Matter of Village of Islandia v Ball
2020 NY Slip Op 33931(U)
January 30, 2020
Supreme Court, Albany County
Docket Number: 905550/2017E
Judge: Peter A. Lynch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the matter of the Application of the

VILLAGE OF ISLANDIA,

Petitioner-Plaintiff,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

DECISION AND ORDER
Index No. 905550/2017E

-against-

RICHARD A. BALL AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, THE SUFFOLK COUNTY LEGISLATURE, SUFFOLK COUNTY, THE SUFFOLK COUNTY AGRICULTURAL AND FARMLAND PROTECTION BOARD, DAVID FEDUN, THOMAS HART III, PAUL MELNIK, MICHAEL CROTEAU, JOSIAH FOSTER, LLC, LAURE KLAHRE AND ADAM SUPERNANT, TWISTED PINE, LLC, BRIDGE A, LLC, HOWARD FLYNN AND DEBORAH SIEGEL, AND PAL-O-MINE EQUESTRIAN, INC.,

Respondents-Defendants.

Hon. Peter A. Lynch, J.

INTRODUCTION

This is a combined Article 78/Declaratory Judgment proceeding/action (hereinafter referred to as "proceeding", and the parties will be referred to as Petitioner and Respondents). Petitioner challenges the inclusion of lands within Agricultural District No. 3 in Suffolk County (hereinafter "agricultural district") pursuant to Agricultural and Markets Law (AML) §303-b, as violative of the statutory requirement that such lands be "predominantly viable agricultural land"

(AML §301 (7) and 303-b (1)), and violative of SEQRA (ECL Article 8 and 6 NYCRR Part 617).

FACTS[1]

Respondent PAL-O-Mine Equestrian, Inc. (hereinafter "PAL-O") maintains commercial equine operation offices at 829 Old Nicholas Road, which parcel is located in the agricultural district. Same Respondent is also the owner of non-contiguous properties located at 891 and 899 Old Nicholas Road. The premises at 891 Old Nicholas Road consists of a 1.03-acre parcel improved with a single-family dwelling, located in a Residential 1 District. The premises at 899 Old Nicholas Road consists of a .78-acre parcel improved with a two-family dwelling, located in a Residential MF District. Petitioner alleges that agricultural use is not permitted at 891 Old Nicholas Road, but acknowledges the sale of crops grown on site is permitted at 899 Old Nicholas Road.

Respondent PAL-O, along with nine (9) other applicants, applied for inclusion of its two (2) parcels, along with 11 others, a total of 13 parcels totaling 94.2 acres, into the agricultural district.

On April 27, 2017 the Suffolk County Agricultural and Farmland Protection Board ("Board") adopted Resolution No. 12-2017 to recommend inclusion of the PAL-O Mine properties in the agricultural district, and further recommended the application be designated an unlisted action. The Board identified the properties as "Part of Commercial Equine Operation: Horticulture; vegetables").

On May 4, 2017, the 13 parcels were described by tax map number in a single Short Form EAF, prepared by Lauretta R. Fischer, Chief Environmental Analyst of the Suffolk County

[1] As more fully appears below, Petitioner lacks standing to challenge the inclusion of lands located outside the Village jurisdiction, so the fact focus is on the PAL-O Mine parcels located within the Village.

Division of Planning and Environment. (See Amended Petition Exhibit "F")[2]. Same date, proposed Approval Resolutions were prepared for each owner (see Amended Petition Exhibit "E"). Except for the unique owner name and tax map number to distinguish each Resolution, the Resolutions are identical in form (i.e. each proposal is classified as an unlisted action, Suffolk County is designated Lead Agency, and a negative declaration should be adopted).

On June 20, 2017, the County Legislature conducted a public hearing on the proposed resolution to include the subject parcels into the agricultural district. Petitioner, through counsel and its Mayor, appeared at the hearing, described the parcels and argued that the PAL-O Mine parcels were not predominantly agricultural lands, pointed out SEQRA violations in the process, and objected to the resolution. Citing "Home Rule" protections, Mayor Dorman argued that Respondent PAL-O Mine's use of the property as an alleged boarding house to service the equine facility at 829 Old Nicholas Road violated the Village zoning ordinance, and that PAL-O Mine was wrongfully seeking to implement such use under the guise as agricultural lands. Legislator Nolan recognized "when a piece of land goes into an Ag District, their—the local zoning powers are diminished to some degree" (see General Meeting Minutes – June 20, 2017, p. 87, Lines 20-22).

