

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT I. CALORAS

IA PART 36

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GABRIELLA VELARDI-WARD,

Index No: 705019/2020

Petitioner-Plaintiff,

Motion Date: July 23,2020

-against-

Mot. Seq. Nos. 1 and 2

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent-Defendant.**

FILED

-and-

**8/12/2020
8:35 AM**

JOSIF A. LLC,

**COUNTY CLERK
QUEENS COUNTY**

Intervenor-Respondent-Defendant.

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The following papers read on this hybrid Article 78 proceeding and declaratory judgment action by petitioner Gabriella Velardi-Ward for a judgment annulling the Freshwater Wetlands Permit issued by respondent New York State Department of Conservation (DEC) to Josif A. LLC on October 23, 2019, on the grounds that respondent improperly relied on the 2017 Environmental Impact Statement (EIS) and that its determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious and an abuse of discretion; adjudging and declaring that respondent’s SEQRA review based on said EIS affected by errors of law, is arbitrary and capricious, and is an abuse of discretion, and is invalid and void for having been made in violation of lawful procedure; ordering respondent to withdraw the subject Permit and conduct a new EIS that complies with SEQRA before considering any new wetlands permit for the subject project; in the alternative, ordering that respondent conduct a public adjudicatory hearing regarding the issues raised by petitioner in the Comment Letter; and granting petitioner costs and disbursements. Respondent/defendant DEC cross moves to dismiss the amended petition/complaint on the grounds of failure to state a cause of action and statute of limitations. Intervenor-Respondent/Defendant Josif A. LLC cross moves to dismiss the amended petition/complaint on the grounds of statute of limitations

Papers
Numbered

Notice of Petition-Amended Verified Petition and Complaint-Exhibits-
Memorandum of Law..... EF 1-15

Notice of Cross Motion-Affirmations-Memorandum of Law..... EF 17-21

Notice of Cross Motion-Exhibits-Memorandum of Law..... EF 22-50

Opposing Memorandum of Law..... EF 53

Reply Affirmation- Reply Memorandum of Law..... EF 54-55

Reply Memorandum of Law..... Reply Memorandum of Law..... EF 56

Upon the foregoing papers the amended petition/complaint(motion seq. no 1) and cross motions (motion seq. no 2) are consolidated for the purposes of a single decision and are determined as follows:

In 1981, DEC prepared a tentative freshwater wetlands map for Richmond County which did not identify freshwater wetlands on the subject project site. In 1987, DEC revised its tentative map and promulgated the final freshwater wetlands map for Richmond County. The final map identified the Graniteville Freshwater Wetland within and adjacent to the subject project site. Shortly thereafter Charles Alpert and Joseph Alpert, owners of unimproved real property located at 534 South Avenue, Staten Island, New York, adjacent to or within a portion of designated freshwater wetlands filed an appeal with the Freshwater Wetlands Appeal Board (Appeals Board) challenging the freshwater wetlands designation of portions of their property and sought relief under the hardship provisions of ECL § 24-1104, which was in effect at the time. The Alberts sought to commercially develop their property. In January 1988, DEC filed its answer and appearance in said appeal. The City of New York’s motion to intervene in said proceeding was granted by the Appeals Board on December 22, 1993. Prior to a hearing scheduled for March 1994, the parties entered into settlement discussions, which ultimately terminated the proceeding.

The Alberts presented the DEC with a proposed site plan, dated February 5, 2008, and last revised on August 16, 2012, for the development of their Staten Island property and the designation of approximately seven acres of the 28.3 acres property as wetlands. In 2012, the parties negotiated a stipulation of settlement. The DEC determined that the site plan, in connection with the 2012 stipulation constituted an acceptable proposal to address and resolve the issues raised in the appeal before the Appeals Board. The 2012 stipulation established agreed-upon wetland boundaries as set forth in the site plan. A permit application appended to the 2012 stipulation as Exhibit B described the development of approximately 18 acres of the then-described 27.8-acre property, including the 0.39 acre Permitted Wetland Adjacent Area, with 4.5 acres of wetland enhancement and buffer planting areas in the remaining 9.8 acres, that included the seven acres of wetland.

By 2012, Josif A. LLC, an entity formed by the Alperets was the permit applicant. The site plan provided for some development on the 0.39 acre Permitted Wetland Adjacent Area. As part of the 2012 stipulation, the DEC tentatively concluded that the applicant's proposal as presented on the site plan met standards for issuance of a freshwater wetlands permit for the Permitted Wetland Adjacent Area under Article 24 of the ECL, subject to environmental quality review under the State Environmental Quality Review Act (SEQRA), Article 8 of the ECL. The 2012 stipulation required the DEC to issue a freshwater wetlands permit so long as the SEQRA process or public review did not raise substantive and significant issues concerning the permissibility of the development project.

On January 26, 2016, pursuant to the 2012 Stipulation, Josif A. LLC filed Uniform Land Use Review Procedure (ULURP) applications with the New York City Planning Commission (Planning Commission) in connection with the development project. Said project required special permits, authorizations, and certifications from the Planning Commission, including a special permit to allow retail establishments in excess of 10,000 zoning square feet (zsf) in a manufacturing zoning district; an amendment to the City Map to de-map portions of Garrick Street, Amador Street, Albany Avenue, and Morrow Street (unbuilt streets) and to map new sections of Morrow Street, and to realign the intersection of Morrow Street and Forest Avenue; and issuance of a DEC freshwater wetlands permit under Article 24 of the ECL.

On August 26, 2016, the New York City Department of Planning (Department of Planning), acting on behalf of the City Planning Commission as lead agency, initiated the environmental quality review process for said project. The Department of Planning solicited participation from the following agencies: DEC, the Planning Commission, New York City Department of Environmental Protection, New York City Landmarks Preservation Commission, New York City Department of Parks and Recreation, New York City Department of Transportation, New York City Department of Housing, and New York City School Construction Authority. The DEC agreed to act as an involved agency.

On September 27, 2016, the Department of Planning held a public scoping meeting to allow all involved and interested agencies and members of the public an opportunity to comment on the range of issues and considerations to be evaluated in the EIS. The meeting was held near the proposed project site at 970 Richmond Avenue, Staten Island, New York. The Department of Planning accepted comments from the public on the scope of work through October 7, 2016.

On June 2, 2017, the Department of Planning issued a final scope of work and a Notice of Completion of the Draft Environmental Impact Statement (DEIS). On July 26, 2017, the Planning Department held a DEIS public hearing and received written comments on the DEIS through August 7, 2017.

On August 25, 2017, the Department of Planning issued the Notice of Completion of the Final Environmental Impact Statement (2017 FEIS), which included comments received during the public comment period. The 2017 FEIS provided that the proposed project would result in development on the Permitted Wetland Adjacent Area, but, would

preserve the seven acres of wetland along with the wetland adjacent area, for a total of 10.77 acres. It further provided that after completion of the ULURP process, the applicant would complete and finalize the DEC freshwater wetlands permit process for the Permitted Wetland Adjacent Area. The 2017 FEIS had, among other things, analyzed “conditions in the future without the proposed project (the No Action condition), and conditions in the future with the proposed project (the With Action condition).” It considered, as a no action alternative, the applicant’s possible development of the project site in conformance with the then underlying zoning and within the development footprint approved by DEC as part of the 2012 Stipulation, in the absence of obtaining de-mapping and special permit approvals from the Planning Commission, but including the issuance of the Freshwater Wetlands Permit.

On September 6, 2017, the Planning Commission issued written findings that concluded that the subject project would not result in any unmitigated adverse environmental impacts and approved the ULURP applications. On October 31, 2017, New York City Council approved the ULURP applications.

On April 12, 2018, Josif A. LLC applied to the DEC for a Freshwater Wetlands Permit to construct a new commercial development located at 534 South Avenue, Staten Island, New York, on the Permitted Wetland Adjacent Area. The proposed project included two one-story retail buildings, a one-story building containing three retail stores, a gas station and an automated bank teller. The proposed project would impact approximately 0.39 acres of adjacent area next to the state regulated Class 11 freshwater wetland known as Graniteville. The applicant proposed that it would preserve 10.77 acres of freshwater wetland and wetland adjacent area, including wetlands buffer plantings, a freshwater wetland enhancement area, a storm water management area and preserved natural areas.

On July 31, 2019, the DEC published a Notice of Complete Application for the Freshwater Wetlands Permit Application, opening the public comment period. Between July 31, 2019 and August 30, 2019, the DEC accepted comments on the Freshwater Wetland Permit Application. On October 23, 2019, the DEC issued responses to the comments submitted in connection with the Freshwater Wetland Permit Application. The DEC determined that the comments submitted on the Freshwater Wetland Permit Application did not raise substantive and significant issues that would warrant holding an adjudicatory hearing on the Freshwater Wetland Permit Application pursuant to 6 NYCRR § 621.8(b). On the same date, the DEC issued a finding statement in connection with SEQRA, which incorporated the 2017 FEIS prepared by the Department of Planning on behalf of the Planning Commission as lead agency, and the September 6, 2017 findings of the Planning Commission, and issued the Freshwater Wetlands permit to Josif A. LLC.

Petitioner-Plaintiff Gabriella Velardi-Ward commenced the within hybrid Article 78 proceeding and action for declaratory judgment against the DEC on February 19, 2020,

and thereafter filed an amended verified petition and complaint.¹ Petitioner Velardi-Ward alleges that she is a citizen of New York State, a Staten Island resident and a co-founder and member of the Coalition for Wetlands and Forest (Coalition), a group of local Staten Island citizens whose mission is to raise awareness of the issues concerning Staten Island Wetlands and save the Graniteville Wetlands and Forest. She alleges that the EIS relied upon by the DEC was prepared in connection to a request made by Josif A. LLC for a special zoning permit, commonly known as a bulk variance, and a mapping amendment from the City of New York. It is alleged that in the No Action alternatives set forth in the EIS were written from a perspective in which the applicant was not granted a bulk variance/special zoning permit and did not consider any development following the issuance of a Freshwater Wetlands permit.

Petitioner alleges that after Josif A. LLC submitted its application for a Freshwater Wetlands permit on April 12, 2018, a letter was submitted on behalf of the Coalition during the public comment period, requesting, among other things, that a public hearing be scheduled. It is alleged that the Comment Letter stated that the EIS relied upon by the DEC in proposing to issue the subject permit, failed to consider a No Action Alternative where a Freshwater Wetlands permit was not issued to the applicant for the construction of the commercial retail development project, and therefore the permit application should have been denied.

The first cause of action pursuant to CPLR Article 78 alleges that the DEC unlawfully violated SEQRA when it relied upon the EIS in issuing the subject permit, as no analysis had been conducted with respect to any beneficial site changes that would occur in absence of the issuance of an Article 24 Freshwater Wetlands permit. It is alleged that SEQRA expressly requires consideration of a no action alternative based on no action being taken on the proposed action, which was the granting of a wetlands permit, and therefore the DEC's reliance on the EIS and the issuance of the subject permit was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, and was an abuse of discretion.

The second cause of action for declaratory judgment seeks a declaration to the effect that the DEC's reliance on the EIS was in violation of the law, that the issuance of the Freshwater Wetlands Permit to Josif A. LLC was issued in violation of SEQRA, and further, seeks the annulment of said permit. Petitioner also seeks an order directing the DEC to conduct a proper EIS which includes a No Action Alternative Analysis where no freshwater wetlands permit is granted.

The third cause of action alleges that the DEC's failure to hold a public adjudicatory hearing following its receipt of the subject Comment Letter violated ECL § 24-0703(2) and 6 NYCRR 621.8(b) and seeks to annul the permit issued to Josif A. LLC and to compel

¹This proceeding/action was commenced under Index Number 1075/2020 and was thereafter converted to the within e-filed proceeding/action on May 12, 2020.

respondent DEC to hold an adjudicatory hearing on the South Avenue Retail Development project.

Respondent-defendant DEC served an answer and interposed the affirmative defense of statute of limitations. Josif A. LLC was granted leave to intervene pursuant to a so-ordered stipulation.

The DEC now cross moves to dismiss the petition/complaint on the grounds of failure to state a cause of action and statute of limitations. The DEC asserts that the time in which to seek judicial review of the DEC's determination to issue the Freshwater Wetlands Permit is governed by a 30 day statute of limitations set forth in ECL§ 24-0705(6), and that petitioner-defendant commenced this proceeding more than 30 days after the permit was issued to Josif A. LLC. It is further asserted that petitioner's SEQRA challenge to the adequacy of the 2017 FEIS is time-barred, as this proceeding was commenced more than four months after the Planning Commission issued its written findings and approved Josif A. LLC's application for a special permit under ULURP for the project on September 6, 2017.

As regards the cause of action for declaratory judgment, the DEC asserts that this cause of action is duplicative of the Article 78 cause of action and cannot serve as a means to evade the statute of limitations applicable to the Article 78 claims. It is further asserted that the declaratory judgment claim is also time barred, as the same claim could have been raised in a timely Article 78 proceeding.

Finally, the DEC asserts that the within proceeding should be dismissed as the determination to issue the Freshwater Wetlands Permit, including the DEC's reliance on the 2017 FEIS and the issuance of the SEQRA Findings Statement, was not affected by an error of law, arbitrary and capricious or an abuse of discretion, or irrational. It is also asserted that the DEC lacks the authority to prepare a separate EIS.

Intervenor-Respondent-Defendant Josif A. LLC cross moves to dismiss the petition/complaint on the grounds of statute of limitations. It is asserted that the first and third causes of action are governed by the 30- day statute of limitations set forth in ECL§ 24-0705(6), and therefore are time barred. It is also asserted that the second cause of action for declaratory judgment is actually an Article 78 claim and is also time barred. Josif A. LLC has withdrawn its request to serve an answer in the event its cross motion is not granted and relies upon and adopts the DEC's arguments opposing the petition/complaint.²

Petitioner-plaintiff in opposition to the cross motions asserts that the correct statute of limitations for the Article 78 claims and the declaratory judgment action is four months, pursuant to CPLR 217, and that the proceeding/complaint was timely commenced within four months after the issuance of the subject permit. Petitioner asserts that she is not challenging the Article 24 permit itself and does not claim that said permit was improperly

²Both cross motions were submitted under motion sequence number 2.

issued. Rather, she asserts that as the DEC failed to comply with SEQRA review, the longer four-year statute of limitations applies, and that the same statute of limitations applies to the action for declaratory judgment.

Petitioner asserts that it was not necessarily improper for the Department of City Planning to rely on the EIS, but that it was improper and illegal for the DEC to rely on an EIS that did not include a no action alternative where the development did not intrude on the wetlands. She therefore asserts that she could not have commenced a proceeding in September of 2017, as no illegal act had yet been committed and no injury had occurred. Rather, it is asserted that this proceeding could only have been commenced against the DEC after it relied on the 2017 FEIS, and granted the Freshwater Wetlands permit to Josif A. LLC on October 23, 2019. She also asserts that prior to commencing this proceeding, she exhausted her administrative remedies by submitting a letter during the comment period.

Petitioner asserts that the petition should be granted as the DEC expressly admitted that the no action alternative actually used assumed “issuance of the Freshwater Wetlands Permit”, and thus admitted to have acted in violation of SEQRA. She further asserts that even if the DEC is correct that it was bound by the FEIS, it could have requested a supplemental EIS that contained an actual ‘no action alternative’, or could have denied the permit for the failure to comply with SEQRA. Finally, petitioner argues that the DEC was required to hold a public adjudicatory hearing on the matter.

Respondent DEC, in its reply to the cross motion denies making any concessions as to violations of SEQRA and restates the arguments raised in the cross motion. Respondent Josif A. LLC in its reply restates the arguments raised in the cross motions to dismiss the petition/complaint.

An action taken by an agency pursuant to SEQRA may be challenged only when such action is final (*see* CPLR 7801 [1]). An agency action is final when the decision-maker arrives at a “definitive position on the issue that inflicts an actual, concrete injury” (*Stop-The-Barge v Cahill*, 1 NY3d 218, 223 [2003], *quoting Matter of Essex County v Zagata*, 91 NY2d 447, 453[1998]). The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party (*see Stop-The-Barge v Cahill*, 1 NY3d at 223; *Matter of Essex County v Zagata*, 91 NY2d at 453-454; *Matter of Stengel v Town of Poughkeepsie Planning Bd.*, 167 AD3d 752, 753-754 [2d Dept 2018]; *Matter of Patel v Bd. of Trustees of Inc. Vil. of Muttontown*, 115 AD3d 862, 864 [2d Dept 2014]).

To the extent that the first cause of action is based upon a SEQRA claim, and does not seek judicial review of the issuance of the permit itself, the 30-day period of limitations set forth in ECL § 24-0705(6) is inapplicable here (*see Matter of County of Orange v Vil. of Kiryas Joel*, 44 AD3d 765 [2d Dept 2007]). Petitioner’s SEQRA claims are governed by a four-month period of limitations (CPLR 217). The Department of City Planning, on behalf of the City Planning Commission, as the lead agency completed its environmental

review pursuant to CEQR (City Environmental Quality Review) and SEQRA no later than August 25, 2017 when it issued the FEIS. The City Planning Commission completed its environmental review on September 6, 2017 when it issued its findings. The 2017 FEIS, thus, constituted a final action on the part of the lead agency.

Petitioner in her first cause of action objects to the DEC's reliance upon the 2017 FEIS. Therefore, as regards the 2017 FEIS, the statute of limitations began running no later than September 6, 2017. Petitioner's SEQRA claim is time barred, as the statute of limitations expired in 2017, years before this proceeding was commenced (*see Stop-The-Barge v Cahill*, 1 NY3d 218, [2003]). It does not avail petitioner to argue that the statute of limitations did not begin to run until October 23, 2019, when the DEC approved the application for the Freshwater Wetlands Permit, and issued its SEQRA Findings Statement, incorporating the 2017 FEIS.

To the extent that petitioner's third cause of action seeks to annul the Freshwater Wetland permit issued on October 23, 2019, and to compel the DEC to hold an adjudicatory hearing, this claim seeks judicial review of the permit application process, and is time barred as it is governed by the 30-day period of limitations set forth in ECL § 24-0705(6).

To the extent the second cause of action seeks to compel the DEC to conduct a new EIS with a No Action alternative that does not include the granting of a Freshwater Wetland permit, mandamus is not available here as a matter of law. The Planning Commission acted as the lead agency and "all involved agencies must rely upon the FEIS as the basis for their review of the environmental impacts that they are required to consider in connection with subsequent permit applications (*see* 6 NYCRR 617.6 [b] [3] [iii])" (*Matter of Guido v Town of Ulster Town Bd.*, 74 AD3d 1536, 1537 [3d Dept 2010]; *see also Troy Sand & Gravel Co. v Town of Nassau*, 125 AD3d 1173 [3d Dept 2015]). In a coordinated environmental quality review, "no involved agency may later require the preparation of . . . an EIS in connection with the action" (6 NYCRR § 617.6 [b][3][iii]). The DEC, therefore, cannot be required to prepare an additional EIS in connection with the Freshwater Wetlands Permit.


Furthermore, petitioner-plaintiff may not maintain the second cause of action for declaratory judgment. Since the legal issues raised in the petition are limited to whether the DEC's determination under SEQRA was arbitrary and capricious, made in violation of lawful procedure, affected by an error of law, an abuse of discretion, or irrational, those issues are subject to review only pursuant to CPLR article 78 (*see* CPLR 7803[3]; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231–232 [2007]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]; *Matter of Coney-Brighton Boardwalk All. v New York City Dept. of Parks and Recreation*, 122 AD3d 924, 925-26 [2d Dept 2014]; *Matter of East Moriches Prop. Owners' Assn. v Planning Bd. of Town of Brookhaven*, 66 AD3d 895, 897 [2d Dept 2009]), thus rendering unnecessary the cause of action for a judgment declaring that the DEC violated SEQRA (*see Matter of East Moriches Prop. Owners' Assn. v. Planning Bd. of Town of Brookhaven*, 66 AD3d at

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897; *Matter of Coney-Brighton Boardwalk All. v New York City Dept. of Parks and Recreation*, 122 AD3d 924, 925-26). The second cause of action for declaratory judgment, therefore, is improper, and is dismissed.

In view of the foregoing, the cross motions to dismiss the petition are granted.

Dated: August 10, 2020



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Robert I. Caloras, J.S.C.

FILED

8/12/2020

8:35 AM

**COUNTY CLERK
QUEENS COUNTY**