

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
GABRIELLA VELARDI-WARD,

Petitioner,

-versus-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondent.
-----X

Index No.: _____

RJI No.: _____

**VERIFIED PETITION
AND COMPLAINT**

**ORAL ARGUMENT
REQUESTED**

The Petitioner, Gabriella Velardi-Ward, by and through her attorneys, the PACE ENVIRONMENTAL LITIGATION CLINIC, INC., and upon her accompanying Affidavit and this Verified Petition for judgment and an order pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and Complaint for declaratory judgment pursuant to CPLR § 3001, respectfully alleges as follows:

PRELIMINARY STATEMENT

1. This Article 78 special proceeding and complaint for declaratory judgment under N.Y.C.P.L.R. section 3001 *et seq.* challenges New York State Department of Environmental Conservation’s (“Respondent”) State Environmental Quality Review Act (“SEQRA”) review, which was based on an outdated Environmental Impact Statement, on the grounds that Respondent’s failed to consider a No Action Alternative. Respondent relied upon the subject Environmental Impact Statement in deciding to grant an Article 24 Freshwater Wetlands permit to Josif A LLC (Permit ID: 2-6401-00287/00002) (*see* Article 24 Freshwater Wetlands Permit annexed hereto as **Exhibit “A”**; the “Permit”). The Permit was applicable to a project by Josef A

LLC known as the South Avenue Retail Development, which is located at 534 South Avenue, Block 1707, Lots 1 and 5, within the Borough of Staten Island, County of Richmond and State of New York (the “South Avenue Retail Development”; or the “Project”).

2. Petitioner respectfully brings this proceeding and action seeking a judgment and order pursuant to Sections 7803[3], 7806 and 3001 of the CPLR, for a judgment and declaration that Respondent’s reliance upon the Environmental Impact Statement in the issuance of the Permit to Josif A LLC was arbitrary and capricious, contrary to law and an abuse of discretion, on the grounds that Respondent failed to consider a true No Action alternative in violation of SEQRA (*see* 6 NYCRR § 617.9[b][5][i][v]), failed to thoroughly analyze and/or identify areas of environmental concern in order to assess whether Respondent’s actions may have a significant adverse impact on the environment (*see* 6 NYCRR § 617.7[b][3]; 6 NYCRR § 617.7[c][1]) and failed to hold an adjudicatory hearing (*see* 6 CRR-NY 621.8[b]).

JURISDICTION AND VENUE

3. This court has jurisdiction over claims brought pursuant to CPLR Article 78, under CPLR § 7804[b]. This court has jurisdiction over the claims for declaratory relief pursuant to CPLR § 3001.

4. Pursuant to CPLR §§ 503 and 506[a] and [b], this proceeding is brought in Queens County, where the challenged determination was made and where Respondent’s regional office is located (1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5401).

PARTIES

5. Petitioner Gabriella Velardi-Ward is a citizen of the State of New York who resides at 40 Wolkoff Lane, within the Borough of Staten Island, County of Richmond and the State of New York. Petitioner is a member of a group of the Coalition for Wetlands and Forest, a group of local Staten Island citizens whose mission is to: 1) raise awareness of the issues concerning Staten Island Wetlands and 2) save the Graniteville Wetlands and Forest. *See Contact Us*, COALITION FOR WETLANDS & FOREST STATEN ISLAND, NY, <http://www.sicwf.org/contact-us/> (last visited Feb. 11, 2020).

6. Respondent is an executive agency of the State of New York with the powers and duties set forth in both the New York Environmental Conservation Law and SEQRA. Respondent is headquartered at 625 Broadway, within the City of Albany, County of Albany and State of New York, and maintains a regional office at 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5401.

STANDING

7. As set forth in her Affidavit accompanying this petition, Petitioner Gabriella Velardi-Ward, on her own behalf, in her capacity as a citizen of the State of New York, in her capacity as an affected individual of the local government, and as a member of the Staten Island Coalition for Wetlands and Forest, has standing to enforce the respective SEQRA obligations against Respondent.

8. Petitioner Gabriella Velardi-Ward resides at 40 Wolkoff Lane, within the Borough of Staten Island, County of Richmond and the State of New York. Petitioner is a domiciliary of the State of New York.

9. Petitioner is a member of a local citizens group, known as the Coalition for Wetlands and Forest, whose mission is to save any and all wetlands located within the Borough

of Staten Island, which includes, but is not limited to, the wetlands that will be destroyed if the South Avenue Retail Development, located at 534 South Avenue, Block 1707, Lots 1 and 5, within the Borough of Staten Island, is constructed.

10. In response to Notice that an Article 24 Freshwater Wetlands permit may be granted to Josif A LLC in connection with the aforementioned South Avenue Retail Development, a Comment Letter was submitted on behalf of the Staten Island Coalition for Wetlands and Forest (*see* Comment Letter from Takeroot Justice dated August 29, 2019, annexed hereto as **Exhibit “B”**).

11. Petitioner Gabriella Velardi-Ward has aesthetically enjoyed and recreated upon, and shall continue to aesthetically enjoy and recreate upon, wetlands located within the Graniteville neighborhood, including the wetlands that will be destroyed if the South Avenue Retail Development is constructed. (*See* Affidavit of Gabriella Velardi-Ward annexed hereto as **Exhibit “C”**).

12. If the Project is completed, it will largely destroy the wetlands, thereby negatively impacting Petitioner’s aesthetic, environmental and recreational interests in the wetlands. As such, because Respondents’ failure to comply with SEQRA in approving the project, including the failure to consider an alternative in which the wetlands would *not* be developed upon, threatens to directly and negatively impact Petitioner’s interests.

13. A favorable result in this matter would remedy these concerns. An order from the Court requiring Respondents to comply with SEQRA and hold an adjudicatory hearing on these issues would allow for the proper consideration of the environmental issues raised herein

14. Respondent is an executive agency of the State of New York with the powers and duties set forth in both the New York Environmental Conservation Law and SEQRA.

FACTUAL BACKGROUND

15. On or about August 23, 2012, Charles and Joseph Alpert, owner(s) of Josif A LLC, entered into a Stipulation with Respondent wherein it was agreed that a Freshwater Wetlands permit was required in connection with the South Avenue Retail Development, and that such permit was subject to the requirements of SEQRA (*see Alpert v. Jorling Stipulation of Settlement annexed hereto as Exhibit "D"*).

16. On or about August 26, 2016, New York City Department of City Planning issued an Environmental Assessment Statement that determined that the South Avenue Retail Development had the potential to result in significant adverse environmental impacts and issued a Positive Declaration.

17. On or about January 26, 2016, Josif A LLC requested a special zoning permit (commonly known as a "bulk variance") and mapping amendment from the City of New York (*see NYC Environmental Assessment Statement Form annexed hereto as Exhibit "E"*). In response to Josif A LLC's request for a bulk variance, an Environmental Impact Statement was drafted (*see Notice of Completion of Final Environmental Impact Statement annexed hereto as Exhibit "F"*). Any No Action Alternatives set forth therein were written in consideration of a scenario wherein Josif A LLC was not granted a bulk variance/special zoning permit, and did not take into account any development that did not obtain a Wetlands permit.

18. On or about April 12, 2018, and at all times pertinent hereto, Josif A LLC submitted an application to Respondent for a New York State Environmental Conservation Law Article 24 Freshwater Wetlands Permit to obtain authorization to construct the South Avenue Retail Development.

19. An opportunity for Public Comment was given and a Comment Letter was timely submitted on behalf of the Staten Island Coalition for Wetlands and Forest (*see* letter from Takeroot Justice dated August 29, 2019, annexed hereto as **Exhibit “B”**).

20. The aforesaid Comment Letter, *inter alia*, requested that Respondent schedule a hearing for public comment. Respondent could not lawfully determine that a hearing was not necessary per Article 24 of the Environmental Conservation Law, Section 24-0703[2], as the construction of the South Avenue Retail Development the permit would authorize is not “of such a minor nature as not to affect or endanger the balance of systems within the wetlands.” (ECL § 24-0703[2]).

21. 6 CRR-NY 621.8[b] sets forth mandatory language that compels Respondent to hold an adjudicatory public hearing on an application if comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issues may result in denial of the permit application. (ECL § 70-0119[1]).

22. The Comment Letter submitted on behalf of the Staten Island Coalition for Wetlands and Forest did raise substantive and significant issues that may have resulted in the denial of the permit application. Specifically, the Comment Letter state that the Environmental Impact Statement Respondent relied upon in proposing to issue the Permit to Josif A LLC failed to consider a No Action Alternative, that is, a scenario wherein an Article 24 Wetlands permit is not granted to Josif A LLC for the construction of the South Avenue Retail Development.

23. In deciding whether to grant Josif A LLC’s request for an Article 24 Wetlands Permit, Respondent did rely upon the aforementioned Environmental Impact Statement from 2017 (*see* Final Environmental Impact Statement annexed hereto as **Exhibit “G”**).

24. The subject Environmental Impact Statement, drafted long before Josif A LLC applied for an Article 24 Freshwater Wetlands permit, considers a No Action Alternative wherein a special zoning permit (bulk variance) was not granted, as opposed to a scenario wherein an Article 24 Freshwater Wetlands Permit is not granted, in violation of SEQRA. The subject Environmental Impact Statement does not consider a true No Action Alternative considering “the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action.” (*See* 6 NYCRR 617.9[b][5][i][v]).

25. By reason of the foregoing, the issuance of an Article 24 Freshwater Wetlands Permit to Josif A LLC was also arbitrary and capricious, inconsistent with applicable law, and represents an abuse of discretion.

26. On or about October 23, 2019, Respondents reached a definitive position under SEQRA with respect to issuance of an Article 24 Freshwater Wetlands Permit to Josif A LLC and took discrete and final agency action with regard thereto.

27. As a result of the unlawful reliance on the 2017 EIS, Petitioner will sustain injury given that real environmental harm will follow as a consequence of inadequate agency foresight, coordination, and deliberation and identification of No Action Alternatives wherein no Article 24 Freshwater Wetlands Permit is granted.

28. As a result of the unlawful reliance on the 2017 Final Environmental Impact Statement, Petitioner will injury as a result of the significant and adverse impacts to air quality, water quality, and aquatic biota and habitat which would occur as a result of the construction of the South Avenue Retail Project.

AS FOR THE FIRST CAUSE OF ACTION (ARTICLE 78)

29. Petitioner Gabriella Velardi-Ward repeats and realleges each and every allegation contained in the preceding counts of this Verified Petition and Complaint as if more fully set forth herein.

30. In relying upon an Environmental Impact Statement that does not consider a No Action Alternative to the proposed action in issuing the aforementioned Article 24 Freshwater Wetlands permit to Josif A LLC, Respondent unlawfully violated SEQRA. Specifically, Respondent relied upon an Environmental Impact Statement wherein no analysis was conducted with respect to any beneficial site changes that would occur in absence of the issuance of an Article 24 Freshwater Wetlands permit (*see* 6 NYCRR 617.9[b][5][i][v]).

31. As such, the Respondents failed to comply with SEQRA, which expressly requires consideration of a no action alternative.

32. The Respondent's reliance on the EIS, and consequently, issuance of the aforesaid Article 24 Freshwater Wetlands Permit, was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, and was an abuse of Respondent's discretion (CPLR § 7803[3]).

AS FOR THE SECOND CAUSE OF ACTION (DECLARATORY JUDGMENT)

33. Petitioner Gabriella Velardi-Ward repeats and realleges each and every allegation contained in the preceding counts of this Verified Petition and Complaint as if more fully set forth herein.

34. By reason of the foregoing, Petitioner is furthermore, or in the alternative, entitled to a judgment pursuant to CPLR § 3001 declaring that Petitioner's reliance on the EIS was in violation of the law.

35. Petitioner is further entitled to a declaration that the issuance of an Article 24 Freshwater Wetlands Permit to Josif A LLC was in violation of SEQRA, and annulling that permit.

36. Petitioner further requests the Court to order that Respondent must conduct a proper EIS that includes a No Action Alternative Analysis where no freshwater wetlands permit is granted.

**AS FOR THE THIRD CAUSE OF ACTION (FAILURE TO HOLD A PUBLIC
ADJUDICATORY HEARING)**

37. Petitioner Gabriella Velardi-Ward repeats and realleges each and every allegation contained in the preceding counts of this Verified Petition and Complaint as if more fully set forth herein.

38. 6 CRRNY 621.8(b) dictates that, “where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application.”

39. On or about August 29, 2019, Takeroot Justice forwarded a Comment Letter on behalf of the Staten Island Coalition for Wetlands and Forest (*see Exhibit “B”*) to Respondent wherein an adjudicatory public hearing was requested.

40. This Comment Letter raised significant issues relating to the application (i.e. the fact that the Environmental Impact Statement failed to consider a No Action Alternative in violation of SEQRA).

41. As set forth above, the Permit could not be lawfully issued without complying with SEQRA, so the Comment Letter raised issues that could have resulted in the denial of the permit or the imposition significant conditions thereon, such as requiring the development to avoid any disturbance of the Wetlands.

42. Moreover, section 24-0703(2) of Title 23 of Article 71 of the Environmental Conservation Law dictates that “the local government shall hold a public hearing on such application at a suitable location in the local government where the affected wetland is situated unless no notice of objection has been filed or unless the local government finds the activity to be of such a minor nature as not to affect or endanger the balance of systems within the wetlands.”

43. As set forth in the Comment Letter, the construction of the South Avenue Retail Development the permit authorizes is not “of such a minor nature as not to affect or endanger the balance of systems within the wetlands.” This is further evidenced by, *inter alia*, the positive declaration of the New York City Planning Department in the aforementioned Environmental Assessment Statement.

44. Respondent has failed to comply with and is in violation of 6 CRRNY 621.8(b) and §24-0703(2). By reason of the foregoing, Petitioner respectfully requests that this Court compel the Respondent to hold a public adjudicatory hearing on the South Avenue Retail Development.

WHEREFORE, Petition respectfully requests that this Court enter a Judgment and Order against Respondents pursuant to CPLR Sections 7803[3], 3001, and 6301 that:

- A. Pursuant to CPLR § 7803, Respondents’ reliance on the 2017 EIS was arbitrary, capricious and contrary to law;

- B. ANNULING the Article 24 Freshwater Wetlands Permit pursuant to CPLR §§ 7803[3] and 7806 on the basis that such determination was made in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious, and was an abuse of discretion;
- C. ADJUDGING and DECLARING pursuant to CPLR § 3001 that Josif A LLC's Article 24 Freshwater Wetlands Permit is affected by errors of law, is arbitrary and capricious, and is an abuse of discretion, and is invalid and void for having been made in violation of lawful procedure;
- D. Ordering that NYSDEC conduct a new EIS that complies with SEQRA;
- E. In the alternative, Ordering that NYSDEC conduct a public adjudicatory hearing regarding the issues raised by Petitioner in the Comment Letter; and
- F. GRANTING Petitioner Gabriella Velardi-Ward the costs and disbursement of this action.

Dated: February 14, 2020

White Plains, New York

Respectfully submitted,

Todd D. Ommen, Esq.
Karl S. Coplan, Esq.
PACE ENVIRONMENTAL LITIGATION
CLINIC, INC.
*Attorneys for Petitioner, Gabriella Velardi-
Ward*
78 North Broadway
White Plains, New York 10603
Phone: (914) 422-4343
Fax: (914) 422-4437

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Index No.: _____

VERIFICATION

STATE OF NEW YORK)
) ss:
RICHMOND COUNTY)

Gabriella Velardi-Ward, being duly sworn, deposes and says that she is a citizen of the State of New York, whose domicile is and hereby states that she has read the annexed Petition, knows the contents thereof and the same is true to his knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters she believes them to be true. Her belief to those matters therein not stated upon knowledge is based upon the files she maintains.

GABRIELLA VELARDI-WARD

Sworn to me before this
____ day of February, 2020

NOTARY PUBLIC

My Commission expires: _____

