Short Form Order

INDEX NO: 601847/2021

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

Citizens for the Preservation of Wainscott, Inc., Pamela Mahoney, Michael Mahoney, Rosemarie Arnold, José Arandia, Olga Arandia, Kenneth Handy, Jane Harrington, Mitchell Solomon, Lisa Solomon, Dune Alpin Farm Property Owners Association Inc., Dune Alpin Farm Corp., Andrea Berger, Robert Berger, Gunilla Berlin, Cindy Cirlin, Amy Depaulo, Rosalind Devon, Katherine Epstein, David Epstein, Neil Faber, Mariano Gaut, Daniel Gettings, Terry Goldstein, Steven Israel, Lynn Jerome, Linda Kaye, George Lee, Susan Rieland, Anthony D. Romero, Albert Ruben, Gil Rubenstein, Arnold Schiller, and Judith Wit,

Petitioners-Plaintiffs

- against-

Town Board of the Town of East Hampton, Peter Van Scoyoc in his capacities as Supervisor of the Town of East Hampton and Member of the Town Board of the Town of East Hampton,

Respondents-Defendants

-and-

South Fork Wind, LLC f/k/a Deepwater Wind South Fork, LLC,

Nominal-Respondent-Defendant.

ORIG. RETURN DATE: 03/02/21
ADJOURNED DATE: 04/29/21
MOTION SEQ. NO.: 001 - MD
ORIG. RETURN DATE: 04/22/21
ADJOURNED DATE: 05/13/21
MOTION SEQ. NO.: 002-MG
003 MG

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Upon the within petition and complaint with supporting papers dated February 2, 2021; Nominal Respondent's notice of motion to dismiss and supporting papers dated April 2, 2021; Respondent's notice of motion to dismiss and supporting papers dated April 2, 2021; Non-Party Win With Wind's Amicus brief dated April 13, 2021; Petitioners' opposition and supporting papers dated April 19, 2020; Petitioners' Memorandum in opposition dated May 6, 2021; Respondent's Reply and supporting papers dated May 6, 2021; Nominal Respondent's Reply dated May 6, 2021; it is

ORDERED that the motions to dismiss brought by Respondents (003) and Nominal Respondent (002) are granted as set forth below. The within petition and complaint are dismissed in all respects.

The within petition arises from a determination by the Town Board of the Town of East Hampton ("Board") to grant an easement to South Fork Wind, LLC ("South Fork") to accommodate the landing of high voltage electrical cable from a proposed offshore wind farm and the running of such cable under residential streets, along with installation of concrete vaults to be buried at intervals under such streets, culminating in the construction of a substation facility near a residential neighborhood. Petitioners assert that the Board failed to comply with New York State's Environmental Quality Review Act by failing to prepare, or cause to be prepared, an environmental impact statement prior to the easement grant. Petitioners further argue that Article VII of the Public Service Law requires South Fork to apply for and obtain a Certificate of Environmental Compatibility and Public Need ("Article VII Certificate") from the Public Service Commission ("PSC") before any action can be taken to "commence the preparation of the site for the construction of a major utility transmission facility in the state" (Public Service Law § 121) and that obtaining an easement constitutes preparation of a site. Pursuant to Public Service Law §126, multiple factors including, but not limited to, the basis of the need for the facility, likely environmental impact, whether or not the facility minimizes impact in the context of available technology and the economics of alternatives, are considered prior to the grant or denial of an application for a certificate. As of the date of the filing of the petition, the Article VII Certificate had not yet been granted or denied; however shortly thereafter the Certificate did issue, as discussed below.

Petitioners argue that the grant of the easement was premature as it is unnecessary in order for South Fork's regulatory applications to proceed. Petitioners further argue that construction would result in a long-term obstruction and disruption of the local residential roadways, including the digging of eight foot deep trenches (deeper for vaults), construction equipment on the sides of roadways and the narrowing of streets to ten feet for ingress and egress of vehicles and pedestrians. Petitioners claim this to be violative of state safety codes regarding egress of fire vehicles and positioning of construction equipment. Petitioners cite concerns about the risk of fires and contamination from the cables, the environmental impact of drilling under sensitive dunes, sand replenishment necessary to keep cables buried as beach erosion removes it and the possibility of trenching activities causing migration of nearby plumes of perfluoroalkyl and polyfluoroalkyl substances (PFAS), which are known to be present in nearby groundwater. Petitioners claim that community concerns have not been adequately addressed, that the Board was motivated by the promise of large payments being made to the Town pursuant to a Community Host Agreement and by the desire to squash Wainscott's move to incorporate as a Village which would shift control over the easement decision. Petitioners further challenge the language of the easement agreement with South Fork in that certain sections of it stipulate that the agreement is subject to a "Road Use and Crossing Agreement" and "Grantor Required Approvals, Authorizations and Environmental Reviews" which purport to be detailed in annexed schedules and that such schedules state only, "TO BE COMPLETED." Additionally, Petitioners assert that New York State Fire and Building Code waivers will be necessary to proceed with the project and that this has not been addressed by the Town. The court notes that the easement agreement annexed to the petition is undated and unsigned.

In sum, petitioners assert that the grant of the easement at this juncture was arbitrary and capricious in that it was motivated by the promise of money and a desire to suppress an attempt by residents to incorporate as a village, that conveyance was an unlawful violation of SEQRA and/or Article VII of the Public Service Law and that the Board's actions in granting the easement to South Fork was a waste of public property in violation of General Municipal Law §51 in that it will enable South Fork to improperly lay cable on such property. Petitioners seek: an order vacating and annulling the Board's January 21, 2021 Resolution which authorized execution of the easement agreement and/or vacating and annulling the agreement itself; a declaratory judgment that the Board's actions violated SEQRA and/or Article VII of the Public Service law; a preliminary and permanent injunction against the Board and Peter Van Scoyoc enjoining them from taking any action with respect to the easement unless and until the Public Service Commission awards South Fork an Article VII Certificate that is no longer subject to administrative appeal or litigation.

Respondent South Fork has filed a motion to dismiss (002) the within petition, Respondents Town of East Hampton and Peter Van Scoyoc (collectively "Town Defendants") have filed a motion (003) seeking both dismissal and an award of costs and disbursements. Non-party Win with South Fork Wind, Inc. also filed a motion (004) seeking leave to file an amicus curiae brief, which was previously granted by "so ordered" stipulation of the parties dated April 27, 2021.

South Fork fails to specify which subsection of CPLR 3211(a) would govern its motion but as its arguments seem to assert failure to state a cause of action, it will be considered pursuant to CPLR 3211(a)(7). South Fork also seeks dismissal pursuant to CPLR 7804(f) which permits a respondent to a petition to raise an objection in point of law by setting it forth in an answer or by motion to dismiss. Town Defendants seek dismissal pursuant to CPLR§3211(a) subsections (7).

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (***Chanko v. Am. Broad. Companies Inc.***, 27 NY3d 46, 52, 49 NE3d 1171, 1175 [2016]; ***Goshen v. Mut. Life Ins. Co. of New York***, 98 NY2d 314, 326, 774 N.E.2d 1190 [2002]; ***Leon v Martinez***, 84 NY2d 83, 88 [1994]). Bare legal conclusions; however, are not presumed to be true and do not receive the benefit of such favorable inference (***Grant v. DiFeo***, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; ***TMCC, Inc. v. Jennifer Convertibles, Inc.***, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (***Chanko,*** *supra;* ***Leon*** *supra*). "If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (***Sokol v. Leader***, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting* ***Guggenheimer v Ginzburg***, 43 NY2d at 275); ***Porat v. Rybina***, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]). "Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR§ 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action" (***Sokol,*** *supra*; ***Porat,*** *supra*). The analysis goes to whether or not a colorable cause of action exists, not whether or not such claim is ultimately likely to prevail on the merits. Although the Court may consider evidentiary material in support of a motion to dismiss on this basis,

