

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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OPERATION STOMP, and TANYA LUKASIK, EUGENE  
GOLDFARB and EDITH AMMERATA, individually and  
as members of Operation STOMP,

Petitioners,

- against -

NASSAU COUNTY, NASSAU COUNTY EXECUTIVE  
EDWARD P. MANGANO, and NASSAU COUNTY  
DEPARTMENT OF PUBLIC WORKS, TRI-STATE  
PAVING, LLC, and LASER INDUSTRIES, INC.,

Respondents.

AFFIRMATION OF  
LILIA FACTOR  
IN SUPPORT OF TRO  
AND PRELIMINARY  
INJUNCTION

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Lilia Factor, an attorney admitted to practice in the courts of the State of New York, affirms  
the following under the penalties of perjury:

1. I am an associate at the Law Firm of Frederick Eisenbud, and as such am fully familiar with the facts and circumstances in this action.
2. This affirmation is made in support of the Order to Show Cause and Request for Temporary Restraining Order and Preliminary Injunction herein.
3. Where a party seeks to preserve the *status quo* during the pendency of an Article 78 proceeding and the remedy at law does not provide a full measure of relief, a preliminary injunction is appropriate supplemental relief. *Johnston v. Planning Bd. Of the Town of Brookhaven*, 11 Misc.3d 1092(A) citing *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 418 N.Y.S.2d 216 (3d Dept. 1979).
4. In order to obtain a TRO or Preliminary Injunction, the moving party is "required to establish a likelihood of success on the merits, irreparable injury in the absence of an injunction, and a

balance of the equities in his favor (see CPLR 6301)". *Stangel v. Chen*, 74 A.D.3d 1050 (2d Dept. 2010).

5. As shown in the annexed Verified Petition, affidavits, and exhibits thereto, Petitioners have complied with all of the above requirements, as follows:

Likelihood of Success

6. In or about July 2014, Respondent Nassau County Department of Public Works ("NCDPW") issued requests for proposals to carry out the work on South Oyster Bay Road, which described the work as a road improvement project involving asphalt pavement removal, 1" [or 1 1/2"] asphalt concrete Type 1 ARA Overlay, removal and replacement of deteriorated pavement, repair of joints, replacement of pavement markings and traffic loops, removal of trees, removal and replacement of concrete sidewalks and concrete curbs and other incidental work." See Exhibit 3.
7. NCDPW records show that a form prepared in advance of the bids for this project classified it as a SEQRA Type II action, meaning that no environmental review is required. 6 NYCRR §617.3(f). See Exhibit 4.
8. This determination was incorrect as a matter of law. In order to qualify as a Type II action, the action must be one of the 37 actions listed in § 617.5(c), or be on a Type II list adopted by the agency (but in no event may an action on an agency's Type II list "have a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c)." 6 NYCRR §617.5(a) and 617.5(b)(1)..
9. The project, as defined by Respondents, does not qualify as a Type II Action under § 617.5(c) because it is not fully covered by any of the items on the enumerated list. § 617.5(c)(4) ("repaving of existing highways") would apply if the project merely required repaving of the

road, but the County's project does much more, including replacement of curbs and sidewalks and the removal of trees.

10. On information and belief, Nassau County has not adopted its own Type II list, and even if it had, the South Oyster Bay Road project could not be included in such a list because it includes significant adverse impacts when the criteria in 6 NYCRR §617.7(c) are considered.
11. Because the action is neither a Type I nor Type II Action, it is an Unlisted Action for purposes of SEQRA review. 6 NYCRR §617.2(ak).
12. The failure to comply with the procedural requirements of SEQRA alone provides a sufficient basis for Petitioners to prevail in this special proceeding.
13. Substantively, had the County Respondents identified the potential adverse impacts from the road project on South Oyster Road by applying the criteria in §617.7(c) to the proposed action, it would necessarily have found a number to apply, including "(i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels, .... A substantial increase in potential for erosion, flooding, leaching or drainage problems"; "(ii) the removal or destruction of large quantities of vegetation.... or other significant adverse impacts to natural resources"; "(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted"; "(vi) the impairment of the character or quality of .... aesthetic resources or of existing community or neighborhood character".
14. The affidavits of Petitioners Tanya Lukasik, Eugene Goldfarb, Edith Ammerata and Richard Oberlander reference the ecological, aesthetic and practical importance of the mature (30 to 70 foot) trees on South Oyster Bay Road to the affiants and to their community. They explain that trees provide not only natural beauty and shade, contributing to the rural character of the neighborhood, but also buffer noise, mitigate air pollution, inhibit erosion, and provide a physical barrier between the heavy traffic and residents' backyards.

