STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

In the Matter of an Application of,

KAREN A. HEGGEN, DISTRICT ATTORNEY OF SARATOGA COUNTY NEW YORK

Petitioner

For Judgment Pursuant to Article 78 of the CPLR

-against-

JAMES MONTAGNINO, COMMISSIONER OF PUBLIC SAFETY FOR THE CITY OF SARATOGA SPRINGS, NEW YORK and RONALD KIM, MAYOR OF THE CITY OF SARATOGA SPRINGS, NEW YORK

Respondents.

DECISION & ORDER
Index No.: EF20222860
RJI No.: 45-1-23-1411

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

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In the early morning hours of November 20, 2022, an incident occurred in the downtown area of the City of Saratoga Springs which developed between a number of individuals and ultimately escalated to include the discharge of at least one firearm. The intervention of members of the Saratoga Springs Police Department (SSPD), resulted in the subsequent discharge of one or more of their service weapons (hereinafter referred to as the "November 20, 2022 Incident"). As a result of these incidents injuries were sustained to one or more persons who required medical attention with at least one individual determined to be in critical condition. Immediately thereafter law enforcement officials, including the SSPD and the New York State Police (NYSP) secured the area as a crime scene for additional investigation and the collection of evidence. Shortly thereafter and over the objection of the Petitioner, a press conference was called and conducted by the Respondents[1] whereupon those known details of the November 20, 2022 Incident and law enforcement's investigation into same were shared with members of the press.

On November 23, 2022, by Order to Show Cause and accompanying affidavits in support, the Petitioner filed an emergency application seeking a Temporary Restraining Order to enjoin the Respondents and similarly situated individuals and law enforcement agencies from making any further public comment on the November 20, 2022 Incident.[2] Upon review of the submitted materials the Court granted the relief sought in the Temporary Restraining Order and set a return on the Petitioner's Order to Show Cause to take place on December 22, 2022. Thereafter, and in accordance with the Court's schedule set forth in the Order to Show Cause the

[1] The Respondents, collectively, are the elected Mayor of the City of Saratoga Springs (Ron Kim) and the elected Public Safety Commissioner of the City of Saratoga Springs (James Montagnino). The Petitioner, respectively, is the elected District Attorney of Saratoga County (Karen A. Heggen).

[2] *In the Matter of the Ongoing Investigation into a Police Investigation Into a Police Involved Shooting at the Corner of Broadway and Caroline Street, Saratoga Springs, New York at 3:03 a.m. on November 20, 2022*, Index No. 2022/2854, Saratoga Co. Sup. Ct. November 23, 2022.

Respondents set forth its responsive papers on December 18, 2022. By letter received on December 19, 2022, the Court was advised by counsel for the Petitioner that it sought an adjournment of the December 22, 2022 return on the November 23, 2022 Order to Show Cause. The Petitioner's request was denied by the Court on December 19, 2022. On December 21, 2022, Counsel for the Petitioner advised the Court and counsel that it was withdrawing the previously filed November 23, 2022 Petition and Order to Show Cause. The Court, upon receipt of the Petitioner's withdrawal of its November 23, 2022 Petition and Order to Show Cause removed the matter from the December 22, 2022 calendar and considered same concluded. By correspondence received December 22, 2022 counsel for the Respondents expressed its vociferous objection to the Petitioner's withdrawal of the November 23, 2022 Petition and Order to Show Cause and to the Court's acceptance of same.

Contemporaneous with the December 21, 2022 withdrawal of its November 23, 2022 Petition and Order to Show Cause, and likewise on December 21, 2022 the Petitioner filed an Article 78 Petition and Motion for Preliminary Injunction[3] (NYSCEF 1) and accompanying Exhibits (NYSCEF 2-10) and Memorandum of Law in Support of Article 78 Petition (NYSCEF 12) seeking a declaration under Article 78 that the Respondents (specifically) should be enjoined from any further public commentary on the November 20, 2022 Incident and that a Writ of Prohibition (anecdotally referred to as a "gag order") and preliminary injunction should be imposed against them preventing (again) any further public commentary on same during the pendency of the Saratoga Grand Jury's investigation into the November 20, 2022 Incident. Specifically, the Petitions sought a Writ prohibiting the Respondents from (1) reviewing and/or examining any evidence gathered by law enforcement and pertaining to the November 20, 2022 Incident, (2) releasing and/or directing the release of any evidence (specifically video and body

[3] Saratoga County Supreme Court Index No. EF20222860.

camera evidence) of the November 20, 2022 Incident and (3) disclosing information, evidence and engaging in public commentary on and about the November 20, 2022 Incident. By Answer in a Special Proceeding (NYSCEF 18) with accompanying Exhibits (NYSCEF 19-26) and Memorandum of Law in Opposition to Article 78 Petition and Motion for Preliminary Injunction (NYSCEF 27) filed on January 18, 2023, the Respondents opposed the Petitioner's December 21, 2022 Article 78 Petition and specifically that the procedural vehicle under which the application was brought (an Article 78 petition) was improper and that the relief requested (a preliminary injunction and writ of prohibition) was exceptional relief neither permitted or appropriate in the context of the instant proceeding and wholly violative of the First Amendment rights of the Respondents. By Memorandum of Law in Further Support of Article 78 Petition (NYSCEF 28) filed on January 30, 2023 the Petitioner contended that its requested relief was appropriate in the context of its unique "hybrid" Article 78 Petition and that the relief was narrowly tailored so as not to be violative of any First Amendment rights outside of those necessary to preserve and protect the integrity of the ongoing Grand Jury Investigation. By Sur-Reply and Memorandum of Law in Further Opposition to Article 78 Petition (NYSCEF 30) filed on February 2, 2023 the Respondents again contended that the requested relief was incredible, had never been previously imposed by a New York Court to prohibit a public official from speaking to the public, and that by so doing would be "interfering" with the Grand Jury process. In its February 2, 2023 Reply papers, the Respondents likewise had considerable objection to the Petitioner's perceived procedural posturing of this matter as a "hybrid" Article 78/declaratory judgment action.

The Court scheduled a return on the instant Article 78 Petition to take place virtually via Microsoft Teams on February 6, 2023, and for counsel to be prepared at that time to offer any

argument to supplement their previously filed papers in support of and in opposition to the instant Article 78 Petition. On February 6, 2023 counsel for the Petitioner and the Respondents appeared virtually before the Court whereupon their respective positions were set forth and supplemental arguments were heard. Thereafter, by letter filed on March 28, 2023 (NYSCEF 31) counsel for the Petitioner advised the Court and counsel that the Saratoga County Grand Jury had completed its investigation of the November 20, 2022 Incident and had handed up an eight (8) count indictment of certain criminal charges upon which a named Defendant was arraigned before the Saratoga County Court on March 28, 2023. Counsel for the Petitioner advised that as the Saratoga County Grand Jury had completed its review of the incident of November 20, 2022, the substantive relief initially sought by the Plaintiff has been rendered presumptively moot. Paradoxically, although advising that the matter had been rendered moot the Petitioner did not seek to withdraw or consent to the Court's dismissal of the instant Article 78 Petition. By letter filed on April 3, 2023, counsel for the Respondents acknowledged that action by the Grand Jury had taken place, but that same did not obviate or render unnecessary the Court's decision on the Order to Show Cause

The Court has considered the arguments and papers submitted by both the Petitioner and the Respondent, and now comes to a decision relative to same.

As above, the Court notes that as it relates to the underlying investigation into the events of November 20, 2022 Incident, the Saratoga County Grand Jury handed up an eight (8) count indictment of certain criminal charges upon which a named Defendant was arraigned before the Saratoga County Court on March 28, 2023. As the Saratoga County Grand Jury has completed its review of the incident of November 20, 2022, the substantive relief sought by the Plaintiff has

been rendered presumptively moot and as such the December 21, 2022 Article 78 Petition is subject to procedural dismissal. *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707 (1980).

It is a fundamental principle of our jurisprudence that the Court's duty is to declare the law only as it arises out of (and likewise is limited to) the determination of actual controversies between litigants. *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707 (1980); *Matter of State Indus. Commn.*, 224 N.Y. 13 (). Here, by action of the Saratoga County Grand Jury the Petitioners have obtained *de facto* the relief sought, and as the parties' rights cannot be affected by this Court's determination of the proceeding it is, therefore, substantively rendered moot. Accordingly, the merits may not be addressed unless found to lie within the exception to the mootness doctrine permitting review of important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable. *See, Roe v Wade*, 410 U.S. 113 (1973). For such a finding, three (3) common factors must exist: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707 (1980), *supra; see, Nebraska Press Assn. v Stuart*, 427 U.S. 539 (1976); *Matter of Capital Newspapers Div. of Hearst Corp. v Lee*, 139 A.D.2d 31 (3rd Dept., 1998)

Here, although substantively rendered moot and thus subject to procedural dismissal, the Court does, however, note that in the criminal matter presently pending before the Saratoga County Court the underlying grand jury process has already been and will continue to be the subject of legal challenge from the Defendant, and as such the subject matter giving rise to the Petitioner's application may not be fully mooted. As such, although the matter may appear to be presently mooted, it is meritorious to consider that there is an exception to the mootness doctrine

for issues that are "capable of repetition yet evading review." *Capital Newspapers Division of Hearst Corp. v. Lee*, 139 A.D.2d 31 (3rd Dept., 1998); *People v. Sullivan*, 168 Misc.2d 803 (County Ct., Saratoga County, 1996). As there remains a potential (whether minimal or substantial) possibility that the actions of the Saratoga County Grand Jury may be invalidated and investigation into the November 20, 2022 matter returned for a second inquiry and further investigation, the Court in this Decision must likewise consider and adjudicate the merits and relief requested in the Plaintiff's December 20, 2022 Article 78 Petition, and likewise the Respondents' appropriate objection to same.

Here, the Plaintiff has sought truly unique and remarkable relief. The Plaintiff's application seeks to enjoin two (2) elected public officials from "causing or directing the release of evidence and information related to the [November 20, 2022) investigation ... without the express written permission of the Petitioner [anecdotally, a similarly elected public official]" and to effectively silence any public commentary relative to same. As set forth by the Respondents, this Court has been unable to identify any previous historical precedent or similar circumstance giving rise to such an application, or for the granting of the relief requested by the Petitioner.

Turning first to the procedural posture of this matter, the Petitioner has styled its application under New York State Civil Practice Law and Rules Section 7803 (commonly referred to as Article 78,) a procedure vehicle most commonly associated with judicial review of a decision or lack of decision from an administrative agency. Article 78 review is permitted where it is alleged that an administrative agency's 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." NYS CPLR Section 7803(3). "Arbitrary" for the purpose of the statute is interpreted as "when it is without sound basis in reason and is taken without regard to the facts." *Pell v*

Board of Ed. of Union Free School Dist. No. of the Towns of Scarsdale and Mamaroneck, Westchester Cty. 34 N.Y.2d 222 (1974). Further, an Article 78 petition may be brought to seek the remedy of mandamus, that is, to compel an agency "to perform a duty enjoined upon it by law." NYS CPLR 7803(1). Mandamus applies only to compel a ministerial duty and not those that involve the exercise of judgment or discretion. *Brusco v Braun*, 84 N.Y.2d 674 (1994). Thus, to be entitled to mandamus, a petitioner must show "a clear legal right to the relief demanded" and "a corresponding nondiscretionary duty on the part of the agency to grant that relief." *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753 (1991). A court can overturn an administrative action only if the record illuminates there was no rational basis for the decision. *Id.* "Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." *Id.* If the court reviewing the determination finds that "[the determination] is supported by facts or reasonable inferences that can be drawn from the records and has a rational basis in the law, it must be confirmed." *American Telephone & Telegraph v. State Tax Comm'n*, 61 N.Y.2d 393 (1984).

Here, the procedural Article 78 issue before the Court is quite narrow and straightforward. Despite the Petitioners contentions, there has simply been no administrative agency's determination on behalf of the Respondents that was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." NYS CPLR Section 7803(3). Indeed, as a circumstance of first impression it cannot be determined that the Respondents have acted in violation of any "lawful procedure" or that their actions have been an "error of law" or were "arbitrary and capricious." Although the Petitioners have styled the instant proceeding as a "hybrid" Article 78, given the absence of any

previous actions of the Respondents, the same standard for application must be applied and under which scrutiny the Petitioner's application is found to be lacking.

The Court must next consider the substance of the relief requested by the Petitioner and likewise whether the actions of the Respondents were an "abuse of discretion" subject to Article 78 review. As above, the relief requested by the Petitioners is remarkably unique in that it seeks to enjoin the Respondents from speaking in virtually any capacity of the November 20, 2022 Incident. As the Respondents have identified, such a restriction is, at its very core, an infringement upon the First Amendment free speech rights of these individuals, their status as elected officials notwithstanding. Admittedly, the Respondents were incredibly hasty in their release of information related to the November 20, 2022 Incident, despite the protestations of the Petitioners and law enforcement against same, and while some discretion may have been better utilized it is axiomatic for this Court to consider whether this lack of appropriate discretion was an "abuse" subject to the restriction on free speech sought by the Petitioner.

Here, because the public at large has a vital stake in the concept of a public safety the circumstances under which the Court may order a protective order on speech, or a "gag" order is closely circumscribed. Restriction is permitted only in unusual circumstances or upon a clear showing that such an order is required to prevent a serious and imminent threat to the integrity of the either the investigatory or trial process. The discretionary judgment which bars the doorway to speech must be sparingly exercised and then, only when unusual circumstances necessitate it. While a bar or "gag" order is regularly made in the context of trial applications and to preclude the release of information, any exclusionary order must be supported by a factual showing of prejudice to the party making said application. In the courtroom context, when no showing of prejudice has been made, an order closing the courtroom is inappropriate and must be vacated.

Indeed, the guiding principle is that a court is a public facility from which the public and press cannot be excluded except when there is a showing of a compelling reason for such action.

In the event that this instant application was to be brought before the trial court (anecdotally, the Saratoga County Court) seeking a courtroom bar and "gag" order, that reviewing court would be compelled to examine the evidence before it to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. That court should then consider whether the record supports the entry of a prior restraint on publication.

In that context, as is requested here, an exclusionary order is entered merely as a substitute for a "gag order" which would otherwise place a direct restraint on what the Respondents may and can say, and such an exclusionary order unduly infringes upon protected First Amendment rights. The fact that such an order is caged in the context of protection of an investigation or of the Grand Jury process nevertheless constitutes a novel form of censorship that cannot insulate or shield it from Constitutional attack. In the area of indispensable First Amendment liberties, the United States Supreme Court has been careful not to limit their protection to any particular way of abridging it, because abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Prior restraint on speech and publication is the most serious and least tolerable infringement on First Amendment rights and only the most exigent circumstances warrant the issuance of an order curtailing the right of speech. All other measures within the power of the Court must be found to be unavailing or deficient.

Similarly, and as the the instant matter seeks a similar speech infringement, based upon established precedent and the instant record this Court is not persuaded that a preclusionary order or infringement upon speech rights is either required, mandated or appropriate in the instant application. The constitutional standards for public restrictions upon First Amendment rights has been amply articulated *(see, Nebraska Press Assn. v Stuart, supra; Matter of Associated Press v Bell*, 70 NY2d 32; *Matter of Capital Newspapers Div. of Hearst Corp. v Lee, supra)*, and while the application herein is novel there is no novel issue presented here to upset that standard for restriction upon public speech.

In view of the same, the Court cannot reach the conclusion that the remarkable relief requested by the Petitioner to infringe upon the speech rights of the Respondents is supported in either merit or law, and as such the instant application must be dismissed. Concluding, as this Court does, that not only the proceeding is moot and not of the class which should be preserved for review, and that the substantive merits and relief requested likewise do not withstand review and/or scrutiny, the Petitioner's Article 78 petition should be dismissed with prejudice so that same may not be again brought either in this specific procedural vehicle or for the relief requested.

While this Court has determined that the Petitioner's application must be dismissed on the merits, it must likewise acknowledge the actions of the Respondents in prompting the Petitioner to commence such a unique proceeding and to seek such remarkable and unique relief. Both parties share the same public safety mission, and the Court is dismayed by the almost purposeful absence of communication, collaboration and cooperation between the Respondents and the Petitioners in both the immediate response to and aftermath of the November 20, 2022 Incident and release of information related to same. Indeed, in the midst of the earliest stages of

an active police investigation into the November 20, 2022 Incident and despite clear requests from both the Petitioner and the investigatory law enforcement agencies for both time and patience to allow all the facts of the Incident and investigation to be developed the Respondents nevertheless called an immediate press conference which resulted in the release of video evidence of the Incident and that subsequently revealed the identities of parties (both civilian and law enforcement) regardless of their level of involvement of the November 20, 2022 Incident. It is well said that "discretion is the better part of valor" and it bears repeating to the Respondents of the importance of being factual over first. While it is hoped that a similar situation never again occurs within the jurisdiction of this (or any other) Court, both the Petitioner and the Respondents should be reminded of their civic duty to the populations of which they have been entrusted to serve and for which the safety and protection is paramount, and that both share this same obligation not only to the public but to those who may be involved and accused.

In view of the above, the Petitioner's December 21, 2022 Article 78 Petition is dismissed with prejudice, and without costs. This constitutes the Decision and Order of this Court, and any relief not specifically addressed is considered denied and dismissed. A copy of this instant Decision and Order shall be uploaded to the NYSCEF system for filing by the Court.

Signed this 10th day of August, 2023, at Ballston Spa, New York.

Dianne N. Freestone

HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER