To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF WESTCHESTER
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In the Matter of the Application of

DANIEL S. NATCHEZ, SHERYL DICKER, NORMAN H. STEIN, ROBERT MANN, BARBARA B. MANN, KEITH WAITT, ROSLYN WOOD and SUZANNE MCCRORY,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

COMMISSIONER OF GENERAL SERVICES OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF STATE, MAMARONECK BEACH & YACHT LLC, MAMARONECK BEACH & YACHT CLUB, INC., and TAYLOR POINT ASSOCIATES, INC.,

Respondents.
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Index No.: 1173 / 15
Fully Submitted: 6/5/15
DECISION, ORDER AND JUDGEMENT

LEFKOWITZ, J.,

The following documents numbered 1 to 134 were read on these motions (1) by respondents, Commissioner Of General Services Of The State Of New York (hereafter, "OGS"), New York State Department Of Environmental Conservation (hereafter, "DEC"), and New York State Department Of State (hereafter, "DOS") (collectively hereafter, the "State Respondents") and (2) by respondents, Mamaroneck Beach & Yacht LLC (hereafter, "MBY"), Mamaroneck Beach & Yacht Club, Inc., and Taylor Point Associates, Inc. (collectively hereafter, the "MBY Respondents"), for orders pursuant, inter alia, to section 7804(f) and rules 3211(a)(3), (5),(7) and (8) of the Civil Practice Law and Rules dismissing the above-captioned special proceeding:

Notice of First Amended Verified Petition - First

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Upon consideration of all of the foregoing, and for the following reasons, the State Respondents' motion to dismiss on the ground that the instant special proceeding can not be maintained because of the statute of limitations is denied and the motions to dismiss for lack of standing are granted.

Factual and Procedural Background

Unless otherwise indicated, the following facts are confirmed or undisputed by respondents, alleged in, or by petitioners in support of, the First Amended Verified Petition (hereafter, "Amended Petition"), or supported by documentary evidence submitted in opposition to the motions to dismiss.

The MBY Respondents are the owners of real property (hereafter, the "MBY Parcel") a portion of which is located in the Village of Mamaroneck, along Otter Creek at its entrance to Mamaroneck Harbor on Long Island Sound. The MBY Respondents operate a club and catering business on the MBY Parcel. MBY has for some time sought to re-develop the MBY Parcel, and its application for approval of a site plan was granted by the Planning Board for the Village of Mamaroneck (hereafter, the "Planning Board") in December 2010 (hereafter, the "2010 Site Plan"). In that application, MBY had included as part of the total land area on which said re-development was proposed, a .59 acre parcel located adjacent to the MBY Parcel (hereafter, the "Otter Creek Parcel"). However, subsequent to said approval, OGS advised the Village of Mamaroneck

(hereafter, the "Village") that OGS believed that the State of New York, and not MBY, owned the Otter Creek Parcel, which had originally been located beneath Otter Creek. If MBY did not own the Otter Creek Parcel, its loss would render the 2010 Site Plan unacceptable because the density of development proposed therein would exceed the applicable Floor Area Ratio (hereafter, "FAR") restrictions in the zoning code.

The MBY Respondents disputed, and continue to dispute, OGS's opinion as to State ownership and claim that MBY owns the Otter Creek Parcel pursuant to an unbroken chain of title dating from a patent granted by King George of England to one, Joseph Budd, in 1720. Nevertheless, in June 2011, MBY filed with OGS a notice of intention to apply pursuant to article 6 of the Public Lands Law for a grant of the Otter Creek Parcel from the State of New York, which application MBY then withdrew in July 2012 before it had been decided.

In January 2013, MBY filed with the Planning Board an application for approval of an amended site plan (hereafter, the "2013 Site Plan") involving less intense density than the 2010 Site Plan and which did not include the Otter Creek Parcel as part of the total land area on which re-development was proposed. The MBY Respondents have not begun construction under the 2010 Site Plan, and the application for approval of the 2013 Site Plan is still pending before the Planning Board.

