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At a Term of the Supreme Court of the State of New York, held in and for the County of Lewis at Lowville, New York on February 1, 2007.

Present: Hon. Joseph D. McGuire, Justice

In the Matter of the Application of

THE ADIRONDACK COUNCIL, ROSE PETTIT, BRADFORD PETTIT, HELEN KRUSPER, BRUCE KRUG, JANETTE PEEK and GERALD SMITH,

Petitioners,

for a Judgment pursuant to CPLR Article 78 and CPLR 3001,

-against-

COUNTY OF LEWIS AND THE BOARD OF LEGISLATORS FOR THE COUNTY OF LEWIS,

Respondents.

DECISION & JUDGMENT /ORDER

Index No. CA2006-00486
RJI No. S24 2006-0122

McGuire, J.

Petitioners have applied to the Court for an Order and Judgment (1) nullifying and vacating Local Law No. 7 recently adopted by Respondent Board of Legislators for the County of Lewis (the Board) related to the Board's plan to provide an extensive all terrain vehicle (ATV) trail throughout Lewis County (2) preliminarily enjoining

Respondents and their agents, servants and employees from carrying out or having anyone else carry out on their behalf any further actions in reliance on the authorization of ATV use on County lands, including the installation of signage or trail improvements, pending preparation of an Environmental Impact Statement (EIS) or Generic EIS (GEIS); (3) permanently enjoining Respondents until such time as all applicable laws are followed; (4) directing the Board to prepare an EIS or GEIS pursuant to requirements of the state Environmental Quality Review Act (Environmental Conversation Law Article 8) (SEQRA); (5) awarding Petitioner costs, disbursements and attorneys fees; and (6) granting such other and further relief as the court may appear to be just and equitable.

BACKGROUND

Respondent County of Lewis (the County) owns and maintains 57 parcels of land known as 'County Reforestation Lands' (the Lands), natural forests which are protected. The Lands contain existing truck trails for emergency usage, along with logging roads.

In February 2006, the Board commenced environmental review of its proposed action to pass a local law allowing ATVs on the Lands. The Board initially determined the action to be an "unlisted" one, and

declared itself as lead agency. In April 2006, the Board changed the proposed action from "unlisted" to "Type I". On May 2, 2006, the Board completed a draft 'Full Environmental Assessment Form' (FEAF), and, on June 6, 2006, adopted and filed Local Law Number 2 -2006 entitled: "A Local Law Establishing Regulations for the Operation of All-Terrain-Vehicles (ATVs) on Existing Truck Trails, Logging Roads and Similar Trials Presently Located in Certain Reforestation Lands". Local Law 2 followed previous local laws that were enacted beginning in 2000 which opened certain county roads to ATVs and was followed by companion Local Laws Numbered 3, 4, 5 of 2006. The Board determined it erred in adopting Local Law 2-2006 without "formally acknowledging the completion of its environmental review under SEQRA..." (Local Law 7-2006). The Board passed Local Law 7-2006 to remedy its perceived omission in Local Law 2-2006, with the language of the two laws being identical, and Local Law 7-2006 also repealed Local Law 2-2006. The Board issued a Negative Declaration after reviewing the Draft FEAF; review of other criteria set forth in 6 NYCRR 617.7; and review of letters from agencies it had contacted regarding the action, Adirondack Park Agency (APA) and Department of Environmental Conservation (DEC), U.S. Department of Fish & Wildlife.

After a public hearing on November 8, 2006, the Board passed Local Law 7-2006 .

Ultimately, trails and roads on 33 of the County's 57 Reforestation Lands were opened to ATV usage. The Respondents intended to institute uniform signing, prohibit rogue trails, establish speed limits, and require supervision of children under the age of 16. Additionally, several local municipalities also opened some of their local roads to ATVs, and the County had already opened several County Roads to ATV travel.

In the Fall of 2006, Petitioners commenced this hybrid action challenging the County's actions. Petitioners' Notice of Verified Petition, dated October 3, 2006, was replaced by the Amended Verified Petition dated December 14, 2006. That Amended Petition thus became the one for consideration in this case (*St. Lawrence Explosives Corp. v. Law Bros. Contracting Corp.*, 170 AD2d 957 [4th Dept. 1991]). Respondents submitted their Verified Answer on or about January 8, 2007. Affidavits were also submitted.

Petitioner Adirondack Council is a not-for-profit environmental organization with a membership of 18,000 working since 1975 "to ensure the ecological integrity and wild character of the Adirondack

Park." Petitioner Rose V. Pettit is a resident of the Town of Greig, Lewis County. Petitioner Bradford S. Pettit, is a resident of Arvada, Colorado, but resides with his mother, Petitioner Rose Pettit, when he visits her in Lewis County, and is legal owner of the Town of Greig property. Petitioner Helen Krusper is resident and land owner in Brantingham, Town of Greig, Lewis County. Petitioner Bruce Krug is a resident and land owner in the Town of Leyden, Lewis County. Petitioner Janette Peek is a resident and land owner in the Town of Watson, Lewis County. Petitioner Gerald A. Smith is a resident and land owner in the Town of Denmark, Lewis County, and also an ornithologist. All of the individual Petitioners are members of the Adirondack Council; and, collectively, the Council and Individuals are referred herein as 'Petitioners'.

Petitioners' Arguments

Petitioners claim the Board violated substantive and procedural requirements of SEQRA and pertinent rules and regulations (6 NYCRR, 617ff). They also claimed, initially, the Board had no power to reopen the SEQRA review process, ultimately passing Local Law 7-2006, while Petitioners' hybrid original Petition challenging Local Law 2-2006 was pending. That contention was withdrawn at argument.

