STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

In the Matter of the Application of

BRISTOL SEWERAGE DISPOSAL CORPORATION,

Petitioner,

JUDGMENT

-vs-

Index No.: 128393-2020

TOWN OF SOUTH BRISTOL, TOWN BOARD OF THE TOWN OF SOUTH BRISTOL,

Respondents.

APPEARANCES:

For Petitioners:
Nixon Peabody LLP
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Jared C. Lusk, Esq.
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Rochester, New York 14604

For Respondents:
Adams Leclair LLP
By: Mary Jo Korona, Esq.
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Schiano, Jr., J.

Petitioner Bristol Sewerage Disposal Corporation ("BSDC") commenced this article 78 proceeding challenging the denial by the Town Board of the Town of South Bristol ("Town Board" or "Board") of its August 2020 application for an increase in the rate it charges its users. The Town Board brings the instant motion seeking dismissal of the

Petition pursuant to CPLR 7804(f) due to BSDC's failure to meet the standard imposed by CPLR 7803. The matter was fully briefed and oral argument took place on February 22, 2021. During argument, Respondents requested a decision on the merits and the Court requested a certified transcript of the proceeding pursuant to CPLR 7804(e) be submitted.

BSDC is a corporation formed in 1969 and organized under New York Transportation Corporations Law ("TCL") providing sewer services for customers within its mapped services area in the Town of South Bristol. BSDC was purchased by its current owner, Bristol Harbor Resort Management, LLC, in 2016. Todd and Laura Cook are the sole shareholders of Bristol Harbor Resort Management.

On August 10, 2020, BSDC provided notice to the Town Board that it would be requesting a rate increase. This was followed by a formal request letter with submissions on August 28, 2020 (Certified Transcript of the Record, NYSCEF Doc. No. 26, Received February 26, 2021 ("Record"), pps. 3 through 63 of 88). BSDC requested that the annual sewer rent be increased from $69.21 to $100. The submissions included: the 2017 rate increase Approval Resolution by the Town Board; BSDC Annual Financial Reports for 2017, 2018, and 2019, each with an independent Review Report by Certified Public Accounting firm RDG + Partners of Pittsford, New York; an accounting of the BSDC capital reserve account and payments made against a letter of credit, as required by the Approval Resolution from 2017 forward; and financial projections for 2021. The current rate increase request follows a 2017 rate increase from $39.14 to $69.21.

At the September 14, 2020 Town Board meeting BSDC made a presentation followed by several questions from the Board. During the Privilege of the Floor portion of

the meeting, three community members spoke against the rate increase. Two speakers alleged that poor business decisions by the Cooks in the management of related entities led to this unreasonable sewer rate increase request. The third speaker suggested the Town hire an engineering consultant to evaluate the request (Record, p. 68-70 of 88). In addition, Supervisor Daniel Marshall received 18 e-mails and letters from September 9th to September 14th expressing opposition to the rate increase and urging the Town Board to deny it. The majority of the sentiments expressed mirrored the concerns expressed by community members at the meeting as to the management of the Cooks' Bristol Harbor entities (NYSCEF Doc. No.28, Affidavit of Daniel Marshall, February 26, 2021, Exhibit A).

The Town Board denied the rate increase at its October 13, 2020 meeting. This action was commenced November 30, 2020.

Section 7804(f) of the CPLR permits a respondent to raise a "an objection in point of law." It is analogous to an action where objections of the kind listed in CPLR 3211(a), that do not go to the merits, and make possible a disposition where the court does not need to reach the merits (Siegel, NY Prac § 567 [6th ed 2018]). The most common objections being for want of jurisdiction or on the statute of limitations (id.). Here, the Court finds that the Petition properly conforms to the requirements of CPLR 7803 and that Respondents motion papers raise no further objections in point of law. Accordingly, the Respondents' motion pursuant to CPLR 7804(f) is denied.

CPLR 7804(f) provides "that where a respondent moves to dismiss a CPLR article 78 petition and the motion is denied, 'the court *shall* permit the respondent to answer, upon such terms as may be just' (emphasis added). We [The Court of Appeals] have indicated,

however, that a court need not do so if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer' (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102, 469 NE2d 511, 480 NYS2d 190 [1984] [emphasis added])" (*Matter of Kickertz v NY Univ.*, 25 NY3d 942, 944 [2015]). Such is the case here (*Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1757 [4th Dept 2016] [holding that on denial of a CPLR 7804(f) motion remittal to require a Response is not necessary where "upon examining the submissions of the parties, we conclude that there exists no issue which might be raised by answer concerning the merits of the petitioner's application"]).

The parties have fully briefed the substantive issues and a certified record was submitted to the Court. In addition, the parties and counsel have submitted affidavits with exhibits. The dispositive facts are not in dispute and the arguments of the parties are fully set forth in the record *(Matter of Lucas v Bd. of Educ. of the E. Ramapo Cent. Sch. Dist.*, 188 AD3d 1065, 1066 [2d Dept 2020]). There are no factual disputes, and no prejudice will result from the failure to require Respondents to answer (*Matter of Kickertz v NY Univ.*, 25 NY3d at 944).

In article 78 proceedings, a court's review is limited to the standards applicable to administrative proceedings generally: "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). Thus, '[a] reviewing court may not substitute its judgment for that of a local zoning board . . . , 'even if there is substantial evidence

supporting a contrary determination'" *(Matter of People, Inc. v City of Tonawanda Zoning Bd. of Appeals*, 126 AD3d 1334, 1335 [2015]). Courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination (*Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (internal citations omitted). "If the reviewing court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Thompson v Jefferson County Sheriff John P. Burns,* 118 AD3d 1276, 1277 [4th Dept 2014]; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

"It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency. We have said that a reviewing court, in dealing with a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis (*Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991] [citations and quotations omitted]; *Matter of Battaglia v Cort*, 49 AD3d 1179, 1180 [4th Dept 2008]["the

court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis"]).

Under New York TCL § 121, sewerage companies are to provide sewage services "at fair, reasonable and adequate rates agreed to between the corporation and the local governing body . . . . Rates shall be reviewable at intervals of not more than five years or at any time by petition of the corporation or motion by the local governing body on written notice after a period of ninety days. The petition of a corporation shall be determined within ninety days of its filing, and in the event a determination is not rendered within such period of time, the petition shall be deemed approved." In addition, case law provides that sewage companies "may not be denied a reasonable rate of return on its investment" (*Bennett Rd. Sewer Co. v Town Bd.*, 273 AD2d 902, 903 [4th Dept 2000][*citing Huff v Sanitary Sys.*, 260 AD2d 892,897 [3d Dept 1999]).

On October 13, 2020, after certain remarks setting forth their position on the issue, Councilmen Scott Wohlschlegel proposed a motion "to deny the rate increase." The motion was unanimously approved. A Town Board written resolution or other memorandum of this decision was not issued. Accordingly, the "grounds invoked by the agency" are found in the remarks of the Council members as they set forth their positions immediately prior to the vote. Supervisor Daniel Marshall placed the following on the record.

> I have had the opportunity to look at the documents that they provided; had some conversation with the Town's accounting firm and at this stage I have serious concerns, myself, about this. I think a 44.5% increase on a rate that [ ] only 3 years ago went up nearly 70%; I think this is just excessive. And it does not appear by the paperwork, that I've look[ed] at, that any particular effort has been made to do any type of cost savings or keep the pricing

> down. So that is my opinion, also things are different from when we talked about this 3 years ago.
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> Three years ago, it had been many years since there had been a rate increase, 20 years ago, so it seemed more logical that a rate increase was due. But, to expect another one and alarming it is in spite of the fact that we had the rate increase, within a year they were losing money again. So, I find that very troubling and not quite sure how to explain that.
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> In my opinion, and other have heard me say this before, when you purchased Bristol Harber, you purchased a whole package . . . a marina, a golf course, a restaurant, and you also happened to purchase a sewer plant and waterworks. *I don't think any one of them necessarily can stand alone, they all need each other.* Certainly, I don' believe the sewer plant, or the waterworks were ever intended to be wildly profitable; perhaps manageably profitable, but *I believe they would have been dependent on the other sister organizations that were part of the Bristol Harbor works.* Having said that, we no longer have a marina under their stead, the restaurant has been closed, the golf course proposing, I guess to be closed and a hotel has been torn down. *Those are the money-making sides from my point of view and that is why I can't support any type of rate increase whatsoever.*

(Record, page 83 of 88, South Bristol Town Board Meeting, October 13, 2020).