In April 2013, MBY commenced an action against OGS and the People of the State of New York for judgment declaring that MBY was the owner of the Otter Creek Parcel. (*See Mamaroneck Beach & Yacht LLC v New York State Office Of General Services, et al*, Index No. 52782/13, Supreme Court, Westchester County). By letters patent executed and issued by DOS on September 26, 2014 (hereafter, the "Letters Patent," a copy of which is annexed to the Amended Petition as part of Exhibit 10) in consideration of $10,000.00, OGS granted MBY the Otter Creek Parcel. The State Respondents confirm that the Letters Patent was mailed to MBY on October 2, 2014. The declaratory judgment action (Index No. 52782/13) was discontinued by Stipulation Of Dismissal Without Prejudice filed with the Westchester County Clerk via the New York State Courts E-Filing system on October 16, 2014.

On January 23, 2015, Petitioners commenced the instant special proceeding pursuant to CPLR art 78 for judgment revoking the Letters Patent, by filing a Notice Of Petition and Petition

(hereafter, the "Petition"). Petitioners filed a Notice Of Verified First Amended Petition and the Amended Petition on February 9, 2015. In the first of five separately stated but unnumbered claims in the Amended Petition, Petitioners allege that the determination to issue the Letters Patent was arbitrary and capricious because OGS had determined in 2012 not to grant MBY's application for title to the Otter Creek Parcel. In their second claim Petitioners allege that the determination to issue the Letters Patent was made without complying with the notice requirements of Public Lands Law §77. In their third claim Petitioners allege that the determination to issue the Letters Patent was made in violation of the provisions of article 8 of the Environmental Conservation Law (also known as the State Environmental Quality Review Act [hereafter, "SEQRA"]). In their fourth claim Petitioners allege that the determination to issue the Letters Patent was inconsistent with the Local Waterfront Revitalization Program of the Village of Mamaroneck in violation of section 916 of the Executive Law. In their fifth claim Petitioners allege that the determination to issue the Letters Patent was made in violation of the requirement in Part 270 of the rules promulgated under the Public Lands Law that grants of underwater land "shall be limited to exceptional circumstances" (9 NYCRR 270-4.1).

In lieu of responsive pleadings, two separate motions to dismiss were interposed: on April 7, 2015, the State Respondents moved pursuant to CPLR 7804(f) (lack of standing) and 3211(a)(5) (statute of limitations); (7) (failure to state a cause of action) and (8) (lack of personal jurisdiction), and on April 9, 2015, the MBY Respondents moved pursuant to CPLR 7804(f) and 3211(a)(3) (lack of standing). Petitioners opposed the motions. The motions were deemed fully submitted upon the filing by both movants of reply papers in further support on June 5, 2015, the date to which the original return dates had been adjourned on consent.

Discussion

The State Respondents have withdrawn so much of their motion as sought dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.

To the extent that the State Respondents seek dismissal pursuant to CPLR 3211(a)(5) on the ground that the instant special proceeding can not be maintained because of the statute of limitations,

their motion is denied. A special proceeding under CPLR art 78 "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). The determination at issue became final and binding upon Petitioners when the Letters Patent was delivered to MBY on or after October 2, 2014 (*see Matter of N. Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs.*, 90 AD3d 1186, 1187-1188 [3d Dept 2012]), and the proceeding was commenced with the filing of the Notice Of Petition and Petition on January 23, 2015, less than four months thereafter. Therefore, the motion to dismiss pursuant to CPLR 3211(a)(5) is denied.

The motions to dismiss for lack of standing are granted. In order to assert a claim that an administrative body or officer has failed to comply with or acted in contravention of law a petitioner must demonstrate that as a result of such action or non-compliance it has sustained or will sustain an injury-in-fact, which injury is within the zone of interests promoted or protected by the statutory provision under which the administrative body or officer has acted, and that the harm the petitioner suffered from such injury is different in some way from that suffered by the public at large. *See Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772-775 (1991). The harm suffered must be direct, not merely potential or general. *See Matter of Brunswick Smart Growth, Inc. v Tn. of Brunswick*, 73 AD3d 1267, 1268 (3rd Dep't 2010). And where, as here, the issue of standing is disputed, a petitioner bears the burden of proof to establish every element thereof. *See Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 (2009). Deeming as true the allegations in the Amended Petition and the affidavits and evidentiary material submitted by Petitioners in opposition to the instant motions, and giving said submissions their most favorable intendment,[1] Petitioners have failed to satisfy their burden.

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[1] "On a pre-answer motion pursuant to CPLR 7804(f) to dismiss a petition upon objections in point of law, only the petition may be considered, and all of its allegations are deemed to be true." *Matter of 1300 Franklin Ave. Members, LLC v Bd. of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006 (2d Dept 2009). In determining such a motion, a court "should not consider documents submitted by respondents in support of dismissal." *Matter of Albany Law Sch. v New York State Off. of Mental Retardation and Dev. Disabilities*, 81 AD3d 145, 148-149 (3d Dept 2011) *affd* 19 NY3d 106 (2012). However, a court may consider any factual and evidentiary submissions made in opposition to a motion to dismiss in order to remedy pleading defects. *Matter of Baugher*, 98 AD3d 1111, 1112 (2d Dept 2012); *Harris v Barbera*, 96 AD3d 904, 906 (2d Dept 2012). And, "[t]hough limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be 'given their most favorable intendment' (*Arrington v New York Times Co.*, 55 NY2d 433, 442)." *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998).

Inter alia, it is alleged in the Amended Petition that:

Petitioner, Daniel S. Natchez, resides "in the 'adjacent area' of the Otter Creek Critical Environmental Area" (Amended Petition at ¶28);

Petitioners, Sheryl Dicker, Norman H. Stein, Robert Mann and Barbara B. Mann, all reside "directly across [Otter Creek] from the Otter Creek Parcel" (*id.* at ¶¶29 and 30);

Petitioner, Keith Waitt, has a "direct line of sight to the Otter Creek Parcel" (*id.* at ¶31) from his residence;

Petitioner, Roslyn Wood, resides "along Otter Creek" (*id.* at ¶32), and;

Petitioner, Suzanne McCrory (hereafter, "McCrory"), resides "across Mamaroneck Harbor from Otter Creek and [the MBY Parcel] and . . . within the mapped 'Adjacent Area' for the Otter Creek Critical Environmental Area" (*id.* at ¶33).

Also in the Amended Petition, as well as in ten affidavits submitted in opposition to the instant motions, Petitioners collectively allege the following ten circumstances as bases for their standing to maintain the instant proceeding:

the proximity of Petitioners' properties to the MBY Parcel and/or the Otter Creek Parcel;

the views from Petitioners' properties of the Otter Creek Parcel;

that MBY has installed "orange construction fencing [on the Otter Creek Parcel] as a means of roping off the 'drainage area' described in the terms of sale for the parcel" (Affidavit Of Keith Waitt In Opposition To Motion To Dismiss [hereafter, "Waitt Aff Opp"] at ¶9);

Petitioners' use of the Otter Creek Parcel for recreational purposes – specifically as a resting place on their return home from kayaking excursions;

that MBY has in the past occasionally used the Otter Creek Parcel as a "go-to dumping ground of sorts, creating a neighborhood eyesore" (Affidavit Of Robert Mann In Opposition To Motion To Dismiss [hereafter, "R Mann Aff Opp"] at ¶14);

that MBY has in the past used the Otter Creek Parcel for overflow parking of cars and buses in conjunction with the catering business that it operates on the MBY Parcel;

that McCrory's application to OGS in 2009 for a grant of underwater land in Otter Creek adjacent to her upland parcel was lost and never considered;

that "the sale of the [Otter Creek P]arcel has left MBY water-quality issues unresolved," (Affidavit Of Suzanne MCCrory In Opposition To Motion To Dismiss [hereafter, "McCrory Aff Opp"] at ¶34);

that MBY's acquisition of the Otter Creek Parcel will enable it to seek and receive from the Planning Board approval for a site plan that would permit more intense development of the MBY Parcel than MBY is presently seeking in its 2013 Site Plan, and;

that "Petitioners were denied their rights to due process when OGS sold the Otter Creek Parcel without complying with the clearly stated statutory requirements for public notice of an application for a grant" (Amended Petition at ¶61).

The alleged proximity of the Petitioners' properties to either the MBY Parcel or the Otter Creek Parcel does not constitute a non-public injury. Generally, petitioners who own real property located in close proximity to the site of a project involving land use or potential environmental impacts, to which the administrative action relates, are the beneficiaries of a presumption that they are adversely affected thereby and, accordingly, need not allege a specific, non-public harm. *See Matter of Fox v Favre*, 218 AD2d 655 (2d Dept 1995); *Matter of Long Is. Pine Barrens Socy., Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 (2d Dept 1995). However, the administrative actions being challenged herein – i.e., the determination to issue, and the issuance and delivery of, the Letters Patent – do not involve such a situation.

Moreover, even assuming arguendo that Petitioners' assertion of a SEQRA claim brought their challenge within an appropriate milieu (*see, e.g.*, 9 NYCRR 270-3.2[b]), their conclusory allegations of proximity would not be sufficient to establish their entitlement to the close-proximity presumption. A petitioner seeking the benefit of the presumption has "the burden of coming forward with competent evidence to support a finding that their property is located in the immediate vicinity of the [site]." *Matter of Piela v Van Voris*, 229 AD2d 94, 95 (3d Dept 1997). Petitioners have not produced any evidence that any of their properties are in the immediate vicinity of the Otter Creek Parcel, only allegations that some of the properties are located "along Otter Creek," or "across Otter Creek" or "across Mamaroneck Harbor." Consequently, Petitioners are not entitled to the benefit of the close-proximity presumption.

Petitioners' allegations concerning the views from their properties are not sufficient to satisfy

their burden to demonstrate that they have sustained or will sustain an injury-in-fact. This is not a situation involving the potential construction of a building, parking lot or other structure upon, or the destruction of the existing condition or appearance of, a pristine habitat. The conveyance authorized by and recorded with the Letters Patent expressly prohibits MBY from constructing any project or structure except for "such plantings and restoration as have been required by [DEC] to restore and enhance the vegetative buffer and native habitat" (Letters Patent, a copy of which is annexed to the Amended Petition as part of Exhibit 10). Further, the only truly post-conveyance consequence which Petitioners allege has actually affected their views of the Otter Creek Parcel in any manner is the orange construction fencing that was installed to facilitate drainage. But since, as Petitioners allege, the fencing was "described in the terms of sale for the parcel" (Waitt Aff Opp at ¶9), the State might well have installed like fencing for the same reason, and Petitioners' views would have been the same, even had the Letters Patent not been issued. An impact, the result of which leaves a petitioner's view substantially unaltered due to the likelihood that a similar impact would have occurred in any event, does not constitute an injury-in-fact. *See Aiardo v Town of E. Greenbush*, 64 AD3d 849, 851 (3d Dept 2009). Therefore, Petitioners have failed to satisfy their burden to demonstrate that they have sustained or will sustain an actual injury to their views of the Otter Creek Parcel.

Petitioners' allegations concerning their recreational use of the Otter Creek Parcel are not sufficient to satisfy their burden to demonstrate that as a result of the conveyance they have sustained or will sustain an injury-in-fact. Petitioners allege that because it was owned by the State, they have for some time used the Otter Creek Parcel as a resting place during kayaking excursions, but argue that such use would now constitute a trespass as a result of the conveyance. This argument is unavailing for two reasons.

Firstly, it is possible that Petitioners' use may have always constituted a trespass and, if that is so, they have lost nothing as a result of the Letters Patent to which they were otherwise entitled. Title to all New York State lands previously held by the King of England passed to the State in its sovereign capacity as of July 9, 1776. *See* Public Lands Law §4. Title to lands acquired by royal grant or patent prior to that date – including, so far as is relevant to the instant proceeding, lands underwater – were not acquired by the State and remained in the grantees. *See DiCanio v Inc. Vil.*

of Nissequogue, 189 AD2d 223, 227(2d Dept 1993). MBY has always maintained, and the MBY Respondents continue to allege herein, that MBY owns the Otter Creek Parcel pursuant to an unbroken chain of title dating from such a royal patent granted in 1720. Indeed, MBY sought judgment declaring that to be the case in the action it commenced against OGS and the State in April 2013, and had MBY prevailed in that action Petitioners would have had no right to use the Otter Creek Parcel for any purpose without MBY's permission.

In fact, MBY did not prevail because it discontinued its action and agreed to accept the Letters Patent in settlement. Whatever the reason that OGS and the State chose to consent to MBY's discontinuance of the declaratory judgment action, there is no allegation, and no evidence has been submitted in opposition to the instant motions that would tend to show, that MBY's claim of title to the Otter Creek Parcel has ever been formally confirmed or recognized by the State.[2] This Court is not making a determination as to the merits of the claim that MBY might have pursued in the declaratory judgment action. However, so far as is relevant to the instant proceeding – and only to the instant proceeding – this Court finds that MBY acquired title to the Otter Creek Parcel from the State pursuant to the Letters Patent. Unfortunately for Petitioners, this finding does not mean that they have standing to challenge the issuance of the Letters Patent.

Title to underwater lands – i.e., lands originally beneath the high water mark of navigable waters – acquired by the State in its sovereign capacity is held for the benefit of the public and the State may not permit such lands to be used in a manner that is contrary to the public interest. *See Coxe v State*, 144 NY 396, 406-407 (1895); *Smith v State*, 153 AD2d 737, 739 (2d Dept 1989). Thus, when the State conveys such land to a private grantee, "the contemplated use by the grantee or his successors in interest must comport with the best public use and not be injurious to the public good[, and] this fee interest may be revoked by the State when the uses proposed are not in conformity with the public trust doctrine [internal citations omitted]" (*Smith v State*, 153 AD2d at 739). A recreational use, such as a place of rest during canoeing or kayaking excursions, may

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Indeed, although in reaching its determination the Court could not consider documents submitted in support of the instant motions (*see Matter of Albany Law Sch. v New York State Off. of Mental Retardation and Dev. Disabilities,* 81 AD3d at 148-149), the Court notes that the Findings of the Commissioner of OGS (a copy of which is annexed to the Affidavit Of Ralph W. Hill as Exhibit GG) explaining her decision that the Letters Patent should be issued, clearly indicates that the State did not confirm or recognize that MBY was the actual titleholder.

constitute such a public benefit the termination of which would be contrary to the public interest. *See* Public Lands Law §75; *cf. Adirondack League Club v Sierra Club*, 92 NY2d 591, 603-604, 606-607 (1998). In which event, the conditions under which the Letters Patent was issued necessarily include the continuation of said use and were MBY to interfere with that use "it would be incumbent upon the State . . . to have the [Letters P]atent terminated for the public good" (*Smith v State*, 153 AD2d at 739).

Petitioners do not allege that prior to acquiring title pursuant to the Letters Patent MBY had ever interfered with any attempt by Petitioners to use the Otter Creek Parcel as a resting place while canoeing or kayaking on Otter Creek, or that MBY has interfered with such attempted use by Petitioners or any other member of the public since the Letters Patent was issued; moreover, the Letters Patent would be terminated were MBY to do so. Therefore, Petitioners have not sustained, and their allegations concerning their recreational use of the Otter Creek Parcel are not sufficient to satisfy their burden to demonstrate that as a result of the conveyance they will sustain, an injury-in-fact.

Petitioners' allegations concerning MBY's past use of the Otter Creek Parcel as a "go-to dumping ground" (R Mann Aff Opp at ¶14) and for unrestricted car and bus parking are not sufficient to satisfy their burden to demonstrate that as a result of the issuance of the Letters Patent they have sustained or will sustain an injury-in-fact. In addition to imposing a condition that the parcel be maintained in its natural state (*see* discussion of Petitioners' views, *supra*), the conveyance authorized by and recorded with the Letters Patent expressly directs that "to the extent that the premises are used for parking of motor vehicles in conjunction with the use of the [MBY Parcel] such parking shall be limited to overflow parking of passenger motor vehicles when necessary to accommodate patrons of [MBY's business]" (Letters Patent). Since the State maintains in perpetuity the power to vacate letters patent for any violation of conditions subsequent imposed thereby (*see Archibald v New York Cent. & Hudson Riv. R.R. Co.*, 157 NY 574, 581 [1899]; *Smith v State*, 153 AD2d at 739), the injuries Petitioners claim will result from the conveyance have actually been eliminated thereby. Therefore, Plaintiffs have not sustained, and have failed to satisfy their burden to demonstrate that as a result of the conveyance they will sustain, an injury-in-fact from such conduct as Petitioners allege MBY had engaged in prior to the conveyance.

Neither the allegations that McCrory's application for a grant of underwater land was lost and not considered, nor that water quality issues were left unresolved, are sufficient to satisfy Petitioners' burden to demonstrate that as a result of the issuance of the Letters Patent they have sustained or will sustain an injury-in-fact. To constitute an injury-in-fact sufficient to confer standing, the impact complained of must at least be related to if not a direct consequence of the action being challenged. *See Socy. of Plastics Indus., Inc. v County of Suffolk, supra* ; *Matter of Open Space Council, Inc. v Town of Brookhaven*, 245 AD2d 378, 379-380 (2d Dept 1997). To begin with, neither of the impacts which Petitioners complain of can have been a consequence of the issuance of the Letters Patent because they each allegedly occurred prior to that event. McCrory's application was allegedly submitted in 2009, and apparently lost sometime before October 2010. (*See* McCrory Aff Opp at ¶43, and Exhibit 6 annexed thereto). And the allegations as to the "MBY water-quality issues" are based upon a newspaper story from August 2013 concerning a possible break in a sewer pump or pipe located on the MBY Parcel, following the publication of which story "[a] supplemental EIS process was begun to evaluate the options for the MBY sewer line." (*See id.* at ¶35-37, and Exhibit 5 annexed thereto). Moreover, even assuming arguendo that they had occurred afterward, Petitioners' allegations do not demonstrate that either the loss of McCrory's application or the water -quality issues were in any way related to the Letters Patent. Indeed, the underwater parcel for which McCrory applied is not even in the general vicinity of the Otter Creek Parcel, and Petitioners contend that the break of which they complain occurred on the MBY Parcel. Therefore, neither circumstance can have been related to or a consequence of the conveyance of the Otter Creek Parcel, and Petitioners' allegations are not sufficient to satisfy their burden to demonstrate that as a result thereof they have sustained or will sustain an injury-in-fact.

Petitioners' alleged fears that based upon its acquisition of title to the Otter Creek Parcel, MBY will apply for approval of a site plan involving more intense development of the MBY Parcel are not sufficient to satisfy their burden to demonstrate that they have sustained or will sustain an injury-in-fact. Allegations founded on mere speculation of a hypothetical harm are not sufficient to demonstrate an actual injury. *See Roberts v Health and Hospitals Corp.*, 87 AD3d 311, 318-319 (1st Dept 2011) *lv denied* 17 NY3d 717 (2011); *Niagara County v Power Auth. of State*, 82 AD3d 1597, 1598-1599 (4th Dept 2011) *lv dismissed in part and denied in part* 17 NY3d 838 (2011). It is not disputed that the development density sought in the pending 2013 Site Plan application –

which does not include the .59 acres of the Otter Creek Parcel in its FAR calculations – is less intense than that permitted in the already approved 2010 Site Plan – which did include the Otter Creek Parcel. But Petitioners do not allege that the MBY Respondents have either taken steps to act upon the 2010 Site Plan, withdrawn the 2013 Site Plan application, or submitted an application for approval of a different site plan involving more intense development based upon the inclusion of the Otter Creek Parcel in the FAR calculations. Moreover, even if MBY were to submit another application, that act would not itself constitute an actual injury sufficient to confer standing to challenge the administrative actions at issue in the instant proceeding. Such an application would of course be subject to appropriate environmental review under SEQRA, and a challenge to that process would not even ripen unless and until the application had been determined. *See Matter of Patel v Bd. of Trustees of Inc. Vil. of Muttontown*, 115 AD3d 862, 864 (2d Dept 2014). Therefore, Petitioners' allegations that MBY may submit such an application are not sufficient to demonstrate that they have sustained or will sustain an injury-in-fact.

Petitioners' allegations that they were denied due process because OGS conveyed title to the Otter Creek Parcel without complying with the statutory requirements for public notice are not sufficient to satisfy their burden to demonstrate that they have sustained an injury-in-fact. The public notice requirements for an applicant for a grant of land under water are contained in Public Lands Law §77. Petitioners do not allege that MBY did not comply with those requirements when it originally applied for a grant of the Otter Creek Parcel in June 2011. Rather, Petitioners allege that after the 2011 application was withdrawn, "OGS did not treat the 2014 sale [– i.e., the conveyance authorized by and recorded with the Letters Patent –] as subject to an application and notification process" (Amended Petition at ¶63). In other words, Petitioners argue that OGS should have compelled MBY to submit a new application, and to comply again with public notice requirements, before taking action and that Petitioners were injured by the failure of OGS to do so.

However, it is apparent from Petitioners' allegations that they were actually aware both of the 2011 application and that MBY's withdrawal of that application did not signal an end to its efforts to confirm its ownership of the Otter Creek Parcel, either by establishing a superior claim or acquiring title from the State. And Petitioners do not allege that there was any change in the condition of the Otter Creek Parcel or their objections to MBY's original application between the date on which it was submitted and the date on which the Letters Patent was issued. Moreover,

Public Lands Law §77 expressly states that "for the purposes of jurisdiction and the validity of any grant issued under this section, the commissioner's finding that the notice requirements of this section have been complied with is final and conclusive," and there is no statutory provision or administrative rule prohibiting the commissioner from reconsidering an undecided application where, as here, the applicant had previously complied with the notice requirements. In these circumstances, the public notice provided in connection with the original application was constitutionally sufficient to satisfy Petitioners' rights to due process. *Cf. Matter of N. Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs.*, 90 AD3d at 1189-1190. Therefore, Petitioners' allegations are not sufficient to satisfy their burden to demonstrate that they have sustained an injury-in-fact as a result of the determination not to require MBY to re-comply with the notice requirements before the Letters Patent was issued.

In sum, none of the ten circumstances Petitioners allege constitute an injury-in-fact. Also, virtually all of the injuries Petitioners allege they have or will sustain – with the possible exception of the views from their properties and McCrory's lost application – are no different from those that have been or would be suffered by the public at large. Thus, it is immaterial to the determination of the instant motions whether such alleged injuries would be within the zone of interests promoted or protected by the statutory provision(s) under which OGS, DOS and DEC acted. *See Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d at 773-775. Therefore, the motions to dismiss the above-captioned special proceeding for lack of standing are granted.

Because the proceeding is being dismissed for lack of standing, the Court has not considered the merits of the State Respondents' motion to dismiss the Petition and Amended Petition for failure to state a cause of action.

Accordingly, for the foregoing reasons, it is

ORDERED AND ADJUDGED that the motion of the State Respondents pursuant to CPLR 3211(a)(5) to dismiss the above-captioned special proceeding is denied, and it is further

ORDERED AND ADJUDGED that the motions of the State Respondents and the MBY Respondents pursuant to CPLR 7804(f) and 3211(a)(3) to dismiss the above-captioned special proceeding are granted, and it is further

ORDERED AND ADJUDGED that the motion of the State Respondents pursuant to CPLR 3211(a)(7) to dismiss the Petition and the Amended Petition is denied as moot, and it is further

ORDERED AND ADJUDGED that the above-captioned special proceeding is dismissed.

The foregoing constitutes the decision, order and judgement of the Court.

Dated: White Plains, New York

August 28, 2015

ENTER:

HON. JOAN B. LEFKOWITZ
Justice of the Supreme Court

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