According to Petitioners, the Local law provides for general

delegation of authority to an appointed Conservation Foreman for further designations authorizing ATVs on any County land, which delegation, Petitioners claim, is an unconstitutional delegation of Legislative authority.

Petitioners also claim the Board violated SEQRA procedurally by not engaging in a coordinated review; not engaging in detailed review of all environmental impacts by failing to prepare an EIS to consider potential environmental impacts to lands, and cumulative impacts from other related local laws (opening certain County Roads to ATVs). Petitioners claim the Board avoided public review by not preparing an EIS. Petitioners argue the Board, as lead agency, failed to strictly comply with SEQRA and coordinate with the Adirondack Park Agency and Department of Environmental Conservation or the U.S. Department of Fish & Wildlife, and failed to provide adequate project description and information, especially regarding the other related local laws regulating ATVs. Petitioners also claim the Board also failed to respond to matters raised at public hearings and thus failed properly explain its Negative Declaration as to environmental impacts.

Petitioners also claim the Board violated SEQRA substantively by not taking a hard look at environmental concerns, not giving a

reasoned elaboration, and not requiring an EIS. Petitioners argue that the Board's findings as to Criteria for Determining Significance were conclusory and "do not refer to evidence in the record."

The individual Petitioners claim injuries, in that they live near lands opened to ATVs and have concerns about personal safety and environmental threats, including noise, dust and environmental destruction. Petitioners argue the Local Law Number 7, "must be voided" until such time as an EIS covering the "entire action is complete."

In support of their substantive and procedural claims, Petitioners argue that the Board considered the ATV issue as if "in a vacuum" and failed to recognize the important environmental aspects of, and to, the Tug Hill Region as to its "municipal water supply, wildlife and plant habitat, as key resources supporting forest industry, farming, recreation and tourism and traditional land uses such as hunting and fishing." Petitioners claim Respondents failed to adequately review the true economic impact of ATV usage but assumed opening trails would be an economic benefit. Petitioners argue the Board failed to consider the potential adverse environmental impacts and harm to Petitioners' rights in their haste to open up County lands to ATVs.

Petitioners claim that, by having treated each of the Local Laws authorizing ATVs on County Roads and Lands as "independent" actions for SEQRA purposes, "the Board failed to consider the entire action and impermissibly segmented its SEQRA review."

Petitioners Rose V. Pettit, and her son Petitioner Bradford Pettit, are both landowners in the County, and she stated in her Affidavit that she is in close conjunction to 10 of the 33 County Lands opened to ATVs. She stated that she, her family and friends enjoy using the County Lands to hike, snowshoe and enjoy the wildlife. She expressed concern about potential physical danger to herself about walking the dirt roads to the County Lands if increased numbers of ATVs will then be traveling the roads. She also expressed concern about the noise, water and air pollution, destruction of habitat and wetlands, that will affect her property and the County Lands.

Petitioner Helen Krusper submitted her Affidavit in which she detailed ATV riders traveling down the road "near my home in a very unsafe manner." According to Ms. Krusper, the ATV riders use the road to access the County Lands nearby. Ms. Krusper swore that she was "harmed by the dust created by ATV use near my home and disturbed by the noise..." and claimed, though 120 feet from the road, she cannot

carry on conversations in her home with windows open due to ATVs.

Petitioner Gerald A. Smith, a county land owner, stated in his Affidavit that he and his family used the "County Reforestation Lands for hiking, birdwatching, and other nature study." He opined that, as an ornithologist, he felt ATV usage on the County Reforestation Lands would "seriously reduce the availability of relative undisturbed habitats in the County."

Petitioner Bruce Krug, also a county land owner, detailed in his Affidavit his concerns that the County failed to comply with SEQRA requirements, and such failure may lead to damage to County Lands, and the use of such lands by future generations. All other Petitioners expressed similar concerns, including Petitioner Janette M. Peek.

Petitioners claim the Board's actions in opening the County Reforestation Lands to ATVs is only "one part of the County's much broader plan to authorize ATV use on an extensive, connected trail system throughout the County, including portions of the County that extend into the Adirondack State Park." Petitioners claimed the Board avoided the public review process and environmental concerns by not preparing an EIS.

Respondents' Arguments

Respondents put forth several affirmative defenses, some standard and some specific to this case. They alleged that Petitioners failed to state a cause of action; that Petitioners lack standing to maintain the Article 78 proceeding against Lewis County; that Lewis County Local Law Numbers 3, 4, 5 and 7 of 2006 were duly adopted according to lawful procedure, and were Legislative actions for which there is a rational basis in the record; that the Respondents took the requisite "hard look" in accordance with the SEQRA regulations and any segmentation of reviews in this case were proper and permissible.

Respondents aggressively argued that Petitioners lack standing to maintain the proceeding, especially as the case is not a zoning one, and Petitioners have no automatic standing due to proximity alone.

As to the merits, the County claims it desired to encourage tourism, with the resulting economic benefits to the communities, yet maintain control over ATV use on County properties. The Respondents point out that they only opened 33 of the 57 County Reforestation areas and did so after several reviews, studies and public hearings. The County also pointed out that it removed one parcel from the list to be opened, Site 13, after a contacted agency (DEC) provided data of an

endangered bat.

Additionally, at oral argument, Respondents pointed out the County Forester has no authority to open additional County lands, and is authorized to open only existing trails.

Respondents claim they are not introducing new impacts, but seeking to regulate already existing illegal ATV usage that they have been unable to control because of the large areas of land. The Reforestation Lands are mainly Red Pine; and under County Law 219, "the essential purpose of such lands is to ensure that natural forest lands are protected and preserved for the current and future benefit of County residents."

Respondents also claim the Board did undertake SEQRA review as a Type 1 action and provided notice to APA, DEC, U.S. Fish & Wildlife, and N.Y. Natural Heritage program, advising them of the project and requesting review of the proposal. Specifically, Respondents claimed such reviews were directed towards "...the presence of threatened and endangered species and wildlife preserves.". Respondents also allege Petitioners attended and participated in most, if not all, of the public hearings. Respondents also point out that four public hearings were held on Local Laws 2 and 7, while SEQRA only requires two.

Respondents claim that, when the Board recognized the incompleteness of the procedures in Local Law 2-2006, absence of a negative declaration under SEQRA, and the Board remedied same by a more complete environmental review under Local Law 7-2006.

Respondents claim the Board, in its October 19, 2006 meeting, received public comment, reviewed the EAF and deliberated over the 20 categories of potential environmental impacts. The Board then determined there were no potentially large impacts and adopted a Negative Declaration. According to Respondents, they complied with the SEQRA review requirements. Respondents also claim that, rather than violating County Law §219, that law specifically enabled the County to pass the local laws in dispute here.

Respondents also dispute Petitioners' claims as to segmentation regarding the Local Laws as to ATV operation on County Reforestation Land and on County Roads. Respondents claim each law is subject to different State Legislation and legal criteria. Respondents deny they have any intention to open a County wide ATV trail system and point out only 2 of the 33 parcels of Reforestation land adjoin County roads.

Respondents also claim, in the eleven month review process, they took a "hard look" at the environmental impacts. The Respondents also

claim they received responses from the environmental agencies contacted, and the only potential problem was the presence of a rare Indiana Bat, but on a County lot not opened for ATV usage.

DISCUSSION

1. Failure to state a cause of action.

When there is a challenge to the validity of a pleading, as in a CPLR 3211[b] motion to dismiss a defense, the pleading should be liberally construed, and the pleading party is entitled to the benefit of every reasonable intendment of the pleading; and, if there is any doubt as to the adequacy of the pleading, it should be allowed to proceed. (CPLR 3211). Failure to state a cause of action is a defense that can be determined by reference to the challenged pleading. Here, the pleading claims relief under a specific body of procedural law (CPLR Article 78). One of the four questions of inquiry for an Article 78 proceeding is whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (CPLR 7803). The Court notes that "[a]legislative enactment is presumed to be valid and the party seeking to invalidate the provision has the heavy burden... " of demonstrating that the statute is invalid (*Burke v. Denison*, 218 AD2d 894).

Nonetheless, if in violation of the SEQRA rules, adoption of a local law following improper review is considered to be done erroneously and in violation of law.

The detailed Petition here, as amended, asserts sufficient claims to be more than adequate to withstand any challenge on pleading propriety, and it sufficiently alleges a cause of action.

2. Standing

Respondents have raised the issue of Petitioners' standing, that is their right to challenge the Local Laws in question, a claimed jurisdictional defect. "Standing is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action. The two-part test for determining standing is a familiar one. First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." (*N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 NY3d 207).

Unless the laws in question define classes entitled to challenge the law, applicable case law is used to determine that issue. Here, the laws

do not define classes entitled to standing.(see *Soc'y of Plastics Indus. v. County of Suffolk*, 77 NY2d 761). "For generations, New York courts have treated standing as a common-law concept, requiring that the litigant have something truly at stake in a genuine controversy." (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801).

The Court of Appeals has dealt with the standing of an "organized group" challenging under the State Environmental Quality Review Act, and the group's claims to generalized environmental degradation.(*Soc'y of Plastics Indus.* ,77 NY2d 761) The Court there differentiated between governmental action indirectly impacting a wide area versus such action directly impacting particular sites, and affecting its immediate neighbors. Here two individual Petitioners, the Pettits, have detailed what they consider individual harm; and, additionally, both are members of the Petitioner organization.

Petitioners bear the burden of establishing standing in these proceedings; and, normally to challenge under SEQRA, Petitioners "must demonstrate that they will suffer . . . injury in fact (i.e., an injury that is different from that of the public at large), and that the alleged injury falls within the zone of interest sought to be promoted or

protected by the statute under which the governmental action was taken."(*Heritage Coalition v. City of Ithaca Planning & Dev. Bd.*, 228 AD2d 862 appeal denied 88 NY2d 809; see also *McCartney v. Dormitory Auth.*, 5 AD3d 1090 [4th Dept. 2004] appeal denied 3 NY3d 603). A "tenuous" and "ephemeral" harm is insufficient to trigger judicial intervention (*Rudder v. Pataki*, 93 NY2d 273). "The existence of an injury in fact -- an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action" *(Society of Plastics Indus.* 77 NY2d 761, 772). The Court must decide if Petitioners have sustained an injury (*Mahoney v Pataki*, 98 NY2d 45, 52).

However, the Court notes that the Court of Appeals has held in SEQRA challenges, "parties whose property is either the subject of the challenged administrative determination or lies in close proximity to the subject property are the beneficiaries of a presumption that they are adversely affected by the alleged SEQRA violation and, accordingly, need not allege a specific harm (see, Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency, supra; Matter of Stephens v Gordon, 202 AD2d 437).)". (*Long Island Pine Barrens Soc'y v. Planning Bd.*, 213 AD2d 484).

Petitioners still must demonstrate their property lies in close proximity to the properties affected by the law. The map of reforestation lands and petitioners properties attached to Affidavit of Renee Beyer reveals that Helen Krusper's lands actually adjoin Reforestation Lands; Petitioner Bradford Pettit's property is in the Adirondack Park and is in very close proximity to several Reforestation Land parcels; and Rose V. Pettit's property is also close to County Reforestation Land. The map also demonstrates that the properties of Janette Peek, Gerald Smith and Mr. Krug are separated from Reforestation Lands by several other land parcels.

Petitioners Krusper, the two Pettits, and Smith have property in proximity to the County Reforestation Lands as shown by Respondents' own exhibit, and are entitled to the presumption of harm from the alleged SEQRA violation. Additionally, all four Petitioners highlighted their specific use of specific County Reforestation Lands, and how that usage has been harmed or is at risk of harm in their submitted Affidavits. Accordingly, they have demonstrated standing.

However, neither Mrs. Peek, nor Mr. Krug, detailed how they have suffered individual injuries from the alleged SEQRA violation separate from potential harm towards the general public. Petitioners Krug and

Peek have set forth in their Affidavits their opinions and participation in the process related to adoption of the laws, but they both state generally their belief that there will be harm to the Lands without specifying their particular attachment to the Lands, in contrast to the other individual Petitioners. Petitioner Peek stated at the June 6, 2006 meeting of the Legislators that she and her husband had documented via video and photographs of damage to County Lands allegedly done by ATVs. However, such damage is a general harm, not one particular to her, and is not adequate to give her individual standing. "That an issue may be one of "vital public concern" does not entitle a party to standing. Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures, both of which have functioned here. By contrast to those forums, a litigant must establish its standing in order to seek judicial review."(*Soc'y of Plastics Indus.*, 77 NY2d 761, 769). Therefore Mrs. Peek and Mr. Krug have failed to carry their burden as to standing.

The standing issue as to Adirondack Council is governed by particular rules as well.

> "In the area of associational or organizational standing, the applicable principles are embodied in three requirements (see, Matter of Dental Socy. v Carey, 61 NY2d 330). First, if

> an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury."
>
> (*Soc'y of Plastics Indus.*, 77 N.Y.2d 761, 775).

Both Rose Pettit and Bradford Pettit are members of the Adirondack Council; and, thus, the organizational committee is entitled to standing via the harm demonstrated by its individual members. According to the Petition, the other Petitioners are also members of the Adirondack Council. The Adirondack Council is a not-for-profit environmental organization whose stated purpose is to protect the lands of the Adirondack Park. It has demonstrated its organizational interests are germane to the SEQRA challenge here. The claims and relief sought by Petitioners are not such that the individual Petitioners' participation in the proceedings are critical, beyond their separate claimed individual injuries. The Court determines the organizational Petitioner Adirondack Council has met its burden to demonstrate standing (see *Committee to Preserve Brighton Beach & Manhattan*

Beach v. Council of New York, 214 AD2d 335 appeal denied 87 NY2d 802.)

> "This court concludes that the interests of justice require recognition of petitioners' standing. Assuming, *arguendo*, that the petition is meritorious, no valid purpose would be served by denying standing. If there is merit to this claim and these individuals and their association are deemed to lack standing, who would be the appropriate party to bring this claim. Certainly the public interest would be ill-served if no one were found to have appropriate standing to challenge the possible alienation of [Reforestation Land]"

(*Roosevelt Island Residents Ass'n v. Roosevelt Island Operating Corp.*, 801 N.Y.S.2d 242; 2005 N.Y. Misc. LEXIS 1078).

3. Delegation of Authority

The Record makes clear, as was argued by counsel, that the Conservation Foreman was hired to manage the County Lands to be opened, and that he had no authority to open new trails, roads, or lands, other than those opened by the Board in the applicable law. Respondents' counsel also made clear, in oral argument, that neither the law, nor the Respondents, envisioned the law as providing authorization to grant the Conservation Foreman such broad reaching future authority. This part of Petitioners' claim must fail.

4. SEQRA

a. Background

SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making; thus the statute mandates that "[social], economic, and environmental factors shall be considered together in reaching decisions on proposed activities" Under SEQRA and its implementing regulations, a lead agency is defined as the governmental entity "principally responsible for carrying out, funding or approving" the proposed action (Environmental Conservation Law 8-0111 [6]; 6 New York Code Rules and Regulations 617.2 [v]). It is this agency that must initially determine whether a proposed action may have a significant effect on the environment (ECL 8-0109 [2], [4]; 6 NYCRR 617.2 [v]). If no significant effect is found, the lead agency may issue a "negative declaration," identifying areas of environmental concern, and providing a reasoned elaboration explaining why the proposed action will not significantly affect the environment (6 NYCRR 617.6 [g])
(*Coca-Cola Bottling Co. v. Board of Estimate*, 72 NY2d 674).

The SEQRA regulations classify proposed actions into three categories: Type I, which are most likely to require the preparation of an EIS; Type II, which have been determined not to have a significant impact on the environment; or Unlisted, which are neither Type I or II (6 NYCRR § 617.4; § 617.5). An agency, including the Board, is prohibited from funding or moving forward on a Type I or Unlisted action until either a Negative Declaration has been issued, or a draft EIS has been completed or accepted (6 NYCRR 617.3). An agency is

directed to use an Environmental Assessment Form [EAF], which is designed, ". . . to assist it in determining the environmental significance or non-significance of actions. A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment." (6 NYCRR 617.2[m]).

In determining whether an agency properly carried out its review of the environmental impact of a project, the record must show that the lead agency "identified the relevant areas of environmental concern, took a 'hard look' at them [citations omitted] and made a 'reasoned elaboration' of the basis for its determination." (*Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 21-23 [4th Dept. 1996] aff'd 76 NY2d 428).

> "It is well settled that judicial review of the SEQRA process is limited to whether "'a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' * * 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" ... '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, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence.'"(internal cites omitted). Thus, this issue for this Court is 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 cites omitted). "Where an agency fails to take the requisite hard look and make a 'reasoned elaboration', or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled."

(Matter of City of Rye v. Korff, 249 AD2d 470, 471-472, appeal den., 92 NY2d 808; quoting *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416-417).

Courts have made clear on many occasions that strict, not substantial, compliance with SEQRA is required to ensure there is meaningful environmental review (*King v. Saratoga County Bd. of Supervisors*, 89 NY2d 341; *Matter of Martin v Koppelman*, 124 AD2d 24).

"SEQRA mandates the preparation of an EIS when the proposed project may include the potential for at least one significant environmental effect (internal cites omitted). "Because the operative word triggering the requirement of an EIS is 'may', there is a relatively low threshold for the preparation of an EIS" (internal cites omitted). Moreover, SEQRA regulations themselves provide that a Type I action, such as the proposed action here, carries the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS (see, 6 NYCRR 617.4 [a][1])."

(*Silvercup Studios, Inc. v. Power Auth.*, 285 AD2d 598 appeal den., 97 NY2d 605; 6 NYCRR § 617.6[a][2]).

"The heart of SEQRA is the EIS process (internal cites omitted). The EIS is the last step in the SEQRA review process. It is a detailed statement setting forth, inter alia, the long- and short-term environmental impacts of the proposed action, the alternatives to the proposed action, and mitigation measures proposed to minimize the environmental impact, and must include HN6"copies or a summary of the substantive comments received by the agency" and "the agency response to such comments" (ECL 8-0109 [2]; see, 6 NYCRR 617.9 [b] [8])."

Citizens Against Retail Sprawl v. Giza, 280 AD2d 234, 237-238 (4th Dept. 2001); see rel proceeding CARS v. Giza, 5 AD3d 1109.)

Initially, the Board here determined the proposed action would be classified as an 'Unlisted' one, which would have required only the completion of the short form EAF. Upon counsel's sound advice, that action was later formally upgraded to a Type I action requiring a full EAF (Exhibit 7 Respondents Official Transcript 1, dated July 5, 2006). While the proposed project was classified as a Type I action, which "...carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS..", it is not a per se requirement for a Type I action (*Dunk v. City of Watertown*, 11 AD3d 1024 [4th Dept. 2004]). In May 2006, the Board informally commented that a "negative declaration will be prepared." A 'Negative Declaration' negated the need for an EIS. Only two of the three parts of the EAF were completed, as there was no finding by the Board of

large environmental impact which would require Part III completion. The EAF reflected no long or short term cumulative effects to the proposed action, and "speculative" as to potential future development or other related activities.

However, and significantly, in light of the County's declared plan to create a Countywide Trail system, as a Model system for the state, as reflected in various comments and activities, the completion of only the short form EAF for opening of the County roads under separate SEQRA review raises some concerns.

The EAF completed by the Board for the County Land project determined the project would not have significant impact on the environment, and thereafter formally issued the Negative Declaration. The records submitted show the entire County Reforestation Lands opened would be 1900 acres, but the Board apparently calculated the total project area to be no more than 55 acres, with opened trail length of 45 miles. The 33 County Reforestation Lands to be opened involved five separate townships: Lyonsdale (14), Greig (13 sites), Pinckney (3), New Bremen (2) and Montague. The three latter townships, Pinckney, New Bremen and Montague, were also the municipalities where the County opened County Roads to ATVs in a companion case previously

decided by this Court (see *Krug, Peek and Smith v County of Lewis;* Lewis County Index Number Index No. CA2006-00460.

The Court does not review the findings to determine if the Board's determinations under the SEQRA review were the "correct" ones, but rather to determine if the Board truly took the required 'hard look' at the proposed project in reaching its determination of 'Negative Declaration.'(*Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400).

The EAF indicated the proposed action would not create any additional demand for community services, such as police. The Court is not exactly clear on how a proposed project that the County hopes will bring thousands of new ATVs to 45 miles of County trails, not to mention yet the numerous miles of proposed connected trails, will not call for increased law enforcement oversight. Petitioners presented evidence that, within the confines of the currently existing ATV program, 135 summons were issued in 2005 for operation of ATVs on closed roads, or public lands, out of 228 complaints made.

In Part II of the EAF, the Board declared the proposed action would not result in any physical change to the project site. Again, it appears questionable how, with a proposal of thousands of new ATVs

using dirt and gravel trails and roads, some physical change to the lands would seem inevitable. The Board did find there would be impact on Air Quality, but then gave no further description. Somewhat surprisingly, the Board found the proposed project would have no impact on Aesthetic Resources (Part II, Question 11). It is this area that the individual petitioners herein have all highlighted as the adverse effects of opening the forest lands to large numbers of ATVs. In Question 13 the Board marked there would be an impact on Open Space and Recreation opportunities, but not as a negative feature for current users, but as a benefit to potential ATV trail users. The Board also found there would be increased gas consumption in Lewis County, and "Temporary noise/odors associated with the use of the trails by ATVs."(Questions, 16 & 17). The Board also found there would be no impact on public health; and, while there would be "impact on growth and character of the community or neighborhood", the Board offered no explanation positive or negative as to that impact. In a truly surprising answer the Board, in question 19, found there would be no public controversy related to the potential adverse environmental impacts. Having found no 'potential large impact' in Part II, the Board was not required to complete Part III of the EAF.

b. Segmentation

Respondents disputed Petitioners' claims they improperly segmented the SEQRA review process. They also argued that, even if there was a County plan to develop a Countywide trail system, the County could not undertake a SEQRA review as to roads opened by individual municipalities (Towns and Villages), as the County had no control over such entities or their roads.

"Segmentation is dividing the environmental review of an action in such a manner that the various stages are addressed as though they were independent, unrelated activities, needing individual determinations of significance (6 NYCRR 617.2 [gg]), is contrary to the intent of SEQRA (6 NYCRR 617.3 [k] [1])."(*Schultz v. Jorling*, 164 AD2d 252 appeal denied 77 NY2d 810).

> Under SEQRA, a project cannot be divided into segments to avoid the appropriate SEQRA review by asserting that no individual segment of a proposed project would by itself require environment review, where the entire project, including the sum of the segments would. (Internal cites omitted) in support of this principle. This rule is logical and proper as the impact of an action must be considered as an organic whole. Although these cases clearly assert that segmentation to avoid environmental review is improper, and was improper in the instances before them, the cases do not set forth a clear test defining what is and what is not a segmentation and how the principle is to be applied.

(*East Fifties Neighborhood Coalition v. Lloyd*, 2006 NY Slip Op 52301U, 8-9 (Supreme Court, NY Co. 2006).

Under SEQRA "the entire set of activities or steps must be considered the action" (*Town of Coeymans v. City of Albany*, 284 AD2d 830, 835 appeal denied 90 NY2d 803; 6 NYCRR 617.3 [g]).

> "When considering an 'action,' a lead agency's initial responsibility is to determine whether it falls within the definition of a 'Type I action,' a 'Type II action' or an 'unlisted action' (internal cites omitted). An action or project which has been listed as a Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (internal cites omitted), and requires the preparation of a full EAF in connection with the determination of significance (internal cites omitted)... It is the total area to be affected by the proposed project which is the key threshold for SEQRA In making its determination of significance, the Town Board, as lead agency, was required to look at "impacts which may be reasonably expected to result from the proposed action and compare them against [the] illustrative list of criteria provided in 6 NYCRR 617.11 [now 6 NYCRR § 617.7(c)(1)]" (internal cites omitted). This list contains "indicators of significant effects on the environment"(internal cites omitted). It includes actions that: 1) result in substantial adverse change in existing air quality, ground or surface water quality, traffic or noise levels (6 NYCRR 617.7[c][1][i]); 2) result in a substantial increase in the potential for erosion, flooding, leaching or drainage problems; (6 NYCRR 617.7[c][1][i]); 3) involve the removal or destruction of large quantities of vegetation or fauna or have substantial adverse impacts on a threatened or endangered species of animal or plant (6 NYCRR 617.7[c][1][ii]); 4) create a material conflict with a community's current plans or goals as officially approved or adopted (6 NYCRR 617.7[c][1][iv]); 5) impair the character or quality of important aesthetic resources of existing

community or neighborhood character (6 NYCRR 617.7[c][1][v]); or 6) constitute a substantial change in the use of agricultural land (6 NYCRR 617.7[c][1][vii]).

(Avy v. Town of Amenia, 2004 NY Slip Op 50972U, 8 [N.Y. Misc. 2004] affirmed by Matter of Avy v. Amenia, 2006 N.Y. App. Div. LEXIS 2844 [N.Y. App. Div. 2d Dep't, Mar. 14, 2006]).

"A project has been improperly segmented if the segmented project has no independent utility, no life of its own or is simply illogical when viewed in isolation." (*Stewart Park & Reserve Coalition v. Slater*, 352 F.3d 545 [2d Cir. 2003] *cited in East Fifties Neighborhood Coalition v. Lloyd*, 2006 NY Slip Op 52301U, 8-9 [Supreme Court, NY Co. 2006]). The Board opened County Roads to ATVs specifically so the ATVs could access continuous trails. The proposal to open County Lands discussed creation of several trail heads, but as the Reforestation Lands are not all contiguous road travel, whether via County or Municipal Roads, would be a necessary requirement. In the summer 2006, the Board issued Negative Declarations on its SEQRA review (short forms EAF) of opening several County Roads(Official Record, No. 7, 8).

Respondents, specifically in oral argument, seemed to dispute Petitioners' claims that the County was attempting to enact a County wide ATV trail system that would trigger a full SEQRA review of the entire project. Such a denial is questionable in light of the March 7,

2006 Board declaration that it wished to develop a County-wide recreational multi-modal [*sic*] trail system, and a Lewis County Master Plan (see Exhibit I, Amended Verified Petition). The October 13, 2006 letter from the Lewis County Recreation Trails Department (Exhibit L, Amended Verified Petition), also highlights the County's efforts to establish such a county wide ATV trail system, and would be "one of the first Countywide ATV trail systems in NY and can serve as a model across the state." The Department also stated how the County hoped to work with adjoining counties to establish "the first regional trail system, which could establish the beginning of the State's first complete ATV system." Minutes of planning meetings also revealed Respondents planning to work with private ATV clubs to assist in getting private landowners to open private lands to connect the ATV trails.

Respondents, in their Memorandum, claimed the Board in its April 3, 2005 meeting properly segmented the proposed actions of opening County Lands and County Roads to ATVs. The Record reveals the Board set a May 2, 2006 date for a public hearing on the issue of opening County Lands; and, "at that time, the Board could act on a negative SEQRA resolution." The Record provides no explanation, other than lack of time, for a complete SEQRA review as to the proposals to open both

County Lands, and County Roads to ATVs. There is also no explanation as to what the term 'negative SEQRA resolution' implies, in that it was put out to the Board over a year before there was to be a public hearing on the issue, and a year before the EAF would be completed. Based on the Board's subsequent actions, a logical interpretation would be that the Board, in April 2005, was looking to move forward after it issued a 'Negative Declaration' as to SEQRA review in May 2006.

Respondents argue; and, it is true, that "segmented review is permissible where the lead agency believes that it is warranted under the circumstances, provided that the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment."(*Concerned Citizens for the Env't v. Zagata*, 243 AD2d 20,appeal denied 92 NY2d 808). What Respondents failed to add in their Memorandum is that "[a]dditionally, the related actions must be identified and discussed to the fullest extent possible."(*Concerned Citizens*, 243 AD2d). The Record also does not reveal, explain, or clarify why, other than a claimed lack of time, full SEQRA review of both the County projects was not feasible, and segmentation therefore warranted. Nor in any part of the Record is there any discussion as to how the local municipalities actions in opening local roads to ATVs could

be or should be considered as part of the overall County plan to develop a Model Countywide ATV trail system. Based upon the stated goals of such all encompassing ATV trails, Respondents would seem to be hard pressed to explain why the two plans are "functionally independent and not part of an integrated development plan"; and, thus, a "cumulative analysis" of the two projects not required (*Settco, LLC v. N.Y. State Urban Dev. Corp.*, 305 A.D.2d 1026 [4th Dept. 2005] appeal denied 100 NY2d 508).

> "Segmentation is disfavored, based on two perceived dangers. 'First is the danger that[,] in considering related actions separately, a decision involving review of an earlier action may be 'practically determinative' of a subsequent action . . . . The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review" (internal cites omitted).
>
> (*Forman v. Trs. of State Univ. of N.Y.*, 303 AD2d 1019, 1019-1020 [4th Dept. 2003])

Respondents cited *Maidman v. Inc. Vill. of Sands Point*, 291 AD2d 499, in support for segmentation. The *Maidman* Court allowed for segmentation but highlighted "[i]n connection with the subsequent SEQRA review, the Board considered the club's master plan as a whole,

and the impact of increased traffic on roads both inside and outside the boundaries of the property due to the expansion of the club's facilities was subject to a full review."(*Maidman*, 291 AD2d 499). Again, there has been no proof that the Board here considered the County's "master plan" to develop the trail system. Respondents have failed to present proof beyond conclusory statements that the segmented SEQRA review was functionally equivalent to a full SEQRA review.

> Courts have made clear that "in Type I actions there is a relatively low threshold for requiring an EIS and one should be prepared when there is a potentially significant adverse effect on the environment (internal cites omitted). Indeed, 6 NYCRR 617.12 (a) (1) states that a Type I action carries with it the presumption that it is likely to have a significant effect on the environment and will require an EIS. More importantly, an EIS is at the heart of SEQRA and is specifically designed to ensure that environmental issues are injected directly and openly into government decision making."
> (*Miller v. City of Lockport*, 210 AD2d 955 [4th Dept. 1994] appeal denied 85 NY2d 807).

c. Hard Look

In reviewing the Record, the Court's objective is "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(*Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The Court must determine whether an

agency has given sufficient consideration to an environmental issue to constitute the required "hard look" (*Akpan v. Koch*, 75 NY2d 561). Over time it has become clear that "each case must be judged on its own merits, and the courts have chosen not to delineate the precise limits of the "hard look doctrine" (*Residents of Bergen Believe in Environment & Democracy, Inc. v. County of Monroe*, 159 A.D.2d 81, [4th Dept. 1990] app. den. 77 NY2d 803). What is key is that the evidence must demonstrate that "the lead agency took a "hard look" at the possible environmental effects of the proposed project."*(Gordon v. Rush*, 299 AD2d 20 affirmed 100 NY2d 236).

> The Court's review "is tempered in two respects. First, an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (internal cites omitted). The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal (internal cites omitted). Second, the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives (see, e.g., ECL 8-0109 [8]). 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, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (internal cites omitted)." (*Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 417).

Respondents claim the Court must resolve any reasonable doubts in favor of the Agency, and cite *Henrietta v. Department of Environmental Conservation*, 76 AD2d 215 [4th Dept. 1980]. However, *Henrietta* involved a substantial evidence question, and the quote put forth by Respondents was not made by the *Henrietta* Court in the context of whether the Agency there took a "hard look."

The Record reveals the Respondents sought information from interested agencies as to 'threatened and endangered species', plant or animal, within the 33 parcels of Reforestation Lands to be opened, or whether the proposed trails would be near or crossing wetlands or protected rivers. The Record also includes the hundreds of signatures of both residents and non-residents who signed Petitions to the Board, requesting County Roads and Lands be opened to ATVs. Also actively involved were ATV clubs. In opposition to opening the land were Petitioners, and other non-parties, both County and non-County residents.

Reviewing the eleven 'Criteria for Determining Significance' (Official Record No. 11), the recurring theme is limited to no environmental impact due to the expected "relatively low volume of ATV traffic overall." Respondents support their Negative Declaration with

statements such as "[t]he Action may trigger an increase in the number of persons visiting the Project site...but the increase in ATV traffic volume is not expected to be significant...". The Respondents also minimize potential environmental impacts by declaring such impacts, such as air and noise pollution, already exist due to unregulated ATV usage. Respondents found no potential hazards to human health, claiming ATV speed and usage would be regulated, as opposed to unregulated usage now in effect. Encouraging tourism and recreation within the County cannot be disparaged. But, what is somewhat troublesome is Respondents' argument that, rather enforce regulations and laws currently in effect, as to ATVs, it may be easier and better for the local economy to make such illegal use legal.

The Court is concerned by segmentation, the Respondents treating the opening of County Roads (and municipalities opening their roads) separately from the opening of Reforestation Lands. The Court finds a lack of a suitable explanation of the Board's reasons for segmentation, and a demonstration that such segmented review is no less protective of the environment. The Board issued 'Negative Declarations' in its SEQRA reviews of the County Roads to be opened, but again each SEQRA was done in the limited context of one or two roads together.

