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STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

FRIENDS OF LONG KILL (FOLK), by its President GAYLE WASSENAAR, and GAYLE WASSENAAR Individually and SCOTT R. DOCHAT,

Petitioners,

DECISION AND ORDER
RJI No. 45-1-2006-0879
Index No. 2006-1612

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York,

-against-

THE PLANNING BOARD OF THE TOWN OF CLIFTON PARK and KAIN DEVELOPMENT, LLC,

Respondents.

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC
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In this CPLR Article 78 proceeding, petitioners, Friends of Long Kill (FOLK), an unincorporated association of nine members who live immediately adjacent or within 500 feet of the property involved in this litigation, and Gayle Wassenaar and Scott Dochat, two members of FOLK and owners of property bordering the site, contest actions taken by the Planning Board of the Town of Clifton Park Planning Board (Planning Board) approving a 16 lot single-family residential subdivision proposed by Respondent, Kain Development, LLC (Kain).

Factual Background

Kain owns an 18.69 acre undeveloped, residentially zoned parcel in the Town of Clifton Park which, though landlocked, has a deeded right of way to Longkill Road. On three sides, the parcel is bordered by single-family residential developments. In September 2004, Kain made application to the Planning Board for preliminary approval to subdivide its parcel into 18 single-family building lots ranging from 20,078 square feet to 56,337 square feet. After modifications and refinements were made to the proposal, Kain's engineers and principals met with the Planning Board in September and December 2005. During the December review, FOLK submitted written opposition raising environmental concerns, including wetland destruction, the elimination of forested habitat, and storm water and groundwater management problems and asked the Board to require an environmental impact statement (EIS). Upon finding the application complete, the Planning Board held public hearings on February 14, 2006 and April 11, 2006. At both hearings, FOLK's attorney, its individual members, and others presented information detailing the alleged adverse impacts that the development, if built, would have on the environment, specifically the exacerbation of the existing groundwater and drainage problems many of the adjoining residences experienced, problems so serious that many of the residences

have sump pumps running almost continuously to keep their basements free from water.

On June 9, 2005, the Planning Board released at 18 page written response addressing all comments made at the public hearings and also comments submitted in writing. On June 13, 2006, it reviewed a revised subdivision plan which reduced the proposal from 18 lots to 16 lots and shortened the proposed access road by 250 feet. At that meeting, the Planning Board concluded that the subdivision will not significantly impact the environment and issued a negative declaration pursuant to the State Environmental Quality Review Act (SEQRA). In doing so, it utilized a standard preprinted EAF form provided for in 6 NYCRR § 617.20 (Appendix A) and supplemented Part 3 with a two page addendum discussing impacts identified in Part 2 of the EAF and, as well, incorporating the Board's June 9, 2006 written response to the concerns expressed by FOLK and others.

The Article 78 Proceeding

Petitioners challenge the negative declaration of the Planning Board as both substantively and procedurally flawed and seek judgment annulling it and compelling the court to direct the Planning Board, inter alia, to require Kain to prepare an environmental impact statement (EIS). In its substantive challenge, FOLK alleges that the Board did not "thoroughly analyze" the areas of environmental concern identified in the EAF to determine if any of them significantly adversely impacted the environment. 6 NYCRR § 617.7 (b) (3). In its procedural challenge, FOLK contends that the Planning Board, in making its determination, did not in writing give "a reasoned elaboration" for its decision of nonsignificance. 6 NYCRR § 617.7 (b) (4). Further, FOLK contends that the decision was preordained and the public vote a mere formality because the preprinted form, though adopted by vote taken June 13, 2006, was actually dated May 23,

2006. FOLK also contends that the Board violated Town Law § 276 in holding public hearings on the subdivision application before having made its negative declaration. In short, FOLK contends that the Board did not take the mandatory "hard look" at the environmental impacts which the build out of this subdivision would have on wetlands onsite, particularly vernal pools, which are a habitat for wood frogs and other wildlife and serve as reservoirs for excess water when the ground is saturated; the destruction of mature forest and wetlands; the effect on the area's high water table specifically resulting from the developer's plan to raise the grade of most lots by approximately three feet with fill material; and the loss of aesthetic and archeological resources. These impacts, petitioners contend, require an EIS, a document which State environmental regulations law requires when a project has been found to present "at least one significant adverse environmental impact". 6 NYCRR § 617.7 (a) (1).

In their answer, the Planning Board denies FOLK's claims and asserts a defense that FOLK, as an unincorporated association, lacks standing to pursue the legal challenge. Kain likewise opposes the petition. In short, respondents contend that the Planning Board conducted a full and complete and comprehensive review that met all SEQRA mandates.

FOLK's Standing to Sue

To establish standing to maintain a proceeding under SEQRA, parties seeking judicial review must show "(1) that they will suffer an environmental 'injury that is in some way different from that of the public at large' and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by the statute under which the governmental action was taken". Matter of Blue Lawn, Inc. v County of Westchester, 293 AD2d 532, 533 (2nd Dept 2002), lv denied 98 NY2d 607 (2002); Ziemba v City of Troy, __AD3d__, 827 NYS 2d 322 (3rd Dept

2006). "...[S]tanding requires an actual legal stake in the outcome...(citation omitted) or, in other words, an injury in fact worthy and capable of judicial resolution (citation omitted)." Matter of LaBarbera v Town of Woodstock, 29 AD3d 1054, 1055 (3rd Dept 2006). When a civic group, like FOLK, seeks to maintain a special proceeding, the court must consider whether one or more of its individual members would have standing to sue. Ziemba, supra. Owners of property immediately adjacent to a proposed subdivision have standing. Reed v Village of Philmont Planning Bd., 34 AD3d 1034 (3rd Dept 2006). Since, individual petitioners, Wassenaar and Dochat, are abutting owners and FOLK members, FOLK benefits from their standing and are entitled to party status. The Planning Board's first affirmative defense lacks merit and is dismissed.

SEQRA Compliance

The court's review of a SEQRA determination and the municipal agency's obligations were recently restated in Matter of Anderson v Lenz, 27 AD3d 942, 943-944 (3rd Dept 2006), lv denied 7 NY3d 702 (2006) as follows:

> [the court's] review of respondent's SEQRA determination "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'" (Apkan v Koch, 75 NY2d 561, 570 [1990], quoting CPLR 7803 [3]). Respondent's obligations as lead agency are equally clear - namely, to identify the relevant areas of environmental concern, take a hard look at such areas and make a reasoned elaboration of the basis for its determination (see Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986]). Assuming respondent fulfills its obligations in that regard, our inquiry is at an end, for it is not the role of this Court to second-guess respondent's determination and/or substitute our judgment for the conclusions it has reached (see Matter of Mersen v McNally, 90 NY2d 742, 752

[1997]; Apkan v Koch, supra at 570).

Since the proposed subdivision is an unlisted action, an EAF must be prepared to assist the reviewing agency "in determining the environmental significance or nonsignificance of actions". 6 NYCRR § 617.2 (m). Although the court recognizes that "strict, not substantial compliance [with SEQRA] is required" to "insure that agencies will err on the side of meticulous care in their environmental review", Matter of King v Saratoga County Bd. of Supervisors, 89 NY2d 341, 347-348 (1996), the "'substantive obligations under SEQRA must be viewed in light of a rule of reason' and agencies have 'considerable latitude in evaluating environmental effects and choosing among alternatives'". Eadie v Town Board of Town of N. Greenbush, 7 NY3d 306, 318 (2006); quoting Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 (1986).

The Planning Board required Kain to prepare a long form EAF and an extensive administrative record was developed during its review of the subdivision. In the court's assessment, the Planning Board fulfilled its responsibilities first in identifying areas of environmental concern and giving those issues the requisite "hard look". The Planning Board had this particular subdivision under review for 18 months before declaring it had sufficient information to issue a negative declaration and to grant preliminary approval. This administrative record documents that FOLK, its members, and others were afforded adequate opportunity to present their arguments and as importantly, the record demonstrates that the Planning Board gave due consideration to the information presented and considered in a meaningful manner the relevant areas of environmental concern. Thus, the Planning Board satisfied its SEQRA obligation to identify and take a hard look at the salient environmental

issues.

More problematic is whether the Planning Board in making its negative declaration satisfied the final requirement of setting forth a "reasoned elaboration" for its decision. Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone, 100 NY2d 337, 350 (2003). The negative declaration resolution adopted was indeed generic and pro forma. Yet, "[A]lthough it is the preferred practice that the Board set forth more of a reasoned elaboration for the basis of its determination", such defect will not require annulment if the "particular record is adequate [for the court] to exercise [its] supervisory review to determine that the Board strictly complied with SEQRA procedures (citations omitted), and the degree of detail with which each factor must be discussed varies with the circumstances of each case". Matter of Ellsworth v Town of Malta, 16 AD2d 948, 950 (3rd Dept 2005). In a circumstance like this, the court can delve into the minutes of the Board's meetings and the supporting documentation before deciding whether the Board complied with SEQRA. Matter of Reed v Village of Philmont Planning Bd., 34 AD3d 1034 (3rd Dept 2006) [Though record did not contain detailed transcript of Planning Board's deliberations and text of negative declaration was "rather terse", the court was able to review detailed meeting minutes, and comments in the record from the consultants and others in determining that SEQRA was satisfied].

As noted earlier, extensive proceedings were held by the Planning Board in considering this subdivision application. The record of those proceedings permits the court to find that "[T]he wealth of documentation contained in the record sufficiently demonstrating the reasons for [the Planning Board's] actions". Ellsworth, supra at 950. In conclusion, the Planning Board's negative declaration was not arbitrary or capricious and did not constitute an abuse of

discretion and is supported by substantial evidence.

The court has considered FOLK's remaining arguments, including that Town Law § 276 required the Planning Board to make its SEQRA determination before holding public hearings on the subdivision application, and finds they lack merit.

The petition is dismissed, without costs.

This memorandum shall constitute both the decision and the order of the court. All papers, including this decision and order, are being returned to the Planning Board's counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

DATED: March 16, 2007
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice