Exhibit F

To be argued by
EDWARD J. SACK
Time requested: 45 minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application

of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner-Respondent,

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 KOBIEROWSKI, as the Zoning Board of Appeals of the Village of Buchanan, New York,
Respondents-Appellants,

HUDSON RIVER FISHERMEN'S ASSOCIATION,
Intervenor-Petitioner-Respondent.

BRIEF FOR PETITIONER-RESPONDENT

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BRIEF FOR PETITIONER-RESPONDENT

Facts

Respondent Con Edison respectfully refers the Court to Appellants' Brief for the procedural history of this proceeding. The Respondent will outline the background of the case which is essential to the Court's understanding of the issues.

Con Edison's application to build the cooling tower for its nuclear generating plant known as Indian Point No. 2 (the "Plant") which is the subject of this proceeding,

stems from a proceeding before the United States Nuclear Regulatory Commission[1] (the "Commission"), which regulates the Plant pursuant to the Atomic Energy Act[2] and the National Environmental Policy Act.[3] The Commission issued a construction permit to build the Plant on October 14, 1966. Hearings on the issuance of an operating license were commenced December 1, 1970 and concluded on April 26, 1973. The Commission issued an operating license authorizing full-power operation on September 28, 1973. In these hearings, the Commission Staff recommended that operation of the present once-through cooling system be terminated as rapidly as possible because of a potential threat to the aquatic ecology of the Hudson River, and that the Plant thereafter be operated with a closed-cycle cooling system.[4]

Con Edison contended that a decision on the necessity for a closed-cycle cooling system should be deferred until completion of its ecological study program now in progress. Extensive hearings were conducted before an Atomic Safety and Licensing Board in which the position of the

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[1] The Nuclear Regulatory Commission has succeeded to the regulatory jurisdiction formerly exercised by the Atomic Energy Commission. Energy Reorganization Act of 1974, 88 Stat. 1233, effective January 19, 1975 (E.O. 11834, 40 Fed. Reg. 2971). References to the Commission shall be to the Atomic Energy Commission for events prior to January 19, 1975 and to the Nuclear Regulatory Commission for events subsequent thereto.

[2] 42 U.S.C. § 2011 *et seq.*, as amended.

[3] 42 U.S.C. § 4321 *et seq.*

[4] "Once-through cooling system" means water is taken from the Hudson River to cool the condensers and is returned to the river. A "closed-cycle system" re-circulates condenser cooling water through a cooling tower which cools the water by evaporation and returns it to the plant for reuse, withdrawing from the river only enough water to make up what is lost by evaporation and what is required for periodic cleaning of the tower. A cooling tower cools the circulating water by allowing it to fall through an air draft. The air draft can be created by a large chimney-like structure which is called a natural-draft tower. The air draft can be created by fans in a mechanical-draft tower. These systems and their environmental impacts were described in detail in Con Edison's Cooling Tower Report, an Exhibit to the Record.

Commission Staff was supported by the Hudson River Fishermen's Association and the Attorney General of the State of New York. The Village of Buchanan did not participate in this proceeding. The result was the present license condition (the "license") (R. 53) which is based on a decision of an Atomic Safety and Licensing Appeal Board (the "Appeal Board").

The license requires termination of operation with the once-through cooling system on May 1, 1979, with possible extensions discussed below. The license contemplates construction of a closed-cycle cooling system since it provides that an evaluation of economic and environmental impacts of alternative closed-cycle cooling systems (the "Cooling Tower Report") be submitted to the Commission by December 1, 1974 and that all governmental approvals required to proceed with the construction of the closed-cycle cooling system be obtained by December 1, 1975. The Appeal Board's decision (ALAB-188, 74-4 RAI 323, 392) makes it clear that the May 1, 1979 date is based on a finding that a closed-cycle cooling system should be constructed as rapidly as possible after receipt of all regulatory approvals on December 1, 1975. (R. 25.)

The license specifically permits Con Edison to apply for an extension of the period of operation with the once-through cooling system if justified by empirical data collected during operations. Such an extension, if granted, would defer the necessity to build the cooling tower. Such an application was filed with the Commission on June 6, 1975, which filing does not *per se* serve to extend the period of once-through cooling. (R. 54.) Another application, not yet filed, would be required to eliminate the necessity to build the cooling tower.

On July 8, 1976 (after the decision below) the Commission Staff issued a Draft Environmental Statement recommending that the application of June 6, 1975, be granted. The Commission's procedures require it to obtain comments from other regulatory agencies and the public and to prepare a Final Environmental Statement. 10 C.F.R. Part 51. A hearing will probably be held before a final decision can be obtained. If Con Edison obtains a favorable decision from the Commission, an appeal by one or more adverse parties is likely.

The Cooling Tower Report was submitted to the Commission on time and recommended a wet natural-draft cooling tower system as the preferred closed-cycle cooling system, principally for environmental reasons. (R. 26.) In February 1976 (after the decision below) the Commission Staff issued a Draft Environmental Statement for the Selection of the Preferred Closed-Cycle Cooling System at Indian Point No. 2, which concluded that the Staff had found nothing to warrant changing Con Edison's selection of the natural-draft cooling tower as the preferred system. This Statement described the license as requiring Con Edison "to terminate once-through cooling at Unit No. 2 by May 1, 1979 and to operate thereafter with a closed-cycle cooling system." (P. iii.) The statement recommended issuance of an amendment to the license authorizing construction of a natural-draft cooling tower. (P. iv.) The Commission Staff has recently issued a Final Environmental Statement dated August 1976, which confirms the conclusions of the Draft Environmental Statement described above. A hearing must now be held and the recommended amendment is expected to be issued soon thereafter.

In view of the delays which have occurred in the Commission's approval of the natural-draft cooling tower system and in this proceeding, Con Edison has asserted that the May 1, 1979 date for termination of operation with the once-through cooling system has been postponed pursuant to § 2.E(1)(b) of the license, which provides, in pertinent part, that if Con Edison, acting with due diligence, has not obtained all necessary governmental approvals by December 1, 1975, then the May 1, 1979 date shall be postponed accordingly. (R. 53.) The Hudson River Fishermen's Association has asserted that such postponement is unwarranted and that a delay in this proceeding is not grounds for such a postponement in view of the decision below.

The history of the Commission proceeding shows that Con Edison has consistently opposed the requirement for a closed-cycle cooling system and intends to pursue all legal avenues available to secure a change in the conditions of the license. But until the license is amended, Con Edison

remains bound by its terms. Accordingly, it is required to attempt to obtain all regulatory approvals for construction of a closed-cycle cooling system diligently, and failure to do so may lead to a long-term shutdown of the Plant on the postponed May 1, 1979 date with practical and economic hardships of enormous porportions. (R. 31.) Furthermore, in view of these enormous costs Con Edison must resolve the legal issues in the instant case sufficiently in advance of the date for termination of operation of the once-through cooling system to allow time for construction of the cooling tower.

The United States Environmental Protection Agency ("EPA") also has jurisdiction over the liquid effluents of the Plant, pursuant to the Federal Water Pollution Control Act.[5] On February 24, 1975, EPA issued a permit for the Plant which required termination of operation with a once-through cooling system by May 1, 1979. On April 7, 1975 Con Edison filed with EPA a request for an adjudicatory hearing on that issue, among others, which was granted on May 16, 1975. (R. 32.) Such hearing has not yet been scheduled. EPA's regulations provide that the grant of a request for an adjudicatory hearing stays the effect of contested provisions of the permit. 40 C.F.R. Sec. 125.35(d)(2).

The facts show that this proceeding is one of several legal proceedings in a complex interrelationship concerning a cooling tower at the Plant. In view of these interrelationships, the enormous economic impacts indicated in the record (R. 31) and the important environmental concerns which permeate the case, Con Edison respectfully requests this Court to give priority to its review of this case.

Questions Presented

1. Did the decision at Special Term correctly find that Federal preemption prohibited Respondents-Appellants from preventing Con Edison from building a natural-draft

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[5] 33 U.S.C. § 1151 *et seq.*

cooling tower for its Indian Point No. 2 nuclear power plant?

2. Are Respondents-Appellants prohibited from preventing Con Edison from building a natural-draft cooling tower for its Indian Point No. 2 nuclear power plant because of Con Edison's duty to furnish utility service?

3. Does the record in this proceeding support the granting of the variance requested by Con Edison?

4. Are the procedural issues raised by the brief for Respondents-Appellants without merit?

Questions 1, 2 and 3 above are in the alternative. If the Court finds in the affirmative with respect to any one of them, it is unnecessary to decide the other two.

POINT I

The decision at Special Term correctly found that Federal preemption prohibited Respondents-Appellants from preventing Con Edison from building a natural-draft cooling tower for its Indian Point No. 2 nuclear power plant.

A. Commission License Requires Construction of the Cooling Tower

The Court below found that, while the license provisions do not on their face constitute an affirmative direction to build the cooling tower, "the effect is the same." (R. 11.) Justice Marbach noted that any change in that requirement would require an amendment of Con Edison's license, which has not yet been obtained. (R. 11.) The brief for Appellants is misleading when it states (at P. 53) that Con Edison is only obligated to cease operation of the once-through cooling system. This lifts one sentence out of a context consisting of the license as a whole and the entire proceeding which led to its issuance.

As noted above, the license not only requires termination of operation of the present once-through cooling system

but also contemplates that all regulatory approvals required to construct a closed-cycle cooling system be obtained by a specified date. (R. 54.) Any slippage in this date leads to an automatic adjustment of the May 1, 1979 date. (R. 53.) The linking of the date for termination of operation with the once-through cooling system with the date for obtaining regulatory approvals of the closed-cycle cooling system shows that the May 1, 1979 date was grounded on the concept that Con Edison would construct a closed-cycle cooling system. Par. 2.E(1)(d) of the license (R. 54) specifically refers to the construction of a closed-cycle cooling system and indicates that such construction was clearly contemplated by the license.

The license requires Con Edison to complete an evaluation of the economic and environmental impacts of alternative closed-cycle cooling systems "in order to determine a preferred system for installation." Par. 2.E(2). (R. 54.) Furthermore the decision of the Atomic Safety and Licensing Appeal Board, the decision of the Atomic Safety and Licensing Board, the Commission Staff's Final Environmental Statement and the record of the hearing all show that a closed-cycle cooling system was contemplated if the present cooling system should be found unacceptable. Accordingly, as Justice Marbach found, the license constitutes an order to proceed with the construction of the closed-cycle cooling system.

Furthermore, the date of May 1, 1979 was derived from testimony presented to the Atomic Safety and Licensing Board on the time required to construct a cooling tower system as rapidly as possible after the receipt of all regulatory approvals. (R. 25.) The use of this schedule in establishing the time interval between the December 1, 1975 date for receipt of all regulatory approvals and the May 1, 1979 date for termination of operation with once-through cooling confirms that the license constitutes an order to proceed with construction as rapidly as possible after receipt of all regulatory approvals.

The Cooling Tower Report, an exhibit to the record (R. 286), required by ¶ 2.E(2) of the license (R. 54),

was submitted to the Commission and the Village of Buchanan, on December 2, 1974 and concluded that the preferred closed-cycle cooling system, principally for environmental reasons, was the natural-draft cooling tower system. (R. 26.) The schedule approved by the Appeal Board and which formed the basis of the May 1, 1979 date then required Con Edison to proceed with detailed engineering and securing regulatory approvals of the preferred system described in the Cooling Tower Report. Although the Commission's proceeding with this report has not yet terminated, Con Edison is obligated by the terms of the license to continue with its program for design, licensing and construction of a natural-draft cooling tower system.

Con Edison has proceeded as required with detailed design and applications for regulatory approvals of a natural-draft cooling tower system and such a system is now the only closed-cycle cooling system which can be constructed on a schedule consistent with the terms of the present license. Accordingly, the license has the effect of requiring Con Edison to proceed with engineering design, licensing and construction of a natural-draft cooling tower system.

The Appellants argue that Con Edison is not under any compulsion to construct the tower (Appellants' Brief, p. 23) and note that Con Edison is continuing to argue before the regulatory agencies that a cooling tower is unnecessary. This point was disposed of by Justice Marbach, who noted that any relief from the obligation to build a cooling tower would require an amendment of Con Edison's license. (R. 11.) Such an amendment has not yet been obtained.

B. Special Term Correctly Found Federal Preemption By Action of the Commission

It is well established that state and local regulations in conflict with a federal regulatory program are prohibited by the United States Constitution. The source of this

federal preemption in this case is the supremacy clause[6] and the interstate commerce clause[7] of the Constitution. In addition, as indicated below, one case raises questions of the due process and equal protection clauses.

The Commission decision in this case preempts the issue of the necessity for a cooling tower. One of the purposes of the Atomic Energy Act[8] is as follows:

> "d. a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;"

Since the action of the Village of Buchanan would prevent continued operation of Con Edison's nuclear power plant, this clearly conflicts with the statutory purpose to encourage peaceful use of nuclear energy, which is the source of the Commission's license for the Plant.

Justice Marbach notes that § 274(c) of the Atomic Energy Act (42 U.S.C. § 2021(c)) provided that the Commission retained authority for regulation of the construction and operation of facilities such as the Plant. (R. 13.) Appellants argue on pages 47-48 of their brief that Justice Marbach ignored subsection (k) of § 274 of the Atomic Energy Act (42 U.S.C. § 2021(k)). Such a suggestion is patently in error because Justice Marbach specifically refers to this subsection in his Opinion. (R. 12.) He considered the two subsections together and concluded that subsection (c) would seem to provide for preemption in this case.

Justice Marbach went on to find implied preemption. (R. 13.) The Commission in ordering the construction of

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[6] U.S. Const. Art. VI, Cl. 2; *First Iowa Hydroelectric Cooperative* v. *FPC*, 328 U.S. 152 (1946); *deRham* v. *Diamond*, 32 N.Y. 2d 34 (1973).

[7] U.S. Const. Art. I, Section 8; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

[8] 42 U.S.C. § 2013(d).

a cooling tower was also exercising jurisdiction conferred by the National Environmental Policy Act of 1969 ("NEPA").[9] NEPA directs federal regulatory agencies such as the Commission to interpret and administer the policies, regulations and public laws of the United States to the fullest extent possible in accordance with the policies of the Act. The purpose of the Act is declared in Sec. 2 as follows:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

It was pursuant to this statutory direction that the Commission ordered the conduct of a hearing on the environmental impacts of the Plant which lasted more than a year, contained several thousand pages of testimony, reviewed the costs and benefits of Plant operation with the present once-through cooling system and alternatives, and resulted in the license condition described above.

NEPA does not on its face preempt state and local regulation. Cases however have established the doctrine of implied preemption. The leading case on this subject is *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). This decision established a fourfold approach as follows (331 U.S. at 230):

1. "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. (citations)."
2. "Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal

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[9] 42 U.S.C. § 4321 *et seq.*

system will be assumed to preclude enforcement of state laws on the same subject. (citations)."

3. "Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. (citations)."

4. "Or the state policy may produce a result inconsistent with the objective of the federal statute. (citations)."

The leading recent case dealing with implied preemption is *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). There, the Court invalidated a city ordinance banning jet takeoffs between 11 pm and 7 am on the grounds that local regulation of air travel was preempted by both the exclusive national sovereignty over airspace and "the pervasive nature of the scheme of federal regulation of aircraft noise." 411 U.S. at 633.

A case with a fact pattern similar to Con Edison's Indian Point problem is *Transcontinental Gas Pipe Line Corp.* v. *Hackensack Meadowlands Devel. Comm.*, 464 F. 2d 1358 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1118 (1973). The plaintiff engaged in the interstate transportation and sale of natural gas and had received a certificate from the Federal Power Commission authorizing the construction of an additional above-ground liquid natural gas storage facility at its existing storage plant. The defendant, a regional development commission, denied the company's request for a building permit, saying the facility was not a "permitted use" under its Master Plan. Later, a variance was applied for and denied. Transco sued to enjoin the Commission from interfering with construction of the facility, and a restraining order was issued by the District Court. The question posed by the appellate court was whether a "complete interdiction of the proposed facility was a reasonable exercise of (the Commission's) police powers. . . ." 464 F. 2d at 1362.

The Court of Appeals affirmed the District Court's order because, among other reasons, the requirements established

by the Commission were "quite unreasonable in view of the potential conflict with a federally regulated business." 464 F. 2d at 1363, n. 17.

Furthermore, where it is impossible to comply with both federal and state regulatory schemes, state regulation is preempted. *FPC* v. *Corporation Commission of the State of Okla.,* 362 F. Supp. 522 (W.D. Okla., 1973) *aff'd* 415 U.S. 961 (1974).

This doctrine has been used to override a local zoning ordinance when provisions of the Clean Air Act conflicted with a local ordinance for provision of employee parking space. *Southern Terminal Corp.* v. *EPA,* 504 F. 2d 646 (1st Cir. 1974).

The rationale of these cases applies to this case. NEPA orders a comprehensive review by all federal agencies of the environmental impacts of their actions. In accordance with this directive, the Commission thoroughly analyzed all aspects of operation of the Plant with the present once-through cooling system and alternative cooling systems including the natural-draft cooling tower which is the subject of the instant case. The Commission concluded that the present available evidence indicated the existence of an unacceptable risk to the population of striped bass, a migratory fish which constitutes an important commercial and recreational resource in New York and adjacent states. The Commission's conclusion that operation with the present once-through cooling system must terminate on May 1, 1979 (now postponed) constitutes a federal policy decision based on a federal interest in protecting an interstate resource. This is clearly an implementation of the policies of NEPA pursuant to a pervasive federal regulatory program, and the cases cited above establish that local concerns cannot interfere with such an implementation of federal policy.

Appellants' argument, on p. 50 of their Brief, that Con Edison's position precludes all local regulation is a gross overstatement. There are obviously many local rules and regulations that can be applied to a facility that will not

conflict with a federal directive to build it. It is only when the locality in effect completely prohibits construction of a facility the federal government has ordered be constructed that a constitutional conflict arises.

C. Preemption Also Arises By Virtue of Action of the U.S. Environmental Protection Agency

In addition to the Commission license, the Plant has a discharge permit issued by EPA pursuant to the National Pollutant Discharge Elimination System as required by Section 402 of the Federal Water Pollution Control Act ("FWPCA"). 33 U.S.C. § 1251 *et seq.* (R. 32.) This permit has the same condition as the Commission's license requiring the Plant to terminate operation with the once-through cooling system by May 1, 1979. Con Edison has requested a hearing on this condition, which request has been granted. Accordingly, this is similar to the condition in the Commission's license in that it will be applicable unless Con Edison succeeds in obtaining a change through regulatory proceedings which may be challenged by other parties.

The FWPCA prescribes a comprehensive regulatory scheme for control of all liquid discharges into the Nation's waters. An objective of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters. . . ." Sec. 101(a).[10] This statute has a specific preemption of state regulation in Section 510 (33 U.S.C. § 1370) as follows:

> "Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharge of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other lim-

[10] 33 U.S.C. § 1251 *et seq.*

itation, effluent standard, prohibition, pretreatment standard or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such States".

The second part of this section specifically prohibits a political subdivision of a state, such as the Village, from enforcing any effluent limitation, prohibition or standard which is less stringent than that prescribed under the FWPCA. If the Village requires continuation of the present thermal discharges, that would constitute a standard less stringent than that prescribed under the FWCPA. The requirement for termination of operation with the once-through cooling system and the construction of a closed-cycle cooling system is pursuant to an effluent limitation established by EPA regulations. 40 C.F.R. § 423.13 (1).[11]

The definition of "effluent limitation" in Sec. 502 (11) (33 U.S.C. Section 1362 (11)) of FWPCA includes "schedules of compliance" as a limitation. Accordingly, the Village is precluded from interfering with the schedule of compliance required by EPA regulations.

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[11] This regulation was recently remanded to EPA for reconsideration. *Appalachian Power Co. et al.* v. *Train*, —— F.2d —— (4th Cir. 7/16/76). The effect of the remand is not clear, particularly because EPA is requiring a cooling tower at Indian Point 2 also pursuant to § 316(b) of FWPCA. 33 USC § 1326(b).

Appellants' argument on page 51 of their Brief that EPA has not ordered the construction of a cooling tower is fallacious. EPA has imposed a limitation on the thermal discharge from the Plant which can only be met by the construction of a cooling tower. (R. 32.) Appellants' argument requires this Court to look at the literal words of one sentence in a permit ignoring their full meaning and purport in the context of the permit as a whole and the entire regulatory program.

D. The Failure of Appellants to Permit Construction of the Cooling Tower Also Constitutes an Impermissible Interference with Interstate Commerce and Violates Other Provisions of the U. S. Constitution

Contemporary black letter law prohibits state action which "unreasonably burdens or discriminates against interstate commerce". *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, at 152-3. In an analogous case, the plaintiff sought to restrain the defendant town from prohibiting construction of a 30-inch pipeline through the town. The court framed the issue as whether a company holding a certificate of public convenience and necessity pursuant to the Natural Gas Act was subject to local regulations in choosing a particular route for a pipeline. It held that such regulation was an undue burden upon interstate commerce and could not be sustained as a reasonable regulation in exercise of the town's police power. *Transcontinental Gas Pipe Line Corp.* v. *Borough of Milltown,* 93 F. Supp. 287 (D.N.J. 1950).

In the *Transcontinental* case the construction was underground but its holding was applied to above ground construction in *New York State Natural Gas Corp.* v. *Town of Elma,* 182 F. Supp. 1 (W.D.N.Y. 1960). The plaintiff sought an injunction directing the municipality to reinstate a zoning permit for a pipeline, for which plaintiff had earlier received a certificate of public convenience and necessity from the Federal Power Commission. Although the 29.5-mile pipeline section was completely intrastate, the Court found the disputed project to be part of an inter-

state distribution system. In analyzing the alleged burden on commerce, the Court referred to *Transcontinental Gas* v. *Borough of Milltown*:

> "A much closer case is presented in the case at bar, however. Here, there is no effort to restrain the construction of the pipeline itself, as there was in the Transcontinental case. Rather, through the exercise of an accepted local power the defendant seeks to restrict the construction of equipment, together with its housing, which is merely ancillary to the pipeline and which is located above ground in a zone where such construction is not permitted by the local zoning ordinance. Nevertheless, on the particular facts presented, the court is of the opinion there is a burden on interstate commerce." 182 F. Supp. at 3.

The facts of the case at bar establish similar equities. The environmental impacts of alternative closed-cycle cooling systems were carefully analyzed in the Cooling Tower Report. The natural-draft cooling tower was selected principally because it minimized the adverse environmental impacts presented by all other feasible alternate systems. The undisputed facts also establish that the impact of the Appellants' decision on interstate commerce is enormous. The Plant is an important source of electric energy for New York and adjacent states. (R. 31.) Any cessation of operation of the Plant because of Buchanan's failure to issue the required building permit would adversely affect the supply of electric power to this interstate area.

Replacement power would have to be furnished by oil-fired power plants with increased fuel cost estimated as $567,000 per day for full power operation. Under Con Edison's rate structure increased fuel cost is passed on directly to the customers. (R. 30, 123-124.) Therefore, any cessation of operation of the Plant would also lead to an automatic increase in Con Edison's rates charged to customers in Westchester County and elsewhere. Any such

cessation caused by Appellants would constitute a clear case of an impermissible burden on interstate commerce.

The case of *Consolidated Edison Co.* v. *Briarcliff Manor,* 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955), discussed under Point II *infra,* indicated that other constitutional provisions are violated by the type of action taken by the Village of Buchanan herein. In that case the Court found that a provision of the village ordinance was contrary to the general welfare since it stood in the way of necessary public utility development. The Court then said: "[W]here the provisions of a zoning ordinance restricting the use by a landowner of his lands do not tend to promote the public interest and general welfare, they may not be justified as being a proper exercise of the police power and they are invalid", citing *Concordia College Inst.* v. *Miller,* 301 N.Y. 189, 196 (1950). 208 Misc. at 300.

The *Briarcliff* court concluded:

> "The fact that such provisions may be said to promote the health, safety or welfare of a few neighboring property owners is no justification therefor where they are in derogation of general public welfare. Consequently, in addition to the provisions being invalid as tending to override the state law providing for public utility service, they are unconstitutional. Specifically, so far as petitioner is concerned, they offend against the due process and equal protection clauses of the Federal and State Constitutions and may not stand as authorized by the police power." 208 Misc. at 301.

In the instant case as in the *Briarcliff* case, the local concerns of the Village cannot justify actions in derogation of the general public welfare as determined by the cognizant federal agencies.

E. Conclusion of Point I

The Village of Buchanan, acting through Appellants, cannot apply an otherwise valid zoning law in such a way as to frustrate national policies and regulatory schemes

enunciated in such laws as the Atomic Energy Act, NEPA and the FWPCA. In the alternative, it cannot use its powers to create an unreasonable burden on interstate commerce and to offend against the due process and equal protection clauses of the Constitution.

POINT II

Respondents-appellants are prohibited from preventing Con Edison from building a natural-draft cooling tower for its Indian Point No. 2 nuclear power plant because of Con Edison's duty to furnish utility service

A. Construction of Cooling Tower is Essential for Continued Operation of the Plant

An alternative argument to the federal issues discussed under Point I is a doctrine under New York State law which requires the same result as ordered below. As described under Point I of this Brief, the Commission license requires termination of operation of the Plant with the present once-through cooling system on a specified date. A nuclear power plant cannot operate without a cooling system. Thus Con Edison cannot operate its plant to generate electricity after that date unless a cooling tower system is in operation. Appellants' action, if allowed to stand, would therefore force Con Edison to shut down the Plant.

B. Continued Operation of Con Edison's Plant is Essential for the Public Interest

Delay in returning the Plant to service after termination of operation with the once-through cooling system, or long-term cessation of its operation, would substantially impair Con Edison's ability to supply electricity, and would adversely affect the supply of energy in surrounding regions. (R. 31.) It would also adversely affect the public interest by increasing the cost of service to consumers and increasing the use of scarce fuel oil. (R. 30.)

Con Edison operates under the mandate of state law to "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Public Service Law, Section 65, Subd. 1; see also Transportation Corporations Law, Section 11.

It is clear that there is real public need for this facility and Con Edison has a duty to provide it.

C. Provisions of Buchanan Zoning Code are Invalid as Applied Insofar as They Bar Construction of the Cooling Tower

1. *Local Rules in Conflict with State Policies are Invalid*

It is a well established principle of law in New York that municipalities cannot exercise their local police powers in a manner so as to conflict with an overriding state policy. The reason for this is that the source of police power is the sovereign, that is the state, and the political subdivisions of the state are simply delegated this power by the state. *City of Albany* v. *Anthony,* 262 App. Div. 401, 28 N.Y.S. 2d 963 (3d Dep't 1941); *Peo.* v. *Blue Ribbon Ice Cream Co.,* 1 Misc. 2d 453, 148 N.Y.S. 2d 408 (N.Y. Cty. Magis. Ct. 1956).

A municipality's zoning power, like all of its other police powers, is limited by the principle that it cannot be exercised in such a manner as to conflict with or frustrate a policy of the state or the performance of a duty or right imposed or granted by the state. Therefore, a village ordinance which zoned all of the property in the village residential cannot act to prohibit a town with the statutory power to build parks, from building a park within the borders of the village. *Incorporated Village of Lloyd Harbor* v. *Town of Huntington,* 4 N.Y. 2d 182, 173 N.Y.S. 2d 553 (1958). A town ordinance which bars the establishment of hospitals for the treatment of contagious diseases within the town is invalid as applied to a tuberculosis sanitarium for which state approval has been obtained. *Jewish Consumptive Relief Society* v. *Town of*

Woodbury, 230 App. Div. 228, 243 N.Y.S. 2d 686 (2d Dep't 1930), *aff'd* 254 N.Y. 619 (1931). A local zoning ordinance may not prohibit the construction of a public high school which has been approved by the State Commissioner of Education. *Union Free School District No. 14* v. *Village of Hewlett Bay Park*, 198 Misc. 932, 102 N.Y.S. 2d 81 (Sup. Ct. 1950), *aff'd* 278 App. Div. 706, 103 N.Y.S. 2d 831 (2d Dep't 1951). Nor may a town zoning ordinance prohibit a county Board of Cooperative Educational Services established pursuant to the Education Law from maintaining a vocational high school within the town, for to permit such action would be to permit the town to frustrate the performance by the Board of its statutory duty. *Board of Cooperative Educational Services* v. *Gaynor,* 60 Misc. 2d 316, 303 N.Y.S. 2d 183 (Sup. Ct.) *aff'd* 33 App. Div. 2d 701, 306 N.Y.S. 2d 216 (2d Dep't 1969).

Finally, given the fact that billiard parlors are licensed by the Secretary of State and subject to his regulation, a local zoning ordinance cannot totally exclude billiard parlors. *G.B. Billiard Corp.* v. *Horn*, 42 Misc. 2d 673, 248 N.Y.S. 2d 757 (Sup. Ct. 1964).

2. *Local Rules in Conflict with Requirements for Public Utility Facilities are Invalid*

As stated above in subdivision B of this Point, Con Edison as a gas, electric and steam corporation is under a statutory duty to provide adequate service to the public of the state within the areas of its franchise. The courts of this state have recognized the demands of this public duty by overturning zoning ordinances which would bar necessary utility facilities. *Long Island Water Corp.* v. *Michaelis,* 28 App. Div. 2d 887, 282 N.Y.S. 2d 22 (2d Dep't 1967); *Long Island Lighting Co.* v. *Griffin,* 272 App. Div. 551, 74 N.Y.S. 2d 348 (2d Dep't 1947); *Long Island Lighting Co.* v. *Incorporated Village of South Floral Park,* 158 N.Y.S. 2d 878 (Sup. Ct. 1956); *Consolidated Edison Co.* v. *Village of Briarcliff Manor,* 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955); *Long Island Lighting Co.* v. *Village of Old Brookville,* 84 N.Y.S. 2d 385 (Sup. Ct. 1948).

In the case of *Consolidated Edison Co.* v. *Village of Briarcliff Manor, supra,* Con Edison sought to reverse the denial of a variance for the erection of a transmission line. The Court found the provisions of the zoning ordinance "invalid insofar as they absolutely prohibit the petitioner from constructing and maintaining through the village, a publicly needed high-tension electric line". 208 Misc. at 300. The court reasoned as follows:

> "Now, upon the undisputed facts, there is necessity for the public utility improvement proposed by the petitioner and the only bar to the same is the local ordinance of this village. The question is, does this village have the right to absolutely bar the passing through it of a high-tension electric line required in the interests of the public. In this connection, it is to be noted that public utility corporations of the nature and type of the petitioner are created and regulated by State law. There is the absolute mandate by State law that the petitioner shall 'furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.' (Public Service Law, Section 65, Subd. 1. See also, Transportation Corporations Law, Section 11.) The petitioner has the franchise and right, and furthermore the duty, subject to reasonable regulations, to erect and maintain the proposed transmission line, and no local governmental unit shall nullify or interfere with that right and duty. Such unit may not, without unequivocal and express statutory grant of authority, enact a local ordinance tending to abrogate or contravene the State law and policy with respect to such a utility. The general grant of power to a municipality to adopt zoning laws in the interest of public welfare does not have the effect of permitting the local legislative body to override such State law and policy." *Id.* at 299-300.

The action of the Appellants in denying Con Edison a variance to build the cooling tower contravenes the principle enunciated in *Briarcliff* and the other cited cases,

since as was established under Point I of this Brief, the natural-draft cooling tower is legally essential to the uninterrupted operation of the Plant.

3. *Variance Is Not Required for Essential Utility Facility*

It has been recognized that a local zoning ordinance will be held to be invalid as applied to the utility if the utility can establish a reasonable necessity to build a facility on a particular site. *Niagara Mohawk Power Corp.* v. *City of Fulton,* 8 App. Div. 2d 523, 188 N.Y.S. 2d 717 (4th Dep't 1959); *Video Microwave Inc.* v. *Zoning Board of Appeals,* 77 Misc. 2d 798, 354 N.Y.S. 2d 817 (Sup. Ct. 1974); *New York State Electric & Gas Corp.* v. *McCabe,* 32 Misc. 2d 898, 224 N.Y.S. 2d 527 (Sup. Ct. 1961); *Northport Water Works Co.* v. *Carll,* 133 N.Y.S. 2d 859 (Sup. Ct. 1954), 1 R. Anderson, New York Zoning Law and Practice, Section 9.23 (2d ed. 1973).

In *Niagara Mohawk Power Corp.* v. *City of Fulton, supra,* the court stated that

> ". . . upon a proper factual demonstration of a public necessity, the petitioner would be entitled to a declaration that the ordinance was void as to it, insofar as it prevented it from erecting a structure which was reasonably necessary to enable it to perform its public duties under the statutes of the State. The power of the municipality to enact a zoning ordinance must yield to the superior force of the state statutes which impose upon the public utility company the duty of rendering safe and adequate service." 8 App. Div. 2d at 527.

The case of *Northport Water Works Co.* v. *Carll, supra,* is in many ways analogous to the present case. In that case a waterworks corporation organized under the Transportation Corporations Law and under a statutory duty to provide water to its franchise area sought a variance to permit it to expand its existing plant which was located in a residential area. The Village of Northport Zoning Board of Appeals granted a variance to construct a housing

for pumps and auxiliary gasoline engine, denied a variance to build an overhead storage tank and granted a conditional variance to construct a reservoir. The variance to construct the reservoir was conditioned on the waterworks corporation limiting the height of the reservoir and landscaping the surrounding area and painting the reservoir green to limit its adverse aesthetic impact.

The court reversed so much of the Board's opinion as denied the petitioning utility a variance to construct the storage tank and limited the height of the reservoir. The court recognized that the proposed additions to the petitioner's plant would probably lessen the value of surrounding properties due to the adverse aesthetic effect but since petitioner had established a need for expanding its plant the effect on the immediate area was held to be not determinative.

> "It may well be that the erection of the proposed addition to petitioner's facilities will detract from the value of the surrounding residential property, but that fact standing alone, is not controlling. The injury which may flow from the enlargement of the petitioner's plant must be weighed against the benefits to be derived by the community as a whole. . . . When taken into consideration with the benefits to be derived by the community as a whole from the enlargement of petitioner's facilities, in my opinion, the ill effects growing out of the enlargement are greatly outweighed by such benefits." 133 N.Y.S. 2d at 863-4.

The cooling tower is no different in substance from the transmission lines, substations, and other facilities previously considered by the courts. It has been made a vital and necessary component of Con Edison's electricity supply system by the Commission's license which provides that the Plant may not operate after a specified date without it. Accordingly, the provisions of the Buchanan Zoning Code which would deny Con Edison permission to construct the towers are invalid even if Con Edison has failed to establish its right to a variance under the terms of the Code.

D. Village May Not Control Selection of Cooling Tower Type

New York has permitted a limited regulation of public utility facilities by localities. "A village may, within reason, regulate public service improvements, but may not ban them altogether." *Consolidated Edison Co.* v. *Village of Briarcliff Manor, supra; Long Island Water Corp.* v. *Michaelis, supra.*

Thus, courts have sanctioned the regulation of local and incidental conditions under the zoning power, at least to the extent of selecting alternative locations (*Long Island Lighting Co.* v. *Horn,* 23 App. Div. 2d 583, 256 N.Y.S. 2d 690 (2d Dep't. 1965) *aff'd* 17 N.Y. 2d 652, 269 N.Y.S. 2d 532 (1966)), requiring underground rather than overhead location of transmission lines (*Niagara Mohawk Power Corp.* v. *City of Fulton, supra.; New York State Electric & Gas Corp.* v. *McCabe, supra.;* locating substation, or camouflaging facilities (*Consolidated Edison Co.* v. *Town of Rye,* 16 Misc. 2d 284, 182 N.Y.S. 2d 688 (Sup. Ct. 1959)).

However, utility facilities may be regulated under local zoning ordinances only if such regulation does not materially affect the distribution of electricity. *Long Island Lighting Co.* v. *City of Long Beach,* 280 App. Div. 823, 113 N.Y.S. 2d 762 (2nd Dep't. 1952), *aff'd* 305 N.Y. 880 (1953) (substation location).

In the case at bar, the Appellants contend that they have the power to decide which type of cooling tower is to be built. Such regulation goes far beyond the regulation of local and incidental conditions. The selection of the proper closed-cycle cooling system was the subject of Con Edison's Cooling Tower Report and is now the subject of extensive Commission review. The Commission Staff has in a Final Environmental Statement concurred in Con Edison's selection.

Buchanan's views were properly placed before the Commission in extensive comments it submitted on the Draft Environmental Statement. Recent correspondence of the Village attorney to the Commission indicates Buchanan

may also wish to participate in the formal Commission proceedings.

Once the Commission has reached its decision, however, the closed-cycle cooling system selected by the Commission will be an essential utility facility, and the cases described above establish that the Village is prohibited from interfering with the construction of that system.

E. Appellants Virtually Concede This Point

Appellants at page 45 of their Brief concede the general principles described above. They then argue that Con Edison did not bring a proper proceeding. Although this is discussed in detail under Point IV, it should be noted that several of the cases cited above were brought in a manner identical to this proceeding.[12]

Appellants argue on page 46 of their Brief that the doctrine described above does not apply because the license does not require erection of the cooling tower. This was discussed above under Point I which analyzed the correctness of the decision below that the effect of the license provisions is to require construction of the cooling tower. (R. 11).

POINT III

The record in this proceeding supports the granting of the variance requested by Con Edison.

As Con Edison has shown above under Point II, the legal standard which has evolved for determining whether a utility is entitled to a variance is public necessity. However, because this Court has the power to remand this proceeding, Con Edison will now demonstrate that the record in this proceeding also supports the granting of the variance under more general principles of zoning law.

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[12] See *Long Island Water Corp.* v. *Michaelis, supra; Long Island Lighting Co.* v. *Griffin, supra; Video Microwave, Inc.* v. *Zoning Board of Appeals, supra; Northport Water Works Co.* v. *Carll, supra.*

The general legal standard for the issuance of a variance is set forth in the Village Law as follows:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the local law or ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the provisions of such local law or ordinance relating to the use, construction, or alteration of buildings or structures, or the use of land, so that the spirit of the local law or ordinance shall be observed, public safety and welfare secured and substantial justice done." Sec. 7-712.2(c).

The necessity for a variance from the height limitations of the Buchanan Zoning Code is considered an area variance, while the other two variances requested are termed use variances. The criteria for both these variances are set forth in the leading case of *Otto* v. *Steinhilber,* 282 N.Y. 71 (1939):

> "Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality." *Id.* at 76.

Buchanan has prescribed substantially the same criteria in the Buchanan Zoning Code at Sec. 54-5, Variance Def. C.

As discussed under Point I, *supra,* the variance, or an affirmance of the decision below, must be received by the postponed December 1, 1975 date for obtaining all regulatory approvals required to construct a closed-cycle cooling system. If not, Con Edison would face a dilemma which

clearly constitutes a practical difficulty and unnecessary (legal) hardship.

Con Edison would have two alternative courses of action. It could proceed on the construction program in spite of the lack of a building permit. This would require getting bids for excavation and tower erection, negotiating contracts and commencing work in the field (land clearing and excavation). (R. 28-29.)

Proceeding on this course without having a building permit in hand obviously places Con Edison in an extremely difficult position. If the permit is never received (and the decision below is not upheld), Con Edison would possibly have committed unnecessary, irrevocable actions, such as land clearing and excavation, would incur substantial expenses for cancellation of contracts and would endanger its relations with suppliers by having negotiated contracts which cannot be fulfilled.

The alternative course of action for Con Edison is to suspend the cooling tower program until the issues concerning the permit and variance are resolved. This requires Con Edison to assume the risk that the Commission will extend the period of operation with once-through cooling on the grounds that either (a) all regulatory approvals have not been received or (b) the application filed on June 6, 1975 based on data from operations is granted.

This is a totally unreasonable risk, because these extensions are beyond Con Edison's control and are subject to regulatory action which can be contested before the regulatory agency and in court. If the extension should not be granted, the economic penalties are severe. (R. 30-31.)

Since, as noted above, the cooling tower schedule is based on constructing a cooling tower as rapidly as possible, any suspension of the schedule would mean that the Plant would be out of operation after the postponed May 1, 1979 date longer than would otherwise be the case. As noted above under Point I, Con Edison has estimated that the outage of the Plant would cost its customers approximately $567,000 per day assuming full power operation. (R. 30-31, 123-124.) The additional fuel in question would consist of

approximately 2,100,000 gallons of fuel oil per day, which would undermine national policy for conservation of fuel. (R. 30, 124.) In addition, Con Edison's investment in the Plant which is in excess of $204,000,000 would be in jeopardy. (R. 21, 124.) These enormous numbers clearly establish an economic hardship not only to Con Edison but also to all of its customers, including those in Westchester County, which would be incurred by reason of any suspension of Plant operation caused by Appellants.

Furthermore, the issuance of the variance would not alter the character of the area in which the Plant is located. The Plant is in a heavy industrial zone with large manufacturing plants both north and south of it. The site already contains three large electric generating units which constitute the Indian Point Station. Several structures on the site exceed the height limitations of the Code. The two large dome containment buildings of Indian Point Units 2 and 3 are 219 feet high and Indian Point Unit 1 has a stack approximately 375 feet high. The turbine halls also exceed the height limitations of the Code. (R. 27.) Thus, it is obvious that no change would occur in the character of the area from the variance in height limitations of the Code.

The other variances requested will also not affect the character of the area. The Cooling Tower Report (Exhibit to Record) concluded that the natural-draft cooling tower system was preferable to other alternatives because it minimized the impact on the community. The large tower will raise the vapor plume to a height at which impacts are not expected to be severe, its precise nature varying with meteorological conditions. The Cooling Tower Report also indicated that the impact of the saline drift from a natural-draft cooling tower would be minimal and only potentially harmful in the event of an extended period of rainless days. (Exhibit to Record at p. 8-1.) Accordingly, these impacts would not alter the character of the locality.

The foregoing facts, which were before Appellants and the Court below, establish that Con Edison has met the

test of practical difficulties and unnecessary hardships as set forth in the case of *Otto* v. *Steinhilber, supra,* and has also fulfilled the requirement of legal hardship as defined in § 54-5 of the Buchanan Zoning Code, quoted in Appellants' Brief, p. 30. Without the granting of the variance requested, Con Edison may be forced to shut down the Plant, clearly a situation wherein the land cannot yield a reasonable return for the investment involved. See *Boomer et al.* v. *Atlantic Cement Company, Inc.,* 26 N.Y. 2d 219 (1970). Secondly, Con Edison's plight is clearly not self-inflicted but has been created by regulatory agencies. Thirdly, as noted above, a cooling tower will not alter the essential character of the industrial zone in which it is located. Although Con Edison must concede some adverse esthetic impact, such impact must be balanced against the enormous economic consequences to Con Edison and its customers described above and the alleged adverse impacts on Hudson River biota upon which the requirement for the cooling tower is based. Brief of Commission Staff, R. 208, 223.

Appellants appear to base their argument on the fact that at the public hearing of May 6, 1975, Mr. Szeligowski used the phrase "economic hardships" rather than "legal hardships". (Appellants' Brief, p. 30, R. 123.) This is irrelevant because all the facts were placed before the Appellants.

The case of *North American Holding Corp.* v. *Murdock,* 9 Misc. 2d 632, 167 N.Y.S. 2d 120 (Sup. Ct. 1957), *aff'd* 6 N.Y. 2d 902 (1959), is somewhat analogous. The petitioner in that case was faced with the dilemma of two inconsistent legal requirements. The Multiple Dwelling Resolution prohibited the use of cellar space for residential purposes and the New York City Zoning Law prohibited the use of that space for retail business. The petitioner filed an application for a variance from the Zoning Law to use the cellar space for retail stores. The application was denied by the New York City Board of Standards and Appeals and that denial was reversed by the Court which held that the petitioner had satisfied the three cri-

teria for the issuance of a variance established by *Otto* v. *Steinhilber, supra.*

Other cases have held that conflicting regulatory requirements leading to financial hardship can justify variances. *Jayne Estates, Inc.* v. *Raynor,* 22 N.Y. 2d 417, 293 N.Y.S. 2d 75 (1968); *Ullian* v. *Tower Board of Hempstead,* 68 Misc. 2d 393, 326 N.Y.S. 2d 606 (Sup. Ct. 1971), *aff'd* 38 App. Div. 2d 850, 330 N.Y.S. 2d 779 (2nd Dep't 1972).

Appellants' argument, on page 49 of their Brief, that substantial financial loss does not constitute hardship is not supported by the cases of *Rowe Street Assoc.* v. *Town of Oyster Bay,* 27 N.Y. 2d 973, and *Mtr. of 113 Hillside Ave. Corp.* v. *Zaino,* 27 N.Y. 2d 258, cited therein. Both cases involved plights which were self-inflicted. In *Rowe,* the petitioner bought land with knowledge of the zoning restriction in question. In *Mtr. of 113 Hillside Ave. Corp.,* the Court found that petitioner's problem was self-created by the manner in which a larger lot had been subdivided. Neither opinion refers to the substantiality of the financial loss.

POINT IV

The procedural issues raised by Respondents-Appellants are without merit.

In their brief under Points I and II, Respondents-Appellants mention a number of "procedural" points for this Court's consideration. These arguments reduce themselves to two broad categories: 1) that Con Edison did not pursue the proper legal course when it brought an Article 78 proceeding; and 2) that other "necessary parties" were omitted from said action.

At the outset, it should be noted that Respondents-Appellants raise their "procedural" objections for the first time on appeal herein. At no time, before the Court below, did they object to the Article 78 proceeding and move for its dismissal. At no time before the Court below did they allege that necessary parties were not before the Court, nor did any other party (except the Hudson River Fisher-

men's Association) seek to intervene herein. The latter point is particularly significant since the Buchanan Village Attorney appeared as attorney for Respondents below (R. 60), and Special Counsel described himself as counsel for the Village Trustees. (R. 142.) It is therefore certain that the Village had notice of the instant action.

Indeed there is no claim that the Village of Buchanan and the Buchanan Building Inspector did not have notice of this proceeding, nor could there be such claim. It is submitted that the "procedural" issues interposed for the first time before this Court constitute nothing more than a contrived smoke-screen.

However, in the event that this Court deems it appropriate to consider the "procedural" objections on their merits, it is useful to briefly review the history and nature of the instant action. Con Edison, as stated above, was and is faced with the necessity of obtaining necessary governmental approvals for the construction of a cooling tower, as ordered by the Commission. Not wishing to be accused at any point of having failed to exhaust all administrative remedies prior to instituting court action, Con Edison initially sought to obtain the necessary variance at the local level. In this regard, proceeding under the applicable portion of the Zoning Code of the Village of Buchanan, Con Edison applied to the Building Inspector of the Village of Buchanan for a building permit. After the application was denied by the Building Inspector, Con Edison sought review of that denial by bringing an appeal before the Zoning Board of Appeals of the Village, pursuant to §§ 54-39, 54-41, 54-43, and 54-44 of the Buchanan Zoning Ordinance.

The above sections, in substance, require that when seeking a zoning permit, a party is first to apply to the Village Building Inspector, who may issue the permit or refer the application to the Zoning Board of Appeals directly. If the Building Inspector denies the permit sought and does not refer it to the Board, the applicant may then appeal the denial to the Village Zoning Board of Appeals, consisting of five members who are compensated for their services.

After a public hearing, the Zoning Board of Appeals is authorized to grant variances by § 54-43 of the Buchanan Code. Subsequent to a decision by the Zoning Board of Appeals, a party is given the right to appeal an adverse decision to "any court having jurisdiction". Sec. 54-44 further requires that in the case of an appeal to any proper court, the Zoning Board of Appeals "shall make the return required by law, and shall promptly notify the village attorney of such appeal, and furnish him with a copy of the return, including the transcript of testimony."

In order to analyze the "procedural" positions set forth by Respondents-Appellants, it is useful to divide the prior proceedings into two distinct categories: the local administrative proceedings pursuant to the Village of Buchanan Code, and secondly, the Article 78 proceeding instituted in Supreme Court, Westchester County. With regard to the first of these categories, it is clear that Con Edison complied fully and completely with the procedures outlined in the Village ordinances.

Con Edison initially followed the procedures prescribed by the Buchanan Zoning Ordinance for two basic reasons: a) had the zoning variance been granted, it would have, at the administrative level, mooted any possible court action and constitutional issues; and b) Con Edison wanted to be certain that it was not left open to the argument that all administrative remedies had not been exhausted.

At the hearing before the Zoning Board of Appeals, Con Edison presented a substantive case in favor of the issuance of a zoning variance. Respondents-Appellants have asserted that if Con Edison claimed that the ordinance was unconstitutional as to its property, it could have raised the question before the Zoning Board on appeal from the decision of the Building Inspector. This suggestion implies that the Zoning Board is authorized and competent to hear and decide argument concerning substantive *legal* issues such as constitutionality and Federal preemption. The authorities, as well as Buchanan's own ordinance, clearly indicate that such is not the case. The Court, in *Western Stone Products Corp.* v. *Town Board*

of Lockport, 25 App. Div. 2d 493, 266 N.Y.S. 2d 686 (4th Dep't, 1966), held that the Board of Zoning Appeals is *without authority* to determine the constitutionality of the ordinance which it is administering. See also *Wesley Chapel, Inc.* v. *Van Den Hende,* 32 App. Div. 2d 565, 300 N.Y.S. 2d 803 (2nd Dep't, 1969), modified on other grounds, 25 N.Y. 2d 930, 305 N.Y.S. 2d 149, 252 N.E. 2d 629 (1969). Con Edison raised the constitutional issues at Special Term, which was the first legally correct forum for such issues.

It should be noted that the Zoning Board of Appeals in its decision evaluated the *substantive* matters presented to it, and denied the granting of a variance on *substantive* grounds. It at no time took the position, as counsel for Respondents-Appellants does herein, that the Board of Appeals in any way lacked the authority or the competence to issue the variance applied for. Further, the Board at no time criticized Con Edison for the procedures that it followed, i.e., applying to the Building Inspector and appealing the Building Inspector's denial to the Board of Appeals.

With regard to the Article 78 proceeding, Con Edison properly brought a proceeding in the Court below pursuant to Article 78 of the Civil Practice Law and Rules; CPLR § 7801 *et seq.* Under the CPLR, a party aggrieved by an administrative decision may seek judicial review of that decision pursuant to Article 78. The rights afforded under Article 78 were precisely the rights that Con Edison sought to invoke in the Court below. In substance, Con Edison made two assertions to the Court below, to wit, that, under the doctrine of Federal preemption or state law, no variance need be obtained at all, and, in the alternative, that a proper showing to substantiate the granting of a variance had been made to the Zoning Board of Appeals.

It should be made clear, at this point, that at no time did Con Edison allege that the Village of Buchanan zoning ordinances were unconstitutional, nor were said ordinances attacked in the Court below. The thrust of Con Edison's

position, as recognized by the Court below, was that the ordinances, even though valid, could not be applied to the cooling tower in question because of the Federal preemption doctrine. The Court below sustained this assertion, and, although Respondents-Appellants continually state herein that the lower Court found the zoning ordinance to be unconstitutional, it is readily apparent from the Court's decision that it did not hold the Buchanan zoning ordinances to be unconstitutional. Rather, the Court held in substance that the ordinance was *inapplicable* to Con Edison's proposed construction of the cooling tower as required by the Commission, under the doctrine of Federal preemption.

The distinction between the *application* of an ordinance, and the *constitutionality* of an ordinance, is crucial to a determination as to the propriety of proceedings under Article 78. This distinction was made clear in *Matter of Overhill Building Company* v. *Delaney,* 28 N.Y. 2d 449, 322 N.Y.S. 2d 696 (1971), a case cited by Respondents-Appellants. The Court in *Overhill* summarized the above as follows:

> "The question presented in Fulling was not whether the zoning ordinance was unconstitutional, but whether it had been *applied* to the property therein in an unconstitutional manner. Thus, Article 78 proceedings continued to be inappropriate vehicles to test the *constitutionality of legislative enactments* and respondents remedy is an action for declaratory judgment. Although it is true that CPLR 103 (c) gives the courts the power to treat an Article 78 proceeding as an action for declaratory judgment, this power is conditioned on jurisdiction over the parties. Since in an action for judgment declaring unconstitutional a legislative act of the Village, the Village Trustees would be necessary parties, CPLR 103 (c) is not available to Respondent because only the Village Board of Appeals, Building Inspector and Village Engineers are parties to this proceeding." (Emphasis added) *Id.* at 703.

The Court, then, held that where the *application* of an ordinance is in issue, an Article 78 proceeding is an appropriate forum to test said application, including the constitutionality thereof. An identical holding was made in *Comparato* v. *Knauf,* 61 Misc. 2d 245, 305 N.Y.S. 2d 640 (1969).

The Appellate Division, in *Mandis* v. *Gorski,* 24 App. Div. 2d 181, 265 N.Y.S. 2d 210 (4th Dep't 1965) held that even though an Article 78 proceeding is an inappropriate forum to test the validity of an ordinance, if the Petitioner stated a cause of action for declaratory judgment, the Court would regard the Article 78 proceeding as such an action and proceed to determine it on the merits. See also *Socha* v. *Smith,* 33 App. Div. 2d 835, 306 N.Y.S. 2d 551 (3rd Dep't 1969), *aff'd* 26 N.Y. 2d 1005, 311 N.Y.S. 2d 306, 259 N.E. 2d 738 (1970).

The Court, in *Consolidated Edison Company of New York* v. *Village of Briarcliff Manor, supra,* upheld the determination of the validity of an ordinance within an Article 78 proceeding as follows:

> "The question of whether or not the ordinance is valid is, however, properly before the Court in this proceeding. Where the only bar to a building permit is a certain ordinance provision prohibiting the proposed use of the particular premises, and the owner would be entitled to the permit as a matter of right except for such provision, the validity of the provision may be challenged and the issue determined in an Article 78 proceeding brought to obtain an order directing issuance of the permit." *Id.* at 299.

The above-mentioned cases indicate that the Courts have broadly viewed the relief obtainable by a petitioner in an Article 78 proceeding. It has been recognized that there may be two distinct aspects to an Article 78 proceeding: 1) an action in the nature of certiorari to review an administrative decision and 2) an action in the nature of mandamus to compel the granting of requested relief. See *Niagara Mohawk Power Corp.* v. *City of Fulton, supra.*

As stated above, an Article 78 proceeding may also, by virtue of CPLR 103(c), serve as the basis for a declaratory judgment action. *Overhill Building Company* v. *Delaney, supra, Lakeville Water District* v. *Onondaga County Water Authority*, 24 N.Y. 2d 400, 301 N.Y.S. 2d 1 (1969). It is therefore clear that Con Edison should not have been compelled to bring distinct actions for mandamus and/or for a declaratory judgment in lieu of an Article 78 proceeding, and the contention herein to the contrary by Respondents-Appellants is wholly without merit.

The only remaining aspect of Respondents-Appellants' "procedural" objections is the identity of necessary parties to this proceeding. It is submitted that, based upon the lower Court's holding, the Zoning Board of Appeals of the Village of Buchanan was the only necessary party herein.

Of the aforementioned three possible applications of this Article 78 proceeding, it is apparent that the lower Court treated the matter as one for certiorari. This is so since the Court's holding concerned the *applicability* of the Buchanan ordinance in this situation and not the underlying validity of the ordinance. The court, in substance, told the Zoning Board of Appeals that even though the ordinance is generally valid, the Board may not apply it to Con Edison's request. While admittedly, the Village itself would have been a necessary party to any proceeding which held the ordinance to be unconstitutional or otherwise invalid, this was not the case herein.

Assuming *arguendo* that the lower Court's ruling is interpreted to be one for mandamus, the Zoning Board of Appeals is the only necessary party. Under Buchanan's ordinances, the Board of Appeals is empowered, and charged with the duty, to hear and decide requests for uses and variances. §§ 54-41 (B) and 54-43. The Board of Appeals may override a decision of the Building Inspector, and is thus the only necessary party to this action. No mandamus against the Village Building Inspector was necessary since, if the Zoning Board of Appeals grants a variance, said Building Inspector is bound to recognize it. Similarly, if the Board of Appeals either rules or is told

by a court of competent jurisdiction, that an ordinance is not applicable to a situation under the doctrine of Federal preemption, the Building Inspector as a ministerial employee of the Village, is also bound and an injunction against him is therefore unnecessary.

For the aforementioned reasons, it is submitted that Respondents-Appellants' "procedural" arguments are totally without merit.

CONCLUSION

For the reasons set forth above, the order and judgment of the Supreme Court, Special Term below should be affirmed.

Dated: New York, New York
August 13, 1976

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