Mutual Redevelopment Houses, Inc. v Metropolitan Transp. Auth.
2023 NY Slip Op 30682(U)
March 8, 2023
Supreme Court, New York County
Docket Number: Index No. 160085/2022
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MUTUAL REDEVELOPMENT HOUSES, INC.,

Petitioner,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY CONSTRUCTION AND DEVELOPMENT, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.

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INDEX NO. 160085/2022

MOTION DATE 03/02/2023

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 49, 50

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 51, 53, 55

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 52, 54, 56

were read on this motion to/for DISMISS.

Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. Respondents Metropolitan Transportation Authority, Metropolitan Transportation Authority Construction and Development and the New York City Transit Authority's motion (MS002) to dismiss is granted. Respondent the New York City Department of Transportation's motion (MS003) to dismiss is granted. That compels the Court to deny the petition (MS001).

Background

In this Article 78 proceeding, petitioner complains about respondents' installation of a high-voltage power substation on West 28th Street between Eighth and Ninth Avenue. Petitioner

comprises 10, 22-story buildings that stretch across several blocks, including a few buildings located adjacent to the worksite. It characterizes respondents' construction project as an ongoing nuisance. Petitioner contends that the construction is loud, particularly the beeping noises as trucks back up. Petitioner insists that this project should be stopped because respondents failed to comply with the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR"). It argues that respondents' contention that this project is exempt from these obligations is without merit and that proper compliance necessitates the drafting of an Environmental Impact Statement ("EIS").

Petitioner expresses frustration that respondents are constructing a massive substation in the middle of a densely populated residential area and in the middle of petitioner's housing complex. It insists that although respondents purportedly considered 30 other locations, the evidence suggests that only three locations were actually reviewed. Petitioner maintains that once the project begins, the disturbances will be irreversible. It characterizes respondents' environmental analysis as subjective and without merit. Petitioner raises concerns about noise pollution, structural damage, child welfare, rodent infestation, air pollution and electromagnetic field radiation.

Respondents Metropolitan Transportation Authority, Metropolitan Transportation Authority Construction and Development and the New York City Transit Authority (collectively, "MTA") move to dismiss. It contends that certain transit and transportation projects, such as the one at issue here, are exempt from state and local environmental reviews. MTA points out that the substation at issue here is necessary in order to improve subway operations. It will expand the electrical capacity for the subway and, when finished, will be housed entirely underground.

MTA emphasizes that the substations will be constructed entirely within the New York City Department of Transportation's right of way (which is now a street and sidewalk). Following the completion of the project, it will continue to be a street and a sidewalk. MTA maintains that the project will not be constructed on petitioner's property. It argues that all of petitioner's 10 causes of action rely on the theory that MTA did not comply with SEQRA. But MTA insists it complied with the applicable law because Public Authorities Law § 1266-c(11) expressly exempts this project from SEQRA's requirements as well as CEQR's obligations.

MTA points out that that the project is being done on publicly owned property, West 28th Street in Manhattan, and that petitioner has no basis to assert that the environmental review statutes are applicable. MTA also questions petitioner's assertion that the resulting improved subway service along Eighth Avenue would alter the character of petitioner's residential buildings. MTA insists that better subway service would not be detrimental to the residents of the complex and the street will remain a street for through traffic (even during construction, part of 28th Street, which is an exceptionally wide street, would remain open for traffic). MTA contends that if the temporary hardships created by the construction project could sufficiently alter the general character of petitioner's building under these circumstances, it raises a questions about how respondents could ever do this type of construction project.

MTA insists that the third cause of action for deprivation of a procedural or substantive due process right has no basis because petitioner has no protected property interest in a public street. It also argues that the ninth cause of action based upon ultra vires agency action fails to state a valid claim because its action is well within the statutory authority of the Public Authorities Law.

Respondent the New York City Department of Transportation ("DOT") makes its own motion to dismiss in which it claims that it has no role in this case. It argues that its sole relationship to this case is a single "misattributed letter" and that it has no substantive involvement in the construction project. DOT contends that petitioner failed to allege any actions that could form the basis of the relief petitioner seeks.

In opposition, petitioner insists that this project is not exempt from SEQRA or CEQR. It contends that projects are only exempt if they will not change, in a material respect, the general character of the prior transportation use. Petitioner complains that MTA's broad interpretation of the Public Authorities Law provision at issue would allow it to do any transportation project without performing an environmental review. It argues that even if the Court considers a sidewalk as land used for a transportation purpose, there is no way that installing a substation that will triple the number of trains per hour would not change the general character of the land's prior transportation use. Petitioner maintains that the current underground use is nothing and the future use will be a massive substation that powers the A, C and E subway lines.

In reply, MTA emphasizes that petitioner has no protected property interest at stake here and that this is simply an attempt to stop this necessary transportation project. MTA claims that petitioner cannot refute the fact that this project will be located entirely underground and within a DOT right-of-way (a street and sidewalk). It argues that petitioner's preferred interpretation of the relevant Public Authorities Law section is too narrow and it is not limited only to areas that are already used for the subway.

Discussion

"In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An

action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431, 883 NYS2d 751 [2009] [internal quotations and citations omitted]).

Plaintiff brings ten causes of action in its petition, all of which arise out of its claim that respondents' failure to comply with SEQRA and CEQR should compel the Court to stop this construction project. Therefore, the Court must begin its analysis with provision that respondents claim exempts this project from review under SEQRA and CEQR.

Public Authorities Law § 1266-c(11) provides that:

> "No transit project to be constructed upon real property theretofore used for a transit or transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior transit or transportation use, nor any acts or activities in connection with such project, shall be subject to the provisions of article eight, nineteen, twenty-four or twenty-five of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article. Nor shall any transit project or any acts or activities in connection therewith taken by any person or entity, public or private, pursuant to this section be subject to the provisions of article eight of the environmental conservation law if such project, acts or activities require the preparation of a statement under or pursuant to any federal law or regulation as to the environmental impact thereof."

A critical case cited by both parties is *Martin v Koppleman*, (124 AD2d 24, 510 NYS2d 881 [2d Dept 1987]). This case considered a challenge to a construction project that involved enlarging five parking facilities at train stations along the Ronkonkoma Branch on Long Island (*id*. at 25). The Second Department observed that under Public Authorities Law § 1266-c, "MTA projects to be constructed upon real property previously used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a

material respect the general character of such prior transportation use, are not subject to SEQRA" (*id*. at 26). The Court found that three of the five projects were not subject to the SEQRA exemption because they included the use of an additional 16.9, 10.6 and 15.95 acres (*id*.). It concluded that "[t]hese additional pieces of property can hardly be considered insubstantial, given the Commissioner of Environmental Conservation's determination that an action involving the physical alteration of 10 acres or more is a Type I action, i.e., likely to produce a significant environmental impact" (*id*.).

The instant circumstances present, in this Court's view, a project that will not change the general character of the current transportation use. This transit project is taking place on real property that is now used for a transportation purpose (street and sidewalk) and, after it is completed, will still be used as a street and sidewalk. The fact is that the substation that respondents intend to install will be completely underground and so the character, appearance and use to pedestrians and motorists will remain exactly the same. That compels the Court to find that this project falls squarely within Section 1266-c(11)'s exemption from environmental review.

Moreover, unlike in *Martin*, this is not a situation in which the project is going to involve the addition of more than 10 acres to an existing premises. The additional structures are being placed underground. To the extent that petitioner claims that the general character of the transportation use will change—because this substation will allow more subway trains to run—that claim is wholly without merit. As an initial matter, the fact that this project will improve subway performance has nothing to do with the fact that this street and sidewalk will remain a street and sidewalk after the project is completed. But, even if the effects on the subway were relevant, the fact is that the location of this subway line (the A, C and E lines) will remain under

Eighth Avenue. The Court fails to see how running more trains along the same tracks could somehow constitute a change sufficient to eviscerate the subject exemption. Subway trains have run along this route for nearly a century—petitioner did not sufficiently show how running more trains in the same exact location changes the general character of this transportation use. Any improvements in subway headways have little to do with West 28th Street, which is where the project is actually taking place. That something may happen on Eighth Avenue is simply too attenuated a change (if one exists) to any effect on West 28th Street.

Petitioner's assertion that denying its relief will create an exemption for every single transit project is without merit. As is evident in the *Martin* case cited above, there are restrictions on the exemption provided in Section 1266-c(11). That this situation meets the requirements of that exemption does not mean respondents have a blank check to do all transit projects without environmental reviews. As with this proceeding, an analysis is required to assess whether the project falls under Section 1266-c(11). This one does.

Because all of petitioner's claims arise from its assertion that respondents failed to comply with the various environmental reviews, the Court grants both motions to dismiss and denies the petition.

Due Process Concerns

Petitioner also makes arguments about alleged due process violations in its third cause of action. It argues that the failure to comply with SEQRA constitutes a deprivation of the use and enjoyment of its cooperative buildings. "A party alleging a deprivation of property must demonstrate the existence of a protectable property interest" (*Huntington Yacht Club v Inc. Vil. of Huntington Bay*, 1 AD3d 480, 481, 767 NYS2d 132 [2d Dept 2003]).

Here, petitioner failed to sufficiently explain how it has a protectable property interest in a public street and sidewalk. While a construction project taking place in a street that is right next to various buildings that are part of its complex will likely have inconvenient or annoying aspects, that does not mean petitioner suddenly has a property interest sufficient to shut down the project. The fact is that the record shows that the project will take place exclusively on the street and the street (and sidewalk) will return once the project is completed. In fact, the plan is to have at least one lane of traffic remain open during the project.

The Court understands that the noise from any construction project can be very annoying in this already- noisy city. The loud sound of the beeping when trucks back up was discussed at oral argument; apparently, that is more annoying (and sustained) than noise from drilling. Unfortunately, this Court is unwilling to order that the beeping mechanisms be disconnected. Back-up beeps are a safety feature to prevent people from getting hit or run over by large trucks and vehicles.

Ultra Vires

Petitioner contends that respondents' actions constitute ultra vires agency action. That is, it contends that respondents exercised authority beyond the powers and duties delegated to it by the legislature. But nothing submitted on these papers supports that contention. Rather, the record shows that respondents simply relied upon a clear and unambiguous exemption to the requirement that they had to perform various environmental reviews. In other words, respondents simply followed this provision.

There is no basis to conclude, as petitioner appears to argue, that the specific Public Authorities Law provision at issue or respondents' reliance on this provision constitute improper rulemaking. This provision does not improperly delegate legislative authority to the MTA; it

simply carves out some projects from required environmental reviews. Nor does it suggest a violation of the separation of powers doctrine. Exempting an agency from certain requirements can be found in nearly every area of law—that petitioner does not like this exemption does not make it a situation involving improper rulemaking. That compels the Court to dismiss the ninth cause of action.

Summary

The Court recognizes that petitioner is unhappy with the proposed construction project. It clearly wanted the project to go elsewhere and it dreads what will likely accompany this project: loud noises, traffic back-ups and restricted access to the sidewalk. But that unhappiness is not a basis to stop the instant project, which seeks to modernize a critical subway line. Petitioner's claims that various environmental reviews must be completed are belied by the fact that this project falls squarely into an exception to those requirements. It is a transit project in which the general character of the location (West 28th Street) will remain the same.

It has long been the case that living in New York City requires its residents to live or work right next to construction projects. And the people in the immediate vicinity are rarely happy about it. Almost a hundred years ago, the Court of Appeals noted "This is common knowledge to those of us who live in a metropolis like New York City. The highway is continually being dug up for subways, sewers, gas mains, repairs and the like. The inconvenience and damage which a property owner suffers from these temporary obstructions are incident to city life and must be endured" (*Farrell v Rose*, 253 NY 73, 76, 170 NE 498 [1930]). The fact is that here, respondents cited valid statutory authority for the proposition that it need not conduct environmental reviews and, therefore, petitioner's claims are without merit.

Accordingly, it is hereby

ORDERED that respondent Metropolitan Transportation Authority, Metropolitan Transportation Authority Construction and Development and the New York City Transit Authority's motion (MS002) to dismiss is granted; and it is further

ORDERED that respondent the New York City Department of Transportation's motion (MS003) to dismiss is granted; and it is further

ORDERED that the petition (MS001) 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.

3/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

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