TO BE ARGUED BY:
DEBORAH KOPALD
TIME REQUESTED: 15 MINUTES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Docket No. 2021-01543

In the Matter of the Application of

DEBORAH KOPALD,

Petitioner-Appellant

For a Judgment pursuant to Article 78

-against-

THE TOWN OF HIGHLANDS, NEW YORK,
THE NEW YORK POWER AUTHORITY
Respondents-Respondents

ORANGE AND ROCKLAND UTILITIES, INC.,
Respondent

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

1. Was Petitioner beyond the Statute of Limitations to bring a challenge to the Town's purchase of streetlighting fixtures from the electric utility - when a municipality had earlier voted to approve an agreement with the New York Power Authority to investigate options for LED lighting that does not bind the municipality to any future specific purchase of lightbulbs, systems or indeed to any future purchase at all?

Answer: The lower court answered in the affirmative. Appellant answers in the negative.

2. Even if unlawful segmentation did not take place, should the Town have deemed its purchase of the streetlighting fixtures from the electric utility a Type II action pursuant to SEQRA?

Answer: The lower court answered in the affirmative. Appellant answers in the negative.

3. Did the Town's purchase of the streetlighting fixtures from the electric utility and its resolution authorizing same constitute unlawful segmentation?

Answer: The lower court answered in the negative. Appellant answers in the affirmative.

4. Did Petitioner demonstrate sufficient standing to bring this case?

Answer: The lower court answered in the negative. Appellant answers in the affirmative.

5. Regardless of whether the Petitioner demonstrated sufficient standing to bring this case to challenge the Town's purchase of streetlighting fixtures from the electric utility, should Supreme Court have found that NYPA's independent SEQRA determination about its own purchase of a stock of LED lightbulbs (that occurred prior to conducting lighting-related business with the Town) was binding upon the Town?

Answer: The lower court answered in the affirmative. Appellant answers in the negative.

NATURE OF THE CASE

This appeal is submitted by Deborah Kopald, Petitioner-Appellant *pro se*. The underlying proceeding is an appeal from a January 22, 2021 Decision and Order from Supreme Court, Orange County (R0007), dismissing an Article 78 proceeding which sought judicial review of an April 27, 2020 Town of Highlands New York Town Board resolution (R0035) that enabled the purchase of Streetlighting Facilities from Orange and Rockland Utilities, Inc. ("O&R") (non-answering Respondent herein) and deemed the purchase to be a Type II action pursuant to the State Environmental Quality Review Act ("SEQRA").

The proceeding also sought review of all other contracts related to LED streetlighting that had been signed by the Town of Highlands (unbeknownst to Petitioner[1]) in the four months[2] prior to the date of filing. It turns out there were no other such contracts.

During the summer of 2019, prior to the April 27, 2020 approval of the purchase of the streetlighting facilities from O&R, the Town of Highlands

[1] The four months preceding filing coincided with the onset of the Covid emergency and based upon the fact that Town governments did not have oversight as people were not going to meetings because of the virus, Appellant was concerned about the possibility of any other contracts that might conceivably have been signed that she did not then know about.

[2] Four Months exclusive of tolled time during the pandemic.

approved a consulting agreement with the New York Power Authority ("NYPA") to investigate Light-Emitting Diode ("LED") streetlighting options.

Petitioner alleges that the agreement between the Town and NYPA did not bind the Town to purchase any specific lighting, LED or otherwise. NYPA admitted as much in their Answer filed in Supreme Court. R1079, ¶16 (See discussion at pg. 13, ¶5). The Town Attorney, Justin Rider, admitted the same before the vote. R0010 (See discussion at pg. 10, ¶2-3) Petitioner-Appellant contends that case law and the regulations make clear that such a non-binding agreement is not an action pursuant to SEQRA and does not preclude environmental review of suggested contracts and purchases that may be entered into after this consulting agreement.

Petitioner-Appellant makes several contentions herein: first that Supreme Court erroneously concluded that the Town had voted to approve any specific lighting scheme during the summer and fall of 2019 and that the votes which did previously take place - to approve an agreement with NYPA to investigate LED lighting options- precluded any challenge of anything relating to LED lighting thereafter (whether with NYPA or with any other party), including the within resolution and contract to approve the purchase of the streetlighting facilities from O&R.

Next, Supreme Court erred when it concluded that the sale of streetlight fixtures was a Type II action; Petitioner-Appellant further contends that unlawful segmentation took place whereby the sale of fixtures could not be considered in isolation from a future purchase of light bulbs to go inside these fixtures. In addition, Petitioner contends that Supreme Court erred by claiming that any purchases by NYPA or findings with regard to other municipalities would govern any SEQRA determination regarding any subsequent purchase of lightbulbs (or any other services) from NYPA by the Town.

Petitioner seeks reversal of each and every part of Supreme Court's Decision and Order including the April 27, 2020 resolution and the contract it authorized. Even if this Court agrees with the lower court that Petitioner did not demonstrate sufficient standing to bring the case to reverse the approval for the purchase of the streetlighting fixtures, or if this Court agreed that the streetlighting fixtures purchase was a Type II action, Petitioner should not be estopped from challenging future purchases of any type of lights that go *into* the fixtures. Therefore, she requests that this court overturn the incorrect holding that the approval of a prior consulting agreement creates a bar to challenging contracts recommended by NYPA as a result of this agreement as well as that NYPA's SEQRA determinations about LED lights in cases not involving the Town of Highlands are

in any way binding upon the Town of Highlands. Petitioner-Appellant seeks costs for this appeal and service, filing and printing costs before the lower court.

STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Petitioner-Appellant is a resident of the Town of Highlands New York. In late 2018, Town Board member Richard Sullivan began discussing having LED streetlighting in the Town of Highlands. This prompted Petitioner-Appellant to write to the local newspaper, *The News of the Highlands* (R0356) and speak publicly about the dangers of LED blue-white streetlights.

In July 2019, Petitioner-Appellant circulated a petition (R0343) among local residents for a few weeks in support of her proposition to keep the yellow-hued sodium vapor and orange-hued mercury vapor streetlights in the Town of Highlands. If the Town ultimately wanted to switch to light-emitting diode ("LED") streetlights, Petitioner advocated that the Town select an orange LED as opposed to a blue-white LED, which would introduce deleterious daylight frequencies into the night-time lighting environment.

Petitioner-Appellant created a streetlighting briefing book ("Briefing Book") (R0037) for the Town and gave citations to scientific studies, articles, including Harvard Health letters, letters by an ophthalmologist and optometrist to the Nassau

County legislature, literature from the International Dark Sky Association and reports from the American Medical Association ("AMA"), the French Agency for Food, Environmental and Occupational Health & Safety a/k/a L'Agence nationale de securite sanitaire de l'alimentation, de l'environnement et du travail ("ANSES") and charts and graphs illustrating the effects of light color-temperature on circadian rhythms and sleep. (R0037-R0342) In the Briefing Book, Petitioner-Appellant distinguished the concepts of color-temperature from wattage (power), lumens (brightness) and watts/lumen (intensity). (R0038-R0041).

Mercury and Sodium Vapor Lights are orange and yellow color temperature respectively, and do not contain any of the blue-white daylight frequencies that do not naturally exist at nighttime. Humans evolved to not be exposed to such light at night which is why shift-work causes many people to experience sleep disruption and cancer. However, many LED lights do contain these harmful blue-white frequencies and have become part of the nighttime street-scape in many communities. There is an alternative in the form of orange and red LED lights, and Petitioner-Appellant suggested that if the Town ultimately wanted to move to LED lighting that it select an orange color-temperature bulb such as is used in Flagstaff, AZ and Yosemite National Park (and to find one that had all of the harmful blue-white frequencies stripped out of it).

