Matter of Residents for Reasonable Development v City of New York
2014 NY Slip Op 31973(U)
July 28, 2014
Supreme Court, New York County
Docket Number: 101624/13
Judge: Jr., Alexander W. Hunter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 7/30/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101624/2013
RESIDENTS FOR REASONABLE
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART 33

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ | No(s). ____________

Answering Affidavits — Exhibits ____________ | No(s). ____________

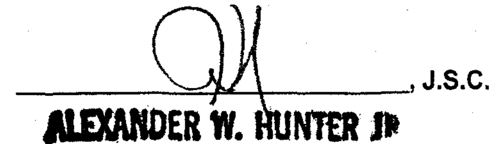
Replying Affidavits ____________ | No(s). ____________

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the memorandum order and judgment annexed hereto.

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

Dated: 7/28/14



____________, J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: .... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

---X

In the Matter of the Application of

RESIDENTS FOR REASONABLE DEVELOPMENT, by its Chairman Robert Jackman, THE HISTORIC NEIGHBORHOOD ENHANCEMENT ALLIANCE d/b/a Defenders of the Historic Upper East Side, ROBERT JACKMAN, individually, PATRICIA MULCAHY, ANDREW BELLO, JR., MINA GREENSTEIN, JERROLD and ELLEN HIRSCHBERG, GEORGE ALEXIADES and GARI-SMITH ALEXIADES, NANCY TERRELL GRACE, SARAH CHU and NEAL BIANGIARDO, ELIZABETH ASBY And EDWARD HARTZOG,

Index No.: 101624/13

Order and Judgment

Petitioners,

-against-

THE CITY OF NEW YORK, CITY COUNCIL OF THE CITY OF NEW YORK, CITY PLANNING COMMISSION OF NEW YORK CITY, NYC DEPARTMENT OF ADMINISTRATIVE SERVICES, BOROUGH OF MANHATTAN BOROUGH BOARD, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, THE CITY UNIVERSITY OF NEW YORK and CITY UNIVERSITY CONSTRUCTION FUND,

Respondents.

---X

HON. ALEXANDER W. HUNTER, JR.

Two separate applications were filed in this matter under motion sequences 001 and 002. Both applications will be decided herein.

The application made by petition for a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), as well as an action for a declaratory judgment pursuant to CPLR § 3001 and for injunctive relief pursuant to CPLR § 6301, against respondents, the City of New York (the "City"), the City Council of the City of New York ("City Council"), the City Planning Commission of New York City ("CPC"), the NYC Department of Administrative Services, the Borough of Manhattan Borough Board (the "Borough Board"), the New York City Economic Development Corporation (the "EDC"), Memorial Hospital for Cancer and Allied

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

Diseases ("MSK"),[1] the City University of New York ("CUNY"), and the City University Construction Fund[2] (collectively as "MSK-CUNY"), is denied.

The motion by respondents, Memorial Hospital for Cancer and Allied Diseases, The City University of New York, and the City University Construction Fund seeking an order dismissing the petition is granted the proceeding is dismissed.

The petition arises out of the City's approvals of an 800,000 square foot development project (the "Project") and the disposition of City property to support the Project. The Project would be located adjacent to the Franklin D. Roosevelt ("FDR") Drive between 73rd and 74th Streets on Manhattan's East Side (the "Project Site"). It consists of two separate abutting buildings - one approximately 450 feet high which would serve as an ambulatory facility for MSK; the other a 350 high that would house nursing school and other facilities for CUNY. Previously, the Project Site had been occupied by a New York City sanitation garage, which the City demolished expecting to rebuild it in place. In 2011, the City decided to sell the Project Site citing a lack of funds needed to construct a new garage facility and, in May of 2011, the EDC[3] issued a Request For Proposals ("RFP") soliciting proposals for "the expansion or creation of a health care, education, or scientific facility" that would finance and build a new sanitation garage "at minimal or no cost to the City." (**MSK-CUNY's Verified Answer ¶ 26**).

By July 28, 2011, the EDC received two competitive proposals - one from the Hospital for Special Surgery to purchase the Project site for $144 million and redevelop it into a hospital and the other jointly from MSK and CUNY to purchase the site for $160 million. Neither proposal offered to co-develop the new sanitation garage on the Project Site and only MSK-CUNY proposed an alternative site for the sanitation garage.[4] (**Id. at ¶ 33**). Ultimately, the EDC selected the MSK-CUNY proposal and, in 2012, the City entered into a Contract of Sale (the "contract") to sell the Project Site, subject to required zoning amendments and other conditions.

