Matter of Voices of the Everyday People v City of New York
2008 NY Slip Op 33114(U)
November 20, 2008
Supreme Court, New York County
Docket Number: 106025/08
Judge: Nicholas Figueroa
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SCANNED ON 11/20/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Figueroa PART 46
Justice

Voice of the Everyday People
- v -
City of NY

INDEX NO. 106025/08
MOTION DATE 6/30/08
MOTION SEQ. NO. 1
MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for ___

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 20, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of:

Voices of the Everyday People (VOTE People), Evan Blum, Hassan Farrah, Eda Hallinan, S. Chink Pope, and the Harlem Tenants Council,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

The City of New York, Michael Bloomberg in his official capacity as Mayor, The City Planning Commission, The Department of City Planning, Amanda Burden in her official capacity as Commission Chairperson and Department Director, The City Council, Christine Quinn in her official capacity as Speaker,

Respondents.

Index No. 106025/08

DECISION AND JUDGMENT

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Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, staying the New York City Council from making a binding vote on an application to rezone 125th Street in Manhattan; or, alternatively, staying the effect of the vote. It also asks the court to toll the time period set for the City Council to vote on the application under the Uniform Land Use Review Procedure (ULURP).

The court notes that subsequent to its denial of a temporary restraining order, the City Council voted on and approved the application by a vote of forty-seven to two, with two members not voting. Thus, more than three-fourths of the Council approved the proposal.

On October, 2003, respondent Department of City Planning certified an application to rezone the 125th Street corridor in Manhattan from the south side of 126th Street to the north side of 124th Street, from Broadway to Second Avenue. According to petitioners, the zoning change "would cause the displacement of 71 local businesses and would bring thousands of market-rate housing units beyond the financial reach of the residential community, while including no requirements for affordable housing or compensation to displaced businesses."

Petitioners further allege that the proposal would allow thirty story buildings in a traditionally low-rise neighborhood, would have adverse environmental consequences, and ignores the landmark status and cultural significance of buildings in the affected area.

Petitioners argue that the zoning proposal was not subjected to the required public review by the affected Community Boards and the Manhattan Borough, prior to returning the proposal to respondent City Planning Commission for approval and submission to respondent City Council for final approval.

Petitioners state that the proposal was approved by Community Boards 9 and 11 with conditions and was disapproved by Community Board 10 with conditions. It was disapproved by the Borough President and approved by the City Planning Commission. It was sent to the City Council on March 10, 2008.

Petitioners allege that on April 1, 2008, they publicly announced their intention to invoke City Charter §200(a)(3) to present a property owner protest of the proposed zoning. Prior to that date, on March 31, 2008, petitioner presented a legal memorandum to the Council Speaker, the Public Advocate and the City Council's general counsel stating their intent to file a protest. The deadline for filing the protest was April 10, 2008. Petitioners have not filed that protest.

[* 4]

As part of their attempt to complete the protest, petitioners assert that they "canvassed" the affected area and learned that a twenty-six percent, "significant percentage" of the area's property owners were neither notified nor aware of the zoning proposal. The sample allegedly comprised sixty-five owners.

Further, petitioners allege, many property owners could not be contacted through publicly available records. They assert that ten out of ninety-five mailings, using the Automated City Register Information System (ACRIS), ten were returned because the addressee was unknown at the given address.

Petitioners argue that because the project is expansive, representing twenty percent of the area, and affecting hundreds of properties, the residents' lack of awareness of the proposal "due to inaccurate public records has culminated in the effective deprivation of the property owners right to protest the proposal."

Petitioners contend that the affected Community Boards failed to give the notice that the Uniform Land Use Review Procedure (ULURP) requires. Petitioners argue that the Boards had to publish notice of public hearings on the proposal in the City Record, not later than sixty days after receipt of the application for the proposal and that there had to have been five days of publication immediately preceding the public hearing.

Additionally, petitioners note, notice had to have been published in the City Planning Calendar and distributed five calendar days prior to the public hearing.

The affected Community Boards are 9, 10 and 11. Community Board 9 held a public hearing on the proposal on December 3, 2007. Community Boards 10 and 11 held their hearings on December 5, 2007.

Petitioners argue that Community Board 10 did not post any notice in the City Record in the five day period before the hearing. Petitioners argue that Community Board 9 did not give adequate notice; although it gave the time and place of the hearing, its notice did not mention the 125th Street rezoning.

Petitioners argue that "In this case, where property owners were effectively stopped from pursuing a §200(a)(3) protest due to lack of awareness of the proposal itself, the breach of the community's process rights of notice of hearing was not without repercussion."

In addition to asking the court to declare the proposal invalid, petitioners ask that the court toll the time in which property owners may bring a protest, "until this matter has been adjudicated and respondents have produced requested information and petitioners have been given a reasonable amount of time to contact owners and a reasonable amount of time to respond, not less than thirty days." Apparently, petitioners seek the names and addresses of persons in the affected area.

Respondents argue that a Community Board's role is merely an advisory one and that, in any event, the affected businesses and residents received notice of the proposal and that various meetings took place at which those persons and entities could express their positions. Respondents assert that there is no requirement to give individual notice to each person or entity and that it has no control over the ACRIS list; therefore, it cannot be responsible for any deficiencies in that system. Respondents urge that petitioners have not been denied any constitutional rights.

Respondents correctly argue that a Community Board's role is advisory (see *Community Board of the Borough of Manhattan v. Schaffer*, 84 NY2d 148, 159). A Community Board may make an initial review and make recommendations on a land use or development proposal (see Charter §2800(d)(17)). However, the recommendation is not binding on the next reviewing body,

the City Planning Commission or the City Council (see *Starburst Realty Corp. v. City of New York*, 125 AD2d 148, 156). Those bodies have the approval powers necessary for a land use proposal to go into effect. In the event the Community Board fails to act or waives its right to act within the appropriate time, the proposal then goes to the next level of review (City Charter §197-c(j); see also subdivisions (e, f, and g).

Because of the Community Boards' limited role in the process, the failure to give proper notice is without legal consequence, and would not have the same legal effect as failing to give notice that may be required before the authoritative body takes final action on a proposal. Therefore, petitioners' argument is unavailing and a case it relies on (*Matter of Kuhn v. Town of Johnstown*, 248 AD2d 828), is inapposite.

Moreover, the required public notice requirements in the ULURP were complied with prior to the time the decision making bodies, the City Planning Commission and the City Counsel, took their actions. In fact, instead of conducting hearings in its lower Manhattan office, the Department of City Planning held hearings on January 30, 2008 at City College's Davis Hall, in Harlem in order to maximize public participation at the hearing. Consistent with the applicable Rule of the City of New York, 62 RCNY §2-06(d), the Department of City Planning placed notice of the meeting in the City Record on January 16, 17, 18, 22, 23, 24, 25, 29, and 30, 2008. Seventy-three individuals and organizations, including petitioners, Blum, Vote People and the Harlem Tenants Council, testified at the hearing.

On February 11, 2000, the City Planning Commission conducted a post-hearing Review Session, open to the public, to discuss the issues raised in the January 30th hearing and also to discuss potential changes to the proposal. The City Planning Commission held a second post-hearing review

on February 25, 2008 to discuss issues and potential changes to the modified proposal.

The City Planning Commission approved the modified proposal on March 10, 2008. The City Council Land Use Committee filed further proposed modifications on April 18, 2008 and, as City Charter §197-d(d) requires, sent the changes to the City Planning Commission for review.

On April 21, 2008, the City Planning Commission met its regularly session to discuss the City Council modifications. That meeting was open to the public. The City Council approved the modified proposal on April 30, 2008.

Moreover, prior to the City Planning Commission hearings, the affected Community Boards publicized their hearings. Although the publications were not in strict compliance with the ULURP's requirements, persons in the affected area were apprised of the proposal. Community Board published notice of its November 20, 2007 in the City Register. Community Board publicized its December 5, 2007 hearing by posting flyers in English, Spanish, and French. It announced the hearing on a radio show hosted by petitioner Harlem Tenants Council's Executive Director, Nellie Hester Baily. Petitioners acknowledge that they had actual notice of the Community Board hearings and that they attended them.

Petitioners' argument that the constitutional claim must fail. The ULURP was created to expand the democratic process and "theoretically" make it more effective by allowing community members to participate in land use decisions. However, it did not create a constitutionally protected property right. (*Jin v. Board of Estimate of the City of New York*, 92 AD2d 218, 223). Therefore, respondents did not deprive petitioners of a due process right (*id.*).

Petitioners' argument that the Community Boards were required to send each affected person individual notice of the hearings is without merit. There is no requirement in the ULURP, or any

other law or regulation, requiring such notice. Moreover, respondents cannot be faulted for any ACRIS deficiencies, as the system depends on property owners to keep their address current in the system.

Petitioners have failed to demonstrate any grounds for tolling their time to protest the proposal. That time expired on April 10, 2008. In any event, had there been a timely protest, the most petitioners could have achieved was the right to demand that the City Council approve the proposal by a three-fourths vote, rather than a simple majority (City Charter §200(a)(3)). The City Council approved the measure by a three-fourths majority. Therefore, the request for a tolling is academic.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: November 20, 2008

ENTER

J.S.C.

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