Shoreham Wading Riv. Advocates for Justice v Town of Brookhaven Planning Bd.
2015 NY Slip Op 31444(U)
August 3, 2015
Supreme Court, Suffolk County
Docket Number: 22674/2014
Judge: Joseph Farneti

[* 1]

ORIGINAL

SHORT FORM ORDER

INDEX NO. 22674/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SHOREHAM WADING RIVER ADVOCATES FOR JUSTICE, ANDRE BLOUNT, RACHEL BLOUNT, TRACY HARDING, MICHAEL HARDING, JEANETTE KUZMA, DONALD KUZMA, DAMIAN PEREZ and SARAH PEREZ, individually and as members of SHOREHAM WADING RIVER ADVOCATES FOR JUSTICE,

Petitioners/Plaintiffs,

-against-

TOWN OF BROOKHAVEN PLANNING BOARD, TOWN OF BROOKHAVEN ZONING BOARD OF APPEALS, TOWN OF BROOKHAVEN, LONG ISLAND LIGHTING COMPANY d/b/a LIPA, PSEG LONG ISLAND LLC, TED LAND HOLDING LLC, RICHWOOD GREENWORKS LLC a/k/a sPower, LEAVENWORTH GREENWORKS LLC a/k/a sPower,

Respondents/Defendants.

ORIG. RETURN DATE: DECEMBER 4, 2014
FINAL SUBMISSION DATE: JUNE 18, 2015
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: FEBRUARY 18, 2015
FINAL SUBMISSION DATE: JUNE 18, 2015
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: FEBRUARY 18, 2015
FINAL SUBMISSION DATE: JUNE 18, 2015
MTN. SEQ. #: 003
MOTION: MG

ORIG. RETURN DATE: JUNE 16, 2015
FINAL SUBMISSION DATE: JUNE 18, 2015
MTN. SEQ. #: 004
MOTION: MG

ORIG. RETURN DATE: JUNE 16, 2015
FINAL SUBMISSION DATE: JUNE 18, 2015
MTN. SEQ. #: 005
MOTION: MD

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Upon the following papers numbered 1 to 39 read on these motions FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR, DISMISSAL, SUMMARY JUDGMENT, A PRELIMINARY INJUNCTION AND TO FIX AN UNDERTAKING. Order to Show Cause and supporting papers 1-3; Memorandum of Law 4; Verified Answer 5; Return 6-11; Affirmation in Further Support of Petition and supporting papers 12, 13; Notice of Motion and supporting papers 14-16; Memorandum of Law 17; Memorandum of Law 18; Notice of Motion and supporting papers 19-21; Verified Answer 22; Memorandum of Law 23; Reply Memorandum of Law 24; Order to Show Cause and supporting papers 25-27; Affidavit in Opposition and supporting papers 28, 29; Affidavit in Opposition 30; Affidavit in Opposition 31; Affidavit in Opposition 32; Memorandum of Law in Opposition 33; Order to Show Cause and supporting papers 34-36; Memorandum of Law 37; Affirmation in Opposition and supporting papers 38, 39; it is

ORDERED that this motion (seq. #001) by petitioners/plaintiffs SHOREHAM WADING RIVER ADVOCATES FOR JUSTICE, ANDRE BLOUNT, RACHEL BLOUNT, TRACY HARDING, MICHAEL HARDING, JEANETTE KUZMA, DONALD KUZMA, DAMIAN PEREZ and SARAH PEREZ, individually and as members of SHOREHAM WADING RIVER ADVOCATES FOR JUSTICE (collectively "plaintiffs") for an Order:

(1) annulling and vacating the variance granted by respondent/defendant TOWN OF BROOKHAVEN ZONING BOARD OF APPEALS for the application of respondent/defendant RICHWOOD GREENWORKS LLC to construct and operate a solar farm on the property of

respondent/defendant TED LAND HOLDING LLC in Shoreham, New York ("solar farm project"); and

(2) annulling and vacating the Negative Declaration of environmental significance issued by respondent/defendant TOWN OF BROOKHAVEN PLANNING BOARD with respect to the solar farm project; and

(3) annulling and vacating the subdivision, site plan and special permit approvals granted by respondent/defendant TOWN OF BROOKHAVEN PLANNING BOARD for the solar farm project; and

(4) declaring that any purported Power Purchase Agreement executed between or on behalf of respondent/defendant LONG ISLAND LIGHTING COMPANY d/b/a LIPA with respondents/defendants RICHWOOD GREENWORKS LLC a/k/a sPower and/or LEAVENWORTH GREENWORKS LLC a/k/a sPower and/or any affiliate or subsidiary thereof relating to the solar farm project is null and void; and

(5) enjoining all respondents/defendants from proceeding or taking any action with respect to the solar farm project, including issuing final site plan approval, building or other permits and/or commencing any work relating thereto, until the application is reconsidered by the relevant Town agencies and full compliance with SEQRA and all applicable laws is ensured; and

(6) enjoining LIPA and PSEG LONG ISLAND LLC from entering into and/or performing any Power Purchase Agreement relating to the solar farm project until all proceedings required by SEQRA and a full investigation into the nature and validity of any purported Power Purchase Agreement are completed; and

(7) staying, pursuant to CPLR 7805, all actions by any party to enforce or implement the determinations challenged herein pending a judgment on the merits in this action,

is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #002) by respondents/defendants LONG ISLAND LIGHTING COMPANY d/b/a LIPA and PSEG LONG ISLAND LLC for an Order, pursuant to CPLR 3211 (a) (3), (5) or (7), and 7804 (f), dismissing

the Verified Petition/Complaint in this action, is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this motion (seq. #003) by respondents/defendants RICHWOOD GREENWORKS LLC a/k/a sPower and LEAVENWORTH GREENWORKS LLC a/k/a sPower for an Order, pursuant to CPLR 3212, awarding respondents summary judgment dismissing this hybrid Article 78/ declaratory judgment action in its entirety to the extent such action or any part thereof or any claim asserted therein may not be fully and finally dismissed pursuant to CPLR 7804 or otherwise, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #004) by plaintiffs for an Order, pursuant to CPLR 6301 and 7805, granting a preliminary injunction restraining respondents/defendants TED LAND HOLDING LLC, RICHWOOD GREENWORKS LLC a/k/a sPower, and LEAVENWORTH GREENWORKS LLC a/k/a sPower, or anyone acting on their behalf, from commencing any physical alteration of the land that is the subject of Town of Brookhaven Building Permit Number 15B102844, issued on May 26, 2015 to TED LAND HOLDING LLC for property at Route 25A, also known as SCTM Number 0200104000200021003, until such time as the within petition, which was originally fully submitted to the Hon. William B. Rebolini on March 11, 2015, is determined by the Court, was, in essence, **GRANTED** by this Court on June 16, 2015, when the Court extended the temporary restraining Order previously granted on June 9, 2015 (Tarantino, J.), pending the determination of the within petition/complaint; and it is further

ORDERED that this motion (seq. #005) by respondents/defendants RICHWOOD GREENWORKS LLC a/k/a sPower and LEAVENWORTH GREENWORKS LLC a/k/a sPower for an Order, pursuant to CPLR 6312 (b) and 6313 (c), requiring plaintiffs to post and file with the Court Clerk an undertaking in favor of respondents/defendants RICHWOOD GREENWORKS LLC a/k/a sPower and LEAVENWORTH GREENWORKS LLC a/k/a sPower in an amount to be determined per day for each and every day sPower is restrained or delayed in proceeding in any way with the project at issue, pursuant to such TRO, plus the reasonable attorneys' fees expended by sPower in connection therewith, if it is ultimately determined the petitioners were not entitled to such relief, was **DENIED** by this Court on the record at the temporary restraining Order hearing held on June 16, 2015.

This matter was reassigned to the undersigned upon the recusal of the Hon. William Rebolini by Order dated June 10, 2015.

By Order dated June 9, 2015 (Tarantino, J.), the Court issued the following temporary restraining Order upon the application of plaintiffs for a preliminary injunction:

> **ORDERED**, that pending the return date of this application for a preliminary injunction, Respondents and anyone acting on their behalf shall be, and hereby are, enjoined and restrained from causing any physical alteration of the land that is the subject of Town of Brookhaven Building Permit Number 15B102844, issued on May 26, 2015 to Ted Land Holding LLC for property at Route 25A, also known as SCTM Number 0200104000200021003.

On the return date of plaintiffs' application for a preliminary injunction, to wit: June 16, 2015, this Court held a hearing with respect to the continuation of the aforementioned temporary restraining Order. At the conclusion of the hearing, this Court extended the temporary restraining Order until a determination on the merits of the within petition/complaint. Additionally on June 16, 2015, the Court, in its discretion under CPLR 6312 (c), **DENIED** the application of respondents/defendants RICHWOOD GREENWORKS LLC a/k/a sPower and LEAVENWORTH GREENWORKS LLC a/k/a sPower to require plaintiffs to post and file an undertaking in favor of these respondents/defendants.

Plaintiffs commenced this hybrid action/special proceeding by filing on or about November 19, 2014, in the form of a Declaratory Judgment action and an Article 78 proceeding against the TOWN OF BROOKHAVEN PLANNING BOARD (hereinafter "PB"), the TOWN OF BROOKHAVEN ZONING BOARD OF APPEALS (hereinafter "BZA"),[1] the TOWN OF BROOKHAVEN (hereinafter "Town"), LONG ISLAND LIGHTING COMPANY d/b/a LIPA (hereinafter "LIPA"), PSEG LONG ISLAND LLC (hereinafter "PSEG-LI"), TED LAND HOLDING LLC

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[1] Although plaintiffs have named the "TOWN OF BROOKHAVEN ZONING BOARD OF APPEALS" as a respondent/defendant herein, in actuality the entity is known as the "Board of Zoning Appeals" in the Town of Brookhaven. As such, the Court shall hereinafter refer to it as "BZA."

(hereinafter "Ted Land"), RICHWOOD GREENWORKS LLC a/k/a sPower (hereinafter "Richwood"), and LEAVENWORTH GREENWORKS LLC a/k/a sPower (hereinafter "Leavenworth") (collectively "the sPower defendants"). Plaintiffs are individual adjoining landowners as well as an unincorporated association of others who oppose the construction of a solar energy production facility at 112 Route 25A, Shoreham, New York.

The plaintiffs' first claim for relief seeks to annul the determination of the BZA which granted sPower certain variances for setback relaxation, fence height and landscaping proposed by the sPower defendants. The basis for this relief is the alleged violation of SEQRA requirements as to the environmental review for this solar farm project. The plaintiffs allege that the BZA as a coordinating agency was required to participate with the PB, the lead agency, in the environmental review of all actions taken in connection with the various town approvals concerning the construction of this solar farm at Shoreham. The BZA avers that it declared its actions regarding these variances as a Type II action, without the need for any further environmental assessment or review on the part of the BZA. Plaintiffs argue that more was required. This Court disagrees. At the time the variances were sought, the BZA's actions were *de minimis* with respect to the application for this solar farm project and there was no need to aggregate its findings at that point with the review to be undertaken by the PB.

Plaintiffs' second claim for relief seeks to annul the determination of the PB which granted sPower's applications for a division of the existing property into two parcels, site plan approval, and a special permit to construct a solar energy production facility upon the larger of the two resulting sub-divided parcels. Plaintiffs' alleged justification for the annulment includes both procedural and substantive allegations of non-compliance with various requirements of SEQRA, the Town's adopted Land Use Plan (hereinafter "LUP"), the Town's adopted Planned Conservation Overlay District (hereinafter "PCOD"), general special permit procedures and criteria, as well as deficiencies in certain elements of the special permit application for the placement and erection of a solar farm.

Plaintiffs' third claim for relief seeks a declaratory judgment as against LIPA and PSEG-LI declaring null and void the Power Purchase Agreement (hereinafter "the PPA") entered into between LIPA and sPower for various alleged procedural and substantive defects in the process of the application and issuance of the PPA.

Plaintiffs' fourth claim for relief as to all respondents/defendants seeks a permanent injunction alleging irreparable harm, and seeks to enjoin any action including the issuance of building permits and/or the commencement of any work until the application is reconsidered by the relevant Town agencies, and full compliance with SEQRA and all applicable local laws is ensured.

Plaintiffs' fifth claim for relief seeks a stay, pursuant to CPLR 7805, pending a judgment on the merits of the case, staying all actions by any party to enforce or implement the determinations challenged in this litigation. Plaintiffs also assert a statutory stay pursuant to Town Law § 282 relating to the subdivision of the property.

All respondents/defendants have answered the petition/complaint and denied the essential allegations.

As described hereinabove, the respondents/defendants have also moved for certain accelerated relief. The BZA and PB have answered the petition/complaint and have provided the Court with a six volume Return, which includes all relevant papers and records of proceedings that involve the variances, property division, site plan approval and special permit pertaining to the solar farm project at Shoreham, including the relevant SEQRA determinations. The BZA and PB have pleaded compliance with all relevant statutory requirements both procedural and substantive.

STANDING

The issue of standing is a central and threshold consideration of the Court. There are two categories of plaintiffs in this proceeding, the unincorporated association and the individuals named in the caption. The association and each individual plaintiff must meet certain requirements to satisfy standing:

> In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large (*see, e.g., Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, *supra*; *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals*, 69 NY2d, at

> 413, *supra*; *Little Joseph Realty v Town of Babylon*, 41 NY2d 738, 741-742; *Cord Meyer Dev. Co. v Bell Bay Drugs*, 20 NY2d 211, 216, *rearg denied* 20 NY2d 970; *Empire City Subway Co. v Broadway & Seventh Ave. R. R. Co.*, 87 Hun 279, 283, *affd* 159 NY 555; *see also*, *Warth v Seldin*, 422 US, at 499, *supra*). This requirement applies whether the challenge to governmental action is based on a SEQRA violation (*Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, *supra*; *Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524, 528-529), or other grounds

(*Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]).

Furthermore, with respect to standing and SEQRA claims in particular, it has been held that a challenger must demonstrate that it will suffer an injury that is environmental and not solely economic in nature:

> The legislature, in its adoption of SEQRA made no provision regarding judicial review or standing. (*Id.* at 770). Accordingly, the courts have devised various tests. "Generally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute." (*Matter of Gernatt Asphalt Prods v. Town of Sardinia*, 87 N.Y.2d 668, 687, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [1996]; *Matter of Sun Brite Car Wash v. Board of Zoning and Appeals supra* at 413-414). Simply stated the zone of interest test requires a party to show that the in-fact injury of which it complains falls within the area of concern sought to be promoted or protected by the statute. (*Matter of Gernatt Asphalt Prods. v. Town of Sardinia supra* at 687; *Lujan v. National Wildlife Fedn.*, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177; *Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 559 N.Y.S.2d 947, 559 N.E.2d 641; *see also Matter of East 13th St. Community Assn. v. New York State Urban Dev. Corp.*, 84 N.Y.2d 287, 617 N.Y.S.2d 706, 641

> N.E.2d 1368 [1994]). However, with regard to land use matters, courts have long imposed the limitation that in order to prove standing one "must show that it would suffer direct harm, injury that is in some way different from that of the public at large." (*Society of Plastic Indus. v. County of Suffolk*, *supra* at 773; *see Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, *supra*). Thus, "A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity." (*Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, *supra* at 687). Standing to raise a SEQRA claim involves this additional variation: "a SEQRA challenger must 'demonstrate that it will suffer an injury that is environmental and not solely economic in nature.' " (*Id.*; citing *Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, supra* at 433)

(*In re CONCERNED HOMEOWNERS OF ROSEBANK*, 2001 NY Slip Op 40096[U], *9-11 [Sup Ct, Richmond County]; *see Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726 [2013]).

There are three categories of respondents/defendants in this hybrid proceeding. Municipal, utility and private entities have been named by plaintiffs, and the relief sought as to each is somewhat different. The private entities, which include the sPower entities who are the applicants and developers concerning the solar farm project and Ted Land the current owner of the property, are proper parties to this action due to their interest in its outcome, but there is no affirmative relief sought directly against them other than injunctive relief which will be dependent upon the Court's ruling as to the actions of the utility and municipal parties. The actions of the utility respondents/defendants and the municipal respondents/defendants are sought to be annulled, which will affect the rights of the private respondents/defendants.

Plaintiffs have no standing to petition this Court to regulate the private conduct of either the developer or the land owner. The agreements between the private entities are not before the Court. The agreement between any of the private entities and the utilities is only subject to review with respect to the actions of the utilities and their compliance with state and federal regulation. Any review of the interaction between the private entities and the municipal

respondents/defendants is limited to an analysis of the actions taken by the municipality and the sufficiency of the basis of their decision-making.

The utility entities are quasi-public in nature, in that LIPA is subject to significant regulation by both the state and federal government entities which regulate electrical and energy policy. Therefore, the analysis of the standing of the plaintiffs involves their standing vis-à-vis their relationship and status as affected by the actions of the utilities and the municipality. In the absence of close proximity, there must be more than just generalized harm suffered or to be suffered by the plaintiffs as a result of the actions of the utilities and the municipality.

STANDING: SHOREHAM WADING RIVER ADVOCATES FOR JUSTICE ("SWRAJ")

As an unincorporated association, there are certain requirements to be met by the organizational litigant. Is SWRAJ the appropriate entity to act as the advocate for the group of individuals whose rights it claims to be asserting? The Court must consider: (1) the capacity of the organization to assume an adversary position; (2) the size and composition of the organization as reflecting a position fairly representative of the community or interest which it seeks to protect; (3) whether the adverse effect of the decisions and actions sought to be reviewed on the group represented is within the zone of interests sought to be protected; and (4) whether a full participating membership in the representative organization be open to all residents and property owners in the relevant neighborhood. The burden of establishing standing is on the party seeking review of the action involved (*see Douglaston Civic Assn. v Galvin*, 36 NY2d 1 [1974]).

Initially, the Court finds that the individual plaintiffs have standing to maintain this proceeding. The individual plaintiffs allege that they live in close proximity and are adversely affected by this project. Thus, the requisite showing of standing has been made (*see Matter of Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals,* 69 NY2d 406 [1987]; *Glen Head – Glenwood Landing Civic Council v Town of Oyster Bay*, 88 AD2d 484 [1982]; 2 Anderson, New York Zoning Law & Practice § 26.07, at 373 [3d ed]). However, the Court finds that SWRAJ lacks standing. Applying the four-pronged test set forth in *Douglaston Civic Assn.*, *supra*, the Court finds that there is insufficient information provided to determine whether SWRAJ is fairly representative of the Shoreham Wading River

community (*see Friends of Woodstock, Inc. v Woodstock Planning Bd.*, 152 AD2d 876 [1989]).

STANDING AND THE BZA AND PB

While the organizational petitioner/plaintiff lacks standing as a result of not meeting the requirements of *Douglaston Civic Assn.*, *supra*, certain individual plaintiffs here have standing to object to the actions of the BZA and PB due to their close proximity to the solar farm project both adjoining the subject property and their inclusion within the 500 feet notification requirement of the Brookhaven Town Code. It is worthy to note that both the zoning issues as well as the SEQRA issues are properly brought before this Court by several of the individual plaintiffs as supported by their affidavits.[2]

The key factor in a determination of standing is whether or not the plaintiffs are asserting injuries similar to that likely to be suffered by the public at large. Even where there are allegations of particular injury unsubstantiated by any record, the likelihood of success in invoking the jurisdiction of the court will not likely be successful (*see* SEQRA Review for 2002: A Good Year for Applicants, Government, NYLJ, 3/28/03, at 5, col 2).

The seemingly harsh nature of this restriction grows out of the courts' recognition that, in land use decisions, a government entity is making a direct impact on a fairly confined site or group of sites while having an indirect impact on the broader community by indirectly affecting noise, traffic patterns, air and water quality, character and aesthetics (*see Soc'y of Plastics Indus.*, 77 NY2d 761). It has been the rule of law set down by the Court of Appeals that those broad indirect effects, while perhaps felt by many individuals, do not create a justiciable controversy before the courts of this State (*see Olish v Heaney*, 2003 NY Misc LEXIS 644 [Sup Ct, Suffolk County], citing *Soc'y of Plastics Indus.*, 77 NY2d 761).

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[2] There are eight named individual plaintiffs. However, there are affidavits of only four named plaintiffs submitted, to wit: Michael Harding, Damien Perez, Donald Kuzma and Andre Blount. Two additional affidavits of non-parties Michael Goralski and Rose Marie Princi have been submitted. The Court finds that there is insufficient support in the record for the inclusion of Rachel Blount, Tracy Harding, Jeanette Kuzma and Sarah Perez as petitioners/plaintiffs herein.

The affidavits of the individual adjacent property owners are critical in this regard, and are summarized below.

Michael Goralski

Mr. Goralski claims to be president of the community group SWRAJ. His allegations concerning this matter are insufficiently specific to give rise to a claim of standing on his behalf or on behalf of the SWRAJ. Given the Court's ruling concerning SWRAJ pursuant to *Douglaston Civic Assn.*, *supra,* and given the lack of any information identifying the location of Mr. Goralski's property or the nature of any ownership interest he may have, he is without standing to challenge the actions of the respondents/defendants herein.

Michael Harding

Mr. Harding resides on Sherwood Drive in Shoreham and his property is adjacent to the proposed solar farm. He indicates that "[w]e oppose this project because it is a large commercial use that is out of place and out of character in our residential neighborhood." He further speaks to the rural character of the neighborhood and the green viewshed of the adjacent sod farm. He further indicates the view will be disturbed from other view points in the areas as well. Mr. Harding states his belief "that having a solar farm in place of the sod farm will severely reduce our property values due to the negative environmental, aesthetic and health related impacts that it will have on the neighborhood."

He opines that catch basins will likely become breeding grounds for mosquitos, which may carry the West Nile virus. He mentions his concern that if an electrical fire occurs in the field of solar panels, it will quickly spread to our residential development. He opines that "our small volunteer fire department is not trained or equipped to handle this situation." He voices additional concerns regarding the capacity of the panels to withstand high winds. He further speaks of concern about "unknown health risks," the uncertainty concerning taxes, the profits to be made by the developer, and the BZA's calculation methods of the lot coverage area. He also speaks to the lack of specificity of the meeting notices that he received, and indicates that he did attend the meetings and he along with others voiced their concerns but feels those concerns were not adequately addressed.

All but the health concerns are general in nature and concerns that are held by the community at large. His concerns about the EMF transmissions due to the proximity of his property immediately adjacent to the subject property are sufficiently particularized to confer standing upon him, but lack any support in the record other than his concern. There are no affidavits of electrical engineers or other experts to confirm these concerns, and without any scientific justification or other support for the assertions, there is insufficient evidentiary or other basis in the record to confer standing. These amount to generalized concerns similar to those voiced by the community at large. Mr. Harding is without standing to challenge the actions of the respondents/defendants without a more particularized assertion of injury with proper foundational support. Mr. Harding does not provide any credentials which he may possess that would provide the necessary evidentiary support as required by case law.

Damian Perez

Mr. Perez resides in and is the owner of property adjacent to the subject property. He indicates that this project is out of character for the area. Mr. Perez indicates that he is the parent of school-age children and is concerned that once the project is complete his children, as well as the neighborhood children who walk and ride their bikes in the area, will be drawn to the property out of curiosity under a theory of attractive nuisance. Mr. Perez indicates "the solar farm would be clearly visible from my backyard, and the glare will likely impact our quality of life, because some of the sunlight would surely be reflected from the glass panels."

Mr. Perez also sets forth his belief that the solar farm "will severely reduce our property values." Mr. Perez indicates that the content of the meeting notice was not specific, and the timing of the meeting at 2:00 p.m. affected the attendance. He indicates that he did attend the meetings and voiced his concerns and also made a written submission in the form of a letter. It is Mr. Perez's assertion that "the Town agencies did not adequately study the impacts of this project on the character of our residential community. If they had, they would have concluded that the application should be denied."

The only particularized prospective injury other then general concern for the project relates to reflection of sunlight onto his property. Other than that general concern, there is nothing in the record to support the claim. sPower's representatives indicate that reflection of sunlight from the solar panels is not an

issue due to their design and purpose to capture sunlight. There is an indication that some glare is expected from the reflection of sunlight by the galvanized steel module frames. This occasional glare is subject to mitigation and is also a general concern in or around the proposed solar farm development. Other than Mr. Perez's statement, there is no additional support for the glare assertion, which is a generalized complaint with the potential to affect the community at large, but could possibly affect Mr. Perez more significantly due to his close proximity to the subject property and proposed modules.

Donald Kuzma

Mr. Kuzma's property is also adjacent to the subject property. Mr. Kuzma cannot recall getting a notice for the hearings regarding the subject property, but indicates that he did attend the meetings. He indicates that he spoke to the issue of the damage to the viewshed. Mr. Kuzma also indicated that he urged the Board to have an appraisal company undertake an analysis of the project's impact upon property values in the area. He opines that the PB relied "on some irrelevant information produced by the applicant about wind power and solar roof installations on home values." Mr. Kuzma claimed that his research indicated "where solar farms were installed in or near residential neighborhoods values dropped substantially."

Mr. Kuzma provided anecdotal information concerning the Clay County Town Assessor's Office in North Carolina having to "lower assessments for properties located near the solar plant which was installed in a residential area." Here, there is no specific injury different from that of the general public and nothing specific to immediately adjacent property owners.

Andre Blount

Mr. Blount's property is also adjacent to the subject property. Like the other affiants, his objection is based upon a general objection that "[w]e oppose this project because of it is a large commercial use that is out of place and out of character in our residential community." Mr. Blount's belief is "that having a solar farm in place of the sod farm will severely reduce our property values due to the negative environmental, aesthetic, and health related impacts it will have on the neighborhood." He indicates "the plans call for the planting of trees around the perimeter of the solar farm to provide screening. However, I am

concerned that these trees will die, leaving the eyesore of the dark glass panels in full view."

Mr. Blount attended the PB meetings but does not believe he received any notification regarding the BZA and this project. His ultimate belief is that "the Town agencies did not adequately consider the harmful impacts of this large scale commercial development in our residentially zoned community."

Rose Marie Princi

Ms. Princi indicates that she works as a real estate agent in the shopping plaza located on Route 25A directly across the street from the sod farm. She indicates that anyone driving in the area along Route 25A has a view of the sod farm. Ms. Princi indicates that she learned of the of the project when representatives of the applicant came to speak to the Shoreham Civic Association regarding the application for a variance. Ms. Princi indicated that:

> "As a real estate agent, I know that people who come to settle in this area are looking for a quiet rural community and appreciate the green open spaces nearby. This is an important factor affecting the value of residential property here. An industrial scale solar energy generation facility is considered by many an eyesore and inappropriate in a residential area."

Ms. Princi further opines about the lack of any benefit offered by the developer to the community, and whether scientifically proven or not, people are generally concerned and anxious about exposure to electromagnetic frequencies and the stigma caused by "High Voltage" signs which can severely depress the price of the property. The assertion by Ms. Princi is that the project is contrary to the character of the community and would damage rather than benefit it.

None of the affiants offer any indication of their education, training or experience in any particular field or any professional license or credential that would support any specific opinion or assertion. Other than Mr. Perez's concern about reflective glare, which could also be a generalized community objection, there is nothing in the record proffered by the plaintiffs asserting any non-general, specific injury to their property within the "zone of interest." The main thrust of all the affiants is that this type of project is inappropriate in a residentially-zoned

area. The problem with that argument is that both the LUP and the PCOD specifically provide for a solar generating facility for this specific property, and the Town Code contains a properly promulgated and enacted provision for the processing and issuance of a special permit for a solar electric generating facility (*see* Brookhaven Town Code §§ 85-707, 85-708, 85-709).

Courts have consistently denied standing and excluded property owners whose property was not in close proximity to the premises re-zoned or otherwise affected by some administrative or legislative action:

> "Injury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury"

(*Matter of Radow v Board of Appeals of Town of Hempstead*, 120 AD3d 502, 503 [2014], quoting *Matter of Powers v De Groodt*, 43 AD3d 509, 513 [2007]; *see Matter of Sun-Brite Car Wash*, 69 NY2d 406).

Plaintiffs Michael Harding, Damien Perez, Donald Kuzma and Andre Blount therefore have presumptive standing to sue. Courts have consistently held that there is a presumption in favor of standing for properties in close proximity to a premise affected by some zoning or other administrative action (*see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297 [2009]; *Society of Plastics Indus.*, 77 NY2d 761; *Matter of Shepherd v Maddaloni*, 103 AD3d 901 [2013]). But for proximity, the allegations claimed by the individual plaintiffs would not have conferred standing had they been asserted by non-adjacent landowners. The Court is, however, bound to find standing based upon proximity alone.

ARTICLE 78 OF THE CPLR

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell*, 34 NY2d

222). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is illegal, arbitrary and capricious, or an abuse of discretion (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell*, 34 NY2d 222). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell*, 34 NY2d 222). Although scientific or other expert testimony is not required in every case to support a determination with respect to zoning, a tribunal may not base its decision on generalized community objections or pressure (*see Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Grigoraki v Board of Appeals of the Town of Hempstead*, 52 AD3d 832 [2008]).

Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]). However, in *Halperin v City of New Rochelle*, 24 AD3d 768 (2005), the Second Department held that a "substantial evidence" question arises "only where a quasi-judicial evidentiary hearing has been held." The court noted that public hearings related to zoning issues are informational and not evidentiary or adversarial (*Id.*). Therefore, those determinations are reviewed under the "arbitrary and capricious" standard rather than the "substantial evidence" standard (*Id.*). Further, "the determination of a land use agency must be confirmed if it was rational and not arbitrary and capricious" (*Id.* [internal quotations omitted]; *accord Herman v Inc. Vil. of Tivoli*, 45 AD3d 767 [2007]; *Rendely v Town of Huntington*, 44 AD3d 864 [2007]). The Second Department adheres to this standard at present and the analysis as prescribed is controlling (*see Matter of Pine v Westchester County Health Care Corp.*, 127 AD3d 868 [2015]).

Moreover, local zoning boards have broad discretion in considering land use applications and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*Id.*). A reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board (*Pecoraro*, 2 NY3d 608).

BZA AND SEQRA

The BZA declared a Type II SEQRA classification concerning the variances before it at the time of the solar farm application. The BZA also informed the attendees at the July 23, 2014 meeting that the PB would be the lead agency on all environmental issues concerning SEQRA and the solar farm project. As to the limited aspects of the matters before the BZA, they were correct in their Type II designation given the items before them. Their determination was appropriate in the circumstances. The set back relaxation of allowing an existing 44 foot frontage setback where a 50 foot setback was required is a 6 foot relaxation or 12%, which is *de minimis*; the six foot maximum fence height increased to permit the proposed eight foot fence height was not environmentally significant at the time and was rendered moot later in the process when the applicant agreed to a six foot fence height to conform with the adjoining property owners already existing six foot fence height for aesthetic reasons. The landscape as proposed with the placing and planting of evergreens on portions of the perimeter of the property, and a departure from the front yard percentage of planting requirements is likewise insignificant in terms of SEQRA requirements. The BZA's classification of its application as Type II was both legally and factually correct.

The application was received by the BZA on July 9, 2014, the hearing at which the Type II designation was given. The decision granting the variance application was dated August 13, 2014, and was filed in the Office of the Town Clerk on August 18, 2014. The BZA correctly argues that the time within which to commence an Article 78 proceeding pursuant to Town Law § 267-c is within thirty (30) days after the filing of a decision of the board in the Office of the Town Clerk. Therefore, plaintiffs' first claim for relief seeking to annul the determination of the BZA that granted sPower certain variances for setback relaxation, fence height and landscaping proposed by the sPower defendants is **DISMISSED**, pursuant to CPLR 3211 (a) (5), having been commenced on November 19, 2014, beyond the period of limitations (*see* Town Law § 267-c; *Save the Pine Bush Inc. v Albany*, 70 NY2d 193 [1987]).

THE PB'S ACTIONS

The main actor in the process of the approval of the solar farm project was the PB. The PB was required to be guided and bound by the

provisions of SEQRA, the LUP, the PCOD, the Town Code's general special permit requirements, as well as the Town Code's solar energy production facility special permit requirements.

The PB undertook and assumed lead agency status for the solar farm project application. It classified the actions concerning the land division, site plan application and special permit application as Type I actions given the size and implications of the solar farm project. The plaintiffs agree that this was the appropriate and proper classification and that the PB was the proper lead agency. The difference of opinion occurs concerning the sufficiency of the review and the PB's Negative Declaration.

The Town has provided a history of the planning and land use studies and decision-making concerning the Hamlet of Shoreham and the Route 25A corridor between the hamlets of Mount Sinai and Wading River. From west to east, there are four contiguous hamlets along Route 25A, namely, Mount Sinai, Rocky Point, Shoreham and Wading River. In July 2002, the Shoreham Hamlet Study was completed and then updated in March 2004. The study was undertaken to identify the community needs and wishes concerning the Hamlet of Shoreham. The Town expanded the study and undertook to study the entire corridor from Mount Sinai to Wading River. In 2010, the Town Board adopted the Draft Route 25A Mount Sinai to Wading River LUP and adopted a Draft Generic Environmental Impact Statement ("DGEIS") pursuant to Environmental Conservation Law Article 8 (SEQRA).

The Final Generic Environmental Impact Statement was adopted by the Town Board in August 2012 and, in September 2012, the Town Board adopted the Findings Statement for the LUP and the LUP itself. The LUP included a PCOD within which the subject parcel is located.

The parcel in question is specifically referenced in the LUP and the PCOD. The preferred future use and development of the property was to either up-zone the property or to conserve it. If that was not feasible, then the espoused plan was to preserve large portions of the sites in their natural state and scenic vistas from Route 25A, and help minimize impacts to the school district.

Also discussed during the visioning process were the benefits of green uses such as a solar farm that could be another alternative to single family residential development for the sod farm sites in Shoreham and Miller Place;

however, the underlying residential zoning does not permit high technology uses, and additional consideration of an appropriate zoning district would be needed.

The PCOD in the LUP included a provision within Section 13.3 at page 72:

> ***Special Permit***
>
> High technology green uses, *such as solar farms*, and single family attached homes (townhouses) would be permitted by Special Permit from the Town Board (emphasis added).

On October 23, 2012, the Town Board amended the Zoning Code and adopted the PCOD, and it became effective on November 7, 2012. The PCOD code indicated that the PB was empowered to authorize the special permit (*see* former Brookhaven Town Code § 85-538, now § 85-708).

On April 28, 2014, the Town of Brookhaven Planning Division received a Land Use Application for the subject parcel for a site plan, special permit and land division to construct a solar energy production facility (a/k/a solar farm). The PB heard the matter on September 8 and 22, 2014. The PB rendered its Findings and Conclusions on October 20, 2014, and the decision was filed with the Town Clerk on October 27, 2014.

Plaintiffs allege that the PB violated both the general and specific provisions of the LUP. The Brookhaven Town Code provides:

> Section 85-708 Planning Board special permits.
>
> The following special permit uses, when authorized by the Planning Board, shall be subject to the criteria as set forth in Article VI, § 85-67, in addition to the criteria contained herein:
>
> A. Solar energy production facility

(Brookhaven Town Code § 85-708 [A]).

The specific criteria for a solar energy production facility special permit are found in Section 85-709. The special permit application and the special permit decision of the PB clearly complies with each of the provisions of Section 85-709. The PB considered the fifteen criteria for the issuance of a special permit for a solar energy production facility, and found that the application complied with all code requirements. The plaintiffs show no deficiency in the compliance. There are general objections that the preamble to the LUP and PCOD are not adhered to with regard to open vistas and view sheds. However, the LUP and PCOD, as codified, are subject to the more specific provisions of Section 85-709. A review of the criteria together with the application and the determination of the PB show compliance. The issue of the propriety of the use is no longer justiciable, the codification of the special permit for a solar energy production facility was complete when the Town Code sections were filed. Further, the PB's decision indicated that the applicant had submitted a decommissioning plan to be implemented upon abandonment or cessation of activity, in compliance with Section 85-709 (B).

The primary objection of the specific criteria has to do with lot coverage. Plaintiffs make two arguments in this regard. They argue that the calculation has not been explained sufficiently as to lot coverage. From the site plan and the application, as well as the findings of Town Senior Environmental Analyst Peter Fountaine of the Planning Division, there are solar panel modules with multiple solar panels mounted throughout the depth and breath of the property, as well as a transformer structure and other ancillary structures. There are 11,909 proposed solar panels, each measuring 6.5 feet by 12 feet. Each panel is 78 square feet in area. In total, the 11,909 panels constitute 928,902 square feet. Albeit, there are spaces of 14 feet between the modules that are not covered by the module supports or the elevated solar panels. The larger of the divided lots is 59.84 acres; each acre is 40,000 square feet in area. The total square footage of the parcel is 2,393,600 square feet. The total coverage area of the proposed solar panels is 38.8% total coverage. The remaining 1% of the proposed development of the lot consists of the inverter and ancillary structures, well within the 53% lot coverage provided by Section 85-709 (A) (5).

The plaintiffs also argue that Section 85-710 (A) (4) concerning site development provides:

> A. A minimum of 70% open space or continued agricultural use must be preserved with development restricted to

> the remaining 30% of applicable property(ies). Open space/agriculture shall be preserved in such a way as to ensure that it is *continuous and uninterrupted*. Location of the open space or agriculture use shall also take into account features of the subject parcel and adjacent parcels such as:
>
> (4) *Scenic views and vistas*

(Brookhaven Town Code § 85-710 [A] [4] [emphasis added]).

The plaintiffs argue that to permit the erection of a solar energy generating facility of this magnitude violates the spirit and letter of the law. The law of statutory construction leads this Court to the conclusion that the 70/30 site plan provisions apply to developments other than solar energy generating facilities. These are successive and adjoining provisions of the statutory implementation of the LUP and PCOD. The special permit provisions for a solar energy generating facility are specific to the type of facility with its fifteen enumerated criteria. The underlying and existing zoning provisions in place for the parcels remaining undeveloped would still apply. For example, Section 85-709 (A) (4) provides the maximum height for free standing solar panels located on the ground or attached to a framework located on the ground shall not exceed 10 feet in height above the ground. In contrast, the development of residential townhouse units would have height limitations in the zone of 30 feet or greater. Taking Section 85-709 as a whole, the provisions and restrictions concerning the solar energy generating facility are specific to that use and are not subject to the provisions of Section 85-710 where the development refers to residential development. Common sense dictates that one cannot place 53% lot coverage for a solar energy generating facility within 30% of a property. The 30% restriction contained in Section 85-710 cannot be read as a restriction of the 53% lot coverage allowance of Section 85-709.

Moreover, the PB considered the requirements for the issuance of special use permits in general by the PB, pursuant to Section 85-107. The PB found, among other things, that as the solar farm project is located in the PCOD and is in conformance with the LUP and is a permitted use, "the project is consistent with the area's present and likely future uses and is particularly suited for the use proposed" (Findings and Conclusions of the PB, October 20, 2014, at

7). With respect to a potential reduction in surrounding home values, the PB found:

> As there is no testimony indicting (sic) a reduction in home values and the only information regarding renewable energy power source did not find a statistically observable impact and weighing the conservation of land values against the proposed and existing use of the land, the Board finds the application encourages the most appropriate use of the land and appropriately conserves property values

(*Id.* at 7-8).

The PB concluded that the proposed land division and future development of the property was consistent with the LUP, and that the special permit application met the specific criteria for an electric generating facility, as well as the general criteria for all special use permits. The Court finds that the general and special permit requirements of this application have been met.

The relief requested as against the PB is properly brought within the context of the Article 78 proceeding. As discussed, the claim seeking a determination that the PB's actions were illegal must be undertaken from the perspective of whether there was any action taken in violation of lawful procedure, affected by an error of law, was arbitrary and capricious, an abuse of discretion, or was irrational. The actions of the Town, BZA, and PB are redressable in the context of the Article 78 proceeding. The actions taken by the PB are supported by the records contained within the Return. It is well-settled that a court may look to the administrative agency's formal Return in an Article 78 proceeding to insure that the necessary record support for its decision exists, as well as to permit intelligent judicial review (*see Matter of Frank v Zoning Bd. of Town of Yorktown*, 82 AD3d 764 [2011]; *Matter of Ohrenstein v Zoning Bd. of Appeals of Canaan*, 39 AD3d 1041 [2007]; *Iwan v Zoning Bd. of Appeals*, 252 AD2d 913 [1998]; *Fischer v Markowitz*, 166 AD2d 444 [1990]).

The record contains a very clear statement of the actions taken by the Planning Division and its staff in investigating, analyzing and reporting their findings and conclusions, which were appropriately contained within the records reviewed and the consideration given to the issues by the PB.

In reviewing a lead agency's compliance with SEQRA, a court does not weigh the desirability of the action, or determine what, if any, adverse environmental effects may result from it. The limited issue for review is whether the decision makers identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for their determination (*see Har Enterprises v Brookhaven*, 74 NY2d 524 [1989]; *Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400 [1986]; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817 [2007]; *Aldrich v Pattison*, 107 AD2d 258 [1985]; *Coalition Against Lincoln W. v City of New York*, 94 AD2d 483 [1983]).

Here, Peter Fountaine performed field inspections of the solar farm project site on July 23, 2014 and August 29, 2014, resulting in a completed report dated September 5, 2014. Mr. Fountaine also prepared a Division of Environmental Protection Review Sheet, which identified various environmental impacts. The PB had numerous items to consider before rendering a determination, and used those items to take a hard look at the relevant areas of environmental concern. The PB then gave a reasoned elaboration of the basis for its Negative Declaration in its Resolution adopted on October 20, 2014.

Therefore, the Court finds that the PB's actions were appropriate under the circumstances presented herein.

LIPA AND SEQRA

No LIPA approval is required for the construction of a solar electric generating facility. It is the PB that has been tasked with the responsibility for the review and granting of any special permit for a solar facility. The plaintiffs argue that without the PPA the applicant would not be able to meet the proof of concept component of the special permit process. Accepting that assertion as true does not transform the execution of the PPA into a discretionary act. LIPA provided no funding, no technical assistance, no guarantees, and no assistance whatsoever to sPower or any of its affiliates in relation to the proposed facility.

LIPA's Board created and approved the "FIT 1" program by the formation of the Clean Solar Initiative Feed-In-Tariff, which was adopted by LIPA on June 28, 2012. PSEG-LI's only involvement in this matter concerned giving effect to the site location substitution of Shoreham for the original Calverton site, which was included in the original PPA. PSEG-LI did not form its relationship

with LIPA until the execution of the Amended and Restated Operations Services Agreement dated December 31, 2013, together with the LIPA Reform Act (L 2013, ch 173, *eff.* January 1, 2014). The plaintiffs argue that due to the redaction of certain identifying information concerning the PPA with sPower, the public would have no way of knowing of the issuance of the PPA. The plaintiffs aver that they had no way of knowing that a PPA was issued for the Shoreham location until the PPA was provided in unredacted form long after its original execution. Both sPower and LIPA agreed to or acquiesced in the redaction as well as the substitution of the Shoreham location for the Calverton location.

The Court accepts the explanation of sPower, in that the redaction served to maintain their competitive advantage in not revealing their interest in specific sites for the placement of solar generating facilities. However, while that competitive advantage is important, there are consequences to the failure to identify the locations involved. The failure to include the location of the PPA contract site deprives any interested party the opportunity to question or challenge the propriety of the action by commencement of a special proceeding within the four month time frame prescribed by law (*see* CPLR 217 [1]). To compel a challenge within four months of the execution of the PPA, when the location of the proposed facility is unknown due to its redaction by LIPA and the contracting party, is fundamentally unfair and renders the statute of limitations meaningless. Therefore, the Court denies that portion of the motion to dismiss by LIPA and PSEG-LI premised upon CPLR 3211 (a) (5), and deems this proceeding timely commenced as against LIPA and PSEG-LI to the extent it seeks review of their actions.

LIPA argues that it is only the actions of the full LIPA Board which are subject to SEQRA regulation. The Court is unaware of any statutory provision or precedential decisional law to that effect. However, ECL 8-0105 specifically excludes certain actions from SEQRA requirements:

> 5. "Actions" do not include:
>
> (ii) official acts of a ministerial nature, involving no exercise of discretion

(ECL 8-0105 [5] [ii]).

6 NYCRR § 617.2 defines a ministerial act which comports completely with the action taken here by LIPA:

> (w) "Ministerial act" means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license

(6 NYCRR § 617.2 [w]).

Pursuant to the FIT 1 program requirements, LIPA was and is obligated to enter into such agreements in every case where the applicant chooses to participate in the program. There is no facility review involved. LIPA was under no obligation to make any SEQRA determination concerning its execution of a PPA. The underlying solar electric generating facility required no input or approvals from LIPA as to any methods or means of construction, or with regard to any direction whatsoever concerning the specifications of the project as to materials, dimensions, or indeed any other issue. Likewise, the issuance of the PPA was a ministerial act and there was no SEQRA-related action as defined in ECL Article 8.

REQUEST FOR PERMANENT INJUNCTION

Plaintiffs seek injunctive relief against the respondents/defendants to prevent them from taking any action with respect to the solar farm project, both on a permanent basis as well as during the pendency of this matter. Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (*see Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*see Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]). Furthermore,

the purpose of a preliminary injunction is to maintain the status quo pending the determination of the action or proceeding (*see Town of Carmel v Melchner*, 105 AD3d 82 [2013]; *Ruiz v Meloney*, 26 AD3d 485 [2006]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642 [2006]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2011]).

As noted, on June 16, 2015, the Court essentially granted plaintiffs a preliminary injunction enjoining and restraining respondents and anyone acting on their behalf from causing any physical alteration of the subject land, pending a determination on the merits of the within petition/complaint. However, in light of the Court's rulings herein, plaintiffs' fourth claim for relief which seeks a permanent injunction against all respondents/defendants is **DENIED**.

Regarding the claims asserted against LIPA or PSEG-LI, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether plaintiffs have a cause of action and not whether they may ultimately be successful on the merits (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Under the circumstances presented, the Court finds that plaintiffs have neither standing nor any cognizable cause of action of any kind as against LIPA or PSEG-LI. Therefore, LIPA and PSEG-LI's motion to dismiss is **GRANTED**, and the third, fourth and fifth claims for relief seeking a judgment declaring null and void the PPA entered into between LIPA and sPower, as well as injunctive relief, are hereby **DISMISSED**.

sPOWER's MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v*

Kirchoff, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

In the case at bar, the Court finds that sPower has made a *prima facie* showing of entitlement to judgment as a matter of law dismissing the claims asserted against sPower (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The Court finds that plaintiffs have no standing to challenge the PPA, as they are strangers to that agreement and have no privity with the contracting parties (*see County of Suffolk v Long Is. Power Auth.*, 117 AD3d 770 [2014]). Moreover, in the absence of some injury in fact, the zone of interest test will not confer standing on individuals merely because they are customers of a utility (*see Matter of East End Prop. Co. #1, LLC*, 46 AD3d 817; *Lederle Laboratories Div. of American Cyanamid Co., v Public Service Com.*, 84 AD2d 900 [1981]; *SRG Properties, LLC v Long Is. Power Auth.*, 2009 NY Slip Op 31196[U] [Sup Ct, Nassau County]).

Accordingly, this motion by sPower for summary judgment dismissing this hybrid Article 78/declaratory judgment action as against the sPower respondent/defendants is **GRANTED**.

CONCLUSION

Based upon the foregoing, the relief sought in plaintiffs' petition/ complaint is **DENIED** in its entirety, and this hybrid special proceeding/action is

hereby **DISMISSED**. The temporary restraining Order heretofore granted on June 9, 2015 (Tarantino, J.), and extended by this Court on June 16, 2015, is hereby vacated.

The foregoing constitutes the decision and Order of the Court.

Dated: August 3, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**