Councilman Scott Wohlschlegal said he concurs with Supervisor Marshall. Further, "[i]t just seems outlandish, the amount they were asking for, for an increase. When you look at the buildings they tore down, you don't have the operation of the lodge anymore to offset some of those costs I would totally agree with you" (id.).

Councilwoman Donna Goodwin said "if they went back they could really pare down this budget. That is my feeling" (id.).

Councilman Stephen Cowley stated that: "he agreed with Dan, a lot of the stuff he said. I know working at a sewage treatment plant; it is not a money-making operation typically. I believe hearing everything since then and what has happened the last 6 months, I agree with the rest of the board" (id.).

The Court finds that the denial of the rate increase request by BSDC by the Town Board on October 13, 2020, was arbitrary and capricious. There is no foundation in law for the Town Board's "denial of any type of rate increase whatsoever" based on the poor performance, closing, or mismanagement of BSDC's affiliated companies. Similarly, there is no legal foundation, that this Court can discern, such that "fair, reasonable and adequate rates" and a "reasonable rate of return on its investment" should be found, in whole or in part, or by reference to, profits from affiliated companies comprising "the whole package."

Moreover, denial of rate increase because sewage companies "are not a money-making operation typically" is contrary to statutory direction that rates be "fair, reasonable and adequate" and that such rates provide a "fair rate of return on investment." A denial based on an objection that BSDC is seeking a rate increase only three years after the last is unlawful as the statute requires that rates "be reviewable at intervals of not more than five years *or at any time* by petition of the corporation" (TCL § 121 [emphasis supplied]).

That the requested rate increase is excessive, or that BSDC could make a greater effort to "pare down the budget" is conclusory where the Town Board made no objective findings tending to undermine BSDC's showing that the current rates were inadequate, or the current rate was adequate but for BSDC budgetary issues or expense control, or that the Town Board relied upon any evidentiary support tending to show excessive expenses or lack of budgetary control.[1] "Where, as here, a denial is based upon general objections

[1] On September 12, 2020, Supervisor Marshall provided BSDC's counsel with questions from the Town's (Town of South Bristol) "accounting firm" (the accounting firm was not otherwise identified) related to salaries, wages, legal fees, tax loss carry forwards and stockholder dividends (Record, p. 64 of 88). Petitioner's Counsel

or conclusory findings without evidentiary support in the record, the denial must be set aside as arbitrary and capricious" *(Matter of Taft v Vil. of Newark Planning Bd.*, 74 AD3d 1840, 1841 [4th Dept 2010][citations and quotations omitted]).

The petition is granted so far as to annul the October 13, 2020, determination of the Town Board to deny the rate increase application for the reasons stated above and to remit the matter to the Town Board to reconsider BSDC's application (*Bennett Rd. Sewer Co. v Town Bd.*, 273 AD2d 902, 904 [4th Dept 2000][where the court determines denial of a rate increase was arbitrary and capricious, "[t]he proper remedy is to remit the matter to the Board for reconsideration of the rate applications"]).

Petitioner is to submit an order.

Dated: March 12, 2021.
Canandaigua, New York

HONORABLE CHARLES A. SCHIANO, JR.
Supreme Court Justice

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addressed these questions at the September 14, 2020 at the Town Board meeting (Record, p. 71-72 of 88), and followed up with written responses by letter to the Town Board on dated September 30, 2020 (Record, p. 79-81 of 88). There is no evidence in the record or in any of the submissions to the Court of any further involvement by the Town's accounting firm, including any evaluation or comment on Counsel's response to the accounting firm's questions on September 14 and September 30, 2020.