

**301 E. 66th St. Condominium Corp. v City of New York**

2022 NY Slip Op 32829(U)

August 22, 2022

Supreme Court, New York County

Docket Number: Index No. 152464/2022

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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301 EAST 66TH STREET CONDOMINIUM CORP.,

Petitioner,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF CITY PLANNING, CITY PLANNING
COMMISSION, NEW YORK CITY COUNCIL, NEW YORK
BLOOD CENTER, INC.

Respondent.

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INDEX NO. 152464/2022

MOTION DATE 08/08/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 111, 113

were read on this motion to/for ARTICLE 78

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 108, 109, 110, 112

were read on this motion to/for DISMISS

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The petition (MS001) to annul respondents' approval of a rezoning application submitted by respondent the New York Blood Center, Inc. ("NYBC") is denied and the cross-motion by respondents the City of New York, the New York City Department of City Planning, the City Planning Commission, the New York City Council (collectively, the "City Respondents") to dismiss is granted. The motion (MS002) by NYBC to dismiss the petition is granted.

Background

Petitioner brings this special proceeding to annul a rezoning pursued by NYBC and approved by the City Respondents. NYBC operates a not-for-profit blood collection and

distribution organization. It also operates a research institute in the areas of epidemiology and data science.

NYBC contends that its current facilities (originally a three-story 1930 trade school) are not adequate to support its operations. It wants to replace its building with a new facility. Petitioner alleges it is located in the “immediate vicinity” of the proposed construction site and argues it will be directly affected by the negative environmental impacts of the new building. NYBC filed an application with the City to consider 1) a zoning map amendment, 2) a zoning resolution, and 3) a special permit. The proposed building would be sixteen stories and contain a biological safety level 3 laboratory (“BSL-3 lab”) as well as a blood donation center and office space. As part of its application, NYBC sought a special permit to allow for scientific research and development facilitated in a C2-7 district.

Respondent the Department of City Planning published a draft scope of work (NYSCEF Doc. No. 58) which analyzed the environmental issues pursuant to the applicable processes under the City Environmental Quality Review (“CEQR”) and state law (“SEQRA”). On November 23, 2021, following a review through the Uniform Land Use Review (“ULURP”), the City Council approved NYBC’s application with modifications.

Petitioner argues that the purpose of the project is to commercialize NYBC for its for-profit partner and that NYBC intends to build a commercial tower. It insists that NYBC would only get a third of the newly constructed office space. Petitioner maintains that the project involves substantial financial and environmental harms. It maintains that it would introduce numerous biohazards into a dense residential and commercial urban environment.

Petitioner speculates that a release of pathogens would portend serious consequences for nearby residents including the condo building petitioner owns. It submits the affidavit of George

Janes (NYSCEF Doc. No. 20), an urban planner, who insists that NYBC wants to put in a new laboratory (a BSL-3 lab) that can handle serious, and potentially deadly, agents such as anthrax. Mr. Janes complains that the City Respondents refused to do a new draft scope of work about the type of laboratory despite the fact that the original design did not state that there would be a new BSL-3 lab. Apparently, NYBC already has a BSL-3 lab but the renovation would include building a new BSL-3 lab for its partner in the building. Mr. Janes expressed his concern about what might happen if there were an accident at the lab and argues that there should have been an analysis of the potential harmful effects of the lab. He maintains that this should have been part of the discussion, particularly when the lab was discussed at the City Council.

In opposition, the City Respondents contend that the petition should be denied and that the various city agencies properly considered the environmental impacts in accordance with CEQR and SEQRA. With respect to the purported “reasonably foreseeable catastrophic impact” of operating a lab with dangerous substances, they claim that the EIS (Environmental Impact Statement) was not required to assess every conceivable thing that could go wrong at a lab. They insist that the lab will be governed by the same federal, state, and local regulations that apply to the current lab operated by NYBC. The City Respondents argue that an EIS need not explore theoretical law violations.

NYBC also opposes the petition and moves to dismiss. It argues that the City Respondents did not engage in impermissible spot zoning, that the approvals were not required to designate use groups and that the approvals were rational.

### **Spot Zoning**

“Spot zoning is the singling out of 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. In evaluating a claim of spot zoning, the inquiry focuses on whether the rezoning is part of a well-considered and comprehensive plan calculated to serve the general welfare of the community” (*Star Prop. Holding, LLC v Town of Islip*, 164 AD3d 799, 802, 83 NYS3d 146 [2d Dept 2018] [citations omitted]).

The Court finds that the approvals that are the subject of this proceeding were not illegal spot zoning. The record here shows that the instant rezoning is part of the City’s effort to support the growth of the life sciences industry (NYSCEF Doc. No. 67 at 8). NYBC “was purposely founded in its current location, close to Rockefeller University, which facilitates collaboration between the two institutions. . . . As the leading supplier of blood and blood products used by over 500 hospitals and research organizations throughout the New York metro area, NYBC plays a critical role in the city’s and the region’s health” (*id.* at 2).

Obviously, allowing NYBC to replace its dated three-story building with a 16-story structure to serve as life sciences hub will benefit the community. As the City Planning Commission report makes clear, NYBC is located on the east side of Manhattan, right near many medical facilities and hospitals and it fits with the City’s stated goal to support this industry. There is no basis to find that the approvals are anything close to illegal spot zoning.

### **Use Group Designation**

The second major issue is whether the City Respondents identified the proposed building with the proper use group designation. A use group designation refers to land use activities that can take place on a site and there are classifications ranging from UG1 through UG18. Petitioner claims that the site should have been marked with a UG17 and that this type of designation is generally restricted to manufacturing districts.

However, as respondents point out, the use group issue is irrelevant because NYBC was awarded a special permit. It is not a UG17 laboratory and so the fact that it is not located in a manufacturing district is beside the point. No use group designation was created.

### **EIS Analysis**

“It is by now well settled 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. 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. Our assessment of an agency's compliance with the substantive requirements of the statute is governed by a rule of reason.

The extent to which particular environmental factors are to be considered varies with the circumstances and the nature of the particular proposals and not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility. 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” (*Save Audubon Coalition v City of New York*, 180 AD2d 348, 355, 586 NYS2d 569 [1st Dept 1992] [internal quotations and citations omitted]).

The central issue raised by petitioner is that the EIS did not properly consider the reasonably foreseeable catastrophic impacts. Certainly, the SEQRA handbook mentions that this type of analysis should be acknowledged in an EIS (*see* SEQRA Handbook, 4<sup>th</sup> edition at 125, available at [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf)). But the

handbook also observes that “For an impact to be ‘reasonably foreseeable,’ it must be more than just conceivable, though the probability of its occurrence may be small. In the examples, hazards are inherent in the nature of the proposed activities and can be exacerbated by the scale of the proposed action” (*id.* at 126).

The Court agrees with respondents that an analysis of how the new facility might handle an accidental release of a dangerous substance is not reasonably foreseeable and did not have to be included in the EIS. That it is conceivable that a substance could “get out” is not a reason it has to be considered when evaluating the environmental impacts of the proposed building. Petitioner cited no instance of NYBC causing harm to its neighbors or to the general public from its current operations nor did it point to anything other than theoretical events that could happen. Lots of events at a lab could conceivably happen; but to require an EIS to explore every one of them would create an insurmountable obstacle for a lead agency.

The fact is that there are numerous federal, state, and local regulations that govern laboratories, especially those that deal with potentially harmful substances. Moreover, it is not an inherent part of running a lab that dangerous materials escape on a regular basis. Conducting research does not entail routine outbreaks among the general public. As the City Respondents correctly argue, the many, many steps that would have to occur in order for there to be a dangerous situation affecting the public makes its inclusion in the EIS superfluous. That is not to say that such a lab need not maintain stringent safety standards, but that issue is not required for an EIS.

The focus of the EIS at issue here, as it should be, is what changes the new building may have and the potential environmental impacts. NYBC has been at the site since 1964—this is not a situation where a sophisticated laboratory is replacing an apartment building. Certainly,

constructing a building that will be more than four times the size of the current structure will affect the neighborhood. But the EIS prepared in connection with this project adequately and rationally considered it under CEQR and SEQRA. And, of course, the City Council approved the application (NYSCEF Doc. No. 70). It is not this Court's role to second guess such well-reasoned analysis and policymaking simply because petitioner is concerned about an unlikely event.

It is also important to consider the "No Action Condition" cited in the EIS (NYSCEF Doc. No. 71 at S-7). The fact is that if NYBC's plans for the larger structure had not been approved, then it would still be able to construct a building as-of-right, including a BSL-3 lab (*id.*) anyway. NYBC needed the approval to build a bigger structure. So, the issues raised by petitioner about potential lab contaminants need not be addressed in the EIS because the lab has been there, is there now, and would be there whether the larger building was approved or not.

### Summary

Although petitioner's concerns are well taken, it did not meet its burden for the Court to annul the City Respondents' approval of NYBC's application or for the declaratory relief it seeks about spot zoning. The record shows that the City Respondents carefully considered the environmental impacts of constructing a new building, appropriately granted a special permit for the new life sciences hub and made an express decision to support this industry.

There is no doubt that this project will be annoying to neighbors during the four years of construction and, because it is going from three to sixteen stories, it may negatively impact neighbors' views. But there is also no doubt that the facility, once finished, will benefit the community. As the City Planning Commission report observes "NYBC was the first blood center to collect convalescent blood plasma donations from individuals who have recovered from


COVID-19 to treat other patients” and it is also researching “cures for macro- and neuro-degenerative disorders such as blindness, Parkinson’s and Alzheimer’s disease, as well as prototypic SARS, MERS and HIV vaccines” (NYSCEF Doc. No. 67 at 3). The City Respondents were entitled to make a judgment to approve NYBC’s application.

Because the Court is denying the petition, it finds that the declaratory relief sought by petitioner is not warranted and grants NYBC’s motion and the City Respondent’s cross-motion to dismiss this cause of action.

Accordingly, it is hereby

ORDERED that the petition (MS001) is denied in its entirety, the cross-motion by the City Respondents to dismiss the declaratory relief is granted and this proceeding is dismissed and the Clerk is directed to enter judgment in favor of respondents and against petitioner along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS002) by respondent the New York Blood Center, Inc. to dismiss is granted.

<u>8/22/2022</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE