

**Penn Community Defense Fund v New York State
Urban Dev. Corp.**

2023 NY Slip Op 33247(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 159154/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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PENN COMMUNITY DEFENSE FUND, 251 WEST
30TH STREET RESIDENTIAL TENANTS
ASSOCIATION, CITY CLUB OF NEW YORK, and
RETHINKNYC,

Petitioners-Plaintiffs

Index No. 159154/2022

-against-

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT and NEW YORK STATE PUBLIC
AUTHORITIES CONTROL BOARD,

Respondents-Defendants

-----x
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AAG MANAGEMENT, INC., 421 SEVENTH AVENUE
LLC, and 155 WEST 33 LLC,

Petitioners-Plaintiffs

Index No. 159184/2022

-against-

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT and NEW YORK STATE PUBLIC
AUTHORITIES CONTROL BOARD,

Respondents-Defendants

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

On July 21, 2022, respondent New York State Urban
Development Corporation, known as Empire State Development (ESD),

adopted the Modified General Project Plan (GPP) for the Pennsylvania Station Area Civic and Land Use Improvement Project, a mixed use redevelopment plan for Pennsylvania Station and the surrounding midtown neighborhood in New York County. Petitioners commenced the two identical proceedings captioned above pursuant to C.P.L.R. Article 78 to invalidate the GPP, in particular its zoning override that greatly expands the permissible height and base square footage of buildings throughout the neighborhood. Petitioners first insist that the project fails to qualify as a civic or land use improvement project. Second, they claim that ESD unlawfully segmented the project. Finally, they claim that a resolution by respondent New York State Public Authorities Control Board (PACB) relating to the project violated New York Public Authorities Law § 51(a). Respondents maintain that ESD articulated a rational basis for its determinations and that petitioners lack standing to challenge the PACB resolution. PACB moves to dismiss the petitions against PACB on this ground. C.P.L.R. § 3211(a)(7). The court denies the petitions and dismisses these proceedings for the reasons explained below. C.P.L.R. §§ 3211(a)(7), 7803(3), 7806.

II. STANDARDS OF REVIEW

The court may overturn ESD's determination to approve the GPP only if that determination was arbitrary, lacked a rational basis in the administrative record, or lacked a basis in law.

C.P.L.R. § 7803(3); Save America's Clocks, Inc. v. City of New York, 33 N.Y.3d 198, 207 (2019); Marsteller v. City of New York, 217 A.D.3d 543, 544 (1st Dep't 2023); Oustatcher v. Clark, 217 A.D.3d 478, 479 (1st Dep't 2023); Carr v. New York State Div. of Hous. & Community Renewal, 217 A.D.3d 442, 443 (1st Dep't 2023).

The court's inquiry ends, however, if "substantial evidence" in the record supports ESD's determination. Haug v. State Univ. of New York at Potsdam, 32 N.Y.3d 1044, 1045 (2018). The

"substantial evidence standard is a minimal standard," id. (quoting FMC Corp. (Peroxygen Chems. Div.) v. Unmack, 92 N.Y.2d 179, 188 (1998)), that "demands only that a given inference is reasonable and plausible, not necessarily the most probable."

Marine Holdings, LLC v. New York City Commn. on Human Rights, 31 N.Y.3d 1045, 1047 (2018) (quoting Ridge Rd. Fire Dist. v. Schiano, 16 N.Y.3d 494, 499 (2011)). Thus the court may not substitute its judgment for ESD's determination where backed by substantial evidence, even if the plan appears dubious in the current economic climate. Haug v. State Univ. of New York at Potsdam, 32 N.Y.3d at 1046.

II. NEW YORK STATE URBAN DEVELOPMENT CORPORATION ACT

A. Civic Project

Under the New York State Urban Development Act, N.Y. Unconsol. Laws (UDCA) § 6260, EDC "shall not be empowered to undertake the acquisition, construction, reconstruction,

rehabilitation or improvement of a project unless the corporation finds:

(d) in the case of a civic project:

(1) That there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project;

(2) That the project shall consist of a building or buildings or other facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes;

(3) That such project will be leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose, and that adequate provision has been, or will be, made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project;

(4) That the plans and specifications assure or will assure adequate light, air, sanitation and fire protection.

Petitioners' main contention is that UDCA § 6260(d)(3) required EDC to assess the project's financial feasibility before adopting the GPP, as the project will finance two other projects, the Penn Station Reconstruction Project and the Penn Station Expansion Project, according to a "Penn Station Master Plan study," to which the GPP refers. Respondents maintain that the three projects are related, but separate, and that the GPP did not require any financial analysis.

The statute is in the disjunctive, in that it requires that "adequate provision has been, or will be, made for the payment of

the cost of acquisition, construction, operation, maintenance and upkeep of the project." UDCA § 6260(d)(3) (emphasis added). The expressly included future tense, "will," unambiguously allows ESD to defer consideration of "the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project" to an indeterminate date. Id. Petitioners insist that a comprehensive financial analysis was required because the GPP was intended to fund two federal railroad projects, but cite no authority that imposes such a requirement.

