

Case No.: 513521  
Tompkins County Index No.: 2011-0522

To be argued by:  
John Alden Stevens, Esq.  
Time Requested: 10 minutes

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**Supreme Court of the State of New York**  
**APPELLATE DIVISION - THIRD DEPARTMENT**

In the Matter of the Application of

ANN DRUYAN, DOMINICK C. LaCAPRA, ELEANOR BENISCH, MARY H. TABACCHI, SANDIP TIWARI, MARI TIWARI, ANNE SERLING, CHARLENE TEMPLE, GABRIELLE S. VEHAR, SHERENE BAUGHER, CATHERINE L. STEIN and JANE PEDERSEN,

Petitioners-Appellants,

For a Judgment pursuant to CPLR Art. 78 & § 3001

*-against-*

VILLAGE BOARD OF TRUSTEES of the VILLAGE OF CAYUGA HEIGHTS,

Respondent.

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES .....ii

STATEMENT OF FACTS .....1

POINT I           THE PETITIONERS’ ARGUMENT  
                      RELIES ON A BACKWARD APPROACH  
                      TO THE ENVIRONMENTAL IMPACT  
                      STATEMENT PROCESS .....3

POINT II           THE VILLAGE BOARD’S DECISION  
                      TO APPROVE THE DEER REMEDIATION  
                      PLAN WAS REASONABLE AND WAS  
                      BASED ON SUFFICIENT EVIDENCE .....6

POINT III           THE BOARD PROPERLY FOLLOWED ALL  
                      SEQRA PROCEDURES AND THERE IS NO  
                      MERIT TO THE PETITIONERS’ CHALLENGE  
                      IN THAT REGARD .....9

CONCLUSION       THE ORDER SHOULD BE AFFIRMED .....14

**TABLE OF AUTHORITIES**

Page No.

*Akpan v. Koch*, 75 N.Y.2d 561 (1990) .....7, 8

*Aldrich v. Pattison*, 107 A.D.2d 258 (2d Dept. 1985).....7

*Argyle Conservation League Inc. v. Town of Argyle*, 223 A.D.2d 796 (3d Dept. 1996).....8

*Matter of Jackson v. New York State Urban Development Corp.*,  
67 N.Y.2d 400 (1986) .....4, 7, 9, 10, 11

*Town of Henrietta v. Department of Environmental Conservation*,  
76 A.D.2d 215 (4<sup>th</sup> Dept. 1980).....3, 5

Environmental Conservation Law § 8-0109(2).....3

6 NYCRR § 617.9.....9, 10

## STATEMENT OF FACTS

The petitioners-appellants (hereinafter “petitioners”) brought this Article 78 proceeding to annul the approval by the respondent, Village Board of Trustees of the Village of Cayuga Heights (hereinafter “the Board”), of a State Environmental Quality Review Findings Statement (R 160-175) and the resolution by the Board to move forward with a deer remediation plan (R 186-187). That action was dismissed by the Decision, Order and Judgment of the lower court (R 7-20). The petitioners now appeal that Order and again seek to annul the actions of the Board.

The Village of Cayuga Heights (hereinafter “the Village”) has been trying to address an overpopulation of deer for more than a decade (R 272). That overpopulation has gradually resulted in increasing problems in the Village, including destruction of landscaping vegetation and gardens (R 294, 694, 700, 703, 843), damage caused by deer-vehicle collisions (R 292-293, 382-384), damage to the local ecology (R 341-343), possible increase in incidences of Lyme disease (R 295, 479-481) and direct physical conflicts with people (R 703, 843). In an attempt to address the problems and concerns caused by the excessive deer population, the Board assembled a Deer Remediation Advisory Committee (R 281-285). The exhaustive research and analysis performed by that committee eventually resulted in the proposed action, a deer remediation plan under which the deer population would be reduced to a desirable level using a combination of sterilization and culling (R 286).

In accordance with the requirements of the State Environmental Quality Review Act (“SEQRA”), the Board prepared a Full Environmental Assessment Form (R 318).

As a result of the Board's thorough review of potential environmental impacts, the Board issued a "Positive Declaration" stating that the proposed action may have a significant effect upon the environment (R 316-317). That positive declaration triggered the requirement under SEQRA to prepare an environmental impact statement ("EIS"). A Draft Environmental Impact Statement ("DEIS") was prepared and the Board issued a notice of completion on November 8, 2010 (R 154). A public hearing was held on December 6, 2010, pursuant to SEQRA, giving the public opportunity to comment on the DEIS. Written comments were also accepted and reviewed by the Board (R 154). A Final Environmental Impact Statement ("FEIS") was prepared and submitted to the Board (R 154). The FEIS incorporated the DEIS by reference. One portion of the FEIS contained the Board's responses to public comments that were critical of the proposed action (R 503-584). The Board then prepared and approved the Findings Statement authorizing the Board to proceed with the proposed action to reduce the deer population in the Village (R 160-194).

Pursuant to the plan, the Board has adopted a goal of 15 deer per square mile or approximately 30 deer in the Village (R 162). The Board made this determination based on evidence that deer populations with a density higher than that tend to be damaging to the environment. This damage includes severe reduction or elimination of certain plant species, spread of invasive species, and reduction in certain species of fauna because excessive browsing by the deer causes a change in the habitat (R 341-343). The Board was concerned about the possible increasing incidence of Lyme disease (R 295). The Board also sought to reduce problems of deer-vehicle accidents and destruction of

landscape vegetation, both of which result in expense to residents and homeowners (R 292-294).

The Board adopted the plan under which 20 – 60 female deer would be sterilized and an ongoing process of culling would occur over several years until the herd was reduced to the goal population (R 273). Meat from the culled animals would be donated to a food bank (R 304).

## POINT I

### **The Petitioners' Argument Relies on a Backward Approach to the Environmental Impact Statement Process.**

The petitioners insist that the action by the Board should be prohibited because the Board did not have sufficient information to justify its deer management plan. That argument, however, relies on a misapplication of the law regarding the EIS process.

The Village has been wrestling with the problem of how to address the overpopulation of deer in the Village for over a decade. Cayuga Heights and the Ithaca area in general are home to a number of people who have strong convictions about animal rights (R 297-300). Therefore, there has long been controversy about how the Village should approach the issue. Finally, however, the Board arrived at a plan that involved a combination of sterilization and culling to reduce the deer population. It was that plan that triggered the EIS process. The petitioners' argument in this case would stand that process on its head. SEQRA requires preparation of an EIS for any action that may have a significant effect on the environment. ECL § 8-0109(2).

An EIS is intended to provide detailed information about the *effect which the proposed action is likely to have on the environment*, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to

form the basis for a decision whether or not to undertake or approve such action [emphasis added].

*Town of Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 220 (4<sup>th</sup> Dept. 1980).

SEQRA insures that agency decision-makers – enlightened by public comment where appropriate – will identify and focus attention on any *environmental impact of proposed action*, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices [emphasis added].

*Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 414-415 (1986).

The process described in those cases is exactly what was done by the Board in this case. The Board developed a proposed action to deal with a long-existing problem of deer overpopulation. It did an assessment of whether the proposed action may have a significant effect on the environment and made a positive declaration. The DEIS was then prepared. The DEIS evaluated the possible adverse environmental effects of the proposed action, possible mitigation of those effects, and possible alternatives to the proposed action.

The only significant adverse environmental impacts of the plan would be the public controversy and the effect on the individual deer that would be culled or sterilized (R 303-306). All other impacts of the plan would be slight or temporary, or would actually be beneficial to the environment (R 274-275). Since the goal of the proposed action is to reduce the deer population, some impact on the deer is unavoidable.

The petitioners, however, are treating the EIS process as though it is intended to be the preliminary step and that its purpose is to provide the initial justification behind the proposed action. They point to areas where they claim the Board did not have sufficient information and argue that, therefore, the Board could not justify the proposed action. That is not the purpose of the EIS.

The EIS comes after the action is proposed. It identifies and focuses attention on environmental impacts. It provides an opportunity to determine and minimize adverse environmental effects. “SEQRA therefore requires a decision maker to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project.” *Town of Henrietta, supra*, 76 A.D.2d at 222. The EIS is not intended as a research project to form the basis for formulating a proposed action.

When the EIS process is viewed in the correct way, the petitioners’ argument makes little sense. Obtaining a new count of the number of deer in the Village is not going to identify any potential adverse environmental effects of the plan. At most, it would only clarify the number of deer that would need to be removed, and even then it would still only be an estimate. It would not change the conclusion that remediation is necessary or how it should be done. The same is true of the petitioners’ criticism that there was no study of the rate of deer migration in and out of the Village.

Studying the impact of the deer population on “private yards/ornamental plantings” or on the “suburban, non-forest ecosystem” does not even relate to any adverse environmental impacts of the plan. The impact of the deer in those respects is visible and apparent to anyone who cares to look. Furthermore, reduction of the deer population would have a positive effect on plantings and the ecosystem, not an adverse one.

Again, the purpose of the EIS is not to provide the basis for the proposed action. It is focused on the effect of the proposed action. Therefore, the petitioners' criticism that the DEIS and FEIS do not provide sufficient scientific basis to justify the proposed action is inapposite. Although the DEIS and FEIS contain ample information regarding the reason the plan is needed, their purpose was to provide information regarding the effect of the plan.

It is clear from the record that, having gone through the EIS process, the Board took a "hard look" at all the issues involved before deciding to implement the plan. Therefore, the Order dismissing the action should be affirmed.

## POINT II

### **The Village Board's Decision to Approve the Deer Remediation Plan Was Reasonable and Was Based on Sufficient Evidence.**

The petitioners argue that the Board's decision to go forward with the deer remediation plan was arbitrary and capricious or was not supported by substantial evidence. They base this argument on an assertion that the Board should have obtained more information regarding certain subjects. In doing so, however, the petitioners ignore the information the Board obtained and reviewed.

The petitioners criticize the Board for not conducting a new survey to get a more recent estimate of the current deer population. The DEIS contained information from Dr. Paul Curtis, a wildlife specialist from Cornell University. Dr. Curtis had performed an estimate of the deer population in the Village in 2006. He was familiar with deer populations in general and with the situation in the Village specifically. Based on his

expertise in the field, he determined a reasonable growth rate for the deer population and gave an estimate of the then current population. His calculations resulted in an estimated population density of approximately 82 deer per square mile in 2006 and 110 deer per square mile in 2009. In addition, he determined that the deer that had previously been tagged, which had formed the basis for the 2006 survey, had either been killed by vehicles or the batteries on their radio collars had died so that a new sample of tagged deer would be needed for any new population estimate (R 321). Obviously, that would require additional time and expense. Furthermore, the population had been considered excessive for many years and a new survey would not have provided any necessary clarification in that regard.

In assessing an agency's compliance with the substantive requirements of SEQRA, the courts must 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. *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). "An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" [citations omitted]. *Ibid.*

Since it is not the court's role to evaluate de novo the data presented to the agency, the court must, as with substantive SEQRA obligations generally, be guided by a rule of reason and refrain from substituting its judgment for that of the agency. Thus challenges to the conclusions drawn from the data presented requiring such a substitution of judgment will likely fail.

*Id.* at 571.

Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before an FEIS will satisfy the substantive requirements of SEQRA. *Aldrich v. Pattison*, 107 A.D.2d 258, 266 (2d Dept. 1985). “Nothing in SEQRA bars an agency from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances.” *Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 426 (1986). The mere passage of time rarely warrants an order to update the information to be considered by an agency. *Id.* at 425. There is no requirement that the EIS contain all the raw data supporting its analysis as long as the analysis is sufficient to allow reasoned consideration and comment on the issues raised. *Argyle Conservation League Inc. v. Town of Argyle*, 223 A.D.2d 796, 798 (3d Dept. 1996). “Although petitioners’ experts are critical of the board and its consultant, it is clear that scientific unanimity need not be achieved and the [EIS] is not required to make an exhaustive analysis of every possible environmental impact” [citations omitted]. *Ibid.*

The Board had information regarding deer-vehicle collisions. It had information regarding the effects of deer density on biodiversity and that excessive deer density is harmful to the environment. It had information regarding rare and scarce vegetation species that exist in the area and that can be damaged by browsing of excessive deer populations. The Board had information regarding alterations to forest habitat caused by deer. It had anecdotal evidence from residents regarding damage to landscaping and gardens as well as physical conflicts with deer. It had information regarding the correlation between deer densities and incidences of Lyme disease. In addition, the

Board members are residents of the Village and capable of making their own observation of the exorbitant number of deer in the Village and the damage they cause.

Clearly, the Board had ample information. Furthermore the Board took public comments both at a public hearing and in writing. In the FEIS, the Board addressed those comments that opposed the plan. Scientific unanimity is not required. *Argyle Conservation League Inc., supra*, 223 A.D.2d at 798. It is also not a court's role to evaluate the data presented to the agency. *Akpan v. Koch, supra*, 75 N.Y.2d at 571. It is well settled that "the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence" [citations omitted]. *Matter of Jackson, supra*, 67 N.Y.2d at 417.

The Board considered everything submitted to it. It considered adverse impacts, possible benefits and involved expenses. There was nothing arbitrary or capricious about the Board's determination. Furthermore, it was supported by substantial evidence, even if it was not the evidence the petitioners wanted the Board to adopt. Therefore, the Order on appeal should be affirmed.

### POINT III

**The Board Properly Followed All SEQRA Procedures and There is No Merit to the Petitioners' Challenge in That Regard.**

Based on years of consideration and study, the Board determined that the population of deer in the Village is excessive and should be reduced. The Board determined that an appropriate carrying capacity would be 15 deer per square mile. The Board considered the possible ways of reducing the deer population and determined that the most appropriate one was a combination of sterilization and culling. The Board then did an environmental assessment that resulted in a positive declaration. This triggered the obligation to prepare an environmental impact statement.

The requirements for what must be included in an EIS are contained in 6 NYCRR § 617.9. As stated in § 617.9(b)(1), an EIS must analyze the significant adverse impacts of an agency's proposed action and evaluate all reasonable alternatives. That section specifically provides, however, that "EISs must be analytical and not encyclopedic." Under § 617.9(b)(2), EISs must be "clearly and concisely written in plain language that can be read and understood by the public... EISs should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts." In other words, "the plain intention is that an EIS be comprehensible, not overly, or overwhelmingly, technical." *Matter of Jackson, supra*, 67 N.Y.2d at 422.

These requirements of SEQRA are in contradistinction to the petitioners' assertions that the DEIS did not provide enough information to allow public comment. The petitioners argue that the DEIS should have included exhaustive new studies on biodiversity in the Village, studies of migration rates of deer, impacts of deer on ornamental plantings and a new survey of the deer population. That argument is not consistent with the requirements of SEQRA stated above.

Furthermore, there was no shortage of information to inform the public regarding the proposed action and the potential impacts of that action. Many public comments were received for and against the plan. Those who opposed it had no difficulty expressing their opinions. The suggestion by the petitioners that the Board prevented the EIS process from being a “cooperative venture” is disingenuous. Their intent was not cooperation. It was opposition, period. Any plan that included culling of deer would be unacceptable to the petitioners. They needed no more information than that culling was involved to form and express their opinion regarding the proposed action.

Nevertheless, the information was there. The Board considered it. The public commented on it and the Board addressed the comments. Then the Board performed its legislative function, approved the Findings Statement and authorized implementation of the deer remediation plan. Accordingly, the Order of the lower court should be affirmed.

In the petition, the second, fourth, fifth, sixth and seventh claims allege that the DEIS/FEIS failed to adequately describe the proposed action and environmental setting, failed to take a “hard look” at potential impacts on human health, failed to take a “hard look” at the potential impact on the Village’s deer population, failed to take a “hard look” at potential impacts on community character and failed to give a sufficiently detailed evaluation of reasonable alternatives. As noted in *Matter of Jackson, supra*, however, an EIS is supposed to be comprehensible, not overly technical; analytical, not encyclopedic; and it should not contain more detail than is appropriate to the proposed action. 67 N.Y.2d at 422.

On appeal, the petitioners continue to argue that the Board failed to look at the impact on the local deer population. This is not true. The Board made the determination

that the deer population has to be reduced. This reduction will, of necessity, have an impact on the deer population. However, other than the direct impact to the individual deer that are sterilized or culled, there has been no adverse impact on the deer that has been identified, either in the Board's investigation or by the petitioners. Rather, the petitioners argue about the effect of the plan on the deer's emotional state without ever having submitted or identified anything to show that it would have any such effect. The petitioners are essentially anthropomorphizing the deer, or asking the Board to, in order to project human feelings onto the deer and then criticizing the Board for not considering those feelings. While deer may be able to experience fear and stress, there is no indication they would experience those reactions in the context of the culling operation (deer are killed instantly with a single shot to the head (R 303)) or that they would experience any more fear or stress than they do as a result of the deer-vehicle collisions that occur in the Village.

The petitioners also argue that the Board failed to consider the impact of the plan on human health. In the public comment part of the process, the petitioners submitted the comments of two social workers who allege that the deer remediation could have serious mental health consequences on some people just from knowing that it is taking place (R 785-786, 832-833). Those allegations were completely unsubstantiated. They gave no authoritative evidence to the Board that such consequences could result. As was noted by the court below, the opinion of petitioner Charlene Temple is based solely on her experience in working with individuals who have been traumatized by abuse or violence (R 15). There is no evidence that those commenters are qualified to diagnose or to anticipate potential psychological harm. Furthermore, the petitioners did not cite any

study or other evidence which suggests that killing of wildlife to control populations causes psychological trauma.

In any event, the Board considered those comments and responded to them. The Board found that no such consequences had been reported in connection with other deer culling programs and that it had no verifiable information that this situation would be any different (R 553, 576). Therefore, the Board fulfilled its obligations under SEQRA.

The petitioners argue that the Board failed to look at the plan's impact on community character. The petitioners never explain what they mean by "community character" but it is apparent from their argument that they are referring to the acrimony of those who oppose the deer remediation plan. However, the Board, in fact, addressed this point in the FEIS, where it stated:

With respect to the potential impacts on community character, the board has listened to all community views and has given consideration to them in its deliberations. There is very little any governing body can do when people choose to vehemently disagree on a potential course of action that is supported by many other people in the community. Government decisions are rarely supported unanimously (R 534).

Some people think that culling any of the deer is unethical and respond to it with obloquy. Those feelings and expressions do not qualify as an adverse impact on the environment or on community character. Rather, it is an expression of anger by individuals who oppose something and have not gotten their way. The Board is well aware that some people vehemently oppose remediation of the deer population problem, and it has given those views the necessary consideration. Therefore, the petition was properly dismissed.

## CONCLUSION

The Decision, Order and Judgment of the court below dismissing the petition was properly made and that Order should be affirmed.

DATED: March 14, 2012

A handwritten signature in black ink, appearing to read 'John Stevens', written over a horizontal line.

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