SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

COUNCILMEMBER CHRISTOPHER MARTE, MARIA SALAS, SHEILA HART, FU MAN CHANG, YUET SIU LEE, WENDALINE PEREZ, MARGARET MOY, BARBARA JETER, PEARL RUSSELL, BARBARA KEMPE, AIDA RUIZ

Plaintiffs,

- v -

THE CITY OF NEW YORK, CHERRY STREET OWNER LLC,TWO BRIDGES SENIOR APARTMENTS, L.P., TWO BRIDGES ASSOCIATES, L.P., 265 CHERRY STREET OWNER LLC, LE1 SUB LLC,

Defendants.

----------X

INDEX NO. 159068/2022

MOTION DATE 03/28/2023

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 84, 85, 86, 87, 88, 89, 91, 92

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 96

were read on this motion to/for DISMISS.

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, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 93, 94, 95

were read on this motion to/for DISMISS.

Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. Defendant the City of New York's motion (MS001) to dismiss is granted. Defendant Cherry Street Owner LLC's motion (MS002) to dismiss is granted. Defendants 265 Cherry Street Owner LLC, LE1 Sub LLC and Two Bridges Senior Apartments, L.P. (collectively, "LE1")'s motion (MS003) to dismiss is granted.

Background

This declaratory judgment action seeks an order compelling defendants to take various actions in connection with a housing development project in the Two Bridges neighborhood in Manhattan. Plaintiffs contend they live in the neighborhood and insist that the development, which encompasses three different sites, impinges on their constitutional and environmental rights. They point to Article 1, Section 19 of the New York State Constitution, which provides that "Each person shall have a right to clean air and water, and a healthful environment" (the "Green Amendment").

Plaintiffs argue that this project will negatively affect air quality, the amount of open space and result in the loss of light. They demand that vibration and crack monitors be installed to prevent damage to the buildings in which they reside. Plaintiffs complain that available parking will be diminished, which will lead to reduced air quality. They raise numerous issues with the Final Environmental Impact Statement (the "FEIS") produced for this project, including that it was completed too long ago (in November 2018) to account for the effects of COVID-19. Plaintiffs insist that the FEIS is unconstitutional and violates the constitutional amendment cited above. Plaintiffs observe that the project will include the addition of over 2,700 units.

All defendants move to dismiss. In motion sequence 001, defendant the City of New York (the "City") moves to dismiss on the ground that the claims are time-barred and fail to state a cause of action. The City points out that there already was an environmental review completed under the State Environmental Quality Review Act ("SEQRA") over four years ago. It claims the project will provide badly needed housing, including 700 permanently affordable housing units.

The City emphasizes that two previous challenges to this development were unsuccessful and plaintiffs cannot seek another change to discredit the FEIS in this case. It argues that plaintiffs provide nothing new or changed about the project itself that would compel the City to reopen a review under SEQRA or CEQR. The City argues that the Green Amendment was not intended to replace New York's expansive environmental regulatory regime. It also insists that the Green Amendment cannot be applied retroactively.

Defendant Cherry Street Owner, LLC ("Cherry Street") reiterates many of the points raised by the City. It also observes that it, along with the other developers, have invested millions of dollars in reliance upon the First Department decision upholding the City Planning Commission's approvals as valid. Cherry Street questions the effect of plaintiffs' theory, which would purportedly call into question every approval that went through SEQRA review.

LE1 also makes a motion to dismiss that highlights many of the points argued by its fellow co-defendants. It claims that an Article 78 proceeding is required to seek the instant relief, the Green Amendment is not retroactive, that even if this were an Article 78 proceeding it would be untimely and that there are no changes to proposed developments that would require a reexamination of the environmental reports.

Plaintiffs' opposition claims that defendants are breaching the Green Amendment by failing to adhere to SEQRA. They insist that the respiratory health impacts that the development will exacerbate, especially in light of the pandemic, will only increase death rates in the community. Plaintiffs point to an affidavit from Dr. Wu, who insists that air pollution increases in the Two Bridges neighborhood will cause more deaths due to COVID-19 (NYSCEF Doc. No. 86).

Plaintiffs argue that there are changed environmental circumstances that occurred after the publication of the original Environmental Impact Statement ("EIS") that compels the City to do a Supplemental Environmental Impact Statement ("SEIS"). They characterize the pandemic as a newly discovered health hazard that must be taken into consideration. Plaintiffs argue that the Green Amendment is self-executing, meaning it does not need any other legislation to be enforced. They maintain that the City does not have the discretion to ignore the state constitution, and the fact that the Green Amendment does not contain any mandatory duties is of no moment. Plaintiffs argue that a declaration is most appropriate where a constitutional question is involved.

Discussion

The instant decision requires this Court to assess the impact of the recently passed Green Amendment and how it interacts with the parties' affirmative rights. The impact of passing this amendment and its influence on environmental jurisprudence in this state is only in its infancy. It has been discussed in at least one case in which residents of Perinton, New York sought relief based on the Green Amendment to modify the operation of a landfill (*Fresh Air for the Eastside, Inc. v State*, 2022 N.Y. Slip Op. 34429[U], 3 [Sup Ct, Monroe County 2022]).[1] However, as will be discussed in greater detail below, that case is distinctly different from this one.

New York ratified the Green Amendment in November 2021, and added it to the New York Bill of Rights. It became effective on January 1, 2022 (*id*. at 2). Various court opinions across the country in states that have adopted these types of amendments suggest: "1) that constitutional environmental rights have been interpreted primarily as procedural, not

[1] The Court observes that it was also discussed briefly in a companion case, *Fresh Air for the Eastside, Inc. v Town of Perinton et al.*, Index No. E2021008617 (Sup Ct, Monroe County 2022), in which petitioners brought an Article 78 petition against The town of Perinton to annul the approval of the application for the landfill.

substantive, rights, and (2) that courts ignore the substantive rights language in the constitutional text in favor of other language, which is then given its content through other legal doctrines" (Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 Hastings LJ 123, 165 [2022]).

Moreover, many states, such as Pennsylvania and Hawaii, have found that this type of provision is self-executing (*id*. n 49). "The doctrine of self-execution has to do with the question of whether the constitutional language provides a complete and enforceable rule that a court could implement without the aid of legislative enactment" (*id*.). Certainly, the broad language used in New York's Green Amendment poses thorny questions about how it impacts a plaintiff's right to seek relief in reliance upon this provision. A key purpose for the passage of this type of amendment is to address the issue of standing (*id*. n 58), an obstacle that often arises when parties attempt to bring environmental cases.

Including in New York's Bill of Rights an affirmative right to clean air, water and a healthful environment will undoubtedly make it easier for parties to seek relief where, potentially, they may not have been able to previously make such application (*Fresh Air*, 2022 WL 18141022, n 6 [discussing the difficulties facing a plaintiff who wanted to seek relief related to the landfill]). And it will undoubtedly change the standard by which such claims are analyzed. A Court must consider whether a challenged agency action brought in an Article 78 proceeding is arbitrary or capricious. That may not be the standard to evaluate a possible violation of a constitutional right under the Green Amendment (*id*.). And, presumably, the Green Amendment—to the extent it is interpreted to confer substantive rights as opposed to solely procedural rights—may aid environmental plaintiffs who seek to pursue causes of action that are notoriously difficult to prove (such as a private nuisance).

This case, however, poses a different question. The context in which this case arises involves numerous other attempts to stop the instant development. Those efforts were ultimately rejected in February 2021, when the Appellate Division, First Department upheld the New York City Planning Commission's decision to approve the building applications (*Tenants United Fighting for Lower E. Side v City of New York Dept. of City Planning*, 191 AD3d 548 [1st Dept 2021], *lv to appeal denied*, 37 NY3d 902 [2021], *and lv to appeal denied sub nom. Lower E. Side Organized Neighbors v New York City Planning Commn.*, 37 NY3d 902 [2021]). Plaintiffs here do not seek relief under the Green Amendment as part of the initial effort to challenge a development. Instead, they seek yet another "bite at the apple" under circumstances where every previous request has proved unsuccessful and where, on this record, nothing substantive has changed in the intervening years. For that reason, the Court grants the motions to dismiss.

The Court hesitates to create a brand-new route to challenge developments on an environmental basis, which is exactly what plaintiffs' action would entail. SEQRA and CEQR provide substantial environmental protections and require state and city agencies to consider all manner of factors before approving certain projects. A Court is not the right forum to, essentially, modify the state's environmental regulatory scheme regarding consideration of proposals for developments—that is the province of the legislature. Unlike the situations suggested above (such as addressing the effects of a landfill), litigants have little problem acquiring standing to challenge, and sometimes stop, proposed development projects while relying on SEQRA and CEQR as well as numerous other regulations.

How the Green Amendment will be interpreted over time is unclear. But this Court declines to find that it somehow creates a way to, essentially, make a motion to renew or to start raising challenges that should have been raised long ago. It does not augment an existing statute

of limitations or start a new limitations period. The Court also finds that although this matter is styled as a plenary action, it is, in fact, an Article 78 proceeding to challenge the City's decision to approve this development and so for that reason it is time-barred. The limitations period of four months applicable to these claims has long expired (*see Matter of Save Pine Bush, Inc. v City of Albany*, 70 NY2d 193, 203, 518 NYS2d 943 [1987]).

Moreover, the substantive claims in the complaint do not compel the Court to deny the instant motions. Unlike in F*resh Air for the Eastside, Inc. v State*, 2022 N.Y. Slip Op. 34429[U], 3 [Sup Ct, Monroe County 2022]), this is not a situation involving odors from an existing landfill. In that situation, the impact on the residents is readily apparent and the application of the Green Amendment is obvious. This litigation involves building new residential units and requires a balancing of many factors—that is partially why there are statutes such as SEQRA, CEQR and other development-focused procedures. City and state agencies considering a zoning change must balance environmental impacts with the benefits of that development; here, that includes increased housing. The project at issue will create about 700 permanently affordable units in addition to thousands of other units.

Plaintiffs' purported environmental harms are, for the most part, the types of harms traditionally raised by those who oppose construction projects. Many are well founded; there is no doubt that living next to a construction site is, at best, annoying and, at worst, a major inconvenience that disrupts neighbors' lives. Construction can be loud and seemingly endless, and it can severely diminish the neighbors' qualify of life. But those valid arguments do not create a substantive basis for this action or require the City to revisit the completed environmental reviews for this project. The construction of these buildings does not evince the

same sort of environmental concerns that might accompany, for example, a landfill or toxic waste site.

A review of the complaint makes this point clear: it contains varying alleged harms, some of which are simply part of living in Manhattan. Plaintiffs complain about a lack of parking (which may actually encourage the use of public transportation although plaintiffs apparently claim it will lead to increased driving, possibly while looking for a spot) before complaining about increased carbon dioxide emissions (NYSCEF Doc. No. 2, ¶¶ 20, 21). The Court makes no finding that concerns about air quality are unfounded. It simply finds that such a concern was addressed in the environmental analysis (*see e.g.,* NYSCEF Doc. No. 15 at S-29-30) and there is no basis to revisit it here.

Plaintiffs also attempt to relate their concerns to the COVID-19 pandemic as a way to justify reopening the Final Environmental Impact Statement ("FEIS"). The Court finds that these concerns are too disparate and remote to justify the relief sought in this action. The pandemic, which caused (and will continue to cause) many harmful effects on the health of Manhattan residents, is not a catch-all reason to open up an environmental review. While COVID-19's impact is a rapidly developing area of public health study, the Court declines to hold that it serves as the basis to reopen an environmental review. To do so would assuredly require agencies to complete another environmental review for nearly every single development project.

Plaintiffs' specific demands, for crack and vibration monitors, are understandable but not supported by the Green Amendment. Those are specific demands that could be made as part of a future lawsuit if the ongoing construction justifies such intervention. Plaintiffs do not allege that the construction, to the extent it is underway, rises to the level that various Building Code provisions (of which there are many) are being violated. Put another way, plaintiffs might have a

right to seek relief under the Green Amendment if the construction violates other laws regarding noise and vibration levels. The problem for this Court is that the demands here are based upon what plaintiffs contend is going to happen—a prediction is not a basis to sustain a cause of action.

The Court also declines to find that the Green Amendment has retroactive effect, at least in a situation where, as here, there have been multiple unsuccessful challenges exploring the same exact issues. Moreover, defendants here have established that there have not been significant changes to the development that might require a second look. As Cherry Street points out, if the Green Amendment could be used to create a way to reopen previously unsuccessful efforts, then countless projects would be ripe for challenge. Therefore, the Court declines to find, as plaintiffs demand, that the FEIS produced here is unconstitutional.

Summary

The Court's decision in this case is limited. It merely finds that the Green Amendment cannot be used to bring challenges that were already unsuccessful and where the challenge is time-barred. The instant opinion does not stand for the proposition that the Green Amendment is merely a statement of principles. The Supreme Court, in *Fresh Air for the Eastside, Inc.*, found a cognizable cause of action under the Green Amendment at least as against a governmental entity. But that case did not involve an effort to seek relief that had previously been tried time and again and where a significant development project is underway. There must be some finality and the challenges to this project were rejected by the Appellate Division, First Department and by the Court of Appeals. The substantive rights conferred by the Green Amendment surely do not create a right to recast previously rejected efforts to stop a development.

Accordingly, it is hereby

ORDERED that defendants' motions (MS001, 002 and 003) to dismiss to complaint are granted, this case is dismissed and the Clerk is directed to enter judgment in favor of defendants and against plaintiffs without costs or disbursements upon presentation of proper papers therefor.

4/17/2023
DATE

ARLENE P. BLUTH, J.S.C.

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