AMENDED MEMORANDUM
DECISION AND ORDER

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 12

In the matter of the application of the LONG ISLAND PINE BARRENS SOCIETY, INC., RICHARD AMPER, as Executive Director and in his individual capacity, CAROLE JONES, PAUL J. DECKER, ERIC BURKE, YOLANDA SUSI, JOSEPH P. WALSH and KIM DARROW, as residents, taxpayers and members of the LONG ISLAND PINE BARRENS SOCIETY,

Petitioners,

- against -

THE CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMMISSION, TOWN OF BROOKHAVEN (PARKS DEPARTMENT), JOSEPH CALLARI, as President of BROOKHAVEN VOLUNTEER FIREFIGHTERS MUSEUM, FRANK VIGLIAROLO, as President and Franchisee of LONG ISLAND SHOOTING RANGE,

Respondents.

By: Loughlin, J.S.C.
Dated: February 26, 2003

Index No. 02-20643

Mot. Seq. # 001 - CDISPSUBJ
002 - MG
003 - MG

Return Date: 9-12-02
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In this special proceeding the petitioners seek a judgment declaring null and void the Resolution of the respondent, the Central Pine Barrens Joint Planning and Policy Commission (Commission), dated July 10, 2002 (Resolution) which granted the respondent, Town of Brookhaven's (Town) application for a hardship exemption pursuant to Environmental Conservation Law section 57-0121(10); a writ of prohibition pursuant to Article 78 restraining the respondents from any further clearing or construction at Fireman's Park; and a judgment declaring the deed conveying Fireman's Park from New York State to the Town of Brookhaven, null and void. The Commission and the Town have submitted answers in response to the petition and the respondents, Joseph Callari, as President of Brookhaven Volunteer Firefighters Museum (Callari) and Frank Vigliarolo as President and Franchisee of Long Island Shooting Range (Vigliarolo), have moved to dismiss the petition.

A tract of land of over 2000 acres, encompassing the property which is the subject of this proceeding, was first acquired in 1971 by the State of New York (State) from the federal government. This deed (Federal deed) contained a covenant in perpetuity that the property be used in accordance with an existing utilization plan for public park and recreation purposes. The Federal deed further provided that the property could be sold to another "eligible governmental agency" provided such purchase was approved by the United States Secretary of the Interior (the Secretary) and provided that the new municipal grantee agreed to use and maintain the property for public park and recreational purposes "subject to the same terms and conditions in the original instrument of conveyance" (Return, Exhibit 91). The State, as grantee, was not precluded from providing "related recreational facilities and services compatible with the approved application" through third parties provided it obtained the consent of the Secretary. The State was required to submit biennial reports to the Secretary setting forth the use made of the property. This deed also provided that upon the breach of any of the conditions or covenants contained therein, all right title and interest to the premises would revert to and become the property of the grantor, at its option.

In 1973 a portion of this tract, consisting of 500 acres, was transferred by the State to the Town of Brookhaven (Town). This deed (State deed) provided that the conveyance be subject to all of the terms, conditions and covenants contained in the Federal deed. The Town further covenanted

and agreed that it would use and maintain the property for "public park, recreation, and/or playground purposes" (Return, Exhibit 69). The Town agreed to comply with the Program of Utilization and Plans (Program) submitted by the Town and dated March 1972 and revised September 1972 and as appended to the State deed as Exhibit A. The State deed allowed the Town to enter into concession agreements with third parties for providing services which were compatible with the Program on the condition that the agreements were approved by the Commissioners of Parks and Recreation and of General Services and the Secretary and compatible with the provisions in the Federal deed pertaining to concession agreements. In the event of any breach of any covenant or condition, all right title and interest to the property would revert back to the State, at its option. The Town is also required to submit biennial reports in perpetuity to the Commissioner of Parks and Recreation and to the Secretary establishing its use of the property for a public park, playground or for other recreation. The Town is also, under the State deed, required to submit a similar report on an annual basis to the New York State Commissioner of General Services. If the Town fails to timely submit this annual report, or upon default in filing, fails to timely cure the default in accordance with terms of the State deed's covenant, the title to the property reverts to the State who may then re-enter and take possession.

Under the terms of the Program the Town chose to develop the five hundred acres by creating two tracts of land. The northerly tract, consisting of 200 acres, fronts NYS Route 25A and the southerly tract, consisting of 300 acres, fronts NYS Route 25. The southerly tract was to be improved with a rifle, pistol and skeet range, a regulation 18 hole golf course and various other recreational facilities such as tennis and basketball courts, a combination football and soccer field and baseball diamonds. The northerly tract was to be improved with an 18 hole pitch-putt golf course, 140 acre picnic area and various other recreational activities such as tennis and handball courts, baseball diamonds and play areas.

In 1987 a revised Program (Revised Program) of Utilization was approved by the United States Department of Interior. The Revised Program provided that the northerly tract be dedicated to passive recreational use for the purpose of using it as a link in a greenbelt system. The original proposals for the southerly tract were amended to eliminate the proposed golf course and to permit the construction of a fireman's tournament facility. Other amendments pertained to the elimination of tennis, handball and basketball courts because of lack of demand. Under the terms of the Revised Program there would be a rifle range and a fireman's tournament facility which would consist of a track, arch, "old fashioned tanks", emergency access road, sanitary facility and maintenance building, barbeque pit building and parking and access roads. There would also be two softball fields and a children's playground. A shooting range and a fireman's tournament facility (Tournament Facility) are currently located on the southerly tract. The shooting range is operated

by the Long Island Shooting Range at Brookhaven[1] (the Range) under a corporate franchise agreement with the Town. Respondent, Vigliarolo, is the President of the Range.

In 1992 the Town authorized the creation of the Fireman's Museum and Park (Museum Complex)[2] on ten acres also located on the southerly tract, but separated from the Tournament Facility and the Range. Also in 1992, the Brookhaven Volunteer Firefighters Museum, was incorporated (the Museum). Clearing for the Museum Complex was started in the Fall of 1991 and was finished by the Spring of 1992 (Return, Exhibit 65). A tool maintenance and equipment storage building (maintenance building) was erected in the Winter of 1992/1993 and the former Center Moriches Firehouse (the Firehouse) was moved to this site on about 1993. In 1994 the Museum entered into a franchise agreement with the Town to construct and operate the Museum Complex. Currently, the Museum Complex includes the Firehouse, the maintenance building, a Quonset Hut building housing antique fire trucks and other historical items, an administration building and footing for a 50 foot by 90 foot building which was intended to house the antique fire trucks. Respondent Callari is the President of the Museum.

Article 57 of the Environmental Conservation Law, known as the Long Island Pine Barrens maritime reserve act (the Act), was enacted in 1990 by the New York State Legislature for the purpose of preserving the Long Island Pine Barrens and Peconic Bay maritime region by the establishment of a Long Island Pine Barrens maritime reserve (ECL 57-0101, 57-0103). The Long Island Pine Barrens is an area encompassing over 100,000 acres in Suffolk County and overlies the largest source of pure groundwater in the State of New York (ECL 57-0105). In 1993 the Act was amended to establish the respondent, the Central Pine Barrens Joint Planning and Policy Commission (the Commission), with the authority to "prepare, oversee, and participate in the implementation of a comprehensive land use plan for the Central Pine Barrens area to guide development therein in a manner suitable to the needs for preservation of the core preservation area and compatible growth and development in the compatible growth area" (ECL 57-0103, 57-0119). The Commission is comprised of five members consisting of the Suffolk County Executive, the respective Supervisors of the Towns of Brookhaven, Riverhead and Southampton and a member to be appointed by the Governor. A Central Pine Barrens Advisory Committee (Committee), comprised of not more than 28 members selected from various community organizations, was also

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[1] It appears from the record that the Range is also known as the Brookhaven Shooting Range.

[2] The term "Fireman's Park" has been loosely referred to in the pleadings and the record as the entire southerly tract, the Museum Complex and Tournament Facility combined or just the Tournament Facility. Because of this imprecise definition, the court will not use the term Fireman's Park unless it appears in quoted text.

created for the purpose of assisting and advising the Commission with respect to the Central Pine Barrens comprehensive land use plan (the Plan) (ECL 57-0119).

The Commission was charged with the duty of preparing the Plan together with a generic environmental impact statement (ECL 57-0121(1)). The Plan is designed to protect the integrity of the Pine Barrens ecosystem and the quality of the surface and groundwater, to discourage piecemeal and scattered development, to promote active and passive recreational and environmental educational uses and to "accommodate development, in a manner consistent with the long term integrity of the Pine Barrens ecosystem and to ensure that the pattern of development is compact, efficient and orderly" (ECL 57-0121(2)). The Commission was also required to file maps of the Central Pine Barrens with the secretary of state delineating the core preservation area, consisting of "essentially intact areas of undeveloped pine barrens ecology" and the compatible growth area "where appropriate patterns of development and regional growth shall be permitted" (ECL 57-0109). The Plan, with respect to the core preservation area, was intended to protect the ecologic and hydrologic functions of the Pine Barrens by preserving the Pine Barrens area in its natural state, promoting compatible agricultural, horticultural and open space recreational uses with the framework of a Pine Barrens environment, prohibiting or redirecting new construction or development, accommodating specific Pine Barrens management practices and protecting and preserving the quality of surface and groundwater (ECL 57-0121(3)). With regard to any proposed development in the core preservation area, any person may apply to the Commission for a hardship exemption permit (ECL 57-0121(10)).

On June 12, 2002 the Town applied to the Commission for a hardship permit pursuant to ECL 57-0121(10). The Town sought, through the hardship permit process, permission to make certain improvements in both the Tournament Facility and Museum Complex areas.[3] In the Tournament Facility, the Town initially sought to repair aprons and other portions of the drill team track, install and provide water for irrigation to a cleared area adjacent to the track, install additional bleacher seats at the drill track area, apply topsoil and seed in unvegetated areas, construct a new 20 foot by 30 foot bathroom and shower facility, install approximately fifty gravel pads for camping, install a gravel access path, electricity and barbeque grills in the camping area, install a pump out station with connections to the existing holding tanks for the bath facility and camping vehicles, install additional equipment in the playground area and a prefabricated gazebo and picnic tables in the camping area. In the Museum Complex area the Town sought permission to continue the use of the existing Quonset Hut building, administration building, the Firehouse and maintenance building. The Town also sought permission to construct a new museum building on the 50 by 90 foot footing as well as a "9/11 Memorial" consisting of a Maltese cross monument, benches and walkways (Return, Exhibit 52). The Commission held a hearing (the Hearing) on this application on June 12, 2002 (Return, Exhibit 51). This application was subsequently modified by an Addendum on July 8, 2002, as to the Tournament Facility, to reduce the request for camping pads

[3] The parties do not dispute that both of these areas lie in the core preservation area.

from fifty to 30 to 40 pads and to eliminate the request for picnic tables and bleachers (Return, Exhibit 64). The Museum Complex application appears to have been modified by a request for permission to create a fifty car parking lot with an access road and a connecting asphalt walkway (Return, Exhibit 73).

On July 10, 2002 the Commission approved by resolution (the Resolution) a subsequently modified request, with regard to the Museum Complex, for the construction of the fifty foot by ninety foot museum building and fifty car parking lot with an access road and, with regard to the Tournament Facility, for construction of the gazebo and a shower/lavatory facility with an above ground storage tank and for installation of thirty to forty crushed-stone camping pads. The Commission found that the application met the criteria for a core preservation area hardship exemption pursuant to ECL 57-0121(10). The Commission also determined that the proposed action would not have a significant adverse impact on the environment pursuant to ECL Article 8 (SEQRA) and issued a negative declaration. The Commission further resolved that the approval was conditioned on the Town's stipulation that there would be no further clearing or development "at the Town's Firemen's Park property" and that the approval constituted the "minimum relief to be accorded to the Firemen's Park property" (Return, Exhibit 79). This special proceeding then ensued.

Petitioners contend that enactment of the Commission's Resolution was arbitrary and capricious and violated the provisions of Articles 8 and 57 of the Environmental Conservation Law and the provisions of the Plan. Specifically, the petitioners contend that the Town is not a "person" within the meaning of ECL 57-0121(10). The petitioners further contend that the Town failed to satisfy the requirements of ECL 57-0121 (10) which require that the applicant for a hardship exemption demonstrates that the subject property did not have any beneficial use if used for its present use or developed as authorized by the provisions of Article 57 of the ECL (ECL 57-0121 (10)(a)) or demonstrates on a showing of specific facts that there was a compelling public need. Petitioners also contend that the Town failed to satisfy the requirement of ECL 57-0121(10)(c)(iii) which requires that the applicant for a hardship exemption demonstrate that the hardship waiver "is the minimum relief necessary to relieve the extraordinary hardship....". Petitioners allege that the granting of the Resolution violated the provisions of SEQRA and the Plan.[4] Petitioners also seek a writ of prohibition restraining respondents from further clearing or development at "Fireman's Park". Finally, petitioners contend that since the Town is in violation of the Program and the State deed, title has reverted to New York State ownership.

Petitioners allege as to respondent Vigliarolo that, as lessee of Town owned land he illegally mined 15,000 cubic yards of sand without a permit. Petitioners further allege that new trap shooting stalls, parking facilities and a pavilion were illegally erected. Petitioners contend that these actions

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[4] Since the petitioners did not allege which provisions of the Plan were violated, this contention was not considered.

violated the Range's corporate franchise agreement with the Town. Vigliarolo moves to dismiss the proceeding on grounds, inter alia, asserting that this proceeding was not properly commenced against him in his capacity as a corporate officer.

As a general rule directors or officers of a corporation who execute a contract in their corporate capacity are not personally liable under the contract except where it appears that it was the parties intent to personally bind the officer or director or where there is evidence of fraud (***Gottehrer v Viet-Hoa Co.,*** 170 AD2d 648, 567 NYS2d 71 [1991]). Moreover, a director or officer of the corporation is not liable for the tortious or criminal acts of the corporation unless he has participated in the wrongful conduct (***Robbins v Panitz,*** 61 NY2d 967, 475 NYS2d 274 [1984], rehearing den. 62 NY2d 803, 1984 N.Y. Lexis 8300; ***People v Alrich Restaurant Corp.,*** 53 Misc2d 574, 279 NYS2d 624 [1967]).

Although petitioners submit in reply, documentation indicating that Vigliarolo and the Range were in violation of Article 23 of the Mined Land Reclamation Law, petitioners admit that any liability that may attach to Vigliarolo or the Range from these activities is still the subject of pending litigation. The record also reveals that the franchise agreement between the Town and the Range was executed by Vigliarolo in his capacity as President of the Range (Return, Exhibit 5). This agreement does not contain any provisions personally binding Vigliarolo as a corporate officer. In the absence of any evidence of alleged wrongdoing attributable to Vigliarolo as a corporate officer, his motion to dismiss this special proceeding as against him, is granted. The record also indicates that the franchise agreement between the Town and the Museum was executed by John J. Austen in his capacity as President of the Museum (Return, Exhibit 36). Since there is no evidence of alleged wrongdoing attributable to Callari as a corporate officer, his cross-motion for dismissal of this proceeding as to him, is also granted.

Respondents Commission and Town assert the defense of lack of standing. Petitioners, Carole Jones, Paul J. Decker, Eric Burke, Yolanda Susi, Joseph P. Walsh and Kim Darrow allege that they have standing as individual taxpayers residing in the Town of Brookhaven (individual petitioners). They reside within one half mile of the subject parcel and would be directly impacted by the actions approved by the Resolution. They further allege that they will be impacted in a manner and degree different from other individuals "with respect to the diminished quality of drinking water, increased traffic and noise associated with the increased intensity of the use associated with the construction of the proposed project and diminished property values".

Petitioner, Richard Amper (Amper), alleges[5] that he is a member of the petitioner, the Long

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[5] Although the "affidavit" of Amper was not properly executed in that he does not indicate that he was "duly sworn", it does appear from the entire affidavit that Amper was in fact under oath at the time he executed the affidavit. Moreover, respondents, not having objected to its form, have waived any objection to the court's consideration of this affidavit.

Island Pines Barren Society, Inc. (Society) and a resident of the Town of Brookhaven. Amper obtains his drinking water from a Suffolk County Water Authority (SCWA) well which is located between his house and a "1/4 downgradient of the proposed project". He routinely takes visits and take visitors through "Fireman's Park" for hiking and bird watching. He contends that the proposed actions challenged herein will have a deleterious effect on his drinking water, visits to "Fireman's Park" as well as on road noise and congestion. Amper concludes that these effects would damage him in a manner and degree different from the public at large. Amper also alleges that he is the Executive Director of the Society and that it is a statutory member of the Committee. He further alleges that the individual petitioners are also members of the Society.

Petitioners have the burden of demonstrating that they are the proper persons to challenge the administrative action taken by the Commission pursuant to Articles 8 and 57 of the ECL (***Society of Plastics Industry, Inc. v County of Suffolk,*** 77 NY2d 761, 570 NYS2d 778 [1991]). In order for the individual petitioner to establish standing, they must demonstrate that the challenged administrative action will have a harmful effect on them and that the interest asserted by them is within the zone of interest protected by the statute (***Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals,*** 69 NY2d 406, 515 NYS2d 418 [1987], recon. den. ***Allen Avionics, Inc. v Universal Broadcasting Corp.,*** 70 NY2d 694, 518 NYS2d 1030). In order to demonstrate that the harmful effect of the proposed action has risen to a level sufficient to confer standing, petitioners must show that they sustained special damages "different in kind and degree from the community generally" (***Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals,*** supra 413). It is presumed, however, that a person who owns property which is the subject of, or within close proximity to, the challenged administrative activity, has sustained such special damage without proof of actual injury (***Mobil Oil Corp. v Syracuse Industrial Dev. Agency,*** 76 NY2d 428, 559 NYS2d 947 [1990]). "In the area of associational or organizational standing, the applicable principles are embodied in three requirements (see, Matter of Dental Socy. v. Carey, 61 N.Y.2d 330, 474 N.Y.S.2d 262, 462 N.E.2d 362). First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury" (***Society of Plastics Industry, Inc. v County of Suffolk,*** supra 775).

Applying these principles to the case at bar, the individual petitioners have failed to establish standing. Their allegation that they live within one half mile of the subject parcel does not entitle them to the presumption of aggrievement applicable to property owners living in close proximity to the challenged actions (***Boyle v Town of Woodstock,*** 257 AD2d 702, 682 NYS2d 729 [1999]; ***Buerger v Town of Grafton,*** 235 AD2d 984, 652 NYS2d 880 [1997], lv. app. den. 89 NY2d 816, 659 NYS2d 856; ***Darlington v City of Ithaca,*** 202 AD2d 831, 609 NYS2d 378 [1994]). Moreover,

their conclusory and generalized allegations as to diminished water quality and property values and increased traffic and noise fail to establish that they have suffered an injury in fact (***Long Island Pine Barrens Soc'y. v Supervisor of Town of Southampton,*** AD2d , 2002 WL 31945017, 2003 N.Y. Slip Op. 10186 [2003]; ***Long Island Pine Barrens Soc'y v Planning Bd.,*** 213 AD2d 484, 623 NYS2d 613 [1995]). Amper, although not living within close proximity to the challenged administrative action, has demonstrated that because of his use of the SCWA well, he would suffer an injury in fact (***Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v Planning Comm'n,*** 259 AD2d 26, 695 NYS2d 7 [1999]; ***Long Island Pine Barrens Soc'y. v Town of Islip,*** 261 AD2d 474, 690 NYS2d 95 [1999])[6].

Society, the organizational petitioner, has also established standing. Society has demonstrated that at least one member of its organization, Amper, has standing. It is also clear that the interests asserted by Society in this proceeding are germane to its purposes.[7] Society has also demonstrated that the participation of its members is not required for it to assert its claim or obtain the appropriate relief (***Stony Brook Village v Reilly,*** AD2d , 750 NYS2d 126, 2002 N.Y. Slip Op. 08613 [2002]). Accordingly, Town's and Commission's requests for dismissal on the ground that the petitioners lack standing, are granted as to the individual petitioners and are otherwise denied.

Turning to the merits of this proceeding, petitioners contend that the Town was not a proper applicant for a hardship permit in that ECL 57-0121(10) applies only to individuals and not to governments. The petitioners allude to the words "any person" in the statute which the petitioners contend limit its applicability to individuals. Petitioners also allege that since 1993, of the forty three hardship exemptions granted, none have been issued to a municipality.

Respondent Commission contends that the petitioners, having failed to raise this issue during

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[6] This short form order is in accord with an earlier memorandum decision of this court (***Matter of Long Island Pine Barrens Society, Inc. v Central Pine Barrens Joint Planning and Policy Commisssion,*** NYLJ, November 11, 1996, page 32, col. 4 (Suffolk County Supreme Court, Hon. W. Bromley Hall, J.S.C.)). In that decision Justice Hall determined that Amper's allegation, that the challenged activity would compromise the Suffolk County Water Authority well located between his home and the proposed site of that activity, was sufficient to confer standing.

[7] Although Amper does not specifically state in his affidavit the purposes of the Society, the court takes judicial notice that one of the primary purposes of the Society is to maintain oversight of the Long Island Pine Barrens (See, ***Matter of Long Island Pine Barrens Society, Inc. v Central Pine Barrens Joint Planning and Policy Commisssion,*** supra, in which Justice Hall referred to the Society as "a watchdog for the Pine Barrens"). The Society also serves as a member of the Committee.

the administrative proceedings, are precluded from raising it in a subsequent judicial review. The Commission further contends that the term "person", as it is defined under the Environmental Conservation Law, includes governmental property owners such as the Town. Commission states that this interpretation of the term "person" is supported by various other sections of Article 57 which refer to the Town's ownership and public improvement of lands within the Pine Barrens.

Judicial review of an administrative action is limited to the record made before the agency (***Montalbano v Silva,*** 204 AD2d 457, 611 NYS2d 630 [1994]). Material objections not timely raised before the administrative agency are not subject to subsequent judicial review (***Old Dock Assoc. v Sullivan,*** 150 AD2d 695, 541 NYS2d 569 [1989]). Commission has alleged that Amper did not raise the issue of whether the Town was a "person" entitled to apply for a hardship permit until two weeks after the Resolution was approved. Petitioners' conclusory assertion that Amper "essentially raised all of the issues that are in the petitioners petition" does not sufficiently demonstrate that this issue was brought to the Commission's attention prior to its passage of the Resolution. Accordingly, petitioners are precluded from raising it now. Moreover, even if this court were to consider petitioners' contention, it is without merit (ECL 1-0303(18); See also ECL 57-0105 and 57-0107(13)(f)(I), Return, Exhibits 68 and 69 (Revised Program and Program, respectively).

The petitioners also challenge the Commission's issuance of a negative declaration under SEQRA. Specifically, petitioners contend the Commission failed to give the requisite "hard look" and that "the frequent unauthorized and uncoordinated periodic development of Fireman's Park" constituted an improper segmentation under SEQRA. The Commission again contends that petitioners, by not raising the issue of segmentation before it during administrative proceedings, waived the right to have it judicially reviewed. It further contends that even if this court were to consider the merits, there was no SEQRA violation. The Commission alleges that there were no planned or pending actions by the Town other than those listed in the application for the hardship permit, the Museum Complex and the Tournament Facility. In reply, petitioners allege that the Commission failed to consider the alleged illegal clearing and construction conducted at the Range.

"SEQRA contains no provision regarding judicial review, which must be guided by standards applicable to administrative proceedings generally: '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' (CPLR 7803[3]; see, Matter of City of Schenectady v. Flacke, 100 A.D.2d 349, 353, 475 N.Y.S.2d 506, lv. denied 63 N.Y.2d 603, 480 N.Y.S.2d 1025, 469 N.E.2d 103; Matter of Environmental Defense Fund v. Flacke, 96 A.D.2d 862, 465 N.Y.S.2d 759). In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively. More particularly, in a case such as this, courts may, first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a

'reasoned elaboration' of the basis for its determination (Aldrich v. Pattison, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23, supra; Coalition Against Lincoln W. v. City of New York, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170, affd. 60 N.Y.2d 805, 469 N.Y.S.2d 689, 457 N.E.2d 795, supra; H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232, 418 N.Y.S.2d 827). Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process" (***Jackson v New York State Urban Dev. Corp.,*** 67 NY2d 400, 416-417, 503 NYS2d 298 [1986])

"Segmentation" in the context of a SEQRA proceeding is defined as the "division of the environmental review of an *action* such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR 617.2(ag), emphasis added)[8]. Segmentation is considered to be contrary to the spirit and intent of SEQRA (6 NYCRR 617.3 (g)(1); ***Concerned Citizens for the Env't v Zagata,*** 243 AD2d 20, 672 NYS2d 956 [1998], lv. app. den. 92 NY2d 808, 678 NYS2d 594). Where an application under SEQRA has been improperly segmented, the court may annul a negative declaration (***Citizens Concerned for Harlem Valley Env't v Town Board*** , 264 AD2d 394, 694 NYS2d 108 [1999], lv. app. den. 94 NY2d 759, 705 NYS2d 5)).

With regard to petitioners' contention that this action was improperly segmented, a review of the record reveals that petitioners, although having the opportunity to request the Commission to consider this issue, failed to do so. Petitioners, having failed to raise this issue at the administrative level are now precluded from seeking a judicial review (***Long Island Pine Barrens Soc'y v Planning Bd.,*** 204 AD2d 548, 611 NYS2d 917 [1994], app. dis. and app. den. 85 NY2d 854, 624 NYS2d 369). Nevertheless, even if the court were to consider this contention, it has no merit. The environmental assessment form (EAF) submitted to the Commission (Return, Exhibit 53) refers to both the Tournament Facility and the Museum Complex. At the Commission's meeting of July 10, 2002, it also considered, as part of the long term effect of this project, the proposed 50 car parking lot which was to be developed in the future (Return, Exhibit 75, pages 5-6). Contrary to the petitioners' contention, the Commission was not required to consider the environmental impact of alleged illegal clearing and development at the Range or at "Fireman's Park". The SEQRA regulations clearly contemplate that an "action" shall not segmented and that the lead agency consider the cumulative effects of a proposed "action". The alleged illegal activities do not

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[8] The SEQRA regulations also provide with regard to determinations of significance, "the lead agency must consider reasonably related long term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent *actions* which are: (I) included in any long-range plan of which the action under consideration is a part; (ii) likely to be undertaken as a result thereof, or (iii) dependent thereon" (6 NYCRR 617.7(c)(2), emphasis added)

constitute an "action" within the purview of SEQRA (6 NYCRR 617.2 (b)).[9]

Petitioners also contend that the Commission failed to take a "hard look" at the proposed action. The court construes this to be a request by the petitioners for the court's review of the record to determine if there was SEQRA compliance (See ***Jackson v New York State Urban Dev. Corp.,*** supra). First it must be determined whether the agency identified the relevant areas of environmental concern and took the requisite "hard look" at them.

One area of environmental concern is whether the proposed action is within a Critical Environmental Area (CEA) designated pursuant to Article 8 of the ECL and 6 NYCRR 617.14(g) (6 NYCRR 617.6(c)(iii)). An area may be designated as a CEA based on certain characteristics including whether it has "an inherent ecological, geological or hydrological sensitivity to change that may be adversely affected by any change" (6 NYCRR 617.14(g)(1)(iv)). Another area of environmental concern is whether the proposed project will cause the "removal or destruction of large quantities of vegetation or fauna" (6 NYCRR 617.6(c)(ii)).

The record indicates that the Town submitted three EAFs for this proposed action. One EAF, dated June 10, 2002 covered both the Tournament Facility and the Museum Complex (Return, Exhibit 53, Combined EAF). The Return also contains an undated document referred to in the Return's table of contents as "54. Hearing Exhibit C (EAF, Part 2)". Although this document was not time stamped, it appears it was delivered to the Commission on the day of the hearing. The second EAF which was solely for the Museum Complex (MCEAF), is dated June 10, 2002, redated July 5, 2002 and stamped "Received" by the Commission on July 8, 2002 (Return, Exhibit 66). The third EAF which was solely for the Tournament Facility (TFEAF), is undated, but stamped "Received" by the Commission on July 8, 2002 (Return, Exhibit 67).

The Combined EAF and the EAF, Part 2 indicate that the proposed action was not located in a CEA. The MCEAF and the TFEAF indicate that the proposed actions are in a CEA. The discrepancy between the EAFs was not corrected until the Hearing. At the Hearing Acting Chairman George Proios indicated that the Pine Barrens was designated as a CEA. The Combined EAF and the MCEAF indicated that there would be no clearing of vegetation. The TFEAF indicated that there would be one half acre of clearing. As a result of these differences considerable confusion arose at the hearing as to the extent of clearing that would be necessary to complete the project (Return, Exhibit 51, pages 18, 22-25, 27-33, 38, 47, 56; Exhibit 60). The Town states in the Addendum, as to the Tournament Facility, that although the new bathroom facility, gazebo and playground modules will be located entirely in "long since cleared areas", the 30 to 40 camping pads to be located at the inner oval of the training track, would be placed on up to 1.7 acres of recently cleared areas. The

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[9] The Commission properly rebuffed a request to separately consider the erection of the "truck building"(Return, Exhibit 51, pages 67-68).

Addendum, with regard to the Museum Complex, makes no reference to the clearing of one half acre for the proposed parking lot.[10]

The court concludes that the Commission failed to give the requisite "hard look" at the impact of the proposed actions being located in the CEA and the extent of vegetation that would have to be cleared or the extent of recently cleared vegetation that would not be allowed to re-grow. Moreover, the Board at the Hearing gave only a cursory review of the potential environmental impact of the possible use of chemicals at the Museum Complex and the gravel camping pads which one member of the Commission described as an "disturbance". A proper review of these factors was also truncated by the Town's submission of the hardship application, the Combined EAF and Part 2 of the EAF (Return, Exhibit 54) on the same day of the Hearing and submission of the TFEAF and MCEAF only two days prior to the Hearing. Chairman Prios indicated at the Hearing that the issue of how sewerage was to be handled could have been addressed had the documents been delivered earlier (Return, Exhibit 51, page 61). [11] Where, as here, the proposed action is located in an environmentally sensitive area, even greater attention should be given to environmental implications (***Westchester Day School v Village of Mamaroneck,***___F.Supp.2d___ , 2002 WL 31746719 (December 4, 2002, U.S. District Court, SDNY)).

The Commission also failed to give a "reasoned elaboration" for its issuance of a negative declaration. As a general rule the amount of detail required for a negative declaration varies in accordance with the nature of the proposed action (***Farrington Close Condominium Bd. of Managers v Incorporated Village of Southampton,*** 205 AD2d 623, 613 NYS2d 257 [1994]). A mere passing reference, without further consideration, is not sufficient to satisfy the requirement of reasonableness (***Kanaley v Brennan,*** 119 Misc2d 1003, 465 NYS2d 130 [1983], aff. 120 AD2d 974, 502 NYS2d 880). The negative declaration issued by the Commission stated merely that the "Full Environmental Assessment Form", all application materials and comments from the involved agencies "revealed that the proposed action will not cause potentially large impacts" (Return, Exhibit 80, emphasis added). The Commission concluded "that a review of the criteria for determining significance in Part 617.7 (c) revealed that the subject application does not meet any of the criteria

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[10] The amendment to the hardship application adding the parking lot and an access road was not made until immediately prior to the Commission's meeting on July 10, 2002 (Return, Exhibit 75, page 5). The only discussion and review of the potential environmental impact of this amendment occurred at this meeting of July 10th immediately prior to the Commission's approval of the issuance of a negative declaration (Return, Exhibit 75, pages 5-6). At this same meeting the Commission considered Amper's suggestion that their decision should be delayed in order to give them more time to review the revised proposal (Return, Exhibit 75, page 6).

[11] The issue of what effect the "approved sewerage system type" would have on the ground water was identified in the EAF Part 2 as a project impact.

for determining significance" (Return, Exhibit 80). The Commission did not explain how relevant areas of environmental concern, such as the proposed action's location in a CEA, the clearing of an acre or more of vegetation, the possible use of chemicals at the Museum Complex and the means for disposal of sewerage, did not create a significant adverse impact on the environment[12]. Under the circumstances here the failure to do so was arbitrary and capricious (***Stony Brook Village v Reilly,*** supra; ***Cannon v Murphy,*** 196 AD2d 498, 600 NYS2d 965 [1993]).

This court is not unmindful of the vital role the volunteer fireman plays in the community. Nevertheless, this public service must be balanced against the mandate of the law of this state requiring the preservation of the Long Island Pine Barrens. Accordingly, Commission's negative declaration and the Resolution must be annulled. The Commission is directed to conduct a new environmental assessment addressing all relevant environmental concerns[13].

Petitioners also seek a writ of prohibition restraining the respondents from any further clearing or construction at "Fireman's Park" and for a judgment declaring the deed conveying Fireman's Park from New York State to the Town of Brookhaven, null and void. In accordance with the relief granted herein, petitioners' request for the writ of prohibition is denied as moot (***Many v Village of Sharon Springs Board of Trustees,*** 234 AD2d 643, 650 NYS2d 486 [1996], lv. app. den. 89 NY2d 811, 657 NYS2d 403.

Petitioners also claim that under the terms of the State Deed the Town's failure to file the annual reports with the State and, under the terms of the Program, its failure to complete phase 2 by 1985, renders the State Deed null and void. Enforcement of the terms and conditions of the Program is governed by paragraph 6 of the State Deed which provides that the State may, *at its option,* demand reversion of the title. Since the petitioners have not adduced evidence that the State has

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[12] The lack of findings is particularly egregious if considered in the context that the Commission at the Hearing and again at its July 10, 2002 meeting had discussed whether this proposed action should have been classified as a Type One action (Return, Exhibit 51, pages 23-24, Exhibit 75, page 5). A Type One action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4(a)(1))

[13] Although the court is not required to consider the remainder of the petitioners' contentions regarding the efficacy of the Commission's approval of the hardship permit, it is compelled to express its concern as to whether there is substantial evidence to support the Commission's findings, particularly with regard to the proposed action at the Museum Complex and parking lot, that the Town demonstrated extraordinary hardship, compelling public need or whether the hardship waiver was the minimum relief necessary to relieve the extraordinary hardship (See ECL 57-0121(10)).

chosen to exercise this option, the relief sought by petitioners on this ground is denied. Enforcement of the failure to file annual reports with the State is also governed by paragraph 6 of the State Deed. Paragraph 6 provides that upon the Town's failure to file the annual report there "shall be a conclusive irrebuttable presumption of non-compliance with and breach of the aforesaid obligation to improve, maintain and use said above described property for continuous public park, recreation and/or playground purposes, and the title thereto shall thereupon revert back to the People of the State of New York and they may thereupon re-enter into the possession thereof" (Return, Exhibit 69).

Even if this court were to assume that the Town had failed to file the annual report and title had reverted to the State under the terms of paragraph 6 of the State Deed, petitioners lack standing to enforce the State's right of re-entry (***Postley v Kafka,*** 213 AD 595, 211 NYS 382 [1925]). Since the State is neither a party to this action nor sought to intervene for the purpose of exercising its rights under the State Deed, there is no justiciable controversy (See ***Southwick v New York Christian Missionary Soc'y,*** 151 AD 116, 135 NYS 392 [1912], aff. 211 NY 515, rehearing den. 212 NY 564). In the absence of a justiciable controversy, the court does not have the authority to render the declaratory relief sought by the petitioners (***Pokoik v Ocean Beach,*** 184 AD2d 499, 584 NYS2d 166 [1992]; ***Bolt Associates v Diamonds-In-The-Roth, Inc.,*** 119 AD2d 524, 501 NYS2d 41 [1986]). Accordingly, petitioners' request for a judgment declaring the State Deed null and void, is denied.

This petition is granted to the extent the Resolution of the Commission, dated July 10, 2002, granting the Town of Brookhaven's application for a hardship exemption pursuant to ECL 57-0121(10), is declared null and void, and is otherwise denied.

So Ordered: February 26, 2003

HON. DANIEL J. LOUGHLIN, J.S.C.