Lower E. Side Organized Neighbors v New York City Planning Commn.
2020 NY Slip Op 30508(U)
February 11, 2020
Supreme Court, New York County
Docket Number: 153024/2019
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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LOWER EAST SIDE ORGANIZED NEIGHBORS, CHINESE STAFF & WORKERS ASSOCIATION, YOUTH AGAINST DISPLACEMENT, NATIONAL MOBILIZATION AGAINST SWEATSHOPS, CLARA AMATLEON, ELVIA FERNANDEZ, ANOTONIO QUEY LIN, DAVID NIEVES, AUDREY WARD,

Petitioners,

- v -

THE NEW YORK CITY PLANNING COMMISSION, THE DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, MARISA LAGO, DIRECTOR DEPARTMENT OF CITY PLANNING AND CHAIR OF CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, TWO BRIDGES ASSOCIATES, LP, LEI SUB LLC, CHERRY STREET OWNER LLC,

Respondents.

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INDEX NO. 153024/2019

MOTION DATE 03/22/2019, 05/29/2019

MOTION SEQ. NO. 001, 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion for CPLR ARTICLE 78 RELIEF.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to DISMISS.

Upon the foregoing documents, petitioners are hereby granted CPLR Article 78 relief, injunctive relief, and summary judgment, and respondents' cross-motion to dismiss is denied.

Brief Background

In this CPLR special proceeding, petitioners are comprised of local community organizations, non-profit groups, activists, and residents of the "Two Bridges" neighborhood located in Manhattan's Lower East Side.[1] Petitioners seek to annul the determination of respondent the New York City Planning Commission (the "Planning Commission") that approved the proposed

[1] The "Two Bridges" neighborhood is so-called because of its proximity to the Brooklyn (opened 1883) and Manhattan (opened 1909) Bridges.

plans of Intervenor-Respondents Two Bridges Associates, LP, LE1 Sub, LLC, and Cherry Street Owner, LLC (collectively hereinafter, the "Developers") to erect several tall, mostly residential skyscrapers on their property, which is located in the Two Bridges Large Scale Residential Development ("Two Bridges LSRD"). The proposed projects, of which there are three, have separate developers, approvals, and financing; however, since all three projects are located within the Two Bridges LSRD and would be developed during the same construction period, the Planning Commission considered them collectively when evaluating the projects' potential environmental impact. (Abinader Affidavit, ¶ 8, NYSCEF Doc No. 137.)

The proposed projects consist of three buildings with four towers: a stand-alone 80-story tower; a 70-story tower and 63-story tower sharing a base; and a stand-alone 63-story tower. They would add approximately 2.5 million square feet of new space and 2,775 new dwelling units (to the existing 1,168 units) in the Two Bridges LSRD.

Petitioners seek to annul the Planning Commission's approvals of the Developers' plans on the grounds that: (1) one of the approvals violates a deed restriction requiring some of the property to be used in perpetuity solely as housing for low-income elderly and disabled persons; (2) the approvals violate new policy proposals involving inter-building voids; (3) the approvals violate the New York City Zoning Resolution ("ZR") that controls LSRDs because the Planning Commission failed to make findings as required by ZR § 78-043; and (4) the approvals violate the City Environmental Quality Review ("CEQR")[2] process by disregarding the proposals' adverse impacts.

The City respondents and the intervening Developers cross-move, seeking to dismiss the petition on the ground that petitioners fail to state a cause of action upon which relief can be granted.

The Zoning Resolution

In or about May of 1972, the Planning Commission and the Board of Estimate (the legislative body predecessor to the City Council) approved an "Application for Large-Scale Residential Development Within Two Bridges Urban Renewal Area on Property Bounded by Pike Slip, Cherry Street, Montgomery Street and South Street, Manhattan."[3] Pursuant to the ZR, a special permit and special authorizations were necessarily sought, and issued, in order to approve the Two Bridges LSRD.

ZR § 78-01, which regulates LSRDs generally, states, in pertinent part:

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[2] The City Environmental Quality Review is the local counterpart of the New York State Environmental Quality Review Act ("SEQRA"). Compliance with CEQR is overseen by the Environmental Assessment and Review Division of the Planning Commission.

[3] In 1961, the Planning Commission designated the area bounded by Cherry, Montgomery, and South Streets and Pike Slip as the Two Bridges Urban Renewal Area ("Two Bridges URA"). On May 11, 1967, the Planning Commission designated the area bounded by Cherry, Montgomery, and South Streets and Market Slip, the latter of which is slightly west of Pike Slip, and just the other side of the Manhattan Bridge, as comprising the Two Bridges Urban Renewal Plan ("Two Bridges URP"). On June 9, 1967, the New York City Board of Estimate ("the BOE"), predecessor to the City Council, approved the Two Bridges URP. The Two Bridges URP expired in 2007 by its own terms, after a 40-year life.

> For such [LSRD] developments, the regulations of this Chapter are designed to allow greater flexibility for the purpose of securing better site planning for development of vacant land and to provide incentives toward that end while safeguarding the present or future use and development of surrounding areas and, specifically, to achieve more efficient use of increasingly scarce land within the framework of the overall bulk controls, to enable open space in large-scale residential developments to be arranged in such a way as best to serve active and passive recreation needs of the residents, to protect and preserve scenic assets and natural features such as trees, streams and topographic features, to foster a more stable community by providing for a population of balanced family sizes, to encourage harmonious designs incorporating a variety of building types and variations in the siting of buildings, and thus to promote and protect public health, safety and general welfare.

ZR § 78-043 sets forth a condition precedent for the Planning Commission when granting approvals to modifications to an LSRD:

> The requirements for findings as set forth in this Chapter shall constitute a condition precedent to the grant of any such modification by special permit or otherwise. The decision or determination of the City Planning Commission shall set forth each required finding in each grant of modifications for a large-scale residential development. Each finding shall be supported by substantial evidence or data considered by the Commission in reaching its final decision.

ZR § 78-313 details the findings that the Planning Commission must make before granting an approval for any modifications to an LSRD (as referenced in ZR § 78-043):

> As a condition precedent to the granting of authorizations under the provisions of Section 78-311 (Authorizations by the City Planning Commission) or a special permit under the provisions of Section 78-312 (Special permits by the City Planning Commission), the Commission shall make the following findings:
>
> (a) that such modifications will aid in achieving the general purposes and intent of this Chapter as set forth in Section 78-01 (General Purposes);
> (b) that such distribution of floor area, dwelling units, rooming units, open spaces, locations of buildings, or location of primary business entrances, show windows or signs will permit better site planning and will thus benefit both the residents of

the large-scale residential development and the City as a whole;

(c) that such distribution or location will not unduly increase the bulk of buildings, density of population, or intensity of use in any block, to the determinant of the occupants of buildings in the block or nearby blocks;

(d) that such distribution or location will not affect adversely any other zoning lots outside the large-scale residential development by restricting access to light and air or by creating traffic congestion;

(e) where portions of the total required open space are pooled in common open space areas or common parking areas, that such common areas will, by location, size, shape and other physical characteristics, and by their relationship to surrounding development and the circulation system, permit realization of the full community service of advantages for which such pooled areas are designed;

(f) where one or more zoning lots in the large-scale residential development do not abut mapped streets, that suitable private access to mapped streets will be provided conforming to standards which will ensure adequate circulation and make adequate provision for public services; and

(g) the modification of height and setback will not impair the essential character of the surrounding area and will not have adverse effects upon the access to light, air and privacy of adjacent properties.

Petitioners assert that the Planning Commission failed to make the necessary findings that ZR § 78-043 requires, and that because ZR § 78-043 instructs that such findings are a condition precedent to granting a modification to an LSRD, the Planning Commission's approvals of the proposed projects must be nullified. Petitioners assert that, were this Court to reach any other result, it would be rendering the words "or otherwise" in the phrase "by special permit or otherwise" meaningless and would be ignoring a pillar of statutory interpretation. Rocovich v Consol. Edison Co., 78 NY2d 509 (1991) (holding that "[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided").

The City respondents assert that ZR § 78-043 does not apply if the proposed modification itself does not require a special permit or authorization. The City respondents characterize petitioners' ZR § 78-043 argument as "based on a distortion of the plain language and structure of the Zoning Resolution, as well as the history of the Two Bridges LSRD." (NYSCEF Doc. No. 49, pg. 2.) However, this Court finds that rather than distorting the plain language, petitioners are appropriately relying on it.

The City respondents assert that "Section 78-043 is not a substantive provision that defines an action to be taken by the [Planning Commission]." (NYSCEF Doc. No. 49, pg. 12.) This Court

disagrees. The plain language of ZR § 78-043 mandates the findings that the Planning Commission must make in approving *any modification*, by special permit or otherwise, to an LSRD; it further mandates that in so doing the "Planning Commission shall set forth each required finding in each grant of modifications for a large-scale residential development." In this Court's view, the plain language of this section is both substantive and clearly defines an action(s) to be undertaken by the Planning Commission.

"Although it is true that an agency's interpretation of its own regulation generally is entitled to deference, courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language." Visiting Nurse Serv. of New York Home Care v New York State Dep't of Health, 5 NY3d 499, 506 (2005). If this Court were to endorse the City respondents' interpretation, it would be rendering the language "by special permit or otherwise" completely meaningless. Deference to the Planning Commission's interpretation is not warranted under these circumstances. McLiesh v Town of Western, 68 AD3d 1675, 1676-77 (4th Dep't 2009) (holding "[i]t is well settled that a zoning ordinance must be interpreted to give effect to all of its provisions, and an interpretation that nullifies any provision of an ordinance is irrational and unreasonable").

Accordingly, the approvals of the proposed projects are nullified on the independent grounds set forth herein, and the Planning Commission is directed to make findings pursuant to ZR § 78-313 as a condition precedent to granting approvals to any[4] modifications to the Two Bridges LSRD.

The Deed Restriction

Petitioners assert that one of the three approved proposals, Parcel 4A/4B, violates a deed restriction requiring that the property be used "in perpetuity" only as housing for "elderly and handicapped persons of low income, as defined in federal law." (NYSCEF Doc. No. 13.)

Petitioners assert that the Planning Commission's approval of Parcel 4A/4B failed to follow the necessary requirements under Administrative Code § 3-119(a)-(c) by failing to obtain the approval of the Mayor or Deputy Mayor before the deed restriction could be modified. Petitioners also assert that, pursuant to New York City Executive Order No. 17, any modification of the deed requires: publication; written notice to the Borough President, local Council Member, and the Community Board; and that a public hearing be held within the Community District in which the subject property is located so that a determination may be made that removing the deed "is in the best interest of the City."

The City respondents assert that petitioners' deed argument is not yet ripe for review, and that, in any event, the petitioners' do not have standing to challenge the approval based on the deed restriction as petitioners were not parties to the agreement creating it.

This Court finds the City respondents' standing argument problematic, as an argument can certainly be made that petitioners are third-party beneficiaries of the deed. Nature Conservancy v Congel, 253 AD2d 248 (4th Dep't 1999) (finding that third-party beneficiary neighbor may

[4] On July 31, 2019, in the related matter of The Council of the City of New York v The Department of City Planning, Index No. 452302/18, this Court nullified the Planning Commissions approvals on separate grounds and ordered that the proposed projects must undergo the New York City Uniform Land Review Process ("ULURP").

enforce restrictive covenant "despite the absence of any privity of estate between the grantor and the neighbor").

However, this Court need not reach the standing issue, as the City respondents have correctly asserted that the issue of the deed restriction is not yet ripe for review, as the Planning Commission did not purport to modify, lift, or consider the alleged deed restriction on Parcel 4A/4B in granting its approval. Consequently, petitioners must wait for the deed restriction to be formally modified by a City agency before asserting their challenge.

The Proposed Policy Changes on Inter-Building Voids

Petitioners assert that the proposed projects would violate new proposed rules put forth, but not yet implemented, by the Planning Commission, the Department of Buildings ("DOB") and the Fire Department of the City of New York ("FDNY") concerning inter-building voids. Petitioners note that similar proposed developments, with inter-building voids even smaller (and presumably, more problematic) than the ones at issue here have been flagged for safety concerns by FDNY and DOB. Petitioners assert that the proposed projects must be re-evaluated in light of these new proposed policies by various City agencies.

Petitioners' argument is unpersuasive. "The courts do not make mere hypothetical adjudications, where there is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events." Prashker v U.S. Guarantee Co., 1 NY2d 584, 592 (1956). As petitioners' arguments challenging the proposed projects rest on purely hypothetical future events (i.e. adoption and implementation of the proposed policies on inter-building voids), petitioners' arguments are premature, and the appropriate course would be to await adoption of the proposals before challenging their effect on the proposed projects in court.

CEQR Process

Under SEQRA and CEQR, State and City agencies are required to assess the potential for significant adverse environmental impacts created by discretionary actions before undertaking, funding, or approving such actions, unless they fall within certain enumerated statutory or regulatory exemptions to the requirements for review. (Abinader Affidavit, ¶11, NYSCEF Doc No. 137.) In New York City, the Environmental Assessment and Review Division at the Planning Commission performs this task.

In performing the environmental review, the Planning Commission utilized the "2014 CEQR Technical Manual," which is a set of guidelines the agency uses to ensure consistency in the City's review processes. The CEQR Technical Manual recommends methodologies for determining the potential significance of 19 different categories of impact. Within those categories, the manual typically provides screening thresholds below which an impact is known not to occur, or considered to be so insignificant such that further analysis is not warranted.

Petitioners' primary assertion as it pertains to CEQR focuses on the issue of indirect residential displacement. The CEQR Technical Manual states, in pertinent part:

> 322.1 Indirect Residential Displacement. The objective of the indirect residential displacement analysis is to determine whether the proposed project may either introduce a trend or accelerate a trend of changing socioeconomic conditions that may potentially displace a vulnerable population to the extent that the socioeconomic character of the neighborhood would change.
> ***
> If the detailed assessment identifies a vulnerable population potentially subject to indirect displacement that exceeds 5 percent of the study area population—or relevant sub-areas, if the vulnerable population is located within the subarea identified—the project may result in a significant change in the socioeconomic character of the study area, and a potential significant adverse impact may occur.

Petitioners assert that "[t]he [Planning Commission] took a rose colored glasses look at the problem of gentrification that is being accelerated by the introduction of these four luxury condo towers in Two Bridges." (NYSEC Doc. No. 1, ¶ 104.)

In the Final Environmental Impact Statement ("FEIS"), the Planning Commission found that the proposed projects would not result in significant adverse environmental impact due to indirect residential displacement, finding:

> While the proposed projects would add new population which, in the aggregate, would have a higher average household income than the average household income in the study area, the proposed projects would not introduce a new trend or accelerate the existing trend as defined under CEQR. Of the proposed projects' 2,775 new DUs, 25 percent (up 694 DUs) would be designated as permanently affordable. There is already a readily observable trend toward higher incomes and new market-rate residential development in the study area. The average monthly asking rent (lowest 10th percentile) for non-rent protected units in the study area currently ranges from approximately $1,900 for a studio to $3,300 for a three-bedroom unit; these rents are generally not affordable to low- and moderate-income households. The proposed projects are expected to introduce a higher percentage of affordable housing than is expected from planned development projects in the future No Action condition, which are primarily market-rate. In this respect, the proposed projects would serve to maintain a study area housing stock that is affordable to households with a wider range of incomes as compared to the No Action condition, in which projects are expected to continue the trend towards market-rate development and rising residential rents in the study area.

(NYSCEF Doc. No. 132.)

Petitioners argue that the Planning Commission's determination that the proposed four towers would not accelerate indirect residential displacement was irrational. In support of their argument, petitioners largely rely on a "common-sense" analysis. As asserted by petitioners in oral argument, the Planning Commission's determination that adding 2000 units of high-end condos is not going to accelerate gentrification is akin to arguing that global warming is happening but there's no need to stop burning fossil fuels.

While this Court both appreciates the common-sense approach put forth by petitioners, and finds many of the statistics relied upon by the Planning Commission to be dubious (including its assumption that incoming market-rate tenants would pay no more than 30% of their income on rent[5], for example), the Court of Appeals has consistently held that a court's review of a SEQRA/CEQR study and determination is very narrow:

> "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.'" "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.'"

Chinese Staff v Burden, 19 NY3d 922, 924 (2012). Accordingly, this Court cannot say that the Planning Commission failed to follow lawful procedures, or that its "hard look" and "reasoned elaboration," however seemingly belabored, is utterly irrational.

Conclusion

Thus, for the reasons stated herein, the petition is granted, the cross-motion to dismiss is denied, the approvals of the proposed projects are nullified, and the Planning Commission is directed to make findings pursuant to ZR § 78-313 as a condition precedent to granting approvals to any modifications to the Two Bridges LSRD.

2/11/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[5] Affidavit of Olga Abinader, Acting Director of the Environmental Assessment and Review Division of the Planning Commission (NYSCEF Doc. No. 137, ¶ 44).