Matter of Prospect Park E. Network v New York State Homes & Community Renewal
2014 NY Slip Op 31577(U)
June 18, 2014
Sup Ct, New York County
Docket Number: 101695/2013
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MOULTON
Justice

PART 57

PROSPECT PARK EAST
-v-
NETWORK
NY STATE HOMES & COMMUNITY RENEWAL

INDEX NO. 101695/13

MOTION DATE

MOTION SEQ. NO. 3

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the written decision dated 6/18/14

FILED
JUN 23 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

Dated: 6/18/14

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
New York County: Part 57

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In the Matter of the Application of Prospect Park East Network; Prospect Lefferts Garden Neighborhood Association; Flatbush Development Corporation; Flatbush Tenant Coalition; Suwen Cheong; Leah Margolies; Leslie Gulick; Crystal M. Harris; Brenda Edwards; Nancy J. Hoch; Derrick S. Edwards; Leo Crooks,

Petitioners,

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

-against-

Index No. 101695/2013

New York State Homes & Community Renewal; Daryl C. Towns, in his official capacity as Commissioner of the New York State Homes and Community Renewal; New York State Housing Finance Agency; The Hudson Companies, Inc.; Hudson CBD Flatbush LLC; Hudson PLG LLC; Hudson Company Ventures LLC; Hudson Catamount Flatbush LLC; and Lettire Construction Services, Inc.,

Respondents.

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Peter H. Moulton, J.S.C.

Motion sequence numbers 01 and 03 are consolidated for disposition.[1]

Petitioners in this Article 78 proceeding are community organizations and individuals based in or near the Prospect Lefferts Gardens neighborhood in Brooklyn. They seek to enjoin the

[1]Motion sequence 02 was withdrawn by petitioners.

construction of a 254 unit, mixed use, mixed income building that certain respondents wish to construct at 626 Flatbush Avenue ("the Project"), until respondent New York State Housing Finance Agency ("HFA"), which is providing financing for the Project, conducts a second environmental review. Because the Project will receive public financing from respondent, it falls within the ambit of the New York State Environmental Quality Review Act (ECL § 8-0101 et seq, hereinafter "SEQRA").

In August 2013 HFA issued a "negative declaration" pursuant to SEQRA finding that the Project would not have a significant adverse effect on the environment. Petitioners contend that HFA violated SEQRA by using the wrong standard and by conducting a superficial review of the Project's environmental impact.

Respondents contend that HFA did conduct a searching review of the Project's environmental impact. Particularly in light of the fact that the Project could be built "as of right" within relevant zoning regulations, respondents argue that the environmental impact of the Project is so slight and transitory as to not require any further analysis under SEQRA.

Petitioners seek a preliminary injunction staying any construction work on the Project, and the disbursement of any further financing by HFA to the developers of the Project, until

HFA conducts an appropriate environmental review.[2]

BACKGROUND

Respondent Hudson PLG LLC contracted to purchase the property upon which the Project is proposed to be constructed in March 2012. The various related Hudson entities named as respondents, which wear different hats with respect to the Project, shall be referred to collectively herein as "Hudson."

On January 31, 2013, Hudson filed plans with the New York City Department of Buildings to build the Project "as of right," meaning it would be in compliance with all relevant zoning regulations of the City of New York and would not be contingent on obtaining any discretionary variances or approvals. The Project also conforms to the relevant height and bulk restrictions promulgated under the Zoning Resolution.

Hudson closed on the purchase on June 6, 2013.

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[2]At oral argument petitioners made an oral application for a temporary restraining order. The court denied the oral application as petitioners failed to demonstrate any immediate and irreparable injury loss or damage. At that time, work on the Project had barely begun. While the preliminary injunction motion was sub judice, petitioners brought a second application for a temporary restraining order, which they subsequently withdrew. Thereafter, after respondents began to pour the concrete foundation at the Project, petitioners brought a third application for a temporary restraining order, which the court granted on May 30, 2014. This TRO prevents certain respondents from "taking any action relating to the pouring of any concrete foundation at the Project."

The next day, June 7, 2013, Hudson submitted an application to HFA requesting $65.5 million worth of financing in the form of tax-exempt bonds for the construction of the Project. In exchange for this financing, Hudson agreed to rent 80% of the units at market rate, while 20% of the units would be made available at affordable rates as prescribed by law. With its application, Hudson submitted part one of an Environmental Assessment Form ("EAF") which included, inter alia, a Phase I Environmental Site Assessment Report prepared by a private consultant. The remaining parts of the EAF are completed by HFA after it investigates a project.

The submission of Hudson's application for financing triggered SEQRA. Regulations passed pursuant to SEQRA provide, among other things, that when taking any action relating to "projects or physical activities, such as construction or other activities that may affect the environment by changing the use appearance or condition of any natural resource or structure that ... involve funding by an agency" the agency must determine whether the Project "may include the potential for at least one significant adverse environmental impact." (6 NYCRR §§ 617.2(b)(1), 617.7(a)(1).) If the Project include the potential for a significant environmental impact, the agency must prepare an Environmental Impact Statement ("EIS").

SEQRA divides proposed actions into three categories: Type II, Type I, and Unlisted actions. Type II actions are comprised of

certain specified actions not subject to review under SEQRA pursuant to 6 NYCRR § 617.5. It is undisputed that the Project is not a Type II action. Type I actions are subject to SEQRA, carry with them a presumption of adverse environmental impact, and may require certain modes of analysis. The final category, Unlisted actions, falls outside the Type I and Type II categories, and requires a less searching scrutiny under SEQRA than Type I actions.

HFA contends that it completes a full EAF, and conducts the same analysis of a project's environmental effects, whether it categorizes the project as Type I or Unlisted. As contemplated by SEQRA regulations, HFA has modified its EAF to require the evaluation of potential environmental consequences in ninetten discrete areas for concern. HFA's EAF also allows for determining whether any other areas of concern might require further analysis.

HFA's analysis into the potential environmental effects of the Project at issue in this proceeding is described in the affidavit of Leonard Sedney, HFA's Director of Environmental Services and its SEQRA Officer. Sedney states that he visited the site, reviewed all materials submitted by Hudson and its environmental consultants and considered the zoning regulations that apply in the neighborhood in question. As noted above, the Project could be built "as of right" as it conforms with all applicable zoning regulations. Sedney states that this fact is important as it carries with it the presumption that the Project fits within the

urban planning scheme desired by the City, and it will not be out of step with the character or "growth objectives" of the surrounding neighborhood.

Sedney filled out the complete EAF, answering the questions contained on the form concerning the range of known or potential environmental impacts that may result from the proposed action. He identified potential impacts with respect to three of the nineteen questions, but ultimately concluded the these impacts were small. With respect to the remaining sixteen areas set forth in part two of HFA's EAF Sedney determined that those areas did not present any reasonable likelihood of any adverse environmental impacts.

Sedney concluded that the Project would not have any significant adverse environmental impacts. He prepared a Negative Declaration. HFA's board approved the Negative Declaration at a meeting held on September 12, 2013. The Negative Declaration ends HFA's inquiry under SEQRA. At the same meeting, the board authorized the issuance of $72,000,000 in bonds. The bond issuance subsequently received further necessary approvals. HFA and Hudson thereupon entered into a formal financing agreement whereby 20% of the apartments in the project would be available at affordable rents.

Petitioners subsequently brought this Article 78 proceeding. Petitioners include individuals that live in the Prospect Lefferts Gardens neighborhood immediately adjacent to the project.

Petitioners also include four community groups whose missions vary in some respects, but who have in common the desire to preserve the neighborhood's affordable housing, mixed socio-economic and racial demographics, and existing built environment and "character." The Landmarks Preservation Commission designated Prospect Lefferts Garden as an historic district in 1979. The name Lefferts is an old one in the history of Brooklyn. The present neighborhood was developed by James Lefferts in at the turn of the last century on farmland owned by his family since the seventeenth century. Lefferts created the Lefferts Manor Association in 1919 to enforce various rules concerning the nature of the buildings in the area: single-family residential, low-rise, and set back from the street. Most of the original buildings were built in a neo-Renaissance style, and many of these still exist in essentially their original form.[3]

DISCUSSION

Petitioners contend that the financing of the Project, and further construction on the Project, should be preliminarily enjoined until HFA conducts an environmental review that comports

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[3] See Landmarks Preservation Commission for New York City, Prospect Lefferts Gardens Historic District Designation Report, 1979 at http://www.nyc.gov.html/lpc/downloads/pdf/reports/PROSPECT LEFFERTS GARDENS HISTORIC DISTRICT.pdf; see also Diamonstein, The Landmarks of New York (1988) at 401.

with SEQRA.

In order to obtain a preliminary injunction, it is well-established that the movant must demonstrate a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of equities in movant's favor. (Levkoff v Soho Grand-West Broadway, Inc., 115 AD3d 536.)

Respondents first argue that petitioners lack standing, and therefore cannot show a likelihood of success on the merits. In order to establish standing to sue in land use matters, petitioners must show that they would suffer direct harm, injury that is in some way different from that of the public at large. (Society of Plastics Indus. Inc. v County of Suffolk, 77 NY2d 761, 774 [1991].) The interest must also fall within the zone of interests protected by the statute invoked. (Id at 773.) Organizational petitioners must demonstrate 1) that more than one of its members would have standing to sue, 2) its asserted interests in the instant proceeding are germane to its purpose, and 3) neither the claim nor the relief sought requires the participation of the individual members. (Id at 7751; see Long Island Pine Barrens Society, Inc. v Cent. Pine Barrens Joint Planning & Policy Comm'n, 113 AD3d 853 [Second Dep't 2014].)

There is a serious question as to whether petitioners have standing to bring this proceeding. The injuries that they allege arise from the height and bulk of the building, and from the

potential that its market rate apartments (albeit 80% of the total number of units) will change the demographic profile of the neighborhood via gentrification.

Because the Project could be built "as of right" there is no nexus between these injuries and HFA's partial funding of the building. As noted, above the only reason that SEQRA is applicable to this project is that the Hudson respondents sought financing from the agency. In Sutherland v New York City Housing Dev. Corp (61 AD3d 479) the First Department held that petitioners did not have standing:

> To the extent challenge HDC's decision to provide tax-exempt funds allowing 20% of the apartment units in the building to be designated as affordable housing for low income tenants, Supreme Court correctly concluded that petitioners lack standing. The unrefuted evidence shows that the building's structure would have been the same without HDC's funding, the only difference being that without such funding, all of the apartment units would rent at market rates. Accordingly, petitioners fail to establish any nexus between the view obstruction injury they allege and HDC's funding of the project.

(61 AD3d at 480 [cites omitted].)

In addition to this serious question of petitioners' standing, the record before the court does not demonstrate that petitioners have a likelihood of success on their claims.

Petitioners argue that HFA made an error of law in deciding that the Project was an Unlisted action under SEQRA. Petitioners state that the Project qualified as a Type I action for two

reasons. First, petitioners argue, the Project is "wholly or partially within, or substantially contiguous to, [a] historic building, structure, facility, site or district or prehistoric site that this listed on the National Register of Historic Places... ." (6 NYCRR § 617.4(b)(9).) According to petitioners, the Project is located approximately 100 feet from the edge of the Prospect Lefferts Garden Historic District, and approximately 300 feet from Prospect Park, both of which are listed on the National Register of Historic Places. This proximity, petitioners argue, is sufficient to make the Project a Type I action.

Petitioners' second argument as to why the Project is a Type I action is that it will be a "structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height." (NYCRR § 617.4(b)(7).) Petitioners argue that this section only makes sense if it means any zoning regulation restricting height. There is currently no restriction the absolute height of a building on the Project site.

Petitioners contend that under the two cited regulations, the Project is a Type I action which, in contrast to an Unlisted action, carries with it the presumption of a negative environmental impact. According to petitioners, respondents' analysis of the project was thus fatally flawed, because it was not carried out using this presumption in analyzing the environmental effects of the Project.

Petitioners contend that, apart from this failure to conduct the analysis with the presumption of environmental impact, HFA's analysis failed to account for eight environmental concerns. These are summarized below.

First, petitioners contend that HFA failed to account for changes to population concentration and distribution, including residential and commercial displacement, caused by the Project. According to petitioners, the Project is the thin edge of the wedge of gentrification, and will reduce the socio-economic and racial diversity of the neighborhood.

Second, petitioners contend that HFA failed to account for the impairment of the character and vista from Prospect Park. According to petitioners, the building will "stick out like a sore thumb" above the Prospect Park Horizon and throw shadow into the Park.

Third, petitioners contend that the Project conflicts with the neighborhood's efforts to obtain "contextual" zoning. At the moment, petitioners allege, Prospect Lefferts Gardens is the only neighborhood bordering on Prospect Park that has not been contextually zoned.

Fourth, petitioners aver that the Project will tower over the neighborhood, irreversibly damaging its low-rise character.

Fifth, petitioners contend that the Project will create a strain on public services by bringing approximately 345 new

residents to the site.

Sixth, petitioners contend that the new residents will increase vehicular and pedestrian traffic and strain parking resources.

Seventh, petitioners contend that the construction of the Project will substantially increase noise in the neighborhood. According to petitioners, the additional residents will permanently add to the noise in the neighborhood. Petitioners do not state how the marginal additional noise visited upon a busy City neighborhood by approximately 345 people could be measured.

Eighth, the shade from the building may affect the use of backyards in the Prospect Lefferts Gardens neighborhood.

Respondents argue that treating the Project as an Unlisted action was correct. Moreover, even if HFA had found the Project to be a Type I action, its review would have been the same. Respondents argue that the review was sufficiently complete to satisfy SEQRA.

Without deciding the issue, the court finds that petitioners have stated at least a colorable argument that the Project is a Type I action because it is substantially contiguous to a place registered in the National Register of Historic Places, namely the Prospect Lefferts Garden neighborhood. The court finds that the Project is not substantially contiguous to Prospect Park. The building is 300 feet away from the Park, and that gulf includes

busy Ocean Avenue and an open air submerged subway line. This cannot be said to be substantially contiguous in a busy urban environment. However, the fact that the Project is 100 feet away from Prospect Lefferts Gardens gives rise to an argument of substantial contiguity. (See In Re Lorberbaum v Pearl, 182 AD2d 897.)

It is clear from the negative declaration and the EAF, as amplified by Sedney's affidavit, that HFA did grapple with the eight concerns listed by petitioners. While the negative declaration is terse, it does sift the potential environmental impacts of the Project. Similarly short negative declarations have been routinely upheld. (See In re Reed v Village of Philmont Planning Bd., 34 AD3d 1034; In re Chu v New York State Urban Dev. Corp., 13 Misc3d 1229[a], aff'd 47 AD3d 542.) Additionally, "an agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant." (In Re Save the Pine Bush, Inc. v Common Council of City of Albany, 13 NY3d 297.) Petitioners' argument that the HFA's analysis was superficial is rebutted by Sedney's affidavit, which sets forth the steps he took to measure the Project's environmental impact. The record before the court on this motion indicates that HFA took the requisite "hard look" under SEQRA. This is true even if it did not look at the Project via the prism of a presumption of negative

environmental impact. The agency carefully weighed the environmental consequences of the project and found them to be slight. (See In Re Friends of Port Chester Parks v Logan, 305 AD2d 676 [2d Dep't 2003] [negative declaration after agency's searching review sufficient even though agency incorrectly found action to be Unlisted].)

Here, the baseline condition is that the Hudson respondents could build the Project as of right. (6 NYCRR § 617.7(a); In Re Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v Council of the City of New York, 214 AD2d 335.) Accordingly, the impact of HFA's involvement in the project is slight. In fact, HFA's involvement in the project might partially address one of petitioners' concerns in that it caused 20% of the project's units to be affordable. In HFA's absence, 100% of the building's units could be market rate.

As the petitioners have not demonstrated a likelihood of success on the merits, their motion for a preliminary injunction is denied.

CONCLUSION

For the foregoing reasons, petitioners' motion for a preliminary injunction is denied. The Temporary Restraining Order is vacated. Respondents shall answer the petition, or make a motion, per the CPLR. This constitutes the decision and order of the court.

Date: June 18, 2014

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE