167 A.D.3d 752, 89 N.Y.S.3d 287, 2018 N.Y. Slip Op. 08488

****1** In the Matter of Roy A. Stengel et al., Appellants,
v
Town of Poughkeepsie Planning Board et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
103/16, 2017-08367
December 12, 2018

CITE TITLE AS: Matter of Stengel v Town of Poughkeepsie Planning Bd.

HEADNOTES

Municipal Corporations
Planning

Site Plan Approval—Environmental Quality Review

Limitation of Actions
Four-Month Statute of Limitations

Compliance with State Environmental Quality Review Act

McCabe & Mack, LLP, Poughkeepsie, NY (Daniel C. Stafford of counsel), for appellants.
Wallace & Wallace, LLP, Poughkeepsie, NY (Lisa M. Cobb of counsel), for respondent Town of Poughkeepsie Planning Board.
Stenger, Roberts, Davis & Diamond, LLP, Wappinger Falls, NY (James P. Horan of counsel), for respondents Arlington Farms, Inc., and another.

In a proceeding pursuant to CPLR article 78, the petitioners appeal from a judgment of the Supreme Court, Dutchess County (James D. Pagones, J.), dated June 16, 2017. The judgment***753** denied the petition and dismissed the proceeding to annul the determination of the respondent Town of Poughkeepsie Planning Board adopting a negative declaration under the State Environmental Quality Review Act (*see* ECL art 8) and granting conditional site plan approval to the respondent Malabar Realty, LLC, for construction of a motor vehicle service facility.

Ordered that the judgment is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The petitioners, the residential neighbors of a proposed motor vehicle service facility (hereinafter the facility), oppose its construction. The facility will consist of a 3,400 square-foot convenience store and gas station within close proximity to their homes. The respondent Malabar Realty, LLC (hereinafter Malabar Realty), is the owner of the lots where the facility will be constructed, and the respondent Arlington Farms, Inc., will run the business thereon. Upon merging two previously separate lots, Malabar Realty will construct the facility on a 0.81 acre triangular-shaped lot, which currently houses a dilapidated apartment building and a smaller motor vehicle service facility. After public meetings regarding the construction of the facility where opponents of the project were permitted to raise their objections, the respondent Town of Poughkeepsie Planning Board (hereinafter Planning Board) determined that the proposed project would not have a significant environmental impact and, thus, a Draft Environmental Impact Statement would not be needed. Subsequently, after review of Malabar Realty's application for site plan approval and the grant of several area variances and a special use permit by the Town of Poughkeepsie Zoning Board of Appeals, the Planning Board granted conditional site plan approval for the project. The petition seeks to nullify the Planning Board's determinations to adopt a negative declaration under the State Environmental Quality Review Act (*see* ECL art 8 [hereinafter SEQRA]) and to grant conditional site plan approval to Malabar Realty for construction of the facility.

****2** To the extent that the petition alleges the Planning Board's noncompliance with SEQRA, the four-month statute of limitations applies (*see* CPLR 217 [1]; *Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 848 [1996]). 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' " ***754** (*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 Patel v Board of Trustees of Inc. Vil. of Muttontown*, 115 AD3d 862, 864 [2014]). Here, the statute of limitations began to run with the issuance of the negative declaration for the project on February 19, 2015, as this constituted the Planning Board's final act under SEQRA and, accordingly, any challenge to the negative declaration had to be commenced within four months of that date (*see generally Chase v Board of Educ. of Roxbury Cent. School Dist.*, 188 AD2d 192 [1993]; *cf. Matter of Cathedral Church of St. John the Divine v Dormitory Auth. of State of N.Y.*, 224 AD2d 95 [1996]). The challenge to the negative declaration under SEQRA is, therefore, time-barred (*see Matter of Wertheim v Albertson Water Dist.*, 207 AD2d 896 [1994]).

The petitioners' contention that the Planning Board's determination to grant conditional site plan approval violated the mandatory setback requirements of Code of the Town of Poughkeepsie (hereinafter the Town Code) § 210-152 (A) (2) is without merit. The Planning Board is vested with discretion in determining whether to issue a site plan approval pursuant to Town Code § 210-152 (A). The record provides a rational basis for the Planning Board's determination (*see generally Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of the Town of Brookhaven*, 73 AD3d 925 [2010]). Scheinkman, P.J., Dillon, Cohen and Christopher, JJ., concur. **[Prior Case History: 56 Misc 3d 1201(A), 2017 NY Slip Op 50804(U).]**

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