The Project has been challenged at every administrative level of review. On April 30, 2013, by a vote of 11 to 4, a "Task Force" established by Community Board 8 (the "Community Board") recommended disapproval of the Project.[5] However, despite the recommendation against approval, on May 8, 2013, the Community Board, by vote of 24 to 17, approved the disposition of the Project Site to MSK-CUNY and each of the requested land use actions. By a separate vote of 23 to 20, the Community Board also approved MSK-CUNY's proposed zoning

[1] Memorial Hospital for Cancer and Allied Diseases is a nonprofit hospital and the clinical arm of Memorial Sloan Kettering Cancer Center, a research and educational facility.
[2] A CUNY affiliate and a New York public benefit corporation responsible for acquiring and developing facilities necessary for CUNY's academic programs.
[3] EDC is a not-for-profit corporation with authority to sell property on behalf of the City.
[4] CUNY proposed to "revest" in the City, as a site for the garage, a property at 425 East 25th Street in Manhattan currently leased to CUNY as part of its Hunter campus (the "Hunter Site"). (See **MSK-CUNY's Verified Answer ¶ 49**).
[5] **Mulcahy Aff. ¶ 6, Pet. Ex. B.**

[* 4]

text amendment.[6] The CPC held a public hearing to discuss the Project on July 10, 2013.[7] On August 21, 2013, the CPC approved the proposed zoning actions concluding that "since Community District 8 suffers from a lack of public open spaces but contains parkland that requires critical improvements, the proposed text amendment permits the community to obtain high-quality, significant public parks when funding is not otherwise available for their design or construction." (**Id. ¶ 128**). That same day, the CPC also approved the Final Environmental Impact Statement ("FEIS").

On September 16, 2013, the Subcommittee on Zoning and Franchises of the City Council (the "Zoning Subcommittee") and Land Use Committee held a public hearing to further discuss the Project.[8] The vote was deferred in part to address issues that were raised at the hearing. On October 3, 2013, the Zoning Subcommittee unanimously approved the Project by a vote of 7-0 with one council member recusing herself. That same day, the Land Use Committee held a public hearing that ended in a unanimous 13-0 vote in favor of the Project. On October 9, 2013, based in part on the record developed by the subcommittees, the City Council voted 45-1 to approve the project citing the Project as "one which minimizes or avoids adverse environmental impacts to the maximum extent practicable[.]" (**Id. ¶ 149**). On November 21, 2013, the Borough Board approved the Project by a vote of 6-3 noting that "as recommended by the Community Board, the Borough President and other elected officials, MSK-CUNY has agreed to provide funds for the Department of Transportation to complete a comprehensive traffic study of York Avenue between 59th and 92nd Streets." (**Id. ¶ 151**). On December 18, 2013, the Mayor of the City of New York provided his authorization approving the sale of the Project Site to MSK-CUNY.

The petitioners filed the instant action on December 6, 2013, having opposed the Project since its introduction to the public. They have been active in their opposition of the MSK-CUNY proposal at every governmental meeting held throughout the approval process. Their ranks include Residents for Reasonable Development ("RRD"), a newly-formed association of East Side residents that came together to oppose the Project,[9] the Historic Neighborhood Enhancement Alliance, a 501(c)(3) not-for-profit corporation dedicated to "protecting the historic and residential fabric of the Upper East Side",[10] and thirteen (13) individual residents. The petitioners contend that the approvals given by the City, including the zoning amendments and Borough Board approval of the sale of the Project Site, violated the State Environmental Quality Review Act ("SEQRA"), constituted illegal "spot zoning," violated the laws applicable to disposition of City property and were otherwise illegal under the laws of the State of New York and the City.

---

[6] The Community Board imposed the following two conditions to its approval (both of which were incorporated): (i) modifying the text amendment so that a park designated for improvement was within the Community District 8, and (ii) requiring a special permit for the 20% floor area bonus, so as to subject the process to Community Board review, a full environmental review, and full Uniform Land Use Review Procedure ("ULURP") public hearings.

[7] During the hearing, 40 people testified, with 25 speaking in favor and 15 in opposition of the Project.

[8] Of the 33 people who testified during the hearing, 17 were in favor of the Project and 16 were in opposition.

[9] RRD is an unincorporated association of Upper East Side residents formed to "oppose the expansion of medical institutions into the Yorkville community north of East 72nd Street." (**Verified Petition ¶ 5**).

[10] The Historic Neighborhood Enhancement Alliance d/b/a Defenders of the Historic Upper East Side. (**See Pet. Memorandum of Law, p. 3**).

This court will first consider standing before moving to the merits of the action.

In **Matter of Sun-Brite Car Wash v. Bd. Of Zoning & Appeals of Town of N. Hempstead**, the Court of Appeals noted that "[s]tanding principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." **69 N.Y.2d 406, 413 (1987)**. The Court went on to state that "[t]he status of neighbor does not, however, automatically provide the entitlement, or admission ticket, to judicial review in every instance." **Id. at 414**. Petitioners are still required to establish that their interests are arguably within the "zone of interests" to be protected by the statute. **See Id.** Petitioners Robert Jackman, Nancy Terrell Grace, Sarah Chu and Neal Biangiardo, Elizabeth Ashby and Edward Hartzog have failed in this respect. Their generalized allegations of increased traffic and a disruption to their community are insufficient to confer such standing. They have not demonstrated any alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA. **See Matter of Barrett v. Dutchess County Legislature, 38 A.D.3d 651, 654 (2d Dept. 2007)**.

Addressing the SEQRA contentions, the First Department has stated that "judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion." **Save Audubon Coal. V. City of New York, 180 A.D.2d 348, 355 (1st Dept. 1992) (internal citations omitted)**. "In assessing an agency's compliance with the substantive mandates of the statute, the courts must review the record to determine 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." **Akpan v. Koch, 75 N.Y.2d 561, 570 (1990)**. The assessment of an agency's compliance with the substantive requirements of the statute is governed by a "rule of reason." **Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986).** The extent to which particular environmental factors are to be considered varies with the circumstances and the nature of the particular proposals, **id.**, and "not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility." **Matter of Neville v. Koch, 79 N.Y.2d 416 (1992)**. "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" **Akpan, supra, quoting Matter of Jackson, supra at 416**.

Turning now to the FEIS, the petitioners contend that it fails to comply with SEQRA. Specifically, they allege that the FEIS was required to address the impact of the replacement garage to be built at the Hunter Site, as well as the impacts of the development at the Project Site. This court finds the two projects to be independent of one another noting that contractual contingencies, standing alone, do not create a geographic or environmental interrelationship between two projects. **See Friends of Stanford Home v. Town of Niskayuna, 50 A.D.3d 1289, 1291 (3d Dept. 2008)**. The evidence has established that the Hunter Site is located fifty (50) blocks from the Project Site, the former involving the potential construction of a sanitation garage and the latter a twin complex housing an educational institution and hospital facility. Where, as here, projects are independent of each other and are not part of an integrated or

cumulative development plan, the projects may be reviewed separately and are not subject to a claim of improper segmentation. **Matter of Forman v. Trustees of State Univ. of New York, 303 A.D.2d 1019, 1020 (4th Dept. 2003).**

The remainder of the petitioners' allegation regarding SEQRA are similarly unavailing. The record demonstrates that the FEIS considered two alternatives to the Project: the "No-Action Alternative" and a "No Unmitigated Significant Adverse Impact Alternative." (**See O'Brien Aff. ¶¶ 37-39**). The alternatives section of an FEIS need not identify or discuss every conceivable alternative, including the particular alternative propounded by the [petitioners], and need not be exhaustive, particularly where the various options lie along a continuum of possibilities." **Cnty. of Orange v. Vil. Of Kiryas Joel, 44 A.D.3d 765, 769 (2d Dept. 2007).** This court has not found merit in any of the remaining arguments with respect to SEQRA.

Next, petitioners' claim that this case involves "a clear cash *quid pro quo* – dollars to the City buys zoning rights."[11] They cite **Mun. Art Soc. of New York v. City of New York, 137 Misc.2d 832 (N.Y. Sup. Ct. 1987),** in support of their proposition. However, in that case, the court specifically noted that the funds were to "be paid to the City to be employed for purposes *other than local improvements*" and went on to say "the grant of the right to increase the bulk of a building may not be the payment of additional cash into the City's coffers *for citywide use*." **Id. at 838. (emphasis added).** Here, the contract provides that, if the text amendment is approved, then MSK-CUNY will pay $11 million and any additional amounts that the City Council may require to the Department of Parks and Recreation, which will perform the improvements.[12] Furthermore, the fourth cause of action alleging that the text amendment exceeded the City's authority is untenable. The cases cited in petitioners' Memorandum of Law apply to government actions taken against private landowners. Accordingly, the petitioners do not have legal grounds to challenge the City's actions on this basis.

This court finds the remaining claims of the petitioners to be without merit. The zoning determinations of legislative bodies are entitled to a strong presumption of validity. **See Rotterdam Ventures, Inc. v. Town Bd. Of the Town of Rotterdam, 90 A.D.3d 1360, 1361-1362 (3d Dept. 2011) (citing Asian Ams. For Equality v. Koch, 72 N.Y.2d 121, 131 [1988]).** Such determinations are beyond interference from the courts unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon he who asserts it. **Robert E. Kurzius, Inc. v. Incorporated Vil. Of Upper Brookville, 51 N.Y.2d 338, 344 (1980).**

The record before this court establishes that the various City agencies approved the zoning map amendment, special permits and text amendment and, at all times, were apprised of the concerns and opposition surrounding the Project. Any allegations made by petitioners with regard to the administrative process are similarly without merit. Mere conclusions or unsubstantiated allegations will not satisfy their burden on this application. **See Janvier v. Urban Mgmt., Inc., 258 A.D.2d 359 (1st Dept. 1999).**

---

[11] **Pet. Memorandum of Law, p. 35.**

[12] **See Respondents' Tab 9 at § 4(e)(6), Tab 42 at C 130216 ZSM, pg. 30.**

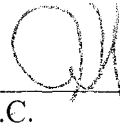
[* 7]

Accordingly, it is hereby

ADJUDGED that the application of petitioners for an order pursuant to CPLR Article 78, as well as an action for declaratory judgment pursuant to CPLR § 3001 and for injunctive relief pursuant to CPLR § 6301, is denied. The motion by respondents for an order dismissing the petition is granted and the proceeding is dismissed without costs and disbursements to either party.

Dated: July 28, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR.

UNFILED JUDGMENT

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