The Board's claim that it took the required "hard look" at potential environmental impacts is negated by not only its segmentation, but by its repeated refrain of expected low ATV usage. In its draft business plan, Respondents considered the trail system as a potential revenue source and calculated up to 80,000 ATV permits. (Official Record, No. 2). Granted, it is a "rough figure" put forth for potential state funding, but that figure, or even half, is more than low to moderate ATV usage. The Record reveals the Respondents implementing its proposed plan of creating a Countywide, first in the State, Model ATV trail system. If that is the Legislators' desire; and, thus, the desire of the populace, that is fine. There nothing improper or illegal about such a plan, despite the Petitioners', and others', opposition. However, when the time came for the required SEQRA review and analysis, the wide ranging plan of extensive connected ATV trails morphed into a 'Negative Declaration' due to the modest and low volume of expected ATV traffic, on the limited County Reforestation Lands. The Reforestation Lands encompass 1900 acres, and would have 45 miles of ATV trails. But the Respondents failed to address the other miles of County Roads, Municipal Roads, and other private trails that will all make up part of the Countywide trail system. Opening the County Reforestation Lands to ATVs is the "first

step, and the next step forward would be to connect the dots."(Official Record, No. 1). Additionally, there was no proof provided that the interested agencies contacted for their input were made aware of the overall purposes, or extensive nature, of the Respondents' project. It is this Court's interpretation of the SEQRA process that Respondents' limited review in the narrow context put forth by the Respondents in their 'Negative Declaration' is contrary to the clear legal import, and surely the extended intent and spirit of the SEQRA process, a process requiring strict compliance. Placing this project in its proper context, as envisioned by the Respondents, would lead to a fuller, and thus proper, environmental review. Both State and Federal lawmakers have emphasized their concern for the needs of future generations by enactment of detailed procedures for close examination of potential problems arising from our present desires to use our land. Time to conduct such thorough review should not be an enemy where environmental issues are concerned.

Considering the Record as a whole, it appears to the Court that the Board failed to "identify the relevant areas of environmental concern, [failed to take] a 'hard look' at them, and [failed to provide] a 'reasoned elaboration' of the basis for its determination" (*see Matter of Pyramid*

Co. of Watertown v. Planning Bd. of Town of Watertown, 24 AD3d 1312 [4th Dept. 2005] appeal dismissed 6 NY3d 844).

Conclusion

Accordingly, in light of the foregoing, it is

ADJUDGED AND DECLARED, that Petitioners Bruce Krug and Janette Peek lack standing, and it is ORDERED their Petition is Dismissed, and it is further

ADJUDGED AND DECLARED, that the Respondents did not make an impermissible delegation of authority in Local Law 7-2006, and it is ORDERED the Petition is Dismissed as to that issue, and it is further

ADJUDGED AND DECLARED, that the Respondents did not comply with the provisions of the State Environmental Quality Review Act in taking Action to adopt Local Law 7-2006, and it is further

ADJUDGED AND DECLARED, that Respondents' failure to properly comply with the State Environmental Quality Review Act in its issuance of a Negative Declaration and in adopting Local Law 7-2006 was a determination made in violation of lawful procedure and was affected by an error of law, and it is further

ORDERED AND ADJUDGED, that the Petition is Granted, and Local Law 7-2006 adopted by Respondents be and the same hereby is

declared null and void, and it is

ORDERED that Respondents are enjoined from carrying out any further actions in reliance on Local Law 7-2006 pending compliance with the State Environmental Quality Review Act, and it is

ORDERED, that the foregoing determination is without costs.

E N T E R

Dated: March 12, 2007
Lowville, NY

Joseph D. McGuire, J.S.C.

The Court has considered the following pursuant to CPLR 2219:

On behalf of the Petitioners, Notice of Verified Petition, dated October 3, 2006; Verified Petition, dated October 3, 2006, with Exhibits A - O; Affirmation of Marc S. Gerstman, Esq. in Support of Petition, dated October 3, 2006;Notice of Amended Verified Petition, dated December 14, 2006; Amended Verified Petition, dated December 14, 2006, with Exhibits A - M attached; Affidavit of Petitioner Rose Pettit, dated September 27, 2006; Affidavit of Bradford Pettit, dated September 27, 2006; Affidavit of Helen Krusper, dated September 27, 2006; Affidavit of Bruce Krug, dated September 27, 2006; Affidavit of Janette M. Peek, dated September 27, 2006;Affidavit of Gerald Smith, dated September 26, 2006; Affidavit of Dr. Barrie Gilbert, dated December 14, 2006; Affirmation in Support of Motion by Jacalyn R. Flemming, dated December 14, 2006; Memorandum of Law in Support of Verified Petition, dated October 3, 2006; Memorandum of Law in Support of Amended Verified Petition.

On behalf of the Respondents, Verified Answer (of Respondent County, dated November 20, 2006; Memorandum of Law in Support of The County of Lewis Respondents' Answer With Objections in Points of Law, dated November 20, 2006;Verified; Official Transcript of Proceedings with Exhibits 1-11;Affidavit of Richard J. Graham Esq., dated November 20, 2006; Affidavit of Renee Beyer, with Exhibits, dated November 20, 2006; Affidavit of Rodney Buckingham, dated November 20, 2006; Memorandum of Law of Respondents, dated November 20, 2006; Petitioners' Reply Memorandum of Law, dated January 18, 2007; Affirmation of Richard Graham, Esq., dated January 8, 2007, received January 24th; Supplemental Transcript with Exhibits A-K; Verified Answer to Amended Verified Petition, dated January 8, 2007, received February 1, 2007. The Court also heard oral argument from counsel.