

**Matter of Hell's Kitchen Neighborhood Assn. v City  
of New York**

2010 NY Slip Op 34085(U)

May 10, 2010

Supreme Court, New York County

Docket Number: 108333/2009

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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In the Matter of the Application of  
HELL'S KITCHEN NEIGHBORHOOD  
ASSOCIATION, DAVID TILLYER, MARTIN  
TREAT and YESENIA ZUNIGA,  
Petitioners,

Index No. 108333/2009  
Mot. Seq. No. 001

**DECISION, ORDER &  
JUDGMENT**

- against -

THE CITY OF NEW YORK, NYC DEPARTMENT  
OF SMALL BUSINESS SERVICES, NYC  
ECONOMIC DEVELOPMENT CORPORATION,  
NEW YORK CITY PLANNING COMMISSION,  
NEW YORK CITY COUNCIL, and MMPI PIERS  
LLC,

Respondents.

-----X  
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**Papers considered in review of this E-filed petition:**

<b>Papers</b>	<b>E-File Number</b>
Notice of Petition, Verified Petition and Exhibits	1, 3, 5, 6
Supporting Affirmation and Exhibits	7
Tillyer Supporting Affidavit	8
Memo of Law in Support	9
Amended/Supplemental Notice of Petition	13
Amended/Supplemental Verified Petition and Exhibits	14
Supplemental Supporting Affirmation	15
Zuniga Supporting Affidavit	16
MMPI Answer	18
MMPI Memo of Law in Opposition and Exhibits	19
Habib Affidavit	20
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City of New York Answer and Exhibits	25
Schwartz Affirmation and Exhibits	26
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**PAUL G. FEINMAN, J.:**

Petitioners commenced this CPLR Article 78 proceeding for judicial review of a determination made respondent City of New York, Department of Small Business Services (“DSBS”) to issue a negative declaration of environmental impact. For the reasons set forth below, the petition is granted and the determination is annulled.

*Background*

Pier 94 has, for a number of years, been used as an exhibition space (Pet. ¶ 20; Padron Aff. ¶ 6). In 2006, the Economic Development Corporation (“EDC”) issued a Request for Proposals “for the lease and redevelopment of Piers 92 and 94 and adjacent upland areas . . . as a mid-sized trade-show facility” (Resp. Exhibits, Ex. 2; Padron Aff. ¶ 22). MMPI Piers LLC submitted a proposal (Maurer Aff. ¶ 9, Ex. D) and the EDC conditionally designated it as the developer in April 2008 (Maurer Aff., Ex. E; Amended/Suppl. Ver. Pet. ¶ 13).<sup>1</sup> In August 2008, the Department of Small Business Services (“DSBS”) was designated as the lead agency (Resp. Exhibits, Ex. 3); in October 2008, DSBS notified several other entities of this designation, but notably not the New York State Department of Environmental Conservation (“DEC”) (Resp. Exhibits, Ex. 4).

In February 2009, MMPI issued an Environmental Assessment Statement (Resp. Exhibits,

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<sup>1</sup> “MMPI is currently operating Piers 92 and 94 under an occupancy permit from the City of New York,” and apparently has been doing so since November 2008 (Maurer Aff. ¶ 3).

Ex. 4) and DSBS then issued a negative declaration, finding that the development would not have a significant adverse impact on the environment (Ver. Pet., Ex. D; Resp. Exhibits, Ex. 7). Notices for type I negative declarations must be published in the Environmental Notice Bulletin, which DSBS did not do until May 20, 2009 (Resp. Exhibits, Ex. 8) (*see* 6 NYCRR 617.12 [c] [1]).

This petition was filed on June 11, 2009. About a week later, the City Planning Commission (“CPC”), the agency vested with the authority to oversee land use matters, approved MMPI’s applications (Resp. Exhibits, Ex. 14). On July 27, 2009, the Council’s Subcommittee on Planning, Dispositions and Concessions held a public hearing on the application (Resp. Exhibits, Ex. 15; Reply Aff. ¶ 12). Tillyer, petitioners’ counsel, and the Hell’s Kitchen Neighborhood Association gave testimony and objected on the grounds, among others, that no EIS was prepared (Resp. Exhibits, Ex. 14; Reply Aff. ¶ 12). Days later, the City Council resolved to adopt the CPC’s approvals (Resp. Exhibits, Ex. 19).

#### *Analysis*

The State Environmental Quality Review Act (“SEQRA”) was enacted “to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state” (ECL 8-0101). SEQRA “inject[s] environmental considerations directly into government decision making” (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 679 [1988]) by imposing substantive and procedural requirements which call for “strict, not substantial, compliance” (*Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]).

First, SEQRA requires that a single entity assume lead agency status (*see* 6 NYCRR 617.6

[b]). The lead agency then designates the action as either type I, type II, or unlisted (*see* 6 NYCRR 617.4; 617.5). If an action is designated as type II then no further action is required by the lead agency (*see* 6 NYCRR 617.3 [f]). If an action is designated as a type I or unlisted action, then the lead agency must prepare an Environmental Assessment Form (“EAF”) (6 NYCRR 617.6 [a] [2], [3]), which the lead agency “must, as soon as possible, transmit . . . to all involved agencies” (6 NYCRR 617.6 [b] [3]).

Next, the lead agency must determine the significance of the environmental impact. To do so, the agency must review the EAF and “any other supporting information to identify the relevant areas of environmental concern” (6 NYCRR 617.7 [b]). The criteria for determining significance includes, among others, any “substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels, impairment of the character or quality of important historical . . . or aesthetic resources or of existing community or neighborhood character, changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment” (6 NYCRR 617.7 [c]). Once the agency thoroughly analyzes and identifies the relevant areas of environmental concern, it must issue a declaration, either positive or negative, of environmental significance (*see* 6 NYCRR 617.2 [y], [ac]). This determination must be “in a written form containing a reasoned elaboration and providing reference to any supporting documentation” (6 NYCRR 617.7 [b]). If a project “*may* have a significant effect on the environment” then the lead agency must issue a positive declaration and prepare an Environmental Impact Statement (“EIS”) (*Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 655 [2d Dept 2007] [emphasis added], quoting ECL 8-0109 [2]). The Court of

Appeals has described this threshold as “relatively low” (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 364 [1986]). Thus, if the project has “at least one significant adverse environmental impact,” then an EIS must be prepared (6 NYCRR 617.7 [a] [1]). If, however, the determination is a negative declaration, then the lead agency is not required to prepare an EIS.

When reviewing a lead agency’s issuance of a negative declaration, this court applies the following standard of review: 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” (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986], quoting *Aldrich v Pattison*, 107 AD2d 258, 265 [2d Dept 1985]). This court will not review the “desirability of the proposed action” nor substitute its judgment for that of the agency (*Matter of Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]; see *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 54 [1st Dept 2001]).

### **I. Hard Look Review**

Petitioners’ main contention is that DSBS failed to take the requisite hard look before issuing the negative declaration by ignoring the impact on Clinton Cove Park, by relying on a faulty traffic/pedestrian analysis and by failing to consider the fact that the proposed exhibition center is “not a water-dependent use” under Executive Law § 912 (10-(4) and 19 NYCRR 605 (a) (2).<sup>2</sup>

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<sup>2</sup> Initially, petitioners set forth additional arguments including the failure to address the impact on the Hudson River (Memo of Law in Supp., at 38-39) and the failure to consider alternatives to the proposed action. The court need not consider these arguments because petitioners concede that alternatives need not be considered unless a positive declaration is issued and “[r]espondents are correct that petitioners have offered no meaningful support for their claim that the project will have an adverse impact on the Hudson River; and to that extent, petitioners cannot demonstrate a legal failing on the part of the City respondents” (Reply Memo of Law, at 19-20).

In support, petitioners rely, heavily, on the fact that type I designation “carries with it the presumption that it is likely to have a significant adverse impact on the environment” (6 NYCRR 617.4 [a] [1]).

Respondents counter that the exhaustion of administrative remedies doctrine precludes these claims because petitioners did not comment or otherwise raise these issues during the administrative proceedings and hearings. Contrary to respondents’ contentions, petitioners’ purported failure to raise certain objections during the administrative process does not necessarily foreclose those issues from judicial review. This court must consider petitioners’ objections to the extent that they speak to whether DSBS took a hard look (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 427; *Matter of Falco Realty Inc. v Town of Poughkeepsie Planning Bd.*, 10 Misc 3d 1078(A), 11 [Sup Ct, Westchester County 2006]).

Here, the EAS upon which the negative declaration was premised considered the following environmental impacts: (1) land use, zoning, and public policy; (2) socioeconomic impact; (3) open space and recreational resources; (4) shadows; (5) historic resources; (6) urban design and visual resources; (7) neighborhood character; (8) natural resources, including the effect on wildlife; (8) hazardous materials; (9) the waterfront revitalization program; (10) infrastructure; (11) solid waste and sanitation issues; (12) energy conservation policies; (13) traffic and parking; (14) transit and pedestrians; (15) air quality; (16) noise; (17) construction; and (18) public health (Resp. Exhibits, Ex. 4). The negative declaration indicates that the findings on the EAS were considered and sets forth six reasons in support of the determination (Ver. Pet., Ex. D; Resp. Exhibits, Ex. 7).

While the lead agency’s determinations are generally afforded ““considerable latitude”” (*Matter of Develop Don’t Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 319 [1st Dept

2009], *lv denied* 13 NY3d 713 [2009], *reargued* 14 NY3d 748 [2010], quoting *Jackson*, 67 NY2d at 417), a determination will be deemed “improperly issued” if the agency “did not consider the necessary data prior to making [the] determination” (*Matter of Schenectady Chems. v Flacke*, 83 AD2d 460, 462 [3d Dept 1981]; see *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 146 AD2d 578, 580-581 [3d Dept 1989], *affd* 75 NY2d 62 [1989]). Here, the areas of significant environmental concern were adequately identified and constituted “a policy decision[] governed by the rule of reasonableness” (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 682 [1988]). “Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed” (*Aldrich v Pattison*, 107 AD2d at 266). Accordingly, this branch of the petition must be denied because DSBS satisfied the hard look requirement by adequately identifying and considering the relevant concerns (see *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 417).

## II. Segmentation

SEQRA prohibits the segmentation of projects for the purposes of evading their aggregate impact (see 6 NYCRR 617.3 [g] [1]; see *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 80 NY2d 500, 513 [1992]). Segmentation is “the division of 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 NYCRR 617.2 [a] [g]). The cumulative impact of tentative, speculative, or independent projects is not sufficient for the purposes of determining segmentation (see *Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 620-621 [2d Dept 2002]).

Petitioners urge this court to find that respondents’ conduct constituted improper segmentation. However, the conduct upon which petitioners rely occurred years before the challenged determination was made. Inasmuch as petitioners’ reply papers concede as much and

also concede that the authority they cite to on involves prospective segmentation (Reply Memo of Law, at 18), the court denies this branch of the petition.

### III. Notice

Next, petitioners argue that “DSBS failed to give timely notice of the [n]egative [d]eclaration . . . as required by the regulations implementing SEQRA” (Amend/Suppl. Pet. ¶ 62). Notices for type I negative declarations must be published in the *Environmental Notice Bulletin* (*see* 6 NYCRR 617.12 [c] [1]). However, neither the ECL nor the implementing regulations mandate that the negative declaration be published within a certain amount of time from its issuance. Here, the DSBS issued the negative declaration on or about February 12, 2009, but did not publish it until May 20, 2009, over three months later (Ver. Pet., Ex. D; Resp. Exhibits, Ex. 7; Resp. Exhibits, Ex. 8).<sup>3</sup> The statute of limitations for a proceeding pursuant to CPLR Article 78 is four months (*see* CPLR 217); there were approximately three weeks from the date of publication until the statute of limitations expired. Thus, petitioners, and any other entity seeking to challenge the determination, were only afforded about 22 days to make such a challenge. However much this may have frustrated the express policies underlying SEQRA, this court cannot find that the negative declaration should be annulled on these grounds because the statute does not expressly mandate that the negative declaration be published within a certain amount of time from its issuance. While it is repugnant to the express policies underlying SEQRA to deprive the public of any meaningful opportunity to review, assess, and challenge such a declaration, here the determination was published 22 days before the statute of limitations expired. Petitioners timely filed this petition and subsequently filed an amended/supplemental petition and thus, cannot be found to have suffered any prejudice. Thus, as to the publication of the negative declaration,

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<sup>3</sup> On June 17, 2009, the CPC approved MMPI’s applications (Resp. Exhibits, Ex. 14).

DSBS complied with the letter, if not the spirit of the law and, there is no procedural violation upon which petitioners can premise this particular argument for annulment. Accordingly, this branch of the petition is also denied.

#### **IV. Failure to Designate the DEC as an “Involved Agency”**

Finally, petitioners argue that DSBS erred by not identifying the New York State Department of Environmental Conservation (“DEC”) as an involved agency. They contend that “the area of the Hudson which supports Piers 92 and 94 is a Tidal Wetland” and a permit issued by the DEC is required for the “[e]xpansion or substantial modification of existing functional facilities or structures” adjacent thereto, which includes the Pier 94 headhouse (6 NYCRR 661.5) (Reply Memo of Law, at 19).

An involved agency is defined as “an agency that has jurisdiction by law to fund, approve or directly undertake an action” (6 NYCRR 617.2 [s]). The DEC is vested with the authority to grant or deny permits for the “[e]xpansion or substantial modification of existing functional facilities or structures” adjacent thereto (6 NYCRR 661.5). Because the proposal clearly contemplates a substantial modification of the Pier 94 headhouse, the DEC should have been designated as an involved agency (*see State of New York v Town of Horicon*, 46 AD3d 1287, 1289-120 [3d Dept 2007]); *Matter of Gordon v Rush*, 299 AD2d 20, 28-29 [2d Dept 2002], *aff’d* 100 NY2d 236 [2003]; *Matter of Scenic Hudson v Town of Fishkill Town Bd.*, 266 AD2d 462, 464 [2d Dept 1999], *lv denied* 94 NY2d 761 [2000]). Nor is there any indication in the record that DEC was treated as an interested agency such that their lack of participation as an involved agency could be deemed harmless or “inconsequential” (*id.*; *see Matter of King v County of Monore*, 255 AD2d 1003, 1003 [4th Dept 1998], *lv denied* 93 NY2d 801 [1999]). “To hold that permit application could only be made after the final determination . . . would violate the spirit of SEQRA to assure informed choices and to prevent needless expenditures of time and resources” (*Matter of*

*City of Schenectady v Flacke*, 100 AD2d 348, 354 [3d Dept 1984], *lv denied* 63 NY2d 603 [1984]). The Court of Appeals has repeatedly recognized “the need for strict compliance with SEQRA” (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 [2004]; *see e.g. Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348-350 [2003]; *Matter of Merson v McNally*, 90 NY2d 742, 750 [1997]). Inasmuch as “anything less will result in annulment of the determination” this court must find that the failure to designate the DEC as an involved agency warrants annulment of the negative declaration (*see Matter of Bauer v County of Tompkins*, 57 AD3d 1151, 1152 [3d Dept 2008]; *Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 151-152 [4th Dept 1992] [failure “to notify the DEC of the subject application during the lead agency designation process or before the negative declaration was issued” renders it “invalid”]). Thus, the petition is granted, the negative declaration is annulled as are the approvals granted pursuant thereto (*see Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1311 [4th Dept 2007]). Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the negative declaration issued by the Department of Small Business Services is annulled as are the approvals and resolutions issued, pursuant thereto, by the City Planning Commission and City Council; and it is further

ORDERED that the matter is remanded to the Department of Small Business Services for *de novo* consideration upon notice to the New York State Department of Environmental Conservation in accordance with this Decision, Order, and Judgment.

This constitutes the Decision, Order, and Judgment of this court.

Dated: May 10, 2010 3<sup>59</sup> pm  
New York, New York

ENTER:

*Paul H. Fenimore*  
\_\_\_\_\_  
J.S.C.

*Nancy Hudson*  
\_\_\_\_\_  
CLERK

**FILED**

MAY 21 2010

COUNTY CLERK'S OFFICE  
NEW YORK