Kellner v City of N.Y. Dept. of Sanitation
2012 NY Slip Op 32771(U)
November 8, 2012
Supreme Court, New York County
Docket Number: 102950-2012
Judge: Eileen A. Rakower
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SCANNED ON 11/16/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: ______________________________ *Justice*

PART 15

Index Number : 102950/2012
KELLNER, MICAH Z.
vs.
NYC DEPT. OF SANITATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ________
MOTION DATE ________
MOTION SEQ. NO. ________

The following papers, numbered 1 to ____, were read on this motion to/for ________________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ | No(s). ________

Answering Affidavits — Exhibits ________ | No(s). ________

Replying Affidavits ________ | No(s). ________

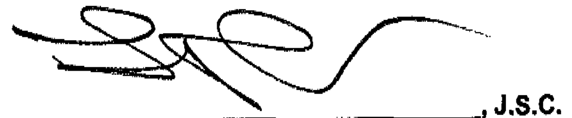
Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ________
FOR THE FOLLOWING REASON(S): ________

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).



Dated: 11-8-12 ________________, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

In the Matter of the Application of
ASSEMBLY MEMBER MICAH Z. KELLNER, THE GRACIE POINT COMMUNITY COUNCIL, by its President, George Morin, RESIDENTS FOR SANE TRASH SOLUTIONS, INC., GEORGE MORIN, individually, KATHY MORIN, ELLIOT MERBERG, LEANNE MOORE, PHILIP OPHER, LORRAINE JOHNSON, HAROLD POSTER and SUSAN J. MILLER,

Petitioners,

Index No.102950-2012

- against -

DECISION and ORDER
Mot. Seq.: 001

THE CITY OF NEW YORK DEPARTMENT OF SANITATION, THE CITY OF NEW YORK, MICHAEL BLOOMBERG, as Mayor of the City of New York, THE NEW YORK CITY COUNCIL and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

---X

HON. EILEEN A. RAKOWER, J.S.C.

Petitioners bring this Article 78 proceeding challenging the New York State Department of Environmental Conservation's ("the State") decision to accept a compliance report from the City of New York Department of Sanitation ("the City"), dated February 24, 2012.

The proposed construction of the 91st Street Marine Transfer Station (MTS) in Manhattan, New York, was approved, was litigated, and was on course for commencement of construction work on the facility. Permits were issued which restricted the use of the facility, in light of impacts to the facility surroundings. The permit restrictions were far less than the proposed facility capacity. The existing

permit was issued in 2009 and expires in 2014. The commencement of work on the facility was delayed from originally proposed 2007 to 2012. The City prepared and submitted an extensive report to the State reflecting the delay. While it was entitled a "modification," the State accepted it as a "compliance report," leaving the project on track to commence.

Petitioners now seek review, arguing that the "compliance report" was an insufficient submission given "the realities" and urging this court to halt the continuation of the project without more extensive analysis and review by the State.

The City's compliance report indicated that the implementation schedule for the 91stStreet MTS had been changed. The date for commencement of work on the facility changed from 2007 to 2012, with the anticipated completion pushed from 2010 to 2016. Implementation schedules for the other facilities in Manhattan were also changed, so that the expected completion of the Gansevoort recycling facility was revised from 2011 to 2017, and the 59th Street facility's completion would follow after recycling moved to the Gansevoort facility. In their submission, the City also included a Technical Memorandum, which extensively explored whether the change in the build year would have different impacts on the 91st street community.

On March 9, 2012, the State issued a letter accepting the Compliance Report without requiring the City to submit a modification of the 2006 Solid Waste Management Plan [SWMP], finding that "the new schedule does not reflect significant alterations to the plan that changed the proposed locations or methods of handling the planning unit's solid waste."

The changes noted in the compliance report essentially referred to a delay in commencement of construction, as distinct from a delay in the duration of the construction. In all respects, the project proposed continues within the confines of the permit, which was issued on October 14, 2009, allowing for a maximum peak day limit of 1,860 tons and a weekly maximum of 9,864 tons of waste. The City specifically noted at oral argument that the proposed 130 truckloads of waste on average peak day, and approximately 1,644 tons of waste per day, would not change at the 91st Street MTS.

Petitioners' oral argument focused on the expected impact of the real delays which they argue are certain to come. Petitioners urge that the realities are that the full operation of the proposed 2006 SWMP are dependent upon a series of events. Before the 59th Street facility can absorb its anticipated share of waste, recyclables must be diverted to a yet to be constructed facility at Gansevoort Street. The Gansevoort location will not be available for construction until Sanitation trucks can be relocated to a yet to be built garage on Spring Street. Petitioners claim that the true delays incumbent in realizing the above transitions will force the 91st Street facility to enlarge its anticipated use, and exceed the environmental impacts previously analyzed and approved.

It is important to note that the permit that is in place, which limits the use of the proposed 91st Street MTS site, expires in 2014. In order to enlarge the 91st Street MTS's anticipated use, the City would have to enlarge the permits that are in place. However, the City reminded this Court at oral argument,

> "[I]f you have any proposed change, including but not limited to one that would increase the volumes for various types of waste accepted at the facility, you have to submit a permit modification. And when you do that, then there would be another SEQR [State Environmental Quality Review] determination... it would require a new determination to take a look at and see what are the specific changes we are proposing and what are the potential impacts of those changes and is there a potential for significant adverse impacts. It also goes through DEC [Department of Environmental Conservation] permit hearing regulations, which are a whole other process that requires notice, sometimes requires public hearings and sometimes allows for adjudicatory hearings to test the conclusions that DEC has made and to see whether the permit as proposed actually complies with DEC's regulations."

Thus, the City submits that if there came a time when the City was to seek to enlarge the use of the 91st Street MTS, petitioners would have an opportunity to raise their concerns. The time to challenge the 91st Street MTS, the 2006 SWMP, has come and gone. This is not the time to revisit the SWMP, which has been fully litigated. Rather, the concerns raised here, at this juncture, are founded not in realities, but in speculation.

Here, the challenge to the State's acceptance of a compliance report instead of a modification, which might include a new State Environmental Quality Review determination, was not arbitrary or capricious or contrary to the State's own rules.

In its submission to the State, the City analyzed specific updates to the community such as new schools in the area, new construction in the area like the second avenue subway, new traffic estimates, air quality and odors, and found that they would not result in any "specific significant adverse environmental impacts that were not addressed in the FEIS [Final Environmental Impact Statement]".

As the State pointed out, "[its] practice throughout the state has been where there is a delay in time, that it does not require a modification." As such the State did not deviate from its own practice. Inasmuch as the City produced an extensive Technological Memorandum analyzing changes to the 91st Street community, it took a good hard look at the potential changes and any potential impacts stemming from the delay, when it found that the only change to the 91st Street MTS would be the time when commencement of the facility was to begin.

Judicial review is limited to a determination as to whether the lead 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' ([]*Jackson* [*v. New York State Dev. Corp.*], *67 NY2d at 417*). A lead agency's determination whether or not to prepare a Supplemental EIS is discretionary. *(Matter of Riverkeeper, Inc. V. New York State Urban Dev. Corp.*, 67 NY2d 400 [1986]). Here, the State prepared the Technological Memorandum with the intention of evaluating the need for a Supplemental Environmental Impact Statement, in light of the change in implementation schedule.

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" (*CPLR 7803 [3]*. . .)' (*Akpan v Koch, 75 NY2d 561, 570, 554 NE2d 53, 555 NYS2d 16 [1990]*). In applying this standard of review, 'it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment

[* 6]

for that of the agency' (*Matter of Fisher v Giuliani, 280 AD2d 13, 19-20, 720 NYS2d 50 [2001]*).

This issue before this Court is very narrow: whether the State's acceptance of a compliance report as submitted with its technical memorandum, reflecting the delays in commencement of construction, as opposed to a full plan modification was an abuse of the agency's discretion, was arbitrary, capricious or contrary to law. Where the court finds that the agency's determination is rational on the record and reasonably based, the court must uphold the determination. *(Matter of Pell v. Board of Education, 34 N.Y.2d 222 [1971]).*

The Court concludes that State's acceptance of the City's submission was an appropriate exercise of its discretion. That there is the potential for the City to seek to enlarge the restricted use of the 91st Street MTS does not go unheeded by this Court. If and when the City explores that option, it will then provide an opportunity for petitioners to expose any additional environmental impacts which then exist and challenge such enlargement of the permit. The status of the project as presented here, however, is that the 2006 SWMP as approved and the existing 2009 permit restrictions remain unchanged.

Wherefore, it is hereby,

ORDERED and ADJUDGED that the Article 78 Petition is denied, and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: November 8, 2012

EILEEN A. RAKOWER, J.S.C.

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