

Tribeca Community Assn. v New York City Dept. of Sanitation

2010 NY Slip Op 30037(U)

January 11, 2010

Supreme Court, New York County

Docket Number: 101498/09

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: HON. JOAN B. LOBIS PART 6
Justice

Tribeca Comm. Assoc.

Plaintiff(s),

- v -

Dept. of Sanitation

Defendant(s).

INDEX NO. 101498/09
MOTION DATE 9/15/09
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 145, were read on this motion to/for Art. 78 petition

Notice of Motion / Order to Show Cause - Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes [] No

PAPERS NUMBERED
Pet. 1-36, Amended Pet 37-93
X MOT 94-100; X MOT 101-102
Answer 103-109; exhibits
110-136; app 137-144
Reply 145

*petition decided in accordance with accompanying
decision, order, and judgment.*

FILED
JAN 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/10

JBL
JOAN B. LOBIS, J.S.C.

Check one: FINAL DISPOSITION

[] NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
 TRIBECA COMMUNITY ASSOCIATION, CANAL
 WEST COALITION, CANAL PARK CONSERVANCY,
 LIBERTY VIEW CORP., 304 SPRING STREET
 CONDOMINIUM, 530 CANAL ST. REALTY CORP.,
 466 TENANTS CORP., CHARLTON COOP CORP.,
 THE JAMES BROWN HOUSE, 340 WEST LLC., PJ
 CHARLTON, ELBA PARKING OPERATING
 COMPANY, URBAN GLASS HOUSE
 CONDOMINIUM, and SOUTH PASS TRANSART
 LTD.,

Index No. 101498/09

Decision, Order and Judgment

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF SANITATION,
 THE CITY OF NEW YORK, NEW YORK CITY
 PLANNING COMMISSION and HUDSON RIVER
 PARK TRUST,

Defendant-Respondents,

FRIENDS OF HUDSON RIVER PARK,

Defendant-Respondent Intervenors.

-----X
JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition. In Motion Sequence Number 003, by amended notice of petition, dated March 9, 2009, plaintiffs-petitioners¹ ("petitioners") assert six causes of action in this hybrid declaratory judgment action and proceeding under Article 78 of the C.P.L.R. Petitioners seek a court order: (1) enjoining, annulling, setting aside and declaring illegal, null and void the provisions of the 2005 Settlement Agreement (the "Settlement"), mandating that the provisions of the Hudson River Park Act, Laws of 1998,

¹ Petitioners initially sought to bring this action as a class action, but during oral argument on September 15, 2009, withdrew their request for class certification.

Chapter 592 (the "Act") be complied with, and preliminarily and permanently enjoining enforcement of the provisions of the Settlement until such time as respondents comply with the provisions of the Act; (2) declaring certain actions of the New York City Department of Sanitation ("DSNY"), and certain resolutions of the New York City Planning Commission ("CPC") and the New York City Council (the "City Council"), to be in violation of the Fair Share Criteria as set forth in §§ 203 and 204 of the City Charter, and preliminarily and permanently enjoining any action in furtherance of those resolutions until said Fair Share criteria are complied with; (3) declaring the Final Environmental Impact Statement (the "FEIS"), certain other DSNY actions, the CPC's resolutions dated October 7, 2008, and the City Council's resolutions dated November 19, 2008, to have been made in violation of the environmental review provisions of New York's State Environmental Quality Review Act ("SEQRA") and New York City Environmental Quality Review ("CEQR"), and preliminarily and permanently enjoining any actions in furtherance of said resolutions until said environmental review requirements are met; (4) declaring the three resolutions dated October 7, 2008 to be unlawful, null and void, in that they violate § 854 of the City Charter; (5) declaring certain CPC and City Council's resolutions to be unlawful, null and void, in that they violate provisions of the Act requiring respondent the Hudson River Park Trust (the "Trust") to give public notice, hold public hearings, and consult with the relevant Community Boards ("CB"s) and interested parties before taking any significant action, and preliminarily and permanently enjoining any actions in furtherance of said resolutions until provisions of the Act are complied with; and, (6) preliminarily and permanently enjoining the transfer of title of the property located in Hudson Square from the United Parcel Service ("UPS") to the City of New York and DSNY , until such time as respondents comply with the Act, including but not limited to the consideration of alternative sites in

coordination and consultation with the relevant CBs and interested parties such as petitioners. Defendant-respondent-intervenor Friends of Hudson River Park (“Friends”) cross-moves for an order, pursuant to C.P.L.R. Rule 3211, dismissing petitioners’ first cause of action. Defendants-respondents DSNY, the City, and the CPC (together, the “City Respondents”) answered and filed objections in points of law seeking dismissal of the proceeding. The City Respondents also cross-move for a judgment, pursuant to C.P.L.R. Rules 3211(a)(1) and (7), and §§ 217(1) and 7801, dismissing the first and fourth causes of action on the grounds that they are time barred, rely on a cause of action that is time barred, and fail to state a cause of action. In Motion Sequence Number 004, defendant-respondent the Trust moves for an order, pursuant to C.P.L.R. Rules 3211(a)(5) and (7), dismissing the combined Article 78 proceeding and declaratory action as against it in its entirety.

Petitioners are a group of community organizations, businesses, and property owners in the Tribeca area of Manhattan. DSNY is a department within the government of New York City which is responsible for collecting and disposing of solid residential waste and clearing snow in the winter. CPC is also a City department which is responsible for planning within New York City, including the location of DSNY facilities. The Trust is a public benefit corporation created by the Act, which is responsible for building and operating Hudson River Park (the “Park”). Friends is a not-for-profit corporation.

As of the time the amended petition was submitted, DSNY maintained facilities for Districts 2, 4 and 5 at the Gansevoort Peninsula, located at the end of Gansevoort Street, at the

western edge of District 2; there is also a salt pile, which is used for snow removal in the winter. The District 4 garage was scheduled to open in July 2009 at a new location at 57th Street and 12th Avenue.

In 1998, the New York State Legislature enacted the Act, which created the Park along the Hudson River. The Act sought to limit the commercial uses along the Park and to promote “[P]ark use”, such as public open spaces, public recreation, and environmental education. The Act also established a public benefit corporation, the Trust, to control the planning, design, construction, operation, and maintenance of the Park. Section 7 of the Act sets forth the powers of the Trust, including the power, under § 7(1)(f), to

provide for meaningful public notice, participation, consultation and review of the planning, development and operation of the [P]ark, which shall include, but not limited to (i) consultation with [CBs] one, two and four within the Borough of Manhattan, the Advisory Council, elected officials representing communities neighboring the [P]ark and appropriate community, civic and advocacy organizations and (ii) timely and reasonable notification to such individuals and groups and appropriate news media of each meeting of the trust and any public hearings regarding significant plans or proposed actions with respect to the [P]ark[.]

Further, § 7(6) sets forth that in the “case of any proposed significant action affecting the [P]ark or community, including the adoption of, and any amendment to, the general project plan or the annual financing plan,” the Trust shall hold a public hearing with not less than thirty (30) days’ notice; consider the views of CBs 1, 2, and 4, the advisory council, elected officials representing communities neighboring the Park, and interested groups and individuals, and give these individuals or groups at least sixty (60) days to submit such views; and, publish a notice of the hearing and proposed action in the city record and state register.

The Act enumerated certain changes that would take place along the waterfront as a result of the Park being created. Related to this proceeding, the Act required the City to relocate a salt pile and remove an incinerator from the Gansevoort Peninsula by December 31, 2003, and to use its "best efforts" to relocate a sanitation garage from the Gansevoort Peninsula. But, by April 2005, none of these facilities had been removed from the Peninsula. In 2005, Friends and other plaintiffs-petitioners brought a proceeding against DSNY, the City of New York, the State of New York,² and the Trust, seeking injunctive, declaratory, and monetary relief arising out of defendant-respondents' violation of the Act and other laws and regulations. Friends of Hudson River Park v. N.Y. City Dept. of Sanitation, Index No. 105763/05. That proceeding was resolved by the Settlement, so-ordered by the Hon. Michael D. Stallman on October 27, 2005, and filed on November 2, 2005, which petitioners now seek to set aside as part of the relief sought here.

The Settlement acknowledged that the City had continued to use the salt pile and parts of the incinerator building on the Gansevoort Peninsula beyond December 31, 2003, the deadline set in the Act for removal of those facilities. The City believed it was necessary to continue to use the facilities at the Gansevoort Peninsula until December 31, 2012. The Settlement set forth that the City had "already begun to pursue the regulatory approvals necessary for construction of a new sanitation garage adjacent to the West Side Highway at Spring Street" (the "Spring Street Garage"). According to the Settlement, in exchange for \$21.5 million to the Trust, the City could continue to use the Gansevoort Peninsula until December 31, 2012, but if the City continued to occupy the site beyond that time, it would owe additional sums of money to the Trust. If the City did not vacate the

² The action was subsequently withdrawn as against the State.

Gansevoort Peninsula by December 31, 2013, then Friends would have the right to seek further court intervention.

The Settlement contained a provision identified by the subheading: "Spring Street Garage: City Commitments". That provision set forth that

[t]he City has identified a site at the corner of the West Side Highway and Spring Street as the preferred location for a new sanitation garage (hereinafter, the "Spring Street Garage") to which its sanitation uses at Gansevoort could be relocated on or before December 31, 2012. The construction of a new garage at that site is necessarily subject to regulatory reviews and/or approvals, including but not limited to those under [SEQRA, CEQR,] and the City Uniform Land Use Review Procedure. Subject to the foregoing, the City is committed to pursuing the Spring Street Garage on a time schedule that will allow it to be completed by December 31, 2012. Schedules of the anticipated process for regulatory approvals, acquisition, design and construction are annexed hereto as Exhibit B. Although these schedules are anticipatory and non-binding, and may be delayed due to litigation or other developments beyond the City's control, and although the City may determine that construction of a garage on that site is not appropriate, or that another site is preferred, the City's commitment pursuant to [the provisions in the Settlement relating to the Gansevoort Peninsula] shall not be changed. In the event that the plaintiffs believe that the process of securing approvals for, and designing and building the Spring Street Garage has fallen behind by one year or more due to delays within the City's control, they may apply to the Court to seek an enforceable schedule for the completion of the Spring Street, or any other remedy pursuant to this Agreement or provided by law or equity, subject to [the provisions of the Settlement regarding reporting and enforcement].

Since 1999, CBs 1, 2, 4, and 5 had been in negotiations with DSNY to address the relocation of the Gansevoort Peninsula facilities. CB2 had agreed to the relocation of facilities for District 1 at Spring and Washington Streets, and CB4 had agreed to the siting of facilities for

Districts 2 and 5 at a proposed facility at Block 675 at West 30th Street, which subsequently went through the Uniform Land Use Review Procedure (“ULURP”) and condemnation procedures to accommodate the facilities there. In 2007, however, DSNY issued a Draft Environmental Impact Statement (“DEIS”) which outlined DSNY’s proposal to build a three-district sanitation garage, for Manhattan Districts 1, 2, and 5, on what is currently a site owned by UPS at Washington and Spring Streets, and to demolish the existing District 1 garage and replace it with a salt shed. The DEIS proposed to site three Districts’ sanitation garages (1, 2, and 5) and a regional salt shed, with 5,000 tons of rock salt and 4,000 gallons of liquid calcium chloride, at one large site in District 2 (Blocks 595 and 596)—the Spring Street Garage. CB2, in response, passed several resolutions objecting to the siting of this project entirely within District 2, and questioned why the alternative site, at Block 675 at West 30th Street, was no longer being incorporated into the proposal.

In March 2008, CB2 passed a resolution recommending an alternative proposal for a smaller garage containing two sanitation districts (Districts 1 and 2) and a two-and-one-half acre park, or what is referred to as the “Hudson Rise Alternative.” Petitioners allege that as of April 2008, DSNY refused to consider options or alternatives to the Spring Street Garage proposal unless the timetable and penalties in the Settlement could be suspended. In June 2008, CB2 passed another resolution opposing the siting of a three-district garage on Spring Street under the “Fair Share” Criteria³, and proposed a smaller garage without the District 5 garage; elimination of the salt pile and

³ The “Fair Share Criteria” are intended to guide the City in the siting of City facilities, as provided by Section 203 of the City Charter. 62 R.C.N.Y. § Appx. A to Title 62. The “purpose of these criteria is to foster neighborhood stability and revitalization by furthering the fair distribution among communities of city facilities.” *Id.*; *Ferrer v. Dinkins*, 218 A.D.2d 89, 96 (1st Dep’t 1996). The criteria are “designed to further the fair distribution among communities of the burdens and

employee parking; reduction of the capacity of the refueling station to accommodate the proposed smaller garage; and, a different, more “community-friendly” design. Petitioners argue that time and again, DSNY and the Trust relied on the deadlines set in the Settlement as a reason why alternative sites and proposals would not be considered for the relocation of the sanitation facilities on the Gansevoort Peninsula, despite the fact that the Settlement recognizes that the deadlines are “anticipatory and non-binding, and may be delayed due to litigation or other developments beyond the City’s control, and . . . the City may determine that construction of a garage on that site is not appropriate, or that another site is preferred[.]”

On October 7, 2008, the CPC passed four related resolutions approving the City’s and DSNY’s application to relocate the sanitation garages for Districts 1, 2, and 5 at Block 596, and the salt shed at Block 595. The CPC’s resolutions noted that the applications were reviewed pursuant to SEQRA and CEQR. It had been determined that the proposed action may have a significant environmental impact, and that an environmental impact statement would be required, because the project as proposed could result in a significant adverse impact on traffic, parking, transit, and pedestrians. The CPC’s resolutions set forth that a Positive Declaration was issued on December 21, 2006, and distributed, published, and filed. The DEIS was issued on the same day. A public scoping meeting was held on the DEIS on January 31, 2007. A final scope of work, reflecting the comments made during the scoping, was issued on June 29, 2007. DSNY prepared a DEIS and a Notice of Completion on November 9, 2007. On August 27, 2008, a public hearing was held in

benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites.” N.Y. City Charter § 203.

conjunction with the ULURP public hearing. The FEIS was completed, and the Notice of Completion was issued on September 26, 2008. The Notice of Completion identified the potential impacts—such as increases in traffic volume—and proposed certain measures to mitigate those impacts.

The CPC's resolutions note that the applications for the proposals were certified as complete on May 5, 2008, and were referred to CB2 and the Manhattan Borough President in accordance with Title 62 of the Rules of the City of New York Section 2-02(b), which governs applications under ULURP. CB2 held a public hearing on June 12, 2008, and on June 14, unanimously adopted a resolution recommending disapproval of the application. Manhattan Borough President Scott M. Stringer issued a recommendation disapproving the application on August 11, 2008, and further recommended that alternative sites be explored so that the proposed site could be used as an open community space. On August 11, 2008, the CPC scheduled a public hearing to take place on August 27, 2008, together with the SEQRA and CEQR hearing. The hearing was held; fifteen speakers testified in favor of the application, and forty-seven speakers testified in opposition.

Having considered the FEIS, together with the social, economic, and other essential factors, the CPC approved the proposed actions for relocating the sanitation facilities and salt shed to the Spring Street site, Blocks 595 and 596. The CPC found that the proposed action minimized or avoided environmental impacts to the maximum extent possible, as opposed to the alternatives, and that the adverse impacts as cited in the FEIS would be minimized or avoided to the maximum

extent practicable by incorporating mitigating measures. The CPC's resolutions set forth that the CPC's report, together with the FEIS, constitute the written statement of facts, and of social, economic, and other factors and standards, that form the basis of its decision, pursuant to Section 617.11(d) of the SEQRA regulations.

On November 14, 2008, the City Council held a public hearing on the CPC's resolutions and the applications for the proposed actions. On November 19, 2008, the City Council passed resolutions approving the CPC's resolutions pursuant to Sections 197-d and 200 of the New York City Charter and on the basis of the CPC's resolutions and application. The City Council found that the FEIS met the requirements of 6 N.Y.C.R.R. Part 617; that the proposed action minimized or avoided environmental impacts to the maximum extent possible, as opposed to the alternatives; that the adverse impacts as cited in the FEIS would be minimized or avoided to the maximum extent practicable by incorporating mitigating measures; and, that the CPC's resolutions together with the FEIS, constitute the written statement of facts, and of social, economic, and other factors and standards, that form the basis of its decision, pursuant to 6 N.Y.C.R.R. § 617.11(d). Petitioners filed their notice of petition and petition on February 3, 2009.

Petitioners maintain that the Settlement requires DSNY and the City to relocate all of the sanitation facilities presently located on the Gansevoort Peninsula to the Spring Street site by specific dates. In their first cause of action, petitioners ask the court to set aside portions of the Settlement, since no public notice was given regarding this "significant action" and neither the relevant CBs nor the public was ever consulted. Petitioners argue that the Settlement was a

“significant action” that should have triggered the “meaningful public notice” provision in the Act. Additionally, petitioners claim that the Settlement requires DSNY to move all of its facilities on the Gansevoort Peninsula to the Spring Street Site, and that this action was also a “significant action” requiring public notice. Petitioners’ maintain that the Trust violated the Act by failing to comply with the notice provisions, thereby invalidating the Settlement and rendering the deadlines to remove the facilities unenforceable. Petitioners further allege that the Trust failed to publicly disclose the monies it received from DSNY in its annual financing plan. The Trust’s 2005-2006 Annual Plan lists the monies it received from DSNY as a “capital contribution,” without reference to the Settlement.

