SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

IN THE MATTER OF THE APPLICATION OF PRESERVE OUR BROOKLYN NEIGHBORHOODS, et al.

- v -

CITY OF NEW YORK et al.

INDEX NO. 159401/18

MOT. DATE

MOT. SEQ. NO. 001

The following papers were read on this motion to/for Art 78

Notice of Petition/Petition/Amended Petition — Affidavits — Exhibits NYSCEF DOC No(s). 1-12

Notice of Cross-Motion/Answer/Affidavits — Exhibits NYSCEF DOC No(s). 15-35, 36-44

Replying Affidavits NYSCEF DOC No(s). 45-46

This is an Article 78 proceeding which turns on whether petitioners are correct in that a City Council resolution approving a City Planning Commission zoning map amendment constitutes unconstitutional spot-zoning. This court finds that it does not.

The underlying zoning map amendment concerns lot (Lot 37) located at 142-150 South Portland Avenue in the County of Kings, City of New York, State of New York ("the site") for development of a thirteen-story high rise mixed use residential and commercial facility with approximately one hundred dwelling units (the "development" or "project").

Petitioners are Preserve Our Brooklyn Neighborhoods, an incorporated association of community members of Fort Greene in Brooklyn, who seek "to maintain the contextual neighborhood character of the Fort Greene community, respecting the quiet, residential, low rise brownstone, multi-class and multi-ethnic residential quality of the community", as well as various individual Fort Greene residents who claim they will be adversely impacted by the proposed development.

Respondents are: [1] the City of New York (the "City"), the New York City Planning Commission ("CPC"), the New York City Council (the "City Council" and together with the City and CPC, collectively the "City Respondents"); and [2] South Portland, LLC and Randolph Haig Daycare Center, Inc (collectively the "Developers") who are the private/applicant developers for the proposed project.

Facts

Background

As petitioners allege, the Fort Greene community "is characterized predominantly by three and four story brownstone row houses and adjacent to and surrounded by landmarked historic districts." Fort

Dated: 6/18/19

HON. LYNN R. KOTLER, J.S.C.

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

Greene is considered one of the best-preserved 19th century residential neighborhoods in New York City. It is also adjacent to the Special Downtown Brooklyn District ("SDBD"), which was established in 2001 "to provide a transition between the ever expanding downtown commercial core of Brooklyn and the low rise community of Fort Greene." The SDBD is subject to height and setback requirements.

In 2007, the City Council passed a contextual zoning resolution which regulates, *inter alia*, the height of buildings within the Fort Greene neighborhood. In connection with that resolution, the City Planning Commission issued a report which noted:

> Under the current R6 zoning, construction of tall apartment buildings without a height limitation is permitted and has resulted in buildings that are inconsistent with the typical brownstone character of the Ft. Greene and Clinton Hill neighborhoods and historic districts. As market demand for housing within these areas has increased, a number of out-of-scale, 11- to 13-story tower developments are proposed or have been constructed that are inconsistent with the low-rise, row house neighborhood character. The proposed rezoning would protect and preserve the historic brownstone, row house character and prevent future out of scale developments while providing opportuniti8es for apartment house construction and incentives for affordable housing on Myrtle Avenue, Fulton Street and Atlantic Avenue within the rezoning area.

The 2007 contextual zoning resolution set a maximum height of six-stories or eighty feet and also created an incentive for affordable housing called an Inclusionary Housing Bonus ("Bonus"). The Bonus allowed an increase in height from a base Floor Area Ratio ("FAR") of 3.45 to 4.6, which would allow a maximum height of ninety-five (95) feet.

The application

This proceeding stems from an application which was filed with the Department of City Planning ("DCP") on September 27, 2017 which sought to upzone the site from the 2007 R7A contextual zoning to an R8A zone as well as to extend the SBDB by allowing commercial development within the zoning site. Presently, the site is improved with a three-story building which houses the CHURCH.

A public hearing concerning the application was held by the City Council on May 30, 2018. On June 28, 2018, the City Council passed the challenged resolution, which "chang[ed] from an R7A District to an R8A District property bounded by a line 115 feet southerly of Hanson Place, South Portland Avenue, a line 235 feet southerly of Hanson Place, and a line midway between South Portland Avenue and South Elliot Place." The City Council noted in the 2018 resolution that the Developer's application "would facilitate a new, approximately 85,900-square-foot mixed residential development with community facility space" and would "change an Inclusionary Housing designated to a Mandatory Inclusionary Housing (MIH) area..."

In this proceeding, petitioners have asserted two causes of action: [1] the challenged resolution is arbitrary, capricious and violative of law, constituting unlawful spot zoning (first cause of action); and [2] the challenged resolution violates the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR"). In addition to declaratory judgment, petitioners seek a judgment annulling and vacating the challenged resolution, enjoining Respondents from proceeding with the development, pending compliance with applicable law and awarding petitioners their costs, disbursements and attorneys' fees;

The City Respondents have answered the petition and oppose it. The Developers have also answered the petition and cross-move to dismiss on the grounds that petitioners failed to serve them pursuant to CPLR § 7804[b].

Discussion

At the outset, the court must grant the cross-motion to dismiss all but petitioners' second cause of action. Petitioners concede that these claims seek review pursuant to CPLR Article 78, which is subject to a four-month statute of limitations. Since petitioners did not timely serve the petition on the developers, who are necessary parties to this proceeding, the court is without power to consider the relief requested. Accordingly, the second cause of action is severed and dismissed.

Even if the court were to consider petitioners' SEQRA and CEQR challenges, they nonetheless fail on the merits. SEQRA challenges are reviewed under the deferential "arbitrary and capricious" standard in Section 7803(3) of the CPLR. (*Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 NY3d 219 [2007]). "Judicial review of an agency determination under SEQRA is limited to 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." (*Id.* at 231-232 [internal quotations omitted]). "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 for that of the agency" (*Fisher v. Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]).

Here, there can be no dispute that the City Respondents took the requisite "hard look" at the environmental effects of the development, as evidenced by the Environmental Assessment Statement and Supplemental Studies to the EAS ("EAS"). The EAS illustrates that the project's environmental impact and effects on socioeconomic conditions, the Fort Greene community and mass transit were all considered before the City Council passed the challenged resolution.

According to the EAS, the site has an improvement on it that is not landmarked or otherwise historic, the project will result in land-use consistent with the area and there are two other fifteen-story buildings on the same block as the site. To the extent that petitioners take issue with the construction itself, they have not demonstrated that the construction will pose any risks greater than those ordinarily accompanying construction-related activities in New York City. On that note, such risks should be properly accounted for by the City's Department of Buildings and other applicable rules and regulations. Such a conclusion is rational and should not be second-guessed by the court (*Friends of P.S. 163 v. Jewish Home Lifecare, Manhattan*, 30 NY3d 416 [2017]; see also *In re Community United to Protect Theodore Roosevelt Park v. City of New York*, 171 AD3d 567 [1st Dept April 18, 2019]).

Otherwise, the projects adverse impacts on the environment and transportation will not be significant.

Petitioners are correct, however, that the first cause of action goes beyond CPLR Article 78 review. Instead, petitioners are challenging the constitutionality of the challenged resolution. Therefore, the court will deem petitioners' service timely *nunc pro tunc* pursuant to CPLR § 306-b and consider the parties' arguments as to the first cause of action on the merits.

Zoning is a legislative act, and it is presumptively constitutional (*Asian Americans for Equality v. Koch*, 72 NY2d 121 [1988]). In order to prevail here, petitioners must meet a heavy burden. They must establish that the challenged resolution is unconstitutional beyond a reasonable doubt. (*Id.*) A zoning resolution will be upheld if "there is a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" (*id* at 132 quoting *McMinn v. Town of Oyster Bay*, 66 NY2d 544 [1985] [internal quotations omitted]).

The Court of Appeals has defined "spot zoning" as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners" (Rodgers v. Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 [1951]). A zone use plan must accord with "a well-considered plan for the community" (*Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 NY2d 668 [1996] citing *Asian Ams. For Equality v. Koch*, 72 NY2d at 131 [1988]).

Here, there can be no legitimate dispute that the development will create approximately one hundred new affordable apartments and community space for the church. Accordingly, petitioners have failed to establish that the challenged resolution does not accord with a well-considered plan calculated to serve the general welfare of the community (see *Randolph v. Town of Brookhaven*, 37 N.Y.2d 544, 547 [1975]).

Indeed, petitioners' arguments largely highlight their dispute as to whether the development will serve their own interests. Petitioners seemingly fail to acknowledge that Fort Greene is only part of New York City, and their own interests cannot be the sole consideration regarding zoning and development. Petitioners lost their battle against the project at the legislative level and now have resorted to court intervention. Yet legislative action is not required to satisfy the universe of affected persons. Mere dissatisfaction is not sufficient to warrant the relief petitioners seek.

Petitioners' contention that the challenged resolution is in contravention to the 2007 contextual zoning resolution is rejected. As respondents correctly argue, "zoning is not static" (*Kravetz v. Plenge*, 84 AD2d 422 [4th Dept 1982]).

Otherwise, petitioners' arguments amount to little more than a siren song about the landscape of the City and the perils of large-scale developments. While the court acknowledges petitioners' concerns, they are unavailing in the context of this proceeding. Rather, such arguments are nothing more than a red herring. Certainly, the Developers will naturally situate themselves so as to realize a financial gain; that is the very nature of capitalism. However, this fact does not compel the conclusion that the challenged resolution was enacted solely for their own benefit on this record (see i.e. *Rodgers v. Village of Tarrytown*, 302 NY 115 [1951]).

Accordingly, the balance of the petition must be denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the cross-motion to dismiss is granted to the extent that the second cause of action is severed and dismissed; and it is further

ORDERED that the balance of the petition is denied and this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 6/18/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.