

Matter of Town of Brookhaven v Ball

2023 NY Slip Op 34878(U)

June 30, 2023

Supreme Court, Albany County

Docket Number: Index No. 907862-22

Judge: Gerald W. Connolly

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
TOWN OF BROOKHAVEN,

DECISION/ORDER/JUDGMENT

Petitioner,

Index No.: 907862-22

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules and Agriculture and
Markets Law §37

-against-

RICHARD A. BALL, COMMISSIONER OF THE NEW
YORK STATE DEPARTMENT OF AGRICULTURE &
MARKETS AND DELEA SOD FARMS, INC.,

Respondent.

-and-

CENTRAL PINE BARRENS JOINT PLANNING & POLICY
COMMISSION,

Additional Respondent,

Joined as Necessary/Affected Party
Under CPLR 1001(a).

(Supreme Court, Albany County, Special Term)

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Connolly, J.:

Petitioner Town of Brookhaven (“Town”) seeks, *inter alia*, an order and judgment (i) pursuant to New York Agriculture & Markets Law §37 and CPLR Article 78, invalidating, annulling and rescinding the September 14, 2022 letter determination (“Determination”) by respondent, Richard A. Ball, Commissioner (“Commissioner”) of the New York State Department of Agriculture and Markets (“Department”) pursuant to the provisions of AML §305-a against the Town and supplemented by a further, substantially identical “Order” dated November 22, 2022 (the “Order”) upon the grounds set forth in the Amended Verified Petition, including, without limitation (a) the Determination/Order is beyond the jurisdiction of the Department and the Commissioner under AML §305-a and ECL §57-0101, et seq., in that, it violates and is superseded by the Long Island Pine Barrens Protection Act of 1993 (“Pine Barrens Act”), codified at ECL §57-0101, et seq., and is thus in violation of the Environmental Conservation Law; (b) the Determination/Order was made in violation of lawful procedure, was affected by an error of law, was arbitrary, capricious and an abuse of discretion and rests upon factual findings and determinations that are unsupported by, and contrary to the Record before the Department and the Commissioner; and (c) the Determination/Order failed to harmonize AML §305-a with the Pine Barrens Act; and (ii) granting petitioner costs and disbursements fees.

Respondent Commissioner opposes the petition and initially argues for dismissal based on the Town's alleged incapacity to sue. Respondent Delea Sod Farms, Inc. ("Delea") opposes the petition. Additionally, Respondent Central Pine Barrens Joint Planning & Policy Commission ("Commission") seeks a judgment dismissing the petition as premature and remanding the matter to the jurisdiction of the Commission for a determination as to whether the land use complained of in the petition is permitted in the Central Pine Barrens area.

It is initially noted that the respondent Commissioner's request for oral argument is denied. As set forth below the Court denies respondent Commissioner's claim that the Town lacks capacity to sue and respondent Commission's claim seeking dismissal for ripeness. Further, the Court denies the petition in its entirety.

Lack of Capacity

Respondent Commissioner argues that the petitioner Town does not have capacity to sue because the Town Board did not hold a public vote to authorize this litigation within the limitations period.

"Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review" (*Matter of Town of Riverhead v N.Y.S. Bd. Of Real Property Servs.*, 5 NY3d 36, 41 [2005]). Respondent Commissioner argues that for organizations, capacity to sue requires to two things: a general power to sue and specific authorization for the suit and that even if petitioner Town has general power to sue, it does not have specific authorization because the Town Board did not record a public vote to file the case. Respondent Commissioner asserts that when "the record fails to demonstrate that [a] proceeding was properly authorized by a vote of the Board within the applicable limitations period, the proceeding must be dismissed" (*Matter of Gersen v Mills*, 290 AD2d 839, 840 [3d Dept 2002]).

Respondent Commissioner argues that nothing in the Town Board minutes from January 9, 2020 to January 5, 2023 indicates that the Town Board approved this litigation before the statutory 30-day limitations period as extended by stipulation of the parties ended on January 4, 2023. Respondent argues that in *Gersen*, a school superintendent sued the state education commissioner within the limitations period, but provided no valid evidence that the district board had authorized the suit during that period and while the superintendent argued that the board had authorized the suit in executive session within the limitations period, the Third Department rejected the argument, holding that there was no evidence of an actual board vote, that any unrecorded approval would be a violation of the Open Meetings Law, and that dismissal was required because allowing the suit would prejudice the respondent by “improperly permit[ing]” the petitioner to “circumvent the applicable Statute of Limitations” (*Gersen*, 290 AD2d 841-842). Respondent argues that because the Town did not authorize this litigation as required under the Open Meetings Law, the Town lacks capacity to sue and the Court should dismiss this action with prejudice.

Petitioner Town, in opposition, asserts that dismissal for lack of capacity is not warranted due to (i) the explicit text of the Brookhaven Town Code; (ii) Appellate Division case law regarding the Brookhaven Town Attorney’s authority under the Town Code; and (iii) additional annual Town Board Resolutions conferring authority on the Town Attorney to commence and defend lawsuits. Petitioner asserts that the Brookhaven Town Code §20-22(c)(13) provides that “[t]he Town Attorney shall be empowered to commence, defend or appeal actions and proceedings in the name of the Town as in his judgment may be necessary for the benefit or protection of the Town in any of its rights or property”. The Town also cites to *Town of Brookhaven v Durao*, 21 AD3d 1083 [2d Dept 2005]) arguing that when a matter fits within the Brookhaven Town Code §20-22, that statute serves as authority for the Town Attorney to bring

suits and no resolution is needed.¹ Further, petitioner argues that Town Board Resolutions 2022-6 (dated 1/6/2022) and Town Board Resolutions 2023-3 (dated January 5, 2023) entitled “Authorization for the Town Attorney to Initiate and Settle any Action, Proceeding and Claim...”, authorizes the Town Attorney to commence, prosecute and/or defend and/or settle or dispose of any action or proceeding in law or equity, in any court.

In response, respondent Commissioner argues, *inter alia*, that neither Town Law nor case law authorizes the delegation of authority by the Town Board to the Town Attorney to initiate a suit without the Town Board’s specific authorization of such suit and that the statutes, town code and town resolutions should be strictly construed to deny the town attorney power to sue the State without specific Town Board approval as they do not explicitly delegate authority to the Town Attorney to institute lawsuits against the State. Respondent Commissioner argues that the State should not be subject to suit by a subordinate municipality in the absence of specific authorization by statute or where “included by necessary implication”. Such respondent argues that the Town Code and Resolution provisions are legislative acts and nothing in them mentions suits against the State, so even if they authorized the Town Attorney to file suits generally, the Court should construe them narrowly not to authorize the Town Attorney to sue the State.

In response to the sur-reply argument made by the Attorney General in further support of the respondent Department’s dismissal motion, petitioner attempts to submit the May 5, 2023 Resolution No. 2023-346 of the Brookhaven Town Board which states, *inter alia*, “NOW, THEREFORE, BE IT RESOLVED, that the Town Board hereby confirms that it has previously authorized and again authorizes the Town Attorney, including through special counsel, to

¹ In such case, the Second Department held in an action to enforce certain building, zoning and general ordinances of the Town of Brookhaven Code that regulate the use of land, that, Town Law §268(2) provides that the proper local authorities of the town may institute any appropriate action to prevent the use of land in violation of a local restriction and the Town Board’s delegation to the Town Attorney of authority to prosecute violations of the town’s local laws was sufficient to designate the Town Attorney as the “proper local authority” to commence civil actions to enjoin such violations under Town Law §268(2).

commence and continue to prosecute the Article 78 proceeding entitled *Matter of Town of Brookhaven v Ball et. Al.*, Sup. Ct., Albany County Index No. 907862-22, including in Supreme Courts and Appellate Courts, from its date of commencement on October 13, 2022 through to final judgment and appeals; ...”.

Capacity Discussion

“The issue of capacity often arises when a governmental entity seeks to bring suit. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate. An express grant of authority is not always necessary. Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity, provided, of course, that there is no clear legislative intent negating review” (*Town of Riverhead v N.Y. State Bd. Of Real Prop. Servs.*, 5 NY3d 36, 41-42 [2005][internal citations and quotations omitted]).

Town Law §65 states that “[t]he town board may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its judgment may be necessary, for the benefit or protection of the town, in any of its rights or property. It shall be the duty of any officer or officers so authorized and directed to institute said action or legal proceeding or to defend or appear therein”. In this case, there is evidence that the Town Board has authorized the instant litigation. The Brookhaven Town Board adopted the Brookhaven Town Code which includes §20-22(C)(13) which provides that the “[t]he Town Attorney shall be empowered to commence, defend or appeal actions and proceedings in the name of the Town as in his judgment may be necessary for the benefit or protection of the Town in any of its rights or property”. Further, the Town Board has submitted adopted annual resolutions from 2022 and 2023 pursuant to which the Town Attorney is

authorized to “commence, prosecute and/or defend and/or settle or dispose of any action or proceeding in law or equity, in any court, forum or venue as follows: a) Enforce or compel compliance with the ordinances and local laws of the Town of Brookhaven and any Regulation thereunder in any instance where there exists reasonable cause to believe a violation of said Code or Regulation has occurred or is about to occur; and b) To enforce or compel compliance with any statute or regulation of the State of New York or the United States where enforcement power thereof has properly vested in the Town of Brookhaven, and where there exists reasonable cause to believe a violation of said statutes or regulations has occurred or is about to occur; and ... e) To carry out the stated policies, goals and objectives of the Town Board of the Town of Brookhaven ...”. Via such resolutions “any actions or proceedings heretofore commenced by the Town of Brookhaven, and any actions to which the Town of Brookhaven, or any Board, Body or Agency of the Town has been made a party in which the Town Attorney or her designated counsel has heretofore appeared are hereby ratified and authorized”.

The record does not reflect that the Petitioner Town has commenced the instant litigation without the requisite prior authority of the Town Board by virtue of the express authority provided by the Town Board in the Town of Brookhaven’s Town Code via its delegation to the Town Attorney of authority to institute litigation on behalf of the Town, and even to the extent the Town Code is insufficient, the Petitioner Town has also submitted annual authorizing resolutions which again provide authority to the Town Attorney to institute the instant litigation which seeks to challenge the determination of respondent Commissioner which precludes the Town’s enforcement of certain provisions of its Town Code, regarding zoning and land use.

To the extent the Respondent Commissioner asserts that the Town Law does not authorize such broad delegations of authority to sue, the Court finds that such issue appears to be

a matter of first impression² and does not find under the circumstances herein where, Town Law §65(1) provides that a town board may authorize and direct any town officer to institute an action or legal proceeding, that such authorization(s) is not present. While the Court recognizes that an action commenced in the name of a Town may be authorized by a resolution of the town board (*see Town of Thompson v Alleva*, 76 AD2d 1022 [3d Dept 1980]), the facts hereunder demonstrate that the Board authorized such litigation via the delegation by the Town Board to the Town Attorney via Town Code and via the annual general resolutions.

While this Court recognizes that given the statute of limitations applicable to this case, the May 4, 2023 resolution (Resolution 2023-345) of the Town Board which has recently been submitted specifically naming the instant litigation and “confirming that it has previously authorized and again authorizes the Town Attorney, including through special counsel, to commence and continue to prosecute” the instant proceeding, such resolution alone would not rescue this litigation from a dismissal for lack of capacity if that was the only authorization that had been provided (*see Matter of Gersen v Mills*, 290 AD2d 839 [3d Dept 2002]; *Town of Caroga v Herms*, 62 AD3d 1123 [3d Dept 2009]), however such May 5, 2023 resolution is not the sole grounds for Town Board authorization of the instant litigation (*c.f. Matter of Gersen, supra*).³

It is further noted that the Second Department, in *Town of Brookhaven v Durao*, 21 AD3d 1083 [2nd Dept 2005], has found that the Town Board’s delegation to the Town Attorney of the authority to prosecute violations of the town’s local laws pursuant to the Brookhaven Town Code was sufficient to designate the Town Attorney as the proper local authority to commence civil

² The Third Department noted that it was not addressing whether the delegation was sufficient in *Town of Claverack v Brew*, 277 AD2d 807 [3d Dept 2000]).

