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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE ASSOCIATION FOR A
BETTER LONG ISLAND, INC., et al.,

Appellants,

-against-

No. 38

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
February 12, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 38, Matter of
2 Association for a Better Long Island.

3 Counselor, you want any rebuttal time?

4 MR. ISLER: Yes, Your Honor. I'd like to
5 reserve four minutes.

6 CHIEF JUDGE LIPPMAN: Four minutes, sure,
7 go ahead.

8 MR. ISLER: May it please the court. My
9 name is Frank Isler. I'm a member of the firm of
10 Smith, Finkelstein, et cetera, in Riverhead, New
11 York. I represent the appellants, the Town of
12 Riverhead and the Riverhead Community Development
13 Associa - - -

14 CHIEF JUDGE LIPPMAN: Counselor - - -

15 MR. ISLER: - - - Agency.

16 CHIEF JUDGE LIPPMAN: - - - will you be
17 able to - - - to challenge this later?

18 MR. ISLER: Absolut - - -

19 CHIEF JUDGE LIPPMAN: If we were to affirm
20 and say that the - - - you know, no problem, not
21 right, no stand, whatever - - -

22 MR. ISLER: The - - -

23 CHIEF JUDGE LIPPMAN: - - - will you be
24 able to challenge later what they're doing?

25 MR. ISLER: Absolutely not. The - - -

1 CHIEF JUDGE LIPPMAN: Why not?

2 MR. ISLER: The one undisputable facts - -
3 - one of the several undisputable facts in this case
4 - - - and the DEC does not argue with this - - - is
5 that it was not and is - - - was not physically or
6 rationally possible for anyone to have gone through
7 the application process created by this new amendment
8 within four months from the adoption of this regula -
9 - - these amendments.

10 JUDGE SMITH: Well, why do you assume that
11 the statute runs from the adoption of the
12 regulations?

13 MR. ISLER: Because the - - - the case law
14 says that from the effective date of the amendment is
15 when your statute runs to bring a procedural - - -

16 JUDGE SMITH: But can - - -

17 MR. ISLER: - - - challenge.

18 JUDGE SMITH: - - - can that really be
19 right? I mean, the - - - suppose - - - you know,
20 suppose there's a totally illegal regulation that
21 they never enforce for fifteen years or twenty years
22 and then they enforce it against somebody who wasn't
23 even born when they adopt - - - when they adopted it.
24 They - - - and he - - - he brings a proceeding to
25 challenge it and they say you're too late?

1 MR. ISLER: There are two different
2 challenges, in this case, that we raised. One is a
3 procedural - - -

4 CHIEF JUDGE LIPPMAN: You're saying you
5 wouldn't be able to challenge it procedurally?

6 MR. ISLER: The procedural - - -

7 CHIEF JUDGE LIPPMAN: You could challenge
8 the - - - later, the substance of it, right?

9 MR. ISLER: Well, we - - - we could, but we
10 have - - - we submit, on the declaratory judgment
11 piece of this, the facial challenge that we have
12 brought to this law - - - these amendments, rather,
13 the regulations, is ripe for determination.

14 JUDGE SMITH: But you're not - - -

15 MR. ISLER: We have standing to prove that.

16 JUDGE SMITH: - - - saying the - - - maybe
17 we're talking past each other. You say that - - -
18 you say that they didn't hold the hearings that SAPA
19 requires and all that, and you say that's going to be
20 time barred if we - - - if you don't do it now. I
21 understand that point. You also say this is ultra
22 vires; it's completely beyond their authority. Do we
23 all agree that that's a challenge you - - - that
24 that's an issue you could still raise later?

25 MR. ISLER: That - - - that may be an issue

1 I could raise later, but I'm not precluded from
2 raising it now. And we brought this proceeding
3 within four months of the effective date of these
4 regulations for the very reason we were not going to
5 waive or be subject to the four-month statute of
6 limitations here. If this regulation is - - -

7 JUDGE ABDUS-SALAAM: Counsel, what injury
8 have you suffered now?

9 MR. ISLER: This - - - this is a facial
10 challenge to the procedural adoption of the law. We
11 are subject to these regulations. There's no dispute
12 that our property - - -

13 JUDGE SMITH: Is that not also true of
14 every landowner in the state?

15 MR. ISLER: No, because our property has
16 been identified by the DEC as a habitat for the
17 endangered and threatened species - - -

18 JUDGE SMITH: Okay. So you say that
19 anybody - - -

20 MR. ISLER: - - - that these regulations
21 speak to.

22 JUDGE SMITH: - - - any landowner who has
23 an endangered species on his property can - - - can
24 do what you're doing?

25 MR. ISLER: That's correct, because these

1 regulations - - -

2 JUDGE GRAFFEO: And that meets the two-
3 prong test in Society of Plastics?

4 MR. ISLER: It does, because we are a
5 landowner who is subject to this regulation. We are
6 not the public at large. We're not a neighbor
7 complaining. We're the landowner.

8 JUDGE GRAFFEO: Is the - - - is a concern
9 about future economic development, does that fit
10 neatly into the zone of interest test?

11 MR. ISLER: The zone of interest here is
12 not economic loss, necessarily, but the use of our
13 property. The Har Enterprise case, which is a zoning
14 status case, clearly says that you don't have to wait
15 to be aggrieved, as a property owner, when zoning is
16 implemented against you.

17 JUDGE GRAFFEO: You think this is against
18 your - - -

19 MR. ISLER: This is a land use - - -

20 JUDGE GRAFFEO: - - - zoning even though -
21 - -

22 MR. ISLER: This is a land use regulation.
23 And what's critical here is - - - and the - - - the
24 DEC no longer really is arguing this in their briefs
25 to this court - - - the regulations that are adopted

1 here creates new environmental standards and criteria
2 that did not exist before. Among other ones, they
3 specifically require now for a landowner - - -
4 whoever wishes to develop lands affected by
5 endangered species habitats must create a mitigation
6 plan that creates a conservation benefit which is
7 then defined in these regulations as making the
8 habitat better. That's the exact wording in there,
9 "better" than it would have been - - -

10 JUDGE SMITH: Aren't you - - -

11 MR. ISLER: - - - had the project not gone
12 forward.

13 JUDGE SMITH: Aren't you arguing merits now
14 rather than standing?

15 MR. ISLER: I'm sorry?

16 JUDGE SMITH: Isn't what you just said an
17 argument on the merits, not a standing or a rights-
18 based argument?

19 MR. ISLER: No, it goes right to the
20 standing issue of the procedural defect, because that
21 and the other changes that were adopted in these
22 amendments are substantive. Under ECL 3-0301, the
23 DEC is required to hold public hearings on it.
24 They're required, at the time they adopted this, to
25 send it over to the environmental - - -

1 JUDGE SMITH: Yeah, but - - -

2 MR. ISLER: - - - board for review. They
3 were required to do a full environmental - - -

4 JUDGE SMITH: But what does this have to do
5 with standing?

6 MR. ISLER: Because we own property that's
7 affected by these laws - - - these amendments,
8 rather. They are defectively adopted.

9 JUDGE SMITH: So you - - -

10 MR. ISLER: They are void, if they don't
11 comply procedurally. Forget about - - -

12 JUDGE SMITH: What you're really - - - I
13 guess what you're really saying is that when - - -
14 when an - - - when an agency promulgates new
15 regulations, and there's a dispute about whether they
16 complied with SAPA, we should be pretty generous in -
17 - - in allowing standing to challenge it because
18 there's only - - - there's only four months to do it.
19 So you - - - you would not require a very
20 particularized injury. You just say, look, I'm a
21 landowner; I've got endangered species, and these
22 could affect me.

23 MR. ISLER: That's just - - - that is a
24 specific injury. I am a landowner whose property is
25 subject to the threatened endangered species

1 habitats. As a result of that, I am subject to this
2 illegally adopted regulation.

3 JUDGE SMITH: So basically, what you're
4 saying is that we're talking about the procedural
5 requirements of SAPA, which does have a - - -
6 unquestionably, has a four-month statute from the
7 date the regulation is enacted. You're saying
8 basically anybody who is within the community subject
9 to that regulation must have standing.

10 MR. ISLER: And not only that, if you are
11 in that community and your property is subject to
12 these amendments, you must bring it within four
13 months or you never can. And these are - - -

14 CHIEF JUDGE LIPPMAN: So you never can
15 object procedurally?

16 MR. ISLER: Procedurally. And we all know
17 that if an administrative agency of the State
18 violates SAPA or violates, in this case, the hearing
19 requirements under the ECL, the regulations are void.
20 We're in a vacuum. If we can't bring this proceeding
21 within four months, we're affected property owners;
22 we're affected by this regulation. They did not
23 adopt these regulations in compliance with the ECL.
24 They're not even seriously arguing anymore that they
25 didn't make substantive changes to this law. They

1 labeled this amendment as an amendment to clarify
2 process and procedure. That gave them the out that
3 they didn't have to comply with the public hearing
4 requirements, they didn't have to do SAPA, and - - -
5 or they could - - - they could do their SAPA
6 regulatory impact statement based on a nonact. They
7 neg dec it under SEQRA because it's a procedural
8 regulation. This will never get reviewed by the
9 courts. It couldn't be brought within four months if
10 I had to go through the administrative processes the
11 Third Department said I must.

12 JUDGE SMITH: So but the argument you're
13 now making really applies only to your SAPA claims?

14 MR. ISLER: No, it - - - the SAPA claim is
15 the - - - the SAPA claim deals with the impact - - -
16 the regulatory impact that must be studied, but also
17 the requirement for the hearing that is really set in
18 ECL 3-0301.

19 JUDGE SMITH: Okay. So it's not just SAPA,
20 but your procedural claims.

21 MR. ISLER: The procedural claims - - -

22 JUDGE SMITH: It does not apply to your
23 ultra vires claim?

24 MR. ISLER: My ultra vires claims are not
25 time barred by the four-month statute.

1 JUDGE SMITH: And therefore, there's - - -
2 maybe - - - maybe there's a better argument that you
3 should not have standing to pursue them now because
4 your injury is, at best, rather speculative.

5 MR. ISLER: Well, the reason why they are
6 timely now, if we want to segue to the substantive
7 attack to the regulations, as opposed to the
8 procedural adoption problem, is - - -

9 JUDGE ABDUS-SALAAM: Could I - - - before
10 you do that - - -

11 MR. ISLER: Yes.

12 JUDGE ABDUS-SALAAM: - - - could I just
13 clarify? You said because you're in this area and
14 you're a landowner. So you're saying just by being
15 in the area under - - - because of the way the
16 regulations were adopted, you could still challenge
17 this?

18 MR. ISLER: I'm not quite sure what you
19 mean by "being in the area". We - - - we own 3,000
20 acres of land we got from the Congress. They are
21 impacted by short-eared owls, tiger salamanders - - -

22 JUDGE SMITH: Where does the record show
23 that, by the way?

24 MR. ISLER: We have in our record the
25 reports of the DEC. When the Town went to subdivide

1 this property, for purposes of only selling lots,
2 without development plans, the DEC declared
3 themselves lead agency on our subdivision
4 application.

5 JUDGE SMITH: I saw their letter, but I
6 guess I'm - - - maybe I shouldn't disrupt your
7 answer, but those species you mentioned, I - - - I'm
8 having trouble finding where the record shows that -
9 - -

10 MR. ISLER: In the George Harmuth (ph.)
11 memo and the management plan that - - - and George
12 Harmuth - - - I'm sorry - - -

13 JUDGE SMITH: Judge Abdus-Salaam has a much
14 more important question. I shouldn't have stopped
15 you from answering it. Go ahead.

16 MR. ISLER: Okay. We are the owners - - -

17 JUDGE ABDUS-SALAAM: Make sure that - - -

18 MR. ISLER: Yeah.

19 JUDGE ABDUS-SALAAM: You're saying that
20 because you're a landowner, as opposed to just
21 someone in this - - - in the state that may be
22 affected by this regulation - - -

23 MR. ISLER: We're a land - - -

24 JUDGE ABDUS-SALAAM: Since this is a land
25 use, in order for you to challenge it, you're - - -

1 are you saying you have to be a landowner or you have
2 to be - - -

3 MR. ISLER: You have to be a landowner
4 whose property has been identified as a habitat for
5 threatened species, which ours is. If I were a next-
6 door neighbor to - - -

7 JUDGE GRAFFEO: Is that some kind of
8 official designation, or can anybody that has one of
9 these owls in their backyard in Suffolk County bring
10 this lawsuit?

11 MR. ISLER: If you're - - - if you are - -
12 - your property is used as a habitat by an endangered
13 species, whether in Suffolk County or anywhere else
14 in the state, this new amendment says that if you do
15 anything on your property that, to any extent, no
16 matter how minimal, impacts or affects the habitat -
17 - -

18 JUDGE GRAFFEO: Well, that's why I'm - - -

19 MR. ISLER: - - - of that bird who come - -
20 -

21 JUDGE GRAFFEO: That's why I'm asking you
22 the scope because - - -

23 MR. ISLER: The scope is - - -

24 JUDGE GRAFFEO: - - - we've been pretty
25 careful to say that if it's an injury that's suffered

1 by the general public, that's not sufficient.

2 MR. ISLER: Well, that - - -

3 JUDGE GRAFFEO: It's starting to sound
4 pretty broad.

5 MR. ISLER: Well, it's going to be
6 whoever's affected by this regulation would have
7 standing under our theory of this case. I don't have
8 statistics for Your Honor as to how many properties
9 in New York State are affected as habitats. I can
10 tell you that ours is because we have grasslands,
11 substantial numbers of acres of grassland. This was
12 a Grumman site where Grumman - - -

13 JUDGE GRAFFEO: So you say this is the
14 former Grumman - - -

15 MR. ISLER: Yes, but there's - - -

16 JUDGE GRAFFEO: - - - facility?

17 MR. ISLER: - - - 3,000 acres of this that
18 are open.

19 JUDGE RIVERA: So the regulation is
20 intended to cover you?

21 MR. ISLER: Yes. In fact, when you read -
22 - -

23 JUDGE RIVERA: You're the actual - - -

24 MR. ISLER: - - - the record - - -

25 JUDGE RIVERA: - - - target of the

1 regulation?

2 MR. ISLER: When you read the record, the
3 DEC already told us we were subject to a management
4 plan for our endangered species here before these
5 regulations were actually implemented or adopted.
6 There's no - - - this is not secret that they're
7 going to implement these regs against us - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. ISLER: I'm sorry?

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. ISLER: Okay.

12 CHIEF JUDGE LIPPMAN: Let's hear from your
13 adversary.

14 MR. AYERS: May it please the court.
15 Andrew Ayers for DEC.

16 CHIEF JUDGE LIPPMAN: Counsel, can they - -
17 - aren't you taking away their procedural right to
18 challenge this, at least the procedural nature of
19 this?

20 MR. AYERS: In order to state a basis for
21 standing on a procedural claim, like their public
22 hearing requirements - - -

23 CHIEF JUDGE LIPPMAN: Yes.

24 MR. AYERS: - - - the petitioner needs to
25 allege an individual interest in participating in the

1 regulatory - - -

2 JUDGE PIGOTT: Who can challenge this - - -

3 MR. AYERS: - - - proceeding.

4 JUDGE PIGOTT: Who can challenge this right
5 now?

6 MR. AYERS: Anybody - - -

7 JUDGE PIGOTT: No, who? I know - - - I
8 know the standard. Pick somebody in - - - in the
9 State of New York that if - - - if counsel called him
10 up tomorrow, could commence an action against you and
11 have - - - have standing?

12 MR. AYERS: I'll point you to specific
13 individuals named in the complaint or the petition.
14 Riverhead's petition says that affected parties and
15 individuals would have attended a public hearing and
16 commented, had we held a public hearing. Any
17 individual in that group, any individual who would
18 have attended a public hearing, but didn't, would
19 have - - -

20 JUDGE SMITH: But so that's the only - - -

21 MR. ISLER: - - - standing to sue now.

22 JUDGE SMITH: That's the only way these - -
23 - the procedural requirement of a public hearing is
24 enforceable. If - - - if you decide to skip the
25 public hearing, say - - - let's say - - - let's say

1 you're sitting around, you say I know the statute
2 requires a public hearing, it's a pain in the neck,
3 I'm busy that day, I don't want to hold a hearing.
4 And I happen to know that there are only three people
5 who would attend the hearing, and none of them is
6 going to bother to sue.

7 MR. AYERS: Um-hum.

8 JUDGE SMITH: Then - - - then you can go
9 right ahead and it works.

10 MR. AYERS: There's a question there about
11 whether there would be an equitable exception to the
12 statute of limitations where the agency has actually
13 kept the thing entirely secret from the public.

14 JUDGE PIGOTT: But if Mr. Isler said I
15 would - - -

16 MR. AYERS: So I don't think - - - I don't
17 think that - - -

18 JUDGE PIGOTT: If Mr. Isler said I would
19 have attended that hearing, then he would have
20 standing?

21 MR. AYERS: Yes, he would.

22 JUDGE RIVERA: But doesn't - - - doesn't
23 that undermine, really, the purpose of the public
24 hearing requirement?

25 MR. AYERS: How so, Your Honor?

1 JUDGE RIVERA: Well, you seem to be
2 limiting it to only those who would show up as
3 opposed to those who might have an interest. And the
4 point of the public hearing requirement to air these
5 issues - - -

6 MR. AYERS: Right.

7 JUDGE RIVERA: - - - to benefit not just
8 the public but the actual agency.

9 MR. AYERS: Right. Well, and that might be
10 another individual interest in participating in the
11 proceedings that would suffice for standing. I
12 didn't mean my example to be exhaustive.

13 JUDGE SMITH: Well - - -

14 JUDGE GRAFFEO: I'm confused.

15 MR. AYERS: Um-hum.

16 JUDGE GRAFFEO: Say, just for purposes of
17 our discussion right now, that he's correct, that DEC
18 should have held a public hearing - - -

19 MR. AYERS: Um-hum.

20 JUDGE GRAFFEO: - - - that there was a
21 violation - - -

22 MR. AYERS: Right.

23 JUDGE GRAFFEO: - - - of SAPA. You're
24 saying who could - - - who could challenge that
25 within four months?

1 MR. AYERS: Anybody who was interested in
2 participating in those proceedings - - -

3 JUDGE GRAFFEO: So - - -

4 MR. AYERS: - - - that we didn't hold.

5 JUDGE GRAFFEO: - - - the deficiency here
6 is that his - - - his petition for declaratory
7 judgment didn't say we would have attended the
8 hearing?

9 MR. AYERS: It didn't say anything - - -
10 that's one of the things it didn't say.

11 JUDGE GRAFFEO: I mean, it's - - -

12 MR. AYERS: That's one of the things it
13 didn't say.

14 JUDGE GRAFFEO: - - - it's pretty obvious
15 that they - - -

16 MR. AYERS: No, we're not splitting - - -

17 JUDGE GRAFFEO: - - - that they wanted to
18 object - - -

19 MR. AYERS: No.

20 JUDGE GRAFFEO: - - - to the adoption of
21 these.

22 MR. AYERS: Not at all, Your Honor; they
23 did object. They submitted comments - - -

24 JUDGE PIGOTT: But if they say - - -

25 MR. AYERS: - - - and they got a response.

1 JUDGE PIGOTT: If they say - - -

2 MR. AYERS: So I don't think they could - -

3 -

4 JUDGE PIGOTT: Counselor?

5 MR. AYERS: - - - make that allegation.

6 JUDGE PIGOTT: Counselor?

7 JUDGE GRAFFEO: Doesn't that mean they
8 would have gone and testified at the public hearing?

9 MR. AYERS: They've never said that.

10 JUDGE PIGOTT: If they - - -

11 MR. AYERS: They've never said anything
12 like that - - -

13 JUDGE PIGOTT: Wait a minute, wait a
14 minute, wait a minute.

15 MR. AYERS: - - - and I don't think this
16 court should give them that inference.

17 JUDGE PIGOTT: Counselor, if they say "and
18 you did not hold a public hearing", doesn't that kind
19 of imply that they wanted you to hold a public
20 hearing to which they would attend?

21 MR. AYERS: No, it doesn't at all, Your
22 Honor. We've been through three courts now.

23 JUDGE PIGOTT: Aren't you being a little
24 bit specious in these arguments? I mean, you've got
25 - - - you've got a town, for God's sakes - - -

1 MR. AYERS: I hope not.

2 JUDGE PIGOTT: - - - who's got 3,000 acres,
3 for goodness sake - - -

4 MR. AYERS: Um-hum.

5 JUDGE PIGOTT: - - - who is saying this is
6 a major impact on our town. And you're saying, well,
7 they never said they'd attend the hearing, so they
8 can't - - - they can't claim that we didn't have one.

9 MR. AYERS: In Save the Pine Bush - - -

10 JUDGE PIGOTT: So are you suggesting - - -

11 MR. AYERS: - - - the court said - - -

12 JUDGE PIGOTT: Let me cut you off. So
13 you're suggesting that if they merely amend their - -
14 - their petition - - -

15 MR. AYERS: Um-hum.

16 JUDGE PIGOTT: - - - to say "and we would
17 attend a public hearing", then at least on that issue
18 - - - because there's three others that they wanted
19 to talk about with respect to regulatory impact and -
20 - - and your negative dec, but at least as to whether
21 or not you had a public hearing, they would have
22 standing and we - - - and we wouldn't be here.

23 MR. AYERS: Now that I've provoked the
24 court's incredulity, can I ask for a minute to - - -
25 to assuage it? The reason - - -

1 JUDGE PIGOTT: No, are you saying that - -
2 -

3 MR. AYERS: - - - why that makes sense - -
4 -

5 JUDGE PIGOTT: Wait a minute; listen to me.

6 MR. AYERS: Um-hum.

7 JUDGE PIGOTT: Are you saying that if he
8 amends his petition to say - - -

9 MR. AYERS: Yes.

10 JUDGE PIGOTT: - - - they would attend a
11 public hearing, then we've wasted our time all the
12 way to Albany because then there would be - - - there
13 would be something to litigate?

14 MR. AYERS: No, you're still stripping away
15 all the claims but the public hearing claim, but
16 yeah, that's exactly right.

17 CHIEF JUDGE LIPPMAN: Why does that make
18 sense? You started to say - - -

19 MR. AYERS: Because just like in the
20 context of Save the Pine Bush, the park was open to
21 the public, and it seems very easy for anyone to
22 allege I'd like to use and enjoy that resource. The
23 hearing, in the SAPA context, is similar to the park.
24 You have to actually allege an individual interest in
25 it. Otherwise - - -

1 JUDGE SMITH: But isn't - - -

2 MR. AYERS: - - - it's citizen standing.

3 JUDGE SMITH: Isn't there - - - aren't
4 public hearings a little different in that public
5 hearings are public for a reason.

6 MR. AYERS: Right.

7 JUDGE SMITH: They're not just for the
8 benefit of the people who show up and testify;
9 they're for the benefit of the people who sit in the
10 audience, the people who see it on TV, the people who
11 read about it in the newspapers.

12 MR. AYERS: That's right, Your Honor.

13 JUDGE SMITH: I mean, so is it - - - should
14 we - - - should we adopt a rule which would make a
15 public hearing unnecessary unless someone who would
16 actually have attended wants to sue?

17 MR. AYERS: I - - - you raised two
18 important points. First, all statutes of limitations
19 preclude challenge, to a certain extent. So you're
20 not screening it, necessarily, from review; you're
21 limiting it to people with an individual interest.
22 But on the - - - on the question - - -

23 JUDGE SMITH: But it's not hard to imagine
24 - - -

25 MR. AYERS: - - - of a public hearing - - -

1 JUDGE SMITH: - - - cases in which the
2 screen would be total.

3 MR. AYERS: Of course. Just as it is in
4 the open meetings context where the statute is four
5 months. I mean every - - -

6 JUDGE RIVERA: Counsel - - -

7 MR. AYERS: - - - every determination gets
8 that.

9 JUDGE RIVERA: Counsel, is it your position
10 that it's only that someone wants to participate in
11 the hearing or actually attend the hearing?

12 MR. AYERS: I don't - - - I'm not sure what
13 the answer to that is, and since they haven't alleged
14 either, I don't think the court needs to reach it.
15 But - - -

16 JUDGE SMITH: But should we modify - - -

17 MR. AYERS: - - - we say that - - -

18 JUDGE SMITH: - - - it to give them leave
19 to amend on that issue?

20 MR. AYERS: Only if they ask.

21 JUDGE RIVERA: But what - - - no, no, well,
22 let's go back. You didn't - - -

23 MR. AYERS: But yes. Yes.

24 JUDGE RIVERA: - - - answer my question.

25 MR. AYERS: I don't know how much more

1 emphatically I can say this.

2 JUDGE RIVERA: No, no, no - - -

3 MR. AYERS: If they alleged that, they
4 would have standing.

5 JUDGE RIVERA: Do you want them to
6 participate or actually attend?

7 MR. AYERS: I would say participating could
8 be enough.

9 JUDGE RIVERA: Okay. Well - - -

10 JUDGE PIGOTT: You're being remarkably - -
11 -

12 JUDGE RIVERA: Well, here's my - - - let me
13 finish.

14 MR. AYERS: Yeah. Yeah.

15 JUDGE RIVERA: Here's my problem with that
16 particular approach.

17 MR. AYERS: Sure.

18 JUDGE RIVERA: Anyone who's tried to go to
19 a public hearing knows that not everyone who wants to
20 participate can.

21 MR. AYERS: Absolutely.

22 JUDGE RIVERA: So I don't see how your rule
23 works.

24 MR. AYERS: Oh, I'm sorry, I thought
25 participate meant attend.

1 JUDGE RIVERA: No, I was very clear.

2 MR. AYERS: I'm sorry - - -

3 JUDGE RIVERA: Participate or attend. No,
4 no - - -

5 MR. AYERS: I'm sorry - - -

6 JUDGE RIVERA: - - - I was very clear on
7 that.

8 MR. AYERS: I'm sorry; then I misspoke.
9 No, I think saying I wanted to attend - - - look,
10 here's - - -

11 JUDGE RIVERA: And it's crowded and I can't
12 get in the door.

13 MR. AYERS: Right, sure.

14 CHIEF JUDGE LIPPMAN: Yeah, but why are we
15 talking about this? Why isn't this form over
16 substance? Why shouldn't we just say don't be
17 ridiculous, that - - - that obviously they're saying
18 that they want to know all about the hearing, maybe
19 they want to attend the hearing. Why isn't this all,
20 like, just a - - - a farcical exercise where you're
21 saying, yeah, if he says, if they tell you they want
22 to attend or they want to participate, that's enough.
23 Isn't that form over substance?

24 MR. AYERS: No, Your Honor. The most - - -

25 CHIEF JUDGE LIPPMAN: No? What's the - - -

1 what's the substance?

2 MR. AYERS: They don't care about the
3 public hearing unless they say they do.

4 CHIEF JUDGE LIPPMAN: But isn't the public
5 hearing - - -

6 MR. AYERS: And standing - - -

7 CHIEF JUDGE LIPPMAN: - - - a way to stop
8 this rule?

9 MR. AYERS: Yes, but that's not what SAPA
10 protects. SAPA doesn't protect your interest in
11 stopping the rule. It's a Sunlight provision. It
12 protects your interest - - -

13 CHIEF JUDGE LIPPMAN: So you're saying they
14 don't really want to be at the hearing? That's your
15 point?

16 MR. AYERS: I'm saying they haven't alleged
17 that they did.

18 CHIEF JUDGE LIPPMAN: No, no, but is that
19 your point?

20 MR. AYERS: Yeah.

21 JUDGE PIGOTT: You're being remarkably - -
22 -

23 JUDGE GRAFFEO: So the sub - - -

24 JUDGE PIGOTT: - - - flip about this.

25 JUDGE GRAFFEO: - - - the submissions - - -

1 JUDGE PIGOTT: I'm kind - - -

2 MR. AYERS: No, I'm sorry. I don't mean to
3 be flip.

4 JUDGE PIGOTT: Let me finish. Let me
5 finish.

6 MR. AYERS: Sure.

7 JUDGE PIGOTT: I'm kind of amazed that when
8 they're talking about an entire town and 3,000 acres
9 of land that they're trying to do something with, and
10 you're talking about - - - I'm almost done - - -
11 endangered species and how to protect them, and he's
12 saying that - - - that it's - - - it's worse than you
13 know, because if - - - if you move an owl, you got -
14 - - you got to say and here's where we're moving the
15 owl and here's why it's going to be better for them
16 and we're going to be subject to your monitoring and
17 everything else. And you're simply saying, well,
18 they didn't - - - they didn't do something, so it
19 doesn't make any difference.

20 MR. AYERS: Your Honor, I apologize if I've
21 seemed flip. The Town has not alleged that they
22 intend to do anything that would affect the
23 endangered species, and that's almost certainly
24 because they don't. The - - - the endangered species
25 are on a subsection of this property, not the whole

1 3,000. And the subdivisions that the Town has - - -
2 this is not a pristine wilderness. This has an
3 airport, a naval museum - - -

4 JUDGE PIGOTT: When I was in government,
5 generally what we would do is what we thought was
6 right. And if somebody came and had a claim, for
7 example, we didn't have a public hearing, we'd hold a
8 public hearing. We wouldn't say, well, we're not
9 going to hold a public hearing, even though we should
10 have, because you failed to allege, in paragraph 3,
11 that you would have attended the public hearing. And
12 it would seem to me that - - - that you guys would -
13 - - would say, you know, maybe they're right; maybe
14 we ought to have a public hearing. Maybe they're
15 right; maybe we ought to have - - - not have a
16 negative dec. Maybe we ought to see what we can do
17 about this rather than procedurally coming all the
18 way to Albany and saying all they had to do is put in
19 a new paragraph and we'd be - - - wouldn't be here.

20 MR. AYERS: I don't think - - - Your Honor,
21 I don't think that this is a technical defect. I
22 think this goes to the substance - - -

23 JUDGE PIGOTT: You said it.

24 MR. AYERS: - - - of what standing is
25 about.

1 JUDGE PIGOTT: You're the one that said if
2 they - - - if they amended it by saying that they
3 would have attended the hearing that they wouldn't -
4 - - they could then assert that.

5 MR. AYERS: But I don't think that's as
6 easy to do as you're making it sound. I think that
7 that's actually - - -

8 CHIEF JUDGE LIPPMAN: What's your - - -

9 MR. AYERS: - - - a substantive allegation
10 that needs to be made - - -

11 CHIEF JUDGE LIPPMAN: What - - -

12 MR. AYERS: - - - in good faith.

13 CHIEF JUDGE LIPPMAN: What's your point?
14 That they don't really want to move the owls? I
15 don't quite understand the point you were saying - -
16 -

17 MR. AYERS: Right.

18 CHIEF JUDGE LIPPMAN: - - - when you're
19 talking about well, they don't really want to - - -

20 MR. AYERS: Right.

21 CHIEF JUDGE LIPPMAN: - - - have anything
22 with the hearing. What do they - - - what's their
23 motive, and what's wrong with being able to vet this
24 at a hearing? What do they really want to do if
25 they're not worried about the fact that your

1 regulation prevents them from developing the
2 property?

3 MR. AYERS: I - - - I'm not sure what their
4 motive is, Your Honor, and I - - - I don't want to
5 speculate on that.

6 CHIEF JUDGE LIPPMAN: But what is it - - -
7 what do they want to do? What do you think they want
8 to do?

9 MR. AYERS: They want to subdivide the
10 property - - -

11 CHIEF JUDGE LIPPMAN: Yeah?

12 MR. AYERS: - - - so that some parts of it
13 can be developed by other people. And this court's
14 case law says that where someone else or some
15 intervening event is between you and the harm,
16 there's no standing yet. That's the situation that
17 we're in.

18 JUDGE SMITH: But wouldn't it - - -
19 wouldn't it be a stronger case, even, if they had
20 alleged in their - - - in their petition that we want
21 to subdivide our property, we've been doing our best
22 to market it, and - - - and the last sixteen buyers
23 we contacted said we won't touch it because of Part
24 82 (sic). That would be - - - would they have
25 standing then?

1 MR. AYERS: I don't think so under Church
2 of St. Paul, but it would be a much harder case for
3 us. In Church of St. Paul, the church was actually
4 designated a historic landmark and there was a
5 development plan - - -

6 CHIEF JUDGE LIPPMAN: But is that - - -

7 MR. AYERS: - - - in action.

8 CHIEF JUDGE LIPPMAN: - - - what you think
9 is going on here? That they want to subdivide it,
10 and as the judge said, that they can't because people
11 aren't interested because of your regulation?

12 MR. AYERS: They haven't alleged - - -

13 CHIEF JUDGE LIPPMAN: Is that - - -

14 MR. AYERS: - - - anything like that.

15 CHIEF JUDGE LIPPMAN: What's the story
16 here? What's this all about? Why are you opposing
17 them? That's what I think a lot of these questions
18 are about. What's going on here? What are you
19 trying to stop them from doing and what are they
20 trying to stop you from doing?

21 MR. AYERS: There's no answer to those
22 questions, Your Honor, because nobody's doing
23 anything.

24 CHIEF JUDGE LIPPMAN: You have no idea what
25 either of you are trying to do?

1 MR. AYERS: Well, I know what I'm trying -
2 - - Your Honor, there's not - - -

3 CHIEF JUDGE LIPPMAN: I know you're trying
4 to stop them from - - -

5 MR. AYERS: No.

6 CHIEF JUDGE LIPPMAN: - - - procedurally
7 challenging it.

8 MR. AYERS: Yes.

9 CHIEF JUDGE LIPPMAN: But what is it that
10 each of you really want to do here? What's the - - -
11 what's the great mystery that we're missing as to why
12 you're - - - you're not wanting them to be able to
13 contest this at a public hearing? What are they
14 trying to do that's bothering you?

15 MR. AYERS: I'm not sure that anybody is -
16 - -

17 CHIEF JUDGE LIPPMAN: And what are you
18 doing - - -

19 MR. AYERS: - - - bothering me, Your Honor.

20 CHIEF JUDGE LIPPMAN: - - - that's
21 bothering them?

22 MR. AYERS: What we're doing that's
23 bothering them is we codified the standard for
24 obtaining a takings permit that DEC had been applying
25 under the prior regulation.

1 CHIEF JUDGE LIPPMAN: Okay. So they don't
2 like it and they want to challenge it.

3 MR. AYERS: Don't like that regulation;
4 they want to challenge it, that's right.

5 CHIEF JUDGE LIPPMAN: So? What's wrong
6 with that?

7 MR. AYERS: They don't have an individual
8 interest that constitutes an injury in fact. SAPA
9 doesn't create citizen standing. This court has been
10 very - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but they're not
12 just a citizen; they're someone who's directly
13 affected by this.

14 MR. AYERS: I don't agree that they're
15 directly affected.

16 CHIEF JUDGE LIPPMAN: They're not directly
17 affected?

18 MR. AYERS: No, they're not - - -

19 JUDGE RIVERA: But they're a landowner with
20 the species on the property; how are they not
21 affected?

22 MR. AYERS: Because this court has said
23 it's not an injury in fact until the harm is
24 imminent.

25 JUDGE GRAFFEO: So only - - -

1 JUDGE RIVERA: Okay. So then that sounds
2 to me - - -

3 MR. AYERS: This is not a regulation - - -

4 JUDGE RIVERA: - - - that sounds to me like
5 that's the substantive claim as opposed to the
6 procedural claim. Have you segued?

7 MR. AYERS: No, I - - - I think there's an
8 interesting open question about whether you can use
9 landowner's interests to just - - - to support
10 standing on a SAPA claim. But even if you could,
11 this interest in land use is so remote that it
12 wouldn't suffice.

13 JUDGE GRAFFEO: So you're saying until
14 somebody actually has a development plan and comes
15 in, there's not an injury in fact?

16 MR. AYERS: Well, what this court - - -

17 JUDGE GRAFFEO: But at that point, the four
18 months are going to have run and it's too late to
19 raise the SAPA argument.

20 MR. AYERS: That's right. That's right.
21 So the procedural challenge will be gone by then, and
22 that's what happens with the Open Meetings Law and
23 every kind of procedural provision that begins
24 running the statute of limitations at the time the
25 reg is promulgated.

1 JUDGE GRAFFEO: So who can - - - who can -
2 - - who can pursue the SAPA challenges within the
3 four months?

4 MR. AYERS: Anyone who can allege an injury
5 in fact that's within the zone of interests of SAPA.

6 CHIEF JUDGE LIPPMAN: Like who? Someone
7 asked you that before, one of the judges.

8 MR. AYERS: Sure, and what I - - - what I
9 was - - -

10 CHIEF JUDGE LIPPMAN: Like who?

11 JUDGE GRAFFEO: Like right now, who?
12 Presuming we're still in the four months - - -

13 MR. AYERS: Sure. Sure.

14 JUDGE GRAFFEO: - - - which we're probably
15 not, but if we are.

16 MR. AYERS: The individuals mentioned in
17 the petition who allegedly would have liked to
18 participate in some way that they were prevented from
19 doing by our failure to provide - - -

20 CHIEF JUDGE LIPPMAN: What about - - -

21 MR. AYERS: - - - a public hearing.

22 CHIEF JUDGE LIPPMAN: - - - Judge Graffeo's
23 hypothetic before? The guy - - - the homeowner who
24 has the owl in the backyard, they could challenge
25 this procedurally?

1 MR. AYERS: If he alleged, I would like to
2 build a treehouse that will disturb the owl and I'm
3 forced, under these regs - - -

4 CHIEF JUDGE LIPPMAN: But he could
5 challenge it - - -

6 MR. AYERS: - - - to apply for a permit - -
7 -

8 CHIEF JUDGE LIPPMAN: - - - and these guys
9 - - - these guys can't - - - this Town - - - the Town
10 of Riverhead can't, but the guy who - - -

11 MR. AYERS: The Town of River - - -

12 CHIEF JUDGE LIPPMAN: - - - has the owl in
13 the backyard can.

14 MR. AYERS: Because the Town of Riverhead
15 has no plans to develop this land - - -

16 JUDGE SMITH: Well, wait a minute.

17 MR. AYERS: - - - in a way that would be a
18 taking.

19 JUDGE SMITH: Are you conceding that if he
20 wants to build a treehouse and disturb the owl, that
21 he can bring his procedural challenges, even if he
22 wouldn't have showed up at the public meeting?

23 MR. AYERS: No, Your Honor, you're - - -
24 thank you for the question. I was going to say,
25 under Church of St. Paul and this court's other

1 cases, as long as there's an administrative step that
2 could plausibly avert the harm, the case isn't ripe.
3 You may have an injury in fact but it's not ripe.

4 JUDGE SMITH: Well - - -

5 JUDGE RIVERA: So he's got to ask for the
6 permit - - -

7 MR. AYERS: Right.

8 JUDGE RIVERA: - - - is that what you mean?
9 And then be denied the permit or somehow it impacts
10 him so adversely that he then - - -

11 MR. AYERS: Exactly.

12 JUDGE RIVERA: - - - challenges it.

13 MR. AYERS: Because the obvious possibility
14 here is they'll never ask for a permit.

15 JUDGE SMITH: Well, I guess but I'm - - - I
16 guess I'm asking a different question.

17 MR. AYERS: Um-hum.

18 JUDGE SMITH: The - - - suppose - - - put
19 aside ripeness, but suppose a guy has - - - has
20 disturbed an owl, and you're about to arrest him
21 under this new statute.

22 MR. AYERS: Yes.

23 JUDGE SMITH: Can he bring the procedural
24 challenge, even if he wouldn't have attended the
25 public meeting?

1 MR. AYERS: Absolutely.

2 JUDGE SMITH: Okay. What cases are there
3 that talk about standing to challenge procedural
4 defects in regulation?

5 MR. AYERS: I am not aware of a single New
6 York case that explains what injury in fact can serve
7 as the premise for a procedural public hearing claim.
8 I think it's an important issue that this court
9 should address. And all I would ask is that - - -

10 JUDGE READ: What about federal cases?

11 MR. AYERS: In the federal courts, it's not
12 well developed, but it - - - it exists. We talk
13 about these in our brief. There's a test where you
14 have to allege a protected right in participating in
15 the proceedings.

16 JUDGE READ: What's the best case?

17 MR. AYERS: Massachusetts v. EPA is the
18 most recent. They talk about it there, although
19 that's a fairly unique case because the plaintiff was
20 a state. But Massachusetts, in that case, had a
21 statutorily recognized right to participate in the
22 regulatory proceedings it was challenging.

23 The federal courts impose an additional
24 restriction that I'm not urging on the court,
25 necessarily, which is it's not even everyone who

1 could have participated in the public hearing or in
2 the regulatory proceedings; you also have to have a
3 concrete interest in the regulated subject matter.

4 Now here, maybe Riverhead's land ownership
5 would be enough. Of course, these aren't land use
6 regulations; these are regulations dealing with
7 activities that take an endangered species, and
8 Riverhead's never alleged an intent - - -

9 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

10 MR. AYERS: - - - to engage in that
11 activity.

12 CHIEF JUDGE LIPPMAN: Thanks - - -

13 MR. AYERS: But I think the federal court
14 approach makes some sense. Thank you.

15 CHIEF JUDGE LIPPMAN: Thanks.

16 Counselor, what cases deal with this, in
17 your mind?

18 MR. ISLER: I'm sorry, Judge?

19 CHIEF JUDGE LIPPMAN: What cases deal with
20 this, in your mind, procedural - - - the right to
21 procedurally challenge.

22 MR. ISLER: Superfund cases that this court
23 addressed, the diesel fuel retrofitting cases;
24 they're cited in our briefs. When you're affected,
25 you don't have - - - you - - - you have a right to be

1 heard.

2 JUDGE SMITH: Are these cases involving
3 procedural challenges to regulations?

4 MR. ISLER: In fact one - - - there's an
5 Appellate Division case - - - I apologize; I don't
6 have the name at my - - - I can look it up, but it's
7 in our brief - - - where the - - - in fact, the Third
8 Department addressed the procedural issue and then
9 found that the - - - the substantive case was not
10 ripe for determination.

11 The real problem here - - - and I must say,
12 I've listened to counsel's argument and I'm
13 absolutely astounded and I'm absolutely confused.
14 The Third Department held that to have standing to
15 challenge the procedural defect you have to go
16 through the application process and be harmed and
17 actually injured. That's what the Third Department
18 says.

19 JUDGE GRAFFEO: Certainly that person would
20 have an injury, in fact.

21 MR. ISLER: Right, but that's not going to
22 happen here. No - - -

23 JUDGE GRAFFEO: If he had a - - - if he had
24 a permit application that was rejected, there's no
25 question - - -

1 MR. ISLER: No ques - - -

2 JUDGE GRAFFEO: - - - you'd have in fact -

3 - -

4 MR. ISLER: But the reality here - - - and
5 I haven't heard, and there isn't anything to dispute
6 this - - -

7 JUDGE SMITH: In your eyes, the four months
8 are gone by then.

9 MR. ISLER: You can't possibly get an
10 application dealt with in four months from the
11 adoption here.

12 CHIEF JUDGE LIPPMAN: Why don't they want
13 to let you be heard?

14 MR. ISLER: Judge, they did - - -

15 CHIEF JUDGE LIPPMAN: Tell us what - - -

16 MR. ISLER: I'll tell you why they didn't -
17 - -

18 CHIEF JUDGE LIPPMAN: Is there something
19 going on that we don't understand?

20 MR. ISLER: This is - - - first of all - -
21 -

22 CHIEF JUDGE LIPPMAN: What is the - - -

23 MR. ISLER: This is - - -

24 CHIEF JUDGE LIPPMAN: - - - back and forth
25 between - - -

1 if you - - - if I'm a property owner and they violate
2 their own laws by not holding a public hearing,
3 whether I go to it or not, I'm still affected by
4 their regulation. And if they illegally adopted that
5 law or that amendment, it's void, whether I showed up
6 and came to Saratoga Springs or I came to Hauppauge
7 to be heard - - -

8 JUDGE PIGOTT: But can't you make an
9 argument - - -

10 MR. ISLER: - - - doesn't make it any more
11 legal.

12 JUDGE PIGOTT: I get the procedural thing,
13 but can't you make that argument when you try to
14 subdivide - - - and I don't know how this ends up,
15 you know, why anybody would make the application
16 anyway, because I would always say, oh, this is - - -
17 this is not an incidental take, so I'm going to sell
18 you the land and you can do what you want.

19 MR. ISLER: Well, that was an argument we
20 were making when we were trying to get a subdivision
21 done of the parcel for resale purposes, and the DEC
22 took the very position you did, that that's a take.
23 You need to go through this whole process.

24 But let's clear up this record - - -

25 JUDGE PIGOTT: Well, that's my point then.

1 Can't you challenge it then?

2 MR. ISLER: Not the procedural defects, no.
3 You can't. The - - - the four months is a statute of
4 limitations. We're out of the box if we didn't bring
5 this proceeding when we did.

6 And counsel's comment that the Town of
7 Riverhead, all they want to do is subdivide this
8 property and not develop it, we are an enterprise
9 park - - -

10 JUDGE ABDUS-SALAAM: Well, I'm sorry. I
11 thought your adversary said that if you had alleged
12 in your petition - - - and your petition was timely
13 brought, you - - - you indicated. So if you amend
14 your petition now, along the lines that he suggested,
15 apparently you could challenge it.

16 MR. ISLER: I don't think that amendment is
17 necessary, because it is clear from our pleadings - -
18 - and by the way, this is a motion to dismiss.

19 JUDGE PIGOTT: 3211.

20 MR. ISLER: You have to presume everything
21 that we're saying is true. That I would have to
22 amend my petition where I allege - - - you can see it
23 in our briefs. Our comments and the co-party whose -
24 - -

25 JUDGE SMITH: Your petition doesn't allege

1 an awful lot about how you're injured.

2 MR. ISLER: No, it says we own this
3 property, you have procedurally violated the law, you
4 didn't hold required public hearings, you didn't send
5 it over - - -

6 JUDGE SMITH: All it says is - - - all the
7 petition says, that I noticed, is we're affected by
8 the regulation. You could have put in a little more
9 detail.

10 MR. ISLER: Right, but - - - that may be
11 true, Judge, but the pleading standards in New York
12 is noticed pleadings. We don't have to put in every
13 single detail.

14 And in response to the motions, they didn't
15 raise this issue. This is the first time, standing
16 here today, I've ever heard this argument being made
17 that our status would be dependent on our saying in
18 our petition we wanted to attend a hearing that you
19 didn't hold. They've got to hold the hearing.
20 They've got it backwards. This is a disingenuous
21 argument. I'm - - - I'm flabbergasted to hear the
22 State of New York and an agency of the State of New
23 York say if we don't - - - we decide not to hold a
24 hearing, in direct violation of law - - - and by the
25 way, he's never said - - -

1 JUDGE SMITH: Well, this is - - -

2 MR. ISLER: - - - nor did they in their
3 brief - - -

4 JUDGE SMITH: - - - this is not the first
5 time an agency has ever argued that, even assuming we
6 violated the law, this plaintiff does not have
7 standing to challenge it.

8 MR. ISLER: Right, be we also are in a
9 situation where the only window we can do it is in
10 four months, and we're clearly affected by these
11 regulations.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. ISLER: Thank you very much.

14 CHIEF JUDGE LIPPMAN: We've gone - - -
15 thank you both.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of The Association for a Better Long Island, Inc., et al., v. New York State Department of Environmental Conservation, et al., No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: February 18, 2014