SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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INDEX NO. 154890/2019

MOTION DATE 01/03/2020

MOTION SEQ. NO. 001 002 003

MICHAEL NIEBAUER, MARYANN GUNTHER, MAUREEN ALLEN, KENNETH WESTERFELD, NAI JIANG, MARGARET LOUGHLIN, BI LIN, BO LU, DAVID DONG, RAYMOND MUCCI, JAMES KLEVEN, MARIANA LO, SHERYL KLEVEN, NANCY ANCHOR, LUCIE SHANNON, LAUREN ANCHOR, MARK FLYNN, DENISE ZAYAS, DJILDO RADOVIC, and ROBERT VOLASKI,

Petitioners-Plaintiffs,

- v -

CITY OF NEW YORK, BILL DI BLASIO, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, STEVEN BANKS,

Respondents-Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 14, 15, 16, 17, 18, 19, 71, 75, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 74

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

ORDER

Upon the foregoing documents, it is

ORDERED that the amended petition/complaint of petitioners/plaintiffs Michael N. Niedbauer, Maryann Gunther, Maureen Allen, Kenneth Westerfeld, Naiqi Jiang, Margaret Loughlin, Bi Zhen Lin, Bo Li Lu, David Dong, Raymond Mucci,

James R. Klevenm, Nancy Anchor, Lucie Shannom, Lauren Anchor, Mark Flynn, Denise Zayas, Djildo Radovic, and Robert Volaski for (1) a permanent injunction against the development of a homeless shelter at 127-03 20th Avenue, College Point, New York (Premises), and (2) a declaration that (i) because the development of such homeless shelter is part of the plan adopted by the respondents/defendants for homeless services throughout the City of New York, the review of the development of such homeless shelter alone and not as part of the entire plan was improper under the State Environmental Quality Review Act and the City Environmental Quality Review (CEQRA) and (ii) the negative declaration with respect to the homeless shelter issued by respondents/defendants under such review is null and void, as irrational (motion sequence numbers 001 and 003) is denied; and it is further

ORDERED that the motion of respondents-defendants City of New York, Bill Di Blasio, in his capacity as Mayor of the City of New York, New York City Department of Social Services, Steven Banks, as Commissioner of New York City Department of Social Services, to dismiss the first amended petition/complaint (motion sequence number 002) is granted to the extent of denying vacatur of the negative declaration, and that part of the amended petition and complaint is dismissed; and it is further

ADJUDGED, ORDERED and DECLARED that respondents/defendants are entitled to a declaration that their issuance of a negative declaration as to the development of the homeless shelter at 127-03 20th Avenue, College Point, New York did not violate CEQRA and was neither arbitrary nor capricious, nor an abuse of discretion.

DECISION

Before the court is the first amended petition/complaint (Amended Petition) of petitioners/plaintiffs (Petitioners) which, along with application by show cause order (OSC) that sought a temporary restraining order (TRO) and preliminary injunction[1], seeks a permanent injunction barring respondents/defendants (together the City) from using the building located at 127-03 20th Avenue in College Point, New

[1] In opposition to the OSC, the City urges that Petitioners are not entitled to preliminary injunctive relief because Petitioners have demonstrated neither a likelihood of success on the merits of their claims, nor that they will suffer irreparable injury in the absence of injunctive relief, nor that the equities balance in their favor. Upon the filing and oral argument of the OSC pursuant to 22 NYCRR § 202.7(f), the court declined to grant Petitioners a TRO enjoining the City from operating the Shelter, finding that Petitioners had failed to demonstrate that they would suffer irreparable harm by such operation. As the court now summarily decides the Amended Petition on its merits, it need not address the question of whether Petitioners are entitled to a preliminary injunction. Nonetheless, as argued by the City at the TRO hearing, the mere desire of Petitioners not to be near a Shelter does not constitute legally cognizable harm. See Spring-Gar Community Civic Association v Homes for Homeless, 149 AD2d 581, 582 (2d Dept. 1989) (trial court noted that petitioner's fears of increased crime near homeless shelter were "speculative"). The court also agrees with the City, that any harm is not irreparable, as the residents of the Shelter could be assigned elsewhere. Likewise, the equities do not balance in Petitioners' favor. See Midtown South Preservation and Development v City of New York, 130 AD2d 385, 388 (1st Dept. 1987).

