SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of the SIERRA CLUB, SENECA LAKE GUARDIAN INC.; COMMITTEE TO PRESERVE THE FINGER LAKES INC.; PETER BECRAFT; CARY BECAFT; MICHAEL D. BLACK; LINDA BRACHT; PHIL BRACHT; ABI BUDDINGTON; WINTON BUDDINGTON; BETH CAIN; LYNNE CRANE; CAROLYN FIRST; LORI FISCHLINE; JOHN GHIDIU; BARBARA GRAY; NEAL HOLTZMAN; KIM HOLTZMAN; NICOLE LAGRECA; CHRISTINE LANNI; JOHN LANNI; FAITH LEWIS; TOM LEWIS; CAROLYN MCALLISTER; GARY MCINTEE; EILEEN MORELAND; DAVE MURRAY; LEAH MURRAY; ADAM PARKER; STEPHANIE PARKER; STEVAN RAMIREZ; EILEEN SCHMIDLIN; ED SCHMIDLIN,

Petitioners,

For a Judgment Pursuant to CPLR Article 78 of the New York Civil Practice Laws and Rules

-vs-

TOWN OF TORREY; TORREY PLANNING BOARD; and GREENIDGE GENERATION LLC,

Respondents.

DECISION, ORDER & JUDGMENT

Index No. 2020-5198

Appearances:

Richard J. Lippes, Esq., Lippes & Lippes, for Petitioners
Yvonne E. Hennessey, Esq., Barclay Damon LLP, for Respondent Greenidge Generation LLC
Kathleen M. Bennett, Esq., Bond, Schoeneck & King, PLLC, for Respondent Town of

Torrey

Daniel J. Doyle, J.,

Introduction

In 2014 Respondent Greenidge Generation LLC (hereinafter "Greenidge") purchased Greenidge Station (hereinafter "the plant"), an electric generating facility in the Respondent Town of Torrey. The plant had been inactive for the preceding three years, and Greenidge sought to resume plant operations by burning natural gas instead of the previously used coal.[1] In order to accomplish this, Greenidge sought Title IV and Title V air permits, a renewal of its State Pollutant Discharge Elimination System permit (hereinafter "SPDES"), and an initial water withdrawal permit from the New York State Department of Environmental Conservation (hereinafter "NYSDEC"). Greenidge received the Title IV and Title V air permits from the NYSDEC in September of 2016.

On April 21, 2017, the Hon. William F. Kocher issued a decision dismissing a petition seeking to invalidate the air permits (among other requested relief). The Appellate Division, Fourth Department dismissed the petitioner's appeal as moot ("Greenidge I"). (*Sierra Club v. New York State Department of Environmental*

[1] The plant was built to use water from Seneca Lake to cool the turbines and then discharge heated water back into Seneca Lake.

Conservation, 169 AD3d 1485, 1488 [4th Dept. 2019]: "Greenidge undertook the construction project with all the necessary permits based upon the conclusions and requirements of the existing SEQRA review. Greenidge substantially completed that construction, and we therefore conclude that petitioners' challenge to the SEQRA review became moot (*see generally Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072, 1073–1074, 861 N.Y.S.2d 155 [3d Dept. 2008], *lv denied* 11 N.Y.3d 716, 874 N.Y.S.2d 5, 902 N.E.2d 439 [2009])".)

In September of 2017 NYSDEC issued Greenidge a water withdrawal permit and a SPDES permit. The water withdrawal permit authorized Greenidge to withdraw up to 139,248,000 gallons of water from Seneca Lake per day; the SPDES permit allowed the discharge of 134,000,000 gallons of water per day into Seneca Lake.

On November 8, 2018, the Hon. William F. Kocher issued a decision dismissing a petition seeking to invalidate the water withdrawal permit and the SPDES permit ("Greenidge II"). Relevant to the issues herein, the court determined that the "DEC fully considered all of the potential environmental impacts of the renewed SPDES permit, including those to surface waters". ("Greeindge II", NYSCEF Docket No. 71 at page 16.) The decision was not appealed.

The plant began operating in March of 2017.

Amended Petition and Related Motions

In June of 2022, Greenidge sought approval from the Town of Torrey Planning Board for necessary approvals and permits to construct a bitcoin mining facility, consisting of four buildings and related computer equipment. Greenidge sought to use the electricity generated from the plant to power the bitcoin facility. The Town of Torrey eventually issued a Negative Declaration under SEQRA and granted site plan approval.

Petitioners filed the First Amended Petition on May 21, 2021 challenging the issuance of a Negative Declaration. On July 1, 2021, Respondent Town of Torrey issued a building permit to Respondent Greenidge, and construction of the bitcoin mining facility began.

Before the Court are (1) the amended petition seeking to void the site plan approval, and enjoining Greenidge from constructing and operating the bitcoin mining facility[2]; (2) Respondent Greenidge's notice of motion to strike the affidavit of Dr. Gregory Boyer,[3] (3) Petitioner's notice of motion for a preliminary injunction

[2] Amended Petition and supporting exhibits (NYSCEF Docket #s 12-21); Petitioner's Memorandum of Law in Support and supporting exhibits (NYSCEF Docket #s 78-81); Respondent Town of Torrey's Verified Answer and supporting exhibits (NYSCEF Docket #s 22-63); Respondent Greenidge's Verified Answer and Objections in Point of Law (NYSCEF Docket #s 64-72); Respondent Greenidge's Memorandum of Law in Opposition (NYSCEF Docket # 73); Respondent Greenidge's Affirmation in Reply and supporting exhibits (NYSCEF Docket #s 82-84); Respondent Town of Torrey's Memorandum of Law in Opposition (NYSCEF Docket # 77).

[3] Respondent Greenidge's Notice of Motion and Affirmation (NYSCEF Docket #s 74-75); Respondent Greenidge's Memorandum of Law in Support (NYSCEF Docket # 76); Respondent

(filed December 3, 2021),[4] and (4) Respondent Greenidge's notice of motion to dismiss the amended petition and in opposition to Petitioner's motion for a preliminary injunction.[5]

Findings of Fact

On June 30, 2020 Greenidge submitted an application for site plan approval to the Town of Torrey to build four structures and related utility equipment on 1.3 acres on property it owned at 590 Plant Road (hereinafter "the project"). The structures were to house computer equipment to "mine" bitcoin, using electricity generated from the Greenidge plant. Included in the application were site plans, a "Site Plan Review- Permit Application", a Full Environmental Assessment Form ("EAF"),[6] and a community noise assessment conducted by Aurora Acoustical Consultants, Inc.[7]

Greenidge's Affirmation in Reply (NYSCEF Docket # 87); Petitioner's Affirmation in Opposition and supporting exhibit (NYSCEF Docket #s 91-92).

[4] Petitioner's Notice of Motion and supporting exhibits (NYSCEF Docket #s 94-96); Respondent Town of Torrey's Affirmation in Opposition (NYSCEF Docket # 109).

[5] Respondent Greenidge's Notice of Motion and supporting exhibits (NYSCEF Docket #s 98-107); Respondent Greenidge's Memorandum of Law in Opposition to Motion and in Support of Cross-Motion (NYSCEF Docket # 108); Petitioner's Memorandum of Law in Opposition to Cross-Motion and In Further Support of Motion (NYSCEF Docket # 110).

[6] "Environmental assessment form (EAF) means a form used by an agency to assist it in determining the environmental significance of actions. A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment." (6 NYCRR § 617.2[m].) Respondent submitted its initial Part 1 of the EAF on June 30, 2020 and a revised Part 1 of the EAF on August 17, 2020. (6 NYCRR § 617.6: "The project sponsor must complete Part 1 of the full EAF, including a list of all other involved agencies that the project sponsor has been able to identify, exercising all due diligence.")

[7] NYSCEF Docket #s 37, 38, 45-50, 61.

Notably, the project did not require an increase in generating capacity at the plant and would use the electricity generated by the plant while it was operating under the previously issued permits.

Respondent Torrey Planning Board reviewed the application at the following meetings: July 15, 2019; August 19, 2019; September 16, 2019; October 14, 2019; July 20, 2020; and August 17, 2020.[8] On September 21, 2020 Respondent Planning Board declared itself the lead agency[9] and the project to be an Unlisted Action under SEQRA. The Planning Board also voted to issue a Conditioned Negative Declaration and approval of the site plan.[10]

On October 7, 2020 the Conditioned Negative Declaration[11] was published in the New York State Department of Environmental Conservation Notice Bulletin for Region 8, requiring public comments to be submitted by November 7, 2020.[12]

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[8] NYSCEF Docket #s 25, 26, 27, 28, 32.

[9] "Lead agency means an involved 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[v].)

[10] NYSCEF Docket # 34.

[11] "Conditioned negative declaration (CND) means a negative declaration issued by a lead agency for an Unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency, pursuant to the procedures in section 617.7(d) of this Part, will modify the proposed action so that no significant adverse environmental impacts will result." (6 NYCRR § 617.2[h].)

[12] NYSCEF Docket # 54.

On November 16, 2020 Respondent Planning Board considered the public comments and voted to issue a Conditioned Negative Declaration under SEQRA.[13] The Conditioned Negative Declaration was filed on November 17, 2020.

Subsequently, Petitioner's filed their Verified Petition (on December 17, 2020) which noted that the Respondent Planning Board violated General Municipal Law § 239-M which required Respondent Planning Board to refer the project application to the Yates County Planning Board for review and possible approval, modification, or disapproval.[14]

Respondent Torrey Planning Board referred the project to the Yates County Planning Board. At a meeting conducted on January 28, 2021 the Yates County Planning Board recommended denial of the project application as presented.[15]

On April 19, 2021 Respondent Torrey Planning Board reviewed the project's site plan application, reviewed the Full EAF, received public comment, issued a

[13] NYSCEF Docket # 35.
[14] NYSCEF Docket # 1 at ¶¶ 54-56; GML § 239-M.
[15] NYSCEF Docket # 41.

Negative Declaration[16] under SEQRA,[17] and granted site plan approval.[18] The required Report of Final Action was filed with the Yates County Planning Board on April 20, 2021 with an explanation of why the project was approved.[19] On July 1, 2021 Respondent Town of Torrey issued a building permit, and construction of the project commended in August of 2021.[20]

On May 21, 2021 Petitioner's filed their First Amended Petition alleging that the Respondent Planning Board violated SEQRA (6 NYCRR § 617 et. seq.) by failing to prepare a full environmental impact statement (hereinafter "EIS"), and in not taking the requisite "hard look" at the potential for negative, environmental impacts.[21]

Petitioners consists of Sierra Club (a not-for-profit conservation corporation), Seneca Lake Guardian, Inc. (a not-for-profit corporation dedicated to preserving the health of the Finger Lakes), The Committee to Preserve the Finger Lakes (a not-for-

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[16] "Negative declaration means a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts. A negative declaration may also be a conditioned negative declaration as defined in subdivision (h) of this section. Negative declarations must be prepared, filed and published in accordance with sections 617.7 and 617.12 of this Part." (6 NYCRR § 617.2[z].) Respondent Torrey Planning Board completed parts 2 and 3 of the EAF, and incorporated in part 3 the Town of Torrey SEQRA Resolution with Negative Declaration dated April 19, 2021- Greenidge Generation LLC Site Plan.
[17] The vote was 4-1 in favor. See GML § 239-M (5).
[18] NYSCEF Docket # 39.
[19] NYSCEF Docket # 44.
[20] Affidavit of Dale Irwin (NYSCEF Docket # 99) at ¶¶ 12-16.
[21] Amended Petition and supporting exhibits (NYSCEF Docket #s 12-20); Petitioner's Memorandum of Law in Support and supporting exhibits (NYSCEF Docket # 78-81).

profit corporation dedicated to preserving the health of the Finger Lakes), and thirty individuals who own property either on or near Seneca Lake, or near to the Greenidge facilities. All the individual petitioners allege that due to the operation of the Greendige plant, there exists an increased risk of harm to their health due to "harmful algae blooms" caused by the discharge of the heated water from the plant into Seneca Lake. Some of the individual petitioners also allege that they will suffer increased noise levels from the bitcoin mining operation. [22]