Friends cross-moves to dismiss petitioners’ first cause of action. Friends contends that the Settlement does not require the relocation of the Gansevoort Peninsula facilities to Spring Street, but merely recognizes Spring Street as one possible site to relocate the facilities on the Gansevoort Peninsula. Friends asserts that the language of the Settlement requires the removal of the sanitation facilities on the Gansevoort Peninsula and establishes deadlines for that relocation, regardless of the relocation site that DSNY eventually determines. Friends also contends that petitioners’ first cause of action is an untimely challenge to the Settlement; that petitioners lack standing to challenge the Settlement; and, that the Settlement did not constitute a “significant action” as that term is defined in the Act so as to require the Trust to conduct certain hearings prior to entering into the Settlement. The Trust similarly moves to dismiss petitioners’ first cause of action on the same grounds as above—statute of limitations, lack of standing, and that the Settlement was not a “significant action”—and also argues that petitioners’ allegation that the Trust violated the Act

by failing to publicly disclose the monies it received from DSNY is without merit, because the Act does not require such specificity in a financial plan. The City also moves to dismiss the first cause of action on statute of limitations grounds, and in its answer, asserts the omnibus affirmative defense that the petition fails to state a cause of action.

The court will first address the threshold issues of standing and the statute of limitations. As to standing, the Trust argues that petitioners have not shown an "injury in fact" relating to the Settlement because the Settlement did not determine that a three-district sanitation garage and salt shed would be relocated to the Spring Street site. The Trust further asserts that none of petitioners are individuals who use the Park or owners of property near the Gansevoort Peninsula. The Trust argues that petitioners lack organizational standing, based on Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 775 (1991), which sets forth:

First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. *Second*, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. *Third*, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury.

(Italics in original.) The Trust argues that the petition fails to allege that any of petitioners' members or shareholders would be affected by the terms of the Settlement, which allow DSNY to remain on the Gansevoort Peninsula for a longer period of time anticipated in the Act. The Trust further points out that petitioners' failure to move for relief requiring the Trust to take action or remove the

facilities from the Gansevoort Peninsula before 2012 evinces a lack of real injury caused by the Settlement.

Friends argues that because there is no express, private right of action set forth in the Act, petitioners must rely on an implied right of action. Friends argues that petitioners fail the test for a claim of implied right of standing (see Sheehy v. Big Flats Comm. Day, Inc., 73 N.Y.2d 629, 633-34 [1989]; Burns Jackson Miller Summit & Spitzer v. Linder, 59 N.Y.2d 314 [1983]), because petitioners are not members of the class of individuals for whom the benefit of the Act was enacted. Friends maintains that the Act is for the benefit of the communities immediately adjoining the Park, and that none of the petitioners are alleged to live or work or have any special connection to any portion of the Park or the neighborhood adjoining the Park, namely, the Gansevoort Peninsula.

Petitioners counter that they have a “close and longstanding connection with and use” of the Park, and thus have standing to challenge the Settlement as in violation of the Act. They maintain that the challenged agency action—the Settlement—caused them an injury in fact by approving the massive sanitation facility and salt pile at the Spring Street site. Further, petitioners argued that they have standing as third-party beneficiaries to the Settlement because Friends and the Trust had an obligation—and in the Trust’s case, a statutory obligation—to represent and consult with the various community members before entering into the Settlement; this third-party beneficiary argument was raised for the first time at oral argument and is not briefed in the papers, but is similar to petitioners’ argument that entering into the Settlement was a “significant act,” and thus entering into the Settlement violated the Act by not allowing for public notice and comment on the Settlement.

There is a two-prong test to determine standing: (1) plaintiffs must demonstrate an injury in fact, or, that plaintiffs will actually be harmed by the determination; and, (2) the injury asserted “must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.” N.Y. State Ass’n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). Petitioners claim that they have suffered an “injury in fact” by the approval to site a three-district sanitation facility and salt pile on the Spring Street site, but a plain reading of the Settlement shows that the Settlement did not determine that the facilities would be relocated to the Spring Street site. Petitioners’ argument that they have standing lacks the “concreteness” required for injury in fact (see id.), because it is based on their relationship to the Spring Street site, not the Park or the Gansevoort Peninsula. Their argument that they are harmed by the Settlement is based on the assumption that the Settlement required or compelled the siting of a multidistrict garage at Spring Street. Setting the speculative aspects of their argument aside, petitioners have failed to identify how they were harmed by the actual provisions in the Settlement setting forth deadlines by which time the City had to remove sanitation facilities from the Gansevoort Peninsula. Petitioners’ challenge to the Settlement must be dismissed due to the lack of standing—they have asserted no cognizable injury in fact.

Respondents further argue that petitioners’ challenge to the Settlement is untimely. There is a four month statute of limitations within which an Article 78 proceeding must be commenced after the determination to be reviewed becomes final. C.P.L.R. § 217(1). The Settlement was so-ordered on October 27, 2005, and filed on November 2, 2005. Respondents argue that the time to challenge the Settlement expired on March 2, 2006, four months after the Settlement

became “final”. In opposition, petitioners argue that the Settlement was not finalized until the City Council passed the November 19, 2008 resolutions adopting the determinations of the CPC to relocate the sanitation facilities for Districts 1, 2, and 3, and the salt shed, to the Spring Street site. Petitioners also assert that the Settlement was a contract, and that the applicable statute of limitations for causes of action challenging the legality of contracts is six years, pursuant to C.P.L.R. § 213.

Actions which are characterized as “administrative”, as opposed to “legislative”, are challenged by a proceeding under Article 78 of the C.P.L.R. See International Paper Co. v. Sterling Forest Pollution Control Co., 105 A.D.2d 278, 282 (2d Dep’t 1984). The Settlement, which is characteristic of an administrative determination (individualized application, limited duration, and informal adoption) as opposed to a legislative determination (general applicability, indefinite duration, and formal adoption), is appropriately challenged pursuant to Article 78. See id. Petitioners fail to cite any supporting case law for their argument that the Settlement is a contract, rather than an administrative determination; their attempt to apply the six year statute of limitations under C.P.L.R. § 213 is rejected.

Petitioners alternatively claim that the Settlement was a preliminary and not final act, so that the statute of limitations was not triggered. That would only hold true if the Settlement was interpreted as petitioners wish, that is, that the Settlement requires the transfer of the sanitation facilities to the Spring Street site. But, a plain reading of the Settlement demonstrates that the Settlement does not require the relocation to the Spring Street site. Rather, the Settlement provides for deadlines by which the City must remove the sanitation facilities from the Gansevoort Peninsula,

which became final and binding the day the Settlement was filed. The alleged injury to the petitioners, that they were not provided with an opportunity to comment on the Settlement, occurred at the time of the Settlement, not four years later when the City approved the multi-district garage at the Spring Street site. Thus, assuming, arguendo, that petitioners had standing to challenge the Settlement, petitioners had four months from November 2, 2005, or until March 2, 2006, to bring the proceeding. Even if, as petitioners assert, the time to bring the proceeding did not start running until they knew of the Settlement, petitioners conceded in their papers that they learned of the Settlement in December 2006, when DSNY issued the Notice of Scoping Meeting and Draft Scope of Work for the Draft Environmental Impact Statement for the Spring Street Garage; thus, at the very latest, petitioners would have had to commence a proceeding to challenge the Settlement by April 2007. Petitioners' time to challenge the Settlement has expired.

Even had petitioners survived the standing and statute of limitations challenges to their petition, their challenge to the Settlement would still be dismissed. At the heart of this action is petitioners' objection to the siting of a three-district sanitation garage and salt shed in their neighborhood. The Settlement sets forth that DSNY will remove the facilities from the Gansevoort Peninsula by dates certain or else be obligated to make payments to the Trust. The determination in the Settlement, if any, was regarding the deadlines by which the facilities had to be removed. This is the fatal flaw in petitioners' action to invalidate the Settlement: nowhere in the language of Settlement do the parties to the Settlement agree to relocate the sanitation facilities to the Spring Street site. During oral argument, the petitioners conceded that the Settlement says nothing about relocating the garages and increasing the number of trucks that would be sited at the Spring Street

site. That the Settlement refers to the potential expansion of the Spring Street site is simply not determinative of anything; as Friends points out, "under the Settlement Agreement, [DSNY] could have chosen to proceed to move the operations on Gansevoort to any location or locations it chooses."

Petitioners allege that the Settlement is illegal because the Settlement imposes or changes the deadline by which DSNY must remove its sanitation facilities from the Gansevoort Peninsula, and that the establishment of these deadlines is a "significant action" which should have triggered the public notice provisions. Petitioners challenge the validity of the Settlement on those grounds because there were no public notice or hearings regarding the Settlement.

For petitioners to prevail on the theory that the Settlement is illegal, it would have to be determined that the imposition or changing of the deadlines was a significant action under § 7(6), and thus the Trust was obligated to hold a public hearing with not less than thirty (30) days' notice; consider the views of CBs 1, 2, and 4, the advisory council, elected officials representing communities neighboring the Park, and interested groups and individuals, and give these individuals or groups at least sixty (60) days to submit such views; and, publish a notice of the hearing and proposed action in the city record and state register. The public notice provisions of § 7(6) are triggered by "any proposed significant action affecting the [P]ark or community, including the adoption of, and any amendment to, the general project plan or the annual financing plan". The general project plan is defined as "the Hudson [R]iver [P]ark concept & financial plan, dated May, 1995, as modified in the May 20, 1998 final environmental impact statement, and any successor plan

or statement of findings created thereafter consistent with [SEQRA]; provided that the general project plan shall be consistent with this act." The concept and financial plans mention that construction of the Park should be complete by 2003, that removal of the municipal facilities from the Gansevoort Peninsula will be necessary because the Act prohibits incompatible governmental uses, but that this cannot be done until alternative locations have been identified and approved. Petitioners argue that the Trust is not permitted to amend the Act, but the court does not find the Settlement to constitute an amendment to the Act. According to the Act, the Trust is empowered to bring and defend lawsuits, and to enter into contracts, as is necessary to carry out the functions, powers, and duties of the Trust. The Settlement and extension or establishment of deadlines by which the City must remove sanitation facilities from the Gansevoort Peninsula is consistent with the Trust's powers, and is neither an adoption of or an amendment to the general project or annual financing plans. If anything, by 2005, when Friends brought the action against the Trust and the City, at which time the salt shed had still not been removed, the Trust was obligated to take measures in furtherance of the Act so that removal of the municipal facilities would occur. The Trust has no power to remove the sanitation facilities itself. The Settlement enables the Trust to protect and enforce the Park plan while providing the City with the time it needed to find an alternative location for the sanitation facilities on the Gansevoort Peninsula. This action is not at odds with the Act. Regardless, the creating or changing of deadlines for removal of the municipal facilities from the Gansevoort Peninsula is not the action that the petitioners challenge; they challenge the decision to locate of the facilities at the proposed Spring Street site, which, as stated before, was not required by the Settlement. The action which adversely affected petitioners was the City Council's passage of three resolutions approving the siting of a three-district garage at the Spring Street site. Their

argument that the Settlement requires, compels, or even endorses a relocation of facilities to the Spring Street Site is unavailing. The Settlement sets forth that the City will remain committed to removing the sanitation facilities from the Gansevoort Peninsula even if the City determines that the Spring Street site is inappropriate or that it prefers a different site.

