SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SANE ENERGY PROJECT and COOPER PARK RESIDENT COUNCIL, INC.,

Petitioners/Plaintiffs, Decision and order

- against - Index No. 518354/2021

CITY OF NEW YORK, FIRE DEPARTMENT OF NEW YORK, and BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID,

Respondents/Defendants, February 14, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant National Grid and the municipal defendants have all moved pursuant to CPLR §3212 seeking summary judgement dismissing the complaint. The plaintiffs have cross-moved seeking summary arguing they are entitled to relief as a matter of law. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

National Grid is a utility company that owns the Greenpoint facility located at 287 Maspeth Avenue in Kings County. Pursuant to New York City Fire Code §2701.10.1 it is prohibited to transport cryogenic containers of liquefied natural gas [hereinafter 'LNG'] within the city of New York. On November 1, 2016, the defendant National Grid submitted an application to the New York City Fire Department for a variance permitting the trucking of such LNG within and outside New York City in times of emergency or supply shortages. That application included an Environmental Assessment Statement [hereinafter 'EAS'] supporting

the variance regarding the transport of LNG. The second page of the 'Application For Plan Examination/Document Review' detailing the job description stated that "National Grid is seeking variances from New York City Fire Code §2707.10.1 entitled "Prohibited compressed gases" and §3205.4.4 entitled "Prohibited filling of flammable cyrogenic fluid," to fill and transport LNG trailers within New York City. LNG would be transported between (to and from) National Grid's Greenpoint LNG facility (located in Brooklyn) and National Grid's New York Holtsville LNG facility (located in Suffolk County) and other LNG facilities outside of New York State ("proposed action"), along approved truck routes" (id). Again, in Section 4 of the New York City Environmental Assessment Statement Full Form the job description is described as follows: "National Grid is seeking variances from the New York City Fire Department (FDNY) to fill and transport liquefied natural gas (LNG) trailers within New York City. The Brooklyn Union Gas Company seeks both variances; KeySpan Gas East Corporation seeks the variance to transport LNG through the City of New York...Issuance of variances from the FDNY would allow National Grid to address gas shortages, which may arise during peak demand periods at National Grid facilities or in the event that unexpected equipment or operational issues or catastrophic weather conditions such as Superstorm Sandy, that reduce National Grid's ability to provide an adequate supply of natural gas to

its customers. Both the Greenpoint and Holtsville facilities currently operate as pre-existing (i.e., non-conforming) facilities for liquefaction and storage of LNG, pursuant to January 1979 New York State Department of Environmental Conservation (NYSDEC) orders. NYSDEC and New York State Department of Transportation (NYSDOT) granted approvals that would allow National Grid to transport LNG. However, due to the regulations on the transportation of LNG within New York City, approval of variances by the FDNY is needed...Improvements to the Greenpoint site would be needed to support the proposed LNG truck transport. Preliminary engineering design work reflects the installation of a new truck loading/unloading station, roadway (including internal looping road) paving, pipe supports and new aboveground piping, an LNG Attendant station, a high expansion foam building, an LNG spill trench and spill pit and drainage sumps, and lighting as necessary, electrical work, fire suppression equipment and gas and fire detection systems" (id). In Section 8 of the application, concerning the extent of the construction work required and the time table of such work, the application stated as follows: "the limited changes at the Greenpoint facility to accommodate LNG cargo tanks would take approximately 6 to 7 months to complete. Work includes the installation of security gates at the Facility entrance, installation of new unloading/loading area, roadway paving,

signage and lighting as necessary, an LNG Attendant station, a high expansion foam building an LNG spill trench and spill pit and drainage sumps, above ground piping and pipe supports and electrical work, installation of fire suppression equipment, and gas and fire detection" (id).

On April 4, 2017 the City of New York responded to the application submitted and noted numerous problems with the variance application. Globally, the response stated that the EAS submitted lacked a "comprehensive Project Description" and did not establish an "analysis framework" (see, Letter from the office of the Mayor of New York, dated April 4, 2017, page 1). The response proceeded to enumerate specific infirmities with the EAS and numerous questions that required further necessary information. Indeed, National Grid believed that a general variance would not be granted, rather, National Grid would be required to seek specific variances as the need or emergency would arise. Therefore, National Grid never responded to that letter and officially withdrew the variance application in a letter dated August 3, 2021.

However, National Grid still maintained an interest in updating its truck unloading infrastructure at the Greenpoint facility and commenced the Truck Unloading Station Project to replace the existing LNG truck unloading station. This project would facilitate the delivery of LNG to the facility that could

be used to refill tanks in case approval for such activity would ever be granted.

This lawsuit centers around the construction of this truck unloading station. The petition contains two causes of action, namely a declaratory judgement that the construction of the trucking station is illegal and alternatively to order the municipal defendants to halt any further construction until proper environmental reviews are undertaken.

The parties have now each moved seeking summary judgement arguing there are no questions of fact each party respectively is entitled to the ultimate relief sought.

Conclusions of Law

Where the material facts at issue in a case are in dispute or more than one conclusion can be drawn from the facts then summary judgment cannot be granted (Friends of Thayer Lake LLC v. Brown, 27 NYS3d 1039, 33 NYS3d 853 [2016]). However, where no such dispute exists and only one conclusion may be drawn from the facts then summary judgement is appropriate (Speller ex rel. Miller v. Sear, Roebuck and Company, 100 NY2d 38, 760 NYS2d 79 [2003]).

Pursuant to 6 NYCRR §617.2(b) et. seq. an "action" is any project or physical activity such as "construction or other activities that may affect the environment by changing the use,

appearance or condition of any natural resource or structure, that: (i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies" (id). Any such action is subject to heightened review pursuant to the State Environmental Quality Review Act [hereinafter 'SEQRA'] (Environmental Conservation Law, Article 8). Further, ECL §8-0105(5)(ii) states that actions do not include "official acts of a ministerial nature, involving no exercise of discretion" (id). Therefore, where activity is only authorized by the issuance of non-discretionary and ministerial fire or building permits no such SEQRA review is required. Thus, the question that must be addressed is whether construction of the truck unloading station requires SEQRA review.

Saed Abdul Hamid, a Manager of Complex Project Management NY for National Grid submitted an affidavit explaining that "National Grid has obtained from all relevant agencies with jurisdiction any and all necessary permits, letters of acceptance, and approvals for the work on the Truck Unloading Station Project that has been done to date. It has also applied for and/or is in the process of applying for any other non-discretionary permits or approvals that are necessary for the remaining work, which will not begin until such permits or approvals are issued by the appropriate agency" (see, Affidavit

of Saed Abdul Hamid, ¶17). In that vein, National Grid obtained eight permits from the Department of Buildings, six concerning a prefabricated control kiosk and two for the spillway, foundations and roadway. Further, National Grid obtained four permits from the New York City Fire Department, for the truck station, fire alarm and gas detection. The fourth permit is for a fire suppression system which contains electrical and mechanical components. Approval for the mechanical component has been provided, while the electrical component remains pending. A further permit for a hydrant location remains pending and is connected to a permit sought from the New York City Department of Environmental Protection for hydrant connection. Mr. Hamid further points out that "in the course of the construction activities relating to the Truck Unloading Station Project to date, at no point has National Grid received any notification, or had any indication or suggestion whatsoever from the City of New York, the FDNY, or any other agency or instrumentality of the City or State of New York, that any construction or activity that is occurring or that is planned to occur in connection with the Truck Unloading Station Project does in fact, or would violate SEQRA, CEQR or any other law, rule or regulation" (id. at ¶36).

Nevertheless, the plaintiffs present three reasons why the truck unloading station is subject to SEQRA review. First, they assert a monitoring report issued on December 18, 2020 and other

such reports indicated that any approval of the truck unloading station is subject to approval by the office of the Mayor, clearly a discretionary exercise (see, National Grid Monitorship: Seventh Quarterly Report, page 5).

Second, the plaintiff's argue that on February 6, 2020 the Mayor issued an executive order essentially prohibiting "the addition of infrastructure within its energy shed that expands the supply of fossil fuels via pipelines or terminals for the transfer of fossil fuels" (see, Executive Order, 52). The plaintiffs assert the truck unloading station violates that order and will require a waiver thus further demonstrating the discretionary nature of the permits necessary for approval.

Lastly, the plaintiffs argue the variance application as well as the response from the City demonstrate that discretion is required to secure the right to construct the truck unloading station. Thus, plaintiff's argue there are surely questions of fact requiring the denial of the defendant's motion.

However, there can really be no question of fact whether SEQRA review is required for any given activity, that is solely a question of law. The plaintiff's first cause of action, in essence, seeks a determination that National Grid may not continue any construction on the truck unloading station until SEQRA review is completed. While the cause of action is directed at construction activity it surely impacts National Grid. This

cause of action necessarily imposes the burden of insuring that appropriate SEQRA review is triggered upon National Grid. The SEQR Handbook is instructive in this regard. It states that "each agency is independently responsible for ensuring that its own decisions are consistent with the requirements of SEQR. If more than one agency is involved in decisions related to an overall action and coordinated review is called for, only the agency which takes the lead role in conducting such review makes the determination of significance and oversees the development and review of any required impact statements" (The SEQR Handbook, 4TH Edition [2020], page 10). The Handbook does provide that "if an agency does not comply with SEQR, citizens or groups who can demonstrate that they may be harmed by this failure may take legal action against the agency under Article 78 of the New York State Civil Practice Law and Rules. Courts may annul project approvals and require a new review under SEQR. New York State's court system has consistently ruled in favor of strong compliance with the provisions of SEQR" (id). Further, page 13 of the Handbook states that "review under SEQR should be started: • As soon as an agency receives an application to fund or approve an action, or • As early as possible in an agency's planning of an action it is proposing. SEQR review should begin as soon as the principal features of a proposed action and its environmental impacts can be reasonably identified. SEQR must be completed

before any final decision to proceed with an action is made" (id).

Thus, other than suing an agency or other governmental authority pursuant to Article 78 regarding SEQRA review (see, generally, Route 17K Real Estate LLC v. Planning Board of Town of Newburgh, 198 AD3d 969, 156 NYS3d 368 [2d Dept., 2021]), a private entity has no obligation or duty to confirm whether it's activities demand any SEQRA review. Indeed, an Article 78 proceeding by its very terms denotes actions against governmental agencies and not private parties. Consequently, private entities cannot be estopped from engaging in activities because there are allegations such governmental agency failed to conduct a SEQRA review. Clearly, any contentions SERQA review has not been followed must be raised with the agency in question.

Similarly, any statements contained in any monitoring reports or the Mayor's executive orders or the original variance application cannot impose any obligations upon the parties or raise questions of fact whether any SEQRA review was necessary. To be sure, outside sources may influence or advocate such review, however, only the relevant agencies are tasked with the decision whether SEQRA review is necessary. Any reliance upon statements from outsiders, no matter how well intentioned, would intrude upon the province of the agencies in question, creating possibly endless layers of popular opinion that would have to be

addressed to satisfy calls SEQRA review must be employed. Indeed, consider the statements in this case, one from a mayoral monitor and one from the mayor's office. Statements made by public officials cannot possibly impose a legal duty mandating SEQRA review, in the same way public officials could not be the subject of any Article 78 proceeding for the failure to advocate for such review. All decisions regarding SEQRA review rest solely with the agencies in question. Thus, any statements endorsing such review are mere statements that carry no legal weight at all and do not raise any questions of fact sufficient to defeat summary judgement. Likewise, the variance application itself, while alluding to the truck unloading station cannot create any SEQRA review requirements and does not raise any questions of fact.

As noted, the petition filed in this case alleges two causes of action, first, against all defendants seeking a declaratory judgement that the construction of the truck unloading station must cease because SEQRA review has not been completed and second, a writ of mandamus against the municipal defendants compelling the cessation of all construction until a full SEQRA review is completed.

The cause of action against National Grid is, in essence, a challenge properly directed to various agencies who did not conduct a SEQRA review. However, as noted such challenge against

National Grid cannot succeed and the proper party that must bear these challenges are the various agencies involved.

The second cause of action seeking mandamus against those very agencies likewise fails. In truth, the plaintiff's mandamus request is two-fold. First, they seek to compel the agencies to engage in SEQRA review and to halt National Grid's construction in the interim. This is the relief sought in the petition and the plaintiff's motion seeking summary judgement. Second, in arguments presented in opposition and in support of these summary judgement motions, the plaintiffs seek just to compel the agencies to conduct an appropriate SEQRA review.

It is well settled that a writ of mandamus is an "extraordinary remedy" and is only available for the performance of a purely ministerial act where there is a clear right to the relief sought (Klostermann v. Cuomo, 61 NY2d 525, 475 NYS2d 247 [1984]). However, it is equally clear that mandamus may not compel an agency to perform an act where the agency may exercise judgement or discretion (see, Thomas v. Trustees of Freeholders & Commonality of Town of Southampton, 59 Misc3d 1202(A), 98 NYS2d 503 [Supreme Court Suffolk County 2018]). Thus, in the SEQRA context, mandamus has been ordered where the reviewing board has failed to act within well defined time constraints (Mamaroneck Beach and Yacht Club Inc., v. Fraioli, 24 AD3d 669, 808 NYS2d 303 [2d Dept., 2005]) or where the board has refused to even process

an application for review at all (2433 Knapp Street Restaurant Bar Inc., v. Department of Consumer Affairs of City of New York, 150 AD2d 464, 543 NYS2d 911 [2d Dept., 1989]) matters that are ministerial in nature and to which the parties are clearly entitled. Thus, it would be appropriate to compel an agency to make a determination whether SEQRA review is required (Lucas v. Village of Mamaroneck, 57 AD3d 786, 871 NYS2d 207 [2d Dept., 2008]) but not to compel the agency which conclusions should be reached or which agencies should be tasked with conducting the review (Residents for a More Beautiful Port Washington v. Department of Environmental Conservation, 153 AD2d 746, 545 NYS2d 306 [2d Dept., 1990]).

The mandamus sought in this case as expressed in the petition seeks to compel the relevant agencies not merely to engage in SEQRA review but to "compel the City of New York and FDNY to halt construction of the LNG Trucking Station and all other Variance Activities at the Greenpoint Energy Center and complete the full SEQRA and CEQR processes mandated by law before allowing construction activities to resume" (see, Petition, ¶60). Thus, the plaintiffs do not merely seek to compel the municipal defendants to engage in SEQRA review but rather seeks to compel them to conclude that SEQRA review is indeed necessary and therefore consequently to curtail the defendant's activities in the interim. Clearly, the action any agency could take following

any SEQRA review is surely discretionary and could not possibly be the subject of any mandamus relief. Of course, no agency can be forced to render a specific conclusion advocated by others.

While the relief sought in the petition seeks mandamus as noted, the plaintiff's have softened that mandamus request and in their motion papers in support and in opposition they merely seek to compel the municipal defendants to conduct SEQRA review. That question necessarily turns on whether any agency is even presented with any SEQRA actions for which they can be compelled to review.

First, there can be no dispute that National Grid's application lapsed and was formally withdrawn in August 2021. The plaintiffs assert that the withdrawal of the application has no bearing on any SEQRA review because the withdrawal was only done to "escape judicial review" (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment, page 10). However, the relevant inquiry is not whether the withdrawal of the application was intended to avoid judicial review but whether SEQRA review by an agency is still possible. Upon the withdrawal of the application the only activity sought by National Grid is the truck unloading station. That construction work, without the LNG variance, is mere ordinary construction not subject to SEQRA. This construction work requires permits of a ministerial nature

which further undermines any SEQRA applicability at all. The fact the truck unloading station was once part of a larger request requiring SEQRA review does not mean that SEQRA review remains continuously applicable. The plaintiff's argue that "there is no dispute that the construction activities at issue at the commencement of this case are the very same construction activities currently underway" (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment, pages 9,10). Of course, any activity requiring SEQRA review is admittedly not underway at this time. Indeed, the municipal defendants have been fully aware of National Grid's current construction activities and have not, pursuant to SEQRA, demanded any heightened environmental reviews. In essence, the municipal defendants have reviewed the current construction project and have concluded none of the SEQRA reviews necessary are implicated. Therefore, a mandamus request cannot demand a further and more searching review.

The petitioners argue the municipal defendants have not provided explicit and affirmative determinations why no SEQRA review has been undertaken (see, Petitioners'/Plaintiffs' Memorandum of Law in Opposition to Municipal Respondents' Motion to Dismiss the Petition as Against the Municipal Respondents, pages 14, 15 and Plaintiffs' Memorandum of Law in Opposition to

Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment, page 22). While that deficiency might provide some basis for further clarification on the part of the municipal defendants such determinations are not required. Indeed, the SEQRA handbook provides that actions that do not require SEQRA review, generally termed Type II actions, "requires no further processing under SEQR. There is no documentation requirement for these actions, although it is recommended that a note be added to the project file indicating that the project was considered under SEQR and met the requirements for a Type II action" (The SEQR Handbook, 4TH Edition [2020], page 26). The decision whether SEQRA review is even required is clearly discretionary and thus, mandamus cannot be utilized to force an agency to engage in SEQRA review when the agency has concluded no such SEQRA review is necessary. In addition, no further notification is required apprising the parties that no SEQRA review will be taking place.

Further, the construction of the truck unloading station does not constitute improper segmentation (see, 6 NYCRR §617.3(g)(1)). That statute states that "actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it...Considering only a part or segment of an

action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible" (id). The plaintiffs argue the whole purpose of constructing the truck unloading station is for the eventual ability to transport LNG. The plaintiffs note that "LNG trucking is clearly included in the same 'long-range plan' of which LNG trucking-related construction is a part, is 'likely to be undertaken as a result' of LNG trucking-related construction, and is 'dependent' on LNG trucking-related construction. In fact, the two activities are entirely interdependent and each has no utility without the other: the construction is useless without the ability to truck, and trucking cannot occur without the associated infrastructure" (see, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment, page 19). The case of J. Owens Building Company Inc., v. Town of Clarkstown, 128 AD3d 1067, 10 NYS3d 293 [2d Dept., 2015] is instructive. In that case the town sough the plaintiff's property to engage in "drain and storm water management improvements" as part of a larger revitalization project. The

town board, the lead agency in that case, only considered the drainage plan as part of its SEQRA review and did not consider the larger revitalization project. The court explained that "if, at this stage, the larger project is merely speculative or hypothetical, then the Town's separate consideration of the drainage plan would not constitute impermissible segmentation" (id). Further, in Sandora v. City of New York, 186 AD3d 1225, 130 NYS3d 61 [2d Dept., 2020] the court held no such impermissible segmentation can exist where a specific action is not yet even proposed. Therefore, where a party has not sufficiently committed to "a definite course of future decisions such that it constituted an action pursuant to SEQRA requiring prior environmental review" then no such segmentation has taken place (id). In addition, improper segmentation does not exist where any future plans require its own SEQRA review (Saratoga Springs Preservation Foundation v. Boff, 110 AD3d 1326, 973 NYS2d 835 [3rd Dept., 2013]).

In this case, it is true that National Grid may potentially seek to construct the truck unloading station for the eventual transport of LNG. However, there are no current plans seeking to transport LNG proposed by National Grid. The court need not speculate why National Grid would expend resources to construct a truck unloading station without also seeking to transport LNG. In any event, if National Grid does seek to transport LNG in the

future there is no dispute that SEQRA review would be required, or such review could be waived in the event of an emergency, alleviating any environmental concerns that exist.

In truth, the plaintiffs really seek SEQRA review at this stage to insure SEQRA review is conducted at all. The plaintiff's fear that if SEQRA review is not conducted now and then a waiver is obtained to transport LNG on an emergency basis in the future, National Grid will be in the same position as if the original variance would have been granted without any environmental reviews taking place. The plaintiffs argue such a ploy would serve to "evade SEQRA review" and frustrate its goals (see, Plaintiffs' Reply Memorandum of Law in Further Support of their Motion for Summary Judgment, page 18).

That argument concedes the truck unloading station standing alone does not really require SEQRA review and that the transportation of LNG on an emergency basis also does not require SEQRA review but that somehow the two activities combined trigger such review. First, to the extent this argument is based upon improper segmentation, no such segmentation is possible if the activities are not subject to SEQRA review. More importantly, National Grid is not "evading" SEQRA review if no SEQRA review is required. Further, the entire notion that National Grid will have achieved in two steps what it could not achieve in one is misplaced. The rejected variance would have permitted National

Grid to transport LNG at National Grid's discretion and pleasure. This potential emergency variance, upon which the plaintiffs fears entirely rest, would require event-specific variances not a complete variance to truck LNG. The fact such emergency variances may be issued which do not demand any SEQRA review is not an evasion of SEQRA, rather, it conforms with SEQRA. These speculative fears cannot impose SEQRA review when the rules simply do not call for such review. The municipal defendants have made this determination based upon an analysis of the facts and circumstances as presented. The plaintiff's displeasure with the decision does not demand any court intervention at all based upon any mandamus. In addition, the plaintiff's impassioned desire to insure environmental reviews are conducted cannot displace the determinations of the agencies tasked which such reviews to the contrary. The plaintiffs may exhaust other administrative remedies in pursuit of those objectives. However, the causes of action contained in the complaint cannot afford the plaintiffs any relief.

Consequently, the motion seeking summary judgement dismissing the entire petition is hereby granted. All cross-motions by the plaintiffs seeking summary judgement are denied.

So ordered.

ENTER:

DATED: February 14, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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