SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 40 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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RICHARD A BRUMMEL, JOSHUA DICKER and DAVID GREENGOLD,

Petitioner(s),

For Judgment and an Order pursuant to Article 78, Section 3001 (Declaratory Judgment) Sections 6311 and 6313 of the Civil Practice Law and Rules

-against-

THE TOWN OF NORTH HEMPSTEAD, THE NASSAU COUNTY LEGISLATURE, NASSAU COUNTY EXECUTIVE EDWARD P. MANGANO and THE ROSLYN WATER DISTRICT,

Respondent(s).

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Index No. 6150-2014

Motion Seq. No.: 001, 002 & 003

XXX

The following papers read on this motion:

Order to Show Cause/Memorandum of Law/Supporting Exhibits/Corrections.....X
Affirmations in Opposition/Memorandum of Law (Roslyn Water District).....XX
Affidavits in Opposition (Roslyn Water District).....XX
Verified Answer and Return (Town of North Hempstead).....X
Affirmation in Opposition/Memorandum of Law (Town of North Hempstead.....X
Notice of Motion/Supporting Exhibits (Nassau County).....X
Verified Reply and Affidavit in Opposition/Memorandum of Law (Petitioners).....X
Reply Affirmation/Supporting Exhibits (Nassau County).....X

Sur-Reply (Petitioners).....X[1]
Order to Show Cause for Leave to File a Supplemental Petition/Supporting Exhibits.....X
Verified Supplemental Petition.....X
Verified Answer to Petitioners' Verified Supplemental Petition (Roslyn Water District).....X
Affirmation in Opposition/Memorandum of Law (Roslyn Water District).....X
Verified Answer to Supplemental Petition (Town of North Hempstead).....X
Affirmation in Opposition (Nassau County).....X
Verified Reply/Reply Affidavit (Petitioners).....X

Petitioners move, by Order to Show Cause, for: (a) a preliminary injunction, pursuant to CPLR §6311, enjoining Respondents from, *inter alia*, "altering in any manner the status quo of the forested and appurtenant areas in Christopher Morley Park, without explicit permission of the Court"; (b) for a declaratory judgment, pursuant to CPLR § 3001, declaring the actions of the respondents, in furtherance of building an air stripper in Christopher Morley Park, null and void; (c) for an order pursuant to CPLR Article 78 challenging the actions of the respondents in furtherance of building an air stripper in Christopher Morley Park. All Respondents oppose the motion.

Respondent Nassau County moves by Notice of Motion to dismiss Petitioners' petition, by challenging their standing, pursuant to CPLR §3211(a)(7). Petitioners oppose the motion.

Petitioners move by a second Order to Show Cause for an order granting them

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[1]Petitioners sought court permission to submit a Sur-Reply to the Reply of Nassau County. Neither Nassau County nor the other respondents objected and permission was granted

permission to supplement their petition, based upon the acts or actions of the respondents which have taken place since the time the original Order to Show Cause was submitted. Respondents oppose the Order to Show Cause.

By order dated July 2, 2014, after a hearing that same day, this court vacated a temporary restraining order issued by the Hon. Dan Winslow of this court, and denied Petitioners' application for a preliminary injunction.

This action was put into motion when Respondent Roslyn Water District (RWD) sought and received permission to build an air stripper, a building-sized device that purifies water, in Christopher Morely Park (the Park). The Park is located in the Town of North Hempstead (the Town).

The RWD is a Special Improvement District of the Town and provides water to approximately 18,000 residents through the use of eight wells. In August, 2013, the RWD learned, by testing the water, that one of the wells, Well No. 4, showed high levels of Chlorodifluoromethane, also known as Freon-22. Subsequent testing indicated the levels of Freon-22 in Well No. 4 was increasing. In November, 2013, the RWD made the decision to shut down use of Well No. 4 despite it being responsible for supplying 21% of the district's water. The RWD was required to develop a plan or method to address the issues of Well No. 4 and determined that an air stripping treatment facility would resolve the problems. An air stripper moves air through the contaminated groundwater in an above-ground facility, thereby ameliorating the problem. The use of an air stripper is not uncommon, and there are, apparently, at least 70 other such units located throughout

Nassau County. In fact, according to the affidavit of Richard Passariello, Superintendent of the RWD, one such facility used by the Port Washington Water District is currently located inside the confines of Christopher Morley Park.

The initial plan was for the RWD to build the air stripper at the same location as Well No. 4, which is located on a residential street in the village of Roslyn Estates. Community opposition to building the air stripper on the site of Well No. 4 led to the decision to put it inside a wooded area of Christopher Morley Park. The building of the air stripper in the Park will require, *inter alia*, constructing a 30-foot high building, an access road, fences and lighting.

Christopher Morley Park is located in the northern part of Nassau County. At nearly 100 acres, it contains a golf course, swimming pool, ice skating rink, baseball fields, basketball courts, tennis courts (indoor and outdoor), campgrounds, other recreational activity space, and approximately 33 acres of woods or forest. It is in a portion of the wooded area that RWD proposes to build the air stripper. The parties herein differ on the amount of physical space the air stripper will take up. While the RWD would be receiving .55 acres of Park land from The County of Nassau, they assert the air stripper, access road and other construction will only cover an area of .19 acres. Petitioners argue it will be much larger than that.

The Parties

The *pro se* Petitioners herein are Nassau County residents. Mr. Dicker and Mr.

Greengold live very close to an entrance to the Park. Mr Brummel lives over two miles away from it. Mr. Greengold lives two houses away from Well No. 4.

Aside from the RWD, Petitioners name The County of Nassau (The County) and The Town of North Hempstead as Respondents. While RWD appears to be the main actor from Petitioners' perspective, The County and The Town have made, and will continue to make, certain decisions that will give the RWD the ability to build the air stripper in the Park, should Petitioners' application herein fail. As the County owns the land, they must take steps to allow the Town and the RWD to appropriate it.

The Petitions

Petitioners' original petition names six prayers for relief: (1) A declaratory judgment declaring a resolution by the Town for appropriations and bonding to fund the air stripper project null and void for, *inter alia*, failure to comply with the State Environmental Quality Review Act (SEQRA). Accordingly, the Town should be enjoined from disbursing funds for that purpose and from acquiring the land; (2) A declaratory judgment declaring that the County failed to comply with SEQRA in passing a Home Rule law to alienate parkland to allow use by the Town and RWD and finding that resolution null and void; (3) A declaratory judgment declaring the RWD's vote on May 1, 2014 approving a resolution to build the air stripper in the Park void for failure to comply with SEQRA. Accordingly, the RWD should be enjoined from acting on the resolution; (4) A declaratory judgment declaring the Environmental Assessment Form

(EAF) issued by the RWD void, and the votes of the RWD Board based on it void, for failure to comply with SEQRA. Accordingly, the RWD "and other agencies" should be enjoined from acting upon the EAF and decisions related to it; (5) a declaratory judgment declaring that building the air stripper in the Park should have a "Positive Declaration" on the EAF pursuant to SEQRA, resulting in the need to perform an Environmental Impact Statement (EIS); and (6) for a preliminary and permanent injunction.

The Supplemental Petition contains three prayers for relief: (1) A declaratory judgment declaring the RWD's full, revised EAF dated July 17, 2014 void for failure to comply with SEQRA. Accordingly, the votes of the RWD based upon the July 17, 2014 EAF should be voided and the RWD and "Other Agencies" should be enjoined from acting upon it; (2) A declaratory judgment declaring that the air stripper will have one or more significant adverse environmental impacts and should be subject to a "Positive Declaration" under SEQRA. Accordingly, a full EIS should be performed before the project proceeds any further; and (3) A declaratory judgment declaring the RWD vote on July 3, 2014, appropriating funds for the construction of the air stripper, void for failure to comply with SEQRA. Accordingly, the RWD should be enjoined from using those funds until SEQRA is properly complied with.

Standing

In the original Order to Show Cause, Petitioners preemptively address the issue of their standing to bring the petition. The RWD and the Town argue in opposition that,

inter alia, the Petitioners lack standing to bring the within petition. The County brought a motion to dismiss the petition due to Petitioners' lack of standing[2]. Whether a party is a proper party to an adjudication is an issue that must be decided at the outset of the litigation. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991), *Caprer v. Nussbaum*, 36 A.D.3d 176 (2nd Dept. 2006).

In *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009) the Court of Appeals addressed the issue of standing in SEQRA matters at length. The issue in *Save the Pine Bush* had to do with a hotel being built near a protected area that contained an endangered species of butterfly. The petitioner in that case was an organization whose members used the Pine Bush for recreation and to enjoy the "unique habitat" found in the Pine Bush. *Id.* at 304. The rule elucidated by the Court of Appeals is simply stated: "...a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality-Review Act to challenge government actions that threaten that resource." *Id.* at 301. While the rule may be simple to state, the court made clear it should not be read to mean that standing is easy to establish. "...[W]e do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face". *Id.* at 306.

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[2]Petitioners argue that the County was precluded from bringing a motion based upon an agreement between the parties and the court that, to expedite matters, only responses/answers to the petition would be allowed. There was no such agreement and neither the County, the other Respondents nor the Petitioners were, or could, be prevented from bringing a motion. Petitioners opposed and sur-replied to the motion.

Petitioner Brummel lives the farthest distance from the park, approximately two and half miles, and states that while he has always lived in the vicinity, he began visiting the Park for the first time since his childhood in roughly March or April, 2014, after learning of the proposed project. He claims to now visit the woods on a weekly basis to enjoy and survey the woods, as well as to monitor the threat. Mr. Brummel enjoys the woods and some of the Tulip trees in particular. There is an "area of open-wood-floor" that he frequents that will be destroyed if the construction is allowed to move forward. Should the project occur, the building, road, fencing and lighting would create "a very unpleasant intrusion" into his enjoyment of the woods.

Petitioner Dicker lives across the street from the woods, and there is an entrance into the woods approximately 250 feet from his front door. In fact, he claims proximity to the Park is one of the reasons he and his wife purchased their home. He and his family look out the windows of their home on a daily basis to enjoy the view provided by the woods. Aside from the visual enjoyment, he and his family use the park on a regular basis to jog, play golf, swim, play tennis and many other activities. Mr. Dicker reverently describes his post-jog walk home when he can soak up "the earthy perfumes and magnificent landscapes of nature." Mr. Dicker's concern is that the Park, the woods and part of the forest "is in imminent danger of being destroyed".

Petitioner Greengold also lives very close to an entrance of the Park. He walks in the park "many days per week". He enjoys the nature trail for both exercise and "moments of solitude". He sees many county residents use the Park, including a group of

senior citizens who walk throughout the Park daily, kids who run the trail with track coaches after school and boy scouts who camp out. The air stripper will, among other things, destroy one of the campgrounds used by campers. Interestingly, Mr. Greengold lives two houses away from Well No. 4 and appears to be in favor of the air stripper being built within feet of his house, as opposed to in the Park.

It should be pointed that the air stripper project will use up somewhere between .19 and .55 acres of the Park and forest, or less than 1% of the Park and a little more than 1.6% of the woods. Petitioners challenge that the amount of land used will be greater than what Respondents assert, but they provide no basis for that assertion.

Applying the standard elucidated in *Save the Pine Bush, supra*, the court finds that the Petitioners herein have failed to establish standing to bring their petition and supplemental petition. The court believes, and is not unmoved by, Petitioner Greengold's and Dicker's fondness and reverence for the Park. However, none of the Petitioners have proven that they use or enjoy the Park more than most other members of the public, or that their injury is real and different from most members of the public.

Regarding Petitioner Brummel, it is possible that the fact that he has only recently re-introduced himself to the Park and the woods therein disqualifies him. Further, his petition states one of the reasons he visits the park is to "monitor the threat" which seems to remove his visits from use and enjoyment to work-related. Regardless, even if that were not the case, the court would find Petitioner Brummel lacked standing. Despite his sudden, reinvigorated fondness for the woods, and particularly that area where the air

stripper is proposed to be built, there 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 resources." *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, 34 Misc.3d 1325(A), (N.Y. Sup 2012), *affd.* 112 A.D. 3d 726 (2nd Dept. 2013).

Petitioner Dicker and his family seem to use much of the 98 acres of the Park for recreation and exercise. The vast majority of their use, including the golf, swimming, tennis, basketball and other recreational activities will not be impacted by the air stripper. His main concern seems to be the potential disruption to his jog, post-jog walk, and the view from his home. However, it is not clear from the papers before the court that the project will actually interrupt his use and enjoyment of those portions of the woods he favors. 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. In essence, Petitioner Dicker has not proven he will be injured at all, much less more than other members of the public.

Similarly, Petitioner Greengold fails to establish standing. In Mr. Greengold's affidavit, he vociferously objects to putting the air stripper in the Park, in part due to the construction, noise, air pumps, and other unattractive aspects (even though the alternative appears to be two doors down from him). However, he barely describes a connection to the Park aside from general descriptions of its beauty. He does state he walks in the Park

"many" days per week, though he undermines his standing argument by 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.

Even if the court were to look at the Petitioners' proximity to the project as a means of conferring injury (see *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, *supra*) the outcome would not change. None of the Petitioners live close enough to the project to result in an injury in fact. *Id.*, *Save the Pine Bush, Inc. v. Common Council of City of Albany*, *supra*.

As the court finds the Petitioners lack standing, it is not necessary or proper for the court to consider the other arguments raised in favor of the petitions.

Accordingly, it is hereby

ORDERED that the County of Nassau's motion to dismiss the petition is GRANTED in its entirety based upon Petitioners' lack of standing. The Petition and supplemental petition are dismissed as against all parties.

Any other relief not specifically granted is DENIED.

This constitutes the Decision and Order of the Court.

Dated: September 19, 2014
Mineola, New York

Hon. James P. McCormack, A. J. S. C.

ENTERED

SEP 22 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE