

FILED
AND
ENTERED
ON OCT 8, 2002
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
RIVERKEEPER, Inc.,

Petitioner,

DECISION & ORDER

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

Index # 10222/02

-against-

THE PLANNING BOARD OF THE TOWN OF
SOMERS, THE TOWN OF SOMERS, and
EAGLET LLC.,

Respondents.

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LANGE, J.

The following papers numbered 1 through 15 were read
in this proceeding brought pursuant to Article 78 of the Civil
Practice Law and Rules:

- Order to Show Cause/Affirmation/Exhibits.....1-3
- Verified Answer of Eaglet/Affirmation/Exhibits.....4-6
- Memorandum of Law of Respondent Eaglet.....7
- Verified Answer of Respondents Somers/Affidavit.....8-9
- Respondents Somers' Memorandum of Law.....10
- Notice of Motion for Voluntary Discontinuance/Affirmation.11-12
- Affirmation of Adam Wekstein in response to
Petitioner's Motion pursuant to CPLR 3217(b).....13
- Reply Affirmation in support of Article 78 Petition.....14
- Petitioner's Reply Memo of Law in Support of Petition....15.

Petitioner moves pursuant to Article 78 of the CPLR, in the nature of mandamus, and §107 of the Open Meetings Law to compel compliance with the provision of New York State's Open Meetings Law, Public Officers Law §100 et seq., in regard to site visits by the respondent, Planning Board of the Town of Somers, to the site of a piece of land in the Town of Somers that is proposed for development.

On June 14, 2002, this Court issued a decision and order, denying petitioner's request for similar provisional relief by a preliminary injunction.

FINDINGS OF FACT

The petitioner, Riverkeeper, Inc., is a non-profit environmental organization with offices at the Pace University School of Law Environmental Litigation clinic. The petitioner, Riverkeeper, Inc. dedicates itself to protecting water quality in the Hudson River and the New York City drinking supply watershed, which serves unfiltered drinking water to over nine million persons in New York City and Westchester County. Petitioner is a signatory to the 1997 Watershed Memorandum of Agreement (MOA). As a signatory to this agreement, petitioner monitors and participates in the environmental review of development proposals which may have an impact on water quality in the watershed.

Respondent, Eaglet LLC, has applied for preliminary subdivision approval for its proposed Eagle River Project with

the respondent, Planning Board. The site involves the development of a six hundred and twenty-eight (628.5) acre parcel into residential building lots. Petitioner alleges that all but ten (10) acres of the site drain into the Angle Fly Brook, which feeds into the Muscoot reservoir. The site is also in close proximity to the Amawalk reservoir. Petitioner alleges that both of these reservoirs are integral parts of the public drinking water supply watershed.

Riverkeeper is requesting, pursuant to New York State's Open Meetings Law, that it be allowed to participate in any site visits scheduled by the respondent, Somers Planning Board. It alleges that, pursuant to New York State's Open Meetings Law, any time a public body, such as the respondent Planning Board, convenes for the purposes of conducting public business, such meetings must be open to the general public. Petitioner claims that the Planning Board would violate the Open Meetings Law by conducting any site visit from which the public is barred, relying upon the language in the Open Meetings Law that, "every meeting of a public body shall be open to the general public, with the exception of Executive sessions." (New York Public Officers Law §103(a)). Petitioner argues that site visits fall within the definition of a "meeting" set forth in Open Meetings Law, and that it would be aggrieved under that law if it were barred from any site visits by the Planning Board. Therefore, petitioner asks for a judgment enjoining the

respondents, the Planning Board and the Town of Somers, from conducting any site visits for any proposed development projects, including that of respondent, Eaglet, that would contravene New York State's Open Meetings Law; compelling the respondents, the Planning Board and the Town of Somers, to notify petitioner seventy-two (72) hours prior to any planned site visits for proposed development projects in Somers; and compelling the respondents, the Planning Board and the Town of Somers, to permit petitioner to attend any such site visits.

Respondents submitted Answers in response to the petition. Petitioner subsequently filed a motion pursuant to CPLR §3217 for an Order and Judgment voluntarily discontinuing the second count of petitioner's Verified Petition, alleging a violation of the State Environmental Quality Review Act ("SEQRA") and to amend the caption. Neither respondent opposed this subsequent application by petitioner, but respondent, Eaglet cross-moves for an award of reasonable attorneys fees, costs and disbursements as a condition to discontinuance of the second cause of action. Respondent, Town of Somers does not join in this request for fees and costs. Petitioner's motion to amend the caption of the instant action so that petitioner will be denominated as "Riverkeeper, Inc." is granted without opposition. Petitioner's motion to discontinue its second cause of action is also granted.

Respondent, Eaglet LLC. argues that a site visit is not a meeting under the Open Meetings Law (Article 7 of the

Public Officer's Law) and that nothing in said law compels a land owner to open its private property to the public. Furthermore, site visits are generally conducted on weekend mornings, weather permitting, and are conducted whether or not a quorum of the Planning Board is present. Respondent, Eaglet LLC, further argues that Riverkeeper is a private group which has no official capacity different from any other member of the public. Eaglet argues that Riverkeeper has appointed itself a watchdog of wetlands in the New York City Watershed and in doing so, seeks to duplicate governmental functions: the City of New York has delegated these same functions to its Department of Environmental Protection (DEP), the State of New York has delegated these functions to its Department of Environmental Conservation (DEC), the Federal government has delegated such responsibilities to its ACOE, and the Town of Somers has delegated such duties to its engineering department, its Planning Board, and its Conservation Board. Therefore, respondent, Eaglet, LLC argues that the wetlands on the property are adequately overseen and protected by public agencies charged with their protection.

Respondents also argue that site visits are not formal meetings, and take place whether or not a quorum of the Planning Board is present. No attendance is taken, no minutes are kept and no business is conducted at the site visits. The Town engineer prepares memoranda, collecting and reporting comments of participants on site visits, without attribution to any

particular participant. Such memoranda are distributed to the Planning Board, are given to the applicant, and are made available to the public. Respondents urge that Planning Board site visits are not meetings of the Planning Board within the meaning of that term under the Public Officer's Law.

The Planning Board argues that the Appellate Division, Second Department, has ruled in the case, Matter of the City of New Rochelle v. New York State Public Service Commission, 150 A.D.2d 441, 541 N.Y.S.2d 49 (2d Dep't 1989), that the Open Meetings Law is inapplicable to site walks. Furthermore, the Committee on Open Government has cited this decision in its advisory opinions for the proposition that site walks are not subject to the Open Meetings Law. Although petitioner asks the Planning Board for permission to enter and inspect the Eagle River site, the Board says the request is one which should have been made to the property owner. The Planning Board did not and does not object to petitioner's attendance during the site visits, but in this case, the property owner who possesses the right to decide who may and who may not enter its property denied permission, citing difficult terrain, liability and insurance concerns. Since Petitioner is not a Town official or representative, respondents argue that the Planning Board is without authority to grant petitioner permission to enter the Eagle River property over the objection of the owner. Respondents argue that the Planning Board's decision to go forward with site walks does not violate the Open Meetings Law.

CONCLUSIONS OF LAW

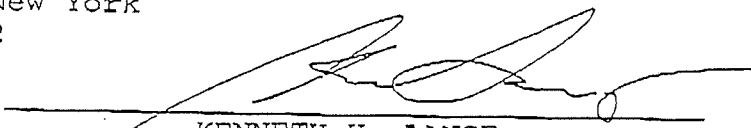
This Court adheres to its conclusion stated in its order of June 14, 2002, that, pursuant to the authority of the holding of the Appellate Division, Second Department in Matter of the City of New Rochelle v. New York State Public Service Commission, supra, the site inspections in this case are not subject to the Open Meetings Law, (N.Y. Public Officer's Law §103; OML-AO-2578, Advisory Opinion, March 1, 1996; OML-AO-2272, Advisory Opinion, October 26, 1993). Petitioner has not demonstrated that respondents are using these site visits for anything other than the purpose of "observation and acquiring information". (OML-AO-3179, Advisory Opinion, July 5, 2000). This Court once again notes that petitioner is not being excluded from participating in the open public process regarding the proposed site development and is expected, pursuant to its stated mission, to contribute substantially to that process.

THEREFORE, it is

ORDERED, that petitioner's application pursuant to Article 78 of the CPLR is in all respects denied and the petition is hereby dismissed. Respondent, Eaglet, LLC's cross-motion for costs and disbursements is denied in its entirety.

The foregoing constitutes the decision, order and judgment of this Court.

Dated: White Plains, New York
October 7, 2002


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Acting J.S.C.

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