15. In addition, The Town of Oyster Bay, which encompasses all of the communities affected by the Respondents' current project, devotes an entire chapter of its Code to trees. Oyster Bay Code Section 225 – 1 declares that:

[T]he preservation of trees is necessary to protect the health, safety and general welfare of the Town of Oyster Bay and its residents because trees provide shade, impede soil erosion, aid in water absorption and retention, inhibit excess runoff and flooding, enhance air quality by absorbing carbon dioxide and releasing oxygen, mitigate noise, provide a natural habitat for wildlife, provide screening, conserve energy, enhance property values and add to the aesthetic quality and character of the entire community. It is, therefore, the purpose of this chapter to protect existing healthy trees and to encourage the planting of new trees in appropriate locations on all private and public properties throughout the Town.

16. A road improvement project which allows for the indiscriminate, mass destruction of healthy large trees clearly runs counter to the Town of Oyster Bay's goals as officially stated in its legislation, and therefore creates a significant adverse impact on the environment.
17. In addition, the SEQRA regulations require that, in determining whether an action may have a significant adverse impact, an agency must consider all reasonably related long-term, short-term, direct, indirect and cumulative impacts. 6 NYCRR §617.7(c)(2).
18. Failure to consider related projects or projects that affect the same environmental aspect of a community is prohibited as segmentation. 6 NYCRR §617.3(g).
19. The instant road improvement project along South Oyster Bay Road is one of several projects in the past two or three years where the County has sanctioned the destruction of large numbers of mature trees along County roads. See Affidavit of Tanya Lukasik, ¶ 25; Exhibit 8.
20. Thus, Respondents were required to consider the cumulative and related impacts of removing trees along County roads when addressing the South Oyster Bay Road improvements.
21. Had they followed SEQRA's mandate, municipal Respondents would have concluded that the project subject to the contracts in question is an Unlisted Action and not a Type II Action. This would have required them to prepare an Environmental Assessment Form (6 NYCRR § 617.3.),



to consider whether this action has at least one potential adverse environmental impact pursuant to the applicable criteria, and whether the impact or impacts are significant.

22. The provisions of SEQRA require literal compliance; substantial compliance is insufficient to satisfy the law's mandate. *See, Matter of Rye Town/King Civic Association*, 82 A.D.2d 474, 480-481 (2d Dept. 1981).
23. This is the case even where the agency thinks that its action is beneficial. *See, e.g. Matter of Whibco, Inc. v. Village of Round Lake*, 149 Misc.2d 415, 564 N.Y.S.2d 700, 701 (Sup. Ct. Saratoga Co. 1991).
24. The result of failure to comply with SEQRA is that the agency's action or determination is annulled and the matter is remanded to it for proper environmental review. *See, e.g. Matter of Serdarevic v. Town of Goshen*, 39 A.D.3d 552, 555 (2d Dept. 2007).
25. The facts herein are unambiguous. Due to the improper classification of this action, the lead agency did not conduct any environmental review. Since this is a clear violation of SEQRA, the Petition is likely to succeed on the merits.

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#### Standing and Timeliness

26. In order to demonstrate standing to raise a SEQRA challenge, the petitioners must show that the determination would potentially cause them to suffer an injury in fact, which falls within the zone of interests sought to be promoted or protected by the statute. Since the zone of interests, or concerns, of SEQRA encompasses the impact of agency action on the relationship between the citizens of this State and their environmental, the petitioners must demonstrate a potential injury which is environmental and not solely economic in nature. *Bridon Realty Co. v. Town Bd. of Town of Clarkstown*, 250 A.D.2d 677 (2d Dept. 1998).

27. Operation STOMP has demonstrated that it has standing as an organization. See *In the Matter of Long Island Pine Barrens Society, Inc. v Central Pine Barrens Joint Planning & Policy Commission*, 113 A.D.3d 853, 856 (2<sup>nd</sup> Dept. 2014):

With regard to the issue of standing, the Supreme Court erred in holding that the petitioners lacked standing to challenge the determination. Whether an organization or association has standing involves the application of the three-pronged test set forth in *Society of Plastics Indus. v County of Suffolk* (77 NY2d 761, 573 NE2d 1034, 570 NYS2d 778 [1991]). As pertinent to this appeal, the first prong of that test requires that the organization or association demonstrate that "one or more of its members would have standing to sue" as an individual (*id.* at 775). An individual has standing where he or she "would suffer direct harm, injury that is in some way different from that of the public at large" (*id.* at 774) and "the in-fact injury of which [he or she] complains . . . falls within the 'zone of interests,' or concerns, sought to be promoted [\*\*\*7] or protected by the statutory provision under which the agency has acted" (*id.* at 773, quoting *Lujan v National Wildlife Federation*, 497 US 871, 883, 110 S Ct 3177, 111 L Ed 2d 695 [1990]; see *Roulan v County of Onondaga*, 21 NY3d 902, 989 NE2d 6, 966 NYS2d 744 [2013]). In *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany* (13 NY3d 297, 918 NE2d 917, 890 NYS2d 405 [2009]), the Court of Appeals held that, in land-use and environmental cases, "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 . . . to challenge government actions that threaten that resource" (*id.* at 301).

28. The individual affidavits of members of Operation STOMP establish each of the elements for standing by the organization, and as individuals. See *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 13. N.Y.3d 297, 301 (2009) ("We hold that 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 (SEQRA) to challenge government actions that threaten that resource.). In addition, the individual Petitioners have established standing regardless of actual injury or special damage because of their close proximity to the trees on South Oyster Bay Road. *Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven*, 213 A.D.2d 484 (2d Dept. 1995).

29. Petitioners are a community group whose goal is to save and preserve the trees slated for destruction by the Respondents and individual members thereof who live in close proximity to the trees that have been or are about to be removed. Other members of Operation STOMP reside in other parts of Nassau County in close proximity to other County roads, and do not want the County to commence similar road projects without appropriate environmental review.
30. The injury is fundamentally environmental in nature and, although it is not required here, these residents are incurring actual and special damages due to Respondents' actions.
31. This proceeding is timely, having been brought within less than a month since Petitioners learned of the road improvement project on South Oyster Bay Road and less than three months since the awarding of the contracts and their execution. See Affidavit of Tanya Lukasik ¶9; Affidavit of Eugene Goldfarb ¶6; Affidavit of Edith Amerrata ¶7; Verified Petition ¶17; Exhibit 3.

#### Irreparable Injury

32. The second requirement for obtaining a temporary restraining order or a preliminary injunction is a showing of irreparable injury if the stay is not granted.
33. It is undisputed that, once a tree is removed and destroyed, it cannot be put back in place. This is already the unfortunate fate of over 55 of the approximately 200 trees marked for removal by Respondents on South Oyster Bay Road. See Affidavit of Tanya Lukasik ¶11; Exhibit 1.
34. The contracts have been awarded and the work is ongoing at this time.
35. The possible future planting of young saplings, which cannot reach the height and girth of the existing trees for decades, is speculative and should not be deemed a "replacement" of the trees removed. See Affidavit of Robert Oberlander ¶¶9-10; *Save Our Parks v. City of New York*, *supra*, at p.24.

36. If a preliminary injunction, together with a temporary restraining order is not issued immediately, a major goal of this Petition, stopping the destruction of trees along South Oyster Bay Road to allow for appropriate environmental review, will become moot.

Balancing of the Equities

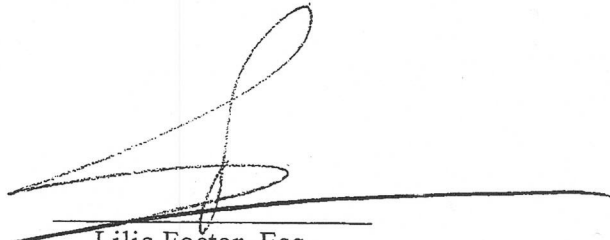
37. Given the fact that no amount of money damages can compensate Petitioners or the community for the trees that have been and are about to be destroyed, equity demands that the *status quo* be preserved while this proceeding is pending.
38. Granting the preliminary injunction does not mean that the County or NCDPW will not be able to proceed with this or future road improvement projects or that their contractors will lose the benefit of their contracts.
39. It will only create a window of time when all parties can seriously consider the means they are employing to achieve their ends and comply with the state law which requires environmental concerns to be part of this analysis.
40. Until this Court grants the relief requested herein, the beautiful trees of Nassau County are literally “under the axe”.

Notice to Respondent of Request for TRO

41. On October 9, 2014, in the afternoon, I faxed a letter notifying the Nassau County Attorney, Tri-State Paving, LLC and Laser Industries, Inc. of Petitioners’ intention to bring an Order to Show Cause before this Court between 12:00 PM and 2:00 PM on Friday, October 10, 2014. A copy of the letter and fax confirmations is attached hereto.
42. On October 10, 2014, in the morning, I called each of the Respondents (calling the County attorney’s office for the municipal Respondents and the contractor companies individually) to ensure that they received the above letter and were aware of the court appearance.

43. For the reasons stated above and in the annexed affidavits, exhibits and Verified Petition, the Court should issue the Temporary Restraining Order until it can hear and determine the motion for a Preliminary Injunction, and the Preliminary Injunction should be granted until the Article 78 Petition is heard and determined.

Dated: Commack, New York  
October 10, 2014



Lilia Factor, Esq.