[22] Petitioners Cary and Peter Becraft alleged they "are concerned that the new operation in the new buildings will substantially increase the noise levels they experience". They live at 58 Cornelia Street in the Village of Dresden, over 2,000 feet from the project. (Amended Petition at ¶ 6; NYSCEF Docket # 61.) Petitioners Abi and Winton Buddington live at 81 Charles Street, over 3,400 feet from the project, and alleged "[t]hey also experience noise from operations at the Greenidge plant and are concerned that the new operations in the new buildings will substantially increase the noise levels they experience". (Amended Petition at ¶ 9.) Petitioner Lynne Crane lives over 3,600 feet from the project (at 80 Charles St.) and also alleged concerns regarding noise. (Amended Petition at ¶ 11.) Petitioner Carolyn First lives at 1297 Arrowhead, over 3,600 feet from the project, and also alleged concerns about noise. (Amended Petition at ¶ 12.) Petitioner Lori Fischline lives at 75 Charles St., over 3,300 feet from the project, and also alleged concerns about noise from the project. (Amended Petition at ¶ 13.) Petitioner Barbara Gray lives at 2007 Perry Point Road, over a mile from the project, and also alleged noise concerns. (Amended Petition at ¶ 15.) Petitioners Kim and Neal Hotlzman also live at 2007 Perry Point Road (over a mile from the project), and alleged noise concerns. (Amended Petition at ¶ 16.) Petitioners Christine and John Lanni live at 1995 Perry Point Road, over one mile from the project, and also alleged concerns about noise. (Amended Petition at ¶ 18.) Petitioners Faith and Tom Lewis live at 66 Cornelia St., approximately 2,800 feet from the subject property, and alleged concerns about noise from the project. (Amended Petition at ¶ 19.) Petitioner Carolyn McAllister lives at 78 Charles St., over 3,600 feet from the project, and also alleged noise concerns. (Amended Petition at ¶ 20.) Petitioner Gary McIntee lives at 1989 Perry Point Road, approximately a mile from the project, and also alleged noise concerns. (Amended Petition at ¶ 21.) Petitioners Leah and Dave Murray live at 72 Cornelia St., over 3,000 feet from the project, and alleged noise concerns. (Amended Petition at ¶ 23.) Petitioners Stephanie and Adam Parker live at 70 Cornelia St., over 3,000 feet from the project, and alleged noise concerns. (Amended Petition at ¶ 24.)

Respondents Town of Torrey and Town of Torrey Planning Board filed an Answer and raised several affirmative defenses and objections in point of law, including that the Petitioner's lacked standing, that the project was properly considered an Unlisted Action, no EIS was required, Respondents took the requisite hard look at the environmental impacts, and the decision to issue a Negative Declaration was supported by substantial evidence.[23] Respondent Greenidge filed an Answer raising the same defenses.[24]

On June 17, 2021 Respondent Greenridge filed a notice of motion seeking to strike the affidavit of Dr. Gregory Boyer (that was attached as an exhibit to Amended Petition) arguing that it was improper as it contained information not presented to Respondents prior to making their determination, and was irrelevant to the issue of standing.[25]

On December 3, 2021 Petitioners filed a notice of motion seeking a preliminary injunction to enjoin Greenidge from continuing to develop the

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[23] Respondents Town of Torrey's and Town of Torrey Planning Board's Answer and supporting exhibits (NYSCEF Docket #s 22-63); Respondents' Memorandum of Law in Opposition (NYSCEF Docket # 77).

[24] Respondent Greenidge's Answer and supporting exhibits (NYSCEF Docket #s 64-72); Respondent Greenidge's Memorandum of Law in Opposition (NYSCEF Docket # 73);

[25] Respondent Greenidge's Notice of Motion and supporting exhibits (NYSCEF Docket #s 74-75); Respondent Greenidge's Memorandum of Law in Support (NYSCEF Docket # 76); Respondent Greenidge's Affirmation in Reply (NYSCEf Docket # 87); Petitioner's Affirmation in Opposition to Motion and supporting exhibit (NYSCEF Docket #s 91-92).

project.[26] Respondent Greenidge cross-moved to dismiss the amended petition and in opposition to Petitioner's motion for a preliminary injunction.[27]

Conclusions of Law

Respondent Torrey Planning Board Properly Characterized the Project as an Unlisted Action

Germane to the issues herein is whether Respondent Torrey Planning Board properly classified the project as an Unlisted "action"[28] under SEQRA.[29] Petitioners argue that the project is properly considered a Type I Action; Respondents argue that they were correct in determining the project to be an Unlisted Action.[30]

Petitioners argue that as the project would use electricity generated by the plant, and the plant would use greater than 2,000,000 gallons of water per day, the

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[26] Petitioner's Notice of Motion and supporting exhibits (NYSCEF Docket #s 94-96); Respondent Town of Torrey's Affirmation in Opposition (NYSCEF Docket # 109).

[27] Respondent Greenidge's Notice of Motion and supporting exhibits (NYSCEF Docket #s 98-107); Respondent Greenidge's Memorandum of Law in Opposition to Motion and in Support of Cross-Motion (NYSCEF Docket # 108); Petitioner's Memorandum of Law in Opposition to Cross-Motion and In Further Support of Motion (NYSCEF Docket # 110).

[28] "Actions commonly consist of a set of activities or steps". (6 NYCRR § 617.3 [g].)

[29]"Actions include:

(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) are directly undertaken by an agency; or

(ii) involve funding by an agency; or

(iii) require one or more new or modified approvals from an agency or agencies..." (6 NYCRR § 617.2.)

[30] Respondents also argue that even if the project was a Type I Action, the procedures they followed were sufficient to satisfy SEQRA. (See 6 NYCRR § 617.6.)

project must be characterized as a Type I action. (See 6 NYCRR § 617.4[b][6][ii].)[31] Petitioners' argument is predicated on a mischaracterization of what the project entails. The project consisted of building four structures, installing computer and networking equipment, and connecting those buildings and equipment to the power grid in order to use some of the electricity generated by the plant. The project did not involve the use of water from Seneca Lake. Thus, Respondent Torrey Planning Board properly determined the project was an Unlisted Action.

Petitioners do not have standing

As a necessary predicate for this Court to consider a claim for relief, it must be established that the Petitioners have standing to maintain the instant action. "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation (*Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 339 N.E.2d 865). Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate

[31] With this allegation, the Petitioners invite this Court to determine whether the NYSDEC properly issued the air and water permits that allowed the Greenidge plant to operate. The Court declines to do so. Those issues were subjected to judicial review when they were litigated in Greenidge I and Greendige II. In those cases, Petitioners sought to invalidate the issuance of the Title IV and Title V air permits, the State Pollutant Discharge Elimination System permit and the initial water withdrawal permit from the New York State Department of Environmental Conservation. The courts in Greenidge I and Greenidge II ruled that the permits were properly issued.

the merits of a particular dispute that satisfies the other justiciability criteria (see, Comment, Standing of Third Parties to Challenge Administrative Agency Actions, 76 Cal.L.Rev. 1061, 1067–1068 [1988]; *see also, Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343)." (*Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769 [1991].)

In support of their application, Petitioners submit affidavits which purport to establish the requisite standing to bring this action. The affidavits contain allegations that the power plant water intake and discharge will have adverse impacts on the water temperature and create harmful algae blooms (HABs) in the vicinity of the affiants' property.

These allegations are irrelevant to a determination of Petitioner's standing.

The project being considered for approval by Respondent Torrey Planning Board was Greenidge's application to build four structures and related utility equipment on 1.3 acres on property it owned at 590 Plant Road. The structures were to house computer equipment to "mine" bitcoin, using electricity generated from the Greenidge plant. The project would not impact the air or water of Seneca Lake. Thus, Petitioners' concerns regarding the discharge of heated water from the Greenidge plant are irrelevant, and do not establish standing.

The Court agrees with Respondent Greenidge that the affidavit of Dr. Gregory Boyer is not properly part of the administrative record as it was not considered by Respondent Torrey Planning Board. Additionally, it is irrelevant as to issues of standing as it addresses the impact of heated water discharge into Seneca Lake. As the project being considered by Respondent Torrey Planning Board did not result in heated water being discharged into Seneca Lake, Dr. Boyer's averments are not relevant. Thus, the Court grants Respondent Greeindge's motion to strike the Boyer affidavit. "A reviewing court may not substitute its own judgment for that of the agency (*see Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997]), and its review "'is limited to the record before the agency and proof outside the administrative record should not be considered" (*Matter of Dolan v New York State Dept. of Civ. Serv.*, 304 AD2d 1037, 1039 [2003], *lv denied* 100 NY2d 512 [2003], *quoting Matter of Piasecki v Department of Social Servs.*, 225 AD2d 310, 311 [1996])." (*Concetta T. Cerame Irrevocable Fam. Tr. v. Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1092[4th Dept. 2004].)

However, some of the Petitioners allege that the project, specifically the operation of the computer equipment and the fans necessary to remove heat, will result in excessive noise and this noise would negatively impact the enjoyment of their property.

These allegations are sufficient to establish that the Petitioners' interest in the enforcement of SEQRA to ensure the project did not generate excessive noise is within the "zone of interest" SEQRA is designed to protect. (*See Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk, supra* at 773. *See also* 6 NYCRR § 617.7: "These criteria are considered indicators of significant adverse impacts on the environment: (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; . . .".) However, that alone does not confer standing on Petitioners. Petitioners must also establish a legally cognizable interest that is negatively impacted that is different than the interest of the public at large. The allegations made by Petitioners, in the light most favorable to the Petitioners, are insufficient to confer standing on the Petitioners to seek the relief requested.

Although the Court of Appeals has stated that the principles of standing should not be overly restrictive (*see Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413 [1987]), something more than the interest of the public at large must be present before standing is conferred on a person seeking to challenge an administrative determination. (*Id.*) Property owners in proximity to the subject property may have standing (*Id.* at 413-414), but Petitioners "may be so far from the subject property that the effect of the proposed

change is no different from that suffered by the public generally (citation omitted). (*Id.* at 414.)

Petitioners have failed to establish that they would suffer an environmental injury different from that suffered by the general public. (*See Matter of Green Earth Farms Rockland, LLC v Town of Haverstraw Planning Bd.*, 165 AD3d 823 [2nd Dept. 2017].) None of the Petitioners lives closer than 2,000 feet to the project. It cannot be said that the Petitioners live in proximity to the subject property such that they have standing to challenge Respondent Torrey's Planning Board's site approval and SEQRA negative declaration. (Compare *Zupa v. Paradise Point Association, Inc.*, 22 AD3d 843 [2nd Dept. 2005]; *Burns Pharmacy of Rensselaer, Inc. v. Conley*, 146 AD2d 842 [3rd Dept. 1989].)

As none of the individual Petitioners have standing, Petitioner-organizations do not have standing. "To establish standing, an associational or organizational group, . . ., "must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Pursuant to the first requirement of the associational standing test, a petitioner must demonstrate an injury-in-fact to one or more of its members and that the injury falls "within the

zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*id.* at 211; *see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991])." (*New York State Psychiatric Ass'n, Inc. v. Mills*, 29 A.D.3d 1058, 1059, [3rd Dept. 2006].)

Respondent Torrey Planning Board Took the Requisite "Hard Look"

Assuming the Petitioners alleged sufficient allegations to establish standing, the Court finds that Respondent Torrey Planning Board took the required "hard look" before issuing the Negative Declaration for the project. ("...[C]ourts may, first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine 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 (citations omitted). Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process." *Jackson v. New York State Urb. Dev. Corp.*, 67 NY2d 400, 417 [1986].)

Respondent Torrey Planning Board, as outlined above, properly classified the project as an Unlisted action. Furthermore, it is clear from the administrative record that Respondent Torrey Planning Board carefully assessed the possible

environmental impacts of the project, identified areas of concern, and addressed those areas of possible concern.

Despite the project properly being classified as an Unlisted action, Respondent Torrey Planning Board used the full EAF in assessing the possible environmental impacts. (6 NYCRR § 617.6[3]: "For Unlisted actions, the short EAF (see section 617.20, Appendix B, of this Part) must be used to determine the significance of such actions. However, an agency may instead use the full EAF for Unlisted actions if the short EAF would not provide the lead agency with sufficient information on which to base its determination of significance. The lead agency may require other information necessary to determine significance.") Using the full EAF, at the April 19, 2021 meeting of the Respondent Torrey Planning Board its members assessed each of the sixteen (16) areas of potential environmental concerns and debated same. The Planning Board identified two areas of concern: (1) "impact on energy" (question 14), and (2) "impact on noise, odor, and light" (question 15).[32]

Both the issue of potential noise from the project, and its energy use, had been discussed extensively by the Board at prior meetings. The concern about noise led to an acoustical study being conducted to determine anticipated noise levels from

[32] Torrey Planning Board Meeting Minutes dated April 19, 2021 (NYSCEF Docket # 36); Full EAF Parts 2 and 3 (NYSCEF Docket # 56); Town of Torrey SEQRA Resolution with Negative Declaration dated April 19, 2021- Greenidge Generation LLC Site Plan (NYSCEF Docket # 66).

the project. The report, and later revisions, were submitted for consideration by the Respondent Planning Board. That study was discussed by the Respondent Torrey Planning Board at the July 20, 2020 meeting. A revised acoustical study was submitted to Respondent on September 3, 2020. The conclusion of the study was that the project's predicted noise levels would be below the limits set by the Zoning Law of the Town of Torrey.[33] The study was again reviewed by Respondent Planning Board and discussed at the April 19, 2021 meeting.

The project's impact on the energy grid was also thoroughly reviewed by Respondent Torrey Planning Board. As the project would not result in an increase in generating capacity at the plant, Respondents properly concluded that there would not be a significant, environmental impact. (See "Greeindge II", NYSCEF Docket No. 71 at page 16: "DEC fully considered all of the potential environmental impacts of the renewed SPDES permit, including those to surface waters".) Additionally, Respondent Torrey Planning Board reviewed correspondence from the NYSDEC which stated that the plant's operations were in compliance with the previously issued air and water permits.[34]

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[33] Aurora Acoustical Consultants, Inc. Report dated June 30, 2020 (NYSCEF Docket # 46); Aurora Acoustical Consultants, Inc. Report, Revision 1, dated July 23, 2020 (NYSCEF Docket # 48); Aurora Acoustical Consultants, Inc. Report received by Respondent Town of Torrey on September 3, 2020 (NYSCEF Docket # 49).

[34] Letter from NYSDEC dated October 23, 2020 (NYSCEF Docket # 59).

As the Court of Appeals observed in *Jackson v. New York State Urban Development Corp. supra*:

> First, an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (*Aldrich v. Pattison*, 107 A.D.2d 258, 266, 486 N.Y.S.2d 23, *supra; Coalition Against Lincoln W. v. City of New York*, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170, affd. 60 N.Y.2d 805, 469 N.Y.S.2d 689, 457 N.E.2d 795, supra). The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal (*see, Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 228, 464 N.Y.S.2d 431, 451 N.E.2d 189). Second, the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives (*see, e.g.*, ECL 8-0109[8]). Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (*Aldrich v. Pattison*, 107 A.D.2d 258, 267, 486 N.Y.S.2d 23, *supra; see also, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460).

Respondent Torrey Planning Board took the requisite "hard look" at the environmental impacts of the project. The findings of the Respondent Torrey Planning Board are supported by substantial evidence, and it cannot be said that the Respondent's determinations were irrational.

Finally, assuming *arguendo* that the project was a Type I action, it is clear from the administrative record that the procedural requirements of a Type I action

were followed, and Respondent's issuance of a Negative Declaration supported by the record. (*See Jaffee v. RCI Corporation*, 119 AD2d 854 [3rd Dept. 1986].)

Petitioners' SEQRA Challenge is Moot

On December 3, 2021 Petitioners filed a notice of motion seeking a preliminary injunction to enjoin Greenidge from continuing to develop the project.[35] Petitioners waited almost eight months after the Respondent Torrey Planning Board issued the Negative Declaration, five months after the Respondent Town of Torrey issued the building permit, and four months after construction began on the project. The Court determines that Petitioners failed to preserve the status quo and this issue is now moot.

> "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 Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172, 746 N.Y.S.2d 429, 774 N.E.2d 193 [2002] [citation omitted]). Where a change in circumstances involves the substantial completion of construction, "courts must consider several factors, including whether the challengers sought preliminary injunctive relief or otherwise attempted to preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*Town of N. Elba v. Grimditch*, 131 A.D.3d 150, 156–157, 13 N.Y.S.3d 601 [2015] [internal quotation marks, brackets and citations omitted], *lv denied* 26 N.Y.3d 903, 2015 WL 5150754 [2015]). Although injunctive relief is theoretically available, as a project can be dismantled, courts consider how far the work has progressed toward completion in determining mootness (*see*

[35] Petitioner's Notice of Motion and supporting exhibits (NYSCEF Docket #s 94-96); Respondent Town of Torrey's Affirmation in Opposition (NYSCEF Docket # 109).

> *Matter of Kowalczyk v. Town of Amsterdam Zoning Bd. of Appeals*, 95 A.D.3d 1475, 1477, 944 N.Y.S.2d 660 [2012]). A determination of mootness is fact-driven (*see Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d at 173, 746 N.Y.S.2d 429, 774 N.E.2d 193).

(*Bothar Constr., LLC v. Dominguez*, 201 A.D.3d 1231, 1232–33, [3rd Dept. 2022].)

Here, Petitioners did not timely seek injunctive relief. "The primary factor in the mootness analysis is "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" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173 [2002]; *see Wallkill Cemetery Assn., Inc.*, 73 AD3d at 1190). Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding" (*Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 750 [1st Dept 2012], *affd* 20 NY3d 919 [2012]). (*Id.* at 1486–87.)

"Also significant are whether work was undertaken without authority or in bad faith, and whether substantially completed work is "readily undone, without undue hardship" (*Citineighbors Coal. of Historic Carnegie Hill ex rel. Kazickas v. New York City Landmarks Pres. Comm'n*, 2 NY3d 727, 729, [2004] quoting *Matter of Dreikausen v. Zoning Board of Appeals of City of Long Beach*, 98 NY2d at 172.)

Greenidge acted in good faith after receiving all the necessary permits and approvals to begin construction on the project. Greenidge had committed substantial funds towards the project for construction costs, supplies and materials, and the necessary computer equipment, and construction had been proceeding for four months at the time Petitioners sought a preliminary injunction. The Court also takes notice of the fact that in prior litigation involving these same parties, Petitioners failed to timely move for injunctive relief, which led to the Appellate Division, Fourth Department dismissing a prior appeal. (*Sierra Club v. New York State Department of Environmental Conservation*, 169 AD3d 1485, 1488 [4th Dept. 2019]: "Greenidge undertook the construction project with all the necessary permits based upon the conclusions and requirements of the existing SEQRA review. Greenidge substantially completed that construction, and we therefore conclude that petitioners' challenge to the SEQRA review became moot (*see generally Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072, 1073–1074, 861 N.Y.S.2d 155 [3d Dept. 2008], *lv denied* 11 N.Y.3d 716, 874 N.Y.S.2d 5, 902 N.E.2d 439 [2009])".)

As there was unnecessary delay by Petitioners in seeking the preliminary injunction, and Greenidge acted in good faith, and construction has substantially completed, this issue is moot. (*Id., Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn., supra*; *Matter of Weeks*

Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y., 95 AD3d 747 [1st Dept. 2012].)

A Preliminary Injunction – Even if not Moot- Is Unwarranted

Assuming Petitioners' challenge to the SEQRA determination is not moot, the Petitioners have failed to establish they are entitled to a preliminary injunction.

"In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Emerald Enters. of Rochester v Chili Plaza Assoc.*, 237 AD2d 912 [1997])." (*Eastman Kodak Co. v. Carmosino*, 77 AD3d 1434, 1435, [4th Dept. 2010].)

Petitioners have failed to establish (assuming they have standing to do so) by clear and convincing evidence that the Respondent Torrey Planning Board's determination was contrary to SEQRA and unsupported by the record. Additionally, they failed to establish that they would suffer irreparable harm should the project be completed. Their allegation of harm to Seneca Lake due to water discharge is irrelevant, and the only other possible environmental harm from the project is noise, which the record establishes would either fall below accepted levels, or the project would need to cease operations until remedied. Finally, the balance of equities

favors Greenidge, as they have invested millions of dollars in the project and a delay in completing the project would have significant financial consequences.

Thus, the motion for a preliminary injunction is denied.

Order and Judgment

Now upon reading the Amended Petition and supporting exhibits (NYSCEF Docket #s 12-21); Petitioner's Memorandum of Law in Support and supporting exhibits (NYSCEF Docket #s 78-81); Respondent Town of Torrey's Verified Answer and supporting exhibits (NYSCEF Docket #s 22-63); Respondent Greenidge's Verified Answer and Objections in Point of Law (NYSCEF Docket #s 64-72); Respondent Greenidge's Memorandum of Law in Opposition (NYSCEF Docket # 73); Respondent Greenidge's Affirmation in Reply and supporting exhibits (NYSCEF Docket #s 82-84); Respondent Town of Torrey's Memorandum of Law in Opposition (NYSCEF Docket # 77); and upon reading

Respondent Greenidge's Notice of Motion dated June 17, 2021 and Affirmation (NYSCEF Docket #s 74-75); Respondent Greenidge's Memorandum of Law in Support (NYSCEF Docket # 76); Respondent Greenidge's Affirmation in Reply (NYSCEF Docket # 87); Petitioner's Affirmation in Opposition and supporting exhibit (NYSCEF Docket #s 91-92); and upon reading

Petitioner's Notice of Motion dated November 30, 2021 and supporting exhibits (NYSCEF Docket #s 94-96); Respondent Town of Torrey's Affirmation in Opposition (NYSCEF Docket # 109); and upon reading

Respondent Greenidge's Notice of Cross-Motion dated January 12, 2022 and supporting exhibits (NYSCEF Docket #s 98-107); Respondent Greenidge's Memorandum of Law in Opposition to Motion and in Support of Cross-Motion (NYSCEF Docket # 108); Petitioner's Memorandum of Law in Opposition to Cross-Motion and In Further Support of Motion (NYSCEF Docket # 110);

AND upon oral argument on the Amended Petition, Motion to Strike the Dr. Gregory Boyer Affidavit, Motion for the Preliminary Injunction, and Cross-Motion in Opposition and to Dismiss the Amended Petition, and due deliberation having been had, it is ORDERED and ADJUDGED that Respondent Greenidge's Motion to strike the Affidavit of Dr. Gregory Boyer is GRANTED; Petitioners' Motion for a Preliminary Injunction is DENIED; Respondent Greenidge's Motion to Dismiss the Amended Petition is GRANTED, and the Amended Petition is DISMISSED on the merits in accordance with the above decision.

This constitutes the Decision, Order & Judgment of the Court.

Dated: April 7, 2022

Honorable Daniel J. Doyle, JSC