NEW YORK APPELLATE DIGEST, LLC

Year in Review
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An Organized Compilation of the Summaries of Selected Decisions Addressing Environmental Law Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There.

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ADIRONDACK PARK.

UPON LEARNING THE STATE, BY EFFECTIVELY MISLEADING THE COURT, OBTAINED A JUDGMENT DETERMINING IT OWNED LAND IN THE ADIRONDACK PARK, THE COURT PROPERLY EXERCISED ITS DISCRETION TO VACATE THE JUDGMENT PURSUANT TO CPLR 5015 (THIRD DEPT).

The Third Department determined Supreme Court properly vacated a judgment pursuant to CPLR 5015 in the interests of substantial justice because plaintiff (the State of New York) had misled the court in proceedings leading to the judgment that it owned land in the Adirondack Park:

Plaintiff argued at trial that, although it could not identify the specific instrument that gave it a superior claim to the parcel at issue, several instruments granted it title to most of Township 40 and that the parcel "was not included within the bounds of any exception" … Plaintiff was aware that the success of this argument would threaten the claims of hundreds of individuals to land in Township 40, and misrepresented to Supreme Court that it would rely upon a judgment in this action to bring RPAPL article 15 actions against those individuals. Upon succeeding, plaintiff instead enforced the 2001 judgment against defendants alone … . It … became evident that plaintiff sought the 2001 judgment despite the doubts … regarding its ownership claims in Township 40 … . Plaintiff subjected defendants to selectively harsh treatment under a judgment about which it harbored doubts, in other words, and Supreme Court stated that it would not have granted the judgment had plaintiff taken the legal position it later adopted. Supreme Court did not abuse its discretion in finding that these circumstances afforded sufficient reason to vacate the 2001 judgment in the interest of substantial justice … . State of New York v Moore, 2020 NY Slip Op 00008, Third Dept 1-2-10

BOW AND ARROW, TOWN VS STATE REGULATION.

TOWN LAW PREEMPTED BY STATE LAW RE THE DISCHARGE SETBACK FOR A BOW AND ARROW (SECOND DEPT).

The Second Department determined the town ordinance regulating the discharge setback for a bow and arrow was preempted by the conflicting provisions in Environmental Conservation Law (ECL) 11-0931:

The Town incorrectly contends that its ability to regulate the discharge setback of a bow and arrow is expressly authorized by Town Law § 130(27). That statute vests certain municipalities, including the Town, with the power to pass ordinances "prohibiting the discharge of firearms in areas in which such activity may be hazardous to the general public or nearby residents," provided that "[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention" (Town Law § 130[27]). However, that statute is premised upon a definition of the term "firearm" that does not include a bow and arrow.

The Town unpersuasively contends that it is free to define for itself the meaning of "firearm," as used in Town Law § 130(27), so as to include "bow and arrow." Although Town Law § 130(27) does not expressly define "firearm," it can be readily inferred that the term is used in the same manner as in ECL 11-0931(4), which explicitly distinguishes between firearms and bows in setting forth discharge setback requirements (see ECL 11-0931[4][a][2]; see also 6 NYCRR 180.3[a] [defining "firearm" for purposes of ECL article 11]). Indeed, the mention of the "five hundred foot rule" in Town Law § 130(27) refers to the five-hundred-foot discharge setback required under ECL 11-0931(4). Construed in pari materia, these two statutory provisions employ the same terminology to regulate the same subject matter, and demonstrate that the Town may not regulate the discharge setback of a bow and arrow in a manner inconsistent with State law. Hunters for Deer, Inc. v Town of Smithtown, 2020 NY Slip Op 04542, Second Dept 8-19-20

BROWNFIELD CLEANUP PLAN.

THE GROUNDS FOR THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S DENIAL OF PETITIONER PROPERTY OWNER'S APPLICATION TO PARTICIPATE IN THE BROWNFIELD CLEANUP PLAN WERE IRRATIONAL AND UNREASONABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitioner property owner's application to participate in the Brownfield Cleanup Plan (BCP) should not have been denied by the Department of Environmental Conservation (DEP) on the grounds that; (1) the petitioner had already entered an agreement to cleanup the property; and (2) an additional financial burden would be imposed on the state. Both grounds were deemed irrational and unreasonable:

… [T]he DEC's determination that the public interest would not be served by granting the petitioner's application because National Grid had already agreed to remediate the site pursuant to the consent order was irrational and unreasonable. We hold, consistent with the determinations reached by several other courts, that a "brownfield site" is not ineligible for acceptance into the BCP "on the ground that it would have been remediated in any event" … . … [A]ny "financial misgivings" (id. at 167) concerning the fiscal impact of a property being accepted into the BCP on the state is irrelevant to the question of whether the public interest would be served by the granting of an application to participate in the BCP. The DEC is not tasked with acting as "a fiscal watchdog" … .

… [T]he DEC's determination that the site was ineligible for acceptance into the BCP on the ground that it is was "subject to [an] on-going state . . . environmental enforcement action related to the contamination which is at or emanating from the site" is also irrational and unreasonable … . There is no support in the language of the statute ECL 27-1405(2)(e) or in its legislative history for the DEC's conclusion that the consent order constituted an ongoing enforcement action … . Matter of Wythe Berry, LLC v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 07076, Second Dept 11-25-2o

CAMPGROUNDS.

THE TOWN'S SEQRA NEGATIVE DECLARATION REGARDING THE EXPANSION OF A CAMPGROUND WAS ARBITRARY AND CAPRICIOUS; THE DEVELOPMENT AGREEMENT BETWEEN THE TOWN AND THE CAMPGROUND CONSTITUTED ILLEGAL CONTRACT ZONING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the town planning board's adoption of negative declaration pursuant to the State Environmental Quality Review Act (SEQRA) with respect to the expansion of a campground (BBFC) was arbitrary and capricious. The Second Department further found that the development contract between the town and BBFC constituted illegal contract zoning:

The Planning Board failed to adequately assess and consider the potential environmental impacts of the construction and expansion of the campground from 74 campsites to 154 campsites, and adopted the negative declaration based largely upon its finding that the campground had been operating 154 campsites—albeit illegally—for many years. Under the circumstances, the Planning Board's adoption of the negative declaration was arbitrary and capricious.

… [T]he development agreement entered into between the Town Board and BBFC constituted illegal contract zoning. "[N]o municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties" … . The test is whether the development agreement committed the Town to a specific course of action with respect to a zoning amendment … . The Town Board agreed to amend the zoning code to permit 210-day occupancy limit, a change from the current 120-day occupancy limit, in exchange for BBFC's agreement that the 210-day occupancy limit would apply to all of the campsites, including the original 74 approved campsites. This was an agreement binding on BBFC to give a form of consideration in exchange for legislative action and to limit the Town Board's authority to change the bulk requirements in the zoning code until such time as BBFC would not be negatively affected by such change … . Matter of Neeman v Town of Warwick, 2020 NY Slip Op 03112, Second Dept 6-3-20

In the same matter, the Second Department determined the granting of an area variance for the campground, based upon the nonconforming campsites which had already been constructed, was arbitrary and capricious. Matter of Neeman v Town of Warwick, 2020 NY Slip Op 03113, Second Dept 6-3-20

CONVERSION, MANUFACTURING TO RETAIL, STANDING.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST PERMITS GRANTING THE CONVERSION OF DEFENDANT'S PROPERTY FROM MANUFACTURING TO RETAIL; PROXIMITY TO DEFENDANT'S PROPERTY WAS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not have standing to contest the defendant City's issuing permits allowing defendant CAB to convert property from manufacturing to retail. Plaintiff operated a grocery store 450 feet from CAB's property. The Second Department held proximity was not enough to confer standing on plaintiff:

"In land use matters, . . . [the plaintiff] must show that it would suffer direct harm, injury that is in some way different from that of the public at large'" … . "An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury" … . "However, this does not entitle the property owner to judicial review in every instance" … . "Rather, in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the [property owner] must establish that the interest asserted is arguably within the zone of interests the statute protects" … . Thus, "even where [the property owner's] premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular [property owner] itself has a legally protectable interest so as to confer standing" … .

Here, the plaintiff alleged standing on the basis of proximity, issues and interests within the zone of interests, and adverse impacts. We disagree with the Supreme Court's finding that the plaintiff had standing to commence this action. The plaintiff

failed to allege any harm distinct from that of the community at large … . 159-MP Corp. v CAB Bedford, LLC, 2020 NY Slip Op 01892, Second Dept 3-18-20

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEY'S FEES.

ONE PURPOSE FOR ASSESSING ATTORNEY'S FEES AGAINST THE AGENCY IN A FREEDOM OF INFORMATION LAW CASE IS TO DISCOURAGE DELAYS IN RESPONSES TO REQUESTS FOR DOCUMENTS; THEREFORE, EVEN THOUGH THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP) TURNED OVER THE DOCUMENTS BEFORE THE APPEAL, THE DEP STILL SHOULD PAY THE ATTORNEY'S FEES RELATED TO THE APPEAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the request for attorney's fees for the appeal in this Freedom of Information Law action should not have been denied. Supreme Court reasoned that the Department of Environmental Protection (DEP) had turned over the requested documents before the appeal:

Supreme Court suggested that it would be "unduly punitive" to include appellate counsel fees and costs in its award given that DEC had already disclosed all responsive, nonprivileged documents to petitioners. The goal of an award of counsel fees and costs under Public Officers Law § 89 (4) (c), however, is to deter "unreasonable delays and denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL" … . As we detailed in our prior decision (169 AD3d at 1311-1312), DEC failed to respond to petitioners' FOIL administrative appeal in a timely manner and disclosed responsive documents after petitioners advanced a FOIL claim in this action/proceeding, and DEC then resisted petitioners' efforts to recover counsel fees and costs incurred as a result of its dilatory conduct. In our view, those facts demonstrate that the portion of the prior appeal relating to petitioners' FOIL claim stemmed from "the very kinds of unreasonable delays and denials of access which the counsel fee provision seeks to deter," and Supreme Court accordingly abused its discretion in declining to include the counsel fees and costs connected thereto in its award … . Matter of 101CO, LLC v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 07969, Third Dept 12-24-20

FREEDOM OF INFORMATION LAW (FOIL).

FOIL REQUEST FOR THE "COMPREHENSIVE STUDY" RE NEW YORK'S TRANSITION TO 100% RENEWABLE ENERGY WAS PROPERLY INTERPRETED TO BE A DEMAND FOR THE COMPLETED REPORT, WHICH THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) CERTIFIED HAD NOT BEEN CREATED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined petitioner's FOIL request was properly denied because the Department of Environmental Conservation (DEC) certified that the document did not exist because it had not been completed. Petitioner had requested "an electronic copy of the 'comprehensive study' ordered by Gov. Andrew Cuomo 'to determine the most rapid, cost-effective, and responsible pathway to reach 100[%] renewable energy statewide' as detailed in [the] January 10, 2017 press release and as completed prior to revisions mentioned publicly by NYSERDA [New York State Energy and Research Development Authority] in February 2019." The majority held the DEC properly interpreted the request as a demand for the completed report, which the DEC certified had not been created. The dissenters argued the request should not have been interpreted as a demand for the completed study, but rather as a request for any relevant documents:

Where, as here, an agency maintains that it does not possess a requested record, the agency is required to certify as much (see Public Officers Law § 89 [3]). Here, respondents submitted affidavits from Alicia Barton, the president and chief executive officer of NYSERDA, and Carl Mas, the Director of the Energy and Environmental Analysis Department of NYSERDA, as well as an affirmation from Daniella Keller, an attorney who served as DEC's records access officer at the relevant time. In their sworn affidavits, Barton and Mas attested that the study referenced in Governor Cuomo's January 2017 press release had yet to be completed at the time of petitioner's FOIL request. Keller stated, in her affirmation, that DEC records custodians had conducted a search of relevant files and advised her that the requested record did not exist because the study "had not been drafted." Such sworn

attestations amply satisfy respondents' obligations under Public Officers Law § 89 (3) … .

Where an agency properly certifies that it does not possess a requested record, a petitioner may be entitled to a hearing on the issue if it can "articulate a demonstrable factual basis to support [the] contention that the requested document[] existed and [was] within the [agency's] control"… [S]peculation and conjecture does not warrant a hearing or a rejection of the sworn statements of Barton and Mas — individuals with personal knowledge of the study and its status — and Keller … . Matter of Empire Ctr. for Pub. Policy v New York State Energy & Research Dev. Auth., 2020 NY Slip Op 07126, Third Dept 11-25-20

FREEDOM OF INFORMATION LAW (FOIL).

SUPREME COURT WENT BEYOND THE PERMISSIBLE REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S DETERMINATION UNION CARBIDE'S FOIL REQUESTS WERE MOOT BECAUSE THE REQUESTED DOCUMENTS HAD BEEN PROVIDED; ONCE SUPREME COURT FOUND THAT THE FOIL REQUEST WAS NOT MOOT BECAUSE THERE WERE ADDITIONAL DOCUMENTS, IT SHOULD NOT HAVE GONE ON TO CONSIDER WHETHER THE ADDITIONAL DOCUMENTS WERE EXEMPT FROM DISCLOSURE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court and remitting the matter to the Department of Environmental Conservation (DEP), determined Supreme Court exceeded its review powers with respect to DEP's response to petitioner's (Union Carbide's) FOIL requests. Union Carbide sought documents relating to a study which determined the radioactive slag found at sites owned by Union Carbide was not the same as the radioactive slag produced by Union Carbide's predecessor. The DEP had determined the FOIL requests were moot because the requested documents had been produced. Supreme Court properly held that the requests were not moot, but then improperly went on to consider whether the additional requested documents were protected from disclosure:

… [T]he administrative determination was that the first two FOIL requests were closed and that the administrative appeal with respect to the third FOIL request was moot given the production of responsive records prior to and following the filing of the appeal. As such, Supreme Court's review was limited to whether the appeal was moot on the basis offered by the FOIL Appeals Officer, that being, whether all responsive records had been provided. By virtue of respondent's in camera submission of additional documents to the court, it was evident that all responsive records had not been provided, and the administrative determination should have been annulled. However, in reviewing the subject documents and finding that those documents, with the exception of the site classification report, were statutorily exempted from disclosure, Supreme Court went beyond its mandate to "judge the propriety of [the agency's] action solely by the grounds invoked by the agency" … . Accordingly, there was no basis for the court to determine that any exemption justified the withholding or redacting of the additional documents submitted to the court … . Inasmuch as the record demonstrates that additional documents responsive to petitioners' FOIL requests exist and were not yet produced or examined by respondent's FOIL Appeals Officer, we remit to Supreme Court to direct respondent to respond to petitioners' FOIL requests by reviewing the additional subject documents and to determine in the first instance whether they are statutorily exempted from disclosure under the Public Officers Law. Matter of Union Carbide Corp. v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 07445, Second Dept 12-10-20

HEAT PUMPS, TAX LAW.

ALTHOUGH A HEAT PUMP SYSTEM DRAWS HEAT FROM SOLAR ENERGY STORED IN THE GROUND, IT IS NOT A QUALIFIED SOLAR ENERGY SYSTEM WITHIN THE MEANING OF THE TAX LAW FOR PURPOSES OF ELIGIBILITY FOR A $5000 TAX CREDIT (THIRD DEPT).

The Third Department determined that a heat pump system, although it draws heat from solar energy stored in the ground, is not a qualified solar energy system within the meaning of Tax Law 606 (g-1). Therefore, as the Tax Tribunal found, petitioners were not entitled to a $5000 tax credit for the heat pump system:

… [S]olar energy system equipment is defined as "an arrangement or combination of components utilizing solar radiation, which, when installed in a residence, produces energy designed to provide heating, cooling, hot water or electricity for use in such residence" … . Here, the Tribunal limited the applicability of the tax credit to those systems that "directly" utilize solar radiation, an interpretation which petitioners assert is too narrow, …

… [W]e do not agree with petitioners' assertion that the plain language of the statute unambiguously includes ground source heat pump systems simply because they utilize solar energy … . As the record reveals, heat harvested by a ground source heat pump system is not, strictly speaking, "solar radiation" since it is being radiated from the ground after being absorbed by the crust. Thus, although a broad reading of the phrase "utilize[es] solar radiation" could certainly include the system at issue, an interpretation excluding indirect utilization of solar energy is not unreasonable. Further, we find that the fact that the system removes heat from indoor air during the warm summer months and moves it to the ground, thereby not utilizing solar radiation, presents another reason to exclude the system from the purview of the tax credit … . Matter of Suozzi v Tax Appeals Trib. of the State of N.Y., 2020 NY Slip Op 00193, Third Dept 1-9-20

LANDFILLS, CIVIL PROCEDURE.

MOTIONS FOR LEAVE TO FILE LATE NOTICES OF CLAIM IN THIS "POLLUTION ESCAPING FROM A LANDFILL" CASE SHOULD HAVE BEEN GRANTED; THE STATUTE OF LIMITATIONS HAD BEEN TOLLED BY THE FILING OF A FEDERAL CLASS ACTION SUIT; ALTHOUGH THERE WAS NO ADEQUATE EXCUSE, THE RESPONDENT WAS AWARE OF THE CLAIMS AND COULD NOT DEMONSTRATE PREJUDICE FROM THE DELAY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the motions for leave to file late notices of claim in these actions stemming from pollution escaping from a landfill should have been granted. Although leave to file a late notice of claim can not be granted after the statute of limitations has run, here the statute of limitations was tolled by the filing of a federal class action suit:

Although more than one year and ninety days had elapsed between the November 2016 accrual date alleged in claimants' proposed notices of claim and their application for leave to serve late notices of claim, we agree with claimants that the filing of the federal class action in March 2017, in which claimants are putative class members, tolled the statute of limitations … . …

… [T]he court abused its discretion in denying their application insofar as it sought leave to serve late notices of claim on respondent … . "In determining whether to grant such [relief], the court must consider, inter alia, whether the claimant[s have] shown a reasonable excuse for the delay, whether the [respondent] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [respondent]" … . Although claimants failed to establish a reasonable excuse for the delay, "[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" … .

… [B]ecause respondent knew that its Site was upgraded to a Class 2 site in 2015 and because similarly situated individuals served timely notices of claim on respondent alleging "substantively identical" exposure to the Site's pollutants and resulting damages … , we conclude that claimants established that respondent received the requisite actual timely knowledge of the claims claimants now assert. We further conclude that claimants met their initial burden of establishing that respondent would not be substantially prejudiced by the delay inasmuch as respondent has been investigating similar claims since early 2017 … and that, in opposition, respondent failed to make a "particularized showing" of substantial prejudice caused by the late notice … . Matter of Bingham v Town of Wheatfield, 2020 NY Slip Op 04241, Fourth Dept 7-24-20

LANDFILLS, STANDING.

ALTHOUGH THE SEQRA REVIEW OF THE PROPOSED MODIFICATION OF A LANDFILL WAS PROPERLY DONE, SUPREME COURT SHOULD NOT HAVE DETERMINED THAT NEARBY RESIDENTS DID NOT HAVE STANDING TO CONTEST THE RULING (THIRD DEPT).

Although the Third Department determined the Department of Environmental Conservation (DEC) had properly conducted its State Environmental Quality Review Act (SEQRA) review of the proposed modification of a landfill, the petition by nearby residents should not have been denied on the ground that the petitioners did not have standing to contest the DEC ruling:

… [A]t least some of the petitioners will suffer distinct environmental harm under the circumstances presented in these proceedings. For instance, although one might expect the visual impact of the landfill expansion to be widespread, DEC specifically found that the impact would be limited and that the areas where the individual petitioners live and/or maintain recreation facilities would be among the few having a "generally unobstructed" view of the landfill. Many of the individual petitioners confirmed that they can see the landfill from their residences, explained how they are personally impacted by the sights, sounds, smells and dust generated by operations there, and further articulated how those impacts will worsen if the landfill expansion goes forward … . Moreover, the Halfmoon petitioners alleged that those impacts will impair the use and enjoyment of Halfmoon's public park, trails and boat launches across the river, while one of the individual Halfmoon petitioners described how she was intimately involved in the development of a trail system and boat launch along the river and was similarly concerned by those impacts … . Standing rules are not to be applied in a manner so restrictive that agency actions are insulated from judicial review and, in our view, the foregoing was sufficient to establish that at least some of the petitioners in each proceeding will suffer environmental impacts different from those experienced by the general public so as to afford standing to sue … . Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 06180, Third Dept 10-29-20

MINING, APPEALS, MOOTNESS.

THE APPEAL WAS MOOT BECAUSE THE PETITION SOUGHT TO HALT THE CONSTRUCTION OF A MINING SHAFT APPROVED BY THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) AND THE SHAFT HAD BEEN COMPLETED AT THE TIME OF THE APPEAL (THIRD DEPT).

The Third Department determined the appeal was moot because the action sought to halt the construction of a mining shaft approved by the Department of Environmental Conservation (DEC) but the shaft had already been constructed at the time of the appeal:

"[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" … . Whether the controversy has become moot requires the consideration of various factors, including how far the construction work has progressed towards completion, whether the work was undertaken in bad faith or without authority and whether the substantially completed work cannot be readily undone without substantial hardship … . A chief consideration to be assessed is whether the challenger to the construction work "fail[ed] to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" … .

This Court has been advised that, during the pendency of the underlying proceeding and this appeal, the construction of the surface shaft has been completed to the point that it cannot be safely halted and that substantial construction costs have been incurred. Furthermore, there is no indication that petitioners promptly sought injunctive relief to maintain the status quo … or that [respondent] proceeded with the construction in bad faith or without the authority to do so … . Based on the foregoing, petitioners' appeal is moot … . Matter of City of Ithaca v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 06322, Third Dept 11-5-20

MINING, QUARRY.

THE QUARRY OWNER HAD, AS A PRE-EXISTING NONCONFORMING USE, A VESTED RIGHT TO MINE THAT PORTION OF ITS LAND SUBJECT TO A PENDING APPLICATION FOR A PERMIT FROM THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP); ZONING BOARD AND SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner had a vested right to mine that portion of its land subject to a pending application for a mining permit from the Department of Environmental Protection (DEP). Petitioner operated a quarry, which was an allowed pre-existing use of the land, and had a DEC permit to mine 37.5 acres (the entire parcel is 241 acres) The petitioner was seeking a permit from the DEC to expand the number of acres to be mined from 37.5 acres to 94 acres. While the application for the permit was pending, the town enacted a new zoning law that allowed mining on only those lands subject to an existing DEC permit. Petitioner sought a declaration that it had a vested right to mine its entire parcel as a prior nonconforming use and Supreme Court dismissed the proceeding:

" [N]onconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance'" … . " By its very nature, quarrying involves a unique use of land. . . . [A]s a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed'" … . "[W]here . . . the owner engages in substantial quarrying activities on a distinct parcel of land over a long period of time and these activities clearly manifest an intent to appropriate the entire parcel to the particular business of quarrying, the extent of [the] protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation may have been limited to only a portion of the property" … . …

… [T]he petitioner demonstrated that it has a vested right to mine those 94 acres as a prior nonconforming use … . In opposition, the respondents/defendants failed to

raise a triable issue of fact. Further, for the same reasons, the petitioner demonstrated that so much of the ZBA's determination as found that the petitioner does not have a vested right to mine those 94 acres was affected by an error of law, arbitrary, and capricious … . …

Accordingly, the Supreme Court should have granted the petitioner's motion to the extent of declaring that the petitioner has a vested right to mine 94 acres of its property as a prior nonconforming use … . Matter of Red Wing Props., Inc. v Town of Rhinebeck, 2020 NY Slip Op 03119, Second Dept 6-3-20

MINING.

LOCAL LAW REVISING ZONING DISTRICTS AND ALLOWING MINING WAS VALIDLY ENACTED; CONTRARY TO SUPREME COURT'S FINDING, TWO PETITIONERS HAD STANDING BY VIRTUE OF THEIR OWNING PROPERTY SUBJECT TO THE NEW ZONING PROVISIONS; ONE PORTION OF THE LOCAL LAW USURPED THE POWERS OF THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) AND WAS ANNULLED; ANOTHER PORTION ADDRESSING TRUCK TRAFFIC VIOLATED THE VEHICLE AND TRAFFIC LAW AND WAS ANNULLED (THIRD DEPT).

The Third Department, in a comprehensive and detailed decision which can not be fairly summarized here, determined a local law which included and new zoning map, revised zoning districts and allowed mining on properties with existing permits was validly enacted. Disagreeing with Supreme Court, the Third Department noted that two of the petitioners, Holser and Hastings, had standing to challenge the State Environmental Quality Review Act (SEQRA) review by virtue of owning property subject to the rezoning ordinance. The court found that one section of the Local Law usurped powers reserved under SEQRA requiring annulment of that section. The court found that another paragraph of the Local Law prohibiting the transport of minerals on town roads did not carve out exceptions for deliveries as required by the Vehicle and Traffic Law. With respect to the standing issue, the court wrote:

For purposes of standing, when a property owner challenges the SEQRA review process undertaken in conjunction with a zoning enactment to which its property is subject, "ownership of the subject property confers a legally cognizable interest in being assured that the Town satisfied SEQRA before taking action to rezone its land" … . "[S]tanding should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules. To that end, the allegations contained in a petition are deemed to be true and are construed in the light most favorable to the petitioner" … . Holser and Hastings have demonstrated that they reside in the Town and own property therein. It is not necessary to assert "proof of special damage or in-fact injury" … , nor do they have to state a noneconomic environmental harm. All that is necessary for standing is to demonstrate ownership of property subject to the rezoning ordinance … . Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 2020 NY Slip Op 04212, Thrid Dept 7-23-20

NATURE PRESERVE, STANDING.

THE FACT THAT PETITIONERS OWN PROPERTY ADJACENT TO THE NATURE PRESERVE DID NOT GIVE THEM STANDING TO CONTEST THE TOWN'S NEGATIVE DECLARATION UNDER SEQRA WITH RESPECT TO THE TOWN'S PURCHASE OF THE PRESERVE (THIRD DEPT).

The Third Department determined petitioners did not have standing to contest the negative declaration under the State Environmental Quality Review Act (SEQRA) allowing the town's purchase of land held by a nature conservancy:

It is well settled that standing to challenge an alleged SEQRA violation by a governmental entity requires a petitioner to demonstrate "that it would suffer direct harm, injury that is in some way different from that of the public at large" … . Importantly, "[p]etitioners must have more than generalized environmental concerns to satisfy that burden and, unlike . . . cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge based on a party's close proximity alone" … .

Here, petitioners claim of standing is based upon the fact that they own property directly adjacent to the nature preserve and have asserted concerns that the Town, in conducting its SEQRA review, failed to consider the impact of increased motor vehicle and pedestrian traffic and/or the environmental effect that a newly proposed parking lot and hiking trail would have on the nature preserve. Initially, assuming, without deciding, that petitioners adequately established their ownership interest in the property directly adjacent to the nature preserve, their position as adjacent landowners does not automatically confer standing on them to challenge the Town Board's negative declaration … . Moreover, petitioners' asserted concerns fail to allege any unique or distinct injury that they will suffer as a result of the Town's proposed land acquisition that is not generally applicable to the public at large … . Matter of Hohman v Town of Poestenkill, 2020 NY Slip Op 00013, Third Dept 1-2-20

NEW CONSTRUCTION, STANDING.

THE IMMEDIATE NEIGHBORS HAD STANDING TO CONTEST THE APPROVAL OF THE CONSTRUCTION OF A DOLLAR STORE; THE PLANNING BOARD DID NOT NEED TO SEND THE MATTER TO THE ZONING BOARD OF APPEALS TO INTERPRET A ZONING ORDINANCE WHICH WAS ONLY A GUIDELINE CONCERNING THE ALLOWED LENGTH OF A BUILDING FACADE; THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK PURSUANT TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (THIRD DEPT).

The Third Department, reversing Supreme Court, noting that the abutting neighbors (Cady and Crawley) had standing to contest the town planning board's approval of the construction of a Dollar Store, determined Supreme Court should not have found that the matter must be sent to the Zoning Board of Appeals (ZBA) for a variance proceeding. Because the zoning ordinance in question, concerning the length of a building facade, was only a guideline, it was not necessary to involve the ZBA to interpret it:

Cady and Cawley's residence is directly adjacent to the proposed construction site, and the proposed retail store would be directly across the woods from their property.

The store's main parking lot, which is located behind the store, is in the line of sight of Cady and Cawley's property. As a result, the store is likely to obstruct or interfere with the scenic views within the scenic viewshed overlay district from Cady and Cawley's property. Cady and Cawley have standing because they have demonstrated that they would suffer an "injury in fact – i.e., actual harm by the action challenged that differs from that suffered by the public at large — and that such injury falls within the zone of interests, or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" … . * * *

… [T]he Town zoning code states that "the length of any faÇade should generally not exceed 50 feet maximum [horizontal dimension]". Insofar as the subject provision lacks any compulsory language, … this provision is deliberately phrased … as a guideline, rather than as a prohibition; in other words, there was no requirement for a referral to the ZBA to determine the plain language of the statute. …

… [O]ur review of the record reveals that the Planning Board underwent a nearly four-year process that involved in-depth environmental impact reports, multiple draft EISes [environmental impact statements] and public hearings, which formed the basis of the FEIS [final environments impact statement] and SEQRA [State Environmental Quality Review Act] findings statement. Accordingly, we find that the Planning Board complied with its procedural and substantive requirements under SEQRA … . Matter of Arthur M. v Town of Germantown Planning Bd., 2020 NY Slip Op 03440, Third Dept 6-18-20

OPEN SPACE, NYC.

NYC'S "OPEN SPACE" ZONING REQUIREMENT IS MET BY ROOFTOP GARDENS ON A SINGLE BUILDING IN A MULTI-BUILDING ZONING LOT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division and upholding the NYC Board of Standards and Appeals (BSA), over an extensive three-judge dissent, determined the "open space" requirement of

the NYC Zoning Resolution in a zoning lot with multiple buildings was met by rooftop gardens accessible to a single building's residents:

The question before us is whether an area must be accessible to the residents of every building on a zoning lot containing multiple, separately owned buildings in order to constitute "open space" within the meaning of the New York City Zoning Resolution … . The Board of Standards and Appeals of the City of New York (BSA), which is responsible for administering the Zoning Resolution, has interpreted the definition of open space to encompass rooftop gardens accessible to a single building's residents as long as the residents of each building on the zoning lot receive at least a proportionate share of open space. …

… "'Open space' is that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" … . The minimum amount of open space required on a zoning lot is determined by the "open space ratio," which is "the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot" … . … [T]he minimum amount of open space required on a zoning lot is calculated by multiplying the given open space ratio by the total residential floor area on the zoning lot. * * * The Appellate Division … opined that the definition of open space in ZR [Zoning Resolution] § 12-10 unambiguously requires that open space be accessible to the residents of every building on a zoning lot. By contrast, the dissent concluded that the statute was ambiguous and would have deferred to the BSA's practical reading of the open-space definition as applied to multi-owner zoning lots. * * *The BSA's interpretation is rational as applied to multi-owner zoning lots. Matter of Peyton v New York City Bd. of Stds. & Appeals, 2020 NY Slip Op 07662, CtApp 12-17-20

PIPELINES.

THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) EXEMPTED THE GAS PIPELINE COMPANY FROM ANY REVIEW REQUIREMENTS OF THE EMINENT DOMAIN PROCEDURE LAW (EDPL); THE COMPANY WAS FREE TO EXERCISE EMINENT DOMAIN OF THE LAND IN DISPUTE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined that the certificate of public convenience and necessity issued to petitioner, National Fuel Gas Supply, for construction of a gas pipeline, exempted National Fuel from any requirements of the Eminent Domain Procedure Law (EDPL). Therefore National Fuel did not need to comply with the notice and hearing requirements of the EDPL before exercising eminent domain of the land in dispute:

In 2017, the Federal Energy Regulatory Commission issued a certificate of public convenience and necessity to petitioner National Fuel Gas Supply for its proposed construction of a 99-mile natural gas pipeline spanning from Pennsylvania to Western New York. … [t]his certificate …—which did not condition National Fuel's eminent domain power on receipt of a water quality certification and which remained valid and operative at all relevant times despite the New York State Department of Environmental Conservation's intervening denial of National Fuel's application for such a certification—exempted National Fuel from the public notice and hearing provisions of article 2 of the Eminent Domain Procedure Law (EDPL) in accordance with EDPL 206 (A). …

The question before us distills to whether the certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) to National Fuel satisfies EDPL 206 (A) so as to entitle National Fuel to exercise eminent domain over the land in dispute without undertaking additional review of the pipeline's public benefit. If satisfied, EDPL 206 (A) excuses compliance with various provisions of EDPL article 2 where a proposed condemnor has successfully completed a review of the project's public benefit and use before a state, federal, or local agency. * * *

… [W]here, as here, a gas company holds a valid certificate of public convenience or necessity from FERC for the proposed construction of a pipeline and that certificate places no relevant conditions on the eminent domain power and has not been stayed or revoked by FERC or a federal court properly reviewing its issuance, compliance with article 2 is excused under EDPL 206 (A). Matter of National Fuel Gas Supply Corp. v Schueckler, 2020 NY Slip Op 03563, CtApp 6-25-20

SUMMARY OF THE FOURTH DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020

ALTHOUGH THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) APPROVED THE GAS PIPELINE, THE STATE DID NOT ISSUE A WATER QUALITY CERTIFICATION (WQC) FOR THE PROJECT, THEREFORE THE PIPELINE COMPANY CAN NOT SEEK EASEMENTS OVER PRIVATE LAND PURSUANT TO THE EMINENT DOMAIN PROCEDURE LAW (EDPL) TO INSTALL THE PIPELINE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, over a two-justice dissent, considering a matter of first impression, reversing Supreme Court, determined that a gas supply company could not acquire easements over private property by eminent domain for the installation of a pipeline for which the state denied a permit:

In February 2017, the FERC [Federal Energy Regulatory Commission] granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land … . Within the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project." …

… [T]he New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC [water quality certification]. The WQC

application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built … . * * *

… [P]etitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL [Eminent Domain Procedure Law] article 2 process. Matter of National Fuel Gas Supply Corp. v Schueckler, 2018 NY Slip Op 07550, Fourth Dept 11-9-18

PUBLIC TRUST DOCTRINE.

UNRESOLVED QUESTIONS OF FACT CONCERNING WHETHER THE CONSTRUCTION OF A WHOLE FOODS STORE IN THE VICINITY OF A RECREATIONAL TRAIL AND A PUBLIC USE EASEMENT VIOLATES THE PUBLIC TRUST DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined petitioner's violation of the public trust doctrine causes of action should not have been dismissed. The action relates to the construction of a Whole Foods store in the vicinity of a recreational trail and a public use easement:

… [T]he court erred by granting a declaration in favor of respondents on petitioner's … causes of action … which allege violations of the public trust doctrine, because there are unresolved factual issues concerning the impact of the Whole Foods development on a recreational trail known as the Auburn Trail, including whether the development would require the constructive abandonment of the existing public use easements for that trail ,,, , Matter of Brighton Grassroots, LLC v Town of Brighton, 2020 NY Slip Op 00754, Fourth Dept 1-31-20

RENTER DISPLACEMENT.

CITY TOOK THE REQUISITE HARD LOOK AT THE ENVIRONMENTAL IMPACTS OF THE REDEVELOPMENT PLAN, INCLUDING ITS EFFECTS ON RENTER DISPLACEMENT; SUPREME COURT SHOULD NOT HAVE ANNULLED THE ADOPTION OF THE PLAN (FIRST DEPT).

The First Department, reversing Supreme Court, ruled that the City Council, in approving the redevelopment plan, had taken the requisite hard look pursuant to the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review Act (CEQRA) at the environmental impacts of the plan as described in the Final Environmental Impact Statement (FEIS):

Petitioners argued that the City violated SEQRA and CEQR by failing to take a "hard look" at eight issues: (1) impact of rezoning on existing preferential rents and effect on renter displacement; (2) impact on area racial makeup; (3) impact on minority and women-owned businesses (MWBEs); (4) accuracy of prior City FEIS projections on rezoning impacts; (5) impact of loss of the existing Inwood library; (6) impact on emergency response times; (7) cumulative impact of other potential area rezonings, including the adjacent 40-acre MTA railyard; and (8) speculative purchase of residential buildings in the wake of the rezoning. …

We find that the City's decision was not arbitrary and capricious, unsupported by the evidence, or contrary to law. The City took the requisite "hard look" at all the issues requiring study under SEQRA/CEQR … , but did not have to parse every sub-issue as framed by petitioners … . Moreover, the City was "entitled to rely on the accepted methodology set forth in the [CEQR] Technical Manual" … , including in determining what issues were beyond the scope of SEQRA/CEQR review. Matter of Northern Manhattan Is Not for Sale v City of New York, 2020 NY Slip Op 04235, First Dept 7-23-20

SEWAGE TREATMENT.

MEMBER OF LLC WHICH OWNED A MOBILE HOME PARK IS PERSONALLY LIABLE, PURSUANT TO THE RESPONSIBLE CORPORATE OFFICER DOCTRINE, FOR AN $800,000 PENALTY IMPOSED FOR FAILING TO COMPLY WITH AN ORDER ISSUED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION REQUIRING SEWAGE-TREATMENT MEASURES (THIRD DEPT).

The Third Department determined Burr, one of two members of a limited liability company, C & J, was properly held personally liable for the violation of an administrative order issued by the Department of Environmental Conservation (DEP). C & J owned a mobile home park and the administrative order concerned the treatment of waste from the park. The penalty was more than $800,000.00:

Under Limited Liability Company Law § 609, a member of a limited liability company is generally not liable for the contractual obligations of the company. The 2008 order on consent, however, is not merely a contractual obligation. It is also an administrative order, the violation of which is subject to statutory enforcement (see ECL 71-1929). This Court has recognized that a responsible corporate officer may be held personally liable for violations of consent orders issued by DEC that implicate public health and safety … . Individual liability may be imposed where the corporate officer has the knowledge of and ability to prevent or remedy a violation that presents a public health hazard … . …

There can be little dispute that Burr was well aware of the ongoing sewage violations at the park, and, as managing member, he held a position of authority to address the problem. … [T]he 2008 consent order, which Burr signed on C & J's behalf, expressly provided for stipulated penalties in the event that C & J "fail[ed] to strictly and timely comply." The order further specified that it was binding on C & J and its officers. …

… [W]e conclude that Supreme Court did not err in holding Burr personally liable under the responsible corporate officer doctrine. State of New York v C & J Enters., LLC, 2020 NY Slip Op 00024, Third Dept 1-2-20

SOLAR ARRAY, SPECIAL USE PERMIT.

TOWN PLANNING BOARD PROPERLY ISSUED A SPECIAL USE PERMIT FOR THE INSTALLATION OF A MAJOR SOLAR SYSTEM; DENIAL OF A SPECIAL USE PERMIT CANNOT BE BASED SOLELY UPON COMMUNITY OPPOSITION (THIRD DEPT).

The Third Department determined the town planning board properly issued the special use permit for a major solar energy system. Petitioners objected to the project alleging "negative visual impact and negative impact on adjoining property values." The court found that the planning board had complied with the State Environmental Quality Review Act (SEQRA), the relevant Local Law and the relevant zoning ordinance. The court noted a special use permit cannot be denied solely based upon community opposition:

A Planning Board may not deny a special use permit based "solely on community objection" … . Petitioners and the community objected to the project due to potential concerns of negative visual impact and negative impact upon adjoining property values. The Planning Board had ample evidence to support its determination that these impacts would be minimal. The visual assessment survey determined that, between the existing vegetation and the topography, the completed project would not be readily visible to the surrounding area. The Planning Board further found that the property owner's concern about potential reflected glare from the solar panels was adequately addressed through Eden's use of anti-glare coating. To further shield the community's view of the project and to allow adjoining property owners to cut down their own trees if they so choose, the Planning Board required a 1,600-foot evergreen barrier. This evergreen screen, the property's continued use of the land for beekeeping and sheep grazing and the determination that the project will not affect any historic resources all provide a rational basis for the Planning Board's determination that the character of the neighborhood and property values would be reasonably safeguarded. Matter of Biggs v Eden Renewables LLC, 2020 NY Slip Op 07011, Third Dept 11-25-20

WASTE PROCESSING, STATE VS MUNICIPAL REGULATION.

THE STATE HAS NOT PREEMPTED A MUNICIPALITY'S ABILITY TO REGULATE THE PROCESSING OF WASTE; THEREFORE, EVEN THOUGH THE STATE HAD ISSUED A PERMIT ALLOWING THE PROCESSING OF 500 TONS OF WASTE PER DAY, THE VILLAGE'S ACTION FOR A PERMANENT INJUNCTION REDUCING THE ALLOWED AMOUNT OF WASTE SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's request for a preliminary injunction limiting the amount of waste that could be processed by defendant recycling company was properly denied, but the action seeking a permanent injunction should not have been dismissed. The Department of Environmental Conservation (DEC) had issued a temporary emergency permit allowing the defendant to process 1100 tons of waste per day and the defendant applied to make 1100 tons per day permanent. The village sought an injunction imposing the 2008 limit of 370 tons per day. While the preliminary injunction was pending, the DEC issued a permit imposing a daily waste limit of 500 tons per day, which obviated the need for the preliminary injunction. But, because the state has not preempted the ability of a municipality to regulate the amount of waste, the permanent injunction action should not have been dismissed:

… [T]he Supreme Court erred in determining, in effect, that it did not have the authority to issue declaratory or injunctive relief limiting the maximum amount of waste that could be processed at the facility in an amount less than that permitted by the DEC. Indeed, "the State has not preempted local legislation of issues related to municipal solid waste management" … . Thus, the DEC's issuance of the 2016 renewal permit did not per se preclude the court from considering the merits of the causes of action asserted in the Village's complaint. * * *

… [A]s a practical matter, the DEC's issuance of the [500 ton per day] permit largely obviated the need for an order preliminarily enjoining the defendants … . … However, the Supreme Court had an insufficient legal or factual basis, at this preliminary stage, to deny the Village's request for permanent injunctive relief

precluding [defendant] from exceeding the 2008 limits. Indeed, if the Village is ultimately able to establish, at trial, that the defendants breached the terms of a prior agreement entered into between the Village and [defendant], or that the facility's operation in excess of the 2008 limits constitutes a nuisance, or that the facility is operating in violation of the Village's zoning code, then the Village may well be entitled to permanent injunctive relief as an appropriate remedy … . Incorporated Vil. of Lindenhurst v One World Recycling, LLC, 2020 NY Slip Op 05037, Second Dept 9-23-20

WASTEWATER TREATMENT.

WASTEWATER TREATMENT COMPANY'S CONTRACT WITH THE MUNICIPALITY WAS NOT VOID; THE CONTRACT WAS IN THE PUBLIC INTEREST AND THERE WAS NO PROOF THE BID SPECIFICATIONS WERE IMPROPERLY DEVELOPED WITH THE COMPANY OR DESIGNED TO ENSURE THE COMPANY RECEIVED THE CONTRACT (THIRD DEPT).

The Third Department, over a partial dissent, determined the plaintiff municipality breached its contract with defendant sewage-treatment company. The plaintiff municipality argued that, although there was competitive bidding under General Municipal Law 103 and 120-w, the contract was void because the bid specifications were improperly developed with the defendant and were designed to ensure defendant got the contract, but that argument was rejected by both Supreme Court and the Third Department:

… [P]laintiff provided nothing to contradict the proof that [use of defendant's technology] served the public interest because it was safer, more reliable and less likely to generate troublesome odors than other technologies.

[D]efendant produced an affidavit from plaintiff's then-mayor, who stated that the options for sludge treatment had been thoroughly investigated and that the type of equipment offered by defendant would further the public interest by stabilizing plaintiff's sludge disposal costs, providing an environmentally sensitive means for that disposal and decreasing odors emanating from the WWTF [wastewater

treatment facility] that might affect ongoing waterfront development. The then-mayor further averred that the bid documents were prepared by municipal employees and that the specifications included nothing of peculiar benefit to defendant. … Defendant's president, a mechanical engineer, confirmed that point and averred that "[n]early any sludge drying pelletizing system on the market" could have satisfied the bid specifications. Plaintiff accordingly failed to meet its burden of showing that the 2004 agreement was void, and defendant demonstrated its entitlement to summary judgment on claims relating to that agreement's validity … . City of Kingston v Aslan Envtl. Servs., LLC, 2020 NY Slip Op 00192, Third Dept 1-9-20

WIND TURBINES.

THE TOWN'S APPROVAL OF CHANGES TO A WIND-TURBINE PROJECT WITHOUT A SECOND SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS) WAS NOT ARBITRARY AND CAPRICIOUS (FOURTH DEPT).

The Fourth Department, dismissing the petition seeking review of the town's approval of a wind turbine project. determined a second supplemental environmental impact statement (SEIS) was not necessary before approving an increase in the height of the turbines and the placement of the transmission lines underground. The Fourth Department noted that Supreme Court's failure to address issues raised in the petition constitutes a denial of the related relief, and the petitioners did not cross-appeal those denials:

During the SEQRA [State Environmental Quality Review Act] process, a SEIS may be required to address "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS," arising from, inter alia, changes in the project … . A decision to require a SEIS "must be based upon . . . the importance and relevance of the information; and . . . the present state of the information in the EIS" … . "A lead agency's determination whether to require a SEIS—or in this case a second SEIS—is discretionary" … , and such determination "should be annulled only if it is arbitrary, capricious, or unsupported by the evidence" … .

We conclude that the Town Board "took a hard look at the areas of environmental concern and made a reasoned elaboration of the basis for its conclusion that a second SEIS was not necessary" … . The Town Board's discretionary determination was not arbitrary, capricious, or unsupported by the evidence … . The prior submissions concerning the impact of the project on bald eagles, combined with the updated materials submitted with the latest project modification, were sufficient to establish that the proposed changes would not adversely impact bald eagles. The materials established that collisions between raptors and wind turbines are rare, and that even the higher, 599-foot turbines lie below the normal flight altitude of bald eagles. With respect to the buried electrical transmission lines, the materials showed that such a modification would have a significant positive environmental impact, reducing the effect of the project on wetlands. Matter of McGraw v Town Bd. of Town of Villenova, 2020 NY Slip Op 04644, Fourth Dept 8-20-20