The Briefing Book described negative effects on animals and plants as well as on humans, who have complained about the irritating nature of overly bright LED lighting (whether it be streetlighting or headlamps on cars), retinal effects, sleep effects, and hormonal effects, which have been linked to increases in breast cancer.

The Briefing Book also featured photos of various lights including the more visibly pleasant orange LED lighting at Yosemite (see bottom of R0050) as well as a noxious blue-white light in the Village of Highland Falls, the boundaries of which lie within the boundaries of the Town of Highlands, (from a photo provided to Petitioner-Appellant by the Town of Highlands' Supervisor's son, R0049). (The Village's lighting scheme is determined by the Village government, not the Town's). In addition, the Briefing Book discussed other hazards from LED lights including "hazmat" situations from nickel and copper breaking from them as well as high frequency transient line pollution, a form of electromagnetic pollution that affects electronics and human health.

During the summer and fall of 2019, the Town's streetlighting fixtures were owned and maintained by Orange and Rockland Utilities, Inc. ("O&R"). The streetlighting fixtures contained non-irritating (from a visual standpoint) sodium

vapor (yellow-hued) and mercury bulbs (orange-hued). When a light would break very, very occasionally, O&R replaced it with a blue-white LED light bulb.

In July 2019, the Town Board voted to enter into a consultancy agreement with the New York Power Authority ("NYPA") to investigate options for LED light purchases. The July 8, 2019 Town Board meeting minutes were recorded as follows (See: R0931)

> Council Member Sullivan reported on LED lighting and he stated that someone has a petition against the LED lighting.
>
> Council Member Sullivan said he would like to move forward with the LED Lighting but expects some adversity from some of the public.
>
> Council Member Sullivan spoke on how cost effective the LED Lights could be for the Town.
>
> Supervisor Livsey asked for a motion for Council Member Sullivan to move on the contract for LED Lighting

The first issue at bar here is what this approved "contract for LED Lighting" says and means. It was *not* a contract to approve the use of any specific lights; nor was it even a contract to approve the use of LED lighting per se; it was a consulting contract to investigate options that did not bind the town to the purchase of specific lights or any purchase at all.

This vote also could not have been for anything else other than to investigate the purchase of LED lighting due to the obvious and incontrovertible fact that the

Town did not then own the Streetlighting Fixtures in its boundaries and had no ability to remove the Sodium and Mercury light bulbs affixed to these Streetlighting Fixtures, which were owned by O&R.

NYPA's consulting contract, termed the "Energy Services Program Master Cost Recovery Agreement Between Power Authority of the State of New York and [Customer]/ Town of Highlands" ("MSCRA" or "Master Agreement") is at R0475 (draft) and R1008 respectively. Indeed, the Town Attorney M. Justin Rider, had provided Petitioner-Appellant a copy of this document a week before the vote, and he properly characterized this document in his email regarding same at R0373:

> Deborah, Attached is the Master Agreement. It does not contain the particulars for moving forward on LED

Later, in 2020, when Petitioner-Appellant filed the instant case regarding a subsequent resolution to purchase Streetlighting Fixtures (into which lights would have to be placed), the Town's litigation attorney, Michael Matsler, who works in Town Attorney Rider's firm, argued that the misnomer that is the MSCRA/Master Agreement somehow meant the Town had definitively committed to the purchase of specific LED lighting or that it was committed to purchasing LED or any other lights from NYPA. However, the meeting minutes only refer to signing this

specific agreement. The next page of the July 2019 minutes (See: R0932) refers to a "proposal and contract" from the New York Power Authority ("NYPA"):

> Council Member Sullivan made a motion seconded by Council Member Gunza to move forward with a proposal and contract from Jeffrey Laino, New York State Power Authority.
>
> MOTION CARRIED: 4-Ayes (Livsey, Gunza, Sullivan, Parry)
>
> 0-Nays 1-Absent (King)

The September 23, 2019 meeting minutes reflect a discussion that for NYPA to provide consulting options for the Town to consider pursuant to the MSCRA/Master Agreement, NYPA required the signing of a two-page Authorization to Proceed ("ATP"). (R0815 (partially signed version), R1049 (fully signed version)). The minutes' reference to "proposal and contract" is to the ATP. The ATP specifically notes that there is no obligation to accept any project that NYPA conceptualizes and suggests to the Town of Highlands:

> By signing below, the Town of Highlands authorizes NYPA to proceed with the full turn-key solution of the LED street lighting project, which includes the final design report, conducting bids for materials and installation, labor, providing construction management, and commissioning the final project. *When the design and bidding is completed, you will receive an initial Customer Installation Commitment (ICIC) for your review* and signature. At this point, if you choose to proceed to project implementation all development costs will be rolled into the overall project. *Conversely, should you decide not to proceed with the implementation of the project, the Town*

> *of Highlands agrees to reimburse NYPA for all costs incurred up to the termination date for the development, design and bidding of the project.*
>
> (Emphases added)

This plainly shows that, after NYPA made suggestions, the Town would then have to decide whether to proceed with any of them and was not bound to do so. The September 23, 2019 minutes refer to the ATP and read as follows on R0936:

> Mr. Rider also verified that there was another two-page contract that the Town needed to review and sign from NY Power Authority.

The September 23, 2019 minutes read as follows on R0941:

> **NYPA**
>
> Supervisor Livsey reads a document from NY Power Authority asking permission to sign the document regarding comprehensive Street Lighting Upgrade.
>
> Council Member Sullivan made a motion seconded by Council Member King to allow Supervisor Livsey to sign the document from NY Power Authority to start work on a comprehensive street lighting upgrade.
>
> MOTION CARRIED: 5-Ayes (Livsey, Gunza, King, Sullivan, Parry).

Again, the document in question was the ATP, or what the Supervisor refers to as a "document *regarding* comprehensive Street Lighting Upgrade". Like the MSCRA, the ATP does not authorize a comprehensive Street Lighting Upgrade. The ATP authorized the commencement of work on the MSCRA. In the context of the agreement in question, it was to start investigating options that the Town could

subsequently vote to proceed with via the subsequent signing of a Customer Project Commitment ("CPC") or reject by not signing same. It was NOT a vote to complete work on any SPECIFIC proposal that might be suggested from the MSCRA consulting arrangement in the future and not for any specific "upgrade".

The MSCRA states the following at R1019, ¶1**:**

> *This Master Agreement does not obligate* the Authority to accept requests for Projects issued by Customer or obligate *any Party to enter into a CPC*.

Customer Project Commitment is defined in the MSCRA at R1015, ¶2:

> "Customer Project Commitment" or "CPC" is a Transaction Document containing terms and conditions for one or more specific Projects at a Customer's Facility(ies) that includes, at a minimum, the location of Customer's Facility, a detailed scope of Work (including a description of milestones, if any), the projected Project costs and any specific payment terms applicable to the Project.

NYPA referred to the MSCRA in ¶16 of the Affidavit of Jeffrey Laino (R1079), NYPA's account executive, (submitted with its Verified Answer):

> In July 2019, NYPA and the Town of Highlands entered into a Master Cost Recovery Agreement ("MCRA"), effective July 23, 2019. See Exhibit C attached to the Verified Answer. This Agreement sets out the general framework for the responsibilities of NYPA and the Town in terms of any particular project specific Energy Services Program. *Since this document does not specifically contemplate any specific energy services project, including the replacement of the Town of Highlands streetlights*, *this Agreement is classified as a Type II action* and SEQR is satisfied with no further action.
>
> (Emphasis added)

In other words, NYPA admitted that the MSCRA "does not specifically contemplate any specific energy services project, including the replacement of the Town of Highlands' streetlights".

Because the MSCRA/Master Agreement (even with the subsequent signing of the ATP) do "not contain the particulars for moving forward with an LED", *neither the MSCRA nor the ATP are actionable under SEQRA*, which NYPA admitted. To be actionable under SEQRA, a decision must "commit the agency to a definite course of future decisions" pursuant to 6 NYCRR §617.2(b)(2). These documents do not. Nor do the votes taken by the Town of Highlands Town Board.

Nevertheless, Supreme Court opined that this agreement time barred Petitioner-Appellant from challenging any specific LED light or LED light-related decision in the future (including, but not limited to the one she has challenged in this case- deeming the purchase of streetlighting fixtures a Type II action). Even if this court finds that Petitioner-Appellant did not show sufficient "standing" to bring this case to overturn the purchase of the streetlighting fixtures, this ruling must be overturned so she can continue to challenge future phases of any LED lighting purchases and decisions by the Town of Highlands. See page 4, ¶3 of the Decision and Order of Justice Vazquez-Doles at R0010:

> Clearly, petitioner is attacking the Town's decision to install LED lights which was made on September 24, 2019 when the Town and NYPA signed the contract which was ten months before she filed this Article 78 Petition.

The judge's conclusion is in error. The Town never voted to install LED lights and never signed a contract to do same. Also, Petitioner-Appellant did not challenge that contract (a consulting agreement). There was no need to do so since it did not constitute an action under SEQRA. This is because the Town did not then decide to install any specific lights and NYPA and the Town Attorney's own statements show that they did not believe that this is what the Town Board was doing either.

To reiterate, the other obvious problem with Supreme Court's logic, is its failure to recognize that *the Town could not have voted in 2019 to put in LED lights into fixtures it did not own*. Indeed, at the time, O&R controlled these fixtures and the Town had not yet voted to purchase them. Absent ownership of the streetlighting fixtures, there would be no way for the Town to vote on purchasing a lighting system to replace the streetlighting fixtures.

Indeed, the Board did not vote to purchase the streetlighting fixtures until April 27, 2020. This further demonstrates that by its earlier vote, the Town Board merely approved a contract to *investigate* lighting systems, (which they could only move to *purchase* when and if they voted to purchase the streetlighting fixtures and secured ownership of same).

Furthermore, Petitioner-Appellant made crystal clear that she was challenging the Resolution made on April 27, 2020 to purchase streetlighting fixtures from O&R and any follow-on contract that emanated out of the MSCRA that could have occurred in the four months (plus time tolled due to Covid) before she filed the Article 78 that she did not then know about. See R0017-R0018.

Accordingly Supreme Court erred at ¶2 at R0010 where it concluded:

> The Petitioner demands nullification of the separate actions taken by the Town on September 24, 2019 and April 27, 2020.

Her Honor also states at page 2 of her order ¶1 at R0008:

> Petitioner is also challenging the Town's decision to convert the street lighting to LED lamps, made on September 24, 2019.

At no time did Petitioner-Appellant request nullification of the September 23, 2019 vote to sign the ATP or the MSCRA which the Town voted to proceed with in July 2019. The four-month statute of limitations is open and notorious to anyone who is a serious litigator and Petitioner-Appellant has initiated several such challenges. At ¶3 of the Decision and Order at R0010, the judge wrote:

> The Town's April 27, 2020 Resolution specifically allows the Town to enter into a contract with O&R to purchase street lighting facilities and nothing to do with LED lighting.

Her Honor missed the point; this is an unlawful segmentation of a whole project: when the fixtures were owned by O&R, the Town could not remove, or vote to

remove, working vapor lighting; only O&R could. The only reason to purchase Streetlighting Fixtures is for the Town to ultimately assume control of what goes into them.

With O&R out of the picture, the Town *ipso facto* would have to make decisions going forward about the lightbulbs that go *into* the streetlight fixtures. It is certain, not speculative, that the Town would engage in another contract because when lights break, they would have to put in new ones.

The April 27, 2020 vote to purchase the streetlighting fixtures (R0035) was the first segment of an overall project to own and control the fixtures and put lights of the Town's eventual choosing into them. Petitioner-Appellant submitted that the April 27, 2020 vote was unlawful segmentation of the project under SEQRA and that the purchase could not be considered alone absent knowing what kind of lights the Town plans to put into the fixtures themselves and that the overall project should be considered at the same time under SEQRA. So, this purchase of the fixtures is relevant, and as Petitioner/Appellant argued, should not be viewed in a vacuum from what will be purchased (lightbulbs) to go inside of the fixtures or wireless control systems to be attached to the fixtures to operate the lights- or as SEQRA looks at it- as a segmented project in isolation from the next phase(s) of same.

Besides misapprehending the unlawful segmentation, Supreme Court misapprehended that streetlight fixtures qualified automatically as a Type II action. The judge writes at page 5, ¶2 of her order at R0011:

> The NYS Department of Environmental Conservation ("DEC") has specifically listed Type II actions in 6 NYCRR §617.5(c) and provides in pertinent part that replacement of a structure or facility, in kind, on the same site, including upgrading buildings to meet building, energy or fire codes or the purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides herbicides or other hazardous material is not subject to environmental review (see 6 NYCRR §617.5 [c][1][2] & [31]).

Supreme Court did not even note Petitioner-Appellant's argument that with regard to subsections 1 and 2, the purchase of fixtures affixed to real property clearly does not qualify for exceptions for "maintenance and repair involving no substantial changes" and "replacement, rehabilitation or reconstruction" or the exception in subsection 31, "furnishings, equipment and supplies", that only applies to tangible moveable personal property (office supplies and furniture, weed whackers, leaf blowers, and machines on wheels, etc.) not to structures affixed to real property and particularly not segments of new systems that require SEQRA review.

Here, that review never happened because the Town circumvented it through unlawful segmentation.

On page 4, ¶3 of the Decision and order at R0010, the judge also erred where Her Honor opined:

> Petitioner also seeks to challenge the propriety of NYPA's bid for the streetlight fixtures themselves in her fifth and sixth causes of action. As NYPA issued a Request of Proposal for the Furnishing and Delivering of Street light material for its Smart Street Lighting Program in 2017 and executed a contract in March and April 2018, petitioner's application is untimely.

2017 and 2018 preceded any business relationship between the Town and NYPA. Again, the judge did not comprehend that the Town could not be bound by a SEQRA determination that NYPA made independently of the Town, years before it even approached the Town to do business regarding the purchase of light bulbs, and in fact that SEQRA *obligated* the Town to conduct its own analysis of the externalities caused by any lighting purchase. (Again, the Town's non-binding consulting agreement with NYPA does not obligate it to purchase their lights, and the Town had not signed a CPC or ICIC to do so when this Article 78 was filed or at any time since). Petitioner-Appellant did not seek to challenge anything NYPA did in 2017 and 2018 including, but not limited to any SEQRA determination that NYPA made regarding lighting.

Furthermore, the purchase of lights is different than their rollout in a site-specific situation; any future rollout in the Town of Highlands, which is nestled in

the Palisades Interstate Park along the historic and scenic Hudson River, is going to have wider ranging effects on the environment than an urban location where NYPA has already rolled out LED lights.

The fifth and sixth causes of action concern any possible contracts that the Town of Highlands might have signed with NYPA for follow on work under the consulting agreement in the four months preceding filing. (R0032) (If they had signed a follow-on contract, which apparently they did not, that would have been actionable). They refer to any agreements signed in the four months (plus tolling) prior to her filing the Article 78 such as a Customer Project Commitment ("CPC") or Customer Installation Commitment ("ICIC") that could have been spawned from the MSCRA/ATP. (Again, apparently there were none).

Below Petitioner-Appellant demonstrated sufficient standing at ¶17 of her Affidavit in support of a preliminary injunction at R0905-0906, writing:

> With regard to the lights themselves, I used to walk in the neighborhood at night before the Pandemic) and don't need the whole neighborhood to be lit up to the point where it is so bright, it is too irritating to walk. I, like the other locally circulated petition signatories, (Exhibit 3) do not wish the environment to be further degraded or to be exposed to extra risk for breast cancer or sleep degradation from these lights or deal with their over-bright nature and harshness to the eyes. Given anecdotes from many other people, I don't think I am particularly sensitive in acknowledging that a brief look at the LED lights hurts my eyes and causes afterimages while looking at the sodium vapor/mercury lights creates no ill effect. Certainly, given the

> evidence that retinal toxicity is associated with these lights, it should not be surprising that people complain about the effects of looking at them.

Petitioner-Appellant described her electromagnetic sensitivity. R0019, footnote 2. The Department of Labor recommends the removal of irritating lights for such individuals (R1126-R1128)[3].

Conversely, the *nisi prius* court made a conclusory statement on the basis of the self-serving statement by a NYPA engineer, that the lights were safe. (In addition, the locations mentioned by Councilman Sullivan included Kingston and Nyack, more urban areas, when the Town of Highlands is rural and forested and will be more adversely impacted by blue-white LED lighting.) The Judge ignored these realities in her statement at R0011-0012 (¶3 of page 5 of her Decision and Order through ¶1 of page 6 of same):

> In their opposition, NYPA submits the affidavit of Charles Hermann, Lead Project Engineer, Mr. Hermann oversees and manages NYPA's individual projects under its Smart Street Lighting Program which seeks to replace at least 500,000 streetlights with energy-efficient LED technology by 2025.

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[3] Besides her argument with regard to a seminal Court of Appeals case that asserts that standing should not be heavy-handed and that standing should especially be granted for someone who uses a natural resource- her walking down the street at night, the voters of the State of New York added the following to Article I of the New York Constitution on Election Day, 2021:

> N.Y. Const. art. I, § 19. Each person shall have a right to clean air and water, and a healthful environment

This means, that a citizen will no longer have to demonstrate "standing" and unique injuries; they can sue because they have the automatic right to a healthful environment. The Briefing Book and Exhibits R0037-0342 make it clear that there is a major environmental issue with lighting and that some lighting is much safer than others and that Petitioner-Appellant's quest for the maintenance of a healthful night-time environment is backed up by science.

> The project is consistent with NYPA's thirty-year history in the replacement of inefficient light fixtures, first with fluorescent lights and now, as technology has evolved with LED lights. He states that NYPA has replaced inefficient streetlights under this Program with LED lights throughout New York State with no deleterious health effects.

Hermann is talking about lighting NYPA had provided for more than 30 years. LED lights are relatively recent, not in use for 30 years[4], and complaints about them likely go to the municipality installing them, not to NYPA directly. (Again, NYPA's certifications of safety have no bearing on what the Town itself would need to decide, as lead agency, should it decide to purchase lights from NYPA).

Furthermore, there is another aspect to any future light purchase and lighting system that raises safety issues beyond the possibility of the purchase of biologically incompatible blue-white bulbs. Petitioner-Appellant's Freedom of Information Law ("FOIL") request to NYPA actually showed that NYPA offered a menu of various options for the Town's consideration and that some of the plans for the streetlighting systems involve so-called "smart" lighting control systems which ipso facto emit microwave radiation (the frequency band that all so-called "smart" systems operate within) i.e. more bells and whistles, and ones

4 NYPA's engineer Charles Hermann acknowledges as much (that LED lights are a recent evolution) at ¶10 of his affidavit (R1074). Also, fluorescents, the lights previously used, create health issues (See "Why CFL's Aren't Such a Bright Idea" by Victoria L. Dunckley, M.D.) (R1110-R1115)

that concern Petitioner-Appellant who is sensitive to electromagnetic radiation. As written, the instant order may preclude her from challenging any future phase of the lighting project. Specifically, NYPA provided correspondence from Guth DeConzo engineering from December 9, 2019 which reads as follows (R0569-0573):

> 2) Establish Scope of Work for Project
>
> > d. Lighting Control Technology & Smart City: The town would like to see options for both a standard dusk to dawn photocell as well as a lighting control nodes.
>
> 3) Open Discussion regarding Design Requirements/Information
>
> > a. Discuss existing lighting system including:
> >
> > > i. Fuseholder/Fuse Type & System: Guth DeConzo requires installation contractor to install/replace fuses and fuseholders on all cobra head fixtures.
> > > ii. Photocell (basic or smart): Guth DeConzo will provide pricing for both options. The town currently has dusk to dawn photocells.
> > > v. Maintenance (Current, Ongoing, future): O&R currently maintains the existing system. The town understands they will be responsible for system once bought out from O&R/after project completion. In order to be eligible for NYPA's ongoing maintenance agreement the municipality must have lighting control nodes, not dusk to dawn photocells.
>
> (Emphasis added)

Lighting Control Nodes suggest a wireless system. Besides the issues Petitioner-Appellant raised about there being no specific project authorized by the Town by resolution or agreement and no agreement that would bind the Town to anything, the consulting work by NYPA's subcontractor suggested installation of something wholly different than anything ever raised by a board member in public - a so-called "smart" control option which would be tantamount to having cell tower type transmitters on every utility poll. Again, there has been no review of the whole proposal.

To reiterate, Petitioner-Appellant is challenging the finding that she did not have standing to bring this case, and the incorrect claim that she was beyond the statute of limitations to bring this case (which is premised on the incorrect assumption that the Town previously voted to approve a specific lighting system). Even if this court were to find that she did not have standing or that the Streetlighting Fixtures purchase was Type II, she also asks this panel to rule that she was not beyond the statute of limitations to bring the case (or any future case to challenge a CPC or ICIC (purchases recommended from the MSCRA), because the Town did not vote to approve any specific LED lighting scheme in the summer of 2019 and because the consulting agreements were not actionable under SEQRA as they did not bind the Town to any specific purchase (and the Town had not then voted to buy the streetlighting fixtures, a necessary precondition to contemplating

lights and lighting systems to purchase to put in them). Appellant asks this panel to rule that no previous purchase by NYPA to which the Town of Highlands was not a party has any bearing whatsoever on what the correct SEQRA determination is for a future purchase of lights/ lighting system that has not yet occurred.

Assuming the Court agrees that Petitioner-Appellant had standing, she asks the Court to find that the purchase of the streetlighting fixtures cannot have been a Type II action and also that the resolution approving same and subsequent contract for purchase constituted unlawful segmentation.

Petitioner-Appellant also requests costs of the appeal and printing, serving and filing courts below the lower court.

ARGUMENT

POINT 1

PETITIONER WAS NOT BEYOND THE STATUTE OF LIMITATIONS TO BRING A CHALLENGE TO THE TOWN'S PURCHASE OF STREETLIGHTING FIXTURES FROM THE ELECTRIC UTILITY, WHEN A MUNICIPALITY HAD EARLIER VOTED TO APPROVE AN AGREEMENT WITH THE NEW YORK POWER AUTHORITY TO INVESTIGATE OPTIONS FOR LED LIGHTING THAT DOES NOT BIND IT TO ANY FUTURE SPECIFIC PURCHASE OF ANY LIGHTBULBS, SYSTEMS OR, INDEED, TO ANY FUTURE PURCHASE AT ALL.

Actions are defined pursuant to the State Environmental Quality Review Act ("SEQRA"). 6 NYCRR §617.2(b) states:

> (b) "Actions" include:
>
> (1) projects or physical activities, 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;
>
> (2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;
>
> (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and
>
> (4) any combinations of the above

The Master Cost Recover Agreement Between Power Authority of the State of New York and Town of Highlands ("MSCRA") and the Authorization to

Proceed ("ATP") with same do not commit the Town of Highlands to a definite course of future decisions. It is a consulting contract and by itself cannot affect the environment. Nor do the votes taken by the Town of Highlands Town Board to enable the signing of same constitute a covered action. As such, the Town had previously taken no action under SEQRA.

The MSCRA/ATP does not contemplate *any specific proposal* and did not preclude the Town from considering other projects/vendors/options at the same time. See also: *Town of Woodbury v. Cty. of Orange*, 114 A.D.3d 951, 981 N.Y.S.2d 126 (2014), "preliminary steps in the planning of a project do not constitute such an action unless they 'commit the agency to a definite course of future decisions'" and *E. End Prop. Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2007) "Neither the issuance of the request for proposals nor the Memorandum of Understanding…. committed LIPA to a "specific project plan"…. or a "definite course of future decisions".

Under the MSCRA/ATP, the Town does have *the right* to subsequently sign Customer Project Commitments ("CPC's") to get cost estimates on projects and then elect to proceed to complete them via an Initial Customer Installation Commitment ("ICIC"). But this is not an obligation; any specific projects that the Town could subsequently authorize to pursue ***could be terminated at any time*** and

the Town could pay NYPA back for the work pursuant to a certain schedule in Exhibit A of the MSCRA. (R1040)

This is important because yet to be defined projects that could derive from the MSCRA/ATP were **reversible**. To date no specific project has been identified out of the MSCRA/ATP that the Town has elected to move forward with to date, *except* that NYPA had suggested that the Town purchase streetlighting fixtures from O&R in contemplation of a later purchase of an overall system (yet to be identified) into which a subsequent lights system purchase would be incorporated. (R0579)

In 2019, the Town voted to sign a consulting agreement and proceed to investigate options under that agreement that could lead to further contracts authorizing work to commence- not to definitively commit to any specific LED lights scheme or ultimately force the town to commit to a scheme at all or to any specific purchase of lights or services. The agreements do not obligate the Town to complete any future project proposed by NYPA. These agreements do not prevent the Town from simultaneously investigating other services and purchases, including the purchase of lower color temperature LED light bulbs that do not emit blue-white harmful daylight frequencies.

Any comments after the fact about eventual "intent" of definitively moving ahead with LED's are irrelevant for the aforementioned reasons as well as the fact that no specific lighting system proposal specifying wattage, intensity and color temperature in Kelvin was voted on in 2019 or even then conceived of.

Not only did the Town not vote to move ahead with any specific lighting system, but the Town also had not then voted to purchase the streetlights themselves, a necessary condition precedent to voting to approve any specific lights and lighting system. Absent an agreement with O&R and a vote authorizing same, the Town could NOT possibly have voted in 2019 on any specific system and lightbulbs because they did not then own the streetlighting fixtures and had no right to tell O&R to remove the working vapor lights. Again, the vote to purchase the fixtures (which Appellant challenged in the within proceeding) did not occur until April 27, 2020, much later.

See again: discussion at pages 10-16 above. In particular, please note again the following:

The MSCRA states the following at R1019, ¶1**:**

> *This Master Agreement does not obligate* the Authority to accept requests for Projects issued by Customer or obligate *any Party to enter into a CPC*.

See again ¶16 of the Affidavit of Jeffrey Laino (R1079), who is NYPA's account executive (submitted with its Verified Answer):

> In July 2019, NYPA and the Town of Highlands entered into a Master Cost Recovery Agreement ("MCRA"), effective July 23, 2019. See Exhibit C attached to the Verified Answer. This Agreement sets out the general framework for the responsibilities of NYPA and the Town in terms of any particular project specific Energy Services Program. *Since this document does not specifically contemplate any specific energy services project, including the replacement of the Town of Highlands streetlights*, *this Agreement is classified as a Type II action* and SEQR is satisfied with no further action.
>
> (Emphasis added)

See again, the ATP at R1049 which specifically notes that there is no obligation to accept any project that NYPA conceptualizes and suggests to the Town of Highlands:

> By signing below, the Town of Highlands authorizes NYPA to proceed with the full turn-key solution of the LED street lighting project, which includes the final design report, conducting bids for materials and installation, labor, providing construction management, and commissioning the final project. *When the design and bidding is completed, you will receive an initial Customer Installation Commitment (ICIC) for your review* and signature. At this point, if you choose to proceed to project implementation all development costs will be rolled into the overall project. *Conversely, should you decide not to proceed with the implementation of the project, the Town of Highlands agrees to reimburse NYPA for all costs incurred up to the termination date for the development, design and bidding of the project*.
>
> (Emphasis added)

NYPA met with the Town of Highlands to "kick off" the consulting arrangement on December 9, 2019. NYPA then suggested the Town move to purchase the streetlights from O&R before contemplating any specific system. (R0579)

As the MSCRA/ATP were not actionable under SEQRA and did not represent any binding agreement, they cannot preclude court review of any binding contract related to LED streetlighting.

Besides all the reasons stated why the signing of the MSCRA/ATP, could not have constituted an action, when the Town voted to investigate lighting option with NYPA, they never voted to have a wireless system with any future light purchase. If not overturned, Supreme Court's order would preclude review of any eventual choice of wireless system as well as the lights themselves.

If this court were to find that Petitioner-Appellant did not demonstrate sufficient standing to bring this case, she should not be estopped from challenging the purchase of lights/ purchasing specific lighting system scheme that the Town eventually will choose to get affixed to the streetlight fixtures. The same is true if the Court feels she did demonstrate sufficient standing but that the purchase of the fixtures was not unlawfully segmented from the eventual later purchase of a lighting system and bulbs to go in and on the streetlight fixtures (again, Supreme Court refers to the fixtures as "lamps") and is a Type II action.

POINT 2

EVEN IF NO UNLAWFUL SEGMENTATION TOOK PLACE, THE TOWN SHOULD NOT HAVE DEEMED THE PURCHASE OF THE STREETLIGHTING FIXTURES FROM THE ELECTRIC UTILITY A TYPE II ACTION PURSUANT TO SEQRA.

Even looking at the purchase of the streetlight fixtures in isolation from what will eventually have to go into the streetlight fixtures, Supreme Court erred by claiming this project qualified for a Type II exemption under SEQRA.

With regard to the streetlight fixtures contemplated to be purchased from O&R in contemplation of the aforementioned change to the streetlights themselves; the Court incorrectly stated that there was an exemption for fixtures pursuant to 6 NYCRR §617.5(c)(31):

> (31) purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials

This exception has to do with tangible movable personal property, not structures to be affixed to real property, and particularly not portions of new systems that require SEQRA review that never happened.

Supplies have the connotation of objects that are mobile like notepads and pens, extra printer cartridges in an office, gasoline to power municipal vehicles and the like. Indeed, Black's Law Dictionary defines supplies as "means of provision

or relief; stores available for distribution". (See: SUPPLIES, Black's Law Dictionary (11th ed. 2019). This has the connotation of something that is used up and replenished, not something that is permanently installed in a fixed location. Equipment also connotes mobile artifacts such as vehicles or hand-held devices to measure things. The LawDictionary.com[5] sees it similarly:

> Tools, be they devices, machines, or vehicles. Assist a person in achieving an action beyond the normal capabilities of a human. Tangible property that is not land or buildings, but facilitates business operations.

Furnishings also have a connotation of something that can be used in a home or office that can be moved around like desks, chairs or similar chattels pursuant to *Endicott v. Endicott*, 41 N.J. Eq. 93, 3 A. 157 (Ch. 1886). Any future lighting system itself would be distributed in a permanent fashion in site-specific locations (in a Census Designated Place nestled in the Palisades Park, next to the Hudson River) such that their emanations would blanket whole neighborhoods. Light doesn't stop at its contours like a desk or lamp; it emanates and creates a permanent effect on the environment. It is also "on" all evening and affects not just the neighborhood but also the flora and fauna.

The Court also incorrectly stated that there was an exception for fixtures pursuant to 6 NYCRR §617.5(c)(1)(2):

5 Definition of Equipment: https://thelawdictionary.org/equipment/

(c) The following actions are not subject to review under this Part:
(1) maintenance or repair involving no substantial changes in an existing structure or facility;
(2) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site

The Town is not engaging in "maintenance and repair". It is buying streetlighting facilities. It also obviously is not replacing the streetlighting facilities, rehabilitating them or reconstructing them. There is thus no automatic Type II exemption for this purchase.

To reiterate, pursuant to 6 NYCRR §617.2(b)(2)(3) the purchase of the streetlighting fixtures and their transfer from O&R to the Town may impact the environment as the Town may have different ideas for what lights to put in the streetlight fixtures or what streetlighting systems to use (including ones that emit microwave radiation), as suggested by NYPA, so the purchase is actionable under SEQRA.

POINT 3

THE TOWN'S PURCHASE OF THE STREETLIGHTING FIXTURES FROM THE ELECTRIC UTILITY AND ITS RESOLUTION AUTHORIZING SAME CONSTITUTED UNLAWFUL SEGMENTATION.

The purchase and sale of the lighting fixtures would not be exempt even if they met the narrow definition of equipment, furnishings and supplies because the declaration by the Town of this contract as a Type II exempted action runs afoul of 6 NYCRR §617.3(g)(1):

> *Considering only a part or segment of an action is contrary to the intent of SEQR*

This is because the purchase of the fixtures is in contemplation of a companion contract to be determined in the future to purchase lights to go into the fixtures as well as it now appears some type of wireless control system. It is inappropriate for the Town to consider the purchases of the streetlight fixtures apart from what will go into them. What the Town has done constitutes **unlawful or improper segmentation**.

This Court has held that a municipality cannot break down a project into piecemeal stages and pretend as if the parts do not equal a whole and thus avoid a holistic environmental review. See: *Maidman v. Inc. Vill. of Sands Point*, 291 A.D.2d 499, 738 N.Y.S.2d 362 (2002).

> Segmentation occurs when "the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated, needing individual determinations of significance" (*Matter of Teich v. Buchheit,* 221 A.D.2d 452, 453; , 633 N.Y.S.2d 805 6 NYCRR 617.2[gg]). *The regulations which prohibit segmentation are "designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review*" ****
>
> (Emphasis added)

Id. 291 A.D. at 501

See also: the New York State Department of Environmental Conservation's ("NYSDEC") SEQR handbook at page 54[6]:

> All known or reasonably anticipated phases of a project should be considered in the determination of significance. If later phases are uncertain as to design or timing, their likely environmental significance can still be examined as part of the whole action by considering the potential impacts of total build-out

Here, it was reasonable to anticipate (especially considering documents that have emerged from the NYPA kick-off which included advising the Town to buy the streetlights from O&R and to purchase a streetlighting system from NYPA that would include a wireless accompaniment to the streetlight fixtures, that another phase was contemplated. Parts of projects examined individually may not rise to the threshold of necessitating environmental review pursuant to *Maidman v. Inc.*

[6] NYSDEC SEQR HANDBOOK
https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf

Vill. of Sands Point, supra, when a holistic review of the whole project would reach that threshold.

The Court of Appeals itself also held in *Matter of Save the Pine Bush, Inc., et al v. City of Albany et al.*, 70 N.Y.2d 193, 512 N.E.2d 526 (1987) that

> ... when an action with potential adverse effects on the environment is part of an integrated project designed to balance conflicting environmental goals within a subsection of a municipality that is ecologically unique, the potential cumulative impact of other proposed or pending projects must be considered pursuant to SEQRA before the action may be approved.
>
> (Emphasis added)

518 N.Y.S 2d at 944-945

Fort Montgomery, which is the portion of the Town that the Town has control of the lights over (the Village of Highland Falls, which is within the Town, has its own government that controls the lights in that municipality) is ensconced in the Palisades Park. Bright blue-white LED lights affect flora and fauna (as well as humans) as described in Petitioner-Appellant's various submissions to the Town Board. Blue-white LED lights were suggested in NYPA's "kick-off" meeting with the Town in December 2019.

Any change to an overall lighting system needs environmental review and would be a Type I, not a Type II action. The lights/lighting system themselves need to be considered in the site-specific context of the installation of the lights in

an environmentally sensitive area. It would be arbitrary and capricious to install certain lights in sensitive areas pursuant to *Town of Bedford v. White*, 204 A.D.2d 557, 611 N.Y.S.2d 920 (2nd Dep't: 1994) even if the item installed itself is deemed to be benign (here- the common traffic light, which doesn't have the type of brightness and reach of a Blue-White LED light, and is thought of as benign):

> Contrary to the DOT's assertion, the proposed action does not fit "squarely" within the criteria… * * * as a Type II action. *This statute specifically requires that the installation of traffic control devices must "not violate any of the criteria contained in subdivision (d) of this section", and those criteria in subdivision (d) include the criterion that there be "no effect on any district, site * * * that is listed, or may be eligible for listing, on the National Register of Historic Places*" ****. *The criteria for what constitutes a Type II action cannot be considered in a vacuum***.** Given the circumstances of this case, consideration should have been given to environmental concerns associated with the proposed action. Accordingly, the DOT's failure to identify and discuss environmental concerns was correctly viewed by the Supreme Court as improper. *Thus, we agree that the DOT's classification of the proposed action as a Type II action was arbitrary and capricious* * * * *
>
> (Emphases added)

Id. 204 A.D.2d at 559

This is very relevant because the environs are a forested and ecologically unique area along the Hudson River and adjacent to the Palisades Interstate Park Commission lands. And even though there was absolutely no specific lights or lights system selected or mandated by any Board vote or even contemplated in the MSCRA/ATP text, the fact that NYPA is now suggesting it as part of an ultimate

system further underscores that the component parts need to be considered together- any wireless component to an eventual system, the choice of lights and the purchase of the fixtures. A wireless system, just like blue-white LED lights, would also be inappropriate in a forested environment.

There is also nothing in the ATP/MSCRA that states that the Town of Highlands cannot buy safer orange LED lights from another vendor and have NYPA design a project around them whereby they ultimately maintain a system for them or simply cease follow through on doing business with NYPA.

Blue-White streetlighting system would not qualify for other exceptions from environmental review under 6 NYCRR §617.5(c) such as

> (c)(1) maintenance or repair involving no substantial changes in an existing structure of a facility

(*The future potential changes in total as described are great, involve brighter illumination and potentially a wireless emissions component*) or

> (c)(2) replacement, rehabilitation or reconstruction of a facility….

