SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President, and COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 2016-0165

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION and LOCKWOOD HILLS, LLC,

Respondents.

REPLY MEMORANDUM OF LAW IN SUPPORT OF STATE RESPONDENTS' MOTION TO DISMISS

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224-0341
(518) 776-2405

NICHOLAS C. BUTTINO
SUSAN L. TAYLOR
Assistant Attorneys General
Of Counsel

Dated: January 19, 2017

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PRELIMINARY STATEMENT

The amended petition is moot. Although petitioners knew about Greenidge's permit application since August 2015, they waited 16 months to seek injunctive relief. By November 3, 2016, when petitioners put Greenidge on notice, the company had already spent millions of dollars. Petitioners knew about the project yet waited more than a year to alert the company to its plans to litigate. The law and equity required petitioners to seek to preserve the status quo months before they did so.

The affidavits submitted with petitioners' response memorandum, which should have accompanied the petition or amended petition, satisfy the Department that petitioners have organizational standing. There is, however, no reason for the court to adopt petitioners' "informational injury" theory of standing, which is both unnecessary and inappropriate in a SEQRA context. Although the affidavits satisfy the Department that petitioners have organizational standing, they go too far. The affidavit of Dr. Gregory Boyer should be excluded. To the extent his affidavit is intended to bolster the claims in the amended petition, it is too late.

ARGUMENT

POINT I

PETITIONERS' CLAIMS ARE MOOT

Petitioners' claims are moot because they allowed Greenidge to spend millions of dollars while petitioners waited months to bring this proceeding. "'Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy[.]'" (*Matter of Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v New York City Landmarks Preserv. Commn*, 2 NY3d 727, 728–29 [2004], quoting *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002].) In cases involving construction projects the court "consider[s] how far

the work has progressed towards completion" and "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation[.]" (*Id.* at 729.) Even an unsuccessful attempt to preserve the status quo puts the builders on notice and can defeat a mootness argument. (*See Matter of Defreestville Area Neighborhood Ass'n, Inc. v Planning Bd. of Town of N. Greenbush*, 16 AD3d 715, 717–18 [3d Dept 2005].)

Here, petitioners waited months to bring this petition while Greenidge spent millions of dollars to further the project. (*See* Affidavit of Dale Irwin ¶¶ 9, 18, 25, 28-29, 32-33.) They made no attempt to preserve the status quo until November 3, 2016 when they served Greenidge. (*See id.* ¶ 8.) Even then, though, the order to show cause by which petitioners brought the proceeding did not seek immediate injunctive relief, instead requesting only that the court grant their injunction *if* they prevail on the merits. Petitioners did not actually move for injunctive relief until December 23, 2016. Either November or December is too late. (*See Matter of Papert v Zoning Bd. of Appeals of the Inc. Vil. of Quogue*, 98 AD3d 581, 582 [2d Dept 2012] [holding an Article 78 claim moot because petitioner failed to move "for a preliminary injunction" even though petitioner filed a petition]). Petitioners should have brought an order to show cause seeking a preliminary injunction at least as early as September 8, 2016, when DEC issued permits. It would be unfair to grant petitioners relief after they bided their time, allowing Greenidge to nearly complete the project.

In arguing against mootness, petitioners misconstrue the law. They cite one trial court decision (*Matter of Allison v New York City Landmarks Preserv. Commn*, 35 Misc 3d 500, 514 [Sup Ct, New York County 2011]) for the proposition that laches cannot apply to an Article 78 petition. However, respondents have not raised laches, and *Allison* does not mention mootness.

(*See id.*) Furthermore, in *Citineighbors* (2 NY3d at 728, 730) the Court of Appeals found an Article 78 challenge to a construction project moot. The builder spent millions of dollars to construct an eight-story building. (*Id.* at 728.) Petitioners challenged the City's certificate of appropriateness, but failed to seek injunctive relief. (*Id.*) In the meantime, the company completed the project, and the Court found the petition moot because petitioners "foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer[.]" (*Id.* at 730.) Mootness is a valid defense to an Article 78 petition and it is appropriate here.

Petitioners' argument that they have not yet suffered a harm from the project also misses the point of the doctrine of mootness. The relevant question is not whether they have suffered a harm, but whether their delay caused Greenidge to suffer a harm. If the court grants the petition, petitioners will have allowed Greenidge to risk millions of dollars, which would have been avoidable if petitioners had put the company on notice promptly. (*See Matter of Kowalczyk v Town of Amsterdam Zoning Bd. of Appeals*, 95 AD3d 1475, 1477 [3d Dept 2012] [finding mootness because "petitioners failed to make sufficient efforts to preserve the status quo and safeguard their rights"].) Under these circumstances, the court should dismiss the amended petition as moot.

POINT II

ALTHOUGH PETITIONERS HAVE ESTABLISHED THEIR STANDING, THEY CANNOT SERVE EXPERT AFFIDAVITS NOT BEFORE THE DEPARTMENT AND AFTER THEY FILED THEIR PETITIONS

The Court Should Not Rule on Petitioners' Claim of an Informational Injury

As set forth in the Department's motion papers, petitioners initially failed to show the harm that they claimed they would suffer, failed to name their members, and failed to submit affidavits. Although petitioners should have submitted their affidavits at the time they filed and served the petitions, the newly submitted sworn statements satisfy the Department that petitioners have organizational standing.

Because petitioners have adequately pleaded their standing under traditional SEQRA standing requirements, the court need not reach the question of whether petitioners suffered an informational injury. No New York court has recognized informational injury and federal courts caution against the doctrine in cases brought under the National Environmental Policy Act (NEPA)—the federal analog to SEQRA. (*See, e.g.*, *Found. on Economic Trends v Lyng*, 943 F2d 79, 84 [DC Cir 1991]; *Atl. States Legal Found. v Babbitt*, 140 F Supp 2d 185, 193 [NDNY 2001]). Applying the doctrine in NEPA and SEQRA cases would relieve petitioners of their obligation to demonstrate injury-in-fact.

Contrary to petitioners' claim, *Matter of Assn. for a Better Long Is., Inc. v NY State Dept. of Envtl. Conservation* (23 NY3d 1, 8-9 [2014]) does not stand for the proposition that New York's highest court recognizes "informational injury" in the context of environmental review statutes like SEQRA and NEPA. (Opp. MOL at 6.) Petitioners rely on a portion of the decision in which the Court of Appeals concluded that petitioners had standing to challenge DEC's alleged failure to comply with procedural requirements in the Environmental Conservation Law and the State Administrative Procedures Act. (*Better Long Is.*, 23 NY3d at 8.) The Court held,

however, that petitioners *lacked* standing to challenge DEC's negative declaration. (*Id.* at 8-9.) *Inc. Vil. of Atl. Beach v Gavalas* (81 NY2d 322, 329 [1993]), on which petitioners also rely, does not address standing. Because petitioners have finally established that they have individual members who are likely to be affected directly by the permit applications, there is no need to find standing based on a doctrine not accepted by any New York court.

The Court Should Not Consider Evidence that Petitioners Failed to Include in the Amended Petition

The court should also not consider the technical portions of the member affidavits and the affidavit of Dr. Gregory Boyer because his affidavit was not before the Department, and because petitioners failed to include this information in their amended petition. They may not submit it now. The Uniform Rules of Trial Courts require Article 78 petitioners to carry their burden of proof when they serve the petition. Under the rules, "[t]he moving party shall serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion." (22 NYCRR 202.8[c].) Rule 202.9 applies Rule 202.8 to special proceedings. (22 NYCRR 202.9 ["Special proceedings shall be commenced and heard in the same manner as motions that have not yet been assigned to a judge as set forth in section 202.8(.)"]) "[B]riefs of the moving party must be served at the time of service of a notice of motion if the moving party elects to serve briefs." (*Sutherland v Glennon*, 157 Misc 2d 547, 549 [Sup Ct, Hamilton County 1993], *appeal dismissed* 209 AD2d 898 [3d Dept 1994].)

The affidavit of Dr. Boyer and the technical portions of the member affidavits violate 22 NYCRR 202.8[c], 202.9 because they constitute additional evidence. The court must decide the merits of the petition based on what petitioners served with the petition and any record that may be submitted by the State. (*See* CPLR 7804(e) [requiring respondents to submit a record with their answer].) Given that submission of the affidavit of Dr. Boyer and the technical portions of

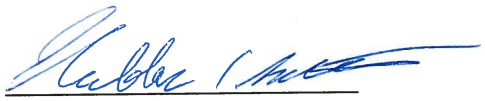
the member affidavits violates the Uniform Rules of Trial Courts, the court should not consider them as evidence now or in the event that respondents answer.

CONCLUSION

For the reasons stated above, the Department requests that the court dismiss the amended petition. If the court denies the motion to dismiss, the Department requests thirty days from service of the notice of entry to answer the amended petition. (*See* CPLR 7804(f) [allowing respondent time to answer if a motion to dismiss is denied].)

Dated: January 19, 2017
Albany, New York

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents

By: 

Nicholas C. Buttino
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224-0341
(518) 776-2406
Nicholas.Buttino@ag.ny.gov