

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 8-23-17SUBMIT DATE 3-22-18

Mot. Seq. # 02 - MD

Mot. Seq. # 03 - MG; CASEDISP

X-Mot. Seq. # 04 - MG

COPY

TOWN OF BROOKHAVEN and  
TOWN OF SOUTHAMPTON, as Intervener,

Petitioners,

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

-against-

LONG ISLAND POWER AUTHORITY and  
PSEG LONG ISLAND,

Respondents.

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Upon the following papers numbered 1 to 105 read on this motion to dismiss & amend petition; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 (#02) & 20 - 78 (#03); Notice of Cross Motion and supporting papers 79 - 91 (#04); Answering Affidavits and supporting papers 92 - 95 (#03); Replying Affidavits and supporting papers 96 - 103 (#03) & 104 - 105 (#04); Other ---; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

In this combined CPLR Article 78 and declaratory judgment action, the petitioner, Town of Brookhaven, seeks to annul the determination of the Long Island Power Authority, hereinafter referred to as "LIPA", and PSEG Long Island LLC, hereinafter referred to as "PSEG", pursuant to New York State Environmental Quality Review Act, hereinafter referred to as "SEQRA", as well as other relief. The respondents, LIPA and PSEG, oppose this application and separately move to dismiss the amended petition pursuant to CPLR 3211(a)(1), (7), and 7804(f). Brookhaven opposes the motion to dismiss and cross moves for leave to serve and file a Second Amended Petition.

Brookhaven's cross motion for leave to serve and file a Second Amended Verified Petition is granted without opposition from the respondents. The Second Amended Verified Petition is deemed served.

Brookhaven filed this action to challenge the determination of LIPA pursuant to SEQRA that the reconductoring of an existing 69 kilovolt overhead transmission circuit, including utility pole replacements, would not have a significant adverse impact on the environment and that a draft Environmental Impact Statement would not be prepared. Brookhaven also seeks a declaratory judgment "that LIPA and PSEG, as its agent, failed to properly notify and include the Town of Brookhaven in the entire siting process, based upon the location of the project and its significant adverse effect on the environment as well as the significant adverse visual impacts resulting therefrom." LIPA and PSEG move to dismiss based upon the mootness doctrine. The respondents argue that the petitioner was informed of the project in advance and that Brookhaven failed to commence this proceeding until three months after the project was started and was already substantially complete. LIPA and PSEG claim that the project was started on April 10, 2017 and the newly installed line was activated on June 9, 2017. The reconductoring involved upgrading 7.3 miles of overhead "transmission line" running between the Riverhead and Eastport substations, as well as the installation of 211 steel utility poles to replace the 195 wood poles that were along the route. LIPA and PSEG indicate that the new steel utility poles have been in place since before June 9, 2017 and Brookhaven did not file its original petition until July 21, 2017. In addition, the respondents argue that the petitioners never sought a temporary restraining order or temporary injunction when the steel utility poles were being installed.

The Court in *PSEG Long Is., LLC v Town of E. Hampton*, 154 AD3d 703, 704 [2d Dept 2017], dealt with a similar fact pattern and noted that

The plaintiff is the service provider and designated agent for the Long Island Lighting Company (hereinafter LILCO), which is a subsidiary of the Long Island Power Authority (hereinafter LIPA), a political subdivision of the State of New York created to provide electricity to Long Island and the Rockaways (see Public Authorities Law §§ 1020-a [LIPA], 1020-b[23] [LIPA]; 1020-c [LIPA]). In October 2013, in order to upgrade the transmission capacity between the East Hampton and Amagansett substations, located in the Town of East Hampton, LILCO and its former service provider commenced construction of a new 6.2-mile overhead transmission line with modifications to both substations. On April 4, 2014, the Town issued a stop work order for the expansion of the Amagansett substation until the plaintiff obtained a building permit and complied with the provisions of the New York State Building Code and the Town's zoning code.

