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

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-Appellants,

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

–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-Respondents.

NOTICE OF MOTION TO REARGUE OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Docket No. CA 18-00648

Yates County
Index No. 2016-0165

PLEASE TAKE NOTICE, that a Motion will be made for the relief specified herein in connection with the above-entitled action as follows:

MOTION ON BEHALF OF	Petitioners SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES and COALITION TO PROTECT NEW YORK
DATE, TIME AND PLACE OF HEARING:	On the 1st day of April, 2019, at 9:30 a.m., at the Supreme Court, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York 14604.
RELIEF SOUGHT:	1. An Order granting Petitioners' Motion to Reargue this Court's determination in its Memorandum and Order of February 8, 2019 and served with Notice of Entry on Petitioners by first-class mail on February 12, 2019 dismissing Petitioners' appeal on the ground of mootness.

2. In the alternative, an Order granting Petitioners leave to appeal to the Court of Appeals from the same Order previously indicated, dismissing Petitioners' appeal; and

3. Such other and further relief as the Court deems just and proper.

GROUNDS FOR RELIEF: CPLR § 5602; Rules of the Appellate Division, Fourth Department § 1000.13(p).

SUPPORTING PAPERS: Affidavit of Richard J. Lippes, Esq., with exhibits attached thereto.

DATED: Buffalo, New York
March 15, 2019

LIPPES & LIPPES

By: _____

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Respondents-Respondents.

AFFIRMATION IN SUPPORT OF PETITIONERS' MOTION TO REARGUE OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

I, Richard J. Lippes, affirm the following to be true under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules ("CPLR"):

1. I am a member of the law firm of Lippes & Lippes, and represent the various Petitioners-Respondents concerning the within Motion. As such, I am familiar with the facts and circumstances of this case.

2. I submit this Affidavit in support of Petitioners' Motion to Reargue or in the Alternative for Leave to Appeal to the Court of Appeals pursuant to Section 5602 of the Civil Practice Law and Rules and Section 1000.13(p) of the Rules of Practice of the Appellate Division, Fourth Department.

PROCEDURAL HISTORY

3. Petitioners commenced an Article 78 proceeding by filing an Order to Show Cause and Verified Petition on October 28, 2016. The Order to Show Cause seeking a preliminary injunction was signed by Justice Dennis Bender on October 31, 2016 and a hearing date set for November 17, 2016.

4. On December 13, 2016 Petitioners filed an amended petition adding the name of the Sierra Club as the lead petitioner.

5. On December 23, 2016 Petitioners filed a motion for temporary injunctive relief.

6. On January 5 and 6, 2017, Respondents moved to dismiss the Petition on the grounds of standing and mootness.

7. By Order and Judgment dated June 13, 2017, the trial court denied Petitioners' request for a preliminary injunction and ruled in favor of the Respondents on the merits.

8. On June 27, 2017, Notice of Entry of the Order was mailed to Petitioners by Respondents.

9. On July 19, 2017, Petitioners filed a Notice of Appeal from the trial court's Order and Judgment.

10. On April 17, 2018, Petitioners perfected their appeal.

11. On June 22, 2018, the Greenidge Respondents moved to dismiss the appeal on the ground of mootness.

12. On July 6, 2018, Petitioners cross-moved for temporary injunctive relief on appeal.

13. On September 6, 2018, this court ruled against both motions, with leave to renew arguments in favor or opposed to the motion to dismiss at oral argument.

14. On February 8, 2019, this Court dismissed the appeal on the ground of mootness. (The Memorandum and Order of this Court is attached to this Affidavit as Exhibit "A".)

15. Notice of Entry was served on Petitioners by Respondent GGLLC on February 12, 2019 by first class mail.

PETIONERS REQUEST TO REARGUE

16. In reaching its determination that Petitioners' appeal was moot, this Court failed to consider that Petitioners' right to challenge the harms caused by the operations of Greenidge Station is directly affected by the court's determination or to consider the sensitivity of Petitioners' environmental concerns and the substantial public importance of the harms that are occurring now and will continue to occur if these harms are not judicially resolved.

17. Thus, it is respectfully submitted that the Court misapprehended and misapplied the law as it relates to mootness and as espoused by many Court of Appeals' decisions, as will be more fully explained in this Affidavit.

18. In *Friends of Pine Bush v Planning Bd. of City of Albany*, 86 A.D.2d 246 (3d Dept. 1982), *aff'd* 59 N.Y.2d 849 (1983) and cited with approval in *Matter of Dreikausen v. Zoning Bd. of City of Long Beach*, 98 N.Y.2d 165, 173 (2002) the court stated that the issue as to the validity of the zoning board's methodology in approving certain subdivision plats was moot on the ground that approximately 30% of the approved residential structures had been built and considerable additional excavation in contemplation of further development has been completed, and because after the extension of an automatic stay denied, no further action was taken by the petitioners. "However," the court determined, "given the sensitivity of the ecological concerns of petitioners with respect to the further development of the Pine Bush generally and the candid admission of the Corporation Counsel of the City of Albany in his brief that "[t]he respondent

Board is unable to advise the Court whether this situation will recur, however, until advised otherwise, it takes the position that it had the power under § 33 of the General City Law to do what was done here" (emphasis added), we conclude that this appeal should not be dismissed on the ground of mootness since a question of general interest and substantial public importance is present and is likely to recur if not judicially resolved." In reaching this determination, the *Pine Bush* court relied on *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707 (1980). In *Hearst*, the Court explained that a case will not be considered moot if "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." Id. at 714-715. The Court noted that there is an exception to the doctrine of mootness if a case demonstrates "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." Id.

19. The facts of the instant case present a factual circumstance similar to the circumstances of the *Friends of the Pine Bush* case in that sensitive environmental concerns have been raised and questions of general interest and substantial public importance are present and is likely to recur if not judicially resolved.

20. The public interest in seeing that an adequate environmental review is conducted of the impacts of the operations of Greenidge Station on Seneca Lake is strong. The case also presents novel issues regarding the proper standard of environmental review to be applied in the case of the repowering of an old, out-of-service coal plant. As old shuttered coal plants are revamped across the state, the issues raised in this proceeding will continue to come up. If Respondent DEC is allowed to prepare determinations of no significant impact for these

repowering projects and continues to deny the public an opportunity to participate in the Environmental Impact Statement process for these projects, significant harm to the environment may be done.

21. An admission comparable to the admission of the Corporation Counsel relied upon in the *Pine Bush* case is contained in the Biological Fact Sheet prepared by Respondent DEC for the Greenidge SPDES permit. The Biological Fact Sheet states that Greenidge Station's "cooling water intake structure lacks any fish protection technology, therefore the facility does not meet either the requirements of 6 N.Y.C.R.R. § 704.5 nor the requirements of the CWA § 316(b) Phase II Rule (40 CFR Parts 122 and 125)." Treichler Affidavit in Support of Petitioners' Cross-Motion for Temporary Injunctive Relief, July 6, 2018, Ex. B, p. 2.

22. A number of Court of Appeal decisions have applied the principles enunciated in the *Hearst* case and determined that, based on the application of these principles, the case before the court was not moot. None of these cases involved environmental concerns. The reasoning applied in these cases, however, is applicable to the circumstances of the present case and indicates that this court should not have dismissed Petitioners' claims on the ground of mootness. In *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), the court considered a challenge to certain agreements entered into by several governors of New York authorizing casino gambling on Indian reservations. The court determined that the challenge to the 1993 compact "undisputedly presents a live controversy. Without a valid Tribal-State compact, IGRA does not permit the operation of a casino. Therefore, a declaration that the 1993 compact violates the State Constitution speaks to the legality of the casino's operation, and thus affects the rights of each party to this suit. Where, as here, a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot." Id. at 812.

23. *City of New York v. Maul*, 14 N.Y.3d 499 (2010) addressed the alleged failures of the New York City Administration for Children's Services (ACS) and the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) to fulfill their statutory and regulatory duties with respect to certain children in ACS's foster care system. The Court stated, "Even assuming that the claims of these plaintiffs pertaining to the waiting list are moot, we concur with the Appellate Division that an exception to mootness should be applied in this case. Plaintiffs raise substantial and novel questions as to whether ACS and OMRDD are fulfilling their statutory responsibilities. These issues are likely to recur and may evade review given the temporary duration of foster care, the aging out of potential plaintiffs and the fact that some placements tend to be transitory [citation omitted]. Concluding that the mootness exception is applicable, we next turn to the class certification issue." Id. at 507.

24. *Coleman v. Daines*, 19 N.Y.3d 1087 (2012), involved claims against the Commissioner of the New York City Human Resources Administration and the Commissioner of the New York State Department of Health for various violations of Petitioner's rights relating to her Medicaid claims. The court concluded that the claims were not moot even though Petitioner was receiving all the services she requested. "Here, respondents assert that Coleman's claims seeking temporary assistance and care services are moot because she is currently receiving all personal care services originally requested. Coleman submits that respondents maintain a policy of not informing applicants of the availability of temporary Medicaid assistance in the form of personal care attendant services and, therefore, do not generally provide or pay for such benefits. Since this policy is alleged to have applied to all similarly situated Medicaid claimants who sought benefits under the same statutory provision as Coleman, we believe this issue is "likely to recur" (*Maul*, 14 NY3d at 507). In addition, based on the potential ramifications from delays in

providing critical benefits and the relatively brief nature of the violation, the question is substantial and will typically evade judicial review." Id at 1090.

25. *NY State Commn. Judicial Conduct v. Rubenstein*, 23 N.Y.3d 570 (2014), a case involving a challenge to the authority of the New York State Commission on Judicial Conduct, the Court considered the Commission's claim that the appeal was moot because the Commission has completed its investigation and returned the sealed documents at issue in the case to the originating court. The Court of Appeals agreed with the appellant that the case was not moot because "the Commission's identification of appellant in its publicly available documents, and its description of his involvement in Judge Doe's judicial election campaign, including assertions that his legal advice informed the Judge's actions, adversely impact his professional reputation and standing within the legal and greater communities, and constitute enduring consequences that flow from the use of the sealed records." Id. at 577.

26. *Matter of Veronica P. v. Radcliff A.*, 24 N.Y.3d 668 (2015) addressed the question of whether an appeal from a contested order of protection issued by Family Court, based upon a finding that the subject individual has committed a family offense, is mooted solely by the expiration of the order. The court held that it was not. The Court stated, "The ability of an appellate decision to directly and immediately impact the parties' rights and interests is among the most important aspects of the mootness analysis, for otherwise the analysis might turn on inchoate or speculative matters, making mootness an unwieldy doctrine of a thousand "what ifs." On the other hand, even where the resolution of an appeal may not immediately relieve a party from a currently ongoing court-ordered penalty or obligation to pay a judgment, the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring

consequences that befall a party as a result of the order which the party seeks to appeal [citations omitted]. Id. at 670-671 The court concluded that:

> In this case, the expiration of the order of protection does not moot the appeal because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision. Because the order of protection on its face strongly suggests that respondent committed a family offense, the court in a future criminal case or Family Court proceeding would likely rely on the order to enhance a sentence or adverse civil adjudication against respondent. In that regard, although the order does not declare respondent guilty of a family offense in so many words, the order notes that it was issued after a hearing in a family offense proceeding, and it expressly bars respondent from victimizing petitioner by committing a variety of crimes nearly identical to those charged in the family offense petition. Thus, a court examining the order may readily discern that Family Court found respondent guilty of committing a family offense against petitioner and issued an order of protection to prevent him from continuing to offend against her. Armed with that information, the court in a future case may increase the severity of any applicable criminal sentence or civil judgment against respondent. In the face of the substantial probability that the order of protection will prompt severely deleterious future legal rulings against respondent, an appellate decision in his favor will directly vindicate his interest in avoiding that consequence of the order.

Id. at 671-672.

27. The present case presents a similar circumstance to these Court of Appeals decisions in that Petitioners and those similarly situated will be disadvantaged in future cases by this Court's failure to address the environmental concerns and harms identified by Petitioners in ruling on mootness claims in subsequent cases involving environmental concerns.

28. For the foregoing reasons, it is respectfully submitted that in failing to consider that Petitioners' right to challenge the harms caused by the operations of Greenidge Station is directly affected by the court's determination or to consider the sensitivity of Petitioners' environmental concerns and the substantial public importance of the harms that are occurring

now and will continue to occur if these harms are not judicially resolved, this Court misapprehended and misapplied the law as it relates to mootness.

LEAVE TO APPEAL TO THE COURT OF APPEALS

29. In the event that this Court does not grant Petitioners' Motion to Reargue, Petitioners request the Court to grant leave to appeal to the Court of Appeals.

30. The first issue Petitioners believe supports their Motion for Leave to Appeal to the Court of Appeals is to clarify the parameters of the mootness requirements that apply in environmental cases. The Court of Appeals has not yet addressed how the rights of the parties might be directly affected by the determination of the appeal in an environmental case or what consequence should be given to the public harms that that will occur if these harms are not judicially resolved.

31. Moreover, while this Court found it unnecessary to determine the merit issues in the case, since the Petition was dismissed on mootness grounds, there are a number of important merit issues that were determined by the trial court which have not had any appellate review. Therefore, the issues of (1) whether Respondent DEC's negative declaration is an impermisable conditioned negative declaration of a Type I action, (2) of whether Respondent DEC improperly segmented its review of the impacts of restarting Greenidge Generating Station from its review of the impacts of the continuing permit violations of the Lockwood Hills coal ash landfill where the waste from Greenidge Station will be dumped and (3) whether Respondent DEC failed to take a hard look at the impacts of the Greenidge repowering project because it used the wrong baseline to evaluate impacts. The trial court ruled against Petitioners on the merits without addressing Petitioners' specific claims regarding the conditioned negative declaration, the

segmentation or the use of an incorrect baseline, and before Respondents answered or Respondent DEC submitted the administrative record.

32. Therefore, for all of the foregoing reasons, it is respectfully submitted that in the event that the Court does not grant Petitioners' Motion to Reargue, that this Court grant leave to appeal to the Court of Appeals to address both the mootness and the merits issues in this case.

Respectfully submitted,

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Attorneys for Petitioners-Respondents

Sworn to this 15th day of March, 2019.

MARIA T. PARRILLA
Notary Public, State of New York
No. 01PA4891745
Qualified in Erie County
My Commission Expires May 4, 2023