STATE OF NEW YORK
SUPREME COURT CHAMBERS

CORTLAND COUNTY COURTHOUSE
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PHILLIP R. RUMSEY
JUSTICE

MARK G. MASLER, LAW CLERK
SHERYL A. HOLBROOK, SECRETARY

September 14, 2011

Paula Nichols, Chief Court Clerk
Tompkins County Supreme Court
P.O. Box 70
Ithaca, New York 14850

RE: **ANN DRUYAN, et al. v. VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CAYUGA HEIGHTS**
Tompkins County Index No. 2011-0522; RJI No. 2011-0270-M

Dear Ms. Nichols:

Enclosed herewith for filing, please find:

1. Report and Proposal of the Deer Remediation Advisory Committee to the Village of Cayuga Heights Mayor and Board of Trustees dated June 15, 2009.

2. A Citizen's Guide to the Management of White-tailed Deer in Urban and Suburban New York, published by the New York State Department of Environmental Conservation.

Also enclosed, for filing and entry, please find the Court's Decision, Order and Judgment.

Very truly yours,

HON. PHILLIP R. RUMSEY
Supreme Court Justice

PRR:sh
cc: Arthur J. Giacalone, Esq.
John Alden Stevens, Esq.

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Tompkins County Courthouse, in the City of Ithaca, New York, on the 24th day of June, 2011.

PRESENT: HONORABLE PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TOMPKINS

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,

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

-against-

VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CAYUGA HEIGHTS, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

DECISION, ORDER AND JUDGMENT
Index No. 2011-0522
RJI No. 2011-0270-M

APPEARANCES:

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PHILLIP R. RUMSEY, J. S. C.

Petitioners commenced this CPLR article 78 proceeding seeking a judgment annulling a plan adopted by respondent Village Board of Trustees of the Village of Cayuga Heights to reduce the population of white-tailed deer in the Village.[1] Respondent moved to dismiss the petition. The court advised counsel prior to the return date that it had granted their mutual request that respondent's motion to dismiss be treated as an application for summary judgment on the petition.

Cayuga Heights is an incorporated Village within the Town of Ithaca that is approximately 1.85 square miles in area and has a population of approximately 3,200 individuals, according to the 2000 census (see Draft Environmental Impact Statement dated November 1, 2010 [DEIS], pp. 2-1 – 2-2). It is a "relatively mature residential community that consists primarily of single family homes amidst mature trees, landscaped areas, play fields and lawns" (Affidavit of Kathryn D. Supron, sworn to June 16, 2011 [Supron Affidavit], Exhibit A [State Environmental Quality Review Findings Statement; herein Findings Statement]). Problems resulting from the deer population in the Village – such as deer-vehicle collisions; damage to landscape plants, flower gardens, and vegetable gardens; and exposure to Lyme disease – have been a matter of public concern and discussion since the late 1990's (see DEIS, pp. 2-5 – 2-6,

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[1] Petitioners also named the New York State Department of Environmental Conservation (DEC) as a respondent for the purpose of seeking preliminary and permanent injunctions enjoining it from issuing any permits that may be required for implementation of the deer management program adopted by the Village. The DEC moved for dismissal of the petition against it on the grounds that the court lacks personal jurisdiction over it and that the petition fails to state a cause of action for the requested injunctive relief. The proceeding was subsequently dismissed against DEC with the consent of all parties. Accordingly, as used herein, respondent refers only to the Village Board of Trustees of the Village of Cayuga Heights.

Appendices B – D). Following a report from the Cayuga Heights Deer Study Committee that was formed in 1999, a two year research trial was undertaken in the Village, which initially confirmed that sterilization by tubal ligation could be successful in reducing the size of the deer herd (see DEIS, p. 2-6). An attempt made in 2005 to control the deer population by the use of contraceptives failed due to a faulty vaccine, and the deer herd again grew in number (see id.).

In 2008, respondent established the Deer Remediation Advisory Committee (the DRAC) to study the issue and recommend a course of action. In June 2009, the DRAC adopted a report recommending that the Village adopt the goal of achieving a cultural carrying capacity of 30 deer per square mile – which would result in a total population of approximately 60 deer in the Village – and that a Phased Options Approach (POA) involving three sequential phases for management of the deer herd be implemented to meet that goal. As initially proposed by the DRAC, Phase I would consist of the surgical sterilization of 60 does within a two-year period. Phase II would be completed within the year subsequent to completion of the sterilization phase, and would consist of hiring professional sharpshooters or bow hunters to cull the remainder of the deer herd by shooting the unsterilized deer at 8 – 10 bait sites located within the Village. In Phase III, the herd size would be maintained through further sterilization and culling.[2]

In September 2009, respondent adopted a "Draft Proposal for the Purpose of Conducting SEQR[,] Village of Cayuga Heights Board of Trustees, 9/21/09" (DEIS, Appendix E; herein

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[2] This description of the POA recommended by the DRAC in June 2009 is taken from ¶¶ 11 – 15 of the petition, a summary which respondent did not dispute. It is consistent with the "Report and Proposal of the Deer Remediation Advisory Committee to the Village of Cayuga Heights Mayor and Board of Trustees: June 15, 2009" (DRAC Report). While the DRAC Report was not provided to the court, a copy was obtained from the website maintained by the Village of Cayuga Heights at **http://www.cayuga-heights.ny.us/doc/DEER - Deer Mgt Proposal.pdf** (accessed August 31, 2011).

Draft Proposal). It estimates that the population of deer within the Village ranges between 160 and 200 deer, indicates respondent's intent to adopt the POA approach to deer management recommended by the DRAC and identifies the specific recommendations to be studied during the SEQRA process. The Draft Proposal is substantially similar to the DRAC Report in all but the following two respects: (1) it identifies for study the goal of achieving a cultural carrying capacity of 15 deer per square mile – one-half of the carrying capacity recommended in the DRAC Report – which would result in a total population of approximately 30 deer in the Village; and (2) it proposes sterilization of 20 – 60 does, while the DRAC Report had proposed that 60 does be sterilized.

Following adoption of the Draft Proposal, respondent named itself lead agency to conduct the required SEQRA review. It issued a positive declaration on March 27, 2010, necessitating preparation of an Environmental Impact Statement (EIS) (see 6 NYCRR § 617.7[a][1]). On November 8, 2010, respondent accepted the DEIS as complete. A public hearing was held on December 6, 2010, and written comments on the DEIS were also accepted. A Final Environmental Impact Statement (FEIS), which incorporated the DEIS by reference, was accepted by respondent on March 14, 2011. On April 4, 2011, respondent approved the Findings Statement and unanimously adopted a resolution that the Village proceed "with the deer remediation plan as outlined in the Environmental Impact Statement" (Supron Affidavit, Exhibit B, p. 10). Petitioners then timely commenced this article 78 proceeding seeking a judgment annulling the plan.

In its motion to dismiss, respondent first seeks dismissal of the claims brought by four petitioners – Druyan, LaCapra, Temple and Vehar – on the basis that they lack standing to

maintain the proceeding because they have failed to allege that they will suffer direct harm different from that of the general public.[3] "[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing" (Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, 13 NY3d 297, 305 [2009], quoting Lujan v Defenders of Wildlife, 504 US 555, 562 – 563 [1992]; see also Fund for Animals, Inc. v Lujan, 962 F2d 1391, 1396 [9th Cir 1992] [the diminished opportunity to view bison was sufficient to confer standing to challenge a bison management plan that would reduce the bison population]). Respondent further argues that Temple and Vehar also lack standing because they are not residents of the Village of Cayuga Heights; however, residence close to a challenged project is not an indispensable element of standing (see Matter of Save the Pine Bush, 13 NY3d at 305).

The petition alleges that all petitioners will "experience a diminished opportunity to observe the deer that live in or migrate in and out of Cayuga Heights" (petition, ¶ 3[a]). Each of the four petitioners whom is alleged to lack standing has submitted an affidavit expanding upon the allegations of the petition by specifically describing how he or she currently enjoys observing deer which may be affected by the deer management plan, and by asserting that each resides in an area frequented by deer likely to be affected by the plan. Such allegations are minimally sufficient to establish standing, especially in light of the principle that standing should be liberally construed so that disputes regarding the environmental impact of governmental

[3] Preliminarily, it bears noting that this defense cannot provide any practical substantive benefit to respondent because it would potentially lead, at best, to dismissal of the claims brought by only four of the twelve petitioners; accordingly, it is not a basis upon which respondent could hope to achieve a complete dismissal of the proceeding.

decisions are decided on their merits, rather than by preclusive, restrictive standing rules (see generally Matter of Massiello v Town Bd. of Lake George, 257 AD2d 962 [1999]; Matter of Parisella v Town of Fishkill, 209 AD2d 850 [1994]; Matter of Rizzo v Verizon CCC LLC, 31 Misc 3d 1206[A] [2011], 2011 NY Slip Op 50505[U], at * 6 – *7). Accordingly, respondent's motion to dismiss the claims brought by petitioners Druyan, LaCapra, Temple and Vehar is denied.

The petition asserts seven claims. The first alleges that adoption of the deer management plan was arbitrary and capricious because respondent failed to gather sufficient factual support for its decision. In that regard, they contend, among other things, that respondent did not obtain an accurate estimate of the current deer population (see petition, ¶¶ 34[B], 37). While there was not a current census, the population estimate used by respondent was prepared by Dr. Paul Curtis – a wildlife biologist at Cornell University who directed Cornell's Integrated Deer Research and Management Study and who was familiar with the Village's deer herd (see DEIS, p. 2-8, Appendices A, F). It was based on a survey of the deer population in the Village actually performed by him during the Spring of 2006, to which he applied an annual growth rate of 10% to arrive at an estimated population in the spring of 2009 of 196 deer (see DEIS, Appendix A). Although noting that deer herds have the capacity to grow at the rate of up to 40% annually, he considered the high density of the deer population then residing in the Village, the type of available habitat, and data showing an actual growth rate in the population of the Village's deer herd of 7% from 2005 to 2006, before estimating a reasonable growth rate of 10% annually on which his final population estimate was based (see id.). Respondent's reliance upon the population estimate prepared by an expert who was personally familiar with the deer herd in the

Village based on actual data previously obtained by him was reasonable under the circumstances and can hardly be considered irrational (see CPLR 7803[3]; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 416 – 417, 427 [1986]).

In reviewing petitioners' remaining six claims – which assert various violations under SEQRA – "it is not the role of the courts to weight the desirability of any action or choose among alternatives, but to assure that [respondent] has satisfied SEQRA, procedurally and substantively" (Matter of Jackson, 67 NY2d at 416; see also 4C NY Prac, Com Litig in New York State Courts § 105:66, SEQRA Litigation [3d ed] [substantive challenges to SEQRA determinations must overcome the standard of deference employed by courts in reviewing agency action; challenges to a completed EIS are less often successful than challenges to a negative declaration]).

In their second claim, petitioners contend that the EIS fails, in several respects, to describe the proposed action and the environmental setting in sufficient detail to comply with SEQRA. The level of detail required for each factor in a DEIS depends upon the circumstances and nature of the proposed action (see Matter of Jackson 67 NY2d at 417); it need not provide all possible data, it need only provide sufficient information to permit informed consideration of the pertinent issues (see Matter of Jackson, 67 NY2d at 422 – 423; Akpan v Koch, 75 NY2d 561 [1990]).

Measured against that standard, the DEIS provides sufficient information regarding respondent's determination of the target deer density. Although the DRAC initially recommended a carrying capacity of 30 deer per square mile, the DEIS contains a description of the rationale by which respondent adopted the goal, at the beginning of the SEQRA review

process, of a cultural carrying capacity of 15 deer per square mile – a goal that was consistently stated and maintained (see DEIS, pp. 2-2 – 2-4). In determining the target deer density for the Village, respondent considered such factors as reasons for the dramatic increase in the deer population in New York State during the twentieth century, the negative effect of deer upon the desired goal of achieving biodiversity, the residential and suburban nature of the Village, and a study showing that where biodiversity is a goal, deer populations in excess of 10 deer per square mile are undesirable.

Likewise, there is sufficient detail regarding the method to be used to cull the deer herd in Phase II. The DEIS, the FEIS, and the Findings Statement each provide that culling is to be accomplished upon implementation of the POA only by the "bait and shoot" technique, by which animals are attracted to the selected areas and killed by professional sharpshooters – there was no suggestion that the "net and bolt" trapping technique would be utilized to accomplish culling of the deer herd (see e.g. DEIS, pp. 2-9 – 2-10, 4-2 – 4-5; Findings Statement, pp. 4, 11 – 12). Rather, the "net and bolt" trapping technique was considered only as an alternative to culling by "bait and shoot" (see e.g. DEIS, pp. 6-1 – 6-3; Findings Statement, pp. 13 – 15). The resolution ultimately enacting the POA specifically provides that the Village proceed "with the deer remediation plan as outlined in the Environmental Impact Statement" (Supron Affidavit, Exhibit B, p. 10). Inasmuch as the POA described in the DEIS and the FEIS and adopted by resolution of respondent does not include the "net and bolt" technique as part of the proposed action, it may not be utilized.

In their fourth claim, petitioners assert that respondent failed to take a hard look at the potential adverse impacts that the POA may have on human health. To support this claim,

petitioners rely on comments submitted in response to the DEIS by two individuals who identify themselves as mental health professionals, namely, Hazel Brill Brampton and petitioner Charlene Temple, MSW, LCSW (see petition, ¶ 61; Affirmation of Arthur J. Giacalone dated June 22, 2011 [Giacalone Affirmation], ¶ 30). Petitioners rely primarily on Temple's opinion that implementation of the POA may cause a number of community residents to experience psychological trauma upon learning of, or witnessing, the culling phase (see id.). Notably, her opinion is based solely upon her training and experience in working with individuals who have been traumatized by abuse or violence; she does not cite any study or other evidence which suggests that killing of wildlife to control populations causes psychological trauma (see id.) The FEIS reflects that respondent addressed such concerns by noting that there have been no reported incidents of psychological trauma in connection with similar deer management programs previously implemented in other areas and by indicating that further review would have been conducted had any such incidents been identified (see FEIS, p. 2-77; see also FEIS, p. 2-54 – 2-55). Reference to outcomes actually experienced under similar management programs is a rational response to the human health concerns raised by the opinions of Temple and Brampton and, therefore, constitutes the requisite hard look at the issue under the circumstances presented.

Petitioners' fifth claim – that respondent failed to take a hard look at potential impacts on the deer population – is patently without merit. The POA plainly describes the adverse effect on the deer population – between 20 and 60 does will be surgically sterilized initially and the remainder of the herd will be culled to eventually reach a final population over time of 30 deer. Given the estimated population of up to 200 deer in the Village, it is readily apparent that the POA will eventually result in the death of up to 170 deer in Phase II – a point specifically

acknowledged by petitioners (see petition, ¶ 24 [noting that the POA will cause a reduction in the population of the deer within the Village of approximately 150 deer]; petition, ¶ 38 [acknowledging that the POA could kill up to 90% of the Village's deer and leave the remaining 20 does unable to conceive]; see also Giacalone Affirmation, ¶ 14 [calculating from the information presented in the POA that the deer management plan will result in sterilization of 20 does and the death of 140 – 180 deer]).[4]

In their seventh claim, petitioners allege that respondent failed to conduct a sufficiently detailed evaluation of alternatives to the POA. An EIS must include descriptions of a range of reasonable alternatives to the proposed action and evaluations of each sufficient to permit a comparative assessment of the action and such alternatives (see 6 NYCRR § 617.9[b]). The degree of detail required in assessing alternatives varies with the circumstances and nature of the proposed action (see Matter of Town of Dryden v Tompkins County Bd. of Representatives, 78 NY2d 331 [1991]; Webster Assoc. v Town of Webster, 59 NY2d 220 [1983]). It is not necessary

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[4] Petitioners' reliance on two decisions rendered in Matter of O'Donnell v Town Bd. of Town of Amherst is misplaced. In an initial decision dated February 5, 1997, Justice Howe held that the Town Board had no way to measure the potential impact of a proposed bait and shoot program on the deer population because it did not know how many deer were intended to be killed (171 Misc 2d 968, 975 – 977). Here, by contrast – and as acknowledged by petitioners – the number of deer proposed to be killed under the POA is known. As noted in Justice Serdita's subsequent decision dated March 31, 1997, following Justice Howe's decision, the Town Board engaged in a de novo environmental review, which acknowledged that 69% of the Town's deer population would be "harvested," or killed, and which resulted in a determination that the proposed action would have no significant environmental impact (a copy of his unpublished decision is part of Exhibit C to the petition). Justice Serdita held that, while the Town had taken the requisite hard look at the issues presented, its finding of no significant impact was in error because the harvesting of hundreds of deer comprising 69% of the deer population in the Town would clearly constitute a significant environmental impact requiring preparation of an EIS. Here, by contrast, respondent made a positive declaration – based, at least in part, on the projected impact on the deer population – and conducted a full SEQRA review.

that the actual costs be projected for each alternative, provided that the relative expense is known (see e.g. Matter of Croton Watershed Clean Water Coalition Inc. v Planning Bd. of Town of Southeast, 5 Misc 3d 1010[A], 2004 NY Slip Op 51312[U] [2004], at * 14 – *15 [statement that the no action alternative would present "an extreme cost to the applicant" sufficient to demonstrate no economic return]). Here, respondent considered four alternatives – no action; sterilization without culling; culling only (without sterilization); and sterilization and culling by trapping ("net and bolt") (see DEIS, pp. 6-1 – 6-3). The descriptions of the alternatives contained information about the relative cost and impact of each which allowed for comparative analysis, especially where, as here, it is clear from the record that both respondent and the general public were familiar with the alternatives (see Webster Assoc., 59 NY2d at 228 – 229). Accordingly, this claim lacks merit.

Finally, while there is sufficient evidence in the record to show that respondent complied with SEQRA, and that its adoption of the deer management program was not arbitrary and capricious, it also bears noting that the POA adopted by respondent is generally consistent with the DEC's recommendations for managing deer populations in urban and suburban areas (see Findings Statement, p. 9 [noting that the POA is consistent with current public policies and programs of the DEC]). In that regard, a publication issued by DEC entitled "A Citizen's Guide to the Management of White-tailed [sic] Deer in Urban and Suburban New York" (the Guide), describes numerous deer management options – including those considered by respondent as alternatives to the POA – before concluding that where, as here, hunting is impractical, the bait and shoot technique adopted by respondent is the preferred option for dealing with overabundant

deer in suburban areas.[5]

Petitioners' remaining contentions have been considered and have been rejected. Accordingly, the petition is hereby dismissed.

This decision constitutes the order and judgment of the court. The transmittal of copies of this decision, order and judgment by the court shall not constitute notice of entry.

Dated: September 14, 2011
Cortland, New York

HON. PHILLIP R. RUMSEY
Supreme Court Justice

ENTER

[5] The Guide, authored by P. Bishop, J. Glidden, M. Lowery and D. Riehlman, was obtained from the DEC website at **http://www.dec.ny.gov/docs/wildlife_pdf/ctguide07.pdf** (accessed August 31, 2011), and is likely the publication referenced as "Citizens Guide" under the heading of background research and additional reading on page 2-2 of the FEIS. While it is not part of the record, case law allows the court to take judicial notice of agency policies and memoranda such as the Guide (see generally Matter of Albano v Kirby, 36 NY2d 526, 532 – 533 [1975] [judicial notice taken of a memorandum issued by the New York State Department of Civil Service]; Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13, 16, 19 – 20 [2009] [court observes that judicial notice is not strictly limited to items listed in CPLR 4511 and, citing Matter of Albano, holds that case law permits it to take judicial notice of a medical diagnoses and procedures key obtained from the official website of the United States Department of Health and Human Services]; Grunberger v S & Z Serv. Sta., 28 Misc 3d 1206[A] [2010], 2010 NY Slip Op 51163[U], at * 3 [judicial notice taken of regulations obtained from the official website of the New York State Department of Motor Vehicles]; Commissioners of the State Ins. Fund v Brooklyn Barber Beauty Co., 191 Misc 2d 1, 6 [2001] [judicial notice taken of guidelines in the Budget Policy and Reporting Manual of the New York State Division of Budget accessed from its official website]).

The following documents were filed with the Clerk of the County of Tompkins:

- Notice of Petition dated May __ [sic], 2011.
- Verified Petition, verified May 23, 2011, with Exhibits A – C.
- Notice of Motion by respondent New York State Department of Environmental Conservation, dated June 15, 2011.
- Affidavit of Lawrence A. Rappaport, sworn to June 15, 2011.
- Affidavit of Mark D. Sanza, Esq., sworn to June 15, 2011.
- Notice of Motion by respondent Village Board of Trustees of the Village of Cayuga Heights, dated June 16, 2011.
- Affidavit of John Alden Stevens, sworn to June 16, 2011, with Exhibits A and B.
- Affidavit of Kathryn D. Supron, sworn to June 16, 2011, with Exhibits A – C.
- Draft Environmental Impact Statement dated November 1, 2010.
- Final Environmental Impact Statement dated March 14, 2011.
- Opposing Affirmation of Arthur J. Giacalone dated June 22, 2011, with Exhibits A and B.
- Affidavit of Gabrielle S. Vehar, sworn to June 19, 2011.
- Affidavit of Charlene Temple, sworn to June 19, 2011.
- Affidavit of Dominick LaCapra, sworn to June 18, 2011.
- Affidavit of Ann Druyan, sworn to June 18, 2011.
- Letter from Arthur J. Giacalone, Esq. to the court dated June 20, 2011.
- Letter from John Alden Stevens, Esq. to the court dated June 22, 2011.
- Email from the court to counsel dated June 22, 2011.

- Stipulation and Order Discontinuing Proceeding Against DEC, filed August 16, 2011.

- Report and Proposal of the Deer Remediation Advisory Committee to the Village of Cayuga Heights Mayor and Board of Trustees dated June 15, 2009 (filed by the court).

- A Citizen's Guide to the Management of White-tailed Deer in Urban and Suburban New York, published by the New York State Department of Environmental Conservation (filed by the court).

- Original Decision, Order and Judgment dated September 14, 2011.