker's feelings are clearly based on facts as presented: the "air stripper" and its appurtenances, lighting, fencing and a cleared roadway, would undeniably physically alter the natural woodland, change its aesthetic character, and thus negatively impact how Petitioner Dicker, as well as Petitioners Greengold and Brummel, and other Park users perceive, experience and enjoy the recreational-forest. It could not be otherwise.

133. In the history of analyzing environmental standing, the courts have not asked for more "evidence" or more explanation of injury than what is readily apparent as a logical extension of the planned activities, in contrast with the apparent demands of Supreme Court.

134. For example, in Society of Plastics the Court took as a given that various impacts would arise from substituting paper for plastic bags and it would cause "more trucking traffic...and additional air and noise pollution...." , *ibid*., at 767.

135. The Court further intuited that regarding the environmental impact

of such traffic, "To the extent that manufacture of paper substitutes threatens environmental harm, again it would be residents close to those facilities that would directly suffer the alleged harms," Society of Plastics *ibid.,* at 779.

136. The Court of Appeals *did not* opine that even with additional traffic, air emissions and noise, perhaps those effects would not truly be bothersome or adverse or harmful, thus requiring still more "proof" of injury. Some things are self-evident, no less to the courts than to the layman. The clearly-described and logically-inferable environmental impacts in the present case are in that class.

137. Similarly, the Second Department recently held that construction along a shoreline, which involved some clearing of vegetation, created a sufficient inference of harm in and of itself to establish injury to a party who resided along the same shoreline half a mile away:

> "Their allegations that the approved construction project will harm their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property, are sufficient to confer standing."
>
> Matter of Shepherd v. Maddaloni, 103 AD 3d 901, 2nd Dept. 2013, at 906 (internal citations omitted)

138. Clearly, when the courts are presented with a disturbance to the environmental *status quo* which entails a logically inferable

environmental-impact, the Courts do not dismiss such assertions out of hand, but accord them due respect.

139. In the present case, each of the Petitioners claimed the totality of the proposed roadway, fenced compound, security lights, and thirty-foot tall building would disturb their forest-view, their enjoyment of the pristine forest in their walks, or their serene natural refuge. Yet the Supreme Court claimed it was not convinced and demanded "evidence"!

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.

141. The encroachment described by the Court in Capruso, *supra*., may have been different in degree to the present project, but not in kind, and the Court found it compelling, given the 'evidence' as known:

> "A project involving the construction of a DPW facility measuring some 12,000 square feet in area, regrading, paving of access roads, destruction of numerous mature trees, and removal of hiking trails is not merely a change in the nature and scope of a road salt storage facility."

Capruso, *ibid*., ¶ 10 (emphasis added)

142. The issue the Court was analyzing in Capruso was not the nature of the view but the character of the encroachment on a park; in that sense it is relevant to this case, the 'evidence' being logically parallel.

143. Petitioners also submitted *expert testimony* about the negative impact of the proposed construction.

144. In response to new material submitted in Respondents' Answers -- a water-resource engineer's 'opinion' that the new facilities would not have an impact on the aesthetics of the Park -- Petitioners submitted the testimony of a certified arborist who has for many years worked with people and their landscapes on a daily basis. Petitioners had already submitted other expert testimony from a professor of botany.

145. The certified arborist affirmed that the air-stripper would have a deleterious effect on the character of the woods:

> "Walking in the forest, being surrounded by trees, hearing birds, and being able to be immersed in nature is a special experience that users of Christopher Morley Park forest have enjoyed for the past decades. Placing a building in the woods will tend strongly to disturb that experience, particularly if the building is known to be emitting toxic chemicals into the air [as the air-stripper would],"

(A287, Verif. Reply, ¶ 94, emphasis added.)*(Please note:*

exhibit missing from certified record (A324)).

146. These findings were uncontested by the Respondents.

147. But the Supreme Court, which demanded "evidence", made no reference to Petitioners' expert analysis of injury, despite the materiality of that evidence to the issue of standing, which the Supreme Court deemed dispositive of the case.