The Court examined the doctrine of mootness and held that

"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 NY2d 165, 172, 774 N.E.2d 193, 746 N.Y.S.2d 429; see *Matter of Hearst Corp. v Clyde*, 50 NY2d 707, 714, 409 N.E.2d 876, 431 N.Y.S.2d 400).



"Where the change in circumstances involves a construction project, [a court] must consider how far the work has progressed towards completion. Because a race to completion cannot be determinative,' however, other factors bear on mootness in this context as well. Chief among them has been 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 Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 729, 811 N.E.2d 2, 778 N.Y.S.2d 740, quoting *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d at 172-173 [citation omitted])... "Also significant are whether work was undertaken without authority or in bad faith, and whether substantially completed work is readily undone, without undue hardship.' Further, [a court] may elect to retain jurisdiction despite mootness if recurring novel or substantial issues are sufficiently evanescent to evade review otherwise" (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d at 729, quoting *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d at 173 [citation omitted])...

Here, although the Town attempted to preserve the status quo by unsuccessfully seeking a stay pending appeal (see *Hidalgo v 4-34-68, Inc.*, 117 AD3d 798, 800, 988 N.Y.S.2d 64; *Matter of E & J Sylcox Realty, Inc. v Town of Newburgh Planning Bd.*, 12 AD3d 445, 446, 783 N.Y.S.2d 819; cf. *Matter of Town of Caroline v County of Tompkins*, 299 AD2d 627, 628, 750 N.Y.S.2d 337), the Town later rescinded the stop work order. The plaintiff's completion of the construction was not done in bad faith. The construction was fully complete on June 12, 2015, the substation has since been operational, and the construction cannot be readily undone without undue hardship (see *Matter of Town of Caroline v County of Tompkins*, 299 AD2d at 628; *Matter of Save the Pine Bush v Cuomo*, 200 AD2d 859, 860, 606 N.Y.S.2d 818). Under these circumstances, the issues of the validity of the stop work order and whether the plaintiff is exempt from the application or enforcement of any local laws, regulations, rules, and/or ordinances that would otherwise govern the construction and maintenance of the LIPA transmission and distribution system have been rendered academic (see *Matter of Bath Petroleum Stor. v New York State Dept. of Env'tl. Conservation*, 272 AD2d 746, 709 N.Y.S.2d 636; *Matter of Save the Pine Bush v Cuomo*, 200 AD2d at 860). Moreover, none of the exceptions to the mootness doctrine are applicable here (see *Matter of Hearst Corp. v Clyne*, 50 NY2d at 714-715). Accordingly, the appeal must be dismissed.

(*PSEG Long Is., LLC v Town of E. Hampton*, *supra* at 705-706).

In the present action neither Brookhaven or Southampton sought a preliminary injunction to preserve the status quo and to prevent construction from starting or continuing during the pendency of litigation.


LIPA and PSEG indicate that the project was started on April 10, 2017 and substantially completed on June 9, 2017 when the pole upgrades were completed and the new transmission line was activated. The Court notes that Brookhaven did not commence this action until July 21, 2017 when the summons and initial Notice of Petition were filed, which was forty two (42) days after the new transmission line was activated and one hundred two (102) days after the project was started. The respondents argue that the work was not done in bad faith and the work can not be readily undone since the work was done in compliance with the "reliability requirements established by the North American Reliability Corporation ("NERC") and enforced by the Federal Energy Regulatory Commission".

The Court finds that the reconductoring of the existing 69 kilovolt overhead transmission circuit, including utility pole replacements, was not done in bad faith, was substantially completed on June 9, 2017 and cannot be undone without undue hardship. The Court does not find any of the exceptions to the mootness doctrine present in this action. Therefore the respondents' motion to dismiss is granted and the Second Amended Verified Petition is dismissed.

The petitioners' remaining contentions are denied as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: April 24, 2018

  
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HON. JOSEPH A. SANTORELLI  
J.S.C.

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION