Z. Brach & Residents for Preserv. of Borough Park Identity v City of New York
2022 NY Slip Op 30161(U)
January 21, 2022
Supreme Court, New York County
Docket Number: Index No. 154724/21
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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Z. Brach & Residents for Preservation of Borough Park Identity et al.

Petitioners,

-against-

The City of New York, et al.

Respondents.

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DECISION and ORDER
INDEX NO.: 154724/21
MOT. SEQ.: 001

Present:

Hon. Lynn R. Kotler, J.S.C.

This is an Article 78 proceeding that challenges the rezoning application from an area zoned M-1 to R7/C3-4, namely 60th Street between 15th and 16th Avenues in the Brooklyn Borough Park neighborhood, on the basis that rezoning was arbitrary and capricious and constituted illegal spot zoning.

Petitioners are Z. Brach & Residents for Preservation of Borough Park Identity, a neighborhood association representing the interests of residents and property owners in the immediate vicinity of the rezoned area; 16th Avenue Equities LLC, the record owner of real property located at 5926 16th Avenue, at the corner of 16th Avenue and 60th Street, who operates a furniture store business; Exact Equities LLC, the record owner of real property at 1501 60th Street, at the corner of 15th Avenue and 60th Street, who operates a furniture store; Jazzy Electronics, owner of real property located 1519 60th Street; 5911 15th Avenue LLC owner of real property located at 5911 15th Avenue, whose residents are Zigmond Brach and Jennie Brach; and Shlomo Weiss owner and resident of property located at 1508 59th Street.

Petitioners allege that they will face direct harm due to the rezoning and elimination of the neighboring lots from the industrial M-1 zoning district and that their quality of life will be directly impacted.

Respondents are the 1) City of New York (City), 2) the New York City Council (City Council), 3) the City Planning Commission (CPC), 4) the Department of City Planning (DCP)

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and 5) 1529-33 60th Street LLC (Developer). The City Respondents and Respondent Developer have answered the petition and oppose it.

The court's decision is as follows.

Background

The Respondent Developer submitted a land use review application to DCP pursuant to ULURP for a zoning map amendment M1 to R7A/C2-4 and a zoning text amendment to establish mandatory inclusionary housing, which would enable construction of 102 dwelling units in 3 buildings, 32 of which would be affordable housing. The ULURP application sought to remap Brooklyn block 5509, Lots 1, 58,62.64,65,68,70,71, 72 and 73; and Block 5516, Lots 4, 9, 10,11.12.13.14.17,20 and 21 from M1-1 to R7A/C2-4. Respondent Developer submitted a Environmental Assessment Statement (EAS) prepared by Environmental Studies Corp. The EAS addressed potential impacts in several technical areas, including land use, zoning and public policy, socioeconomic conditions, community facilities, open space, shadows, historic and cultural resources, urban design and visual resources, hazardous materials, transportation, air quality, noise, and construction. DCP, on behalf of CPC, conducted a New York City Environmental Quality Review ("CEQR"; collectively "SEQRA/CEQR").

On January 6, 2020, the DCP certified EAS and issued a Negative Declaration (Statement of No Significant Effect) certifying that the proposed project would not have significant impact on the environment or trigger significant socio-economic repercussions. Thereafter, the ULURP received conditional approval by Community Board 12 on February 26, 2020 and the Brooklyn Borough President on October 13, 2020. CPC approved the ULURP application on December 2, 2020 and sent it to the City Council for review. The City Council conducted two hearings in December 2020 and approved the application with modifications to the ULURP application and notified CPC via letter dated December 21, 2020.

In relevant part, the letter states:

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> The Council's modification will reduce the rezoning area by excluding certain areas closer to 15th Avenue. By implementing this rezoning with modifications, the creation of new affordable housing through MIH that would otherwise not be developed in this neighborhood can take place. At the same time, by reducing the rezoning area, new growth will be balanced with the preservation of longstanding business, and existing residents of unregulated rental units. In this time of economic stress due to the Covid-19 pandemic, the protection of these jobs, as well as the small residences which do not have the protections of rent regulation, is vitally important. In addition, the modifications to reduce the rezoning area will ensure that buildings built on an R7A scale will not overwhelm the adjacent R5 zoning district, where the predominant character is two to three story homes.