(*Any replacement of the lights would not constitute just switching out like for like supplies but involve a system with environmental effects.*)

Furthermore, under the definitions of Type I actions, any LED streetlighting system would qualify; the other alternative is that the system would

be "unlisted" which would still require a review to determine if there is an environmental impact. The lighting from LED lights encompasses a wider area than the sodium and mercury vapor lights; the total illuminated area would exceed 10 acres for a Type 1 action pursuant to 6 NYCRR §617.4(b)(6)(i) and unlisted actions need only meet 25% of the Type 1 threshold and apply Type I rules when parkland is adjacent, which is the case in the Town of Highlands. (See: 6 NYCRR §617.4(b)(9)(10)). In any event, it is certainly not Type II.

Municipalities may not mistype actions to avoid taking a hard look at the environmental consequences of them pursuant to *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 502 N.E.2d 176 (1986). That appears to be what the Town has done here by mistyping the fixtures as Type II without doing a coordinated review of an entire system to say nothing of the hard look.

The streetlights fixtures are the first of a series of contracts the Town is trying to approve piecemeal and this purchase may have an effect on the environment, especially if the Town is going to choose blue-white LED lights to put into them and/or a wireless control system. (Streetlight Fixtures also do not meet the Type II furniture, equipment and supplies exception, the Type II maintenance or repair exception or the Type II replacement, rehabilitation or reconstruction exceptions pursuant to Point II above).

POINT 4

PETITIONER DEMONSTRATED SUFFICIENT STANDING TO BRING THIS CASE.

The lower Court was wrong to say Petitioner-Appellant lacked standing. One of the schemes being discussed includes a wireless component to add to the fixtures and a possible so-called "smart city" which is akin to turning the streetlight fixtures into mini cell towers. Petitioner has electromagnetic sensitivity. Any wireless transmission would have an effect on Petitioner-Appellant's ability to access public rights of way including, but not limited to those reaching her house.

There is currently litigation on the issue of wireless transmissions in neighborhoods by parties who allege they are harmed by it such as *Eisenstecken et al.*, v. *the Tahoe Regional Planning Agency et al.*, ED California, 2:20-cv-02349. The United States Access Board, a federal agency, has recognized electromagnetic hypersensitivity as a disability since 2002[7].

[7] Federal Register/ Vol. 67, No. 170/ Tuesday, September 3, 2002/ Rules and Regulations in which the Access Board's entry is listed as 36 CFR Part 1191 [Docket No. 98-5] RIN 3014-AA16 Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Recreation Facilities; Action: Final Rule, Page 56353 :

> "The Board Recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits life activities."

It has also been recognized to exist in at least two federal courts. See: *Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018 (10th Cir. 2012) and *G. v. Fay School*, 282 F.Supp.3d 381 (2017).

Petitioner-Appellant's briefing book established that dimmable LED lights create high frequency transients on the wiring; these are issues that particularly afflict electromagnetically sensitive people, whom the federal government also recognizes as being afflicted by photosensitivity (light comprises electromagnetic waves.) R1126. The more blue-light content in the LED light, the more it would be an irritant to her. Exposure to blue-white LED light reduces melatonin levels, something that is implicated in poor sleep (and something that the federal government recognizes afflicts electromagnetically sensitive people when exposed to electromagnetic field emissions). (R1126, R1129)

Petitioner-Appellant also enjoys walking at night, so that activity would be precluded by having overly bright lights and any wireless transmission on electric poles. Petitioner-Appellant also cited to studies regarding blue-white light and their effects on heart patients in a hospital; one known symptom of electromagnetic sensitivity includes heart rate changes, which would suggest that the neighborhood streetlights should be as environmentally friendly to accommodate all. With regarding to walking at night, Petitioner represented as follows:

> With regard to the lights themselves, I used to walk in the neighborhood at night before the Pandemic) and don't need the whole neighborhood to be lit up to the point where it is so bright, it is too irritating to walk.
>
> Petitioner's Affidavit in Support of Request for Preliminary Injunction, affidavit §17: (R0905)

Brummel v. Town of North Hempstead Town Bd., 145 A.D.3d 880, 43 N.Y.S.3d 495 (2016) speaks to the instant situation:

> "[I]n land-use and environmental cases, '*a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing ... to challenge government actions that threaten that resource*'" ****
>
> (*Emphasis added)*

Id. 145 A.D.3d at 882

There is nothing speculative about Petitioner-Appellant's use of the resource- the outdoor environment - for evening exercise.

Ultimately, New York State's highest court has ruled that standing should not be such a restrictive test to insulate a municipality from review. See *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 43 N.E.3d 745 (2015).

> …."This Court recognize[s] ... that standing rules should not be 'heavy-handed,' and [has] declared that we are 'reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action
> from judicial review. * * * *That result would effectively insulate the [municipality's] actions from any review and thereby run afoul of our pronouncement that the standing rule should not be so restrictive as to avoid judicial review."

> Thus, [Petitioner's] allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, would be sufficient to confer standing….

Id. 26 N.Y.3d at 311

Here the Town of Highlands would like to similarly escape judicial review of its improper determination. Petitioner-Appellant met standing thresholds due to her allegations of enjoying the outdoors at night, when she generally exercises, unlike most people, and due to her allegations of environmental sensitivities, which she need not need prove herein, as she has alleged to the standard of *Sierra Club v. Village of Painted Post,* supra.

POINT 5

REGARDLESS OF WHETHER THE PETITIONER DEMONSTRATED SUFFICIENT STANDING TO BRING THIS CASE TO CHALLENGE THE TOWN'S PURCHASE OF STREETLIGHTING FIXTURES FROM THE ELECTRIC UTILITY, SUPREME COURT SHOULD NOT HAVE FOUND THAT NYPA'S INDEPENDENT SEQRA DETERMINATION ABOUT ITS OWN PURCHASE OF A STOCK OF LED LIGHTBULBS (THAT OCCURRED PRIOR TO CONDUCTING LIGHTING-RELATED BUSINESS WITH THE TOWN) WAS BINDING UPON THE TOWN.

Pursuant to 6 NYCRR §617.5(b), "No agency is bound by an action on another agency's Type II list." The Town has not even done a SEQRA review of the lights…. because again, no action has been taken with regard to lights or a lighting system. And certainly, there is no *res judicata* with what NYPA previously determined about any specific lights it may in the future offer to sell the Town of Highlands. It made its own internal determination that these light bulbs were Type II prior to even discussing a consulting arrangement with the Town of Highlands. The Town was not party to any previous independent SEQR determinations by NYPA of individual component parts of some yet to be defined suggested offering of a specific lighting system.

Not only is NYPA's independent and prior activity not binding upon the Town, but the Town is in fact *obligated* to come up with its own determination with regard to a subsequent purchase of lights and/or lighting systems and in fact

would have to be lead agency in a SEQR review or any lights and lighting systems purchase as NYPA is not the agency with local knowledge of how the lights would be distributed in this specific forested environment. See: *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625, 773 N.Y.S.2d 224 (Sup. Ct. 2004):

> Respondents' contention that the Planning Board had the most direct authority to approve the permit for the helipad is mistaken. Only the Common Council had that power ****….. To the extent it is claimed that the Common Council and the Planning Board conducted a coordinated environmental review, the failure of the Common Council to act as lead agency and conduct a public hearing to address environmental issues requires that its approval of the helipad be nullified.

Id. 3 Misc.3d at 630.

Brander v. Town of Warren Town Bd., 18 Misc. 3d 477, 847 N.Y.S.2d 450 (Sup. Ct. 2007) also stands for the proposition that the Town cannot delegate SEQR reviews it is supposed to do to *other* entities:

> *Although a lead agency* without environmental expertise to evaluate a project *may rely on outside sources and the advice of others in performing its function, it must exercise its critical judgment… By so delegating, the planning board failed to take the requisite hard look at an area of environmental concern and the board's actions are annulled…*
>
> ...Inasmuch as the Town of Warren Board, as lead agency, *failed to properly evaluate and analyze sufficient and acceptable alternatives to the project*, improperly relied upon plans for future mitigation *and improperly delegated its SEQRA duties to other agencies*, *the board failed to take the requisite*

> *hard look at potential environmental impacts*. Consequently, this Court finds that [the decision] was arbitrary, capricious and an abuse of discretion
>
> (Emphasis added)

Id. 847 N.Y.S. 2d at 485

The Town must judge for itself if these lights are safe and may not depend on NYPA's previous internal designation of "no effect" (which again has no *res judicata* to the Town since NYPA decided this long before dealing with the Town and with regard to its own internal purchase of "supplies"). The entity principally responsible for *approving* the project, the Town, has the responsibility and authority to conduct a SEQR review.

In addition to a future SEQR determination about the safety of the actual lights themselves (or a combined system with a wireless or other control mechanism) (with or without a coordinated review of the purchase of the streetlights fixtures), the Town would have to perform an evaluation under SEQR of the rollout of the lights/ lighting system in a site-specific context.

Again, *Town of Bedford v. White*, supra suggests that even if the item installed itself is deemed to be benign (in that case- the common traffic light in the context of an historic district), *"The criteria for what constitutes a Type II action cannot be considered in a vacuum"* Id. 204 A.D.2d at 559. In other words, the

rollout of different types of lights in an area nestled in a State Park along the Hudson River must be considered and this is something that the Town must determine as lead agency- not NYPA, and certainly not before any specific action has been taken!

Chinese Staff & Workers Ass'n v. City of New York, supra also stands for the proposition that the threshold for review is low: "*it need only be demonstrated that the action may have a significant effect on the environment*." Id. 68 N.Y.2d at 365 and that a significant effect on the environment may be found if a proposed project impairs *"the character or quality of * * * existing community or neighborhood character*" Id. 68 N.Y.2d at 367.

This is certainly relevant to the rollout of blue-white streetlights in an area nestled in a State Park, again something to be determined in the future when there is a specific action to be analyzed, and as Petitioner-Appellant has argued, in tandem with the purchase of the streetlighting fixtures.

Besides the fact that the Town is not bound to another agency's Type II list pursuant to 6 NYCRR §617.5(b) (and the fact that *res judicata* does not apply and NYPA and the Town cannot imagine some kind of SEQRA determination before an action has been taken (or even been selected to be voted upon) and in fact the Town itself made no SEQRA determination about the future purchase of as yet-to-

be-determined lights and a lighting control system), a Town cannot make up a Type II designation list that violates the strictures of 6 NYCRR §617.5(b)(1)(2):

> (1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part; and
> (2) not be a Type I action as defined in section 617.4 of this Part.

Any future lights scheme could qualify as a Type I action, because it could have a significantly adverse effect upon the environment and would implicate 6 NYCRR §617.4(b)(6)(i) (alteration of more than 10 acres) among other provisions. It would not get a Type II designation because 6 NYCRR §617.7(c)(1)(3) gives specific criteria for when a project has a significantly adverse effect upon the environment. Ones that are applicable to LED lights include:

> (c)(1)
>
> > (ii)….substantial interference with the movement of any resident or migratory fish or wildlife species: impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources….
> > (iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;
> > (v) the impairment of the character or quality of important historical, archaeological or architectural. or aesthetic resources or of existing community or neighborhood character;
> > (vi) a major change in the use of either the quantity or type of energy;
> > (vii) the creation of a hazard to human health;

xi) changes in two or more elements of the environment. no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment;

(c)(3) The significance of a likely consequence (i.e., whether it is material, substantial, large or important) should be assessed in connection with:

(i) its setting (e.g.. urban or rural;
(iii) its duration:
(iv) its irreversibility
(v) its geographic scope
(vi) its magnitude: and
(vii) the number of people affected.

The chronic exposure to blue white light at night which is not natural and is linked to serious health consequences is a long-duration problem of great magnitude that will affect the entire town as these lights will be outside many people's windows and illuminate their property where it was not illuminated before.

The issue of setting and irreversibility is patently obvious. So too is the duration of the problem as well as the fact that Blue-White lights are totally incompatible with the environment and are especially inappropriate for a rural area around state park land. (R0037-R0342) There would obviously be a major change in the use and type of energy being emitted by different types of bulbs; LED lighting is brighter and sharper than vapor lighting. The effects on wildlife and on humans were presented to the board. The color-temperature and intensity of the light involve major changes that have a substantial effect on the environment. At a

minimum, SEQRA case law supports the use of the Precautionary Principle before letting the technology genie out of the bag[8].

To reiterate, the Town has selected no lights and no lighting scheme and is bound to none, and no review has yet been conducted of any hypothetical future decision, which still would need to be brought to a vote; any coordinated, non-segmented review of the streetlights/streetlighting system would have to involve consideration of the aforementioned.

Such review must be done by the Town when it actually takes an action. Contrary to Supreme Court's ruling, such review cannot be deemed to have occurred ahead of time via whatever decision NYPA made independent of the Town (and before it even started talking to the Town about doing business regarding lighting and with regard to the lights only- not their rollout in a site-specific context).

[8] See esp.: *Joint Petition of Williams Field Servs. Co., LLC, Williams Partners, L.P., Dmp New York, Inc., & the Williams Companies, Inc., for A Declaratory Ruling Regarding Application of Section 70 of the New York Pub. Law., No. 18-G-0330*, 2018 WL 3817927 (July 17, 2018) as well as McKinney's commentary on ECL §27-0707, "*the village "did not need to wait for actual harm to occur" -- a fundamental precautionary principle underlying environmental protection*." See also R1116-1225.

CONCLUSION

WHEREFORE, it is requested the appeal contained herein be granted in its entirety and the Decision and Order be reversed and relief requested be granted in its entirety, including costs of this appeal, and lower court filing, printing and service costs, together with any other further relief this Court may deem just and proper.

Dated: Fort Montgomery, NY 10922
July 2, 2022

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New York Supreme Court
Appellate-Division – Second Department

In the Matter of the Application of

DEBORAH KOPALD
Petitioner-Appellant

For a Judgment pursuant to Article 78

-against-

THE TOWN OF HIGHLANDS, NEW YORK
THE NEW YORK POWER AUTHORITY,
Respondents-Respondents

ORANGE AND ROCKLAND UTILITIES, INC.
Respondent

Statement Pursuant to CPLR section § 5531

1. The index number of this case in the court below is EF004088-2020. The Docket number of this case is 2021-01543.
2. The full names of the original parties to this special proceeding are set forth in the caption above. There has been no change.
3. This special proceeding was commenced in Supreme Court, Orange County.
4. This special proceeding was initiated by the filing of a Petition and Notice of Petition on July 31, 2020. Respondents-Respondents, THE TOWN OF HIGHLANDS, NEW YORK and ORANGE answered around September

29, 2020 AND THE NEW YORK POWER AUTHORITY answered on or about October 2, 2020. ORANGE AND ROCKLAND UTILITIES, INC. never answered the petition.

5. This special proceeding was filed to overturn a Type II designation for the purchase of light fixtures. The decision and order denying same was entered on or about January 26, 2021.
6. This appeal is made on a full record.

PRINTING SPECIFICATION STATEMENT

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