STATE OF NEW YORK
COUNTY OF CORTLAND SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

In the Matter of the Application for a Judgment Pursuant to Article 78 of the Civil Practice Law Rules of:

DECISION AND ORDER

PAMELA JENKINS, CHERI SHERIDAN and OLGA SMITH,

Petitioners,

v.

Index No. 2015-720

LEACH PROPERTIES, LLC, LEACH'S CUSTOM TRASH SERVICE, SUIT-KOTE CORPORATION, TOWN OF CORTLANDVILLE ZONING BOARD OF APPEALS, TOWN OF CORTLANDVILLE PLANNING BOARD, and TOWN OF CORTLANDVILLE TOWN BOARD,[1]

Respondents.

This matter comes before the Court upon the December 4, 2015, Petitioners' Notice of Verified Petition and Verified Petition seeking to reverse and annul determinations made by Respondents with respect to the September 17, 2015, application of Respondent Leach Properties, LLC, for a Use Variance, Subdivision Approval and Conditional Permit, and Aquifer Protection District Special Permit, regarding it's properties located in the Town of Cortlandville, County of Cortland, New York. Respondents Leach Properties, LLC, and Leach's Custom Trash Service (Leach) filed the Affidavit of Gregory Leach dated February 1, 2016, along with the February 3, 2016, letter/memorandum of Attorney Richard C. Lewis in opposition to the Verified Petition.[2] Respondents Town of Cortlandville Zoning Board of Appeals, Town of Cortlandville Planning Board and Town of Cortlandville Town Board, filed the Affidavit of Attorney John B. Folmer,

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[1]By stipulation of the parties the action as against Respondent Suite-Kote Corporation was discontinued.

[2]The Leach Affidavit was subsequently verified on February 9, 2016.

Town Attorney of the Town of Cortlandville, dated February 3, 2016, in opposition to the Verified Petition. Petitioners responded by Reply Affidavit of Pamela Jenkins dated December 24, 2015; Reply Affidavit of Cheri Sheridan dated December 22, 2015; Reply Affidavit of Olga Smith dated December 23, 2015; Reply Affirmation of Attorney Douglas H. Zamelis dated February 5, 2016, and; Petitioners' Reply Memorandum of Law dated February 5, 2016.[3] By letter dated February 9, 2016, Leach submitted a response to the Petitioners' reply.

On February 9, 2016, this matter was heard in Cortland County Supreme Court.

The following reflects the Decision and Order of this Court:

Brief Factual History

Respondent Leach is possessed of property located at 1834 State Route 13 in the Town of Cortlandville, Cortland County, New York, in close proximity to the intersection of Loring Crossing Road, which has been operated by Leach since approximately 1986 as a solid waste transfer station with respect to garbage and recycled materials. On September 17, 2015, Leach made application to the ZBA, Planning Board and Town Board of Cortlandville, for a variance, subdivision approval and permitting with respect to a planned expansion of its location. The expansion would consist of the consolidation of two adjacent parcels, the subdivision of such parcels and the creation of an access road, parking and equipment storage area with respect to Leach's existing transfer station. Leach has described the "expansion" as merely the creation of a driveway of some five hundred feet in length which would permit access to the transfer station from Loring Crossing Road. Leach alleges that this driveway would, as constructed, permit ingress/egress to the transfer station by truck traffic in a safer and more efficient manner. Leach further sought to provide additional space behind the existing transfer station for the parking of trucks. Leach did not seek an expansion of the transfer station's tonnage, additional buildings or increased capacity with respect to its collection of solid waste.

The ZBA heard and granted the Leach application on October 27, 2015, for a use variance. Thereafter, the Planning Board conducted it's review of the Leach application on October 27, 2015, immediately after the ZBA meeting, and also approved the subdivision application and granted a conditional permit to Leach. The Town Board met on November 18, 2015, conducted what petitioners have described as a "cursory review of Part 1 of the EAF," determined that the proposed project did not present any significant adverse environmental impacts, and granted Leach an Aquifer Protection District Special Permit.

It is these determinations by the ZBA, Planning Board and Town Board which precipitated the filing of the instant Article 78 proceeding by the petitioners.

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[3]Reply Affidavits were obviously prepared prior to formal submissions by the Respondents regarding a primary issue of contention between the parties pertaining to the petitioners' standing to commence the instant action.

Legal Analysis

I. Procedural Conformity

This Court will first address the procedural conformity of the pleadings and submissions by the parties with respect to this action. In particular, the question to be addressed is whether the respondents had sufficiently complied with the procedural requirements of Article 78 by the responses submitted and, if they had not, what impact such would have on these proceedings.

In the first instance it should be noted that petitioners, by way of the Reply Affirmation of Attorney Zamelis, assert that the respondents had not properly noticed their responsive pleadings as a motion to dismiss nor paid the requisite fee for such. In addition, petitioners assert that the respondents had failed to file and serve an answer as is required by Article 78. Finally, petitioners assert that Respondent Cortlandville had not filed and served the record of the proceedings as is also required pursuant to Article 78. Based upon such alleged deficiencies the petitioners ask of this court relief consisting of a judgment in their favor. (See CPLR §7804(e)).

Respondent Leach had taken the position that the affidavit of Gregory Leach, managing member of Respondent Leach, dated February 1, 2016, was, for all intents and purposes, an answer to the petition. Contemporaneously, Leach also took the position that the Leach affidavit should be viewed as a motion to dismiss the petition upon the ground that the petitioners lack standing to maintain this action. (See Lewis letter of February 9, 2016, referenced internally as a "Reply Affirmation.) This posture is consistent with that taken by counsel for Leach at oral argument as well as that of Respondent Cortlandville with respect to both its submissions and argument.

CPLR Article 78, which is a special proceeding designed to expeditiously address matters between parties, provides that a petitioner is to commence the action in one of two ways. Petitioner is either to initiate the action by way of an order to show cause or by way of a "notice of petition with the petition and affidavits specified in the notice." (CPLR §7804(c)). The respondents are thereafter required to submit a reply along with any supporting affidavits.

The pleadings "shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer..." (CPLR §7804(d)). Additionally, where a respondent is a municipality such as Respondent Cortlandville it is also required that such a respondent file with its answer a "certified transcript of the record of the proceedings under consideration...and affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact." (CPLR §7804(e)). Any objection in point of law may be submitted by the respondent within the body of its answer.

However, alternatively, a respondent may choose to file a motion to dismiss the petition in lieu of filing an answer and, if unsuccessful, may by permitted by the court to thereafter file its answer. (CPLR §7804(f)).

Here, it is evident to this court that the submissions of the respondents are neither an answer nor a motion to dismiss. Rather, the submissions are somewhat of a hybrid of the two which serve to blur the lines between such responses. However, this court, upon a review of these submissions, along with the reply affidavits of the petitioners and petitioners' counsel, find such deficiencies, if they be such, to be without prejudice to the petitioners and otherwise address the merits of the primary issue raised herein. If this court were to summarily grant judgment to the petitioners upon a finding that respondents' submissions are without authority pursuant to CPLR §7804(e), the merits of the issues at hand would be dispensed with as an exercise of form over substance; something which this court cannot countenance. Therefore, in order to address the merits of the primary issue raised within the submissions this court will consider the respondents' submissions as motions to dismiss singularly with respect to the issue of standing.[4]

II. Standing

The question to be addressed here, in essence, is whether the petitioners, one or more, are the proper parties by which to challenge the determinations made by the legislative bodies of the Town of Cortlandville by way of an Article 78 special proceeding. The issue of standing, therefore, is an initial threshold inquiry which must be resolved in the affirmative before the merits of this matter may be considered by the court.

With respect to standing, the Court of Appeals held in *Society of the Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, at 782, that:

> Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation. Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria...The burden of establishing standing to raise that claim is on the party seeking review. (Internal citations omitted).

The party seeking such judicial redress must generally demonstrate that he or she has suffered some injury in fact which, when determining standing pertaining to administrative actions, is more narrowly defined as to whether such party has suffered an injury in fact which "falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency acted." (*Id* at 785). The courts have sought to insure that the party seeking such redress has a recognizable interest in the matter before granting such a party access to a judicial forum lest the floodgates of litigation be otherwise flown open without rhyme nor

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[4]This court, at the request of counsel, had conducted a telephone conference with counsel on January 28, 2016, prior to the submissions by respondents. The submissions here are consistent with the parties' decision to address the issue of standing first and, as is necessary, the remaining substantive issues.

reason.

The instant matter is, in essence, an action seeking to address administrative determinations made by the respondents as they pertain to land use and management. As such, the Court of Appeals has concluded that a plaintiff or petitioner must demonstrate, to withstand a challenge upon the ground of standing, that "it would suffer direct harm, injury that is in some way different from that of the public at large." (*Id* at 785).

The Court of Appeals thereafter in *Save the Pine Bush, Inc., v Common Council of the City of Albany*, 13 NY3d 297 (2009), expounded upon its prior decision regarding standing as set forth in *Society of Plastics* by holding as follows:

> Thus, while we decline to erect standing barriers that will often be insuperable, we are also conscious of the danger of making these barriers too low. It remains true, as it was when *Society of Plastics* was decided, that SEQRA litigation "can generate interminable delay and interference with crucial governmental projects." In *Society of Plastics,* we said that such delay could come from "challenges unrelated to environmental concerns;" but even good faith environmental challenges, like the one brought by these petitioners, can be very burdensome. Striking the right balance in these cases will often be difficult, but we believe that our rule – requiring a demonstration that a plaintiffs use of a resource is more than that of the general public – will accomplish that task better than alternatives. (*Id* at 306; internal citations omitted).

In the present case the question raised by the respondents is whether any of the three petitioner's are possessed of a "recognizable interest in these proceedings" such that this action may be considered by the court. A review of their individual circumstances then is necessary to determine whether they are so possessed.

Petitioner Jenkins, who resides in the Town of Cortlandville, alleges the following bases for a finding of standing: (1) she takes "regular and frequent paddling trips on the Tioughnioga River which runs directly under Loring Crossing Road in the immediate vicinity where Leach wants to expand the trash transfer station" and may be impacted upon by the "noise, odors, and trash from the expanded transfer station, and because of that my paddling experience will be diminished;" (2) she takes "regular and frequent bicycling rides on loops which take me through the Loring Crossing neighborhood in the immediate vicinity of the trash transfer station" and will be exposed to the dangers presented by the passing of large trucks utilizing the transfer station, and; (3) that due to the additional presence of large trucks and equipment at the transfer station the likelihood of a fuel spill of some nature has the potential to impact upon the Cortland Homer Preble Aquifer.

Petitioner Sheridan, a resident of the Town of Homer, asserts that she has standing to pursue this action for the following reasons: (1) her residence is approximately one mile from the Leach

transfer station and she owns three properties in the Loring Crossing neighborhood which are in close proximity to the Leach property; one of her properties, which is rental in nature and approximately two-tenths of a mile from the Leach property, may become less desirable as a rental property due to "noise, traffic, odors, potential for increased flooding, threat to groundwater pollution, and unsightly appearance" of the Leach transfer station; (2) the noise, odor and increased truck traffic may impact adversely upon "community gardeners" who use the neighboring property; (3) an art studio operated by Sheridan, which is approximately four-tenths of a mile from the Leach property, will be adversely affected by the noise, odors and appearance of the Leach property; (4) she is concerned about her and her family members traveling past the Leach property entrance on Loring Crossing Road which would expose these parties to delays and unsafe traveling conditions; (5) the potential flooding in the Loring Crossing neighborhood may increase due to the filling of a portion of the property to construct the driveway at issue; (6) the age and condition of the Loring Crossing bridge may become so affected by additional heavy truck usage that it may be closed thus impeding prompt access for medical emergencies of those who live near the bridge; (6) the anticipated storage of multiple roll-offs, trucks and dumpsters will only serve to enhance the odor of rotting garbage, and; (7) the risk for potential impact upon the Cortland Homer Preble Aquifer due to a leakage or spill of oils, fuel or the like will adversely affect the use of this sole potable water resource.

Petitioner Smith, who is a resident of Cortlandville and is the mother of Petitioner Sheridan, summers at the Sheridan property adjacent to the art studio. Smith asserts that she will be: (1) exposed to possible danger from large trucks while she travels near the Leach property; (2) the odor and noises emanating from the Leach facility may impact upon her enjoyment of her summer residence; (3) the Loring Crossing bridge may be adversely affected by additional truck usage of the bridge and may result in the bridge being closed thereby affecting prompt utilization of emergency services; (4) the potential for leakage of fluids on the Leach property could impact upon the integrity of the aquifer and wells, and; (5) the added fill to create the driveway may result in flooding in the Loring Crossing neighborhood.

Respondents, on the other hand, take the position that the petitioners are not entitled to any presumptive standing nor a finding that they have suffered an injury unique and unlike that of the general public. As such respondents request that the petition be dismissed as no petitioner can demonstrate a recognizable interest in this action.

More specifically Respondent Leach submits the following in support of its position that the petitioners do not maintain standing in this action:

Petitioner Jenkins resides approximately five miles from the Leach properties and on the other side of the river which runs between them. While bicycling the only portion of the project which would be visible to Sheridan would be the end of the driveway in an area which is otherwise occupied by the Suit-Kote asphalt plant, parking areas and the Leach facility. Sheridan's view of the Leach properties while kayaking is effectively blocked by the Suit-Kote plant.

Petitioner Smith does not continuously reside at the property which is approximately four-tenths of a mile from the Leach property and also across the river from such property. Her view of the Leach property is limited if not entirely obstructed and fluid leaks on the Leach property, if such were to occur, are to be promptly remediated by Leach.

Petitioner Sheridan does not reside in the Town of Cortlandville. The Sheridan property is on the other side of the river from the Leach property and is more than one-half mile away. The likelihood of increased traffic is illusory as there is no planned increase regarding utilization of the facility. The Loring Crossing bridge would not be utilized to any greater extent than previously and not at all if the bridge unable to accommodate such trucks. Any potential erosion would not be caused by the expanded driveway as the Suit-Kote plant is located adjacent to the river and between the driveway and the river.

Respondent Cortlandville, while objecting to standing, acknowledged that Petitioner Sheridan "has real property and an accessory use building within relatively close area to the subject premises." However, it is noted that Sheridan's property is located across the Tioughnioga River from the Leach property and that her expressed concerns about the traffic impact upon the bridge would be inconsequential as traffic leaving the Leach properties would not travel Easterly towards the bridge but rather Westerly towards St. Route 13. Sheridan's remaining contentions, it is alleged, are speculative and thus cannot form the basis upon which she asserts standing.

Respondent Cortlandville also takes issue with standing as alleged by Petitioner Smith. Though also acknowledging that "she may live in close proximity to the subject premises she does not allege any specific damage or effect that she will suffer." Additionally, Respondent takes the position that both Sheridan and Smith are unable to visualize the Leach properties as the Suit-Kote plant is situate between their property and that of Leach.

Finally, as to Petitioner Jenkins the respondent asserts that her voluntary insertion into the area at issue cannot give rise to standing. Respondents' position is that, "However, it cannot be countenanced that the Court [of Appeals] would have expanded the definition to such an extent that a mere tourist could travel to an area and then claim to have standing to maintain a proceeding of this type."

With regard to matters such as SEQRA standing may be presumed merely upon proximity of the petitioner's property to that of the property to be affected by the action. (See *Matter of Long Is. Pine Barrens Socy. v Planning Bd of the Town of Brookhaven*, 213 AD2d 484, 2nd Dpt. 1995). However, absent such proximity petitioner must demonstrate that the injury is unique and falls within the scope of that interest sought to be protected by the statute.

Here, it is evident to this court that neither Petitioner Smith nor Petitioner Jenkins may benefit from the presumption given that their property is not within close proximity to the subject parcel. However, Petitioner Sheridan is possessed of property which is within close proximity to the subject property, as conceded by Respondent Cortlandville.

As Smith and Jenkins may not benefit from the presumption regarding proximity, and even if Sheridan were not to benefit from such presumption, assuming *arguendo*, the fact that the allegations of potential harm to the sole source aquifer existing at this location which provides potable water to these residents, confers standing upon them as this is a matter which is clearly within the scope of interests sought to be protected by SEQRA. As Justice Ferris D. Lebous found in *Citizens for Aquifer Protection & Empl. v. Town of Cortlandville*, 16 Misc.3d 1121(A), 847 NYS2d 900 (2007), that petitioners maintained standing where "[a] direct impact on one's drinking water supply is a concern that is plainly within the zone of interest that SEQRA is designed to protect, and entitled petitioners to assurance that respondents have complied with SEQRA." (Citations omitted; Emphasis added). This proposition is well founded in our law and reflects the proposition that "standing should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules." (See *Powers v. DeGroodt*, 43 AD3d 509, 3rd Dpt. 2007).

While it is clear that for the most part the petitioners' assertions pertaining to increased traffic, noise and odor and the potential risk associated with an increased presence of large trucks and potential damage to the Loring Crossing Bridge are at best speculative and an injury likely to be sustained by the public at large, thus serving to defeat the standing of petitioners, those aspects pertaining to proximity (Sheridan) as well as sole source aquifer impact are sufficient to confer standing for the present purposes.

Therefore, upon the pleadings, argument of respective counsel, as well as relevant statutory and decisional law, it is

ORDERED, that the Respondents' motion to dismiss the instant petitioner upon the ground that petitioners lack standing is DENIED; and it is

ORDERED, that Respondent Leach is to file and serve a Verified Answer by not later than March 25, 2016; and it is

ORDERED, that Respondent Cortlandville is to file and serve a Verified Answer and a certified transcript of the record of the proceedings under consideration by not later than March 31, 2016; and it is

ORDERED, that Petitioners are to file and serve any responsive pleadings by not later than April 8, 2016.[5]

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[5]This Court is cognizant of the fact that Cortlandville may very well reconsider this application of Leach on or about March 23, 2016, which may then serve to render the instant proceeding moot.

Enter.

DATED: March 18, 2016
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice
County of Cortland