

**Matter of Peconic Baykeeper, Inc. v Board of
Trustees of Freeholders & Commonalty of Tn. of
Southampton**

2010 NY Slip Op 30182(U)

January 22, 2010

Supreme Court, Suffolk County

Docket Number: 004145/2009

Judge: John J.J. Jones

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MEMORANDUM

I.A.S. TERM
PART 10

BY: HON. JOHN J.J. JONES, JR.
Justice

SUPREME COURT, SUFFOLK COUNTY

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In the Matter of the Application of

DATE: 22 January 2010

PECONIC BAYKEEPER, INC.,

SUBMIT DATE: 11/4/2009

Petitioner,

INDEX NO.: 004145/2009

For a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules

MOTION DATE: 3/9/2009

-against-

MOTION NO: MG; CASEDISP SEQ#001

BOARD OF TRUSTEES OF THE
FREEHOLDERS AND COMMONALTY OF
THE TOWN OF SOUTHAMPTON, TOWN OF
SOUTHAMPTON, and 94 DUNE ROAD
HOLDING CORP.,

Respondents.

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Petitioner, Peconic Baykeeper, Inc., commenced this proceeding pursuant to CPLR Article 78 for "a judgment vacating permit number 9607 dated October 6, 2008 (hereinafter 'Permit') issued by Respondent Board of Trustees of the Freeholders and Commonalty of the Town of Southampton (hereinafter 'Trustees') to Respondent 94 Dune Road Holding Corp. (hereinafter 'Dockers') for the development of 16 boat slips along with the construction or reconstruction of bulkheads, catwalks, associated ramps, floating docks and pilings in Shinnecock Bay, within the Town of Southampton, thereby significantly expanding an existing minimal marina with a restaurant without the review required by the State Environmental Quality Review Act (SEQRA)." Among the twelve affirmative defenses and objections in points of law asserted by respondents Trustees and the Town of Southampton (Town) and the affirmative defenses asserted by respondent Dockers are that the provisions of SEQRA do not apply to the Trustees, and that petitioner lacks standing to maintain this

challenge. Thus, this Court must determine whether the Trustees is an “agency” that is required to comply with SEQRA (Environmental Conservation Law Article 8) and whether its action in issuing the aforementioned permit to Inter-Science Research Associates, Inc., as agent for Dockers, was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803). This action is ripe for consideration and is not premature; the challenge that petitioner lacks standing to maintain this proceeding, however, must be determined at the outset.

According to the averment of Kevin McAllister, President of the Peconic Baykeeper, Inc., Peconic Baykeeper is a not-for-profit organization whose mission is “to protect and improve the aquatic ecosystems of the Peconic and South Shore estuary systems of Long Island by, *inter alia*, acting to safeguard and enhance sustainable commercial, recreational and subsistence uses of these estuary systems and their watersheds, in furtherance of the interests of its members and supporters.” Its supporters and members include persons who live in the Town of Southampton who use the waters, beaches and wetlands for a variety of purposes, including commercial and recreational fishing, shellfishing, boating, bird watching, hiking, sailing, kayaking, swimming, sun bathing, picnicking, and nature study. Mr. McAllister’s work with Peconic Baykeeper includes the maintenance of an on-water presence through regular patrolling of the open bays and tributaries by boat, as well as active advocacy for the preservation, protection and improvement of the waters in and about Shinnecock Bay. In addition, Peconic Baykeeper owns 289 acres of submerged lands in the Great Peconic Bay for the purpose of shellfish propagation and study. It is alleged that Shinnecock Bay is “generally shallow and subject to shoaling, especially in the southern areas near Dockers” and that the plan “to attract, and store, motorized watercraft at Dockers’ restaurant will tend to lead to pollution through vessel discharges and spills as well as prop dredging, a process where a vessel’s prop wash suspends bottom sediment, which is destructive to important benthic habitat.” It is also asserted by Mr. McAllister that, as a person who enjoys fishing, kayaking, sailing, swimming, snorkeling and studying nature in the immediate vicinity of the Dockers property and the adjacent bay area, the proposed construction and use of the facilities at Dockers “will diminish my recreational and scenic and other enjoyment of the bay in the immediate vicinity of Dockers . . .” Petitioner also submitted the affidavit of Ian Burliuk, a member of Peconic Baykeeper and President of the Southampton Town Baymen’s Association, who has worked as a fisherman and clammer in Shinnecock Bay in and about the area around Dockers. Burliuk claims that the expansion of a marina by Dockers will result in pollution of the waters and that his “living and enjoyment of this area can only be diminished by the marina proposal at Dockers.”

In establishing standing as an organization, three key principles must be considered: first, whether one or more of the organization’s members would have standing to sue; second, whether the interests asserted by the organization are germane to its purposes so as to satisfy the Court that it is an appropriate representative of those interests; and third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members of the organization (*see Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, 573 NE2d 1034, 570 NYS2d 778 [1991]). The interests of recreational enjoyment, aesthetic appreciation and nature study that are asserted by Kevin McAllister, as member and President of petitioner, are within

the zone of interest that SEQRA seeks to protect which allegedly will be affected by the actions of respondents. Furthermore, the interests asserted by petitioner are germane to its purposes and Peconic Baykeeper is an appropriate representative of those interests. It is evident that neither the claim asserted nor the relief requested in this proceeding requires the participation of the individual members of Peconic Baykeeper.

The Court of Appeals recently considered the issue of a petitioner's standing under SEQRA to challenge certain government actions. In *Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297 at 301 (2009), the Court held "that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource." Like the petitioner in this case, the petitioners in *Save the Pine Bush* alleged that they enjoyed repeated use of the area in issue, not just rare or isolated use, and that the threatened harm to the environment is real and would affect them differently from members of the general public. Accordingly, it is the determination of this Court that the petitioner has standing to bring this proceeding.

The primary purpose of SEQRA is to "inject environmental considerations directly into governmental decision making" (*Coalition for Future of Stony Brook Vill. v Reilly*, 299 AD2d 481 at 483, 750 NYS2d 126 [2d Dept 2002], citing *Akpan v Koch*, 75 NY2d 561, 569, 555 NYS2d 16, 554 NE2d 53, quoting *Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679, 536 NYS2d 33, 532 NE2d 1261) by insuring "that agency decision-makers -- enlightened by public comment where appropriate -- will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices" (*Coalition for Future of Stony Brook Vill. v Reilly*, *supra* at 299 AD2d 483, citing *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415, 503 NYS2d 298, 494 NE2d 429). Literal compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act (*Coalition for Future of Stony Brook Vill. v Reilly*, *supra* at 299 AD2d 483, citing *Matter of Golten Mar. Co. v New York State Dept. of Envtl. Conservation*, 193 AD2d 742, 743-744, 598 NYS2d 59; *Matter of Rye Town/King Civic Assn. v Town of Rye*, 82 AD2d 474, 480-481, 442 NYS2d 67).

It is asserted by respondents that the Trustees is not an "agency" subject to the provisions of SEQRA because it is an independent proprietary entity that derives its autonomy from colonial patents, not from the state. In connection with its permit application, Dockers was not requested to provide and it did not provide an Environmental Assessment Form, and the Trustees did not make a preliminary classification of the action under SEQRA, nor did it establish a lead agency (*see* 6 NYCRR § 617.6). While it is not disputed that the Trustees is a proprietary entity vested with title to certain lands and waters derived from the Dongan Patent of 1686, it also serves as a "body politic" with the right to legislate and control property within its jurisdiction (*see State v Trustees of the Freeholders and Commonalty of the Town of Southampton*, 99 AD2d 804, 472 NYS2d 394 [2d

Dept 1984]). Thus, the Courts of this State have acknowledged the right of the Trustees to regulate and enforce its regulations regarding the use and management of their lands (*see The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co.*, 116 NY 1, 22 NE 387 [1889]). Indeed, the Trustees adopted “Rules and Regulations for the Management and Products of the Waters of the Town of Southampton” and compliance with those regulations is mandated under § 111-37 of the Code of the Town of Southampton. Moreover, the Trustees manage and control their property, in part, through the permit process that, for example, is mandated under the Code of the Town of Southampton § A340-29, which provides: “No person shall dig, dredge or change the bottom of any of the waters in the Town of Southampton nor drive or place therein any bulkheading, dock, mooring or obstruction nor deposit any material whatsoever nor empty any drain or sewage in said waters nor dig any boat channel or basin in any upland to afford access to any of said waters nor cause the same to be done unless authorized by a permit issued by the Trustees.” Furthermore, there is anecdotal evidence that the Trustees execute their authority as an agency of the Town of Southampton, for example, by maintaining offices and holding meetings in Southampton Town Hall, being funded through taxes collected by the town, and being represented by the Southampton Town Attorney on legal matters. Accordingly, the Trustees exercise both proprietary rights as well as governmental authority.

Under SEQRA, an “agency” includes any state agency or local agency, which is defined under ECL § 8-0105 (2) as “any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state.” As explained in Weinberg, Practice Commentaries (McKinney’s Cons Laws of NY, Book 17 ½, Environmental Conservation Law § 8-0105, at 117), there is a “clear intent to encompass every governmental entity within SEQRA, including authorities and public benefit corporations, historically immune from much public disclosure of their activities”, since “SEQRA’s mandate that agencies stop, look and listen before risking environmental impact plainly includes those bodies as well.” The statute applies to “actions” which include “projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies” (ECL § 8-0105 [4] [I]).

While the Trustees have discretion to grant or deny permit applications (*see Poster v Strough*, 299 AD2d 127, 752 NYS2d 326 [2d Dept 2002]), the application process is subject to the review process mandated under SEQRA. For this Court to hold otherwise would frustrate the intent of the statute which, in part, has as its stated purpose to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state” (ECL § 8-0101). Furthermore, any contention that the Dockers’ proposal does not require a permit from the Trustees is disingenuous and without legal or factual basis (*see* Code of the Town of Southampton § 111-30).

Accordingly, the petition is granted in its entirety, with costs and disbursements, the Trustee Permit No. 9607 and “Notice of Determination of No Significance” are annulled, and the Trustees

and the Town of Southampton are enjoined from issuing any further permits until compliance with the provisions of SEQRA have been met.

Order and judgment is signed simultaneously herewith.


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION

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