On June 21, 2017, the Council on Environmental Quality ("CEQ") adopted Resolution 31-2017 to recommended that the Suffolk County Legislature ("Legislature") adopt the proposed Resolutions (see Amended Petition Exhibit "G"). In so doing, the CEG recommended that the PAL-O proposal be classified as an unlisted action and that a negative declaration issue thereon.

On July 25, 2017, the Suffolk County Legislature conducted a public meeting on the application. Respondent PAL-O Mine, through Counsel, submitted a "Memorandum" in support of the application and read the following opinion from the Department of Agriculture into the

[2] Part 1 and Part 2 of the EAF were completed, but Part 3 – Determination of Significance was left blank.

record, to wit: "the addition of these two properties to the Agricultural District is consistent with the intent of the AML to provide protection to all parcels that are part of a farm operation. The production of vegetables and their sale to the public, as well as the use of the residences on the property to provide housing for farm employees, are consistent with the definition of farm operation as identified in the AML 301-11" (see Legislative Meeting Minutes 7/25/17 p. 24, Lines 16-22)[3]. The Legislature then voted to adopt Resolution 1451-2017 to include the PAL-O Mine properties into the agricultural district (see Amended Petition Exhibit "H").

By letter dated July 26, 2017, the Suffolk County Director of Planning and Development notified the Commissioner that the Legislature passed a resolution to include all parcels in the agricultural district and included approval resolutions[4].

By letter dated August 16, 2017, Lauretta R. Fischer notified Petitioner that the PAL-O Mine properties had been included in Agricultural District No. 3 (see Amended Petition Exhibit "I") as of August 8, 2017. The record does not, however, contain a copy of Certification by the Commissioner of NYS Department of Agriculture and Markets ("Commissioner") to include the subject properties into Agricultural District 3[5].

AMENDED PETITION/COMPLAINT

Petitioner has pled seven (7) causes of action. In the *First Cause of Action*, Petitioner alleges that the PAL-O Mine properties do not consist of predominantly agricultural properties, and that Respondent's Adoption of a Legislative Resolution, and corresponding Certification, to include these properties in the Agricultural District violated AML §301 (7) and 303-b (1) and

[3] The record does not contain the "Memorandum" but does contain the April 19, 2017 e-mail from Robert Somers, Manager of Farmland Protection Unit of Ag & Mkts to attorney Snead dated April 19, 2017 containing the cited language (See Snead Aff. "Exhibit "8"). This Court notes the e-mail was issued in advance of the SEQRA review process.
[4] The Court notes that the transmittal letter did not reference the EAF as an attachment.
[5] The Court notes that the record does not evidence any independent SEQRA review by the Commissioner.

constituted an error of law. In the *Second Cause of Action*, Petitioner alleges that Respondent's failed to follow the procedure set forth in AML § 303-b (1), by, inter alia: failing to identify and assess the characteristics and use of the subject properties, i.e. by failing to describe the land. In the *Third Cause of Action*, Petitioner alleges that Respondent's exceeded their jurisdiction by accepting non-viable agricultural lands into the District, in violation of AML § 303-b (1). In the *Fourth Cause of Action*, Petitioner alleges Respondents' actions lacked substantial evidence, and constituted an abuse of discretion. In the *Fifth Cause of Action*, Petitioner alleges Respondents' violated SEQRA. In the Sixth *Cause of Action*, Petitioner seeks injunctive relief. In the Sixth *Cause of Action*, Petitioner seeks injunctive relief. In the Seventh *Cause of Action*, Petitioner seeks declaratory relief that Respondents' inclusion of the PAL-O Mine properties into the agricultural district was unlawful.

