Battery Park City Neighborhood Assn. v Battery Park City Auth.
2023 NY Slip Op 30433(U)
February 8, 2023
Supreme Court, New York County
Docket Number: Index No. 160624/2022
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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BATTERY PARK CITY NEIGHBORHOOD ASSOCIATION, J. KELLY MCGOWAN

Plaintiff,

- v -

BATTERY PARK CITY AUTHORITY,

Defendant.

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INDEX NO. 160624/2022

MOTION DATE 02/03/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 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, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

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

BACKGROUND

Petitioners in this Article 78 proceeding are the Battery Park City Neighborhood Association (BPCNA) a grassroots neighborhood organization and J. Kelly McGowan, a resident of Battery Park City.

Respondent Battery Park City Authority (BPCA) is a New York State public benefit corporation whose mission is to plan, create, coordinate, and sustain Battery Park City, a 92-acre neighborhood on the west side of lower Manhattan.

In response to Superstorm Sandy, both the City of New York and BPCA began evaluating ways to improve Lower Manhattan's resilience to future storm events.

This proceeding was commenced because the parties disagree on BPCA's proposed plan for a southern portion of Battery Park City, specifically Wagner Park.

PENDING APPLICATION FOR RELIEF

On February 3, 2023, Petitioners moved for an order, pursuant to CPLR 6301, preliminarily enjoining and restraining, BPCA from undertaking the planned Wagner Park portion of the South Battery Park City Resiliency Project or conducting any construction on Wagner Park, other than routine maintenance, during the pendency of these Article 78 proceedings.

The motion was fully briefed on submitted to the court on that date and the court reserved decision. The court held a brief conference with the parties on the record on February 8, 2023, in which the parties expressed they had stipulated to extend Respondent's time to answer the petition until after a decision on the motion. The parties agreed no TRO was necessary, as Respondent stipulated to refrain from commencing work affecting Wagner Park pending an order on the motion.

For the reasons stated below, the motion is denied.

ALLEGED FACTS

Among the parks within Battery Park City is Wagner Park, comprised of 3.5 acres along the waterfront. Superstorm Sandy, which devastated New York in October 2012, significantly impacted Battery Park City, resulting in over $10M of damage for which BPCA was responsible. Wagner Park fared comparatively well in that storm due to its slope and relative elevation at its high point, however Respondent alleges that coastal modeling demonstrates that the Park would not fare as well in the face of the projected severity of future storms over the coming decades.

In response to Superstorm Sandy, both the City of New York and BPCA began evaluating ways to improve lower Manhattan's resilience to future storm events. New York City's plans for lower Manhattan were developed through the Lower Manhattan Coastal Resiliency (LMCR) Study. Planning and design for what would ultimately become the current South Battery Park City Resiliency (SBPCR) Project began in 2015.

The parties disagree as to the level of input BPCA has given the community in developing these plans.

Three potential alignments were identified for the section of the Project that runs through Wagner Park: one that ran along the water's edge, one that ran inland, and one that ran through the Park along the edge of the relieving platform that forms the waterfront esplanade. The waterfront edge alignment (Alternative 2 in the Final Environmental Impact Statement [FEIS]) was rejected because it would physically separate the Park and the community from the waterfront and would present engineering challenges.

The inland alignment also known as Alternative 1 in the FEIS, which Petitioners supported, would have involved the placement of a flood barrier along the north side of the Wagner Park lawn, leaving most of Wagner Park on the "water side" of the barrier.

BPCA rejected this alternative because it argues it would leave the majority of Wagner Park vulnerable to flooding in the 2050's 100-year storm, and the alignment would depend on many mechanical gates to be deployed in advance of a storm, which presents significant operational and reliability concerns. Finally, the existing Pavilion would have to be demolished and rebuilt to incorporate a flood barrier into its design, which BPCA asserts is undesirable for a variety of reasons.

BPCA has advanced the design of the alignment that would bury a flood wall beneath the Park (Alternative 3 in the FEIS).

Wagner Park would be elevated 10 to 12 feet, and the buried floodwall would be constructed beneath the raised park. The Project would also require the demolition of the existing Pavilion building within Wagner Park, to be replaced by a new pavilion to be constructed further inland. One of the critical aspects of the design was the calculation of the design flood elevation that must be achieved to provide the necessary flood risk reduction for the design storm. This is another area where the parties disagree with Petitioner arguing the data relied upon by Respondent is inaccurate and that said level of protection is unwarranted.

In September 2021, BPCA commenced its New York State Environmental Quality Review Act (SEQRA) review of the SBPCR Project. The Draft EIS (DEIS) issued in May 2022 sets forth the alternatives analysis undertaken by BPCA and provides analyses of the potential environmental impacts of the Project. After affording the public an opportunity to review and provide comments on the DEIS, BPCA prepared written responses to the comments received and published the FEIS in September 2022. The SEQRA process culminated in the adoption of a SEQRA Findings Statement in October 2022.

Shortly after this, Petitioners proposed an alternative 1a that would combine floodwalls and deployable measures to be surgically threaded through the Park. BPCA rejected this alternative arguing it was too risky and lacking in engineering details.

Petitioners argue Alternative 1a has several benefits including that placing the floodwall farthest from the river provides maximum inland protection from flooding with minimal disruption to the existing park; and the park can largely stay open during construction; and both the views to the water and the Statue of Liberty will be preserved.

DISCUSSION

"A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 154 (1st Dep't 2007). This "extraordinary" and "drastic" remedy, *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011), "should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification," *O'Hara v. Corporate Audit Co., Inc.*, 161 A.D.2d 309, 310 (1st Dep't 1990). As the moving party, Petitioners bear the "particularly high" burden of establishing each necessary element for injunctive relief. *Council of the City of N.Y. v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't 1998).

Petitioners Have Not Established a Likelihood of Success on The Merits

To establish a likelihood of success on the merits, Petitioners "[a]re required to 'demonstrate a clear right to relief which is "plain from the undisputed facts."'" *Mosseri v. Fried*, 289 A.D.2d 545, 545–46 (2d Dep't 2001). Petitioners' failure to satisfy this requirement requires the denial of Petitioners' request for a preliminary injunction. *See Eljay Jrs., Inc. v. Rahda Exports*, 99 A.D.2d 408, 409 (1st Dep't 1984).

"SEQRA ensures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices." *In re Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 414–15 (1986). Central to SEQRA is the Environmental Impact Statement (EIS) process. *In*

re Town of Henrietta v. Dep't of Envtl. Conservation, 76 A.D.2d 215, 220 (4th Dep't 1980). SEQRA prescribes both the procedure that must be followed for formulating an EIS, as well as its substantive content, but SEQRA does not require an agency to act in a particular manner or to reach a particular result. *See Aldrich v. Pattison*, 107 A.D.2d 258, 266–67 (2d Dep't 1985).

As recognized by the Court of Appeals, "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." *In re Jackson*, 67 N.Y.2d at 416. Judicial review of an agency's determination is therefore limited to an assessment of "'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.'" *In re Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 430 (2017). Because "[i]t is not the province of the courts to second-guess thoughtful agency decision making . . . an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence." *In re Riverkeeper, Inc. v. Plan. Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007). Where an agency's action has a rational basis, it cannot be considered arbitrary or capricious. *In re Save America's Clocks, Inc. v. City of N.Y.*, 33 N.Y.3d 198, 220 (2019).

Judicial review under SEQRA is "supervisory only." *In re Jackson*, 67 N.Y.2d at 417. Therefore, the court may not substitute its own judgment or "weigh the desirability of any action or choose among alternatives," but must "assure that the agency itself has satisfied SEQRA." *Id.* at 416. To prove that an agency acted in an arbitrary and capricious manner, the challenging party must through competent evidence establish that any error or omission in an agency's environmental review is of such significance that the agency's determination must be vacated. *See In re Valley Realty Dev. Co. v. Tully*, 187 A.D.2d 963, 964 (4th Dep't 1992). Generalized

"community objections" to an agency's conclusions are insufficient to challenge an environmental review that is based on empirical data and analysis. *In re WEOK Broadcasting Corp. v. Plan. Bd. of Town of Lloyd*, 79 N.Y.2d 373, 385 (1992).

SEQRA requires agencies to consider reasonable alternatives to their actions. However, courts have acknowledged that SEQRA is subject to a "rule of reason," such that "[n]ot every . . . alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." *In re Northern Manhattan is Not for Sale v. City of N.Y.*, 185 A.D.3d 515, 517–18 (1st Dep't 2020). Similarly, it is not enough for the challenging party to contend that there was a better alternative that the agency should have chosen instead. *See In re Uptown Holdings, LLC v. City of N.Y.*, 77 A.D.3d 434, 436 (1st Dep't 2010), *lv. denied*, 16 N.Y.3d 764 (2011); *In re Coalition Against Lincoln W., Inc. v. Weinshall*, 21 A.D.3d 215, 222 (1st Dep't 2005).

Respondent argues that the New York City Building Code clearly dictates the use of the more restrictive elevation established by FEMA. FEMA is the federal agency tasked with assessing flood risk through the United States, and its Flood Insurance Studies ("FISs") and corresponding Flood Insurance Rate Maps ("FIRMs") serve as the basis for the National Flood Insurance Program and building codes across the country.

BPCA used the same sea level rise projections that have been used by the City for the other LMCR projects, 30 inches of sea level rise by 2050. Respondent argues that because many of these coastal resiliency projects are interrelated, it is important that the projects are designed to the same standard. Even BPCNA's own affiant, Britni Erez, acknowledged the importance of a conservative design, cautioning that "[i]f they prove to be wrong by underestimating the flooding risk in the coming years or misstating it in some way, the Authority's design will be

outdated and presumably the Park will need to be reconstructed again." (Affidavit of Britni Erez, sworn to Dec. 9, 2022 (NYSCEF No. 18) ¶ 97.)

Ultimately the choice between conflicting expert testimony rests in the discretion of the administrative agency. *In re Friends of P.S. 163, Inc*., 146 A.D.3d at 578; *see also Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp*., 291 A.D.2d 40, 55 (1st Dep't 2001).

All parties agree that Wagner Park is a special place. All parties agree that work is necessary to protect the area against future super storms and flooding. While Petitioners are correct that the space will not be the same after the work as proposed by Respondent is done, Petitioners have failed to establish that the proposed work or the way the plan was chosen was arbitrary or capricious, and thus have failed to establish a likelihood of success on the merits. Absent a showing of an arbitrary and capricious process, this Court must defer to BPCA in determining the appropriate design standards for coastal resiliency projects intended to provide flood protection for Lower Manhattan.

The Balance of The Equities Favors BPCA

In balancing the equities of a requested injunction, a court may weigh the harm alleged by the movant against "the harm caused to defendant through the imposition of the injunction." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc*., 114 A.D.2d 165, 174 (2d Dep't 1986). In doing so, the court "must consider the 'enormous public interests involved.'" *Seitzman v. Hudson River Associates*, 126 A.D.2d 211, 239–40 (1st Dep't 1987).

Here, the equities favor BPCA in its pursuit of a critical flood risk reduction project that has that been the subject of years of planning and design. The public interest here is incontestable. Residents, employees and visitors to southern Battery Park City and adjoining

areas of Lower Manhattan should not be made to suffer further delay in the accomplishment of this Project, and the alleged costs associated with delay are considerable.

Petitioner argues that the balance of equities lies in their favor because they seek only a pause to preserve the *status quo*. However, the delay in the project will come at a significant cost to Respondent and Petitioners acknowledge that they are unable to post a bond in an amount necessary to guard against such damages as will be further discussed below.

Petitioners Will Not Suffer Irreparable Harm If Their Motion Is Denied

Petitioners argue that Wagner Park will be destroyed by the Project. Respondent argues that the Park will be preserved and protected. The Project is in fact a public benefit project meant to protect Lower Manhattan from future storm surge and sea level rise. One of the fundamental purposes of the Project is to ensure that the Park can be enjoyed by generations to come. The parties simply differ on the best way to accomplish this.

Respondent has made a well-reasoned case that The Park will be reconstructed to be more resilient, with a new pavilion building with a smaller footprint, and a design that increases universal accessibility. That Petitioners prefer the existing Park to the new design or would prefer that the Authority had selected a less protective alternative does not mean that they will be irreparably harmed by allowing the Project to proceed. However, BPCA would be harmed by further delay. *See Save Our Parks v. City of N.Y.*, 2006 N.Y. Misc. LEXIS 2365, at *26–27 (Sup. Ct. N.Y. Cnty. Aug. 15, 2006) (*denying preliminary injunction to halt stadium construction, finding that removal of 377 trees and four-year temporary loss of parkland for four years did not constitute irreparable harm, but that the City would be irreparably harmed by further delay of the project*); *cf. N.Y.S. Thruway Authority v. Dufel*, 129 A.D.2d 44 (3d Dep't 1987) (*granting preliminary injunction against property owner who was barricading detour route needed to*

handle traffic while collapsed bridge was replaced, finding that delaying completion of the bridge constituted irreparable injury to agency).

Petitioner argues the loss of trees would constitute irreparable harm however Respondent counters 114 trees would be removed and 240 planted, to achieve a net increase of 126 trees throughout the Project Area. In accordance with the New York City Department of Parks and Recreation's Tree Restitution Policy, to compensate for the removal of approximately 77 trees in The Battery, which is under the jurisdiction of NYC Parks, 86 new trees would be planted, and 3 trees would be transplanted. This tree restitution, which does not include the value of the trees to be planted on BPCA property, is valued at approximately $5.2 million. Moreover, as noted in the FEIS, the Authority has been coordinating with NYC Parks and The Battery Conservancy regarding the salvage of plant material and trees.

CONCLUSION

In conclusion

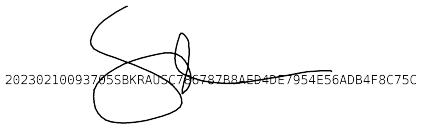
WHEREFORE it is hereby

ORDERED that Petitioner's motion for a preliminary injunction is denied; and it is further

ORDERED that, within 20 days from entry of this order, Respondent shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.



2/8/2023
DATE

SABRINA KRAUS, J.S.C.

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