

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of September, 2021.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

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SANE ENERGY PROJECT and COOPER PARK
RESIDENT COUNCIL, INC.,

Petitioners/Plaintiffs,

-against-

Index No.: 518354/21

CITY OF NEW YORK, FIRE DEPARTMENT of
NEW YORK, and BROOKLYN UNION GAS
COMPANY d/b/a NATIONAL GRID,

Defendants.

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The following e-filed papers read herein:

NYSEF Doc. Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1, 4-6, 9, 15</u>
Opposing Affidavits (Affirmations) _____	<u>19, 23, 36, 41</u>
Affidavits/ Affirmations in Reply _____	_____
Other Papers: <u>Party Correspondence</u> _____	<u>53, 54</u>

Upon the foregoing papers, petitioners/plaintiffs Sane Energy Project and Cooper Park Resident Council, Inc., (collectively referred to as Sane) move, by way of an order to show cause, for an order granting a preliminary injunction halting the construction of a liquified natural gas (LNG) truck station at respondent/defendant Brooklyn Union Gas Company d/b/a National Grid's Greenpoint Energy Center (motion sequence number 2) during the pendency of this action.

Based upon the following discussion, Sane's motion for a preliminary injunction is denied in all respects.

Background

In this hybrid Article 78 proceeding and action for a declaratory judgment under CPLR 3001, Sane seeks, inter alia, to halt the construction of an LNG truck station being built by respondent/defendant Brooklyn Union Gas Company d/b/a National Grid (National Grid) in Greenpoint, Brooklyn. Sane argues that construction must cease because National Grid has begun construction of the trucking facility despite the fact that it never obtained approval of its November 1, 2016 LNG variance petition (Variance Petition)¹ from the Fire Department of New York (FDNY), in violation of State Environmental Quality Review Act (SEQRA) (ECL art 8), SEQRA's regulatory scheme and the City Environmental Quality Review (CEQR). In the Variance Petition, National Grid states that the Greenpoint facility operates as a pre-existing, non-conforming, facility for the liquefaction and storage of LNG. LNG cannot currently be shipped to or from the Greenpoint facility by truck, however, because New York City Fire Code (Administrative code of City of NY, tit 29, ch 27) § FC 2707.10.1 bars the transport of LNG in the City of New York (City) by truck, and New York City Fire Code (Administrative code of City of NY, tit 29, ch 32) § FC 3205.4.4 bars the filling of

¹ The Variance Petition dated November 1, 2016 includes an environmental assessment statement (EAS)

cryogenic containers with cryogenic fluid (which includes LNG).² According to the Variance Petition, National Grid sought the variances because:

“Issuance of variances from the FDNY would allow National Grid to address gas shortages, which may arise during peak demand periods at National Grid facilities or in the event that unexpected equipment or operational issues or catastrophic weather conditions, such as Superstorm Sandy, that reduce National Grid's ability to provide an adequate supply of natural gas to its customers. Examples of situations that may lead to natural gas shortages include 1) a pipeline failure 2) extreme weather events and/or natural disasters resulting in impaired ability to operate and 3) unexpected equipment failures that would impact the ability to secure the supply necessary to meet the needs of the customer base” (Sane Petition, Exhibit F, at 16 of 38).

National Grid further states in the Variance Petition that:

“Improvements will be required at the Greenpoint facility to accommodate cargo tanks, with construction taking 6 to 7 months to complete. Work would include the installation of new security gates; the installation of a new loading/unloading area; installation of pipe supports for the new cryogenic piping to be extended to the unloading/loading area; new roadway (including internal looping road) paving; an LNG Station Attendant building; a new high foam expansion building; an LNG spill trench and spill pit; curbing, signage and lighting as necessary; electrical work as well as the installation of fire suppression equipment, and gas and fire detection systems in accordance with FDNY requirements” (Sane Petition, Exhibit F, at 17 of 38).

Sane contends that National Grid violated SEQRA and CEQR by beginning construction of the LNG truck station without obtaining the requisite variance approvals from the FDNY or other appropriate agencies given the potential environmental impacts

² The Variance Petition also sought the variances in order to allow tanker trucks to drive certain routes through the City in order to make deliveries to a National Grid facility located in Long Island. This aspect of the Variance Petition is not currently before the court.

associated with the ultimate operation of the LNG truck station as well as environmental issues with the construction of the improvements at the facility. With respect to the construction of the facility, Sane relies on issues identified in the Variance Petition, such as: (1) National Grid's statement that it would flood proof the area of the truck station up to the "500-year floodplain" (Sane Petition, Exhibit F, at 28 of 38); (2) the need to confirm the adequacy of the stormwater management plan (Sane, Petition Exhibit F, at 26 of 38); (3) a statement that, in view of an order on consent and administrative settlement (AOC) with the New York State Department of Environmental Conservation (NYSDEC), "[a]ny improvements to be constructed for the new loading/unloading at the Greenpoint LNG facility will need to be reviewed and approved consistent with this AOC (Sane Petition, Exhibit F, at 24-25 of 38)."

Upon the filing of the Sane's petition, the court (Rothenberg, J.), signed an order to show cause, dated July 27, 2021, that included a temporary restraining order prohibiting further construction at the LNG truck station pending the resolution of the motion for a preliminary injunction. In opposing Sane's motion for a preliminary injunction, National Grid submits an affidavit from Christopher Connolly, a National Grid vice president, who represents that National Grid first applied for a variance to the Fire Code's restrictions on the trucking and loading/unloading of LNG in 2013. After this 2013 submission, the City's Law Department informed National Grid that it would have to submit an Environmental Assessment Form (EAS) evaluating the environmental impacts of trucking LNG into the City. Connolly asserts that National Grid thereafter engaged in discussions with the City regarding the variances and submitted multiple draft

versions of an EAS to the FDNY for review, including the November 1, 2016 Variance Petition noted above. In response to the Variance Petition, the Mayor's Office of Environmental Coordination sent National Grid a letter, dated April 4, 2017, that raised many questions regarding the EAS submitted with the Variance Petition. These questions were primarily addressed to issues such as how an emergency warranting a variance would be defined and requested additional detail regarding the trucking of LNG and operation of the facility. National Grid, according to Connelly, thereafter engaged in further discussions with the City regarding its Variance Petition, and ultimately, in or around July 2020, came to the understanding that it would not receive approval of a general variance, but instead, that National Grid would have to apply for an "an event-specific variance, limited in scope based on the nature and duration of a defined emergency event" (Connolly, affidavit at ¶ 10). As such, Connolly represents that National Grid did not move forward with its variance application (which it formally withdrew by a letter addressed to the City dated August 3, 2021), and decided to proceed with the construction of the LNG truck station in order to have a facility ready in the event that an emergency application was granted.

National Grid also submits an affidavit from Saed Abdul Hamid, a Manager with National Grid who has been involved in the planning and project oversight of the construction of the LNG truck station. Hamid represents that the LNG truck station is being built at the location of a former LNG truck station that has not been used since 1977, when the last variance to allow truck shipment of LNG was granted, and which is now no longer operational. According to Hamid, the new facility will be similar in size

and scope to the facility it is replacing and will meet current code requirements and safety standards. Hamid states that construction work on the current project is budgeted at \$27,000,000, began on December 16, 2020, and is slated to be completed in December 2021. As of July 27, 2021 (the date the temporary restraining order halting construction was signed), the construction was approximately 50 percent complete, with \$13,357,000 of the construction budget having been spent. Moreover, Hamid notes that the LNG plant with which the LNG truck station would connect is currently off-line for a two-month window period in order to allow the piping from the LNG truck station to be connected to the larger facility, and that each day construction is halted by the temporary restraining order is costing National Grid \$60,000 to \$80,000 a day. Hamid asserts that “[i]t is critical to the National Grid system that the tie-in work be completed so the LNG plant can be brought back online in time to liquefy adequate gas supplies for the winter heating season” (Hamid, affidavit at ¶ 50).

In contrast to the discretionary variance needed for the facility to actually operate, Hamid represents that all of the construction work relating to the LNG truck station involves non-discretionary fire and building related permits from the FDNY, the City’s Department of Buildings (DOB), and the New York City Department of Environmental Protection (DEP).³ Further, Hamid states that National Grid has obtained all of the necessary permits/approvals necessary for the work that has been done, and has applied for, or is in the process of applying for, the remaining permits. With respect to Sane’s

³ Although not discussed by the parties, National Grid represents in its Variance Petition that the Greenpoint facility is zoned for heavy manufacturing uses (M3-1) (Sane Petition, Exhibit F, at 21 of 38).

contentions regarding sedimentation and storm water management, Hamid asserts that National Grid has developed a specific plan to address such issues, and that, since the project does not involve the discharge of storm water into surface water, no specific storm water permit is required by NYSDEC.⁴ Contrary to Sane's assertions regarding flooding risks, Hamid represents that the DOB and FDNY have granted permits approving the location of the facility based on their determination that it is located outside the 100-year floodplain area. Regarding the AOC with NYSDEC,⁵ Hamid represents that National Grid has given NYSDEC notice of the project, that NYSDEC has noted no objections, and that NYSDEC has issued approvals for sampling and soil management associated with the project.

Discussion

It is in the context of this factual background that the motion for a preliminary injunction must be considered. "To establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor" (*Keneally, Lynch & Bak, LLP v Salvi*, 190 AD3d 961, 963 [2d Dept 2021]; see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Network Fin. Planning v Prudential-Bach Sec.*, 194 AD2d 651, 652 [2d Dept 1993]; CPLR 6301).

⁴ A copy of an email from NYSDEC confirming that no permit is needed if storm water is not discharged into surface waters is appended as an exhibit to Hamid's affidavit.

⁵ According to Hamid, the AOC was reached because National Grid's LNG facility is on the site of a former manufactured gas plant.

Sane's ability to demonstrate its likelihood of ultimate success on the merits turns on whether National Grid has violated SEQRA and/or CEQR in commencing the construction work on the LNG truck station without first obtaining the variances that would allow it to actually operate the facility. As is relevant here, SEQRA applies when an agency is faced with an action involving discretionary decision making involving new or modified approvals (i.e. discretionary decision regarding permits, certificates, licenses or other such approval to authorize a project or activity) (*see* ECL 8-0109 [2]; 6 NYCRR 617.2 [b] [1] [iii] and [e]).⁶ Expressly exempted from the definition of an action, however, are "official acts of a ministerial nature, involving no exercise of discretion" (ECL 8-0105 [5] [ii]; *see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 325 [1993]; *Citizens for Preserv. of Windsor Terrace v Smith*, 122 AD2d 827, 828-829 [2d Dept 1986]). Once faced with an action, the agency must make an initial determination as to what kind of action is at issue (*see* 6 NYCRR 617.6). If the agency finds that it is faced with a Type I action (6 NYCRR 616.4), or an unlisted action (6 NYCRR 617.2 [a]), it must conduct a determination relating to the significance of the potential environmental impact (*see* 6 NYCRR 617.6 and 617.7). However, a Type II action classification exempts an agency from having to conduct any further review (6 NYCRR 617.6 [a] [1] [iii], and 617.5 [a]; *see Matter of Lucas v Village of Mamaroneck*, 57 AD3d 786, 787 [2d Dept 2008]; *Matter of Hazan v Howe*, 214 AD2d 797, 798-800 [3d Dept

⁶ CEQR, in this respect, largely parallels SEQRA (*see* Rules of City Planning [62 RCNY] §§ 5-02 [c], [d]; Rules of City Planning [62 RCNY Appendix A] § 6-02). The court notes that parties have not identified any provision of CEQR that would require a finding different from that required by SEQRA, and the court has identified none in its own research.

1994]). The regulations, however, provide that a project sponsor like National Grid “may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with” (6 NYCRR 617.3 [a]; *Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 137 [2010]; *State of New York v Sour Mtn. Realty*, 183 Misc 2d 313, 326 [Sup Ct, Dutchess County 1999], *affd* 276 AD2d 8 [2d Dept 2000]).

While National Grid itself essentially concedes that the variance to the FDNY regulations regarding the transportation and loading/unloading of LNG necessary for National Grid to actually operate the LNG truck station would require a full environmental review, it asserts that the ultimate determination of its right to operate its facility is not necessary for it to obtain the approvals to construct the facility. This court agrees and finds that considering the construction of the facility separate from its operation does not result in improper segmentation under SEQRA.⁷

As stated in *Matter of Forman v Trustees of State Univ. of N.Y.* (303 AD2d 1019 [4th Dept 2003]):

“Segmentation is disfavored, based on two perceived dangers. First is the danger that[,] in considering related actions separately, a decision involving review of an earlier action may be ‘practically determinative’ of a subsequent action The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project or,

⁷ Contrary to Sane’s contentions, National Grid’s statements in the Variance Petition that it would not complete its engineering work and construct the LNG truck station until the variance was granted are not the kind of statements that would judicially estop National Grid from arguing that the approvals required for the construction of the facility and its construction may be considered separately from the variances that would be required for National Grid to operate it (see *Ghatani v AGH Realty, LLC*, 181 AD3d 909, 911 [2d Dept 2020]).

indeed, where one or more aspects of the project might fall below the threshold requiring any review . . . Thus, a project developer is not permitted to exclude certain activities from the definition of a project for the purpose of making it appear that adverse environmental impacts have been minimized for the purpose of circumventing the detailed review called for under SEQRA” (*Matter of Forman*, 303 AD3d at 1019-1020 [internal quotation marks and citations omitted]; see *Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1603 [4th Dept 2020]; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817, 822-823 [2d Dept 2007], *lv denied* 10 NY3d 926 [2008]; *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550-551 [1994], *lv dismissed in part and denied in part* 85 NY2d 854 [1995]).

Neither of these concerns that underlay the restrictions on segmentation are in play here. Namely, most, if not all, of the primary environmental concerns relating to this project relate to its operation, i.e., the trucking of LNG through City streets and the unloading/transfer of LNG at the LNG truck station. Moreover, review of these environmental concerns is not foreclosed by construction of the facility, since, in order to operate the facility, National Grid will still have to obtain a variance from the City Fire Code’s bar on the transportation and loading/unloading of LNG from the FDNY. As is evident from National Grid’s interaction with the City with respect to the prior Variance Petition that has since been withdrawn, the review of the such a variance request by the FDNY, or any other City agency designated a lead agency for purposes of SEQRA, will undoubtedly entail some form of SEQRA review, and there is no reason to believe that any such City agency will abdicate its responsibility to conduct such a review at that time (*see Matter of Sierra Club v Village of Painted Post*, 134 AD3d 1475, 1477 [4th Dept 2015]; *Marshall v City of Albany*, 45 AD3d 1064, 1067 [3d Dept 2007]). Accordingly,

this court finds that Sane has failed to demonstrate that improper segmentation has occurred or is occurring here (*see Matter of Court St. Dev. Project, LLC*, 188 AD3d at 1603; *Matter of Rodgers v City of N. Tonawanda*, 60 AD3d 1379, 1379-1380 [4th Dept 2009]; *Matter of East End Prop. Co. #1, LLC*, 46 AD3d at 823; *Matter of Forman*, 303 AD2d at 1019-1020).

In considering the construction of the facility on its own, Sane has failed to demonstrate that the granting of the permits for the construction of facility involved anything other than non-discretionary ministerial decisions. Hamid, in the affidavit submitted by National Grid, identifies the permits and approvals obtained and those that will be needed to finish the construction, and, in a non-conclusory manner, asserts that such approvals and permits are all non-discretionary in nature. Although Sane, in its petition and memorandum of law, points to a few possible environmental issues related to the construction that were identified in National Grid's Variance Petition, it has supplied no evidentiary proof suggesting that such issues would require the issuance of discretionary approvals or permits by any State or City agency. Sane has thus failed to show that any of the approvals necessary for the construction of the LNG truck station constitute an action for purposes of SEQRA, and thus, it has failed to show that there was a need for a SEQRA assessment before construction could begin (*see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 325-326; *Citizens for Preserv. of Windsor Terrace*, 122 AD2d at 828-829 [2d Dept 1986]; *Matter of Committee To Save Washington Sq. v Dormitory Auth. of State of N.Y.*, 281 AD2d 770, 772 [3d Dept 2001]; *Matter of Dujmich v New York State Freshwater Wetlands Appeals Bd.*, 240 AD3d 743, 743 [2d Dept 1997];

see also *Matter of Waterways Dev. Corp. v Town of Brookhaven Zoning Bd. of Appeals*, 126 AD3d 708, 713 [2d Dept 2015]; cf. *Matter of Sierra Club*, 134 AD3d at 1477-1478).⁸

Additionally, absent evidence that National Grid made any effort to conceal the construction work at issue, and, given that National Grid's submissions show Sane received notice that permits were granted and construction work commenced on the LNG truck station (as part of the "rate case" proceedings before the Public Service Commission [PSC] in early February, 2021), for Sane to wait more than seven months into such work to commence this action and seek a preliminary injunction is prejudicial to National Grid. In this respect, as noted in Hamid's affidavit, the construction work is nearly half-way completed and each day of delay associated with the preliminary

⁸ National Grid also asserts that, even if the approvals at issue must constitute an action for purposes of SEQRA, the construction of the facility constitutes a Type II action involving an in kind, replacement or reconstruction of a facility that is excused from SEQRA review (6 NYCRR 617.5 [c] [2]). This court, however, is hesitant to find that Sane's motion for a preliminary injunction may be denied on this basis where there is nothing in the record to suggest that any City agency made a determination that the project constitutes a Type II replacement project in determining the approvals or permit applications (see *Matter of Lucas*, 57 AD3d at 787 [granted branch of petition to compel town to make a threshold determination as to whether an action was Type I, Type II, or unlisted]; but see *Matter of Civic Assn. of Utopia Estates v City of New York*, 175 Misc 2d 779, 782 [Sup Ct, Queens County 1998] [court concluded that it could rule that an action was a Type II in kind replacement even though there had been no such formal determination by an agency where there was no substantial doubt that sewer replacement project was a replacement project], *affd* 258 AD2d 650 [2d Dept 1999]; *Matter of Hazan*, 214 AD2d at 798-799 [absence of explicit finding that project constituted Type II action did not require that agency determination to approve project be annulled where project fell within the agency's specific lists of projects that constitute Type II renovations]). Additionally, although a period of vacancy/disuse does not preclude finding that a project involves a Type II replacement (see *Matter of Chatham Towers Inc. v New York City Police Dept.*, 75 AD3d 431, 432 [1st Dept 2010]; *Matter of New York City Coalition for Preserv. of Gardens v Giuliani*, 175 Misc 2d 644, 653-654 [Sup Ct, New York County 1997], *affd on other grounds* 246 AD2d 399 [1st Dept 1988]), this court is particularly hesitant to make any determination as to how an agency would rule in this respect given that there has been over 40 years of disuse of the former LNG truck station, there is little in the record describing the former facilities that are being replaced, and there is no suggestion that the project falls within the scope of an agency's specific list of Type II replacement projects (cf. *Matter of Hazan*, 214 AD2d at 798-799).

injunction is costing National Grid \$60,000 to \$80,000 per day. Further, as the LNG plant is currently offline in order to allow the LNG truck station pipes to be connected to the LNG plant's pipes, further delay in connecting the pipes and placing the plant back online will impinge on National Grid's ability to have sufficient gas ready for the heating season. Under these circumstances, the balancing of the equities favors National Grid over Sane (*see Matter of Crowell v Zoning Bd. of Appeals of the Town of Queensbury*, 151 AD3d 1247, 1250 [3d Dept 2017]; *Matter of Miner v Town of Duanesburg Planning Bd.*, 98 AD3d 812, 813-814 [3d Dept 2012]; *Matter of McGuinn v City of New York*, 219 AD2d 489, 489-490 [1st Dept 1995]; *Finn v Morgan Is. Estates, Inc.*, 283 App Div 1105, 1106 [2d Dept 1954]; *see also Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]; *PSEG Long Is., LLC v Town of E. Hampton*, 154 AD3d 703, 705-706 [2d Dept 2017]; *cf. Matter of Micklas v Town of Halfmoon Planning Bd.*, 170 AD3d 1483, 1485 [3d Dept 2019]).

In sum, as Sane has failed to demonstrate by clear and convincing evidence its probable success on the merits and that the balancing of the equities favor it, Sane's motion for a preliminary injunction is denied (*see 19 Patchen, LLC v Rodriguez*, 153 AD3d 1382, 1383 [2d Dept 2017]; *Rosenberg v Trazzera*, 147 AD3d 1099, 1101 [2d Dept 2017]; *Town of Brookhaven v MMCCAS Holdings, Inc.*, 137 AD3d 1258, 1259 [2d Dept 2016]; *Network Fin. Planning*, 194 AD2d at 652).

In reaching this determination, the court wishes to emphasize that the issue of whether a potential emergency need for LNG to be trucked into the City justifies National Grid's construction of a \$27,000,000 LNG truck even though National Grid may never

obtain the variances needed to operate the facility even under such emergency circumstances are not before the court. The propriety of that determination, however, would appear to fall within the jurisdiction of the Public Service Commission's oversight of utilities (see *Matter of Crescent Estates Water Co. v Public Serv. Commn. of State of N.Y.*, 77 NY2d 611, 617 [1991]; *Matter of Long Is. Light Co. v Public Ser. Commn. of State of N.Y.*, 134 AD2d 135, 143-144 [3d Dept 1987]).

This constitutes the decision and order of the court.

ENTER


J.S.C. HON. ELLEN M. SPODEK