Moreover, the GPP does contemplate when ESD will consider the project's acquisition, construction, operation, and maintenance:

It is expected that prior to development of Sites 4, 5, 6, 7, and 8, ESD will enter into a development agreement with the Site's developer, acquire a property interest in the Site, and ground lease the Site to the developer. Such agreements will include the material terms of the transaction, including PILOT, PILOST and PILOMRT. For each of Sites 4, 5, 6, 7, and 8 (which are currently owned, partially owned, or controlled by Vornado and other private entities), ESD would enter into these transactions with the developer of the Site.

For each of Sites 1, 2, and 3 (if any of those Sites are part of the preferred alternative in the federal review and approval process for the potential Penn Station expansion), it is expected that ESD would acquire a property interest in each Site, enter into a development agreement, and ground lease the Site to the developer, and it is expected that each such developer would be designated pursuant to a competitive Request for Proposals ("RFP") process. Such agreements would include the material terms of the transaction, including PILOT, PILOST and PILOMRT.

Aff. of Philip E. Karmel Ex. 185, at 53 (emphases added). The

GPP thus shows that, in compliance with UDCA § 6260(d)(3), "ESD will enter into a development agreement," and each such agreement "will include the material terms of the transaction, including PILOT, PILOST and PILOMRT [Payments in Lieu of Taxes, Payments in Lieu of Sales Taxes, and Payment in Lieu of Mortgage Recording Taxes]," which petitioners do not dispute are all funding mechanisms for the project. Karmel Aff. Ex. 185, at 53. Nor do petitioners dispute that the development agreements' "material terms" will disclose all the financial details that petitioners seek. Therefore they fail to demonstrate ESD's noncompliance with UDCA § 6260(d)(3).

Apart from the project's financial terms, the zoning override understandably remains a significant concern to petitioners as local residents in the midtown area. They also contend that ESD arbitrarily bestowed the zoning override on intervening respondent Vornado Realty Trust, a private developer, because the GPP did not impose a project deadline. The override, which ESD admits will not expire, obviously benefits Vornado Realty Trust as a private developer. At the same time, the absence of a redevelopment schedule potentially allows Vornado Realty Trust to redevelop at its own discretion.

While the zoning override may be an incidental benefit to Vornado Realty Trust until the development agreements are approved, the override does not detract from ESD's determination

that the project will provide a substantial public benefit.

Lavin v. Klein, 12 A.D.3d 244, 245 (1st Dep't 2004); Matter of

Fisher (New York State Urban Dev. Corp.), 287 A.D.2d 262, 264

(1st Dep't 2001); Tribeca Community Assn., Inc. v. New York State

Urban Dev. Corp., 200 A.D.2d 536, 537 (1st Dep't 1994).

Moreover, ESD currently is negotiating development agreements with Vornado Realty Trust for sites 4-8, which will address petitioners' concerns. Petitioners also are entitled to review the proposed agreements as determined in a prior proceeding. The proposed agreements will require approval from PACB, where ESD must show "there are commitments of funds sufficient to finance the acquisition and construction of such project." N.Y. Pub. Auth. Law § 51(3). Finally, petitioners may inquire regarding the project's finances at another public hearing before PACB's approval.

ESD's remaining determinations under UDCA § 6260(d) "are entitled to extraordinary judicial deference." Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d 312, 322 (1st Dep't 2009). According to the GPP:

The primary purpose of the Project is to transform a substandard and insanitary area in and around Penn Station into a revitalized, high-density, sustainable, and transit-oriented mixed-use district that incorporates civic facilities, including substantial improvements to the subway stations surrounding Penn Station, an extensive new below-grade pedestrian concourse leading to and from Penn Station, and 18 new off-street entrances to Penn Station and surrounding subway stations. When implemented, the Project also will generate revenue to help fund reconstruction of

the existing Penn Station, the potential expansion of Penn Station and other transit and public realm improvements, as well as supporting overall economic growth in New York City and the region.

Karmel Aff. Ex. 185, at 49. The GPP thus encompasses community and public service facilities within the project area that will serve a civic purpose, including underground pedestrian concourses, renovated subway entrances and passageways, expanded sidewalks, public space, shared streets, and additional bicycle lanes, which all demonstrate that ESD has satisfied UDCA § 6260(d)(3). The GPP also "will assure adequate light, air, sanitation and fire protection." UDCA § 6260(d)(4). Therefore ESD demonstrates a rational basis for its determination that the project qualifies as a civic project. Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 257 (2010); Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d at 325.

C. Land Improvement Project

To qualify as a land use improvement project, ESD must consider whether: "(1) the proposed project site is substandard or insanitary and impairs sound growth and development; (2) there is a plan for clearance, replanning, reconstruction and rehabilitation of that area; and . . . (3) the plan affords maximum participation by private enterprise." West 41st St. Realty LLC v. New York State Urban Dev. Corp., 298 A.D.2d 1, 4 (1st Dep't 2002). See UDCA § 6260(c)). Petitioners maintain that the project area is not substandard or insanitary because

the neighborhood comprises several new or recently renovated buildings, including Moynihan Train Hall, Madison Square Garden, the commercial towers 1 Penn Plaza and 2 Penn Plaza, and the James A. Farley Building.

ESD's consultant, nonparty VHB Engineering, Surveying, Landscape Architecture and Geology, P.C. (VHB), undertook a Neighborhood Conditions Study to evaluate the project area. VHB's report assessed "a combination of physical, land use, environmental, and other socioeconomic and real estate indicators." Karmel Aff. Ex. 53, at 68. Among these factors, the report underscored the area's outmoded buildings, economic stagnation, shuttered businesses, New York City Building Code violations, poor energy efficiency, and underutilization. The report also considered the area's public realm, defined as "as the buildings, streets, sidewalks, public open spaces, and signage that together comprise the built environment" as substandard due to incongruous buildings, limited entrances to and exits from sidewalks, lack of stimulating business fronts, and a high crime rate. Id. at 33.

Petitioners point to the report's visual assessment that observed only a few buildings in poor or critical condition, but whether an area is blighted does not turn on one determinative factor. The report considered several factors that ESD adopted in determining that the project qualifies as a land use

improvement. Therefore ESD provided a rational basis for its determination. Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d at 257; Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d at 324; Tribeca Community Assn., Inc. v. New York State Urban Dev. Corp., 200 A.D.2d at 537.

III. STATE ENVIRONMENTAL QUALITY REVIEW ACT

The regulations implementing the State Environmental Quality Review Act (SEQRA) define segmentation as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." 6 N.Y.C.R.R. § 617.2(ah). Petitioners contend that the Final Environmental Impact Study (FEIS) unlawfully segmented the project because the FEIS did not review the Penn Station Reconstruction Project and the Penn Station Expansion Project. ESD maintains that both projects are exempt from SEQRA review.

Public Authorities Law § 1266(11) provides that:

No project to be constructed upon real property theretofore used for a transportation purpose, or an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior 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 acts or activities taken or proposed to be taken by the authority or by any other person or entity, public or private, in connection with the planning, design,

acquisition, improvement, construction, reconstruction or rehabilitation of a transportation facility, other than a marine or aviation facility, be subject to the provisions of article eight of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article if such acts or activities require the preparation of a statement under or pursuant to any federal law or regulation as to the environmental impact thereof.

The statute exempts the Penn Station Reconstruction Project from SEQRA review because it will be constructed at Penn Station's current location, for the purpose of expanding the available train lines, which will not change the station's general character or use. Niebauer v. City of New York, 198 A.D.3d 441, 442 (1st Dep't 2021); Huntley Power, LLC v. Town of Tonawanda, 217 A.D.3d 1325, 1325 (4th Dep't 2023); Martin v. Koppelman, 124 A.D.2d 24, 26 (2d Dep't 1987). The statute similarly exempts the Penn Station Expansion Project because it requires environmental review under a federal law, the National Environmental Policy Act, which petitioners do not dispute. 42 U.S.C. §§ 4321-47.

Moreover, the FEIS actually addressed the environmental impacts of both railroad projects, including resident and business displacement, open space, shadows, historic resources, urban design and visual resources, transportation, and noise. In fact, almost every chapter of the FEIS discussed the potential expansion of Penn Station, perhaps unsurprisingly, as any expansion likely would concern the same environmental considerations as the current midtown project.

Last, petitioners insist that the FEIS also required a

financial analysis. Yet SEQRA does not require ESD to consider the project's financial feasibility. Tudor City Ass'n, Inc. v. City of New York, 225 A.D.2d 367, 368 (1st Dep't 1996); Kirquel Dev., Ltd. v. Planning Bd. of Town of Cortlandt, 96 A.D.3d 754, 755 (2d Dep't 2012). Therefore ESD did not fail to satisfy SEQRA's procedural requirements. Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d at 257.

IV. PUBLIC AUTHORITIES CONTROL BOARD

Petitioners complain that respondent PACB approved ESD's revenue sharing PILOT agreement for individual development sites, when no such approval was required, and the agreement was enforceable without that approval. Petitioners maintain that PACB's authority extends only to the approval of a development plan and not to agreements regarding individual development sites.

Petitioners concede, however, that, even if PACB thus acted outside its authority, that approval caused no injury to them. Petitioners thus lack standing to challenge the PACB resolution approving ESD's revenue sharing PILOT agreement. Mental Hygiene Legal Serv. v. Daniels, 33 N.Y.3d 44, 51 (2019); Tribeca Community Assn. v. New York City Dept. of Sanitation, 83 A.D.3d 513, 513 (1st Dep't 2011). Finally, petitioners also concede that, if the court denies their petitions against ESD, their claim against PACB is of no consequence. Therefore the court

grants PACB's motion to dismiss the petitions against PACB.

C.P.L.R. § 3211(a)(7).

V. CONCLUSION

For the reasons explained above, the court denies the petition in both proceedings and dismisses both proceedings.

C.P.L.R. §§ 3211(a)(7), 7803(3), 7806.

DATED: September 18, 2023



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C