Petitioners also challenge the Settlement on the grounds that the Trust failed to publicly disclose the monies it received from DSNY in its annual financing plan. The Trust's 2005-2006 Annual Plan lists the monies it received from DSNY as a "capital contribution" without reference to the Settlement. The Trust maintains that the section of the Act herein referenced, Section 7(7), requires no such specificity to identify the source of certain monies. Petitioners fail to rebut the Trust's assertion. Rather, they argue that the fact that the Trust continues to maintain that the signing of the Settlement is not a signification action requiring disclosure "lead[s] inevitably to the conclusion that the Trust takes the position that no conceivable decision by it warrants public notice and hearings." Petitioners have not identified how, under New York law, the Trust violated the Act by failing to reference the Settlement in the Annual Plan. Their claim on these grounds lacks merit.

Petitioners ask the court to set aside the selection of the Hudson Square site at the UPS building on Spring Street on the grounds that it violates the Fair Share Criteria of the New York City Charter. They object to what they allege is a truncated, misleading, and unsubstantiated Fair Share analysis that gave only "lip service" to alternative sites and ignored criteria that must be taken into account when a regional facility is being considered. They further allege that DSNY failed to

consult with the community about the project and instead engaged in a “one-sided dialogue” involving a “done deal.” They allege that the terms of the Settlement, in which the Spring Street site was identified as a proposed site for relocating the Gansevoort facilities, affected DSNY’s consideration of alternative sites in its Fair Share analysis, causing DSNY to give the Fair Share Criteria “short shrift.” Petitioners argue that no data was provided to show the cost estimates of the proposed regional facility compared to other alternative locations, including alternatives not assuming consolidated facilities, and especially with respect to the site at Block 675, which had previously gone through detailed analysis before it was selected as an appropriate site for two garages and then condemned by the City for the facility. Finally, petitioners allege that DSNY and the City neither consulted with the community nor established a consensus building process pursuant to the Fair Share Criteria §§ 4.2 and 6.2.

The City agrees that it was required to consider the “Criteria for the Location of City Facilities” or “Fair Share Criteria,” in accordance with Section 203 of the City Charter, as part of its review of the ULURP applications for the Spring Street Garage. The City maintains that the Spring Street Garage would be located in an area zoned for as-of-right garage vehicle storage and maintenance. The surrounding area is predominantly industrial, although it does include residential and commercial uses on the southeast perimeter, and the site is already used for similar activities, such as vehicle refueling and washing. The City argues that, there not being another single or multi-district garage in the half mile surrounding the proposed Spring Street Garage, the placement of that project would not pose an undue burden on the community. Consolidated garages are not inconsistent with the Fair Share Criteria, because there are a limited number of suitable sites with

industrial zoning and proximity to arterial roadways. The City maintains that DSNY made considerable efforts to identify suitable alternative sites, including proper early notification, extensive public consultation, and community board outreach. The City also asserts that although sanitation garages are considered "local facilities" under the Fair Share Criteria, and although each district will operate its own garage in the new facility, DSNY determined that the project should be analyzed under both "local" and "regional" criteria as a conservative measure to identify and consider a broad scope of siting considerations. The City argues that in this case, the proposed garage met both the local and regional facility criteria.

In an Article 78 proceeding, the court must decide whether the challenged determination has a rational basis in law. C.P.L.R. § 7803; In re Sullivan County Harness Racing Ass'n. Inc. v. Glasser, 30 N.Y.2d 269, 277 (1972); In re Colton v. Berman, 21 N.Y.2d 322, 329 (1967). This court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "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.'" Pell, 34 N.Y.2d at 231 (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. "In this regard, the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing the underlying factual determinations." In re Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992).

Under Section 204 of the City Charter, the Mayor prepares a Statement of Needs in accordance with the Fair Share Criteria, which is intended to provide early notice of facility proposals to Borough Presidents, CBs, and the public at large. Section 204 also sets forth procedures for public comment on the Statement of Needs, permits borough presidents to propose alternative locations for new city facilities, and requires city agencies to consider the comments and alternatives proposed. Courts have reiterated, as stated in the preface to the Fair Share Criteria, that the Fair Share Criteria are not regulations, but are merely criteria intended to guide the location of city facilities. See Fields v. Giuliani, 2001 N.Y. Slip Op. 40315(U), 2001 N.Y. Misc. LEXIS 576 (Sup. Ct. N.Y. Co. 2001); Comm. Planning Board No. 4 v. Homes for the Homeless, 158 Misc. 2d 184, 191 (Sup. Ct. N.Y. Co. 1993).

In this instance, the 2006-2006 Statement of Needs, published in November 2004, identified Spring Street at West and Washington Streets as the proposed location for the replacement of three district garages: the District 1 garage from 297 West Street, and the Districts 2 and 5 garages from the Gansevoort Peninsula. The Borough President submitted comments on the Statement of Needs in June 2005. As part of its ULURP application, DSNY submitted a Fair Share Analysis ("FSA"), dated February 1, 2008. The FSA points out that neither the Fair Share Criteria nor the Department of City Planning's publication, *"Fair Share Criteria" - A Guide for City Agencies* (1998) addresses the classification of a facility that would house more than one local facility at a particular address, with each serving only one community district or local service area, and with at least one serving a different local district than the one in which it is located. To accommodate this situation, DSNY sets forth that its analysis considered the project under both the "local facility"

criteria of Article 5, and the "regional/citywide facility" criteria of Article 6. The FSA addresses the Fair Share Criteria and considers five alternatives, all on privately owned sites. The considerations weighed, *inter alia*, were (1) proximity to the district served, (2) consistency with zoning laws, (3) proximity of truck routes and arterial highways, (4) cost-effectiveness, and (5) availability of developable space. It is undeniable that DSNY also considered as a factor the Settlement requiring DSNY to remove operations from the Gansevoort Peninsula. The FSA sets forth that although none of the alternatives would result in significant adverse impacts to neighborhood character, they were inferior to the Spring Street Garage. DSNY determined that siting the three garages at the Spring Street site best avoided causing significant adverse impacts to neighborhood character and was the most cost-effective choice; it was determined to be the best alternative.

Consultation with the community under Section 4.2 is detailed in the FSA. It references the 2006-2007 and 2008-2009 Citywide Statements of Needs that identified the Districts 1, 2, and 5 garage complex site as the Spring Street site. The Borough Presidents submitted comments on both Statements. Meetings with the CBs concerning the siting of this project took place on numerous occasions. DSNY responded to CB2's resolution seeking to halt the project. In response to comments received during the public review process, DSNY amended the proposed project to eliminate refueling in proximity to the Holland Tunnel; eliminate the loss of a private parking garage; ensure that the trucks would be equipped with green diesel technology and that the building would attain "Silver" LEED (Leadership in Energy and Environmental Design) status under criteria established by the U.S. Green Building Council; and, modify vehicle routes to prevent impacts.

As set forth in Section 6.2 of the Fair Share Criteria, the Borough President may request a consensus building process for a proposed regional facility within ninety days of the publication of a Statement of Needs, or if the facility is not in a Statement, within thirty days of a subsequent submission to the Borough President. It appears from the exhibits supporting the petition and the answer, a consensus building process was never requested. DSNY deemed the consensus building process inapplicable since DSNY described the facility as “local” rather than “regional”. Letters between Manhattan Borough President Stringer and DSNY reflect Mr. Stringer’s desire to clarify DSNY’s classification of the project and DSNY’s reluctance to label the project as either local or regional. Nevertheless, community input was provided to and considered by DSNY, and DSNY analyzed the project under both “local” and “regional” facility criteria. Petitioners argue that the costs were not substantiated, and that DSNY unfairly focused on the terms of the Settlement as a reason why the Spring Street Garage was the recommended alternative, but the costs and the deadlines in the Settlement were just two of the factors considered and weighed in the FSA. DSNY’s efforts constitute substantial compliance with the Fair Share Criteria, and “[t]hus, [DSNY’s] determination was neither arbitrary nor capricious.” In re Turtle Bay Association v. Dinkins, 207 A.D.2d 670 (1st Dep’t 1994). Meaningful analysis of the alternative sites did occur. Cf. Silver v. Dinkins, 158 Misc. 2d 550 (Sup. Ct. N.Y. Co. 1993). However, “[s]ome deviation from the Criteria guidelines . . . is anticipated and implicitly allowed.” Comm. Planning Board No. 4 v. Homes for the Homeless, 158 Misc. 2d 184, 191 (Sup. Ct. N.Y. Co. 1993).

Petitioners allege that the FEIS that was approved by the CPC on October 7, 2008, violates multiple sections of SEQRA, notably, 6 N.Y.C.R.R §§ 617.9(b)(1), (2), and (5)(iii), which

require all environmental impact statements to analyze all significant adverse impacts of any actions and evaluate all reasonable alternatives. Petitioners also allege that the FEIS violates the requirements of CEQR. They argue that DSNY failed to take the requisite "hard look" at the potential impacts on the environment of the proposed Spring Street Garage, taking issue with DSNY's analysis on environmental impact issues such as the proposed garage as a "stationary source"; the air quality and particulate matter; the salt pile; the shortnosed sturgeon (an endangered species); the odor from stored refuse; the health of the public from construction and hazardous pollutants; the traffic and noise level in the vicinity; compliance with laws regarding regional solid waste management facilities; and, improper segmentation of the environmental review of the Spring Street Garage from the proposed Marine Transfer Station on Gansevoort and the Hudson Rise Alternative.

In opposition, the City asserts that DSNY took the requisite "hard look" at every area of potentially significant impact from the project, and fully satisfied the SEQRA and CEQR requirements. The City respondents argue that petitioners' claims are speculative and made without any supporting evidence, which the City argues is required of a party challenging the adequacy of an environmental impact study. The City maintains that the FEIS properly considered all reasonable project alternatives as it was required under SEQRA and CEQR, and reasonably concluded that none of the alternatives would reduce or eliminate the environmental impacts while meeting the project's objectives. Finally the City argues that the environmental review of the project was not improperly segmented, as it is not required to treat the planned Gansevoort Marine Transfer Station and the Spring Street Garage as one project, since they are separate projects with different goals, objectives, time frames, and boundaries.

Under SEQRA, an agency must identify and assess the potential environmental effects of, and alternatives to, certain proposed government actions before the agency funds, approves, or undertakes the action. 6 N.Y.C.R.R. § 617.1. SEQRA does not require an agency to act in a particular manner, or reach a particular result, and as such, agencies have considerable latitude in evaluating the potential environmental impacts of a proposed action. Aldrich v. Pattison, 107 A.D.2d 258, 267 (2d Dep't 1985); Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483, 492 (1st Dep't 1973).

“Judicial review of an agency determination under SEQRA is limited to ‘whether the agency identified the relevant areas of environmental concern, took a “hard look” at them, and made a “reasoned elaboration” of the basis for its determination.’” In re Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 231 (2007) (citations omitted); Akpan v. Koch, 75 N.Y.2d 561, 570 (1990). In reviewing the agency’s determination as to the potential for adverse environmental impact, a court may not substitute its judgment for that of the agency, weigh the desirability of a proposed action, or choose among alternatives. Merson v. McNally, 90 N.Y.2d 742, 752 (1997); Akpan, 75 N.Y.2d at 570; In re Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986). Rather, the court is limited to reviewing whether the agency’s determination was arbitrary, capricious, an abuse of discretion, or affected by an error of law. Akpan, 75 N.Y.2d at 570; Chinese Staff & Workers Ass’n v. City of New York, 68 N.Y.2d 359, 363 (1986); In re Halperin v. City of New Rochelle, 24 A.D.3d 768, 776 (2d Dep’t 2005).