CPLR 3211 MOTION TO DISMISS BY RESPONDENT PAL-O MINE

Respondent moved to dismiss the Amended Petition on a myriad of grounds pursuant to CPLR Rule 3211 (a) (1), (2), (3), (5), (7) and (10). Respondent moved to dismiss the Fourth Cause of Action pursuant to CPLR Rule 3211 (a) (1) on a defense founded upon documentary evidence (see Snead Aff ¶ 108-114). Respondent moved to dismiss due to lack of subject matter jurisdiction pursuant to CPLR Rule 3211 (a) (2) grounded on ripeness. Respondent moved to dismiss due to lack of **standing** pursuant to CPLR Rule 3211 (a) (3)[6]. Respondent moved to dismiss pursuant to CPLR Rule 3211 (a) (5) but failed to raise any of the enumerated defenses listed in that section of the CPLR. Respondent moved dismiss pursuant to CPLR Rule 3211 (a) (7)[7] for failure to state a cause of action. Respondent moved to dismiss due to the absence of

[6] Standing and capacity "are treated as synonyms for the purposes of applying paragraph 3" (see CPLR Rule 3211, Practice Commentaries C3211:13).
[7] On review the alleged facts will be deemed to be true and Petitioner is entitled to every favorable inference which may be drawn from the alleged facts (see Rovello v. Orofino, 40 N.Y. 2d 633 [1976]; New York Practice 4th Ed.

necessary parties pursuant to CPLR Rule 3211 (a) (10).

CPLR 3211 MOTION TO DISMISS BY RESPONDENT BALL

Respondent Richard A. Ball, As Commissioner of the New York State Department of Agriculture and Markets (hereinafter "Commissioner") moved to dismiss the Amended Petition on a myriad of grounds pursuant to CPLR Rule 3211 (a) (3) (7) and §7804 (f) on the grounds that Petitioner lacks **capacity** to sue, lacks standing, and fails to state a cause of action.

CPLR 3211 MOTION TO DISMISS BY COUNTY RESPONDENTS

Respondents, the County of Suffolk, the Suffolk County Legislature, and the Suffolk County Agricultural and Farmland Protection Board (hereinafter "County") moved to dismiss the Amended Petition on a myriad of grounds pursuant to CPLR Rule 3211 (a) (2) (3) (7) and §7804 (f) on the grounds that the Court lacks subject matter jurisdiction, Petitioner lacks **capacity and/or** standing, and fails to state a cause of action

STATEMENT OF LAW

To the fullest extent practicable, the Court has addressed the substantive issues raised in the pleadings in distinct categories as follows:

DOCUMENTARY EVIDENCE

A motion to dismiss will only be granted "if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Fontanetta v. John Doe 1, 73 A.D. 3d 78, 83 [2d Dept. 2010]; see also, S & J Serv. Ctr., Inc. v. Commerce Commercial Group, Inc., 2019 NY Slip Op 09049 [2d Dept. 12/18/19]). Here, Respondent PAL-O Mine cites the Commissioner's determination that the premises at 829 Old Nicholas Road is a commercial equine operation, as evidence their actions were lawful. Frankly, that property is not

David D. Siegel §265). The Court notes that Respondents have not submitted affidavits or documents to conclusively establish Petitioner does not have legally sufficient causes of action (c.f. Jeanty v. State, 175 A.D. 3d 1073 [4th Dept. 2019]).

directly at issue in this proceeding. To the contrary, as more fully appears below, the critical documentary evidence in the record consists of an EAF which is barren of site-specific information, raising SEQRA compliance issues. Moreover, there is no documentary evidence that the Commissioner engaged in any independent SEQRA review. In fine, Respondent has not submitted documentary evidence determinative of the Petitioner's causes of action.

JUSTICIABLE ISSUE/RIPENESS

It is manifest that this Court does not have jurisdiction to issue an advisory opinion (see In Re Workmen's Compensation Fund, 224 N.Y. 13 [1918] [Cardozo, J.] where the Court held, "The function of the courts is to determine controversies between litigants...They do not give advisory opinions"). CPLR 3001 requires a justiciable issue. Here, Respondents have issued a definitive approval/certification to include the subject parcels in an agricultural district. These are final decisions which establish a commitment to agricultural development, and preemption of Petitioner's zoning power to regulate same lands (see Matter of Kuzma v. City of Buffalo, 45 A.D. 3d 1308, 1310 [4th Dept. 2007]; c.f. Matter of Town of Riverhead v. Central Pine Barrens Joint Planning Commn., 71 A.D. 3d 679 [2d Dept. 2010], where Court held the lack of a definitive decision rendered the challenge not ripe for review).

In Save the Pine Bush v. Albany, 70 N.Y. 2d 193 [1987], the City of Albany Common Council adopted an Ordinance creating a new zone classification called Commercial Pine Bush (C-PB), but "no particular land was set aside for possible development under the ordinance" (id., at 201). Notwithstanding the absence of a specific site or development project, the action was ripe for review. The Court held that the "creation of this classification" (C-PB) ... "constituted an 'action' within the meaning of SEQRA, in that it committed the City to future commercial development in the Pine Bush" (id. at 203). Here, inclusion of the lands in the agricultural

district did commit to future agricultural development, local zoning oversight by the Commissioner, as well as to a substantive change in real property tax assessment, all of which impact neighborhood character. Petitioners have thus alleged a cognizable injury that is ripe for review.

While Respondent has challenged the sufficiency of the pleadings, subject matter jurisdiction clearly exists in this case (see Manhattan Corp. v. H & A Inc., 21 N.Y. 3d 200, 203 [2013], where the Court held, inter alia: "Lack of jurisdiction should not be used to mean merely that elements of a cause of action are absent but that the matter before the court was not the kind of matter on which the court had power to rule"). It is the finding of this Court that the action/proceeding is ripe for review.

STANDING

With respect to standing, the Court notes that AML §303-b (3) (a) provides that hearing notice "**shall** be given in writing directly to those municipalities whose territory encompasses the lands which are proposed to be included in an agricultural district" (emphasis added). While this is not strictly a zoning case in the traditional sense, the action does have a direct impact on zoning issues, more fully discussed below. In zoning cases, the notice mandate "gives rise to a presumption of standing" but the party must still be in the "zone of interest to be protected by the statute" (see Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals, 69 N.Y. 2d 406, 413-414 [1987]; see also, Ctr. Square Ass'n v. City of Albany Bd. Of Zoning Appeals, 9 A.D. 3d 651 3d Dept. 2004]). In fine, the statutory notice mandate is a relevant but not determinative factor to resolve the standing issue.

In Soc'y of Plastics Indus v. County of Suffolk, 77 N.Y. 2d 761, 774 [1991 the Court recognized that to establish standing in land use and SEQRA actions, the claimant must show

direct harm different from the public at large (see Matter of Association for a Better Long Is. Inc. v. New York State Dept. of Envtl. Conservation, 23 N.Y. 3d 1, 8 [2014]). In Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297 [2009] standing was expanded to include injury to aesthetic and environmental well-being.

In Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency, 95 A.D. 3d 1539, 1541 [3d Dept. 2012], the Court held, inter alia: "in order to establish standing to challenge a SEQRA determination, a **municipality** must demonstrate how its personal or property rights, either personally or in a representative capacity, will be directly or specifically affected apart from damage suffered by the public at large...that it will suffer an injury that is environmental and not solely economic in nature" (emphasis added; internal citations omitted) (see also, Matter of Village of Woodbury, 154 A.D. 3d 1256, 1259 [3d Dept. 2017], where Court found municipal standing to challenge action that impacted ground water supplies).

Here, the record evidences that Petitioner has alleged direct harm, distinct from the public at large. First, Petitioner has alleged its ability to enforce its zoning ordinance to preserve the residential character of the relevant residential neighborhood is directly impacted by inclusion in the agricultural district, for zoning enforcement is superseded by the Commissioner in accord with AML § 305-a (1) (a) (see Matter of Ball v. Town of Ballston, 173 A.D. 3d 1304 [3d Dept 2019]; Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Bd., 13 A.D. 3d 846 [3d Dept. 2004]; and Town of Butternuts v. Davidsen, 259 A.D. 2d 886 [3d Dept. 1999]). Clearly, limitation on local zoning enforcement may impact the community or neighborhood character, as well as change in the land use intensity, including agricultural lands; these are considered factors in assessing environmental impact (6 NYCRR 617.7 (c) (1) (v) and (viii))[8]. Moreover, this claim

[8] Notably, the record contains the September 9, 2016 letter from the Commissioner directing it not to enforce its zoning powers relative to the premises at 829 Old Nicholas Road (see Respondent PAL-O Mine Motion Exhibit "5".

may be likened to the enlightened view of standing recognized in Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, supra.

Inclusion of the PAL-O Mine lands in the agricultural district also impacts the land value for tax assessment purposes pursuant to AML § 304-a. Economic injury, alone, is insufficient to establish standing for a SEQRA challenge (Soc'y of Plastics Indus v. County of Suffolk, supra. at 777). It is manifest, however, that erosion of the Petitioner's real property tax base impacts community growth and/or neighborhood character, i.e. cognizable environmental impacts (see e.g. Chinese Staff v. City of New York, 68 N.Y. 2d 359, 366 [1986]).

The record thus evidences that Petitioner has standing to challenge Respondents' action to include the PAL-O Mine parcels into the agricultural district. As distinguished, the record does not evidence any cognizable injury to establish standing to challenge lands situate outside the Village of Islandia territory (see In the Matter of Kenneth Hohman v. Town of Poestenkill et al 2020 Slip Op 00013 [3d Dept. 1/2/2020]).

CAUSE OF ACTION/LEGISLATIVE/MINISTERIAL ACTS

Respondent PAL-O MINE claims that the County Board, County C.E.Q. and County Legislature's E.P.A committee were all advisory bodies, and merely made recommendations to the County Legislature, i.e. recommendations lack finality and are not an action subject to an Article 78 challenge pursuant to CPLR §7801 (1) (See Sneed Aff. ¶81). The Court notes that the County C.E.Q. and County Legislature's E.P.A committee are not named parties. With respect to the Board, it is manifest it made a recommendation only. Motion Granted to dismiss the proceeding only to the extent Petitioner seeks relief from the County Board but is denied against

the remaining Respondents[9].

Respondent PAL-O Mine also claims that the first four causes of action should be dismissed on the grounds that Suffolk County's determination to include the PAL-O Mine Properties in the agricultural district was a **"legislative" act** which cannot be challenged pursuant to an Article 78 (See Sneed Aff. ¶80; Memo of Law Point IV). In so doing, Respondent alleges, "it is well settled that an article 78 proceeding is unavailable to challenge the validity of a legislative act", citing Mtr. of Save the Pine Bush v. City of Albany, 70 N.Y. 2d 193, 202 [1987][10] (see Respondent PAL-O MINE Memo of Law p. 18). Respondent neglected to cite the balance of the Court's decision upholding the SEQRA challenge to the legislative act therein (i.e. a zone change) (see id. at 200, where the Court held, inter alia: **"However, when the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an Article 78 proceeding").** In this Court's view, the Suffolk County Legislature's Resolution is subject to challenge by means of an Article 78. Moreover, Petitioners amended their pleadings to make this a hybrid proceeding and declaratory judgment action. Motion is denied.

Respondent PAL-O Mine argues that inasmuch as Respondents had jurisdiction to include the PAL-O Mine properties into the agricultural district, Petitioner failed to state a cause of action (see Sneed Aff¶ 97-106). Respondent fails to account for the fact that the Petitioner alleged the disputed properties do not meet the threshold definition of viable agricultural land defined by AML §301 (7) in the first instance. Petitioner further alleges that absent compliance

[9] The Court notes that Respondent erroneously seeks dismissal of the First Count, stating "since there are no allegations in the First Claim for relief other than the Board's alleged failures, the dismissal of the allegations against the Board requires dismissal of the First Claim against all Governmental Respondents." (Sneed Aff ¶90). Respondent fails to account for the allegations against the County Legislature (see Amended Petition ¶57, 58, and 60).

[10] Respondent incorrectly cites the case as 70 N.Y. 3d 193.

with AML §301 (7), Respondent exceeded its statutory jurisdiction under AML §303-b (1) to include Respondent PAL-O Mine's land in the agricultural district. In fine, Petitioners allege the existence and violation of a statutory mandate, as well as corresponding injury, establishing a cause of action. Motion Denied.

Respondent PAL-O Mine moved to dismiss the Fourth Cause of action pursuant to CPLR Rule 3211 (a) (7). Petitioner alleges that the PAL-O Mine property was not viable agricultural land and that inclusion in the agricultural district was an abuse of discretion, arbitrary and capricious, and lacked substantial evidence. Such allegations establish a cause of action pursuant to CPLR § 7803 (3). It is manifest, however, that the hearings below were informational, not quasi-judicial proceeding where sworn testimony is taken; as such, judicial review is not based on substantial evidence under CPLR § 7803 (4). Motion denied.

Respondent PAL-O Mine claims that the Commissioner's issuance of a certification under AML §303-b (5) is **ministerial** and no cause of action exists under CPLR § 7803 (3) (see Snead Aff ¶124). SEQRA **"actions"** include "the issuance…of a…**certificate**" (ECL §8-0105 (4) (i); 6 NYCRR 617.2 (aa)) (emphasis added). ECL §8-0105 (5) (ii) provides, however, that "actions do not include…official acts of a ministerial nature, involving no exercise of discretion". A "ministerial act means an action performed under a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license" (6 NYCRR 617.2 (w)).

Here, once the County Legislature adopted the Resolution to include the land into the agricultural district, it was required to submit the Resolution to the Commissioner (AML §303-b (4)). On receipt, the Commissioner is required to certify "**whether** the inclusion of predominantly viable agricultural land as proposed is **feasible** and **shall serve the public**

interest" (emphasis added). Only "if the commissioner certifies that the proposed inclusion of predominantly viable agricultural land within a district is feasible and in the public interest, the land shall become part of the district immediately upon such certification" (emphasis added) AML §303-b (6). The Commissioner's certification of feasibility and public interest is a condition precedent to the inclusion of lands within the district. Absent such certification, the land simply does not become part of the district[11]. By its terms, the statute requires the Commissioner to exercise judgment and discretion in determining feasibility and public interest (see Pius v. Bletsch, 70 N.Y. 2d 920, 922 [1987], where Court held issuance of building permit in conjunction with site plan approval involved "case-by-case judgments" and was not a ministerial act; c.f. Atlantic Beach v. Gavalas, 81 N.Y. 2d 322 [1993], where court held permit issuance was ministerial; see also, Matter of Ziemba v. City of Troy, 37 A.D. 3d 68 [3d Dept. 2006]).

By way of comparison, Certificates of Environmental Compatibility and Public Need (Public Service Law§§121) is listed as a Type II action (6 NYCRR 617.5 (a) (c) (35)[12]). The omission of a certificate of feasibility and public interest under AML§ 303-b (5) (6) from the Type II list is meaningful (compare McKinney' Statutes §363).

It is the determination of the Court that that the certification process under AML§ 303-b (5) (6) is not a ministerial act, and it is subject to SEQRA compliance. Motion denied.

SEQRA

Respondent PAL-O Mine moved to dismiss the Fifth Cause of action pursuant to CPLR Rule 3211 (a) (7). Respondents assert that Petitioner's allegation they failed to take a **"hard**

[11] Since the inclusion of the land into the agricultural district necessitates two approvals, i.e. County Legislative approval and Commissioner Certificate, it is manifest that the Commissioner is an "involved agency" (6 NYCRR 617.2 (s)).
[12] While the SEQRA regulation also references PSL Articles VIII and X, such articles have been repealed.

look" at the environmental impact is "false on the facts, and incorrect on the law, such that a failure to plead a cognizable claim for relief is established with regard to SEQRA" (see Snead Aff. ¶125-127).

Judicial review of a claimed SEQRA violation is limited and must be reasonable. In Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y. 3d 416 [2017], the Court succinctly stated the review standard:

> Judicial review of SEQRA findings is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion, quoting CPLR 7803 [3]). This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively. Courts review an agency's substantive obligations in light of a rule of reason. Importantly: Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA. The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal. . . . [T]he Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue or permits the courts to second-guess the agency's choice. In short, **we 'review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.** (internal quotations and citations omitted) (emphasis added);

(See also, Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297, 306-307 [2009]; Chinese Staff & Worker's Assn v. New York, 68 N.Y. 2d 359, 363 [1986]; Jackson v. New York State Urban Dev. Corp., 67 N.Y. 2d 400, 416-417 [1986]; In the Matter of Adam Bruner et al v. Town of Schodack Planning Board et al., 2019 NY Slip Op

08753 [3d Dept. 12/5/19]; Matter of Anderson v. Lenz, 27 A.D. 3d 942, 944 [2006]). Petitioners alleged Respondent failed to take a hard look at the relevant areas of environmental concern (see Amended Petition ¶ 85-107).

Petitioner has alleged Respondents failed to comply with the "hard look" test. Moreover, Petitioner challenges the sufficiency of the Short form EAF, due to the failure to complete Part 3 thereof. In Matter of Wellsville Citizens for Responsible Dev., Inc. v. Walmart Stores, 140 A.D. 3d 1767, 1768 [4th Dept. 2016], the Court held that the failure to complete Part 3 did not nullify the negative declaration "because the Town Board addressed each of the potentially moderate-to-large impacts identified in part 2 of the EAF. Here, part 2 of EAF was completed, but no area of environmental concern was identified as "moderate to large". The subject EAF it is barren of any site-specific information, other than the tax ID number and property owner identification. On its face, the EAF begs the question of whether Respondent had sufficient information to identify the relevant areas of environmental concern and take a hard look at them. Moreover, there is nothing in the record to evidence that Legislature made a reasoned elaboration of the basis for its determination to issue a negative declaration. Petitioner has alleged legally sufficient facts to establish a SEQRA violation, i.e. failure to identify and take a hard look at environmental impacts and failure to set forth a reasoned basis for its determination to issue a negative declaration.

Frankly, the minutes of the County Legislature's public hearing and meeting do not address the EAF, nor set forth any basis for the issuance of the negative declaration. While the Board and CEQ recommended the action be designated an unlisted action and that a negative declaration issue thereon, such determination may not be delegated by the Lead Agency (see

Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y. 2d 674 [1988]; Save Pine Bush v. Planning Bd of Albany, 96 A.D. 2d 986 [3d Dept. 1983] Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D. 2d 484 [2d Dept. 1982]). This Court notes that while an uncoordinated review may be conducted on an unlisted action (6NYCRR 617.6 (b) (2) (4)), there is nothing in the record to evidence that the Commissioner, as an involved agency, conducted any independent SEQRA review (see Matter of Kuzma v. City of Buffalo, 45 A.D. 3d 1308 [4th Dept. 2007], where the Court recognized SEQRA noncompliance necessitated vacatur of the challenged approvals).

Respondent PAL-O Mine claims that the Legislature's adoption of the Resolution to include the PAL-O Mine properties in the agricultural district does not constitute an **"action"** under SEQRA in the first instance (see Snead Aff ¶¶ 128-132). This claim is wholly belied by the record demonstration that Respondents identified the proposal as an unlisted action and issued a negative declaration thereon. Notably, neither local legislative actions nor Commissioner certificates are listed as Type II actions (6 NYCRR 617.5 (37)).

Respondent PAL-O MINE claims that the Resolution did "not commit the County to any decision in the future" (Snead Aff ¶131). I disagree. Inclusion of the lands in the agricultural district did commit the properties to future agricultural development, local zoning oversight by the Commissioner, as well as to a substantive change in determining assessment for real property tax purposes (see In Save the Pine Bush v. Albany, supra.).

SEQRA actions are defined, inter alia, as: "agency planning or policy making activities that may affect the environment and commit the agency to a definite course of future decisions" and "adoption of ...resolutions that may affect the environment", or "any combination" thereof

(6 NYCRR 617.2 (b) (2) (3) (4); see also, ECL§8-0105 (4)) (emphasis added). Clearly, inclusion of the subject parcels in the agricultural district may impact future development of the lands, and correspondingly the environment (emphasis added).

Respondent PAL-O MINE's reliance on Matter of Humane Socy of U.S. v. Empire State Dev. Corp., 53 A.D. 3d 1013 [3d Dept. 2008] and Pure Air & Water, Inc. v. Davidson, 246 A.D. 2d 786 [3d Dept. 1998], to support its contention that inclusion in the agricultural district is a Type II action is misplaced. In Matter of Humane Socy of U.S, supra.,the Court held that issuance of a grant for improvements that "involve the construction or maintenance of on-farm buildings to permit the treatment of manure and raising additional livestock" was exempt from SEQRA as "agricultural farm management practices", which is specifically listed as a Type II action (6 NYCRR 617.2 (a) (c) (3)). Here, inclusion in, not management of, an agricultural district is at issue, and that is not listed as a Type II action.

In Pure Air & Water, Inc. v. Davidson, supra., the Court held that the issuance of an "opinion" relative to "the soundness of its [property owner] manure management program" (id., at 786) was "not a license or permit to act." Accordingly, the Court held the opinion was not an action under SEQRA. The Court also held that even if it were an action, it was exempt as an agricultural management practice (6 NYCRR 617.5 (a) (c) (5). Here, as distinguished, while the Board's recommendation was akin to an opinion and not actionable, the Legislative approval was final and actionable. Motion denied.

NECESSARY PARTIES

As an offshoot to their erroneous claim that an Article 78 Proceeding cannot be used to challenge a legislative act, Respondent PAL-O Mine argues that every County Legislator is a necessary party (see Respondent's Memo of Law p. 18-19). As aforementioned, the Article 78 is

a proper means to challenge the Legislative act at issue, it is manifest that the individual legislators are not necessary parties. Motion denied.

CAPACITY

With respect to the claimed lack of capacity, Respondent's reliance on City of New York v. State of New York, 86 N.Y. 2d 286 [1986] and its progeny, including Mtr. of World Trade CTR LITIG, 30 N.Y. 3d 377 [2017] is misplaced. In each case, the court recognized "the traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation" (City of New York, supra. at 289; World Trade, supra. at 384) (underscored emphasis added). Here, Petitioner has not filed a constitutional challenge. Rather, Petitioner seeks to protect its zoning powers to preserve the community character as a relevant area of environmental concern through compliance with SEQRA under § ECL 8-0107, and the procedures set forth in AML §303-b (3). Petitioner has the right to do so under article IX §2 of the New York Constitution (see DJL Rest. Corp. v. City of New York, 96 N.Y. 2d 91, 96-97 [2001], where Court recognized local zoning power to regulate land use; Riverhead v. New York State Dep't of Envtl. Conservation, 193 A.D. 2d 667 [2d Dept. 1993]; Village Law §1-102 (5); c.f. Matter of Town of Verona v. Cuomo, 136 A.D. 3d 36, 41-42 [3d Dept. 2017], where Court recognized home rule power exception to capacity issue, but held Town failed to prove settlement agreement impinged on home rule powers).

Respondents reliance on Black Brook v. State, 41 N.Y. 2d 486 [1977]and Matter of Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D. 3d 756 [3d Dept. 2011], appeal dismissed 17 N.Y. 3d 947, is also misplaced. In Black Brook, the Town sought a declaration that the enactment of the Adirondack Park Agency violated the home rule provisions of article IX of

the State constitution. While the court found that local zoning was subordinate to the APA comprehensive plan, it recognized the Town's capacity to sue. In Matter of Blue Line Council, the Court did recognize that "a municipality lacks capacity to challenge a state agency's interpretation of statutes and regulations where...the result impacts the municipality in its governmental capacity" (id. at 758). The Court held, however, that the Petitioners "do have capacity to raise their claims insofar as they argue that the 2008 amendments violated the home rule protections contained in article IX of the NY Constitution" (id. at 759), albeit the Court dismissed the proceeding on the merits.

Even if Petitioner had not included the Commissioner as a party, Petitioner clearly has capacity to commence this action against the County Respondents (see Matter of Vil. Of Chestnut Ridge v. Town of Ramapo, 45 A.D. 3d 74, 81 [2d Dept. 2007]). Moreover, if the underlying legislative act is determined to be in violation of SEQRA, the Certificate is effectively null and void for AML requires both local legislative approval and a certificate. Frankly, had the Petitioner omitted the Commissioner as a party, the action would have been subject to a motion to dismiss for failure to name a necessary party under CPLR Rule 3211 (a) (10). In fine, the Petitioner has capacity to bring this action/proceeding.

CONCLUSION

For the reasons more fully stated above, Respondents' motion to dismiss the within action/proceeding as against Respondents' THE SUFFOLK COUNTY AGRICULTURAL AND FARMLAND PROTECTION BOARD, DAVID FEDUN, THOMAS HART III, PAUL MELNIK, MICHAEL CROTEAU, JOSIAH FOSTER, LLC, LAURE KLAHRE AND ADAM SUPERNANT, TWISTED PINE, LLC, BRIDGE A, LLC, HOWARD FLYNN AND DEBORAH SIEGEL, is ***Granted***. Respondents' motion to dismiss the within action/proceeding

as against Respondents' RICHARD A. BALL AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, THE SUFFOLK COUNTY LEGISLATURE, SUFFOLK COUNTY, AND PAL-O-MINE EQUESTRIAN, INC., is ***Denied.***

With respect to the remaining Respondents, the Answer is due within 20 days of the Petitioner's service of this Decision and Order.

This memorandum constitutes both the decision and order of the Court.

Dated: Albany, New York
January 30, 2020

PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.

01/30/2020

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