Chenango Val. Cent. Sch. Dist. v Town of Fenton Planning Bd.
2017 NY Slip Op 31820(U)
August 28, 2017
Supreme Court, Broome County
Docket Number: CA2017001388
Judge: Ferris D. Lebous

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the City of Binghamton, New York, on the 2nd day of August, 2017.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

CHENANGO VALLEY CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

TOWN OF FENTON PLANNING BOARD; AND NG ADVANTAGE, LLC,

Respondents.

ORDER, JUDGMENT & DECISION

Index No.: CA2017001388
RJI No.: 2017-0799

In the Matter of the Application of

MAUREEN P. SINGER, LINDA A. BAKER, AJA TOWNLEY, MICHAEL WEAVER, ST. FRANCIS OF ASSISI PARISH,

Petitioners,

For a Judgment Pursuant to CPLR Article 78

-against-

TOWN OF FENTON PLANNING BOARD, TOWN OF FENTON ZONING BOARD OF APPEALS, NG ADVANTAGE LLC,

Respondents.

Index No.: CA2017001383
RJI No.: 2017-0800

APPEARANCES

COUNSEL FOR CHENANGO VALLEY CENTRAL SCHOOL DISTRICT:	TOOHER & BARONE, LLP BY: MEAVE M. TOOHER, ESQ., OF COUNSEL 313 HAMILTON STREET ALBANY, NY 12210
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COUNSEL FOR NG ADVANTAGE, LLC:	STOCKLI SLEVIN & PETERS, LLP BY: MARY ELIZABETH SLEVIN, ESQ., OF COUNSEL 1826 WESTERN AVENUE ALBANY, NY 12203
COUNSEL FOR THE TOWN OF FENTON:	HINMAN, HOWARD & KATTELL, LLP BY: ALBERT J. MILLUS, JR., ESQ., OF COUNSEL 700 SECURITY MUTUAL BUILDING BINGHAMTON, NY 13901

FERRIS D. LEBOUS, J.S.C.

This decision addresses two proceedings involving the same project. Due to the overlapping facts and issues involved in both proceedings the court has elected to issue one decision addressing both matters.

BACKGROUND

A. The Project

The project at issue involves the proposed construction by respondent NG Advantage, LLC (hereinafter "NG") in the Town of Fenton of a natural gas compressor facility at 65, 69 & 93 West Service Road, Binghamton on 5.3 acres in a Limited Industrial Zoning District in the Town of Fenton (the "Project"). The natural gas compressor facility would extract natural gas from the Millennium Pipeline, fill specialized trucks with compressed natural gas up to 4000 psi, and transport the compressed natural gas to customers of NG.

The Project is on West Service Road in the Town of Fenton which is a two way road that runs parallel to Route 88. There are several crossovers that allow local residents to pass over Route 88 and also provide access to Route 88 including, as relevant to this Project, the Phelps Street crossover to the south of the Project and the Route 12A crossover to the north of the Project. Route 12A crosses over Route 88 and continues into the main entrance for the Chenango Valley High School and Middle School complex.

To the immediate south of the Project is Port Dickinson Community Park. An elevated

portion of Route 88 runs through Port Dickinson Community Park. Additionally, the Millennium Pipeline runs underneath the park as well.

B. Town Planning Board timeline

This Project first came to the Planning Board's attention when Richard Armstrong, both the assistant town engineer and a planning board member, advised the Planning Board at the December 2016 meeting that he had been approached by a NG representative. Thereafter, there were four Planning Board meetings at which the Project was formally discussed held on January 31, 2017, March 28, 2017, April 11, 2017, and May 23, 2017.

At the January 31, 2017 Planning Board meeting (Meeting #1), NG attended the meeting and presented a preliminary site plan for a natural gas compressor station, a power point presentation and engaged in a question and answer session with the Planning Board. The minutes from Meeting #1 contain almost two pages of "highlights of Gerry's presentation"[1] followed by some general questions and answers between the Planning Board and NG.[2]

In the next two months it appears Mr. Armstrong, as both assistant town engineer and planning board member, reviewed the EAF-Part 1 dated March 17, 2017, the site plan, the Lease Map, and other submissions. Mr. Armstrong avers that the other members of the Planning Board

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[1]"Gerry" is Gerry Myers, chief operating officer for respondent NG Advantage, LLC.

[2]The Town Attorney advised the court that there are no transcripts of any of the Planning Board meetings due to inaudible tapes.

were not involved in his reviews but that he kept them "advised of developments outside of meetings" (Armstrong Affidavit sworn to July 13, 2017, ¶ 11).[3]

The second Planning Board meeting regarding this Project was held on March 28, 2017 (Meeting #2). The Planning Board and NG conducted a question and answer session but there were no formal votes or actions taken during Meeting #2.[4]

This Project was subject to a General Municipal Law § 239-m review since it was located within 500 feet of "a Municipal Boundary", "State/County Road", "Other Recreation Area" and "a State/County Drainageway/Watercourse" (AR, Vol 3, PB 20).[5] On April 3, 2017, Mr. Armstrong submitted a 239 Review Submission Form to the Broome County Department of Planning and Economic Development pursuant to GML § 239-m. The County had thirty days from receipt to report its recommendations to the referring body, here the Town Planning Board (GML § 239-m [4]).

On April 11, 2017, the Planning Board held its third meeting regarding this Project and

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[3]The Armstrong Affidavits submitted in the two separate proceedings are nearly identical.

[4]The minutes from Meeting #2 reflect the entire meeting, including other business, lasted just over an hour.

[5]The Town's GML 239 application was completed by Mr. Armstrong. The application itself states the Project qualified for a 239 review because it was within 500 feet of each of the four marked categories.

took the following actions (Meeting #3):[6]

> **Following the question and answer/comment session, Mr. Keough made a motion for the Planning Board to assume the role of lead agency for the purposes of the Full Environmental Assessment Form (EAF) for the Fenton Trucking Terminal at 65 West Service Road**, seconded by Mr. Mullins. **Motion carried**.
>
> ***
>
> **Mr. Keough made a motion to declare a Negative Declaration with the belief that the Fenton Trucking Terminal will not have a significant adverse impact on the environment,** seconded by Mr. Aurelio. **Motion carried**.
>
> ***
>
> **Mr. Keough made a motion to approve the site plan dated March 31st, 2017, contingent on the 239 Review coming in affirmative**, seconded by Mr. Aurelio. **Motion carried**.

(AR, Vol 1, Tab 6,[7] pp 2-3 [bold in original; underline added]).

Thus, it was Meeting #3 on April 11, 2017 wherein the Planning Board formally declared itself lead agency, issued a negative declaration, and approved the site plan for this Project, all before receiving the County's GML § 239 report.

On April 13, 2017, two days after Meeting #3, Mr. Armstrong completed and signed

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[6] The entire length of this meeting was 35 minutes.

[7] The Administrative Record will be referred to as "AR". Volume 1 of the Administrative Record contains seven tabs labeled "ZBA Decisions PB Agendas & Minutes 01" et seq. These tabs in Volume 1 will be abbreviated as "Tab 1", et seq.

Parts 2 and 3 of the EAF, which contains the first reference to this Project as an Unlisted action. Another member of the Planning Board, Mr. Eldred signed Parts 2 and 3 of the EAF on April 17, 2017 (Singer Petition, Exhibit E).

On May 16, 2017, the Broome County Department of Planning and Economic Development issued its recommendation pursuant GML§ 239 comprised of a 14 page letter, with attachments. The County's 239 review concluded, in pertinent part, as follows: "[t]he Planning Department has reviewed the [Project] and has determined that the project as submitted would have significant negative county-wide and inter-community impacts within the intent of General Municipal Law Section 239-l as described below and for these reasons *recommends denial of the project as submitted*" (AR,Vol 3, Tab 25 [emphasis added]). The County's 239 recommendation contains detailed areas of concern including noise, air quality, traffic, safety and security, drainage, community facilities, and municipal/county development policies.

On May 23, 2017, one week after receiving the County's 239 recommendation to deny the Project, the Planning Board held its fourth meeting (Meeting #4). The Planning Board voted against the County Recommendation by a vote of a majority plus one pursuant to GML § 239-m (5) as follows:

> **Mr. Armstrong made a motion to rescind the approval of the site plan dated March 31st, 2017, contingent on the 239 Review coming in affirmative, which was made at the Planning Board Meeting on April 11, 2017**, seconded by Mr Randall. **Motion carried**.
>
> With benefit of the 239 Review responses of the applicant and

> input from individuals this evening, **Mr. Armstrong made a motion to approve the site plan**, seconded by Mr Randall. **Motion carried**.

(AR, Vol 1, Tab 7, p 5 [emphasis in original]).

C. **Town Zoning Board of Appeals timeline**

The Town Zoning Board of Appeals (ZBA) held two meetings involving an area variance for this Project.

First, on March 1, 2017, the Town ZBA held a hearing to consider the issuance of an area variance to satisfy a five foot rear set-back issue. By written decision dated March 7, 2017, the ZBA approved the area variance "[i]n accordance with drawings/plans as submitted to the Planning Board conditional through the life of the lease with Boland. The approval is also subject to any further conditions imposed by a 239 l & m and BC Planning or the Town Planning Board" (AR, Vol 1, Tab 1, p 2).

On May 23, 2017, one week after the County 239 issued its negative recommendation and the same day the Planning Board was holding Meeting #4, the Town ZBA held its second meeting described as a "rehearing". The Decision dated May 24, 2017, states the Town ZBA was meeting to address the "[p]rocedural issue raised given the prior decision [was] rendered prior to the completion of the 239 l & m by Broome County Planning" (AR, Vol 1, Tab 2, p 1). The Town ZBA's Decision dated May 24, 2017 approved the area variance "[s]ubject to satisfaction

of the further concerns and requirements cited within the 239 l & m review by BC Planning or those of the Town Planning Board. The Board voted unanimously to classify this as a Type II action under SEQR" (*Id.* at p 2).

D. The Petitions

1. The School District Petition

The first petition was commenced by petitioner Chenango Valley Central School District (hereinafter "the School District") by way of a special proceeding pursuant to Article 78 of the CPLR for a judgment to annul, vacate and void the Planning Board's April 11, 2017 negative declaration of the significance determination under the State Environmental Quality Review Act ("SEQRA") and the Planning Board's site plan approval of May 23, 2017 in relation to said Project.

The School District Petition alleges numerous "counts" including: (I) Article 78 to Nullify the Fenton Planning Board Negative Declaration of Significance for Failure to Comply with the Procedural Requirements of SEQRA; (II) Article 78 to Nullify the Fenton Planning Board Negative Declaration of Significance for Improperly Classifying the Project as an Unlisted Action under SEQRA; (III) Article 78 to Nullify the Fenton Planning Board Negative Declaration of Significance as Arbitrary and Capricious; (IV) Article 78 to Void Planning Board's Completion of Parts 2 and 3 of the Full EAF in Violation of the Open Meetings Law;

(V)[8] Article 78 to Nullify the Fenton Planning Board's Site Plan Approval as Arbitrary and Capricious and Not Based upon Substantial Evidence; and (VI) Article 78 to Void Planning Board's SEQRA Review and Site Plan Approval in Violation of Open Meetings Law; as well as costs, disbursements, and attorney's fees.

On June 27, 2017, this court signed an Order to Show Cause with Temporary Restraining Order enjoining respondents from taking any action pursuant to the May 23, 2017 site plan approval of said Project including, but not limited to site preparation or construction.[9]

2. The Singer Petition

The second Article 78 proceeding was commenced by various petitioners (hereinafter sometimes referred to collectively as the "Singer Petitioners") alleging numerous causes of action including: (1) the Planning Board failed to properly classify the type of action; (2) the Planning Board failed to satisfy its obligations as the lead agency pursuant to SEQR[10]; (3) the Planning Board violated SEQR because it issued a negative declaration without preparing or reviewing the required environmental assessment form; (4) the Planning Board failed to prepare Parts 2 and 3 of the full EAF in a meeting that was open to the public; (5) the Planning Board failed to identify

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[8]The court has numbered the counts consecutively but notes that the counts are misnumbered in the petition.

[9]Prior to executing said Order to Show Cause, the court held an attorney conference on June 27, 2017 with the School District and respondents' attorneys.

[10]The Singer Petitions refers to "SEQR" instead of "SEQRA". The court will use the abbreviation SEQRA.

or take a hard look at the potential adverse environmental impacts; (6) the Planning Board decision should be annulled because the proposed natural gas compressor station does not satisfy the criteria for site plan approval; (7) the Zoning Code limits the uses that are permitted in the L-I Zoning District; and (8) the Planning Board failed to apply the Town of Fenton Aquifer Protect permit requirements and did not issue such a permit, together with costs, disbursements, and attorney's fees per Open Meetings Law § 107.

The court heard oral argument on both petitions from all counsel on August 2, 2017. At the conclusion of the argument, the court continued the Temporary Restraining Order dated June 27, 2017, pending this decision.

DISCUSSION

I. STANDING

A threshold issue raised by respondents in both petitions is whether the named petitioners have standing to bring these proceedings. Generally, "[s]tanding should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules [citation omitted]" (*Matter of Parisella v Town of Fishkill*, 209 AD2d 850, 851 [3d Dept 1994]). Accordingly, "[t]he allegations of a petition are deemed true and construed in the light most favorable to the petitioner to determine whether the petitioner has established standing through averments demonstrating an injury-in-fact which falls within the zone of interests that the relevant statutory provisions seek to protect [citations omitted]" (*Matter of Powers v De Groodt*, 43 AD3d 509, 512-513 [3d Dept 2007]). An "[i]njury-in-fact may arise from the

existence of a presumption established by the allegations demonstrating close proximity to the subject property [citations omitted] or, in the absence of such a presumption, the existence of an actual and specific injury [citations omitted]" (*Powers*, 43 AD3d at 513).

A. The School District Petition (Index No. CA2017001388)

Respondents argue that the School District lacks standing because it is not located close enough to the Project to be entitled to a presumption of an injury-in-fact nor has it demonstrated any actual and specific injury. Respondents contend that the School District's standing allegations are similar to the petitioner that was denied standing based upon only speculative concerns of harm in *Powers*.

This court finds that the School District as petitioner is distinguishable from the petitioner in *Powers*. In *Powers*, standing was denied to a coalition of residents living in the vicinity of a project because the allegations of increased traffic flow and traffic safety concerns were too speculative. Here, the court finds the key distinction from *Powers* is the capacity of the petitioner School District as a public entity entrusted with the safety and well being of hundreds of students as compared to a private coalition of residents in *Powers*. Moreover, petitioner School District has identified a specific location of concern, namely the intersection of Route 12A and Route 88 which is the only point of ingress and egress to and from the school for students, families, and staff that has been the location of several accidents and raises concerns for student arrivals and dismissals, bus routing and emergency responses (Gill Affidavit sworn to June 21, 2017, ¶¶ 10-15). The court notes that these traffic concerns are mirrored in the County's

239 recommendation of denial. Respondents' responses regarding traffic levels and routes per hour are not based upon any traffic study conducted as part of a review for this Project but rather a NYSDOT Roadway Traffic Count Hourly Reports conducted in 2013 (Slevin Affidavit sworn to June 27, 2017, Ex D). In this court's view, the School District's heightened duty to its students combined with the specific identifiable traffic safety concern satisfies the requirement that the injury is in some way different from that of the public at large (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]).

In view of the foregoing, the court finds that petitioner School District has standing to bring this proceeding.

B. The Singer Petition (Index No. CA2017001383)

Respondents argue that each of the Singer Petitioners lack standing due to either lack of proximity to the Project or failure to allege any direct harm distinct from the public at large. The court will address each petitioner individually.

1. Maureen P. Singer

Ms. Singer avers she resides on and also owns a rental property on Fenton Avenue within 700-725 feet from the Project and also owns another rental property on Chenango Street which is within .5 miles of the Project. Ms. Singer also states that she purchased this residence due in part to the accessibility to the Port Dickinson Community Park which her son uses several times a week. The court finds that Ms. Singer has demonstrated standing by way of proximity, as well as

frequent use and enjoyment of the Port Dickinson Community Park (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297 [2009]).

2. St. Francis of Assisi Parish

Petitioner St. Francis of Assisi Parish is a church located at 1049 Chenango Street in the Town of Fenton, approximately 600 feet from the Project. The court finds that St. Francis of Assisi Parish has demonstrated standing by way of proximity.

Since the court has determined that Ms. Singer and St. Francis of Assisi Parish have demonstrated standing, the Singer Petition may proceed without regard to the standing of the remaining petitioners. That said, the court finds it prudent to address their standing as well.

3. Linda A. Baker

Ms. Baker lives on Ivan Lane which is a cul-de-sac that is perpendicular to and leads into West Service Road, approximately one mile from the Project. Ms. Baker avers that the traffic flow is already difficult onto West Service Road particularly at the access ramp for Route 12 and Route 88 which is the interchange the Project trucks will be using. Ms. Baker also avers that she uses Port Dickinson Park for recreational purposes. The court finds that Ms. Baker's residence on a cul-de-sac, with the only roadway access point onto West Service Road, together with her alleged park usage, satisfies the standing requirement that her purported injury is in some way different from that of the public at large.

4. Aja Townley

Ms. Townley lives on Franklin Avenue approximately 1,100 feet from the Project. Ms. Townley states she is concerned with smells and negative visual impact from the Project. Ms. Townley's affidavit repeats many of the same allegations found in the Weaver affidavit. The court finds that Ms. Townley has not satisfied the standing requirement.