148. In this regard, Petitioners clearly met the burden of demonstrating use and enjoyment, and injury, and should have been accorded standing, notwithstanding the unjustifiably onerous and improper 'tests' -- and demand for 'evidence' -- the Supreme Court sought to impose.

Petitioner Greengold's Usage Ignored By Supreme Court

149. Petitioner Greengold also presented evidence of various types of the clear environmental harm he would suffer from the project. Petitioner Greengold's view-based special harm was already discussed above (*supra*, ¶¶ 41 *ff.*).

150. Petitioner Greengold's use and injuries were stated repeatedly in Petitioners' submissions to the Court.

151. But somehow, despite the facts of Petitioner Greengold's routine

usage and his view across the street, Supreme Court determined that Petitioner Greengold "barely describes a connection to the Park" (A23, Decision of Justice McCormack, *ibid*. p. 10).

152. Among other points (¶41*ff.*, *supra*) Petitioner Greengold stated:

> "I and many others enjoy this nature trail for both exercise and to provide moments of solitude. My family also uses the nature path on a regular basis. The nature path is shrouded under a forest of trees. It is a one of a kind natural preserve within our community. Entering the park offers an instant transition to a natural serene and undisturbed environment."
>
> (A119, Greengold affidavit ¶ 3a-3b, emphasis added).

153. Far from a lack of connection, he describes a connection of the most profound type, which affects him deeply, and which he seeks and experiences regularly.

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.*).

Petitioner Greengold Distinguished From "The Public At Large"

155. To add insult to injury, rather than acknowledging Petitioner Greengold's standing based on the testimony regarding his regular walks in the forest, the Court twisted his testimony to incorrectly conclude, to paraphrase: 'If other members of the public also use the Park intensively, as he states, then Petitioner Greengold cannot assert a level of usage greater than most other members of the public'. The Supreme Court thus held that his claim of standing supposedly failed.

156. Supreme Court concluded Petitioner Greengold "undermines his standing argument" by describing both his own and others' usage of the Park, and by implication thus 'invalidates' his claim of standing (A24, Justice McCormack Decision, p. 11).

157. But the Court's logic is clearly flawed. The fact that other members of the public *also* use the Park does not deprive Petitioner Greengold of standing; *rather*, it establishes standing for those *other* members of the public as well!

158. Standing in New York is not supposed to be some rare element to be parsimoniously bestowed on the unique individual who surpasses everyone else in using and enjoying a resource. Rather, standing is a

practical judgment to be rendered carefully, but when the facts are established, it is to be recognized and affirmed in order that essential rights may be defended when the circumstances dictate.

159. The Court of Appeals stated:

> "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria"
>
> Society of Plastics, *ibid*.at 769 (emphasis added)

160. And:

> "[W]e decline to erect standing barriers that will often be insuperable, [while] we are also conscious of the danger of making these barriers too low....Striking the right balance in these cases will often be difficult, but we believe that our rule — requiring a demonstration that a plaintiff's use of a resource is more than that of the general public—will accomplish that task better than the alternatives."
>
> Save the Pine Bush, *ibid*. at 306 (emphasis added)

161. SEQRA cannot enforce itself. It was designed to be enforced by an enlightened and motivated citizenry. Standing cannot be used as an impossible hurdle to frustrate conscientious and legitimate litigation, if SEQRA is to operate as intended and protect the environment.

162. The Court of Appeals was clearly concerned that excessively 'strict' standing rules with respect to SEQRA would have a negative public-policy effect, and should be rejected:

> "The City asks us to adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site; that rule would be arbitrary, and would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury."
>
> Save the Pine Bush, *ibid.*, at 305 (emphasis added)

163. That is precisely the issue Supreme Court mistook in discussing Petitioner Greengold. The Court of Appeals did not find that because there were "*many* who suffered real injury" (Save the Pine Bush, at 305, emphasis added) therefore *no one* had standing. On the contrary, the Court was concerned that an overly doctrinaire criterion for standing would disqualify the substantial number of people who *were indeed* injured, and should thus *obviously* have access to the courts to sue for their rights!

164. Rather than *disqualifying* himself by reporting the facts that others also used the Park, Petitioner Greengold was giving the Court useful facts, which both validated his own standing and described a class of *other* people who could be injured as well by the proposed project, in the absence of judicial review.

165. Furthermore, Petitioner Greengold did not assert that the 'typical' member of "the public at large" walks and camps in Christopher Morley Park; he stated only that discrete groups of other individuals used the Park also. That other people regularly visit the forty-acre preserved woodland -- which is crossed with walkways and contains well-used campsites -- is hardly a surprising claim, nor one that should have any impact whatsoever on Petitioners' standing in this case.

166. The Court of Appeals has not asked that a citizen be the exclusive user of the natural resource, or the member of a tiny and exclusive cabal that does so, or one who does so with some especially pronounced intensity, only that he or she demonstrate regular 'use and enjoyment' that will be affected by the proposed alteration. Supreme Court's decision was thus seriously flawed by its erroneous analysis with respect to Petitioner Greengold and his standing in this regard.

Precedent Defining "The Public At Large" Ignored By Supreme Court

167. Supreme Court also accepted other erroneous arguments of Respondents that Petitioners failed to distinguish themselves and their injuries from those of the "public at large" (Save the Pine Bush, *ibid*., at 305) as required for environmental standing.

168. Said the Supreme Court with respect to Petitioner Brummel: "[T]here is nothing in his petition which proves he uses the Park more...than any other person with physical access [to it]" (A23, Justice McCormack Decision p. 10, internal quotation omitted); with respect to Petitioner Dicker: "[He] has not proven he will be injured at all, much less more than other members of the public" (*ibid*.); and with respect to Petitioner Greengold, as discussed above: "He can hardly set himself apart from the public at large when in his own affidavit he makes himself part of it" (*ibid*.).

169. Petitioners' Memorandum of Law in Support of the Reply fully explored the definition of "the public at large" as established in Save the Pine Bush and Society of Plastics, (A365*ff*.pp. 41*ff.)*. Petitioners showed that "the public at large" meant, for example, those not living near a gas station (or forest), or those not partaking of daily, weekly or

regular treks through the woods.

170. Petitioners thoroughly demonstrated 'use and enjoyment' of the Park, *supra*, ¶¶ 26*ff.,* showed the key elements of Petitioners' use and enjoyment was uncontested by the Respondents, *supra*, ¶¶ 89*ff.,* and that their injury was real e.g. ¶71, ¶¶ 129*ff.,* ¶¶ 149*ff., supra*.

171. 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.

172. No such further evidence was required of the petitioners in Save the Pine Bush. It was sufficient that the Petitioners asserted they used the Pine Bush area for recreation, study, and enjoyment, *without* any further proof that *the rest of the world* did not do so -- because that fact was logically presumed. Said the Court:

"...[P]etitioners allege that they use the Pine Bush for recreation and to study and enjoy the unique habitat found there. It is clear in context that they allege repeated, not rare or isolated use. This meets the Society of Plastics test by showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large.'"

Save the Pine Bush, *ibid.*, at 305 (emphasis added, internal quotations omitted)

173. Further, there is no requirement in either Save the Pine Bush or Society of Plastics that the 'users' of a resource engage in some 'scientific study' of endangered butterflies or otherwise, or that the resource be endangered or home to an endangered creature, to enable the users to be distinguished from the public. Those alleged requirements are only added by parties seeking to frustrate plaintiffs, by adding requirements the high court did not. "Use" is the test, pure and simple.

174. As stated in Save the Pine Bush:

"In recognizing that injury of the kind petitioners here allege can confer standing, we adopt a rule similar to one long established in the federal courts. In Sierra Club v Morton (405 US 727, 734 [1972]), the United States Supreme Court held that a generalized 'interest' in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's "[a]esthetic and environmental well-being" would be enough...."

Save the Pine Bush, *ibid*., at 305 (emphasis added)

175. Looking directly to Sierra Club v. Morton, as cited, the U.S. Supreme Court held:

> "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society....[T]he 'injury in fact' test requires...that the party seeking review be himself among the injured. The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.
>
> Sierra Club v. Morton, 405 US 727 (1972) at 734-735 (emphasis added) (where the Court found the environmental group did not have standing because it did not allege injury to any individual person)

176. The holding in Sierra Club, *ibid*., thus was *not* that to qualify as injured, parties had to engage in some abstruse study, *nor* that the area at issue needed to host endangered animals. The Court found "use" alone and the 'lessening' of the aesthetic values of the area -- in the eyes of those users -- was adequate to qualify as injury (Sierra Club v. Morton, *ibid*., at 735). The Court of Appeals specifically adopted that standard in Save the Pine Bush, at 305.

177. The Court of Appeals ruled that those persons who specifically allege "use" of the resource -- "repeated, not rare or isolated use" -- *are*

by definition different from those who do not allege specific use, i.e., members of "the public at large" (Save the Pine Bush, *ibid*., at 305 (emphasis added)).

178. There is no requirement established by the Court of Appeals to analyze the habits of "the public at large" with respect to a discrete piece of woods or park. To the contrary, the Court said that those who visit it and use the resource are the necessary distinct population (non-"general public") *by definition*.

179. This insight into what is required to be distinct from "the general public" also discredits the supposed conclusions of the Orange County Court in Tuxedo Land Trust, *supra*, ¶74*ff.* and *infra,* ¶197*ff.*, regarding who qualifies for standing.

180. Supreme Court's rejection of the Petitioners' actual distinction from "the public at large" given their proven usage of the Park is thus based on a misunderstanding of the test established by the Court of Appeals, and must be reversed.

Supreme Court Holding On Presumptive-Standing Based On Proximity

181. Supreme Court also discounted standing based on "proximity" with respect to Petitioners Greengold and Dicker. In doing so, it cited Save the Pine Bush (A24, Justice McCormack Decision, p. 11).

182. But in Save the Pine Bush, the issue of proximity as would apply in the present case was only discussed in a concurring opinion by one Justice -- who concluded that a five-hundred-foot standard was established for presumptive standing.

183. In contrast to Supreme Court's holding, that interpretation *supports* Petitioners' presumptive standing in the present case, at least with respect to Petitioner Greengold.

184. The Court was advised that Petitioner Greengold's property is "approximately more than 500 feet" away from the project in the affidavit of engineer Joseph Todaro introduced by Respondent Roslyn Water District (A437, RWD Todaro affidavit, ¶15, p. 3) and also cited in the Petitioners' Reply and Affidavit in Opposition (A276, ¶42). In fact Petitioner Greengold lives *well under five-hundred feet* from the 'project', when the cleared roadway is accounted for, some dozens of yards from his property. But in any event, the term "approximately more than" can hardly be enough to dismiss the possibility the Petitioner actually does reside within a five-hundred-foot boundary that

supposedly confers standing.

185. Rather than sustaining the Supreme Court's decision, the proximity issue would presumptively confer standing on Petitioner Greengold, using the Supreme Court's own citation, and the criterion for a motion to dismiss, *supra*, ¶¶ 52 *ff.,* or compel a trial of facts *supra,* ¶¶ 60*ff.*

186. Some recent decisions hold that proximity does not confer presumptive standing in *non-zoning* cases "based solely on a party's proximity" Matter of Sierra Club v. Village of Painted Post, 2014 NY Slip Op 2166 (Fourth Dep't, 2014) at ¶ 5, *acc'd* Matter of Kindred v. Monroe County, 2014 NY Slip Op 5069 (Fourth Dep't, 2014).

187. But the Fourth Department in those cases re-affirmed criteria that do sustain Petitioners' standing here, in any event:

> Where, as here, the proceeding does not involve a zoning-related issue . . . there is no presumption of standing to raise a challenge under the State Environmental Quality Review Act based solely on a party's proximity. In such a situation, the party seeking to establish standing must establish that the injury of which he or she complains falls within the zone of interests...and that he or she would suffer direct harm, injury that is in some way different from that of the public at large.
>
> Matter of Sierra Club, *ibid.*, ¶5, (internal quotations omitted, emphasis added)

188. But Supreme Court did not cite those cases. By implicitly citing

the "five-hundred-foot" rule and then using it against the nearby Petitioners, especially Petitioner Greengold, the Court demonstrated an actual aversion to granting standing, regardless of the facts.

189. In fact, Petitioner Greengold, as well as Petitioners Dicker and Brummel, did sustain their standing argument under the standards of Sierra Club v. Vill. Painted Post and Matter of Kindred, to wit: (1) an injury in the zone of interest of the applicable law; and (2) a harm different from "the public at large" (Sierra Club, *ibid.*, at ¶5). SEQRA is concerned with the protection of the environment through the use of public and scientific review, and this case is about nothing less.

190. Petitioners showed their injury would be different from the public at large due to their "repeated, not rare or isolated" usage of the forest (Save the Pine Bush, *ibid.*, at 305), as well as Petitioners Dicker and Greengold's view-based injury due to their status as "across the street" neighbors of the forest (Matter of Shapiro, *ibid.*, at ¶ 4).

191. Proximity may not yield presumptive standing in a non-zoning case, according to the recent holdings, but neither is it altogether irrelevant. No court has stated that by proximity a Petitioner *cannot* indeed suffer an injury, and clearly when it comes to scenic 'view' that element of injury is found for Petitioners Dicker and Greengold.

192. As one Court stated:

> While the Third Department has taken the position that in cases where no zoning related issue is involved, there is no presumption of standing based upon proximity, here, it is not solely proximity which gives rise to [petitioner's] standing, but, rather, the fact that her proximity results in allegations of direct harm which differs in degree, if not also in kind, from that experienced by the public at large. That difference in degree is a basis for standing here.
>
> Saratoga Lakes Prot. and Improvement Dist. v. Dept. Pub. Works of City of Saratoga Springs, 11 Misc.3d 780, (Supreme Court, Saratoga County (2006)) (Nolan, J.) (internal quotations and citations omitted, emphasis added), at 788 (where the Court found that resident nearby a proposed intake pipe enjoyed standing based on the foreseeable impacts to their use and enjoyment of a lake)

Supreme Court's Ruling On Petitioner Brummel

193. In ruling against Petitioner Brummel's standing, Supreme Court challenged but did not state that it ruled on the duration of his use of the forest (A22, Justice McCormack Decision, p. 9). Because he was monitoring the threat to the forest from the proposed construction project during his visits, the Court wrote, his assertion of standing under the "uses and enjoys" provision of Save the Pine Bush (at 301) was undermined. The Court suggested that 'monitoring' qualified instead as "work-related" (A22, Decision of Justice McCormack, p. 9).

194. But Petitioner Brummel indicated no 'employment' as such a monitor or advocate. Even so, Supreme Court might more correctly rule that a person with a substantial work-related connection to a natural resource by definition "uses and enjoys" that resource more than the general public, and should therefore be granted standing, not denied it!

195. Petitioners in Save the Pine Bush, *ibid*., were also performing resource-protecting activities: the Court noted that preservation of habitat at issue was "thanks in part to petitioners' efforts" (at 301) and the organization and actions of the petitioners were connected, stating: "it seems highly likely that many members of an organization called Save the Pine Bush, Inc. are people who frequently visit and enjoy the Pine Bush," (at 306). That did not disqualify them!

196. It appears from much of Supreme Court's analysis it was simply looking for any pretext to disqualify Petitioners. Such a policy is not endorsed by the Court of Appeals, which stated:

> "Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules...."
>
> In the Matter of Sun-Brite v. Board of Zoning and Appeals of the Town of North Hempstead, 69 NY 2d 406 (1987) at 413 (internal quotations and citations omitted, emphasis added) (where a competing business was found not to have standing in

> a zoning matter because monopoly was not a legitimate interest, and neighbors of a tower were found to have standing but not to be injured by it).

197. The Supreme Court ruled that Petitioner Brummel should be denied standing based on a purported lack of "enthusiasm, inquisitiveness or concern" in his use of the forest, compared with others who had "physical access to the same resource" (A22-23, Decision of Justice McCormack, pp. 9-10).

198. Said the Supreme Court:

> "...[T]here is nothing in his petition which proves he uses the Park '...more frequently or with any greater enthusiasm, inquisitiveness or concern than any other person with physical access to the same resource,'"
>
> (A23 Decision of Justice McCormack, p. 10, quoting Tuxedo Land Trust).

199. But Petitioners fully explored both here and before Supreme Court the errors in that supposed 'test' to distinguish a party from the general public, as asserted in Tuxedo Land Trust -- *supra*, ¶¶ 77*ff.*, ¶¶ 167*ff.,* and A368, Petitioners' Mem. of law in Support of the Reply and Opposition, pp. 44 *ff.*

200. Petitioner Brummel demonstrated that he used the resource of the forest, and that he did so in a manner that reflected "repeated, not rare or isolated use" which "meets the Society of Plastics test", in the language

of Save the Pine Bush, *ibid.*, at 305, *supra* ¶¶ 64*ff.*

201. That Petitioner Brummel supposedly did not demonstrate to the Court's satisfaction some supposed "enthusiasm" etc. (A23, Decision of Justice McCormack, p. 10) is *not* a valid test for establishing standing.

202. Even were it a valid 'test', Petitioner Brummel should have passed: he defended the forest at issue before various government agencies orally or in writing; with others, he engaged a biologist and arborist to document the project's impact on the forest; he participated in complex, time-consuming litigation to protect the forest; and he frequently visited, photographed, and walked in the forest. Certainly that would demonstrate if anything an uncommon degree of "enthusiasm, inquisitiveness or concern" with respect to the resource (A23, Justice McCormack Decision, p. 10), if that were indeed a test of standing.

203. Petitioner Brummel met the test of standing as it actually exists, demonstrating that he "uses and enjoys" the forest more than most other members of the public, as required by Save the Pine Bush, at 301, and that he would suffer injury from the destruction of those woods and damage to their character as a result of the proposed water-treatment project.

204. Supreme Court's finding in this instance as elsewhere suggests

errors by the Court: attempting to impose new 'tests', unsupported by the Court of Appeals; unduly to parsing or re-interpreting the affidavits of the *pro se* Petitioners to create doubt or tentativeness where none existed; ignoring the clearly present facts that supported Petitioners' claims of standing; misapplying the standard of a motion to dismiss, giving the plaintiff "the benefit of every possible favorable inference," Leon v. Martinez, *ibid*., at 87; and ignoring the need for a trial of fact,

205. The Supreme Court's ruling is thus an example of the blatant misapplication of standing thresholds improperly to frustrate legitimate plaintiffs, where the Court of Appeals clearly attempted in Save the Pine Bush to remove such thresholds once and for all.

Conclusions

206. Petitioners have more than made their case for standing based upon: (1) their active use and enjoyment of the undeveloped woodland area; (2) the imperiled scenic view of woods from the homes of two of the Petitioners; and (3) the obvious and substantiated harm and injury to their enjoyment of the undeveloped woodlands that would logically be expected to occur were the project to go forward.

207. Petitioners Dicker and Greengold demonstrated their standing to sue based upon the deleterious effects of the proposed "air stripper" project on the scenic view from their homes.

208. All three Petitioners demonstrated standing through their frequent use and enjoyment of the recreational-forest, and the injury they would suffer to their enjoyment of its natural character by the proposed project.

209. The Supreme Court violated established standards for ruling on a motion to dismiss, i.e. presumptions in favor of plaintiffs, and violated the *pro se* Petitioners' due process rights insofar as factually-contentious issues should have been put to a test by trial of fact, under CPLR 7804 (h), not summarily disposed of by the Supreme Court.

210. Petitioners drew from authoritative cases in their submissions to the Supreme Court and in this brief to clearly define the law as presently established by the Court of Appeals, and based thereupon their legal standing to maintain this proceeding.

211. As Petitioners have stated before, if the holding is sustained that they -- who demonstrated they use this Park, two of whom reside facing this Park, and all of whom are threatened with the blatant intrusion of a proposed quasi-industrial facility into this Park -- do not have legal

standing to seek judicial review of gross procedural and substantive errors in the approval of this project, then effectively 'no one' can demonstrate standing in such cases.

212. As a direct consequence, the Courts of this State would otherwise be rendered impotent in their role of assuring that 'self-enforcing' environmental laws like SEQRA are complied with -- despite the crass insensitivity to the environment and to such laws frequently demonstrated by agencies and political subdivisions of this State, in their over-accommodation to vested interests and the politically connected, as occurred in this case.

213. Petitioners urge therefore that their standing be sustained and the matter be subject to a fair determination on the merits, as justice requires.

Notes on Appendix

214. Petitioners wish to offer a brief discussion of the Appendix:

215. Petitioners omitted from the Appendix certain voluminous pleadings the contents of which were either irrelevant to the issue of standing or are fully represented elsewhere in Respondents' included

papers.

216. Had Petitioners included these irrelevant or duplicative submissions, they would have unnecessarily spent grossly excessive sums of money, and would have wasted paper and other resources, defeating the goal of the Appendix method in promoting judicial economy.

217. Petitioners omitted Respondents Roslyn Water District and Town of North Hempstead answers to the Verif. petition and the Roslyn Water District answer to the Verif. supplemental petition due to the aforesaid considerations of size and relevance.

218. Respondents' answers were almost completely 'boilerplate' denials and expressions of 'lack of knowledge' regarding claims in the Verif. petition and Verif. supplemental petition, and more significantly they were accompanied by massive exhibits largely irrelevant to the issue on appeal.

219. Otherwise, they added nothing with respect to standing not otherwise contained in the Respondents' Memoranda of law, Affirmations, Affidavits and Answer, as included.

220. The contents of the Appendix, and the pages devoted to discussion of standing are:

From the Petitioners

Verif. petition and exhibits; standing pp. 9 - 14.
Mem. of law in support of Verif. petition and order to show cause; standing pp. 25 - 29.
Verif. Reply and affidavit in opposition to motion to dismiss; standing, pp. 13 - 17.
Mem. of law in support of Verif. Reply and affidavit in opposition to motion to dismiss; standing pp. 40 - 45.
Petitioners' Sur-Reply to NC Reply Affirm. in support of motion to dismiss; standing pp. 8 - 12.

From the Roslyn Water District:

Mem. of law in opposition to order to show cause and Verif. petition; standing pp. 3 - 8.
Engineer Todaro affidavit in opposition to order to show cause and Verif. petition; standing p. 3 (¶¶13 - 15).
Mem. of law in opposition to motion for preliminary injunction; standing pp. 1 - 4.
Affirm. in opposition to application for preliminary injunction; standing pp. 3 - 5.

From Nassau County Respondents

Notice of motion and Affirm. in support of motion to dismiss; standing pp. 3 - 5.
Reply Affirm. in further support of motion to dismiss; standing pp. 3-8.

From the Town of North Hempstead

Affirm. in opposition to order to show cause; standing pp. 6 - 7.
Mem. of Law; standing pp. 4 - 5.
Verif. answer to Verif. supplemental petition; standing -- none.

221. Petitioners believe the papers thus recited offer a fair, balanced, and complete record of the case.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

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