SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application

of : Index #10811-75

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

To review a determination of, and for an Order and Judgment pursuant to Article 78 of the CPLR to annul the determination denying a variance,

---against---

WALTER HOFFMAN, GERALD MARALLO, JOHN MORAITIS, WILLIAM MURRAY, and JOHN NOBILSKOWSKI, as the Zoning Board of Appeals of the Village of Buchanan, New York,

Respondents,

HUDSON RIVER FISHERMEN'S ASSOCIATION,

Intervenor-Petitioner.

MASBACH, J.

This is an Article 78 proceeding to annul and set aside respondents' decision of June 19, 1975 whereby petitioner was denied a variance for the construction of a natural-draft, closed-cycle cooling tower system for its nuclear generating plant known as Indian Point Unit No. 2. The plant is part of a complex of 3 nuclear generating plants all located in the Village of Buchanan in an industrial zone. All of the existing facilities were built or under construction prior to the adoption of the Buchanan Zoning Code. The tower, if built, would be a massive structure, being some 560 feet high and having a diameter of some 300 feet at its top. It would replace the present open-ended cooling system whereby huge quantities

of water from the Hudson River are inducted into the plant for cooling and the heated water returned directly to the river. The open-ended system is alleged to be destructive of fish and plant life in the river and has been the target of criticism and administrative action by the intervenors here and others, including the State of New York which has supported a requirement for closed-cycle cooling.

Because of the height of the tower and the fact that it would give off a plume of vapor, saline in nature, which would drift beyond the boundaries of petitioner's property, petitioner sought an area variance (height) and a use variance (vapor discharge) from respondents under the provisions of the Buchanan Zoning Code. Respondents denied the variances on the ground that petitioner had not demonstrated practical difficulties or unnecessary hardship in that petitioner is under no present requirement to construct a closed-cycle cooling system of any kind and therefore the structure might never be built.

To understand why petitioner went before respondent Board for variances at all and on what basis respondents decided that the variances could not be granted, it is necessary to review the regulatory scheme to which petitioner is subject and the history of that regulation.

The governmental agency primarily responsible for regulating petitioner's plant is the Nuclear Regulatory Commission (NRC), formerly the Atomic Energy Commission. The NRC regulates the plant under the provisions of the Atomic Energy Act (42 U.S.C. 2011 et seq.) and the National Environmental Policy Act (42 U.S.C. 4321 et seq.). The plant currently operates pursuant to a full-power operating license issued in September of 1973. Pursuant to a decision of an

Atomic Safety and Licensing Appeal Board in May of 1974, petitioner's license was amended to permit operation with the open-ended cooling system only until May 1, 1979 and directed petitioner to complete an evaluation of alternative closed-cycle systems by December 1, 1974 and to proceed with due diligence to obtain by December 1, 1975 all "governmental approvals" required to construct the closed-cycle system. The amendment does provide that petitioner may seek to extend the interim operation with the open-ended system and indeed may seek to convince the NRC that no closed-cycle system is necessary at all and that permanent operation with the open-ended system with appropriate safeguards would not be unduly destructive of the Hudson River's ecology. In other words, petitioner may succeed at some future date, based on appeals it is currently pursuing, in avoiding any direct requirement to build a closed-cycle system and it is obvious from this record that petitioner has made and will make every effort in that regard. At present then, petitioner is under no direction by any regulatory body to build the cooling tower for which it sought variances, and it is this fact that respondents seized upon in denying the variances. It is this court's opinion that reliance on the lack of a final direction to build was misplaced and that therefore respondents' decision was effected by errors of law.

It is absolutely clear that under the provisions of petitioner's license as it now exists, petitioner will have to cease operation of its nuclear plant with the open-ended cooling system on May 1, 1979. While the license provisions do not on their face constitute an affirmative direction to build, the effect is the same. The license to operate the plant is subject to compliance with the Commission's conditions. Respondents themselves tacitly recognize this in their decision of June 19, 1975. At page 7 of this decision, the Board states that "the existing license of Con Edison for Unit

No. 2, . . . provides for the continued operation with a once-through system only on an interim basis . . . .". At page 9, the decision recognizes that petitioner sought a building permit "under the requirements of its license" (emphasis supplied). Respondents have urged on us that a decision of the Atomic Safety and Licensing Appeal Board of September 3, 1975 concerning Indian Point Unit No. 3 supports their position. In that decision the Licensing Appeal Board refers back to its earlier decisions on Unit No. 2 and states that it had never sanctioned the use of closed-cycle cooling at Indian Point No. 2 and viewed the question of the type of cooling system to be an open one. Even according this dicta the weight urged by respondents, it is still obvious that in order for once-through or open-ended cooling to remain on a permanent basis, petitioner's license would have to be amended. This fact is acknowledged by the Licensing Appeal Board throughout its opinion. We think then that petitioner sought the variances in good faith and that respondents were required to decide the matter on the merits and to make specific findings on the issues of hardship and practical difficulties. Not having done so, respondents' decision is erroneous and cannot stand.

If this were an ordinary zoning case, the court would direct that the matter be remanded to respondents for consideration consistent with this opinion. Part of that consideration would be to analyze the data submitted by petitioner concerning the economic consequences of a forced shut-down of its nuclear facility and the resulting need to generate additional power at petitioner's fossil-fuel facilities. Additionally, respondents would be directed to consider whether the proposed structure is a "utility tower" thus exempting it from the requirement of an area variance under §54-24(A)

of the Buchanan Zoning Code. Here however the court must inquire as to whether respondents have any authority to regulate this proposed structure at all, i.e., whether the federal agencies and federal regulatory statutes have preempted local regulation.

As noted earlier, petitioner's plant is regulated by the NRC pursuant to the Atomic Energy Act and the National Environmental Policy Act. Because petitioner is now discharging heated water into the Hudson River, it is subject to regulation by the Environmental Protection Agency which has, incidentally, directed that petitioner cease operation with once-through cooling by the same May 1, 1979 date contained in the license amendment. Whether the Atomic Energy Act by its terms provides for federal preemption in this case seems, to this court, to be uncertain. Section 2021[k] provides that "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards". While this would indicate a congressional intent not to preempt, an earlier subsection, 2021[c], provides that ". . . the Commission shall retain authority and responsibility with respect to regulation of - (1) the construction and operation of any production or utilization facility; . . . . " Indian Point Unit No. 2 is a "utilization facility" as defined by §2014 [cc]. Certainly the matter before the court concerns construction and operation of the facility in question and thus §2021[c] would seem to provide for preemption in this case.

Aside from the statutory language, this court believes that the pervasive federal regulation of petitioner's facility necessitates a finding of implied preemption (Rice v. Santa Fe Elevator Corp., 331 U.S. 218) and that this is so even if the Atomic Energy Act be read to disclaim preemption (City of Burbank v.

Lockheed Air Terminal, 411 U.S. 624). To require petitioner under the circumstances of this case to secure permits and variances from local government or to face shutting down its nuclear facility would, in this court's view, unduly interfere with federal regulation and control by the agencies responsible therefor and this requirement thus cannot be imposed (First Iowa Coop. v. Power Comm'n. 328 U.S. 152). We therefore read the provision of the license which refers to "government approvals" to exclude local zoning approvals. We do not deem the fact that petitioner sought such approval in the first instance to estop it from asserting federal preemption in this proceeding.

In reaching this result, we have not left Buchanan at petitioner's mercy. The Village may appear before the federal agencies and make its views known, something it has elected not to do up until now. The Village can also appeal any adverse agency rulings to the federal courts.

Accordingly, it is the decision of this court that the actions of respondents in requiring petitioner to seek a building permit and in attempting to regulate or prohibit construction of the closed-cycle cooling system, contravene the supremacy clause of the United States Constitution and are thus illegal and void. The petition is granted to the extent that respondents are enjoined from enforcing or attempting to enforce the provisions of the Buchanan Zoning Code as against construction by petitioner of a closed-cycle cooling system at its Indian Point No. 2 facility.

Submit order on notice.

DATED: White Plains, N.Y.

November 14, 1975

/s/ John C. Manbach

JOHN C. MANBACH

J.S.C.

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