

**Matter of Lost Lake Resort, Inc. v New York State
Pub. Serv. Commn.**

2020 NY Slip Op 32152(U)

March 12, 2020

Supreme Court, Albany County

Docket Number: 903037-19

Judge: L. Michael Mackey

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of LOST LAKE RESORT,
INC.,

Petitioner,

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

DECISION
AND
ORDER

-against-

THE NEW YORK STATE PUBLIC SERVICE
COMMISSION,

Respondent.

(Supreme Court, Albany County, Special Term, December 20, 2019)
Index No. 903037-19
(RJI No. 01-19-ST0352)

(Justice L. MICHAEL MACKEY, Presiding)

APPEARANCES:

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MACKEY, J.:

Petitioner Lost Lake Resort (“petitioner”) commenced this CPLR Article 78 proceeding to challenge the July 18, 2018 and January 22, 2019 orders of respondent the Public Service Commission (the “PSC”) denying its application for a waiver from the requirement of the installation of underground utilities in new residential developments.

Petitioner alleges that the orders were arbitrary and capricious and lacked a rational basis.

In 2007, petitioner purchased 2,079.53 acres in the Town of Forestburgh (the "Town") in Sullivan County for \$11 million. Petitioner sought to develop a residential community with 2,600 lots, including numerous amenities. On May 27, 2015, petitioner submitted a one-page letter seeking an exemption of regulations that required electric infrastructure in new residential developments to be installed underground pursuant to 16 NYCRR § 100 et al. Petitioner also submitted a letter from its engineers in support of such a waiver.

On April 22, 2016, the PSC rejected petitioner's petition for a waiver of the undergrounding requirement for the development, finding that the waiver request was "excessively large," and petitioner's arguments concerning water and sewer underground facilities, rocky terrain, and financial hardship, were unpersuasive (the "2016 Order"). The PSC concluded "the environmental and engineering reasons provided by [petitioner] do not justify an exemption from the underground requirement." The PSC did, however, leave open the possibility of a waiver "in certain areas" and permitted petitioner to "file another waiver request limited to select non-residential areas." Petitioner admittedly did not challenge this order.

On October 19, 2017, petitioner submitted a subsequent petition for a waiver of the underground requirements. Notwithstanding the PSC's express provision in its 2016 Order that a second application be limited to non-residential areas of the development, petitioner sought a waiver as to underground requirements for 400 lots for single family homes slated for Phase I of the development¹ as well as seeking a waiver for water and sewage facilities. In a February 1, 2018 letter, the Secretary to the PSC notified petitioner, pursuant to 16 NYCRR § 100.1(f), that Department of Public Service Staff objected to the waiver based on, among other reasons, having learned that the Town had passed a resolution requiring

¹ The project is planned to be built in seven phases over ten years. "Phase I" consists of 400 lots for single-family homes, a sales office, utilities, roads, and a golf course.

underground electric facilities.² Petitioner responded to Department of Public Service Staff's objection, arguing that the Town had initially approved overhead facilities before it passed the aforementioned resolution requiring underground facilities. Petitioner argued that the Town had acted unlawfully when it passed the resolution requiring underground facilities by ignoring petitioner's vested right to overhead facilities. In an Order dated July 18, 2018 (the "2018 Order"), the PSC denied the second waiver application. The PSC found that the scope of petitioner's application (400 residential lots) did not comply with the provisions of the 2016 Order. The PSC further found that inasmuch as it had already assessed the merits of a waiver for the 400 Phase I lots, the application was nothing more than an untimely attempt to relitigate the 2016 Order. The PSC maintained that pursuant to Public Service Law § 22, an application for a re-hearing of the 2016 Order had to be made within thirty (30) days of service of the 2016 Order. Since a copy of the 2016 Order was served in April 2016, the application for re-hearing was untimely.

The PSC stated:

[Petitioner] ignored the 2016 Order's limited allowance for re-filing, and is now seeking an untimely rehearing of the 2016 Order as it pertains to Phase I, presenting substantially identical arguments, which remain insufficient. Granting [petitioner's] petition under these circumstances would be a signal to developers that they may ignore the finality of the [PSC's] determinations and make untimely requests for the same relief in hopes of a favorable outcome, which would only serve to erode the [PSC's] authority and waste administrative resources.... The [PSC] finds that [petitioner] in its latest petition has sought the same relief which was denied in [the 2016 Order]. The [PSC] has already denied the petitioner's request in [the 2016 Order] for the residential portions of the development. In this regard, the petitioner, has in essence, requested an untimely petition for rehearing.

The PSC also found that notwithstanding the untimeliness, petitioner "again failed to satisfy the requirements for the requested waiver." In this regard, the PSC determined that

² On December 7, 2017, in response to the 2016 Order, the Forestburgh Town Board (the "Town Board") adopted a resolution requiring underground electric facilities at the Lost Lake Resort.

its 2016 Order had already rejected petitioner's arguments about rocky soil purportedly creating difficult conditions for undergrounding facilities and that hardships caused by the underground electric facilities requirement, such as conflicts with water and sewage infrastructure, were of petitioner's own making. The PSC also stated that the Town's position on overhead facilities was not a factor in its decision.

On August 17, 2018, petitioner filed a petition for a re-hearing of the 2018 Order. Petitioner argued, among other things, that it relied on the Town's initial approval of overhead facilities in creating its plan and budget; that underground facilities would increase costs for other electric customers; that the PSC did not consider how the rustic nature of the development would be affected by the electric transformers required by underground facilities; and that the PSC committed an error of law by relying on the Town's resolution requiring underground facilities. In an Order dated January 22, 2019, the PSC found that the petitioner "failed to demonstrate valid grounds for re-hearing" and denied the petition. The PSC confirmed that the re-hearing application of the 2016 Order was untimely and that the application was properly denied on procedural grounds. The PSC concluded "in any event, consideration of relevant environmental, economic and engineering factors would lead us to conclude that a partial waiver is not warranted." On May 20, 2019, petitioner commenced this CPLR Article 78 proceeding challenging the PSC's 2018 and 2019 Orders.

When the issue before the Court concerns the exercise of discretion by an administrative agency, it "cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, the Court is also mindful when reviewing decisions of the PSC that "(a)dmistrative agencies are endowed by experience with greater expertise" (*Matter of Estrella v Bradford*, 146 Misc.2d 48, 52 [Sup. Ct. Albany County 1989]) and on issues of fact and policy it is appropriate to defer to the agency (*Matter of New York State Elec. & Gas Corp. v. Public Serv. Commn. of State of N.Y.*, 194 Misc.2d 467, 470

[Sup. Ct. Albany County 2002]) and “whose judgment in such matters will be set aside only if it can be shown that rational basis and reasonable support in the record are lacking” (*New York Tel. Co. v. Public Serv. Commn.*, 98 AD2d 535, 538 [3rd Dept 1984]). Stated differently, the PSC’s determinations are entitled to substantial deference and must be affirmed unless they lack “any reasonable support in the record for the action taken” (*Matter of Campo Corp. v. Feinberg*, 279 AD 302, 307 [3rd Dept 1952]; see also *Public Service Commission v. Spitzer*, 95 NY2d 40 [2000]; *National Fuel Gas Dist. Corp. v. Public Service Commission*, 169 AD3d 1334 [3rd Dept 2019], *lv denied* 33 NY3d 1053 [2019]). “[A] court, in dealing with a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency” (*Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011], quoting *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]).

Petitioner maintains that the PSC never conducted a “full merits” review of its first application for a waiver as it admits it did not address or significantly detail the environmental, economic or engineering considerations as required by 16 NYCRR § 100.1. In the second application, petitioner maintains that it sought a waiver for only 400 lots in Phase 1 and not the entire subdivision (consisting of 2,600 lots). Petitioner contends that since it received Town Board Final Subdivision Approval on June 25, 2013, which authorized limited overhead utilities, the Town was without authority to require the installation of underground utilities in December 2017. Petitioner contends that the Town resolution was passed at the insistence of the PSC after it contacted the Town Board almost five years after Final Subdivision Approval. Petitioner alleges that the Town cannot retroactively modify Final Subdivision Approval.

Petitioner alleges that it has invested \$7.656 million in reliance of the Final Subdivision Approval by the Town. Petitioner alleges that it has invested almost \$18 million in this project, pays property taxes on 400 lots, assessed at fair market value and has not sold a single lot since September 25, 2017. Petitioner claims that the costs of installing

underground facilities is almost three times the average Orange and Rockland Utilities, Inc. ("O & R") costs.³ Petitioner contends that the costs of underground facilities is \$3.860 million with rock removal and blasting expenses versus \$1.594 million for overhead installation. Petitioner claims that the PSC abused its discretion when it procedurally denied its waiver request.

Petitioner admits it did not seek a re-hearing or Article 78 review in relation to the first order. Petitioner claims that it relied on the 2016 Order in order to file a second waiver request for the non-residential portion of the Phase I project. Petitioner alleges that the PSC ignored the costs of rock blasting and its financial effect on the total project. Petitioner maintains that the PSC denied the waiver application finding petitioner did not demonstrate its entitlement for an exemption based upon economic hardship, environmental and engineering factors. Petitioner alleges the PSC should not have considered its second application for a waiver as an untimely request for a re-hearing. Petitioner alleges its procedural due process rights were violated during the waiver application process. Petitioner maintains the conclusions of the PSC in denying the exemptions were arbitrary and capricious and lacked a rational basis.

In opposition, the PSC argues that while residential real estate developers, such as petitioner, are provided an opportunity to apply for a waiver from regulations that require electric facilities to be placed underground in a proposed development, that opportunity is not endless: once the PSC issues a ruling denying a waiver for a particular development, the law does not require the PSC to expend limited public resources on entertaining repeated applications regarding the same development. The PSC maintains that petitioner received a full merits review from the PSC in 2016 regarding a waiver for the proposed development, and petitioner failed to prove it was entitled to a waiver. As a matter of discretion, in its 2016 Order, the PSC provided a limited opportunity for petitioner to apply a second time for a waiver, but the PSC expressly provided that the application could not seek a waiver for

³ The O & R determined that the costs of the underground portion of Phase 1 was only 18% greater than the cost for

residential areas of the development. According to the PSC, petitioner then ignored the 2016 Order when, in 2017, it filed a second waiver application that again sought a waiver for residential areas of its development.

16 NYCRR § 100.1(b) requires electrical facilities in new residential subdivisions be installed underground. “The Commission’s undergrounding requirement was designed to effect an improvement in the quality of service rendered to the consuming public and, thus, in furtherance of the public interest.” *Sleepy Hollow Lake, Inc. v Public Service Commission*, 43 AD2d 439 (3rd Dept 1974), *lv denied*, 34 NY2d 519 (1974). However, the regulations allow waivers of this requirement and provide that “the utility or applicant may petition the Secretary of the Commission to allow overhead installation” pursuant to 16 NYCRR § 100.1(f). The applicant must demonstrate that the underground facilities would cost twice the amount of the utility’s average per foot cost of underground electric facilities pursuant to 16 NYCRR § 98.6(b)(1). The applicant is required to prove an exemption is warranted based on economic, engineering and environmental factors (*see* 16 NYCRR § 100.1[f]).

When the Commission issues a determination denying a 16 NYCRR § 100.1(f) waiver application on the merits, the sole statutory remedy available to an applicant for seeking a second merits determination is to petition for rehearing pursuant to PSL § 22. PSL § 22 provides “[a]fter an order has been made by the commission, any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein.” However, the time for filing a rehearing petition is limited: “any such [re-hearing] application must be made within thirty days after the service of such order” (PSL § 22).

The Court finds that the PSC did not act irrationally in denying petitioner’s applications for a waiver of the underground utilities requirement and therefore the petition is dismissed. Both the 2018 and the 2019 Orders of the PSC are legally sound and factually

overhead utilities and not double the cost as claimed by the petitioner.

supported. Petitioner readily concedes it failed to satisfy its burden of proving its entitlement to a waiver on its first application and that it neither petitioned for re-hearing of the first application within 30 days (*see* PSL § 22), nor initiated a CPLR Article 78 challenge to the first application within the statute of limitations period (*see* CPLR § 217[1]). The PSC also acted rationally when it procedurally denied petitioner's second application for failing to abide by the subsequent-waiver-application rule from the 2016 Order to limit its second application to non-residential areas. The Court also finds that notwithstanding the procedural infirmity of petitioner's second application, the PSC rationally concluded that petitioner's arguments regarding the economic, engineering and environmental factors were unavailing.

The record also does not support petitioner's suggestion that the Town, in granting Final Subdivision Approval, was somehow determinative or "binding" on the PSC. As pointed out by the PSC, the plain language of 16 NYCRR § 100.1(f) unambiguously establishes that municipalities' utility-infrastructure preferences are not a factor in the relevant analysis: "The petition [for a waiver] shall be granted or denied based on economic, engineering or environmental factors." Thus, even if the Town supported petitioner's position regarding the waiver, such position would not be "binding" on the PSC. Nor does the PSC have the authority to annul or strike down the Town's December 2017 resolution requiring underground utilities.⁴

Finally, the Court finds petitioner's arguments suggesting that the PSC is somehow estopped from enforcing the requirement for underground utilities because petitioner acquired Final Site Plan Approval from the Town even though it did not specify underground utilities to be without merit. The record reflects that the regulations requiring underground facilities were established in 1993, which predate any activity by petitioner by over a decade. Petitioner was under a legal obligation to install underground facilities when it initially purchased the land and, per its own initial Planned Development District application, knew undergrounding of electric facilities was required. That petitioner based its cost estimates on

⁴ The Court notes that petitioner never judicially challenged the adoption of the Town's December 2017 resolution.

the fact that it had already gone ahead with certain aspects of developing the resort without considering the regulations requiring underground electric facilities is a mistake of its own making and the result of petitioner's failure to exercise its due diligence. The PSC rationally interpreted 16 NYCRR § 100.1(f) as not counting costs attributable to mistakes made by developers who had ignored relevant regulations. Any hardship is self-created.

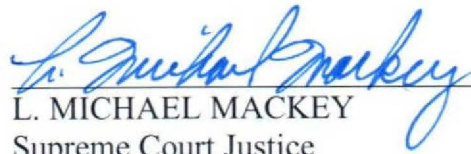
All of the above is good and sufficient evidence supporting the rationality of the PSC's determination. It is not for the Court to superimpose its wisdom upon the judgment of an administrative agency. Administrative agencies are endowed by experience with greater expertise than the usually generalized court, and where agency determinations cannot be said to be arbitrary and capricious, they cannot be disturbed (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, supra at 231; *Matter of United States Tube & Foundry Co. v Feinberg*, 7 AD2d 591 [3rd Dept 1959]). Such is the case here.

Accordingly, the petition is dismissed and the determination of the Public Service Commission is confirmed in all respects.

This constitutes the Decision and Order of the Court which is being electronically filed by the Court via NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for petitioner shall promptly serve notice of entry on all other parties to this action (*see* Uniform Rules for Trial Courts 22 NYCRR §§ 202.5-b [h][1], [2]).

SO ORDERED.
ENTER.

Dated: Albany, New York
March 12, 2020


L. MICHAEL MACKEY
Supreme Court Justice

Papers Considered:


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03/13/2020

- (1) Notice of Petition dated May 20, 2019;
- (2) Verified Petition dated May 19, 2019, with exhibits annexed;
- (3) Verified Answer dated December 6, 2019;
- (4) Certified Record dated December 6, 2019;
- (5) Memorandum of Law December 6, 2019;
- (6) Reply Memorandum of Law dated December 19, 2019.