³ If such special proceeding was dismissed for lack of capacity, the provisions of CPLR §205(a) may be applicable permitting a new special proceeding to be commenced (*see Town of Colonie v Cahill*, 172 AD2d 904 [3d Dept 1991]).

actions to enjoin violations under Town Law §268(2) with respect to building, zoning and general ordinances of the Code of the Town of Brookhaven. The Second Department did not address however whether the general authority to commence actions on behalf of the Town, given by the Town Board's resolution was insufficient in the absence of specific authorization by the Town Board, and noted that without regard to Town Law §65 or the January 4, 2001 resolution, the Town Attorney had the authority to commence the action on behalf of the Town.

It must be noted that the Department "has waived the defense that municipalities lack capacity to sue the State even when suit is properly authorized" (*see* Respondent Commissioner's SurReply MOL, pg. 8) and accordingly, the Court need not address such matter herein.

Background

Petitioner challenges the Determination/Order of respondent Richard A. Ball, Commissioner of the Department, barring Petitioner Town from enforcing its zoning law concerning the farm's operation's in violation of AML §305-a(1) by restricting respondent Delea's proposed sale of mulch, topsoil and other products, that are utilized in the installation of sod or which are incidental and contribute to the marketing of nursery stock. The Department issued the Determination/Order finding that Town enforcement would unreasonably restrict farm operations in violation of AML §305-a.

On July 24, 2020 a letter was issued from Respondent Commissioner noting, *inter alia*, that on April 20, 2020 counsel for respondent Delea sent a request for an AML §308(4) opinion⁴. Such letter noted that respondent Delea operates a 285-acre⁵ sod farm located at 696 Rt. 25A,

⁴ A&M §308(4) provides as follows: [t]he commissioner, in consultation with the state advisory council on agriculture, shall issue an opinion within thirty days upon request from any person as to whether particular land uses are agricultural in nature. Such land use decisions shall be evaluated on a case-by-case basis.

⁵ While respondent Commissioner has stated 285, respondent Delea has represented in the record that the farm is a 258-acre sod farm.

Miller Place, Town of Brookhaven, within Suffolk County and that Delea had “asked whether the on-farm use and incidental sale of compost and mulch on a 285-acre sod farm is agricultural in nature. Such letter noted that “[a]ccording to information received, the Town of Brookhaven accused [DeLea] of operating an illegal seven-acre commercial mulch facility” and that the Town commenced legal action against Delea “claiming that the sale of mulch is not agricultural and not an appropriate or accessory use to the sod farm’s operation”. Ultimately the Respondent Commissioner issued an opinion that “[b]ased upon the information you provided and applicable law, and upon consultation with the Advisory Council on Agriculture, it is my opinion that to the extent that the compost, soil and mulch are used on the farm to benefit the on-farm production of sod and vegetables and the incidental sale of such materials to help with the installation of sod purchased from the farm, are agricultural in nature”.

In January 2021, Delea submitted a “letter in support” of its request “for review of restrictive laws pursuant to Section 305-a of the [AML]”. Delea noted that it owns and operates a 258-acre sod farm which, as of September 22, 2020 was part of Suffolk County Agricultural District No. 3 and that Delea is located in the Town’s A Residence 1 District. Such January 2021 letter noted that in July of 2020, the Commissioner issued an opinion on the agricultural nature of Delea’s importation and sale of mulch and compost materials as an incidental agricultural use in connection with Delea’s cultivation and sale of sod produced at the farm. Delea noted that since the date of the July 2020 opinion, “the Town has intensified its efforts [to][sic] interfere with Delea’s operations in an effort to eliminate the alleged commercial mulch facility at the Farm. ...”. Delea asserted that the mulch and compost materials imported to the Farm are necessary for the production of sod as well as preparing it for sale, and replanting it once it is purchased, that Delea has been operating this way for decades and is not operating a standalone mulching operation for independent sale of mulch or compost to end-users. Delea asserted that as

part of a certified agricultural district, Delea was entitled to certain protections from local laws and regulations that would impose unreasonable restrictions on its farming operation. Delea noted that the Town was alleging that Delea is violating the Town Code and particularly the zoning provisions by operating a “commercial mulch facility” in a residential district that does not permit such uses. Delea argued that the “Town’s attempt to mischaracterize Delea’s operation as a ‘commercial mulch facility’ and therefore a violation of its Zoning Code is a blatant violation of Delea’s rights under New York’s Right-to-Farm laws” and accordingly Delea filed the request for review of restrictive laws pursuant to AML§305-a and to ask for guidance concerning whether the Town’s application of its laws, regulations, procedures, practices and its general course of conduct constitute an unreasonable restriction on Delea’s operations.

Via letter dated November 19, 2021, the Department issued an interim determination noting that the Town is alleging that Delea is violating the Town Code’s zoning provisions by operating a “commercial mulch facility” in a residential district. The Department determined that Delea “is a farm operation for purposes of AML §305-a and the Town’s enforcement proceeding, which alleges that Delea is operating a commercial mulch facility, and its restriction on Delea’s sale of mulch, topsoil, fertilizer and other products utilized in the installation of sod, unreasonably restricts Delea in possible violation of AML §305-a”. Such interim determination requested that the Town respond in writing within 30 days of receipt of the letter noting that “[i]f the Town believes that the public health or safety is threatened by Delea Sod Farm’s proposed sale of mulch, topsoil or other products that are utilized in the installation of sod, please provide us with any documentation and other evidence you may have to that effect ...” and noted that the Department would consider the Town’s response in evaluating whether the local law and its administration are in compliance with AML §305-a(1).

Via letter dated September 14, 2022, the Department completed its review of the Town Code's zoning provisions as administered with respect to Delea for compliance with AML §305-a(1). The Determination noted that “[f]or the reasons set forth below, as well as those set forth in the Department’s November 19, 2021 letter, the Department finds that the Town of Brookhaven’s Zoning Code and its administration unreasonably restricts Delea’s farm operation, in violation of AML §305-a(1). Further, that the Town has not demonstrated that the public health or safety is threatened by the farm operation’s proposed retail sale and bulk sale of mulch, topsoil, fertilizer and other products that are utilized in the installation of on-farm produced nurse stock (sod).”

The Department noted that AML Article 25-AA (Agricultural Districts Law) forms the cornerstone of the State’s agricultural protection program and implements the New York State constitutional directive to preserve and protect the State’s agricultural lands as important State resources and that AML §305-a prohibits local governments from enacting and administering laws that would unreasonably restrict farm operations within a county-adopted, State-certified agricultural district, unless the locality can show a threat to the public health or safety. The Determination noted that the Town contends that the Department does not have the authority to preempt Brookhaven Town Code §§85-378 and §85-925. Brookhaven Town Code §85-38 addresses the permitted uses in a RD residential district and §85-925 is entitled “Farmland Bill of Rights”.

The Department noted that the Town argued that AML §305(a)(1) is a “general law” and that it must yield to a “specific law”, in this case the Long Island Pine Barrens Protection Act of 1993, incorporated into the ECL; or in the alternative be applied in harmony with the Long Island Pine Barrens Protection Act.

The Determination held that a local law which conflicts with a state statute must yield to the state statute and the express language of AML § 305-a, a general law of state-wide applicability, authorizes the Department to supersede unreasonably restrictive local laws. The Determination noted that the Town argues that its implementation of the Central Pine Barrens Comprehensive Land Use Plan (“Plan”) through its zoning law somehow divested the Department of its statutory power to review and supersede zoning laws that it finds unreasonably restricts farm operations in agricultural districts. The Determination held that it does not. The Determination held that ECL §57-0107 (13) provides that the use of land for agriculture or horticulture does not constitute development for the purposes of the Pine Barrens Act and that the ECL §57-0107(14) definition of agriculture or horticulture is extremely broad, covering “any production of plants or animals useful to man ...”. The Determination held that the AML§305-as protection of agriculture is also broad, covering the cultivation, sale, distribution and marketing of agricultural products, that the Pine Barrens Act does not provide that farm operations located in the agricultural district within the Pine Barrens are stripped of protections afforded under AML §305-a, that there is no inconsistency between the Pine Barrens Act definition of agriculture and horticulture, and the AML §305-a protections provided to farm operations located within the county adopted, State certified agricultural district located within the Long Island Pine Barrens. The Determination further held that ECL §57-0133 states that except as expressly provided in the Pine Barrens Act, the statute does not affect the zoning powers or authority to regulate land use and accordingly, the Town failed to identify any statutory basis for its contention that the Pine Barrens Act insulates its zoning law from the Department’s §305-a review. Further, the Determination noted that the Town had neither demonstrated any threat to public health or safety nor any harm to the Pine Barrens in connection with the farm operation’s use or sale of mulch in connection with its business.

The Determination also specifically noted that initially the Town argued that Delea was manufacturing mulch at the Brookhaven location and then asserted that Delea dyes the mulch on-farm and does not have to be producing or manufacturing to be a “commercial mulching operation”. The Determination noted that Department staff conducted a field inspection and observed the on-farm mulch piles but did not observe grinders or any of the equipment necessary to produce mulch and that the farm operators stated that they import the mulch on-farm and do not dye or produce it and further that Department staff have reviewed invoices demonstrating that Delea purchases the off-farm produced mulch and it is delivered on-farm. The Determination notes that the Department concluded that this is not a “commercial mulching operation” but rather a commercial sod farm that is selling at retail, and in bulk, materials that are utilized for the installation of on-farm produced nursery stock and items that are incidental to the sale of nursey stock.

The Determination held that the Town’s application of Brookhaven Town Code §§85-378 and 85-925 to Delea, whereby the Town concluded that certain activities are not permitted because Delea is located within a residential zoning district, and that Delea is a “commercial mulching operation”, unreasonably restricts the Delea farm operation.

As to health or safety claims, the Determination noted that the Department requested that the Town provide any evidence or documentation of asserted public health or safety threats; however, no facts or circumstances were provided that identified any specific threats to public health or safety by the farm operation and the information and analysis set forth in the Department’s November 19, 2021 letter were not responded to.

The Department requested that the Town confirm within 30 days that such requirements would not be imposed on the farm operation.

On October 13, 2022 petitioner filed the instant special proceeding. On November 22, 2022 the Department issued an Order, *inter alia*, directing the Town of Brookhaven to comply with the provisions of AML §305-a(1).

On October 13, 2022 the Town filed this Article 78 proceeding to challenge the Determination. The parties obtained leave of Court to adjourn the return date and stipulated to a schedule for the Department to issue the November 22, 2022 Order and for the Town to file, *inter alia*, an amended verified petition (*see* Stipulation of Adjournment, NYSCEF Doc. 19).

Ripeness

Respondent Commission (the Central Pine Barrens Joint Planning and Policy Commission) asserts that the matter is not ripe for adjudication because neither the petitioner Town nor respondent Delea sought a determination from the Commission as to whether the land use in question is permitted in the Central Pine Barrens area of Suffolk County pursuant to ECL Article 57 and the Plan adopted thereunder. The Commission notes that ECL §57-0123(3)(a) provides that

Subsequent to the adoption of the land use plan, the provisions of any other law, ordinance, rule or regulation to the contrary notwithstanding, no application for development within the Central Pine Barrens area shall be approved by any municipality or county or agency thereof or the commission, and no state approval, certificate, license, consent, permit, or financial assistance for the construction of any structure or the disturbance of any land within such area shall be granted, unless such approval or grant conforms to the provisions of such land use plan ***.

The Commission argues that it is the only entity authorized to waive strict compliance with the Plan or with any element or standard contained therein. The Commission asserts that respondent Delea never filed an application with the Commission regarding the purported “agriculture” in which it was engaging in the Central Pine Barrens area pursuant to Section 4.5.2.1 of the Plan, Petitioner Town never petitioned the Commission to review the land use of respondent pursuant to Section 4.5.3 of Plan, and the Commission has never asserted jurisdiction

over the land use engaged in by respondent Delea pursuant to section 4.5.3.1 of the Plan. Further, the Commission asserts that respondent Department did not refer the land use engaged in by the respondent Delea to the Commission.

Respondent Delea opposes the Commission's ripeness argument, asserting that there is nothing in the AML's procedure for AML §305-a review requiring Delea to also apply to the Commission for interpretation of the Plan as applied to its farming operation nor can Delea speak to the reason or reasons the Commission never asserted jurisdiction over the land use engaged in by Delea. Further, Delea argues that the Department has never purported to interpret the Plan or claimed authority to do so but nonetheless the Department has exclusive authority over farm operations taking place within state-certified agricultural districts.

The Petitioner Town opposes the Commission's ripeness argument arguing, *inter alia*, that the Determination/Order is ripe for review as it wholly bars the Town's enforcement of its protective Code provisions and is accordingly ripe for review as the AML Order inflicts an actual and concrete "injury" to the Town which by its express terms was "final" and binding.

The Court finds that the matter is ripe for adjudication and accordingly, the Commissions' contentions otherwise are without merit. Based upon the record, respondent Department has reached a definitive position on the issue that inflicts actual, concrete injury on the petitioner Town by precluding them from enforcing portions of its Town Code and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party (*see Matter of Best Payphones v Dep't of Information Tech. and Telecomms.*, 5 NY3d 30 [2005]).⁶

⁶ Further, it is noted that pursuant to the Commission's argument, the matter could potentially never become ripe if none of the parties took action for review before the Commission, including the Commission itself which, according to the Plan, has the authority to initiate review.

Claims in this Litigation

Petitioner Town claims: (i) that the Determination/Order is unlawful as the Department has no authority to preempt the Town's zoning laws implementing and enforcing the Long Island Pine Barrens Protection Act of 1993 codified in the ECL; (ii) that the Determination/Order is arbitrary, capricious and otherwise unlawful as it rests upon factual findings and determinations that are both unsupported by and contrary to the record; and (iii) that the Determination/Order unlawfully failed to harmonize the Department's AML §305-a authority with the Pine Barrens Act. Petitioner requests that the Court rescind and annul the Determination/Order.

Additional Respondent, the Commission, *inter alia*, argues that ECL Article 57 is a special statute that supersedes the application of AML §305-a. The Commission notes that AML §305-a was first enacted in 1992 and the Pine Barrens Act was enacted amending ECL Article 57 in 1993 to create the Commission and empower it with jurisdiction over land use in the Central Pine Barrens area of Suffolk County. The Commission argues that the Pine Barrens Act is a special law enacted subsequent to AML §305-a and accordingly to the extent the provisions of the Pine Barrens Act conflict with the provisions of AML §305-a, the provisions of the Pine Barrens Act and the Plan adopted pursuant thereto should supersede the provisions and application of AML §305-a.

Respondent Delea argues in opposition, *inter alia*, that the Town's claim that the Pine Barrens Act allows the Town Code's zoning provisions to supersede the Department's authority pursuant to AML Article 25-AA is unfounded and ignores the legislature's clear intent when it granted the Department authority to override local zoning through the AML; that the Pine Barrens Act is not a special law; and that the Town fails to support its argument that the determination was arbitrary or capricious.

Respondent Commissioner argues in opposition, *inter alia*, that (i) the Department had authority to issue the Determination/Order under the AML and neither the Pine Barrens Act nor the Plan limits such authority; (ii) the Determination/Order is rationally based on the administrative record and is not arbitrary or capricious; and (iii) there is no statutory inconsistency necessitating “harmonization” by the Department.

The AML, Pine Barrens Act and Farmland Bill of Rights

The Agriculture and Markets Law

The AML authorizes counties to establish agricultural districts (*see* AML §303). AML §300 sets forth a declaration of findings and intent as follows:

It is hereby found and declared that many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes. When nonagricultural development extends into farm areas, competition for limited land resources results. Ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements, often leading to the idling or conversion of potentially productive agricultural land.

The socio-economic vitality of agriculture in this state is essential to the economic stability and growth of many local communities and the state as a whole. It is, therefore, the declared policy of the state to conserve, protect and encourage the development and improvement of its agricultural land for production of food and other agricultural products. It is also the declared policy of the state to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds, as well as for aesthetic purposes.

The constitution of the state of New York directs the legislature to provide for the protection of agricultural lands. It is the purpose of this article to provide a locally-initiated mechanism for the protection and enhancement of New York state’s agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance.

AML §305-a provides that local governments in exercising their powers to, *inter alia*, administer comprehensive plans and local laws, ordinances, rules and regulations, “shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of “Article 25-AA Agricultural Districts” which embodies AML §300-319, “unless it can be shown that the public health or safety is threatened”.

AML §305-a provides as follows:

1. Policy of local governments.

a. Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.

b. Upon the request of any municipality, farm owner or operator, or a person or entity performing agricultural practices on behalf of a farm owner or operator, the commissioner shall render an opinion to the appropriate local government officials, as to whether farm operations would be unreasonably restricted or regulated by proposed changes in local land use regulations, ordinances or local laws pertaining to agricultural practices and to the appropriate local land use enforcement officials administering local land use regulations, ordinances, or local laws or reviewing a permit pertaining to agricultural practices.

c. The commissioner, upon his or her own initiative or upon the receipt of a complaint from a person within an agricultural district, may bring an action to enforce the provisions of this subdivision.

Town Law §283-a(1) and Village Law §7-739 similarly provide that “[l]ocal governments shall exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm operations in contravention of the purposes of article twenty-five-AA of the agriculture and markets law, unless it can be shown that the public health or safety is threatened”.

AML §36(1) provides the Commissioner authority to compel compliance, stating “[i]f it be ascertained after an investigation or hearing conducted as herein provided, that any person, association or corporation has failed to comply with or is guilty of a violation of the provisions of this chapter or of a rule of the department, or of any other general or special law relative to any matter within the jurisdiction of the department, an order may be made by the commissioner, under the seal of the department, compelling a compliance with such law or rule.”

In *Lysander v Hafner*, 96 NY2d 558, 563-564 (2001) the Court of Appeals stated, in pertinent part, that

The Legislature enacted article 25-AA of the Agriculture and Markets Law in 1971 for the stated purposes of protecting, conserving and encouraging “the development and improvement of [this State's] agricultural lands” (L 1971, ch 479, § 1). At that time and again in 1987 (L 1987, ch 774, § 1), the Legislature specifically found that “many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes” due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas (Agriculture and Markets Law § 300). To foster the socio-economic vitality of agriculture in New York, the Legislature gave county legislative bodies the power to create “agricultural districts” (see, *id.*, § 303). Lands falling within those “agricultural districts” may be entitled to various statutory protections and benefits. As is relevant here, Agriculture and Markets Law § 305-a (1) (a) mandates that, when exercising their powers to regulate land use activities, local governments must do so in a manner consistent with the policy objectives of article 25-AA. Thus, the statute directs that local governments “shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened” (*id.*, § 305-a [1] [a]).

The Pine Barrens Act and the Plan

In 1993, the Legislature enacted the Pine Barrens Act, finding, *inter alia*, “that eastern Long Island contains a maritime region of statewide importance known as the Pine Barrens-Peconic Bay system”; that the “Long Island Pine Barrens, an area encompassing over one hundred thousand acres in the county of Suffolk, is of critical importance to the state because it overlies the largest source of pure groundwater in New York. The Pine Barrens are interconnected to the Peconic Bay system by the Peconic River, the longest groundwater river in New York, and the ecologic and hydrologic integrity of this system should be protected in a comprehensive plan adopted by the state and individual local governments”; and “...that a portion of the system known as the Central Pine Barrens area requires the preparation and implementation of a state supported regional comprehensive land use plan...”. The Legislature recognized “that the provisions of this title may restrict the beneficial use of some lands currently in private ownership” but that “these restrictions are deemed to be necessary and desirable to protect and preserve the hydrologic and ecological integrity of the Central Pine Barrens area as well as the public’s health and welfare for future generations” (ECL §57-0105).

The Pine Barrens Act defines the “Central Pine Barrens area” as referring to a contiguous area as described and bounded as set forth in ECL §57-0107(10). The Central Pine Barrens area consists of the “Core preservation area” which comprises “the largest intact areas of undeveloped pine barrens as described and bounded” as set forth in ECL §57-0107(11) and the “Compatible growth area” which comprises “that area within the central pine barrens, but outside the core preservation area as defined (ECL §57-0107(12)).

The Act created the Commission which consists of five voting members including the supervisor of the Town of Brookhaven (*see* ECL §57-0119). Such Commission was directed to prepare the Plan with respect to the core preservation area and compatible growth areas (see ECL §57-0121).

After the Plan was adopted by the Commission, “each town board and village board with jurisdiction within the Central Pine Barrens area shall adopt and amend as necessary land use and zoning regulations, by local law or ordinance, rule or regulation to conform their land use regulations to the land use plan” (ECL §57-0123).

The Town’s Code contains a section entitled “Article XXXVII, Central Pine Barrens District” in Chapter 85 “Zoning” of the Code which provides, in pertinent part, that §§85-718 through 85-726 “are enacted pursuant to Article 57 of the State Environmental Conservation Law, the [Act], which requires that each local government with land use jurisdiction over lands within the Central Pine Barrens area enact land use regulations which conform to the [Plan]. ...” (Town Code §85-719(A)(1)).

Town’s Farmland Bill of Rights

The Town Code also includes within its zoning provisions a “Farmland Bill of Rights” at §85-925(C) which provides, in pertinent part, as follows:

The right to undertake protected farm practices. Protected farm practices are

permitted at all times, except as otherwise provided in §89-925F. Protected farm practices undertaken in the active pursuit of agricultural production shall include the following activities: ...

(12) Disposing of organic wastes on the farm and composting of said materials in the following conditions: Storage and use of organic material for the subject farm a maximum 3,000 cubic yards of organic material may be utilized off site. Nothing herein shall be construed to allow a commercial mulching operation or the stockpiling and screening of compost for sale to others;

Article 78 Standard

CPLR §7803 provides, *inter alia*, that the questions that may be raised in an article 78 proceeding include (i) “whether the body or officer failed to perform a duty enjoined upon it by law”; and (ii) “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed”.

The standard to be applied by the Court when reviewing an administrative determination is “severely limited” to the issue of whether the determination was arbitrary and capricious, i.e., whether there was no rational basis for [the] decision, or the decision was affected by an error of law (*see Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753 [1991]; *see also Matter of Johnson v. Ambach*, 74 AD2d 986, 987 [3d Dept 1980]). “It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion” (*Matter of Pell v. Board of Education*, 34 NY2d 222, 231 [1974] [internal citations omitted]). The burden of proof in this regard rests with the Petitioner (*see Matter of Johnson Elec. Constr. Corp. v New York State Dept. of Transp.*, 124 AD3d 1199, 1200 [3d Dept 2015]). A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration (*see Scherbyn v Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). The Court must give deference to and not substitute its judgment for

factual evaluations within the agency's area of expertise (*Matter of Rodriguez v. Perales*, 86 NY2d 361 [1995]).

Discussion

As asserted by Respondent Commissioner, pursuant to AML §305-a(1), the Commissioner has the authority to issue the Determination/Order at issue herein. (*see* AML §305-a(1); *Town of Butternuts v Davidsen*, 259 AD2d 886 [3d Dept 1999]). As noted in the Determination, AML§305-a provides that a local law may be superseded when the Commissioner determines that the law unreasonably restricts or regulates farm operations within agricultural districts in contravention of the purposes of AML Article 25-AA unless the local government can demonstrate that the public health or safety is threatened.

While Petitioner Town focuses its arguments on the asserted interplay between AML §305-a(1) and the Pine Barrens Act, the record before the Court in this matter reflects that Petitioner Town has failed to demonstrate that the public health or safety is threatened via any alleged violation of the Pine Barrens Act or otherwise. The record demonstrates that the respondent Commissioner requested, in furtherance of his consideration, that the Town provide any evidence or documentation of asserted public health or safety threats. While the Town argues that the Pine Barrens Act has been violated, and such violation is in and of itself a public health or safety threat, the record does not reflect that the Town has set forth for the respondent Commissioner's review how any such alleged violation of the Pine Barrens Act actually results in a public health or safety threat under the specific facts and circumstances of the case herein.

Petitioner Town focuses its arguments on the alleged interplay in this matter between its Town Code zoning provisions and the Pine Barrens Act and Plan. Petitioner Town argues, *inter alia*, that the Department has no authority to preempt or diminish local laws "incorporated into" and enacted pursuant to the Pine Barrens Act and Plan. Petitioner Town further argues that

“[b]oth because of the express texts of the relevant statutes, and because the Pine Barrens Act is a “special law” whereas the relevant Agriculture and Markets Law provisions are “general laws”, the [Pine Barrens] Act prevails and the Department has no authority to preempt or diminish local laws enacted pursuant to the [Pine Barrens Act]” (Petitioner’s MOL, pg. 8). The Court does not find, under this record, that the Petitioner Town has demonstrated that its Town Code as a whole, or any portion, has been “incorporated into” the Pine Barrens Act and Plan (resulting in such local zoning laws being inoculated from respondent Commissioner’s statutory authority to override such local zoning provisions pursuant to AML §305-a).

The Town Code consists of many provisions including certain provisions relating to zoning. The Town Code zoning provisions specifically noted by the Respondent Commissioner in his Determination/Order relate to the RD Residential District (Town Code §85-378) and the Farmland Bill of Rights (Town Code §85-925), zoning provisions which are not the portions of the Town Code specifically relating to the Pine Barrens Act (see Town Code §§ 85-718- 85-726). Petitioner Town has failed to sufficiently legally demonstrate that its entire Town Code or any part of its Town Code (even those related to the Pine Barrens Act) were “incorporated” into the Pine Barrens Act or the Plan, because of its implementation of a limited number of provisions related to the Pine Barrens Act.

To the extent the Pine Barrens Act contains an enforcement clause providing that for “any land use conduct within the Central Pine Barrens Area that violates any provision of an applicable village or town law, the responsibility for enforcement of such violation shall lie with the applicable village or town in the first instance as provided for in the laws of the respective town or village” (ECL §57-0136(1)(b)) and further if the town or village does not take enforcement action, under certain circumstances the respondent Commission may, Petitioner Town has not legally demonstrated that such enforcement clause, nor any other law, provides

additional authority incorporating all or any portion of the Town's zoning laws into the Pine Barrens Act or Plan nor that such language somehow provides petitioner Town overriding authority to enforce its own zoning laws, particularly those unrelated to the Pine Barrens Act or Plan, as such provision specifically relates to "applicable" local laws, i.e. those related to the Pine Barrens Act or Plan.

To the extent Petitioner Town argues that the Pine Barrens Act provides that respondent Commissioner may not grant approvals contrary to the Plan as ECL §57-0123(3)(a) provides: "[s]ubsequent to the adoption of the [Pine Barrens] land use plan, the provisions of any other law, ordinance, rule or regulation to the contrary notwithstanding, no application for development within the Central Pine Barrens area shall be approved by any municipality or county or agency thereof or the commission, and no state approval, certificate, license, consent, permit, or financial assistance for the construction of any structure of the disturbance of any land within such area shall be granted, unless such approval or grant conforms to the provisions of such land use plan", based upon the record herein, such contention is without merit as petitioner has failed to demonstrate that such provision is applicable herein. There has been no demonstration that an application for development is at issue herein nor that the respondent Commissioner AML §305-a Determination/Order is providing state approval, certificate, license, consent, permit or financial assistance for the construction of any structure or the disturbance of any land for such provision of the ECL to constitute a prohibition upon the respondent Commissioner's AML §305-a(1) authority under the facts set forth herein.

Petitioner Town also asserts that the respondent Commissioner has impermissibly attempted to exercise AML provisions which are "general laws" in a manner which, when invoked against its local laws regulating "development" activities in the Central Pine Barrens

area, is preempted by the Pine Barrens Act, which is a “special law” that has an altogether different definition of allowed “agriculture”.

Petitioner has pointed to nothing specifically in the Pine Barrens Act which expressly limits the respondent Commissioner’s AML §305-a(1) authority (*see generally, El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015]). Further, while petitioner Town asserts that the Pine Barrens Act is a “special law”, which prevails over the AML, a general law, “the intention to repeal a statute by implication will not be presumed, nor the effect of repeal be admitted, unless an unavoidable inconsistency in the statutes exists, and then only to the extent of the repugnancy between them. Nor is one statute to be considered as repugnant to another unless they relate to the same subject and are enacted for the same purpose.” (*Bush v Delaware, L. & W.R. Co.*, 166 NY 210 [1901]).

Based upon the record before the Court, petitioner Town has failed to legally demonstrate that both statutes relate to the same subject matter and were enacted for the same purpose, as the Pine Barrens Act as codified in the ECL was enacted to provide environmental protection to a portion of Long Island while AML §305-a was enacted to promote agriculture throughout the State. Even assuming that they do relate to the same subject matter, the Court does not find based on the specific facts and circumstances herein that Petitioner Town has demonstrated an unavoidable inconsistency between such statutes warranting a finding that the Commissioner’s Determination/Order must be annulled.

Initially, while petitioner Town argues that the Pine Barrens Act restricts “development” activities as its prime means of protecting the environment, as stated above, it has failed to demonstrate that the activities at issue herein were determined to constitute “development” by the Commission which Respondent Commissioner should have considered. Also, the Court notes again, that the Respondent Commissioner noted that it had asked Petitioner Town to provide relevant specific facts as to how the public health or safety was threatened by Delea’s activities

and to the extent the Pine Barrens were being threatened by such activities it is unclear why the petitioner Town could not have set any specific facts forward for the respondent Commissioner to consider.

Further, while Petitioner Town argues that the Pine Barrens Act restricts “development”, as such term is defined in ECL §57-0107 (13) and (14) as anything that is not allowed by local zoning, it is noted that the ECL does not define “development” to include the use of any land for the purpose of agriculture or horticulture”.⁷ Petitioner Town argues that the definition of “agriculture” is limited to actual on-site agricultural activity (as opposed to Delea selling mulch that it has purchased off-site in conjunction with its other permitted agricultural activities).

The Respondent Commissioner however did not ignore the Pine Barrens Act’s definition of “agriculture”, as codified in the ECL. While asserting the right to supersede unreasonably restrictive local laws, the Commissioner’s Determination/Order noted that the use of land for agriculture or horticulture did not constitute “development” for purposes of the Pine Barrens Act, citing to ECL §57-0107(13) and further, considered the definition of “agriculture or horticulture” in ECL §57-0107(14) finding such definition to be “exceedingly broad” covering “any production of plants or animals useful to man”. While such definition include specific examples, it is noted that such examples are not limiting as the definition states “including but not limited to: forage or sod crops; grains and feed crops; ...” (*see Id.*). The Commissioner’s Determination/Order further noted that AML §305-a’s protection of agriculture is broad, covering the cultivation, sale, distribution and marketing of agricultural products. Such

⁷ “Agriculture” or “horticulture” is defined in the ECL §57-0107 and “shall mean any production of plants or animals useful to man, including but not limited to: forage or sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock, including beef cattle, sheep, swine, horses, ponies, mules or goats, and including the breeding and grazing of any or all of such animals; bees and apiary products; fur animals; trees and forest products; fruits of all kinds including wineries; vegetables; nursery, floral, ornamental and greenhouse products and farmstands for selling products raised or produced on site and other associated structures required for their production.”

Determination/Order further determined that “[t]he Pine Barrens Act does not provide that farm operations located in the agricultural district within the Pine Barrens are stripped of protections afforded under AML §305-a; and there is no inconsistency between the Pine Barrens Act definition of agriculture and horticulture and the AML §305-a protections provided to farm operations located within the county adopted, State certified agricultural district located within the Long Island Pine Barrens”.

The Court does not find from the record before this Court and the particular facts and circumstances herein, that petitioner Town has demonstrated that the Commissioner’s Determination/Order, holding that under the particular facts and circumstances of this case, that the ECL §57-0107’s definition of “agriculture” or “horticulture” is inconsistent with the AML §305-a protections provided to farm operations nor that such ECL definition is constrained to on-site agricultural production, and accordingly, is in error of law.⁸

Additionally, upon review of the record, the Court finds that Petitioner Town has not demonstrated that the Respondent Commissioner’s Determination/Order was arbitrary or capricious and in fact, the record demonstrates that they were rationally based on the administrative record. The Respondent Commissioner’s Determination/Order was based upon the record, including discussions with Delea farm personnel, a site visit and submissions from both Respondent Delea and Petitioner Town. As noted by Respondent Commissioner, he determined, *inter alia*, the mulch is purchased off-site and accordingly there is no “commercial mulching operation”; that compost is generated on site and used primarily on site with respect to

⁸ “Farm operation”, as defined in AML §301(11) means the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a “commercial horse boarding operation” as defined in subdivision thirteen of this section, a “timber operation” as defined in subdivision fourteen of this section, “compost, mulch or other biomass crops” as defined in subdivision seventeen of this section and “commercial equine operation” as defined in subdivision eighteen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

Delea's sod production; the sale of sod represents the majority of Delea's income; and the sale of compost, topsoil, mulch, wood products, stone, bagged fertilizer and grass seed are less than five percent of Delea's sales.

To the extent Petitioner Town asserts that the Determination/Order is inconsistent with an earlier opinion, assuming without deciding such is correct, Petitioner Town acknowledges such opinion is not binding upon the Department. As to Department guidelines, Petitioner Town has not demonstrated that such guidelines preclude the Final Determination nor that such guidelines are materially inconsistent with the Final Determination.

As to Petitioner Town's third cause of action asserting that the Determination/Order failed to harmonize AML §305-a with the Pine Barrens Act, such contention is without merit as the Respondent Commissioner did consider the Pine Barrens Act. It again being noted that petitioner Town failed to demonstrate how public safety and health were at issue in violation of the Pine Barrens Act, which information the Respondent Commissioner requested for consideration in rendering the Determination/Order.

Finally, to the extent petitioner has requested attorney's fees via the Notice of Petition, such request is denied as petitioner has not prevailed in this special proceeding and petitioner's requests for costs and disbursements is also denied.

Otherwise, the Court has considered the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider.

Therefore, it is hereby

ORDERED and ADJUDGED that Respondent Commissioner's application for dismissal based on lack of capacity is denied; and it is further

ORDERED and ADJUDGED that Respondent Commission's application for dismissal based on ripeness is denied; and it is further

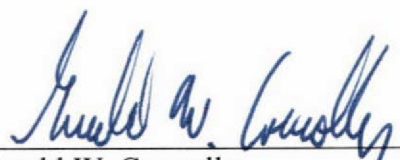
ORDERED and ADJUDGED that the Petitioner Town's petition is denied in its entirety.

This constitutes the Decision/Order/Judgment of the Court which is being electronically filed by the Court via NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for Petitioners shall promptly serve notice of entry on all other parties to this action (*see* Uniform Rules for Trial Courts 22 NYCRR § 202.5-b [h][1], [2]).

SO ORDERED and ADJUDGED.

ENTER.

Dated: June 30, 2023
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice

06/30/2023

Papers Considered:

1. NYSCEF Documents 1-11, 19-46, 50-51, 54-59 (it is noted the Petition was considered to the extent Petitioner referenced and incorporated Petition Exhibits H and I as noted in the Memorandum of Law in Support of Amended Petition (Doc. 29).