To be Argued by:
MICHAEL J. MATSLER
(Time Requested: 15 Minutes)

New York Supreme Court

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 of the Civil Practice Law and Rules

– against –

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

Respondents-Respondents,

– and –

ORANGE AND ROCKLAND UTILITIES, INC.,

Respondent.

BRIEF FOR RESPONDENT-RESPONDENT THE TOWN OF HIGHLANDS, NEW YORK

RIDER, WEINER & FRANKEL, P.C.
Attorneys for Respondent-Respondent
The Town of Highlands, New York
655 Little Britain Road
New Windsor, New York 12553
(845) 562-9100
mmatsler@riderweiner.com

Orange County Clerk's Index No. EF004088/20

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

QUESTIONS PRESENTED

1. Did Respondent Town of Highlands violate SEQRA, as alleged by Petitioner in her First Cause of Action, by designating as a Type II action the purchase of existing street lighting equipment and fixtures from Orange & Rockland Utilities, Inc. in its Resolution of April 27, 2020?

Answer: The lower court correctly ruled that pursuant to the SEQRA regulations in 6 NYCRR §617.5 the purchase of existing street lighting equipment and fixtures is exempt from environmental review and therefore the Respondent Town did not violate SEQRA.

2. Did Respondent Town "proceed in excess of jurisdiction in violation of §7803(2)" as alleged by Petitioner in her Third Cause of Action, by "issuing a resolution allowing for the signing of contracts for LED lights without having proper SEQRA review"?

Answer: It is undisputed that the only resolution referring to LED lights to be furnished by co-Respondent NYPA was adopted on September 23, 2019 authorizing the Town Supervisor to execute the LED lighting contract Authorization to Proceed with NYPA, and accordingly the lower court correctly ruled that the four month statute of limitations barred Appellant's claim, which was filed on July 31, 2020.

3. Did the Respondent Town violate lawful process or act in an arbitrary or capricious manner, as alleged by the Appellant in her Fourth Cause of Action, by adopting its resolution authorizing the purchase of O&R's existing street lighting equipment and fixtures as a Type II action exempt from SEQRA review?

Answer: The lower court correctly ruled that the Respondent Town's resolution and contract with O&R to purchase "168 existing street lighting fixtures and equipment" is a Type II action pursuant to 6 NYCRR 617.5 not subject to SEQRA review and therefore the Town's action was not arbitrary or capricious nor a violation of lawful procedure.

4. Did Appellant allege facts sufficient to plead and prove that the Respondent Town's contract with co-Respondent NYPA to supply LED street light bulbs and fixtures and its contract with O&R to purchase existing street lighting equipment and fixtures would cause direct injury in fact to Appellant different in kind and degree from the public generally such as to confer standing on Appellant?

Answer: The lower court correctly ruled that Appellant lacks standing.

NATURE OF THE CASE

On September 23, 2019 Respondent Town of Highlands, at a public hearing, adopted a resolution authorizing the Town Supervisor to execute an authorization to proceed with a contract with co-Respondent NYPA to implement NYPA's LED street lighting replacement program, over Appellant's objections. (R at 0941). On September 24, 2019, the Town Supervisor signed the NYPA Authorization to Proceed, nominally dated April 5, 2019 which NYPA executed on October 3, 2019. (R 1050-51). On April 27, 2020 Respondent Town adopted a resolution authorizing the Town Supervisor to sign an agreement with Orange & Rockland Utilities, Inc. to purchase 168 existing street lighting fixtures and equipment. (R 0948). The O&R purchase agreement was signed on June 15, 2020. (R 0829).

Appellant filed her Article 78 petition with order to show cause on July 31, 2020 seeking to annul Respondent Town's contract to purchase co-Respondent O&R's existing street lighting fixtures and equipment and Respondent Town's agreement with co-Respondent NYPA to implement the LED light replacement project. Appellant, whose house is in a forested area of the town a mile away from the streetlights along New York State Route 9W, a busy four-lane highway, alleges her night-time walks will be disturbed and that LED lights and electromagnetic radiation are harmful to health. Appellant admits that areas of the town already have LED streetlights installed by O&R.

By Decision and Order filed January 26, 2021 the lower court dismissed the Petition, ruling that Appellant lacked standing, that her attack on Respondent Town's agreement with co-Respondent NYPA for LED lights was time-barred and that the Respondent Town's purchase of O&R's existing street lighting equipment and its NYPA contract is exempt from SEQRA review as Type II actions.

COUNTER-STATEMENT OF THE FACTS

As set forth in the NYPA contract proposal, the LED-light conversion program is a successful state-wide initiative of long standing to replace inefficient and costly streetlights with highly energy-efficient, economical LED lights. (R 1004; Laine Aff. ¶¶10-12, at R 1078). The Smart Street Lighting Program was announced by the New York Governor's office in 2018 to replace public streetlights with energy-and-cost-efficient LED light fixtures. (NYPA Answer ¶25, R 0996). The Appellate Court can take judicial notice of New York State's policy to convert streetlights to LED lighting, under the Governor's Smart Street Lighting NY program, and Governor Kathy Hochul's Press Release dated September 27, 2021 in which she "announced that New York has now replaced more than 286,000 of its streetlights with LED fixtures, surpassing the halfway milestone in the state's goal to replace at last 500,000 streetlights with LED technology by 2025." (See https://www.governor.ny.gov/news/governor-hochul-announces-more-286000-led-streetlights-installed-under-smart-street-lighting). "The street lighting initiative – administered by the New York Power Authority – is improving lighting quality and neighborhood safety while reducing energy and lighting maintenance costs across the entire state…[t]he new LED street lighting fixtures…reduce electric costs, improve safety and save money for local governments." (Id.).

Appellant's attack on Respondent Town's project to install LED public street lights began in the Summer of 2019, as she admits in her Petition (¶2, R 0018; ¶12, R 0029) when she circulated a citizens' petition and voiced her objections at public meetings that summer. (See also Appellant's Brief at 6-7; 9). Appellant stated in her Petition she believed in the summer of 2019 that the Respondent Town had decided to replace the existing street lighting bulbs along Route 9W with "Blue-White color temperature LED lights that were then under consideration and effectively already decided upon as a *fait accompli*…". (See Petition, ¶2, R 0018). Appellant's citizens' petition is referenced in the Town Board meeting minutes of July 8, 2019. (R 0929). Appellant attended the Town Board meeting on September 23, 2019 and was aware the Respondent Town was about to sign the Authorization to Proceed with the NYPA contract and expressed her objections, alleging she had been deceived by the Town. (Petition ¶¶13-14, R 0028-29).

As set forth in the affidavit of Supervisor Livsey, the Town had been studying for several years the cost and energy savings advantages of LED lights. In April 2019 NYPA presented the Town with its proposal to replace the Town's existing street lamps with LED light fixtures. (NYPA Answer ¶¶29-30, R1004). Under the program municipalities can achieve significant savings in the cost of electricity and maintenance, expert advice and assistance from NYPA, and beneficial financing. (NYPA Answer ¶26, R 0996).

At a Town Board meeting in June 2019 Appellant objected to the LED light replacement project (Petition ¶8, R0021) and presented her citizens' petition against the project in July 2019. (Petition ¶12, R0026).

On July 8, 2019 the Town Board authorized Supervisor Mervin Livsey to sign the NYPA Master Cost Recovery Agreement ("MCRA") (Minutes July 8, 2019 at R 0932) to study, develop and implement NYPA's LED lighting project, which was executed by the parties on July 23, 2019. (MCRA R1013-1039).

On September 23, 2019 the Town Board directed Supervisor Livsey to sign the NYPA authorization "to start work on a comprehensive street lighting upgrade." (Minutes, R0941).

The "Authorization to Proceed with turn-key street light project", bearing the nominal date of April 5, 2019, was signed by Supervisor Livsey on September 24, 2019 and by NYPA on October 3, 2019. (R1050-51). It provides:

> Consistent with the Master Cost Recovery Agreement, NYPA provides a turn-key solution to upgrade the Town of Highlands' existing streetlights to energy efficient LED technology. NYPA is pleased to offer these services to replace approximately 167 existing street light fixtures with new high-efficient LED technology.
>
> 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. The cost of developing the design and for bidding the materials and labor will be determined during the next phase. NYPA will be fully transparent through this process and provide complete documentation as to how it determined all project costs.

(R1050).

Thus, it is clear from the NYPA Proposal, the Town Board meeting minutes, Appellant's emails, and the Authorization to Proceed that replacement of the existing Orange & Rockland street light bulbs with LED bulbs was the parties' intent, with the MCRA by its terms governing all specific CPCs. (MCRA §11, R1018-19).

The MCRA as well as the Authorization to Proceed provide that the Town is liable to the NYPA for all costs of the work and services performed regardless whether any individual CPC is executed. (MCRA §§2.1 at R1020; MCRA Ex. A at R1040-42).

In that O&R owned the existing street lighting fixtures, equipment and facilities, by Resolution dated April 27, 2020 the Town Board authorized the Town Supervisor and officials to execute an agreement with O&R for the purchase of approximately 168 existing fixtures at a cost of $30,922. (Resolution, R 0948). The agreement was executed on June 15, 2020. (R 0955). Neither the Resolution nor the Agreement mention LED lighting or any construction activity, contrary to Appellant's numerous statements in her Petition. The April 27, 2020 Resolution and

O&R contract are discrete actions in their own right neither of which require SEQRA approval. (See 6 NYCRR §617.5).

In response to the Respondents' motions to dismiss, Appellant stated she did not seek to annul the ATP and July 2019 NYPA LED light agreement (Appellant's Reply §13, R1085), despite the clear implication that such had been her intent. Appellant's Third Cause of Action attacks the Town's "resolution allowing for the signing of contracts for LED lights." (R0031). Appellant alleged in her Petition that Respondent Town board "passed the Resolution on April 27, 2020 to install Light Emitting Diode ("LED") Streetlights" (Petition ¶3, R 0019-20) and claimed that the Resolution declared "the LED lighting scheme a Type II Action." (Petition ¶16, R0031). The Town's April 2020 Resolution, however, was for the purchase of existing O&R streetlights along Route 9W and did not refer to LED lights, as the lower court observed. (See April 27, 2020 Resolution, R 0948). It is clear Appellant's targets were the NYPA LED light replacement agreement with the Town as well as the O&R purchase agreement.

In her citizens' petition she gave to the Respondent Town board in July 2019, she claimed that O&R was already replacing sodium and mercury vapor lights with blue-white LED bulbs. (Petition ¶12, R 0026).

A description of the existing O&R street lighting equipment is given in the June 2020 purchase contract on page 4. It includes "luminaires, lamps, mast arms, their associated wiring, electrical connections, and appurtenances…" The existing poles are excluded from the sale. (Contract §2.3(a), p. 5, R 0959). In essence, the Town under the O&R contract is purchasing primarily the existing lamp heads containing the bulbs, which are attached to the top of the poles.

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY HELD THAT APPELLANT'S ATTACK ON THE RESPONDENTS' LED PROJECT AGREEMENT WAS UNTIMELY

A close reading of Appellant's statements in her Petition compared to her back-peddling in her appellate brief reveal that her true target is the Town-NYPA LED lighting contract and Authorization to Proceed signed by the Supervisor on September 24, 2019. The lower court so found:

> 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 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. 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 for 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.

(Decision and Order at 4, R 0010).

That Appellant was fully aware of the tardiness of her Petition is betrayed by her insistence, throughout her order to show cause and petition, in re-writing the Town's April 27, 2020 resolution as though it set forth the adoption of the LED street lighting program. In ¶16 of her Petition she alleges, disingenuously:

> During the Pandemic when meetings were not physically attended by the public, the Town voted on a resolution dated April 27, 2020, declaring the LED lighting scheme a Type II Action and voting to sign contracts. They don't explain how they arrived at the decision that the LED streetlights are a Type II action given the controversy, the health and environmental concerns. Exhibit 14 includes the documents released in June to my FOIL. It appears the Town will buy lights from O&R and have NYPA service them.

(Petition ¶16, R 0031). In obtaining the TRO she misrepresented to the lower court that she was seeking to enjoin Respondents "from taking any action in furtherance of the Light Emitting Diode ("LED") streetlighting project approved in the April 27, 2020 Resolution of the Town of Highlands." (R 885). As the lower court noted, the April 2020 resolution and the resulting June 25, 2020 O&R purchase agreement do not mention LED lighting. The lower court reasonably read Appellant's Petition as including an attack on the NYPA-Town agreement.

The NYPA agreement Authorization to Proceed nominally dated April 5, 2019 and signed by Supervisor Livsey on September 24, 2019 provides that the scope of NYPA's contract includes "implementing a comprehensive street lighting upgrade [by] improving the existing streetlights [and] to replace approximately 167 existing streetlight fixtures with new higher efficient LED technology." The agreement further states:

> 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. The cost of developing the design and for bidding the materials and labor will be determined during the next phase. NYPA will be fully transparent through this process and provide complete documentation as to how it determined all project costs.

(R 0926). The lower court's interpretation of the Petition as an attack on the LED lighting project and contract signed July 23, 2019 was reasonable.

An Article 78 Petition challenging a municipal determination or action or alleged failure to comply with SEQRA or other laws must be brought within four months of the date by which the claim accrued, that is, the date the action was taken. CPLR §217; see also Matter of Stengel v. Town of Poughkeepsie Planning Board, 167 A.D.3d 752, 89 N.Y.S.3d 287 (2d Dept. 2018); Matter of Young v. Board of the Village of Blasdell, 89 N.Y.2d 846, 848, 652 N.Y.S.2d 729 (1996).

The lower court properly ruled that her Article 78 claims relating to the NYPA LED project contract dated July 23, 2019 were time-barred.

POINT II

THE PURCHASE OF EXISTING STREETLIGHT FIXTURES AS WELL AS LIGHT BULBS ARE EXEMPT TYPE II ACTION UNDER SEQRA

In adopting Environmental Conservation Law Article 8 the Legislature designated the DEC to define the regulatory framework municipalities are to follow in determining whether a project, private or public, is subject to one or more phases of environmental review. The regulations are found in 6 NYCRR Part 617. Type I actions expressly list frequently occurring activities which on their face impact the environment and therefore trigger at least a mandatory initial determination of applicability and whether an Environmental Impact Statement ("EIS") must be prepared. (See 6 NYCRR 617.4). "Unlisted Actions" are those which, although not specifically identified in the regulations as Type I, nonetheless require, due to their nature, an initial determination of applicability and potentially an EIS. (See 617.2 Definitions).

Type II Actions are set forth in 617.5 and show a common-sense approach to exclude activities which cannot reasonably be claimed to have any deleterious effect on the environment, such as a municipality's purchase of equipment and existing facilities. 6 NYCRR 617.5(a) provides:

> (a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part, except as otherwise provided in this section. These actions have been determined not to have a significant impact on the environment or are otherwise

precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) apply to all agencies.

6 NYCRR 617.5(c) provides in relevant part:

(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, including upgrading buildings to meet building, energy, or fire codes unless such action meets or exceeds any of the thresholds in section 617.4 of this Part;

(3) retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure

* * * *

(27) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;

(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 material;

Both the September 24, 2019 Authorization to Proceed and the NYPA contract dated July 23, 2019 and the June 15, 2020 O&R contract are exempt Type II actions as they contemplate the replacement of existing equipment and fixtures with no construction of new structures or facilities and also fall within the definition

of subsection (c)(3) as retrofitting existing structures to incorporate green infrastructure. See e.g., Matter of Uncle Sam Garages, LLC v. Capital District Transportation Authority, 171 A.D.3d 1260, 97 N.Y.S.3d 776 (3d Dept. 2019); Matter of Chatham Towers v. New York City Police Dept., 901 N.Y.S.2d 898 (Sup., Ct. N.Y. Cty. 2009).

NYPA has been replacing hundreds of thousands of inefficient streetlights under this Program with LED lights throughout New York State with no deleterious health effects. (Hermann Aff. ¶10 at R 1074). The objective of Respondent Town, as explained in the affidavit of Supervisor Mervin Livsey, is to fulfill the Board's duty to the Town's residents to explore ways to reduce energy consumption and to reduce its costs by providing adequate road illumination with energy efficient and cost-effective LED lighting. (R 0998). As found by the lower court, to that end the Town Board adopted the resolution referred to in the Petition to enter into the purchase agreement with O&R for approximately 168 existing street lighting fixtures and equipment, which is a Type II action pursuant to 6 NYCRR 617.5(c)(31) not subject to SEQRA review. The physical work for the project will consist of replacing existing fixtures and light bulbs and adding new pieces of equipment such as control boxes, wiring and LED light bulbs. The conversion to LED lighting is an energy and cost-saving measure for the benefit of the public. Consequently, the

lower court ruled, the determination that this project is a Type II action was proper and was not arbitrary or capricious.

The Court will note that the existing telephone poles are not included in the sale to the Town, which O&R retains ownership. No land is being transferred to the Town. What the Town is buying is simply the existing lightbulbs and their fixtures attached to the poles and related equipment, wiring and hardware. The new LED light bulbs and their fixtures are to be inserted in place of the old light fixtures. (See NYPA contract April 5, 2019; O&R contract June 25, 2020, R 0955).

The substitution of energy-efficient lightbulbs in place of existing inefficient lightbulbs fall within a common-sense reading of the Type II exemptions listed in §615(c) and the Town's decision to enter into the NYPA agreement and the O&R purchase contract was neither arbitrary or capricious, and within its legal powers.

POINT III

THERE CAN BE NO SEGMENTATION WHERE NEITHER OF RESPONDENT'S RESOLUTIONS AND CONTRACTS REQUIRE SEQRA REVIEW

Both the NYPA agreement and the O&R equipment purchase agreement are exempt under §617.5(c). As neither action is subject to SEQRA it follows there can be no wrongful segmentation.

POINT IV

APPELLANT LACKS STANDING

Appellant lacks standing to maintain her Article 78 Petition. In order for a petitioner to have requisite standing to challenge an agency's determination she must plead facts and prove through admissible evidence that she has or will suffer actual, specific injury or harm in fact substantially different in degree or kind from that suffered by the general public at large. See, e.g., Matter of Sheive v. Holley Volunteer Fire Co., Inc., 170 A.D.3d 1589, 95 NYS3d. 700 (4th Dept. 2019); Matter of Kindred v. Monroe County, 119 A.D.3d 1347, 989 N.Y.S.2d 732 (4th Dept. 2014). There is no presumption of standing in a SEQRA challenge. Kindred, supra, 119 A.D.3d at 1348, 989 N.Y.S.2d at 733.

Appellant's self-proclaimed status as an expert and concerned activist and reliance on inadmissible hearsay and speculative opinion, are too conjectural and not sufficient to demonstrate she has or will suffer any actual and specific injury in fact and she therefore lacks standing. See Matter of Propane Gas Association v. New York State, 17 A.D.3d. 915, 793 N.Y.S.2d 601 (2005); Matter of Sierra Club v. Village of Painted Post, 115 A.D.3d 1312, 983 N.Y.S.2d 380 (2014); Matter of Save Our Main Street Buildings, 293 A.D.2d 907, 740 N.Y.S.2d 715 (2002). See also Gasoline Heaven at Commack, Inc. v. Town of Smithtown Town Board, 2013 N.Y.Misc. LEXIS 5748, 2013 NY Slip Op. 33095(U) (Sup. Ct. Suffolk Cty. 2013)

(complaints which relate to increased traffic, light pollution, are not unique to the complainant). As stated by the Second Department in Matter of Long Island Pine Barrens Society, Inc. v. Planning Board, Town of Brookhaven, 213 A.D.2d 484, 485, 623 N.Y.S. 613 (2d Dept. 1995):

> The burden of establishing standing to raise a challenge based on a N.Y. Envtl. Conserv. Law §8 claim rests upon the petitioners who must demonstrate (1) that they will suffer an environmental injury in fact, i.e., an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be promoted or protected by the statute under which the governmental action was taken.

See also Matter of Tuxedo Land Trust, Inc. v Town of Tuxedo, 34 Misc.3d 1235, 950 N.Y.S.2d 611 (Sup. Ct. Orange Cty. 2012).

Appellant alleges, without having offered any objective proof, that she suffers from electromagnetic sensitivity and that her eyes hurt when she stares into blue-white LED light bulbs as opposed to orange or yellow LED lights. She claims that when she goes for her evening stroll along New York State Route 9W, which is a major four-lane commuter highway, over half a mile to a mile from her house, blue-white LED lights will illuminate the road "up to the point where it is so bright it is too irritating to walk." (Appellant's Brief at 19). Appellant presented no admissible proof that LED lights are harmful and her subjective feelings and sensitivities are not competent evidence. She admits that many New York State municipalities have

installed blue LED lighting, and that portions of the Respondent Town are already illuminated with blue-white LED streetlights. (Appellant's Brief at 21 no. 2).

As the lower court stated, Appellant's claims of harmful exposure "are too speculative and conjectural to demonstrate any actual and specific injury-in-fact" and the conditions created by LED streetlights are not unique to Appellant but are shared by the public generally. The lower court's dismissal of the Petition for lack of standing is warranted.

CONCLUSION

As set forth above, the lower court properly ruled that Appellant's Article 78 claims were time-barred; that the determination by the lower court that the project is a Type II action was proper and was not arbitrary or capricious; that the purchase agreement of O&R's equipment was exempt under §617.5(c) and not subject to SEQRA or segmentation; and the lower court's dismissal of the Petition for lack of standing is warranted.

Dated: New Windsor, New York
August 9, 2022

/s/ *Michael J. Matsler*
Michael J. Matsler
Rider, Weiner & Frankel, P.C.
Attorneys for Respondent The Town of Highlands
655 Little Britain Road
New Windsor, New York 12553
Tel.: (845) 562-9100
Fax: (845) 562-9126
mmatsler@riderweiner.com

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