York as a shelter (Shelter)(motion sequence numbers 001 and 003) and a declaration that the negative declaration under the City Environmental Quality Review (62 RCNY 5-02 et seq.) and State Environmental Quality Review Act (Environmental Conservation Law § 8-101 et seq. and 6 NYCRR § 617.2 et seq.), (together CEQRA), that respondents/defendants issued for such Shelter is "null and void".

The Shelter would house homeless single men.

The City has moved to dismiss the Petition, pursuant to CPLR 2211 (a) (2) and (7) and 7804 (f) (motion sequence number 002).

The Nature of this Case

Preliminarily, on its motion to dismiss, the City argues that the Amended Petition is improperly fashioned as a plenary action for declaratory judgment, and that this court should convert such action, which seeks a review of the determination of a City agency, to a special proceeding pursuant to Article 78 of the Civil Practice Laws & Rules. This court disagrees with the City and holds that such conversion is unnecessary as this case is properly brought as a hybrid CPLR article 78 proceeding and declaratory judgment action. See South Bronx Unitel v New York City Industrial Development Agency, 115 AD3d 607 (1st Dept. 2014).

On its motion to dismiss the original petition, the City argues that the claims of Petitioners are not ripe for judicial review because the City had not acted to open the Shelter as it had not completed the CEQRA and Fair Share reviews, without which there was no final agency determination to be reviewed by this court under CPLR § 7801(1).

The City also argues that Petitioners' claim of improper segmentation is not viable.

Ripeness for Review

The Amended Petition states that the City performed a CEQRA review and issued a negative declaration "on September 16, 2019, determining that the project would not present any potential negative environmental impacts" (Amended Petition, Docket No. 76, p. 2). The City notified Petitioners that it would begin operating the Shelter on October 2, 2019. Thus, the Amended Petition, which seeks review of such final determination, rendered moot the City's argument about ripeness.

The City served and filed a Verified Answer to the First Amended Verified Petition on December 13, 2019. On January 2, 2020, petitioners/plaintiffs served and filed a Reply Memorandum of Law in Support of the First Amended Verified Petition and Complaint. In the opinion of this court, by serving and filing an Amended Answer to the Amended Petition, the City has exercised the option to apply its motion to dismiss to the new

pleadings. See Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 (1st Dept. 1998). Moreover, given that issue has been joined in this hybrid special proceeding and plenary action, the court will apply the standards of summary judgment pursuant to CPLR 409(b). See Port of New York Authority v 62 Cortlandt St. Realty Co., 18 NY2d 250, 255 (1996). Finally, this court may reach the merits of a declaratory judgment on a motion to dismiss. See Fillman v Axel, 63 AD2d 876 (1st Dept. 1978).

Rationale for the City's Negative Declaration

A. Segmentation of SEQRA Review

With respect to the judgment sought by Petitioners declaring the City's CEQRA review null and void because such review was segmented, Petitioners correctly state that the opening of the Shelter was part of a city-wide plan (Plan) to move homeless people from cluster housing and out of hotels, where they are currently housed, and into community shelters. See generally "Turning the Tide on Homelessness in New York City" (NYSCEF Doc. No. 3). Petitioners argue that, as part of a Plan, the Shelter may not operate, absent compliance with the requirements of CEQRA, as to the Plan as a whole, and that the City has improperly segmented the Shelter for individual CEQRA review.

It is established that, where a unitary project is planned, its component parts may not be segmented for purposes of more

readily complying with the requirements of CEQRA. See Matter of Save the Pine Bush, Inc. v City of Albany, 70 NY2d 193, 205 (1987), citing Chinese Staff & Workers Assn. v City of N.Y., 168 NY2d 359 (1986).

However,

> "a broadly conceived policy regarding land use in a particular locale is simply not a sufficiently unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as 'related proposals'"

Long Isl. Pine Barren Soc. v Planning Bd. of Town of Brookhaven, 80 NY2d 500, 513-14 (1992),

Here, the City is planning 90 shelters on an ongoing basis, as proposals from the nonprofit groups that propose to operate them are received, and as suitable sites are identified and prepared. Thus, it is both the case that an environmental impact statement embracing all the projects would not be possible for an as yet indeterminable number of years, and that there is no requirement that these temporally and spatially heterogeneous projects be considered together for purposes of an environmental impact statement. The fact that, as discussed below, the City issued a negative declaration, with regard to the Shelter, is not, as Petitioners appear to believe, an argument to the contrary. Notably, in a similar case brought by counsel for Petitioners here, the court held, with regard to

another shelter, that the Plan does not identify the sites of future shelters, and "a general agency policy that addresses the issue of homelessness" is not subject to SEQRA/City Environmental Quality Review (SEQRA/CEQR) review. Sandora v City of New York, 2017 N.Y. Misc. LEXIS 3723 *12, (Sup. Ct., Queens County 2017).

B. Adequacy of the Environmental Assessment Study

Petitioners also argue that: (1) the City improperly relied upon an outside consultant to perform the environmental assessment study (EAS); (2) the EAS was faulty, and therefore, the negative declaration issued by the City, finding that the Shelter would not cause significant adverse environmental impacts, was invalid; (3) the City's decision to proceed with the Shelter preceded the City's consideration of environmental concerns; and (4) the citing of the Shelter was made in violation of the City's 'Fair Share" program, which, seeks to distribute municipal benefits and burdens equitably throughout the City. See "Doing Our Fair Share, Getting Our Fair Share" (NYSCEF Doc. No. 85).

As to the first of these contentions, neither SEQRA nor CEQR requires that the lead agency prepare an EAS. See Finn v City of New York, 141 AD3d 436, 436 (1st Dept 2016) ("DHS did not delegate its review responsibilities to the environmental

consulting firm it properly retained to assist it with the preparation of the EAS.")

The EAS applied the "screening levels" set forth in the CEQR Technical Manual (March 2014 Edition), which provides guidance to City agencies in regard to the CEQR process, to consider whether the construction and operation of the Shelter would cause an adverse environmental impact. Of the 19 impact categories considered, three - transportation, air quality, and noise -- exceeded CEQR Technical Manual thresholds, and, therefore, required further study (Rupp affidavit ¶ 7). The additional analysis found that, in none of the three areas studied, would the Shelter result in significant adverse impact (Rupp affidavit ¶ 8).

Petitioners contend that the EAS was faulty in its consideration of transportation, in regard to both traffic and parking, community facilities, and neighborhood character. As to traffic, the CEQR Technical Manual provides that, where an action would cause fewer than 50 peak hour automobile trips per intersection, 200 peak hour subway or bus riders, or 200 pedestrian trips, a detailed traffic analysis is not needed (see CEQR Technical Manual at 16-3; Rupp affidavit, ¶ 11). Residents of shelters operated by Westhab are not allowed to leave the building between 10 PM and 7 AM, and, based on Westhab's experience operating other single adult shelters, the

EAS assumes that Shelter residents would not be traveling to, or from, the Shelter by automobile. The EAS assumes that all 70 staff and security personnel will drive to, and from, work. Based on the three shifts that such personnel will work, the EAS concluded that operation of the Shelter would cause fewer than 50 peak hour automobile trips, and that, therefore, a more detailed analysis of traffic was not needed.

Petitioners argue that the EAS ignored impacts upon parking. However, the EAS determined that Shelter residents were not likely to use automobiles, and that the Shelter would provide 30 parking spaces for the at most 30 workers, who would be working in any shift (Rupp affidavit ¶ 12 and Exhibit D, cited therein).

Although Petitioners claim that the EAS failed to consider public transportation in College Point, the EAS analyzed the two bus routes serving the nearby area and concluded that the Shelter would generate, at most, 142 combined transit and pedestrian trips during peak hours, well below the 200 that the CEQR Technical Manual posits as the minimum of such trips needed to require a detailed analysis.

Petitioners also argue that the EAS failed to consider the Shelter's impact on the character of the neighborhood, and on public facilities in the neighborhood. The CEQR Technical Manual defines neighborhood character as:

> "an amalgam of the various elements that give a neighborhood its distinct 'personality'. These elements may include a neighborhood's land use, urban design, visual resources, historic resources, socioeconomics; traffic, and /or noise."

CEQR Technical Manual at 21-1. The EAS found that the Shelter would have no significant adverse impact on noise, zoning, open space, public policy, historic and natural resources, urban design and visual resources, transportation, shadows, hazardous materials, or socio-economic conditions. Petitioners make no cogent argument about any of these findings. The court notes that Petitioners' criticism of the EAS relies heavily upon the affidavit of lead plaintiff Niebauer, who does not claim to have any technical competence in the matter (see Niebauer Affidavit, NYSCEF Doc. No. 48). Mr. Neubauer notes, for example, at paragraphs 17 and 18 of his affidavit, that the Shelter will be located near several schools and day care centers. He offers no explanation of the significance of this proximity. It is undisputed that no children will live in the Shelter.

Finally, Petitioners argue that the Shelter is a high residential occupancy facility, and that, therefore, the EAS should have considered its effect on land use. Inasmuch as the neighborhood contains residential buildings, as well as well as buildings for commercial and industrial use, the EAS properly

concluded that the Shelter is consistent with current land use and is not expected to affect current land use patterns.

> "Judicial review of SEQRA findings 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. This review is deferential for it is not the role of the courts to weigh the desirability of an action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA procedurally and substantively."

Matter of Friends of PS,163 Inc. v Jewish Home Lifecare, Manhattan, 30 NY3d 416, 430 (2017) (internal quotation marks and citations omitted). Here, the court is fully satisfied that the City complied with SEQRA and CEQR both substantively and procedurally

As to Petitioners' third argument, SEQRA review is timely, so long as an agency has taken no action "which would commit [it] to a definite course of future decisions." Hudson River Sloop Clearwater v Cuomo, 222 AD2d 386, 387 (1st Dept. 1995). Here, SEQRA review was completed before the construction contract for the Shelter was executed (Ali affidavit, ¶ 31). Accordingly, the construction work that was done prior to SEQRA review was performed at the developer's risk, and neither that work, nor the negotiations between DHS and Westhab, nor the community meetings held to discuss the development of the Shelter committed the City to going forward with opening the

Shelter. Consequently, these preliminary actions did not require SEQRA review. See Matter of East End Prop. Co. #1, LLC v Kessel, 46 AD3d 817, 821 (2d Dept 2007) (neither a request for proposals, nor a memorandum of understanding calling for a feasibility study, committed the agency to further action, and thus, did not require SEQRA review).

The New York City Department of Homeless Services (DHS) prepared the Fair Share Statement (Statement) for the Shelter. The Statement shows that: (1) there are no DHS facilities within a half mile of the Shelter; (2) there are four DHS facilities within Community District (CD) 7, to wit, the Shelter and another shelter for single adults, and two hotels housing families which are due to close, pursuant to the "Turning the Tide" plan by the end of 2023; and (3) CD7 has 12.6 beds in residential care facilities per 1,000 people, compared to the citywide average of 18.4 beds per 1,000 people (Ali affidavit, ¶¶ 33-34).

Petitioners argue, however, that the DHS information is stale, and that there is already a concentration of municipal institutions in College Point. The bed to population ratios that DHS used were current as of 2015 and were provided by the City's Department of City Planning, as is required by the Fair Share Criteria (Ali affidavit, ¶ 38). Moreover, the Fair Share Criteria neither bar the City from siting facilities in certain

neighborhoods, nor limit the number of City facilities that can be sited in any specific neighborhood. Rather, they require that agencies disclose the concentration in a given neighborhood of facilities similar to the one planned and balance any such concentration with the need for a specific facility and the suitability of a proposed site.

8/03/2020
DATE

DEBRA A. JAMES, J.S.C.

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