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At a Term of the Supreme Court of the State of New York, held in and for the County of Herkimer, New York on the 28<sup>th</sup> day of June, 2018

PRESENT: HON. CHARLES C. MERRELL  
Justice of the Supreme Court

STATE OF NEW YORK  
SUPREME COURT            COUNTY OF HERKIMER

Gerard J. Snyder,  
  
Petitioner,  
  
v.

**DECISION  
AND  
JUDGMENT**

New York Rising Housing Recovery Program,  
  
Respondent.

Index No. 2018-104150  
RJI No. 21-18-058

APPEARANCES:            GERARD J. SNYDER, Esq.

La REDDOLA, LESTER & ASSOCIATES, LLP  
ROBERT J. La REDDOLA, Esq.  
Attorneys for Plaintiff

GOVERNOR'S OFFICE OF STORM RECOVERY  
NICOLE GREEN, Esq.  
Attorneys for Defendant

**Merrell, C. C., J.S.C.**

Petitioner Gerald J. Snyder has commenced this proceeding pursuant to CPLR Article 78 seeking an Order directing Respondent New York Rising Housing Recovery Program ("New York Rising") to reverse its Final Determination dated February 6, 2018 which denied Petitioner's application for funding to repair a bulkhead on his property due to Petitioner's failure to obtain a New York State Department of Environmental Conservation (DEC) permit by December 31, 2017.

The Court has considered the following submissions:

1.     Order To Show Cause dated April 25, 2018 with Verified Petition sworn

to April 25, 2018;

2. Respondent's Administrative Record;
3. Verified Answer dated May 24, 2018;
4. Affidavit of Paul Lozito sworn to May 24, 2018;
5. Respondent's Memorandum of Law dated May 24, 2018;
6. Petitioner's Reply to Affirmative Defenses verified June 6, 2018;
7. Reply Affirmation of Gerard J. Snyder, Esq. dated June 6, 2018;
8. Reply Affidavit of Jon McManus sworn to June 5, 2018;
9. Petitioner's Memorandum of Law dated June 6, 2018;
10. Court request for further information dated August 1, 2018;
11. Petitioner's letter of August 3, 2018;
12. Letter from Cassiah M. Ward, Esq. dated August 7, 2018; and
13. Reply Letter from Petitioner dated August 9, 2018.

The Court heard oral argument of the petition on June 28, 2018. The material facts are not generally in dispute and the Court finds them as follows:

The New York Rising Homeowner Program ("Program" or "New York Rising"), a subset of the New York Rising Housing Recovery Program, is administered by the Governor's Office of Storm Recovery (GOSR), an office of the Housing Trust Fund Corporation (HTFC), a subsidiary public benefit corporation of the New York State Housing Finance Agency administered by the Division of Housing and Community Renewal. GOSR was tasked with the development and implementation of long-term disaster recovery programs in the areas of housing, economic development, and community reconstruction.

In response to the extensive damage caused by Superstorm Sandy, Hurricane Irene, and Tropical Storm Lee ("Covered Storms") to the State of New York, the U.S. Congress appropriated \$4.4 billion in Federal Fiscal Year 2013 funds to the Department of Housing and Urban Development (HUD) for the Community Development Block Grant - Disaster Recovery (CDBG-DR) Program. The Program is funded by CDBG-DR funding which is awarded directly to the State or municipalities.

GOSR established the New York Rising Homeowner Recovery Program to help New Yorkers whose properties were damaged by Covered Storms to meet their unmet recovery needs. The Program provides grant assistance to fund repair, reconstruction, and mitigation activities. GOSR established policies and procedures in accordance with the applicable Federal regulations and the NOD-approved action plan. This included compliance with Federal spending limits, expenditure deadlines and environmental requirements.

Homeowners who are eligible for financial assistance for home repairs may also elect to participate in an optional bulkhead component of the Program if their property was damaged as a result of a Covered Storm and if such repair is necessary to protect and improve the resiliency of the property. Petitioner applied for funding to repair a bulkhead on his property. His application was terminated and/or denied in February 2018 as untimely.

Petitioner's residence is located adjacent to the Otsquago Creek in the VanHornesville, Herkimer County, New York, and is protected by an 88 foot long bulkhead wall along the creek. At the time of the storm, his bulkhead was about ½ natural stacked stone and ½ concrete. On October 29, 2012, Petitioner's residence,

including the bulkhead, was damaged by storm surge caused by Hurricane Sandy.

On October 25, 2013, Petitioner submitted an online application to New York Rising Housing Recovery Program for financial assistance to repair his residence. Upon inspection of the residence by New York Rising on February 6, 2014, Petitioner was informed he was eligible to receive an award to repair his home.

On August 22, 2014, Petitioner also elected to opt-in to the Optional Bulkhead component of the Program by completing an Opt-in Form for funding for bulkhead repair or replacement and other items.

On May 18, 2015, Petitioner was informed by New York Rising that his award for bulkhead repairs would be determined after he hired a design professional and submitted design documents to the Program. Any award would be subject to deadlines set by New York Rising.

Program deadlines changed during the period that Petitioner's application was pending. In November of 2016, applicants were initially informed that they would need to submit a DEC permit to New York Rising by December 31, 2016, and would need to complete work by December 31, 2017. On December 16, 2016 New York Rising modified and extended the December 31, 2016 deadline to require that applicants need only submit an application for a permit to DEC by December 31, 2017, as opposed to a completed DEC permit.

These deadlines were again revised on November 16, 2017, when applicants were informed they had to submit a copy of the issued DEC permit by December 31, 2017 and complete of all work by December 31, 2018.

New York Rising inspected Petitioner's property on May 26, 2015 and

determined that Petitioner's existing bulkhead design was a "reinforced concrete wall and stone wall", "including 43 feet of reinforced concrete and 45 feet of stone wall".

The length of the bulkhead to be replaced under the New York Rising Program was 45 feet. The concrete portion of the bulkhead, which included a 21.5 foot long and 6 foot wide concrete cap on top of the concrete portion, was found to be in good condition.

The stone wall on the eastern half was destroyed by the storm, and New York Rising found that the 45 foot stone portion of the wall should be removed and reconstructed, at an estimated total cost of \$28,124.28.

Since the bulkhead repair was taking place in or near a New York State waterway, a Department of Environmental Conservation Permit was required. On January 14, 2016, Petitioner timely submitted an application to the Regional Permit Administrator at the NYS DEC for a Permit for Repair/Replacement of the bulkhead. Respondent's deadline at that time was that a DEC permit application was due by December 31, 2016.

On January 22, 2016, DEC sent Petitioner a Notice of Incomplete Application noting further required items, including drawings and a detailed project description.

New York Rising contends that on June 15, 2016 Petitioner's engineer was verbally advised by staff that the existing stacked stone bulkhead would not be eligible for funding. In a subsequent letter issued August 4, 2016, Petitioner was informed that the Program would only fund bulkhead work for an applicant whose home was damaged in one of the Covered Storms and where the repair of damage to the bulkhead supports the investment made in that home. Based upon the results of the inspection, New York Rising determined that Petitioner's existing stone and reinforced

concrete structure was not a bulkhead necessary for the protection of his home and was ineligible for funding. In this letter, Petitioner was also informed that the Program would only fund bulkhead repair/replacement, "in place and in kind".<sup>1</sup> The denial did not specifically state that funding was denied due to the design of his existing bulkhead, which consisted of both stacked stone and reinforced concrete.<sup>2</sup>

On September 16, 2016, the Petitioner filed an Appeal of the initial New York Rising Denial requesting a formal review of the eligibility determination made by the Program. Petitioner submitted an engineer's report to support his contention that the bulkhead was in fact eligible for Program funding.

On November 30, 2016, while Petitioner's appeal was under review, New York Rising revised its program deadlines. Participants were informed that they were now required to "submit bulkhead permit by December 31, 2016 or be withdrawn from the program." (This deadline was later modified on December 16, 2016 to require applicants only to submit a DEC permit application by December 31, 2017.) In December 2016, the deadline for expected completion of projects was December 31, 2017.

On December 7, 2016, New York Rising granted Petitioner's appeal dated

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<sup>1</sup> There is no published definition of "in place and in kind". Respondent now takes the position that "Generally, in place and in kind repair or reconstruction projects are located within the same geographic foot print of the previous/damaged structure and are built of materials similar to the previous/damaged structure." (Ward letter August 7, 2018, item 5).

<sup>2</sup> The Program defines a bulkhead eligible for funding as a vertical erosion control structure in the form of a wall made of consolidated materials such as steel, wood, fiberglass, or unconsolidated materials joined by concrete to create a consolidated structure. Respondents concede Petitioner's existing structure qualified for funding as of December 6, 2017 (Ward letter of August 7, 2018, item 1).

September 16, 2016. Respondent found that “the bulkhead is a structure providing protection to Petitioner’s residence, and is eligible for funding.” Again, the issue of the stacked stone design was not specifically addressed but the decision clearly finds the structure to be a bulkhead eligible for funding. Mr. Lozito contends, in his opposition affidavit, that Petitioner’s bulkhead never met the Program’s definition of bulkhead because it was constructed partially of unconsolidated stacked stone. However, in its letter to the Court dated August 7, 2018, Respondent concedes that Petitioner’s bulkhead is eligible for funding (Item 1).

On September 25, 2017, Petitioner submitted documents to New York Rising including his drawings for a proposed concrete bulkhead which had also been submitted to the DEC for approval. Petitioner’s application was still timely in September 2017 as the deadline at that time was to submit a DEC application by December 31, 2017.

On September 27, 2017, Petitioner also requested an extension due to a DEC prohibition against any work in Otsquago Creek, between October 1, 2017 and May 15, 2018. On September 27, 2017, DEC informed Petitioner that in-water work would not be permitted on the bulkhead between October 1 and May 15 due to the Otsquago Creek’s classification as a trout stream. Petitioner was informed by DEC that a permit could be issued immediately and remain effective until December 31, 2019, but that work would be restricted. The restrictions would allow Petitioner to immediately begin any dry work, or work that would not affect the trout stream, but prohibited in-water work from commencing before May 15, 2018.

From September 27, 2017 until October 2, 2017, New York Rising reviewed

Petitioner's request for an extension and determined that an extension could only be granted once the December 31, 2017 deadline had passed. After the deadline passed, Petitioner could apply for a Demonstrable Hardship wherein Petitioner could provide the information he received from DEC (Record 387-390).

On October 2, 2017, Michelle Arko, a New York Rising staff member, emailed Petitioner and advised that New York Rising would no longer grant "preemptive deadline extensions" and advised Petitioner to wait until the December 31 deadline passed and submit a "Demonstratable Hardship Request Form" and request a deadline extension (Record 391). However, in the meantime, on December 12, 2017, before the deadline passed, New York Rising changed its policy without advance notice and stopped granting Demonstratable Hardships for missed Program deadlines, effective as of December 31, 2017 (Lozito Affidavit, page 11, footnote 8). Also, as previously noted, on November 16, 2017 the deadline to submit a DEC permit was changed to December 31, 2017, leaving Petitioner without the remedy of a Demonstratable Hardship.

Petitioner then inquired if New York Rising would fund construction of a rock wall bulkhead instead of concrete. By using rock, Petitioner alleged that DEC would allow him to begin constructing during the restricted period. As noted, Petitioner's initial plans submitted to New York Rising dated September 27, 2017 indicated that Petitioner sought to replace the bulkhead with a concrete wall. On October 6, 11, and 20 of 2017, Petitioner called New York Rising to seek permission to use a rock wall in place of a concrete wall and informed New York Rising that DEC would approve that type of structure. Since Petitioner's existing structure was made of both stone and



concrete, New York Rising argued in its opposition papers that it could only fund a consolidated stone and concrete structure. A rock wall, according to New York Rising, would not qualify for funding (Lozito Opposition Affidavit paragraphs 46-49). However, Respondent has since conceded Petitioner's bulkhead qualifies for funding (Ward letter of August 7, 2018, item 1).

New York Rising subsequently issued an updated and Final Notice of Deadlines ("Final Notice") to Petitioner on November 16, 2017. In the Final Notice, Optional Bulkhead participants were required to submit a DEC permit by December 31, 2017 and complete the closeout process by December 31, 2018. Petitioner had not submitted a DEC permit to New York Rising by December 31, 2017, although New York Rising admits being aware that the DEC was prepared in to issue a permit with restricted work dates.

By letter dated February 6, 2018, Petitioner was "withdrawn" by New York Rising from the Optional Bulkhead Program.

The withdrawal letter stated as follows:

"Because we have not received the required documents by the December 31, 2017, deadline to submit a complete DEC bulkhead permit, you [Petitioner] was no longer eligible to proceed with the Optional Bulkhead repair component of the New York Rising Housing Recover Program. You are being withdrawn from the Optional Bulkhead portion of the Program."

The Program provides no appeal mechanism from a withdrawal letter. As previously noted, appeals for missed program deadlines were terminated on December 12, 2017 without advance notice.

On March 19, 2018, Tom Voss ("Voss") of DEC contacted New York Rising to

discuss Petitioner's permit. On March 20, 2018, Petitioner submitted a DEC permit for a rock wall and a letter from Voss to New York Rising. In the letter, DEC noted that Petitioner submitted an incomplete permit application on January 22, 2016 and that a set of DEC approvable project plans were eventually submitted which resulted in the issuance of a permit effective March 19, 2018. In this letter, the DEC approved wall is described as "a stacked and pinned rock wall, referred to by the engineer as 'stackable rip-rap,' to replace the damaged bulkhead."

Although these plans were approved by DEC, they were never approved by New York Rising. New York Rising contends in opposition papers that even if Petitioner had obtained the issued permit in time to meet its deadlines, he would have been withdrawn from the Program because DEC only issued a permit for a rock wall, a structure that does not meet New York Rising's "in place and in kind" requirement regarding Petitioner's existing consolidated stone and concrete wall.

New York Rising has again revised its deadlines and any work must now be completed by December 31, 2018.

As noted, Petitioner contends that the eligibility requirement of the New York Rising Program were satisfied by his submission of an application for a permit to the DEC by December 31, 2017 deadline, and not by the date of the issuance of the permit and providing a copy to New York Rising. Petitioner is partly correct in that as late as November 16, 2017 Petitioner need only have submitted his DEC application to New York Rising by December 31, 2017. On November 16, 2017 New York Rising changed the deadline to require submission of the DEC permit itself by December 31, 2017.

From this confused administrative history several issues become apparent.

The first issue to be resolved is whether Plaintiff's existing bulkhead was ever eligible for funding. This was resolved in Petitioner's favor by Respondent's appeal determination dated December 7, 2016 which found that Petitioner's bulkhead was a structure eligible for funding. Respondent as since conceded this point in its letter to the Court dated August 7, 2018.

The second issue is New York Rising's "in place and in kind" requirement, which apparently conflicts with DEC permit requirements in Petitioner's case. The DEC has approved a stacked and pinned rock wall subject to the condition that no work take place between October 1 and May 15. New York Rising has argued that it will not fund the repair or replacement of the stone portion of Petitioner's wall because it will only fund "in kind" work and an unconsolidated stone wall does not meet New York Rising's definition of bulkhead, which must be made of consolidated materials or unconsolidated materials joined by concrete to create a consolidated structure. As noted, 50% of the existing bulkhead is reinforced concrete. To the extent New York Rising now claims that Petitioner's bulkhead does not qualify for any funding would be arbitrary and capricious as it has already been determined by Respondent's administrative appeal. Further, neither the Program nor the regulations define the term "in place and in kind" (Ward letter of August 7, 2018, item 5). In any event, the Court finds that Petitioner's bulkhead meets Respondent's "general" understanding of "in place and in kind" because Petitioner's proposed bulkhead is located within the same geographical footprint and built of similar materials.

The third issue of legal concern is the deadline compliance and demonstrable

hardship reviews. As late as November 16, 2017 Petitioner had a timely application before Respondent in that he had a pending application before the DEC. On November 16, 2017 the deadline changed and he was given forty-five (45) days to secure a DEC permit.

Although Petitioner had delayed obtaining a DEC permit, during the Fall of 2017, Petitioner was negotiating with both DEC and New York Rising as to whether the agencies would approve a concrete or stone structure and whether work could be performed between October and May. Petitioner was advised to apply for an extension after December 31, 2017. Then, with no advance notice, on December 12, 2017 his right to seek an extension was revoked. He has no administrative appeal rights from his termination of February 6, 2018. Respondent refuses to accept Petitioner's DEC permit which was issued thirty (30) days later on March 19, 2018.

The Court finds Respondent's determinations to terminate Petitioner's appeal rights or right to seek an extension, without notice, to be arbitrary and capricious; particularly where Respondent advised Petitioner not to appeal or seek an extension until after December 31, 2017. The Court is cognizant that the Agency has general authority to set reasonable deadlines but in Petitioner's particular case the Agency acted arbitrarily and capriciously. Respondent maintained throughout the permitting process that Petitioner's bulkhead did not qualify for funding, which caused additional delays (Lozito Affidavit paragraphs 46-50). However, it now appears clear that Petitioner's bulkhead qualified all along.

The Court further finds that to the extent Respondent may still claim that Petitioner's bulkhead does not qualify for funding or is not "in place and in kind" those

determinations are arbitrary and capricious. There is no published definition of "in place and in kind". Respondent's published regulations do not support these determinations and, in any event, the issue of whether the bulkhead qualified for funding was resolved on administrative appeal. The Court finds that the proposed bulkhead is "in kind". Petitioner is limited to replacement of the existing bulkhead "in place" in the same location and the record reflects no objection by Respondent to its proposed location.

Taking into account the entire record and according Respondent due deference in the administration of its Program, the Court finds that a rational basis does not exist to support Respondent's findings. It cannot be said that Respondent followed its own policies in that the policies were either non-existent (e.g. "in place and in kind") or constantly changing without adequate advance notice to applicants (e.g. permit deadlines and requests for deadline extensions).

The petition is granted and it is

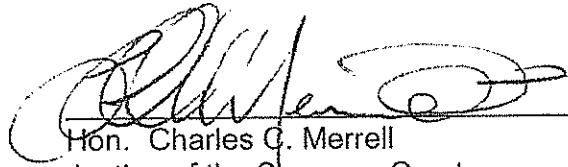
ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Petitioner Gerard J. Snyder and against Respondent New York Rising Housing Recovery Program annulling the decision of the Respondent dated February 6, 2018; and it is further

ORDERED, ADJUDGED AND DECREED that Respondent is to provide the approved level of funding for Petitioner's bulkhead repair/replacement as approved and permitted by the New York Department of Environmental Conservation, subject to Petitioner meeting all other deadlines set by Respondent, including completion of the project by December 31, 2018.

The foregoing constitutes the Decision and Judgment of the Court.

ENTER

Dated: September 5, 2018



Hon. Charles C. Merrell  
Justice of the Supreme Court