On January 4, 2021, CPC sent the City Council an Approval Letter stating that the modifications the City Council proposed do not require further CEQR review. On January 6, 2021, the City Council passed Resolution No. 1530. which approved, as modified, the ULURP Application, with a finding of no significant impact on the environment pursuant to the Negative Declaration and reaffirmed CPC Approval and the related Zoning Map amendment. Since there was no mayoral veto issued during the applicable timeframe, the City Council resolution became final. This Article 78 ensued.

In this proceeding, petitioners contend that: 1) the submitted EAS and in issuing the Negative Declaration, respondents neglected to comply with CEQR analysis and arbitrarily and capriciously dispensed with conducting a more thorough EIS analysis; 2) the rezoning application did not receive the "hard look" required by SEQRA/CEQRA and the "reasoned elaboration" for the certification of the EIS is lacking.; and 3) the subject rezoning constitutes a prime example of illegal spot zoning.

Discussion

SEQRA challenges are reviewed under the deferential "arbitrary and capricious" standard in Section 7803(3) of the CPLR *(Riverkeeper*, Inc. *v. Planning Bd. of Town of Southeast*, 9 NY3d 219, 881 N.E.2d 172, 851 N.Y.S.2d 76 [2007]). "Judicial review of an agency

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determination under SEQRA is limited to 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." (*Id.* at 231-232 [internal quotations omitted]). "It is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency" (*In re Community United to Protect Theodore Roosevelt Park v. City of New York*, 171 AD3d 567 [1st Dept 2019] *quoting Fisher v. Giuliani*, 280 AD2d 13, 19-20, 720 N.Y.S.2d 50 [1st Dept 2001]).

Petitioners argue that in accepting the submitted EAS and in issuing the Negative Declaration, respondents neglected to comply with CEQR analysis and arbitrarily and capriciously dispensed with requirement of conducting a more thorough EIS analysis as well as ignored the significant environmental impact of the rezoning application. Petitioners further argue that the EAS misstates the impact of rezoning, more specifically, 1) the rise in density and its consequences, 2) it underestimates the impact on industrial uses, 3) the ramifications for displaced industrial and residential uses in the M1 District, 4) it disregards public policy with regard to industrial sector of the economy in the City, 5) it fails to address if LIRR was addressed/consulted on developer's proposed construction, 6) deficient mandatory inclusionary housing, 7) open space deficit, 8) shadow analysis and 9) no mitigation measures to ameliorate significant environmental impacts.

The City Respondents disagree and argue that the environmental review took the appropriate "hard look" and that the City Council approval of the project with modifications was rational and does not amount to spot zoning.

Respondent Developer also disagrees and contends that the actions of the City Planning Commission and the City Council were not arbitrary and capricious, and were based on expertly prepared studies and factual information. Developer further argues that the municipal

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respondents complied with the provisions of SEQRA and that petitioners' argument that the rezoning constitutes spot zoning should be rejected.

Here, the court finds that the City Respondents took the requisite "hard look" at the environmental effects of the development under SEQRA/CEQRA, as evidenced by the Environmental Assessment Statement (EAS) and a detailed technical analysis prepared consistent with guidance set forth in the CEQRA Technical Manual (*see i.e. In re Community United to Protect Theodore Roosevelt Park v. City of New York*, *supra* at 568-569). The EAS illustrates that the project's environmental impact and effects on socioeconomic impacts to industrial businesses and residential uses, the public policy impact including housing, the open space impact, and the rezoning's potential for shadow impacts, were all considered before DCP issued a negative declaration, which resolution was then passed by the City Council. Since the EAS showed that there was no potential for the subject rezoning to result in significant adverse impacts to the environment, the preparation of an EIS was not required or necessary. Petitioners have failed to show that these actions were not made in accordance with lawful procedure, were affected by an error of law, or were arbitrary and capricious or an abuse of discretion (*id*. citing Matter of Chinese Staff & Workers' Assn. v. Burden, 19 NY3d 922, 924 [2012]).

Petitioners have submitted to the court an expert affidavit from Paula Caplan to "conduct an expert evaluation of the EAS" and claims that Ms. Caplan found the EAS misstates the impact of rezoning and contains inaccuracies and disregards impacts and effects to the subject area. However, Ms. Caplan's disagreement with the EAS and/or its conclusion does not warrant a different result. Respondents addressed the environmental conditions and 19 different impact categories. Respondents are "entitled to rely on the accepted methodology set forth in the [CEQRA] Technical Manual". *Matter of Friends of P.S*. 163, Inc. v. Jewish Home Lifecase *Manhattan*, 30 NY3d 416 [2017] There is no dispute the that the SEQRA/CEQRA procedures

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were followed. Otherwise, respondents own expert affidavit from Kevin Corte rebuts the purported deficiencies which Ms. Caplan points to. On this record, petitioners have merely highlighted a disagreement between experts about the environmental impact of rezoning, which is not for the court to resolve (*In re Community United to Protect Theodore Roosevelt Park, supra*, *Fisher v. Giuliani*, *supra*).

Next, petitioner's claim that the application of mandatory inclusionary housing was not properly applied to the subject project is rejected. Tthe mandatory inclusionary housing program options were applied by the City Council in its resolution approving the project. The fact that petitioners disagree and prefer to substitute their own data and preferences does not warrant a different result. Furthermore, petitioners failed to demonstrate that the application of the MIH program was arbitrary or capricious or that it lacked a rational basis.

Petitioners' claim that the EAS failed to account for the project's impact of the LIRR rail tunnel project also lacks merit. As explained in the EAS, the Rail Tunnel Project is still in the planning stages undergoing environmental review, as conceded by petitioners.

Finally, petitioners allege that the Subject Rezoning constitutes a prime example of illegal spot zoning because the rezoning "serves only the benefit of the developers, to the detriment of the surrounding community."

Respondents disagree and maintain that the Subject Rezoning is both rational and not an instance of spot-zoning precisely because it is part of a "well-considered and comprehensive plan" to benefit the community at large and nothing in the Petition comes close to undermining the wisdom of the legislature in adopting the Subject Rezoning". The court agrees with Respondents.

Zoning is a legislative act, and it is presumptively constitutional (*Asian Americans for Equality v. Koch*, 72 NY2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 [1988]). In order to prevail here, petitioners must meet a heavy burden. They must establish that the challenged resolution

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is unconstitutional beyond a reasonable doubt. (*Id*.) A zoning resolution will be upheld if "there is a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" (*id* at 132 quoting *McMinn v. Town of Oyster Bay*, 66 NY2d 544 [1985] [internal quotations omitted]).

The Court of Appeals has defined "spot zoning" as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners" (*Rodgers v. Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d *731, 734 [1951]).* A zone use plan must accord with "a well-considered plan for the community" *(Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 664 N.E.2d 1226, 642 N.Y.S.2d 164 [1996] *citing Asian Ams. For Equality v. Koch*, 72 NY2d at 131 [1988]).

Here, there can be no legitimate dispute that the development will create approximately 32 permanently affordable apartments and 70 residential dwelling units at market rate. Moreover, the subject rezoning is consistent with the MIH program to create permanently affordable housing units that aligns with New York City's housing goals. In addition, the proposed development is located at the intersection of two wide corridors – 60th Street and 16th Avenue – both of which are 80 feet in width, which will allow for any additional density from the ground floor retail, "would include buildings whose exteriors would resemble large town-houses in order to comport with the overall aesthetic of the neighborhood" and "the Commission noted, the proposed development site borders areas which have also been zoned for mixed-use and which include buildings of similar size". Accordingly, petitioners have failed to establish that the challenged resolution does not accord with a well-considered plan calculated to serve the general welfare of the community (*see Randolph v. Town of Brookhaven*, 37 N.Y.2d 544, 547, 337 N.E.2d 763, 375 N.Y.S.2d 315 [1975]).

Based on the foregoing, the petition is denied.

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CONCLUSION

In accordance herewith, it is hereby

ORDERED that the petition is denied and this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied. This constitutes the Decision and Order of the court.

New York, New York
January 21, 2022

SO ORDERED:

Hon. Lynn R. Kotler, J.S.C.