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Matter of Powell v City of New York
2007 NY Slip Op 51409(U) [16 Misc 3d 1113(A)]
Decided on June 18, 2007
Supreme Court, New York County
Stallman, J.
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Decided on June 18, 2007

Supreme Court, New York County

In the Matter of the Application of New York State Assemblyman Adam Clayton Powell, IV; Yorkville Youth Athletic Association; Allison Spitz-Perry; Laurie Selinger; Greg Costello; and James Bolster, Petitioners-, Plaintiffs,

against

City of New York; Mayor Michael Bloomberg; the New York City Department of Sanitation; Commissioner John J. Doherty; the New York City Department of Parks and Recreation; Commissioner Adrian Benepe; the New York City Department of Environmental Protection; Commissioner Emily Lloyd; and the New York City Council, Respondents-, Defendants.

108220/06

Michael D. Stallman, J.

This is the third lawsuit to challenge portions of the City's proposed "Solid Waste Management Plan" (SWMP), a plan which outlines a framework for managing the City's trash and recyclables for the next 20 years. In the two prior lawsuits, residents and community organizations contended unsuccessfully that, among other things, the City failed to perform

an adequate review of the environmental impacts from the "conversion and reactivation" of a marine waste transfer station located at East 91st Street in Manhattan (East 91st Street MTS), which was in operation from 1940 until November 1999.[FN1] The residents and community organizations also contended unsuccessfully that the operation of the proposed East 91st Street MTS would constitute a private and public nuisance, in that they claimed that the proposed East [*2]91st Street MTS would interfere with use of the Asphalt Green athletic and recreational complex, Carl Schurz Park, and the East River esplanade, which are close to the site of the proposed East 91st Street MTS.

In this "hybrid" Article 78 proceeding and plenary action, a state assemblyman and persons who claim to regularly use Asphalt Green and the esplanade, also known as the Bobby Wagner Walk, also contend that the City did not comply with the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR) process (*see* ECL § 8-0101 *et seq.*; 62 RCNY 5-01 *et seq.*). Specifically, petitioners-plaintiffs contend that the City failed to analyze adequately the construction impacts related to the City's plans to convert and reactivate the East 91st Street MTS. They also assert that the construction and operation of the proposed East 91st Street MTS will take over portions of parkland for a non-park purpose, which would therefore require approval of the State Legislature.

I.Judicial review of administrative action is limited to determining whether the agency's determination was made in violation of lawful procedures, was affected by an error of law, or was arbitrary and capricious. CPLR 7803. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). "In this regard, the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations." *Matter of Heintz v Brown*, 80 NY2d 998, 1001 (1992).

In reviewing SEQRA determinations, a court must (1) determine whether the agency procedures were lawful, and (2) determine from the record 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. *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986). "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, because it is not their role to weigh

the desirability of any action or to choose among alternatives.'" *Akpan v Koch*, 75 NY2d 561, 571 (1990)(citation omitted).

Petitioners-plaintiffs argue that the City did not thoroughly assess and make a detailed assessment of the impacts of construction of the proposed East 91st Street MTS. According to petitioners-plaintiffs, the City's Final Environmental Impact Statement (FEIS) of the SWMP should have discussed the means and methods of demolition and construction, and should have evaluated or analyzed construction impacts in detail. Petitioners-plaintiffs argue that it is absurd for the City to assert that the access ramp leading to the proposed East 91st Street MTS will be wider, and yet still occupy the same footprint as the existing access ramp. Finally, they argue that the City failed to addressed their safety concerns as to the construction site. Petitioners-plaintiffs believe that the project cannot be built without staging construction in open space, adjacent to areas where children and adults would play.

Petitioners-plaintiffs raise arguments similar to those raised in the two prior lawsuits, in which this Court rejected arguments that the construction impacts of the proposed East 91st Street MTS were inadequately addressed in the FEIS. *See Assoc. for Community Reform Now v Bloomberg*, 13 Misc 3d 1209(A). "An agency's responsibility under SEQRA must be viewed in light of a rule of reason'; not every conceivable environmental impact, mitigating measure or [*3]alternative, need be addressed in order to meet the agency's responsibility." *Matter of Neville v Koch*, 79 NY2d 416, 425 (1992). "EISs must be analytical and not encyclopedic." 6 NYCRR 617.9 (b) (1). Here, Chapter 23 of the FEIS adequately addresses the construction impacts associated with each of the proposed MTSs, as well as possible mitigation measures that DSNY would employ to minimize those impacts. Most of the construction of the proposed East 91st Street MTS will occur over water, and construction of the access ramp, which bisects Asphalt Green, is estimated to last 11 months. *See* Czwartacky Aff. ¶ 21; Mariani Aff. ¶ 26. Given the relatively short-term duration of the construction of the access ramp, CEQR therefore does not require a detailed analysis of the construction impacts to the recreational areas near the site of the proposed East 91st Street MTS. *See* CEQR Technical Manual, at 3S-1 to 3S-2 (2001). The record abundantly demonstrated that the City, through its responsible entities, took the required "hard look" and acted legally under the circumstances.

Safety is an important concern that the City should address when construction of the proposed East 91st Street MTS begins. However, the fundamental policy of SEQRA requires

that *environmental* considerations play a direct role in governmental decision making (*Matter of Merson v McNally*, 90 NY2d 742, 750 [1997]), as well as social and economic factors. *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 51 (1st Dept 2001), *lv denied* 97 NY2d 613 (2002). The regulations implementing SEQRA do not require an analysis of safety concerns. *See* 6 NYCRR 617.9. Nonetheless, the City states that DSNY's contractors will be strictly prohibited from using any areas of the Asphalt Green complex for storage of construction equipment and materials. Mariani Aff. ¶¶ 23-30; Czwartacky Aff. ¶¶ 19-26. Most of the construction equipment and materials are to arrive on barges staged on the East River, and barges will also remove demolition debris. FEIS at 32-3; Mariani Aff. ¶ 26.

Therefore, the first cause of action of this "hybrid" proceeding-action, which pleads an Article 78 petition, is dismissed.

II.

The other half of this "hybrid" Article 78 proceeding and plenary action seeks a declaratory judgment that the demolition, construction, and operation of the proposed East 91st Street MTS and access ramp constitute a violation of the public trust doctrine. Petitioners-plaintiffs allege that Asphalt Green and Bobby Wagner Walk are dedicated parkland areas protected under the public trust doctrine, which requires the approval of the State Legislature "when there is a substantial intrusion on parkland for non-park purposes, regardless of whether . . . the parkland is ultimately to be restored." *Friends of Van Cortlandt Park*, 95 NY2d 623, 630 (2001).

Respondents-defendants ask this Court to consider petitioners-plaintiffs' public trust doctrine argument as another argument of the Article 78 proceeding in this "hybrid" proceeding-action, in the nature of mandamus to review. Alternatively, respondents-defendants ask the Court to convert the "hybrid" proceeding-action entirely into an Article 78 petition. Respondents-defendants maintain that neither Asphalt Green nor Bobby Wagner Walk is dedicated parkland. In any event, they argue that the temporary construction impacts to Asphalt Green and Bobby Wagner Walk do not constitute a substantial intrusion on parkland.

CPLR 103 (b) provides that "all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." It does [*4]not allow civil judicial proceedings to be prosecuted as both an action and a special proceeding. The "hybrid" Article 78 proceeding and plenary action is an apparent creation of the Appellate Division, Second Department. *See Heimbach v Mills*, 54 AD2d 982 (2d Dept 1976). Although CPLR 7803 specifically limits the questions that can be raised in an Article 78 proceeding, the "hybrid" Article 78 proceeding and plenary action effectively relegates, as in this case, the Article 78 proceeding to a cause of action among other causes of action that can raise a plethora of other issues. Courts noted in passing the peculiar nature of the "hybrid" proceeding and action (*see Glenwood TV, Inc. v Ratner*, 103 AD2d 322, 327 n 4 [2d Dept 1984]["No one has questioned the propriety of this procedure, and we do not pass on it."]). Nevertheless, the Court of Appeals has recognized its existence. *See Matter of Crown Communication NY, Inc. v Department of Transp. of State of NY*, 4 NY3d 159 (2005).

Because the CPLR has no rules governing the hybrid Article 78 proceeding-action, its existence creates a host of other procedural issues that unfortunately must be addressed in an ad hoc manner. CPLR 103 (c) requires that a court not exalt form over substance and provides for a court to "make whatever order is required for [the] proper prosecution [of a civil judicial proceeding]." Accordingly, when a "hybrid" proceeding-action is commenced, it must adequately set forth separate claims that would each be appropriately prosecuted either by plenary action or special proceeding. The court should, where possible, treat them according to the appropriate distinct procedures, whether for a plenary action or a special proceeding. **[FN2]**

In this case, defendants-respondents argue that the cause of action for declaratory relief should be dismissed because no summons and complaint were served with the petition and notice of petition. This argument is unconvincing. Defendants-respondents submit no authority that a "hybrid" Article 78 proceeding-action must be commenced by filing separate pleadings of both a special proceeding and action, followed by service of both sets of papers. The initiatory papers filed and served here, denominated as a notice of petition and petition, are the functional equivalent of a summons and complaint for the declaratory judgment claim pleaded as the second cause of action. The Court therefore deems them the summons and complaint.

This "hybrid" proceeding-action cannot be converted solely into an Article 78 proceeding, as the City suggests. "[T]he determination of the City's authority to transfer parkland for nonpark purposes is not dependent upon the adequacy of the SEQRA process." Matter of Jones v Amicone, 27 AD3d 465 (2006). The public trust doctrine does not impose any specific time limit upon the agency to secure the approval of the agency action. Thus, petitioners-plaintiffs' public trust doctrine argument cannot be viewed as a Article 78 petition for mandamus to compel. *Matter of Wolf v Novello*, 297 AD2d 746, 747 (2d Dept 2002). Neither may the claim be viewed as a petition for mandamus to review, because petitioners-plaintiffs do not allege that respondents-defendants denied any request to seek the approval of the State Legislature that could arguably be the subject of review of agency action. A plenary action for a declaratory judgment is the proper procedural vehicle to determine whether Asphalt Green and Bobby Wagner Walk is or has become dedicated parkland. *See Matter of Lauria v Hess*, 305 [*5]AD2d 511, 512 (2d Dept 2003).

Although respondents-defendants present apparently compelling evidence that Asphalt Green and Bobby Wagner Walk are not dedicated parkland areas, the Court cannot appropriately address these issues at this time. Respondents-defendants have not made any dispositive motions as to the cause of action for declaratory relief.

Accordingly, it is hereby

ORDERED and ADJUDGED that the first cause of action of the petition-complaint is severed, and the Article 78 petition is denied and the proceeding is severed and dismissed; and it is further

ORDERED that the action shall continue as to the second cause of action; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on August 2, 2007 at 9:30 a.m. in IAS Part 7, 111 Centre St Rm 949.

Copies to counsel.

New York, New York

ENTER:

J.S.C.

Footnotes

Footnote 1: For an extensive discussion of the City's plan, see *Assoc. for Community Reform Now v Bloomberg*, 13 Misc 3d 1209(A) (Sup Ct, NY County 2006) (Stallman, J.) and *Assoc. for Community Reform Now v Bloomberg*, Sup Ct, New York County, Stallman, J., Sep. 19, 2006, Index No. 114711/05.

Footnote 2: The Court does not rule on the propriety of the "hybrid" proceeding-action under New York law. However, prudent practice suggests that the claims be brought in separate pleadings, so as to simultaneously commence a plenary action and an Article 78 proceeding.

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