consideration of whether or not Plaintiff might survive a summary judgment motion is not part of the analysis (***Doe v. Ascend Charter Sch.***, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; ***Neuman v. Echevarria***, 171 AD3d 767, 768–69, 97 NYS3d 203, 205–06 [2d Dept. 2019]). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (***Doe***, *supra*; ***McMahan v. McMahan,*** 131 AD3d 593, 15 NYS3d 190, 192 [2d Dept. 2015]; ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 372 NE2d 17 [1977]; ***TMCC, Inc. v. Jennifer Convertibles, Inc.***, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Annexed to South Fork's motion is a Joint Proposal submitted to the Public Service Commission ("PSC") dated September 17, 2020 to which Deepwater Wind South Fork, LLC ("DWSF" or "Applicant"), PSEG Long Island ("PSEG-LI") on behalf of and as an agent for the Long Island Power Authority ("LIPA"), Win With Wind, Montauk United, Concerned Citizens of Montauk, the Group for the East End, Inc., Deborah Foster, Michael Hansen, and Cathy Rogers, were all signatory parties. The Trustees of the Freeholders and Commonality of the Town of East Hampton were to vote on becoming signatory to the proposal after it was filed with the Secretary to the PSC and South Fork indicates that they did subsequently sign on. South Fork also claims that various New York State agencies signed the Joint Proposal including the Department of Environmental Conservation, Department of Public Service, Department of Transportation, Department of State, and Office of Parks and Recreation. Such signatory status is not clear from the agreement annexed to the motion but the Order Adopting Joint Proposal by the Public Service Commission which is dated March 18, 2021, does indicate that the State agencies signed off on October 8, 2020. The Joint Proposal provided a detailed analysis of Environmental Compatibility and Public Need which was broken down into subsections including but not limited to: environmental impact, availability and impact of alternatives, state and local laws, public interest, necessity and cost. The Joint Proposal additionally discussed an Environmental Management and Construction Plan and Water Quality Certification requirements. The initial testimony and related exhibits in PSC proceedings began on October 9, 2020, motions ensued, additional evidence was submitted and the proceedings continued through February 2021. The Joint Proposal was opposed by the Citizens for the Preservation of Wainscott (a petitioner herein), the Long Island Commercial Fishing Association, Simon Kinsella and Zachary Cohen. By 106 page decision, the Joint Proposal was considered and, with a few exceptions, it was generally adopted and incorporated into the PSC's March 18, 2021 order which granted a Certificate of Environmental Compatibility and Public Need to applicant Deepwater Wind South Fork, LLC (now known as South Fork Wind, LLC).

On January 21, 2021, the Town Board adopted a resolution accepting the Easement Agreement which South Fork describes as consisting of (1) a "25 year "Transmission Easement" to install the underground Cable in a 20-foot-wide path under certain Town-owned roads; and (2) a "Temporary Installation easement" to allow for the construction necessary to install the Cable," along with a resolution adopting the Host Community Agreement which South Fork avers would pay $27.8 million to the Town and Town Trustees over the term of the project and committed to other development obligations. The agreements were subject to referendum on petition; such referendum could be sought by filing of a petition within thirty days. The resolutions did not take effect until the lapse of this period (Town Law §91). No petitions seeking a referendum were filed and the resolutions took effect, pursuant to Town Law §91, on or about February 20, 2021. On February 2,

2021, prior to the lapse of this thirty (30) day period, Petitioners herein filed the within petition seeking to vacate the resolutions, rather than seeking a referendum. Shortly thereafter, on March 9, 2021, the Easement Agreement was executed on behalf of the Town of East Hampton by the Town Supervisor and on behalf of South Fork Wind, LLC by its Vice-President of Siting and Permitting. Schedules B and C which were blank in the copy of the agreement provided by Petitioners do contain detailed provisions in the signed agreement.

South Fork argues in its motion that, in order to challenge a governmental action, Petitioners must establish standing by showing that they will actually be harmed by the challenged action in some direct way that is different from harm suffered by the public at large. South Fork claims that Petitioners fail in this regard because the action complained of is the granting of the easement but all of the harm asserted arises from the Project rather than the easement itself. Additionally, South Fork states that the claimed injury is too remote and indirect to confer standing, as generalized grievances that affect residents as a whole do not constitute impairment of a legally protectable interest that would confer standing. Petitioners counter that proximity to the site constitutes impacts different from the public at large and that they have alleged present injury. Petitioners claim that their present injury arises from the giving of permission to do something harmful and that conveying the easement enabled the harm.

In order to establish standing to challenge an administrative action, the petitioner must show that the challenged action will result in "an injury in fact" and that the interest asserted is within the zone of interest sought to be promoted or protected by the statute under which the agency has acted (***Panevan Corp. v. Town of Greenburgh***, 144 AD3d 806, 807, 40 NYS3d 530, 533 [2d Dept. 2016]; ***New York State Ass'n of Nurse Anesthetists v. Novello***, 2 NY3d 207, 211, 778 NYS2d 123 [2004]). The injury asserted must be greater than that experienced by the public at large and may not be conclusory or speculative (***Sierra Club v. Town of North Castle***, 200 AD3d 694, 154 NYS3d 846, 847 [2d Dept. 2021]; ***Vasser v. City of New Rochelle***, 180 AD3d 691, 118 NYS3d 717 [2d Dept. 2020]). In the case of land use, an adjacent property owner may rely upon a presumption of direct injury but still must establish that such injury is within the zone of interest sought to be protected (***Panevan Corp. v. Town of Greenburgh***, *supra,* ***John John, LLC v. Plan. Bd. of Town of Brookhaven***, 15 AD3d 486, 790 NYS2d 500, [2d Dept. 2005]). For an organizational party to establish standing, it must show that (1) one or more of its members would have standing to sue, (2) that the interests asserted are germane to the organization's purpose and (3) that the asserted claim or relief does not require participation of individual members (***Society of Plastics Indus., Inc. v. County. of Suffolk***, 77 NY2d 761, 570 NYS2d 778 [1991]; see also ***New York State Ass'n of Nurse Anesthetists v. Novello***, *supra*; ***Mental Hygiene Legal Serv. v Daniels***, 33 NY3d 44, 98 NYS3d 504 [2019]). "Alternatively, an organization can demonstrate 'standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy'" but such demonstration must necessarily include injury in fact, different from that experienced by the public at large, that is within the zone of protection (***Mental Hygiene Legal Serv. v Daniels***, *supra* (quoting *Warth v. Seldin*, 422 US 490); ***Sierra Club v. Village of Painted Post***, 26 NY3d 301, 306, 22 NYS3d 388 [2015]) .

Petitioner Citizens for the Preservation of Wainscott, Inc. ("CPW") is a corporation which is described in the petition as being " a local community organization devoted to preserving the natural beauty and bucolic character of Wainscott." Petitioner CPW alleges concerns about "the dangers, disruptions, and impacts that the construction and installation of the High-Voltage Cable would cause throughout Wainscott, particularly given the number of residences and narrow lane. CPW also insists that the Board follow all laws, regulations, and protocols that require close examination of the way in which South Fork proposes to construct and operate the Project." CPW does not assert that one of its members has standing to sue, that the asserted interests are germane to its purpose or that its individual members' participation is unnecessary for its claim. As such, in order to assert a claim to vindicate its own rights, it must allege injury in fact, different from that experienced by the public at large, which is in the zone of protection. CPW simply makes speculative statements about disruptions to the neighborhood and insists that the Board follows laws and regulations, this does not constitute such injury. CPW has failed to establish standing.

Petitioners Pamela Mahoney and Michael Mahoney are year-round residents on Beach Lane and the easement runs the length of Beach Lane. The harm they assert includes dangers and disruptions that would arise as a result of use of the easement for the purpose it was granted. Pamela Mahoney and Michael Mahoney have alleged direct injury within the zone of interest to be protected. Petitioner Rosemarie Arnold also alleges direct injury within the zone of interest to be protected, as she resides on the corner of Wainscott Main Street and Sayres Path. The easement runs past her property and she claims potential harm from dangers and disruptions that would arise as a result of use of the easement for the purpose it was granted. Pamela Mahoney and Michael Mahoney and Rosemarie Arnold have established standing to bring the within petition.

Petitioners José Arandia, Olga Arandia, Kenneth Handy, Jane Harrington, Mitchell Solomon, and Lisa Solomon reside on or adjacent to Wainscott Northwest Road. It is not alleged that the easement runs near their property. Their articulated concern is that digging for the project could cause a known contaminant plume of PFAS to migrate toward their property and their wells. Although the harm asserted is greater than that experienced by the public at large and within the zone of injury sought to be protected, the potential harm that would arise is not simply from the use of the easement, it would arise specifically from the way in which the project is conducted. The way that the Project is conducted is under the purview of the PSC. In fact, it is clear from the plain language of the Certificate of Environmental Compatibility and Public Need issued on March 18, 2021, that the PSC considered such concerns and created mitigation and monitoring procedures to address them. Any challenge to these procedures should have been brought in those proceedings. Petitioners José Arandia, Olga Arandia, Kenneth Handy, Jane Harrington, Mitchell Solomon, and Lisa Solomon have failed to establish standing to bring the within petition.

Petitioner Dune-Alpin Farm Property Owners Association describes itself as being a corporation "made up of (a) 57 individual homeowners, and 2 owners of unimproved lots in the Dune Alpin Neighborhood, and (b) the 48 individual members of the Dune Alpin Farm Corp. (the "Dune Alpin Co-op"). All owners of homes or lots in the Dune Alpin Neighborhood, and all owners of shares in the Dune Alpin Co-op, are members of the Dune Alpin POA. The Dune Alpin Co-op also is a member of the Dune Alpin POA. 33." Petitioner Dune Alpin Co-op is a corporation that owns the 48 co-op units in the Dune Alpin Neighborhood. Petitioners Andrea Berger, Robert Berger,

Gunilla Berlin, Cindy Cirlin, Amy Depaulo, Rosalind Devon, Katherine Epstein, David Epstein, Neil Faber, Mariano Gaut, Daniel Gettings, Terry Goldstein, Steven Israel, Lynn Jerome, Linda Kaye, George Lee, Susan Rieland, Anthony D. Romero, Albert Ruben, Gil Rubenstein, Arnold Schiller, and Judith Wit (collectively, the "Dune Alpin Residents") are residents of the Dune Alpin Neighborhood. It is not alleged that any one property or the entire community is directly impacted by the easement. The allegation of harm advanced by these petitioners is that the new substation will be located right near their neighborhood next to an existing substation, that the new substation will be much larger than the average house is permitted to be and that the building of the substation would "add to the potential dangers and concerns the residents of the Neighborhood already have from the existing East Hampton Substation, including fires or explosions, water contamination, air pollution, noise pollution, and exposure to electromagnetic fields." It is unclear that the substation would actually be located on the easement at issue. Additionally, the articulated dangers are conclusory and speculative. Petitioners Dune-Alpin Farm Property Owners Association, Dune Alpin Farm Corp. and the Dune Alpin Residents have failed to establish standing.

South Fork further claims that Petitioners claims are moot because the PSC has completed its environmental review, that Petitioners had the opportunity to object to the siting of the Project in the PSC proceedings and that the PSC has exclusive authority over all issues involved in the siting of major transmission facilities. It is also argued that this court has no jurisdiction over issues that can be properly raised in an Article VII proceeding because such issues must be brought in the first instance directly to the Appellate Division (Public Service Law §129). Public Service Law § 128 deals with parties aggrieved by an order issued on an application for a certificate. Public Service Law § 129 provides:

> Except as expressly set forth in section one hundred twenty-eight and except for review by the court of appeals of a decision of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear or determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article or to stop or delay the construction or operation of a major facility except to enforce compliance with this article or the terms and conditions of a certificate issued hereunder.

There is nothing in the plain language of this statute that would lead this Court to believe that it lacks jurisdiction to consider whether or not Respondent Town acted arbitrarily and capriciously or violated General Municipal Law §51 or that such issues are properly the subject of Article VII review. ***Simonds v. Power Auth***., 64 AD2d 746, 747, 406 NYS2d 639, 640 [3d Dept. 1978] which is cited by movants in both motions is inapposite, in that the Article 78 proceedings therein specifically sought to challenge determinations by the PSC and actions taken based upon PSC approval, not a determination of a Town Board. However, it is the case that, pursuant to 6 NYCRR § 617.5 (c) (44), "actions requiring a certificate of environmental compatibility and public need under articles VII, VIII, X or 10 of the Public Service Law and the consideration of, granting or denial of any such certificate;" are not subject to State Environmental Quality Review; therefore the part of Petitioner's argument which is reliant on Respondents' alleged non-compliance must necessarily fail. It is additionally clear that consideration of environmental concerns was undertaken as part of the Article VII review process and that the first named petitioner herein was aware of and involved in that process.

Additionally, it is not at all clear to this court that acquisition of land rights constitutes "preparation" of a site for construction. However, to the extent that a Certificate from the PSC must be obtained prior to commencement of any such activity, the Certificate issued nine days after the easement agreement was signed, rendering academic Petitioner's argument that the Town acted capriciously in this regard.

General Municipal Law §51 provides that persons acting on behalf of a municipality may be prosecuted and "and an action may be maintained [by taxpayer(s)] against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of..." such municipality. "[A] taxpayer action pursuant to section 51 of the General Municipal Law lies "only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'" (***Mesivta of Forest Hills Inst., Inc. v. City of New York***, 58 NY2d 1014, 1016, 462 NYS2d 433 [1983] (*quoting* ***Kaskel v. Impellitteri***, 306 NY 73, 79); see also ***Godfrey v. Spano***, 13 NY3d 358, 373, 892 NYS2d 272 [2009]; ***Tilcon New York, Inc. v. Town of New Windsor***, 172 AD3d 942, 102 NYS3d 35 [2d Dept. 2019]). A Town's alleged failure to observe certain statutes and rules does not, by definition, constitute fraud or the level of illegality required to support a taxpayer action under General Municipal Law §51 (***Tilcon New York, Inc. v. Town of New Windsor***, *supra*). Here, Petitioners have neither alleged fraud nor have they properly alleged illegal dissipation of municipal funds (***Godfrey v. Spano***, *supra*). The general allegations asserted, of insufficient environmental review and improperly enabling the laying of high voltage cable, are insufficient to state a cause of action under General Municipal Law §51

South Fork also asserts that Petitioners improperly seek a declaratory judgment that the Board's actions in conveying the easement are an unlawful violation of SEQRA and/or Article VII; arguing that the siting issues are in the exclusive jurisdiction of the PSC and that Petitioners' claim therefore cannot have any direct or immediate effect on the rights of the parties.

A cause of action for declaratory relief manifests when there is an actual, justiciable controversy between the parties involving substantial interests for which a declaratory judgment will have some real effect (***Cong. Machon Chana v. Machon Chana Women's Inst., Inc.,*** 162 AD3d 635, 80 NYS3d 61 [2d Dept. 2018]; ***Zwarycz v. Marnia Const., Inc.***, 102 AD3d 774, 958 NYS2d 440 [2d Dept. 2013]; see also CPLR§3001; ***Bettan v. Geico Gen. Ins. Co.***, 296 AD2d 469, 745 NYS2d 545 [2d Dept. 2002]). Such interests may not be hypothetical or predicated upon a speculative future event (***Tomasulo v. Vill. of Freeport***, 151 AD3d 1100, 58 NYS3d 440 [2d Dept. 2017]; ***Waterways Dev. Corp. v. Lavalle***, 28 AD3d 539, 813 NYS2d 485 [2d Dept. 2006]; ***American Insurance Ass'n v. Chu***, 64 NY2d 379, 487 NYS2d 311 [1985]). A declaratory judgment may appropriately delineate the rights of the parties in the context of a given set of facts, based upon a justicable controversy presented; however, its purpose is not to declare findings of fact (***Cong. Machon Chana v. Machon Chana Women's Inst., Inc.,*** 162 AD3d 635, 80 NYS3d 61[2d Dept. 2018]). Here, it is established as a matter of law that the Board's actions did not violate SEQRA and any Article VII violations should have been raised in the proceedings before the PSC. Furthermore, the Article VII Certificate has issued and any grievance in that regard is not within the jurisdiction of this court.

Petitioners argue that the subsequent issuance of the Title VII Certificate has no bearing on the within petition, because the Board adopted the resolution without benefit of an environmental review. This is despite the fact that the New York State Department of Environmental Conservation, along with several other State agencies, signed off on the Joint Proposal that was submitted to the PSC in September 2020 and that the PSC was engaged in comprehensive review in proceedings which were ongoing and nearing completion at the time the within petition was filed– proceedings in which the first-named petitioner herein was directly involved as an objecting party. Petitioners further maintain that certain sections of the Easement Agreement are blank and issues remain unaddressed, apparently still relying on their own unexecuted copy of the agreement (as their petition was filed before the Easement Agreement was actually executed). Petitioner's position is refuted by documentary evidence that is in this record. Their claim that the Board acted in an arbitrary and capricious manner is predicated upon the notion that there was absolutely no consideration of environmental factors. This position is belied by the record before this Court.

The Board and Peter Van Scoyoc also bring a motion seeking dismissal based upon lack of subject matter jurisdiction, lack of standing, and failure to state a cause of action. Van Scoyoc, by his affidavit, attests that the Town of East Hampton ("Town") has participated in the PSC proceedings that lead to issuance of a Certificate of Environmental Compatibility and Public Need, along with the U.S. Bureau of Oceanic Energy management's environmental review and has repeatedly provided public meeting facilities for such proceedings. He further avers that the agreements executed were fully negotiated for the benefit of the local community and passed in accordance with the permissive referendum provisions of Town Law §91.

The Board's arguments with respect to lack of subject matter jurisdiction do not change the court's determination as set forth above. The issues of standing and viability of Petitioner's General Municipal Law §51 claim are also determined above. The Board further argues that Petitioners have failed to state a cause of action with respect to Public Service Law §121 which requires issuance of a Title VII certificate prior to commencement of preparation of a site because it does not apply to acquisition of an easement. Additionally, the Board argues that the Article VII certificate has been issued, rendering the asserted claim academic. The Court agrees. The Board further argues that SEQRA does not apply to the project here at issue, based upon Environmental Conservation Law. This point is correct, as discussed above.

The standard of review in an Article 78 proceeding brought challenging a determination such as the one here at issue, is "...whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." (CPLR§ 7803; ***Perry v. Brennan***, 153 AD3d 522, 524–25, 60 NYS3d 214, 217 [2d Dept. 2017]; ***Suffolk Cty. Ass'n of Mun. Employees, Inc. v. Levy***, 133 AD3d 674, 675, 19 NYS3d 563, 565 [2d Dept 2015]; ***Zupa v. Bd. of Trustees of Town of Southold***, 54 AD3d 957, 957, 864 NYS2d 142, 143 [2d Dept 2008]). A decision is arbitrary and capricious when it is taken without regard to the facts or without reasonable basis (***Ward v. City of Long Beach***, 20 NY3d 1042, 1043, 985 NE.2d 898, 898–99 [2013]). If the determination has a rational basis, it will be sustained, even if an alternate result would be reasonable (***Ward***, *supra*; ***Peckham v. Calogero***, 12 NY3d 424, 883 NYS2d 751[2009]).

Here, the crux of Petitioners' argument with respect to their assertion that the actions of the Board were arbitrary and capricious is that there was no environmental review. It is clear from the record that extensive environmental review was undertaken and that the easement grant was contingent upon PSC approval. Petitioners have failed to establish that the decision to grant the easement was made without regard to the facts or without reasonable basis. Additionally, as discussed above, Petitioner's second cause of action for declaratory relief based upon a violation of SEQRA must fail because there was no such violation, any alleged violation of Public Service Law should have been raised in the PSC proceeding and Petitioners have failed to state a claim with respect to General Municipal Law §51. Based upon the foregoing, Respondents' motions sequence 002 and 003 are granted to the extent that the within petition/complaint is dismissed in all respects.

Dated: February 17, 2022
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: __X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION