

Supreme Court, Orange County — Index No. EF004088-2020

Supreme Court of the State of New York
Appellate Division: Second Department

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In the Matter of the Application of

DEBORAH KOPALD,

Petitioner-Appellant,

For a Judgment pursuant to Article 78

-against-

Docket No.: 2021-01543

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

Respondents-Respondents,

ORANGE AND ROCKLAND UTILITIES, INC.,

Respondent.

BRIEF OF RESPONDENT NEW YORK POWER AUTHORITY

Of Counsel:
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Dated: August 15, 2022

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COUNTER QUESTIONS PRESENTED

1. Whether Petitioner’s SEQRA challenge to the Authorization to Proceed executed by NYPA and the Town is time barred since Petitioner filed her challenge more than four months after the contract was executed?

Yes. The Court below held Petitioner’s challenge to the Authorization to Proceed was time barred. Record on Appeal (“R.”) 10. Specifically, that Court found Petitioner’s challenge was filed more than ten months after the Town executed the Authorization to Proceed, well in excess of the applicable four-month statute of limitations. Id.

2. Whether Petitioner lacks standing to challenge the Authorization to Proceed?

Yes. The Court below held petitioner failed to “demonstrate an actual and specific injury-in-fact.” R. 9.

COUNTER STATEMENT OF NATURE OF CASE AND FACTS

This brief is submitted on behalf of Respondent-Respondent New York Power Authority (“NYPA”) in opposition to the appeal of Petitioner-Petitioner Deborah Kopald (“Petitioner”) from an order of the Supreme Court, Orange County, entered January 22, 2021, which dismissed Petitioner’s Article 78 proceeding on the grounds, in relevant part to the claims against NYPA and appealed now, that the proceeding was not timely and Petitioner lacked standing. The other Respondents in the case are the Town of Highlands, New York (“Town”) and Orange and Rockland Utilities, Inc. (“O&R”). O&R never appeared in this matter.

NYPA adopts and incorporates by reference the Town’s Statement of Facts contained in its brief. NYPA, however, does wish to add the following:

NYPA is a corporate instrumentality and political subdivision of the State of New York, created pursuant to [Public Authorities Law §§1000-1017](#). R. 1077. NYPA generates, transmits, and sells electric power and energy, principally at wholesale, to industries, municipalities, and electric cooperatives, and to utilities for resale to their customers throughout New York. Id. NYPA finances its operations, including its operation of sixteen generating facilities and 1,400 circuit miles of transmission lines, through the sale of bonds and revenues earned largely

through the sale of electricity. Id. NYPA does not use New York State tax money or state credit. Id.

Since 1994, NYPA provided energy efficiency programs to county and municipal governments. Id. NYPA's programs provide energy-efficiency improvements, with no up-front costs, to government facilities and public schools. Id.

NYPA's Smart Street Lighting Program seeks to replace at least 500,000 streetlights with energy-efficient LED technology by 2025. R. 1078. Through this Program, NYPA contracts with local municipalities throughout New York State to offer a turnkey proposal to upgrade the municipalities' existing streetlight system to energy efficient LED streetlights. Id. The upgrade to the LED streetlights offers individual municipalities significant costs savings in both energy and maintenance costs. Id. NYPA initially finances each Project, so the individual communities do not incur upfront out of pocket costs to implement Projects. Id. NYPA has commitments to replace 300,000 streetlights and successfully installed 100,000 streetlights two years into this program. Id.

The mere replacement of light fixtures is classified as a Type II action, and SEQR is satisfied with no further action. R. 1074. This treatment is thoroughly consistent with NYPA's thirty-year history in its involvement in the replacement of inefficient light fixtures, first with fluorescent lights and now, as

the technology has evolved, with LED lights. *Id.* There have been no deleterious health effects with these installations. *Id.*

On this appeal, Petitioner challenges the Town of Highlands Street Light Replacement Project (“Project”) that seeks to replace the existing light fixtures with energy efficient LED lights.

On April 8, 2019, NYPA presented its proposal to the Town at a public forum. R. 1078, 1003-07. Specifically, the Project contemplated the Town would realize estimated yearly electricity costs savings of \$25,545 along with reduced maintenance costs. R. 1078. NYPA’s proposal set the entire cost of the replacement of the current inefficient streetlights, including the purchase of the current streetlights by the Town from O&R, at \$169,784, and that entire amount would be financed through NYPA’s project financing package. R. 1078-79.

In July 2019, NYPA and Town entered into a Master Cost Recovery Agreement (“MCRA”), effective July 23, 2019. R. 1079, 1013-1048. MCRA sets out the general framework for the responsibilities of both parties in terms of any project specific energy services measure. R. 1079. MCRA does not specifically contemplate any particular energy services project, including the Town of Highlands Street Light Replacement Project. *Id.* As such, the MCRA is classified as a Type II action and SEQR is satisfied with no further action. *Id.*

On September 24, 2019, the Town signed an Authorization to Proceed with the Project. R. 1079, 1050-51. The Authorization to Proceed allowed 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.” R. 1050. The Authorization to Proceed contemplated once that process was completed the Town would “receive an Initial Customer Installation Commitment (ICIC) for [the Town’s] review and signature.” Id. Thereafter, the Town could “choose to proceed to project implementation” or “decide not to proceed with the implementation.” Id. This language is consistent with the MCRA. See R. 1020 (“For each Project undertaken under this Master Agreement, the parties will enter into one or more CPCs [Customer Project Commitment], each of which will state the specific terms and conditions applicable to each Project, segregating the Project into logical phases to be performed consecutively. Each CPC will include, at a minimum, the phasing plan setting forth how the Project will proceed, the location of Customer’s Facility, scope of Work, (including description of milestones, if any), projected Total Reimbursement Costs, and payment terms”).

After the execution of the Authorization to Proceed, NYPA assigned this Project to one of its Implementation Contractors, Guth DeGonzo Consulting Engineers, a firm selected by NYPA after a competitive bidding process. R. 1073.

Guth DeGonzo completed a draft 90% design of the Project. Id. While the Project design contains an allowance for a \$20,000 Smart City Grant that would permit the installation of technologies (e.g., cameras, Wi-Fi hotspots, weather sensors), Town did not apply for that grant, and the Project, at the 90% design phase, did not contemplate such further installations. R. 1073-74.

PROCEEDINGS BELOW

In her verified petition, Petitioner sought wide-ranging relief as she contested the Town of Highlands Street Light Program, including an order that NYPA be required to put out a competitive bid that included considerations for the color temperature of the lights. R. 18. Petitioner asserted three causes of action against NYPA. Specifically, Petitioner asserted that NYPA violated SEQRA for the LED lights, NYPA acted in excess of jurisdiction by putting lights out to bid without engaging in a SEQR review, and NYPA acted arbitrarily and capriciously by refusing to issue a bid for non blue-white lights. R. 31-32. (Second, Fifth, and Sixth Causes of Action). NYPA answered, along with the Town, and opposed the relief sought by Petitioner.

On January 22, 2021, the lower court issued a decision and order dismissing Petitioner's petition in its entirety. In addition to finding that the Petitioner lacked standing (R. 8), the Court also found that Petitioner's challenge to the Authorization to Proceed was untimely, citing [CPLR § 217](#), since the proceeding

was commenced more than four months after the Town signed the contract¹. R. 10.

ARGUMENT

POINT I

PETITIONER’S CHALLENGE TO THE AUTHORIZATION TO PROCEED IS TIME BARRED

Petitioner challenges that portion of the decision below that found that her challenge to the Authorization to Proceed was untimely.

It is clear that the lower court’s decision that Petitioner’s challenge to the Authorization to Proceed was untimely is correct. [CPLR § 217, R. 9; Best Payphones, Inc. v. Dep’t of Information Tech. & Telecomms. of the City of N.Y., 5 N.Y.3d 30, 34 \(2005\)](#) (“An article 78 proceeding must be brought ‘within four months after the determination to be reviewed becomes final and binding upon the petitioner’”); see also, [Matter of Young v. Board of Trustees of Vil. of Blasdell, 89](#)

¹ The lower court also found that Petitioner’s challenge to the “propriety of NYPA’s bid for the streetlight fixtures themselves” was untimely. R. 10. The Court further found that NYPA’s determination that the Project was a Type II action was not arbitrary and capricious. R. 11-12. Petitioner does not challenge these portions of the lower court’s decision on this appeal. See Petitioner’s Brief on Appeal (“Pt. Brief”), filed on July 15, 2022, pp. 1-2.

[N.Y.2d 846, 848 \(1996\)](#) (“the four-month Statute of Limitations applicable to allegations of SEQRA violations applies”).

It cannot be disputed that Petitioner, who filed her notice of petition and petition on July 31, 2020, was well beyond the applicable four-month statute of limitations to challenge the Authorization to Proceed, signed by the Town on September 24, 2019 and by NYPA on October 3, 2019, or the earlier executed MCRA, signed by both parties on July 23, 2019. R. 15-34; 1150-1; 1009-1048. Her challenge to these agreements is clearly time-barred.

Petitioner argues that “this ruling must be overturned so she can continue to challenge future phases of any LED lighting purchases and decisions by the Town.” Pt. Brief, p. 14. These concerns however cannot revive her otherwise stale challenges to the agreements executed by the Town and NYPA.

The MCRA describes the general framework for any particular energy services project that the Town and NYPA may eventually enter into during a 10-year period. R. 1079. As recognized by Petitioner in her brief, the MCRA does not contemplate any specific energy services project, including the replacement of street lights by the Town, and as such, this MCRA is properly classified as a Type II action under SEQR and requires no further action. R. 1079; Pt. Brief p. 14. The Authorization to Proceed, while focusing on the Town of Highlands Street Lights,

similarly does not commit the Town to any specific course of action, a fact recognized by Petitioner in her brief. Pt. Brief p. 14.

Petitioner cannot avoid the plain fact that her challenge to the NYPA Authorization to Proceed was well beyond the relevant four-month statute of limitations and was therefore properly dismissed by the lower court. As such, that portion of the lower court's decision should be upheld by this Court on appeal.

POINT II

PETITIONER LACKS STANDING TO PURSUE HER CLAIMS

NYPA joins in and adopts the arguments made by the Town that Plaintiff lacks standing to pursue her claims.

CONCLUSION

For all the foregoing reasons, the Order dismissing the petition as untimely and that Petitioner lacks standing to pursue her claims should be affirmed.

Dated: White Plains, New York
August 15, 2022

Respectfully submitted,
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STATEMENT CERTIFYING COMPLAINEE WITH PRINTING REQUIREMENTS

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table to contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is, according to the word count tool on Microsoft Word, 1,812.