5. Michael Weaver

Mr. Weaver lives on 70 Rogers Mountain Way in the Town of Kirkwood approximately 5,000 feet from the Project. Mr. Weaver offers general statements regarding his family's use of the park. Mr. Weaver's affidavit repeats many of the same allegations found in the Townley affidavit. The court finds that Mr. Weaver has not satisfied the standing requirement.

In sum, the court finds that petitioners Maureen P. Singer, St. Francis of Assisi Parish, and Linda A. Baker have satisfied the standing requirement.

II. PRELIMINARY INJUNCTION

With respect to the School District Petition, this proceeding is presented to the court in the context of a motion for a preliminary injunction pursuant to CPLR § 6301 and an Article 78 petition. It is well-settled that the fundamental purpose of a preliminary injunction is not to give a plaintiff the relief sought in the plenary action, but to preserve the status quo and prevent irreparable damage until a decision can be reached on the merits (*Matter of Heisler v Gingras*, 238 AD2d 702 [3d Dept 1997]). To that end, entitlement to a preliminary injunction is premised

upon the demonstration of three factors, namely: (1) a likelihood of ultimate success on the merits; (2) irreparable injury if an injunction is not issued; and (3) an overall balancing of the equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). That said, counsel agreed that this matter is ripe for a determination on the merits of the underlying Article 78 petition.

III. ARTICLE 78

With respect to the Article 78 petitions in the context of both proceedings, a local planning board has broad discretion in deciding applications for site-plan approvals, and "[j]udicial review of an agency determination under SEQRA is limited to determining whether the agency procedures were lawful and 'whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination'" (*Matter of In Defense of Animals v Vassar Coll.*, 121 AD3d 991, 993 [2d Dept 2014], *lv denied* 24 NY3d 914 [2015]; CPLR § 7803 [3]).

The court will address the Planning Board's actions relative to SEQRA raised in both petitions separately from the actions relative to the issue of permitted use raised solely in the Singer Petition.

A. PLANNING BOARD - SEQRA VIOLATIONS

1. SEQRA classification

Petitioners object to the Planning Board's classification of this Project as an Unlisted

action under SEQRA at the May 23, 2017 meeting. Petitioners' objections are based on both the delay in classification as well as the type of classification.

a. Timing of classification

Initially, SEQRA requires that *"as early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application..."* an agency determine whether the action is a Type I, Type II, or an Unlisted action (6 NYCRR § 617.6 [a][1]; emphasis added).

The first reference to classification of this Project is contained in Part 3 of the EAF wherein the Project is listed as an Unlisted action (signed by Mr. Armstrong on April 13, 2017 and Mr. Eldred on April 17, 2017) (Singer Petition, Exhibit E). However, there is no entry in the minutes from any of the first three Planning Board meetings held on January 31, 2017, March 28, 2017 or April 11, 2017 to authorize the completion of this form and/or type of classification. The first reference to the type of classification at a meeting is found in the minutes from the Planning Board's fourth and final meeting of May 23, 2017 as part of a question and answer portion as follows:

> •William Huston - Is this a Type I SEQRA Action? Mr. Eldred replied yes. So you are going to do a full environmental review? Mr. Eldred said it was already done. Mr. Armstrong stated it was a Type II SEQRA Action. (Mr. Armstrong since admits an error here. This is an Unlisted Action and was treated as such).[11]

[11]It appears the sentence in parentheses is an editorial comment contained in the minutes that was not contemporaneous with the meeting.

(AR, Vol 1, Tab 7, p 2).

Clearly, the Planning Board did not classify this Project as early as possible or upon receipt in violation of 6 NYCRR § 617.6 (a)(1).

b. Type of classification

Secondly, petitioners allege that the Planning Board improperly classified the type of this Project as an Unlisted action, instead of a Type I action under 6 NYCRR § 617.2 (b)(6) or (b)(10).[12]

Under SEQRA, an Unlisted action is not defined other than an "Unlisted action means all actions not identified as a Type I or Type II action in this Part..." (6 NYCRR § 617.2 [ak]). A Type I action is defined under 6 NYCRR § 617.4 although the list is not exhaustive (6 NYCRR § 617.2 [ai]). At issue here are the definitions of a Type I action under 6 NYCRR § 617.4 (b)(6)(i) and 6 NYCRR § 617.4 (b)(10).

According to 6 NYCRR § 617.4 (b)(6)(i), "[t]he following actions are Type I if they are to be directly undertaken, funded or approved by an agency:...(6) activities...that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds: (i) a project or action that involves the

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[12]For its part, the Zoning Board of Appeals' decision dated May 24, 2017 states "the Board voted unanimously to classify this as a Type II action under SEQR" .

physical alteration of 10 acres." Here, this Project calls for the disturbance of 5.3 acres. Thus, the level of disturbance here of 5.3 acres is greater than 50 percent of the 10 acre threshold. On this basis alone, this Project qualifies as a Type I action under NYCRR § 617.4 (b)(6)(i) and the Planning Board's failure to conclude as such was arbitrary and capricious and without substantial evidence.

Further, according to 6 NYCRR § 617.4 (b)(10), "[t]he following actions are Type I if they are to be directly undertaken, funded or approved by an agency:...(10) any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or *substantially contiguous* to any publicly owned or operated parkland, recreation area or designated open space...." (emphasis added). The term "substantially contiguous" includes the concepts of "in proximity to" or "near" (*Matter of Lorberbaum v Pearl*, 182 AD2d 897, 900 [3d Dept 1992]).

Here, the record establishes that the Port Dickinson Community Park owned by the Village of Port Dickinson is adjacent to and less than 500 feet from the Project (*Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d 614, 616 [3d Dept 1998], *lv denied* 93 NY2d 803 [1999]). Respondent NG argues that the Park is not substantially contiguous to the Project because the Park and Project are separated by both Route 88 and the Millennium Pipeline. Contrary to these arguments, the record establishes that the portion of Route 88 that passes through the Park is actually an elevated portion of the highway while the Millennium Pipeline is underground. Thus, neither serves as a physical barrier between the Park and the

Project. Moreover, the NYSDEC Handbook directs that "if there is question whether an action is substantially contiguous, it is best to treat it as Type I and proceed with the review" (SEQRA Handbook, p 24 [3d ed 2010]). The court finds that the Project is close enough in proximity to the Park that there could potentially be an impact which satisfies the concept of substantially contiguous under SEQRA (*Id.*). Thus, as a separate and distinct ground, the court finds this Project qualifies as a Type I action under 6 NYCRR § 617.4 (b)(10) and the Planning Board's designation of the Project as an Unlisted action was arbitrary and capricious and without substantial evidence.

For the reasons stated, the court finds that the Planning Board's determination that this Project was an Unlisted action was arbitrary and capricious and without substantial evidence.[13]

2. Lead agency/coordinated review

A "lead agency" is the "[i]nvolved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required" (6 NYCRR § 617.2 [u]).

The Planning Board's first reference to the concept of a lead agency is the following entry

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[13]The court rejects NG's argument that even if the Planning Board was incorrect in stating the Project was an Unlisted action, that the Planning Board sufficiently followed the guidelines for a Type I action. For all the reasons stated herein, the Planning Board failed to satisfy the requirements of a Type I action.

in the March 28th, 2017 meeting minutes: "[t]he Planning Board will probably assume lead agency role, as they will want to be as informed as possible" (AR, Vol 1, Tab 5, p 4). A formal declaration of lead agency declaration was not made until the Planning Board's meeting on April 11, 2017 (at the same time as the issuance of the negative declaration and site plan approval):

> **Following the question and answer/comment session, Mr. Keough made a motion for the Planning Board to assume the role of lead agency for the purposes of the Full Environmental Assessment Form (EAF) for the Fenton Trucking Terminal at 65 West Service Road**, seconded by Mr. Mullins. **Motion carried**.

(AR, Vol 1, Tab 6, p 3).

For Type I actions involving more than one agency (here, Town of Fenton ZBA, NYSDEC, Broome County Department of Planning and Economic Development, Town of Chenango, and Village of Port Dickinson) the lead agency must undertake a coordinated review with the other involved agencies and "[m]ust, as soon as possible, transmit Part 1 of the EAF completed by the project sponsor, or a draft EIS and a copy of any application it has received to all involved agencies and notify them that a lead agency must be agreed upon within 30 calendar days of the date the EAF or draft EIS was transmitted to them" (6 NYCRR § 617.6 [b][3]).

The court finds that the proof is unequivocal that there was no coordinated review by the Planning Board with the other involved agencies. The Planning Board issued its lead agency and negative declaration determinations and site plan approval on April 11, 2017 which was *before* the County's thirty days to issue a GML § 239 recommendation had expired. In and of itself,

these premature determinations demonstrate a lack of coordinated review. Moreover, however, the Planning Board failed to involve the other interested agencies such as the Village of Port Dickinson on the issue of weight limits on Village roads and truck traffic. In fact, the April 11th, 2017 minutes acknowledge that "[t]here has not been any response from the Town of Chenango or the Village of Port Dickinson yet. Also, the other County agencies still have time to respond" (AR, Vol 1, Tab 6, p 2). Nevertheless, later in the same meeting, the Planning Board declared itself lead agency, issued a negative declaration, and approved the site plan, all without input or a coordinated review from any of the involved agencies (AR, Vol 1, Tab 6, p 3).

The court finds that the Planning Board's lead agency determination and failure to conduct a coordinated review were arbitrary and capricious and without substantial evidence.

3. Hard Look

Petitioners allege that the Planning Board failed to take a hard look at potential environmental impacts such as traffic before issuing a negative declaration and site plan approval at the May 23, 2017 meeting.

The court will focus, as have the parties, on the issue of traffic as a relevant area of environmental concern. The court must determine whether the Planning Board took a hard look and made a reasoned elaboration of the basis for their determination (*Matter of Frigault v Town of Richfield Planning Bd.*, 107 AD3d 1347, 1349-1350 [3d Dept 2013]).

Originally, the Project identified two possible routes by which trucks leaving the site would access Route 88. The first option involves trucks exiting the site, traveling south on West Service Road, taking a left onto Phelps Street which travels under Route 88, and then another left onto Route 7 and merge into East Service Road and then onto Route 88. This Phelps Street option is first mentioned in the Planning Board's January 31st, 2017 meeting when NG's representative responded to a board member question by stating that "DOT recommended going down to Phelps Street to return to the highway which currently many of the trucks do" (AR, Vol 1, Tab 4, p 4). The second option involves the trucks exiting the site, traveling north on West Service Road, taking a right onto the Route 12A crossover, a left onto Towpath Road, and merging onto Route 88.

The minutes from the January and March meetings reflect DOT's concerns about the second option of using Route 12A. For instance, the January 31, 2017 meeting contains the following exchange:

> Mr. Standard - You said you already talked to the DOT about this? Yes, initially they thought this was a DOT road but the Site Plan Committee at DOT said that the road was turned over to the Town of Fenton. Their only concern was the bottle-neck issue on Route 12A. Coming down from Albany on Route 88 will be a straight shot onto the Service Road but coming back the other way is going to be more difficult due to some turns that would have to be made. *DOT recommended going down to Phelps Street to return to the highway which currently many of the trucks do.*

(AR, Vol 1, Tab 4, p 4 [emphasis added]).

At the March 28th, 2017 meeting, the minutes reflect the following comments by a NG representative:

> NYSDOT had concerns about the Route 12/12A corridor particularly during the peak hours of the day. It is usually crowded during that time of the day and they did not want a lot of maneuvers being done in that intersection. They did not have any problems with the trucks getting off the highway onto Route 12 to go to the Service Road but they did not recommend the trucks returning via that route to make a left turn onto the highway. *The recommendation was for the trucks to return to the highway by using Phelps Street.*

(AR, Vol 1, Tab 5, p 2 [emphasis added]).

There are no further formal comments in the minutes until the April 11th, 2017 meeting in which the Planning Board issues its negative declaration and site plan approval - prior to receipt of the County's 239 recommendation.

However, on May 16, 2017, the County's 239 recommendation finds that the Phelps Street option was not viable because "[t]he 5-ton weight limit applies and the tankers will not be allowed to enter the Village of Port Dickinson on the West Service Road to enter I-88 east bound at Phelps Street" (AR, Vol 3, Tab 25, p 5 of 14). Based upon the Village's position, the County reported that the NYSDOT changed its opinion of using Phelps Street and stated "[t]he Region will not recommend any routing of vehicles in a manner where they would proceed in violation of traffic regulations, and we strongly advise the applicant to ensure that transportation to and from the site conforms to all traffic laws" (*Id*).

To be clear, the County's 239 recommendation contained the first written notice in the record that the Phelps Street route was no longer a viable option and that Project traffic would have to use the Route 12A alternative in front of the School District's location. The Planning Board meeting on May 23, 2017 contains the following summary from a NG representative regarding traffic:

> •Truck Routes- There is still an outstanding issue with the truck routes. NG Advantage has met with Chenango Valley Superintendent of Schools David Gill but has not met with Village of Port Dickinson Mayor Kevin Burke. Currently there is a weight limit on a road in Port Dickinson which poses a problem for the trucks leaving the project site. Gerry noted that the truck route that was chosen was chosen by the DOT. *Getting into the site seems to be resolved but getting out of the site is the big issue that needs to be resolved*.

(AR, Vol 1, Tab 7, p 4 [emphasis added]).

Immediately following this comment, Planning Board members made the following statements:

> Mr. Mullins - Mr. Mullins asked if NG Advantage could share anything about the routing issue and whether or not the trucks would be using the intersection near Chenango Valley High School. Gerry said that after the Chenango Valley Superintendent and Village of Port Dickinson Mayor made their comments on the routing issue, the DOT said to work it out amongst the Towns, which hopefully would include NG Advantage. If they went with the original suggestion of DOT to go through Port Dickinson, they would travel on approximately 300' of Phelps Street at the most. Chenango Valley Superintendent of Schools David Gill spoke and said they his [sic] main concern is the safety of the students.
>
> ***
>
> Mr. Eldred - Mr. Eldred thought about the routing issue and

> recently followed John Cole's tractor trailer through the area and does not see it as a problem. The 52' truck went south[14] on the West Service Road, turned right onto Route 12A, crossed Route 88, and then turned left onto the Route 88 ramp leading toward Port Crane.

(AR Vol 1, Tab 7, p 5).

The Planning Board did not specifically address the County's 239 review on traffic or resolve the unresolved issue of the exit route for Project traffic. The Planning Board did not require any traffic studies with the only comment regarding the previously issued DOT and County concerns regarding Route 12A and the School District being that Mr. Eldred "thought about the routing issue" (*Id.*). Nevertheless, later in the same meeting, the Planning Board voted to rescind the prior approval of the site plan being contingent on County approval without resolution of the aforesaid truck route issue (AR, Vol 1, Tab 7, p 5).

In response to these petitions, respondents attempt to justify the traffic "solutions" with reference to the DEC website and a 2013 DOT study regarding peak volume of traffic in the area versus the expected number of trips anticipated by this Project (Sleven Affidavit sworn to June 27, 2017 [Index CA2017001388], Exhibit D). The court finds that these references were not part of the record before the Planning Board and should not be considered by the court (*Matter of Van Antwerp v Board of Educ. for Liverpool Cent. School Dist.*, 247 AD2d 676, 678 [3d Dept 1998]).

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[14]It appears this entry should read "north".

Based upon this record, there is no evidence from which the court could conclude that the Planning Board took a hard look at the traffic issues and made a reasoned elaboration of the basis for its determination. As such, the Planning Board's determinations were arbitrary and capricious and without substantial evidence.

4. Aquifer

Petitioners also allege that the Planning Board admits that it failed to consider the aquifer protection permit requirements.

The Planning Board minutes from the April 11th, 2017 meeting contain the following entry: "[t]he third question was actually a reminder that the project is within the Zone II of the Fenton Aquifer District. There are limitations as to what can occur in that Zone. Mr. Armstrong has reviewed what those limitations are in light of this project and there is no impact associated with it" (AR, Vol 1, Tab 6, p 2).

Notably, according to Mr. Armstrong, the assistant town engineer, "[u]nfortunately, due to an oversight, there was no vote on an Aquifer Protection Law development permit. The Board will likely entertain such a vote prior to the return date of the petitions" (Armstrong Affidavit July 13, 2017, ¶ 19).

In sum, an aquifer protection permit was not issued and is a separate and distinct basis for finding that the Planning Board did not take a hard look at potential environmental impacts of

this Project or engage in a reasoned elaboration of its determination thereof.

For all the reasons stated above, the court finds that the actions of the Planning Board were, in all respects, arbitrary and capricious and without substantial evidence.

B. ZBA - Permitted use

As noted above, while the Town ZBA's Decision dated May 24, 2017 approved an area variance relative to this Project, there was never any application for a use variance. The Singer Petitioners allege that a natural gas compressor station is not an allowed use in a L-I Zoning District because this Project does not qualify as a truck terminal as alleged by the respondents. The Singer Petition contains a cause of action seeking an order declaring that respondent Planning Board may not approve a site plan for this natural gas compressor station until a use variance is obtained.

Respondents argue that the ZBA was not required to consider a use variance because a truck terminal is a specifically permitted use under the Zoning Code (Slevin Affidavit sworn to July 14, 2017, ¶ 50). Respondents further argue that "[t]his interpretation of the Zoning Code was affirmed at the January Planning Board meeting as the most appropriate description of the Project" (Slevin Affidavit sworn to July 14, 2017, ¶ 49). Further, respondents assert that using January 31, 2017 as the decision date means that the Singer Petitioners failed to comply with the 60 day time period to appeal that decision to the ZBA pursuant to Town Law § 267-a(5)(b).

In reply, the Singer Petitioners contend that their appeal time to the ZBA was never triggered because there was never a written and filed determination from the building inspector in the first instance pursuant to the Town's Zoning Code § 150-45(C)(6) or an interpretation from the ZBA pursuant to the Town's Zoning Code § 150-45(B)(1).

According to Matthew Banks, the Town's building inspector, he concluded that the proposed facility would be a truck terminal because it is a facility where trucks deliver and/or pick up products for delivery (Banks Affidavit, ¶¶ 3-4). Daniel Griffiths, NG's consulting engineer, avers:

> [t]he Use designation for the Project was discussed at length with the Building Inspector, the Town's Engineer and the Planning Board. All agreed that that [sic] "Trucking Terminal" was the appropriate description for the proposed use. That interpretation/determination was made prior to the January 2017 Planning Board meeting and confirmed at the January Planning Board Meeting as well.

(Griffiths Affidavit, ¶ 24 [emphasis added]).

Neither Mr. Banks nor Mr. Griffiths specify when such an "interpretation/determination" was actually made.[15] There is simply nothing in this record demonstrating that the building inspector ever issued a formal determination on whether the natural gas compressor station was or was not a permitted use in the L-I Zoning District.

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[15]The building inspector is not listed as being present at the January 31, 2017 meeting (AR, Vol 1, Tab 4, p 1).

Nevertheless, it is clear that the issue was touched upon by the Planning Board at their January 31, 2017 meeting based upon the following statements in the minutes:

> •Natural Gas Compressor Station - 65 W. Service Road... James [Tofte of Griffiths Engineering] said the project is actually called a Commercial Fueling Station (vs. Natural Gas Compressor Station, as indicated above). Within the Town's Zoning, James felt it would most likely fall under 'Truck Terminal' because that is the most appropriate use for the project.
>
> ***
>
> •Steve [Palmer, NG Vice President of Engineering, Construction, and Maintenance] asked if the project should be considered a fueling station or a trucking terminal. Mr. Armstrong said it seemed to be more of a trucking terminal.

(AR, Vol 1, Tab 4, pp 2 & 5 [emphases added]).

The court finds that these minutes do not reflect, as argued by respondents, that the Planning Board "concluded" or "affirmed" at the January 31, 2017 meeting that this Project was a truck terminal and qualified as a permitted use in a L-I Zoning District. Rather, these minutes reveal that the Planning Board was aware of confusion regarding whether or not the Project was a permitted use. The Planning Board guessed or speculated the use was permitted. In fact, the Planning Board's own published "Agendas" show the evolution of the description of this Project from "Natural Gas Fueling Station" in December 2016, to "Natural Gas Compressor Station" in January 2017 and March 2017, and finally to "Fenton Trucking Terminal (previously referred to as Natural Gas Compressor Station)" (AR, Vol 1, Tabs 3-7). Once it became apparent that there was some confusion as to whether or not this Project was a permitted use within a L-I Zoning District, the matter should have been sent to the ZBA for an interpretation of permitted uses

within said district. If the ZBA determined it was not a permitted use, then respondent NG could have either: (1) applied for a use variance; or (2) petitioned the Town Board to amend the Town's zoning ordinance to add gas compression stations as a permitted use within that zoning district.[16] The court finds that by informally interpreting this Project as a truck terminal, and thus a permitted use, the Planning Board usurped the power and duties of the ZBA (Fenton Town Code § 150-45 [B][1]).

Based upon the foregoing, the court finds that there never was a formal interpretation on whether or not the proposed natural gas compressor station was a permitted use as a truck terminal in a L-I Zoning District and the issue was never presented to the ZBA. Thus, the court may not entertain this cause of action (seeking an order declaring the Planning Board may not approve a site plan for a natural gas compressor station) unless and until it is determined to be a permitted use by the body charged with determining the same, namely the ZBA (*Lemmon v Seneca Meadows, Inc.*, 46 Misc 3d 1215[A] [Sup Ct Seneca County 2015]). Accordingly, this portion of the Singer Petition is dismissed without prejudice as premature.

Parenthetically, the court notes that in deciding this case, the court is not telling petitioners there will never be a natural gas compression station at this location. Rather the court has only applied the law as it currently exists to the facts as established by this record. The court passes no judgment, nor should it, as to whether in the future this use should be permitted at this

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[16]A zoning ordinance is not static. It must be reviewed and amended periodically as innovation and new technologies create potential uses of land within various zoning districts not previously envisioned.

location.

IV. COSTS AND ATTORNEY'S FEES

Both petitions seek an award of costs and attorney's fees due to the Planning Board's completion of Parts 2 and 3 of the EAF outside of formal meetings in violation of Open Meetings Law § 103. OML § 107(2) expressly states that "[c]osts and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

Even assuming the sequence of events regarding the completion of Parts 2 and 3 of the EAF equates to a technical violation of the Open Meetings Law, not every technical violation entitles the successful party to an award. In this court's view, the violations were not an intentional and flagrant attempt by the Planning Board to violate the OML, but merely indicative of the cavalier manner in which this entire application traversed the approval process (*Matter of Gordon v Village of Monticello*, 87 NY2d 124 [1995]). In short, the court will exercise its discretion and declines to make an award of costs and attorney's fees in either petition.

V. OBJECTIONS TO THE RECORD

CPLR § 7804 (e) requires, in part, that "[t]he body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court." Here, the Town filed an answer with an Administrative Record comprised of five volumes labeled as follows: (1) Decisions of Zoning Board of Appeals, and Agendas and Minutes of Planning Board Meetings; (2) Press & Sun

Bulletin Notices; (3) Planning Board File; (4) Zoning Board of Appeals File; and (5) Building Inspector's File.

Petitioner School District has filed objections to the Administrative Record to the extent that numerous documents therein post-date the determinations of the Planning Board at issue herein.

Generally, judicial review of administrative action is limited to facts and records adduced before the agency when the determination was made (*Matter of Jennings v Coughlin*, 99 AD2d 635 [3d Dept 1984]). Here, it is undisputed that the recordings of the relevant Planning Board meetings were inaudible and not able to be transcribed. As such, there is no "certified transcript of the record of the proceedings under consideration" which the Town could have submitted pursuant to CPLR § 7804 (e). The court finds that the Town effectively complied with CPLR § 7804(e) by providing the court with sufficient material by which the court was able to review whether the determinations challenged by the petitioners were irrational, or arbitrary and capricious (*Matter of County of Rockland v Town of Clarkstown*, 128 AD3d 957 [2d Dept 2015]). That said, as noted above, the court declined to consider the DOT study referenced by respondents' counsel in relation to traffic volume. Otherwise, the court declines to make any modifications to the Administrative Record.

CONCLUSION

Accordingly, it hereby is ORDERED and ADJUDGED as follows:

1. The School District Petition and Singer Petition are GRANTED to the extent of the following:

   a. voiding the Planning Board's designation of the Project as an Unlisted action, declaring itself lead agency, and completion of Parts 2 and 3 of the Full Environmental Assessment Form;

   b. vacating, nullifying, and setting aside the Planning Board's negative declaration of significance under SEQRA on April 11, 2017;

   c. vacating, nullifying, and setting aside the Planning Board's site plan approval on May 23, 2017; and

2. The remaining portion of the Singer Petition regarding the need for a use variance is DISMISSED without prejudice as premature.

The foregoing constitutes an order and judgment of the court.

It is so ordered.

Dated: August 28, 2017
Binghamton, New York

Hon. Ferris D. Lebous
Justice, Supreme Court

Index Number CA2017001388 (School District Petition)

The court considered the following papers in connection with Index Number CA2017001388 (School District Petition) which are on file in the Broome County Clerk's Office:

1. Notice of Verified Petition dated June 22, 2017;
2. Verified Petition dated June 22, 2017 with Exhibits A through J
3. Affirmation of Meave M. Tooher, Esq. dated June 22, 2017 with Exhibit A;
4. Affidavit of William Fitzpatrick, P.E. sworn to June 21, 2017 with Exhibit A;
5. Affidavit of David Gill sworn to June 21, 2017 with Exhibit 1;
6. Memorandum of Law in Support dated June 22, 2017;
7. Affidavit in Opposition of Mary Elizabeth Slevin, Esq. sworn to June 27, 2017;
8. Affidavit of Gerry Myers in Opposition sworn to June 27, 2017;
9. Memorandum of Law undated on behalf of NG Advantage LLC;
10. Order to Show Cause with Temporary Restraining Order signed June 27, 2017;
11. Verified Answer of the Town of Fenton Planning Board sworn to July 14, 2017;
12. Affidavit of Richard Armstrong, assistant town engineer, sworn to July 13, 2017;
13. Affidavit of Daniel Griffiths, P.E. in opposition sworn to July 12, 2017;
14. Supplemental Affidavit of Gerry Myers in Opposition sworn to July 13, 2017;
15. Affidavit of Enrico Biasetti in opposition sworn to July 12, 2017;
16. Supplemental Affidavit in Opposition of Mary Elizabeth Slevin, Esq. sworn to July 14, 2017 with exhibits;
17. Supplemental Memorandum of Law of NG Advantage LLC dated July 14, 2017;
18. Memorandum of Law in Reply by petitioner dated July 21, 2017;
19. Letter dated August 1, 2017 from Albert J. Millus, Jr., Esq;
20. Administrative Record Volume 1 of 5;
21. Administrative Record Volume 2 of 5;
22. Administrative Record Volume 3 of 5;
23. Administrative Record Volume 4 of 5;
24. Administrative Record Volume 5 of 5;
25. Petitioner's Verified Reply and Objections to the Administrative Record dated July 21, 2017;
26. Affidavit of David Gill sworn to July 20, 2017;
27. Affidavit of Kevin Burke sworn to July 11, 2017;
28. Affidavit of Michael Marinaccio sworn to July 13, 2017.

Index Number CA2017001383 (Singer Petition)

The court considered the following papers in connection with Index Number CA2017001383 (Singer Petition) which are on file in the Broome County Clerk's Office:

1. Notice of Petition dated June 21, 2017;
2. Verified Petition dated June 21, 2017;
3. Affidavit of Maureen P. Singer sworn to June 19, 2017;
4. Affidavit of Linda A. Baker sworn to June 18, 2017;
5. Affidavit of Aja Townley sworn to June 19, 2017;
6. Affidavit of Michael Weaver sworn to June 19, 2017;
7. Letter from Claudia K. Braymer, Esq. dated July 10, 2017;
8. Affidavit of Richard Armstrong, Assistant Town Engineer, sworn to July 13, 2017;
9. Affidavit of Matthew Banks, Town Building Inspector, sworn to July 13, 2017;
10. Affidavit of Mary Elizabeth Slevin, Esq. sworn to July 14, 2017;
11. Affidavit of Gerry Myers sworn to July 13, 2017;
12. Affidavit of Daniel Griffiths, P.E. sworn to July 12, 2017
13. Memorandum of Law in Opposition (undated) filed July 17, 2017;
14. Affidavit of Maureen P. Singer sworn to July 19, 2017;
15. Affirmation of Claudia K. Braymer, Esq. dated July 21, 2017;
16. Petitioner's Reply Memorandum of Law dated July 21, 2017.
17. Administrative Record Volume 1 of 5;
18. Administrative Record Volume 2 of 5;
19. Administrative Record Volume 3 of 5;
20. Administrative Record Volume 4 of 5;
21. Administrative Record Volume 5 of 5.