“An agency’s responsibility under SEQRA must be viewed in light of a ‘rule of reason’; not every conceivable environmental impact, mitigating measure or alternative, need be

addressed in order to meet the agency's responsibility." Neville v. Koch, 79 N.Y.2d 416, 425 (1992). Generally, an agency meets the hard look requirement if it follows the provision set forth in SEQRA and CEQR and provides a reasoned explanation for its findings. See In re C/S 12th Ave. LLC v. City of New York, 32 A.D.3d 1, 5-6 (1st Dep't 2006).

The FEIS addresses land use, zoning, and public policy; socioeconomic conditions; community facilities and services; open space; shadows; historic resources; urban design and visual resources; neighborhood character; natural resources; hazardous materials; waterfront revitalization; infrastructure; solid waste and sanitation services; energy; traffic and parking; transit and pedestrians; air quality, including odor; noise; construction impacts; and, public health. The analyses of these issues address the pertinent regulations; the future without the proposed project; and, the future with the proposed action. The alternatives—including a no action alternative, an alternative where DSNY is the sole occupant of the Spring Street Garage, an alternative where there is a separate truck washing and refueling facility, and an alternative where the Districts 2 and 5 garages are relocated to Block 675—are analyzed in light of the same issues as above. The FEIS addresses unavoidable significant adverse impacts, growth-inducing aspects of the proposed action, and irreversible and irretrievable commitments of resources. The FEIS also includes a 129-page list of public comments on the DEIS.

The Court rejects the claim that DSNY did not take the requisite "hard look" at the relevant areas of environmental concern. "While it is essential that public agencies comply with their duties under SEQRA, some common sense in determining the extent of those duties is essential too." In re Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297, 308

(2009). DSNY identified numerous relevant concerns and sufficiently addressed those concerns in the FEIS, which complies with the requirements of SEQRA and CEQR. “A ‘rule of reason’ is applicable not only to an agency’s judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation.” *Id.* (internal citation omitted). In reviewing the FEIS, the court is not authorized under the “hard look” standard to conduct a “detailed de novo analysis of every environmental impact of, or alternative to, a proposed project which was included in, or omitted from, a FEIS.” *Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2d Dep’t 1985). Here, DSNY considered a reasonable range of alternatives and has provided a reasoned explanation for the choices it made. *Ass’n for Community Reform Now v. Bloomberg*, 52 A.D.3d 426, 428 (1st Dep’t 2008). This court will not substitute its judgment for that of the agency’s.

Regarding the alleged segmentation, improper segmentation occurs when an agency divides “the environmental review of an action such that various activities or stages are addressed . . . as though they were independent, unrelated activities, needing individual determinations of significance.” 6 N.Y.C.R.R. § 617.2(ag). Segmented review understates the full extent of potential environmental impacts of an action. There is a “danger” that “a decision involving review of an earlier action may be ‘practically determinative’ of a subsequent action,” or that two projects reviewed separately might not appear to have as significant an environmental impact as if they had been reviewed as one project. *See Concerned Citizens for the Env’t. v. Zagata*, 243 A.D.2d 20, 22 (3d Dep’t 1998) (internal citations omitted); *see also Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 206 (1987).

DSNY did not improperly conduct a segmented review of the Spring Street Garage. With respect to the Hudson Rise Alternative proposed by the DSNY Initiative, DSNY identified numerous reasons why that proposal was not considered in the scope of alternatives for analysis in the FEIS, including, but not limited to, the time frame for removing the sanitation facilities from the Gansevoort Peninsula; zoning consistency; location of facilities for efficient operations; and, costs of the proposal. DSNY's determination not to consider the Hudson Rise Alternative as amongst the alternatives considered in the FEIS does not amount to improper segmentation. The time table set forth in the Settlement was not the only reason DSNY determined not to consider the Hudson Rise Alternative. Further, with respect to the Gansevoort Marine Transfer Station, that project and the Spring Street Garage are two separate projects, and the Marine Transfer Station will be subject to its own environmental review.

The fourth cause of action is simply an amalgam of statements and allegations relating to the CPC's issuance of a special permit with respect to zoning laws and petitioners' preference for the Hudson Rise Alternative. There are two discernable claims asserted in the fourth cause of action: that the CPC's resolutions should be set aside as in violation of Section 854 of the City Charter, because the Design Commission never considered the final design of the salt shed at a public hearing; and, that the CPC's resolutions are unlawful because the CPC relied on the provisions of the "fatally flawed" Settlement that violated the Act and "various other statutes." With respect to the allegation that the CPC's resolutions violate Section 854 of the City Charter, the court finds no merit to this challenge. It is not apparent that Section 854, which addresses approvals by the Art Commission, applies to the Spring Street Garage project, and a plain reading of the statute does not indicate that Section 854 "requires that any structure to be erected or placed upon land

belonging to the City be reviewed by the Design Commission at a regularly scheduled Public Hearing prior to the approval of the FEIS," as petitioners assert. Regarding petitioners' claim that the CPC's resolutions should be set aside because they rely on the provisions of the "fatally flawed" Settlement that violated the Act and various other statutes, this claim is rejected for the reasons that petitioners' first cause of action was rejected by the court. The remainder of the statements and allegations in the fourth cause of action were considered and rejected.

Petitioner's fifth cause of action asserts that the City Council's resolutions approving the relocation of the sanitation facilities from the Gansevoort Peninsula to the Spring Street site—as well as the CPC's resolutions as described in the fourth cause of action—violated the requirements of the Act regarding public hearings by the Trust and full consultation with the relevant CBs, community groups, and other interested parties. The fifth cause of action is also rejected for the reasons that petitioners' first cause of action was rejected.

Finally, in their sixth cause of action, petitioners seek to enjoin the transfer of title of the UPS property to the City until respondents comply with the provisions of the Act. Given the disposition of the petition and analysis above, that petitioners have no basis to assert their sixth cause of action with respect to enjoining the transfer of title of the subject property from UPS to DSNY.

The petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: January 11, 2010



 JOAN B. LOBIS, J.S.C.