SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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INDEX NO. 159502/2021

MOTION DATE 10/18/2021

MOTION SEQ. NO. 001

KATHRYN ARNTZEN, PAULINE AUGUSTINE, DIEM BOYD, LESLIE CLARK, MARJORIE DIENSTAG, MARY PIZZA DENNIS, ROBIN FELSHER, DEBORAH GONZALEZ, DOROTHY GREEN, ELLEN KOENIGSBERG, MELISSA KRAWITZ, SHANNON PHIPPS, KATE PULS, LARRY ROBERTS, MARCELL ROCHA, ELIZABETH SABO, MICHAEL SIMON, GORDON STANLEY, STEVEN THALER, STUART WALDMAN, PATRICK WALSH, JUDITH ZABOROWSKI

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22, 23, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for MISCELLANEOUS.

As discussed in motion sequence 002, the instant petition relates to sidewalk cafes and restaurants erected during the COVID pandemic along the street of New York City, familiar to recent visitors and citizens of the City. As relevant to this proceeding, following executive orders from former Governor Cuomo during the earlier months of the pandemic, former Mayor de Blasio issued Emergency Executive Order 126 which, inter alia, directed the Department of Transportation to establish and administer a program to expand seating options for restaurants, bars, and other establishments in certain

outdoor areas, including on public sidewalks and curbside/street space, and otherwise suspended various zoning laws related to same (Emergency Executive Order No. 126, Open Restaurants Program and the Expansion of Outdoor Seating in Phase 2, June 18, 2020; hereinafter referred to as "the program"). Thereafter, following the issuance of an environmental assessment statement, the Department of Transportation issued a negative declaration, concluding that the program would have no significant effect on the environment (Negative Declaration, Permanent Open Restaurants Program, Department of Transportation, June 18, 2021).

Petitioners seek to annul respondent's negative declaration finding the outdoor dining program would not significantly adversely impact the environment. Petitioners allege that the program qualifies as a type 1 action under the State Environmental Quality Review Act (hereinafter "SEQRA"), and thus the respondent must take a hard-look at environmental impacts, as required under SEQRA, including noise, traffic and parking, sanitation, and neighborhood character. Petitioners further allege that respondent pre-judged the environmental impact of the program, as essential portions of the program have not been developed or finalized. Respondent opposes contending that it complied with SEQRA, performed the requisite hard-look, and properly issued

a declaration that the program would not significantly adversely impact the environment.

As an initial matter, the Court notes that the parties' papers have failed to comply with the Court's Uniform Rule 202.8-b (22 NYCRR § 202.8-b, requiring an attorney certify the number of words in their motion papers does not exceed 7,000), in that none of the submissions have included the requisite word-count certification (*see* submissions on motion sequence 001; *see also* submissions on motion sequence 002). "Page limits on submissions are appropriate, as is the rejection of papers that fail to comply with those limits" (*Macias v. City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]). The Court notes that this is not an isolated incident, and that Corporation Counsel of the City of New York has regularly flouted §202.8-b in this Part. Notwithstanding, given the importance of this matter to the People of the City of New York, the Court will consider the parties' non-complying papers. The Court advises Corporation Counsel of the City of New York that future non-complying papers, in this matter or any others in which it appears in this Part, may be rejected by the Court for non-compliance.

The standard of review of a municipal agency's SEQRA determination, including an agency's negative declaration that a program will not have significant environment impacts and thus not subject to the full review scheme contemplated by SEQRA, 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" (*Akpan v. Koch*, 75 NY2d 561, 570 [1990] [internal quotations removed]; *see also* CPLR § 7803[3]). Such review considers whether the agency took a "hard-look" at environmental concerns and reasonably contemplated same before making its determination (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]; *Matter of New York City Coalition to End Lead Poisoning v. Vallone*, 100 NY2d 337 [2003]). In reviewing the determination, the Court will not supplant its own judgment for that of the agency or second-guess an agency's choice among alternatives (*Matter of Jackson*, *supra*.).

The Court must first address whether the respondent's actions are lawful, that is whether they comport, both substantively and procedurally, with the regulatory statute at issue – namely SEQRA (*id*.). "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental

decision making'" (*Akpan v. Koch*, 75 NY2d 561, 569 [1990] *quoting Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679 [1988]). "[When] making determinations of significance, the reviewing agencies must look at impacts which may be reasonably expected to result from the proposed action (*Matter of Farrington Close Condominium Bd. of Mgrs. v. Incorporated Vil. Of Southampton*, 205 AD2d 623, 625 [2d Dept 1994]). An illustrative list of impacts for consideration by the agency in determining whether the action may have a significant adverse impact is found at 6 NYCRR 617.7(c)(1)(i), and includes, as relevant here: changes to air quality, surface water quality and quantity; traffic or noise levels; and substantial increase in potential for drainage problems (*id.*).

To achieve its purpose of injecting environmental considerations into governmental decision making, SEQRA mandates the preparation of an environmental impact statement where a proposed project "*may* have a significant effect on the environment" (ECL § 8-0109[2] [emphasis supplied]). It is well settled that the operative word "may" sets a low threshold for requiring impact statements (*Chinese Staff & Workers Assn. v. City of New York*, 68 NY2d 359, 364–365 [1986]). The adoption of zoning regulations is presumed to have a significant adverse impact on the environment (6 NYCRR 617.4[a][1]; *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 82 AD3d 1377 [3d Dept 2011]).

Here, there is no question that the program changes zoning regulations, respondent did not prepare an environmental impact statement and, instead, issued a negative declaration that the dining program would not have a significant environmental impact. Likewise, it is undisputed that the program amounts to a type 1 action, which is more likely to require an environmental impact statement (*see generally* New York Jurisprudence, Second Edition § 131, 55 NY Jur.2d Environmental Rights § 131). While SEQRA contemplates environmental studies and public comments before the enaction of a proposed program, here, the dining program was enacted, initially temporarily, as part of COVID emergency declarations by former Governor Cuomo and former Mayor DeBlasio. Thus, the consideration of environmental impacts here is not merely an abstract undertaking or municipally-provided nicety, but warrants nothing less than a comprehensive and earnest consideration and examination of the actual impacts of the already implemented program upon the daily functioning of the City's sidewalks and streets, as well as the impact upon locally affected residents.

Considering petitioners' evidence, and that the Court's inquiry should be governed by "a rule of reason" (*Matter of Jackson*, *supra* at 417), reveals that the programs have, at a minimum, impacted traffic and noise levels, and may have

significantly impacted sanitation. Petitioners cite the increase in noise complaints in locations where the program has been implemented as further evidence of the environmental impacts. Consequently, these impacts *may* be significant, and therefore the environmental impact studies and public comment are required under SEQRA (*see* ECL § 8-0109[2]; *see also Chinese Staff & Workers Assn. v. City of New York*, 68 NY2d 359). Furthermore, the environmental assessment statement, which found no significant environmental impacts in instituting a permanent dining program, failed to consider the likelihood that ongoing environmental impacts from the temporary dining program would continue in the permanent program. Respondent's bald assertion that no significant impact on noise or traffic is attributable to the program is arbitrary and capricious considering the plain evidence that noise complaints have increased in areas where the program has been implemented. Given the foregoing, and as it is undisputed that respondent did not perform an environmental impact study nor solicit public comment, as required by SEQRA, respondent's action is unlawful.

Finally, to the extent that respondent contends that because the program is not fully developed it may change the program's rules to ameliorate certain environmental impacts, and therefore an environmental impact study is not

required, such contention finds no support in either SEQRA or appellate authority (*c.f. ACORN v. Bloomberg*, 52 AD3d 426 [1st Dept 2008]; dismissing article 78 petition where agency conducted environmental impact study and reviewed alternatives). Respondent argues that despite its environmental review of the program preceding the development of the program's rules, its declaration that the program will not negatively impact the environment is nevertheless proper. This is the very definition of impermissible pre-judgment. Put differently, where the essential components of a program have not yet been established, the agency cannot issue a negative declaration that the potentially changing program will not have significant environmental impacts. For a taxpayer supported agency to declare, in effect, the Open Restaurants Program and Outdoor Seating have no negative impact on our streets and communities because that Agency has unilaterally made that determination, serves only as a thinly-veiled attempt to avoid statutory scrutiny of the program by a baseless declaration of its own omnipotence. Any assertion otherwise warrants no further discussion.

Accordingly, it is

ORDERED that respondent failed to undertake an environmental impact study and public comment, as required under SEQRA for a project that may well

impact the environment as previously noted, and including but not limited to the adversity of unabated noise, and potential safety hazards; and it is further

ORDERED that respondent neither took a hard look at environmental impacts of the program nor did it reasonably elaborate on the basis for its negative declaration, in contravention of SEQRA; and it is further

ORDERED that the negative declaration relates to a program in which the essential components have not been finalized and does not comport with SEQRA; and it is further

ORDERED that the petition is granted to the extent of annulling respondent's negative declaration as arbitrary and capricious and remanding the matter to respondent to complete an environmental impact review in compliance with SEQRA.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

3/23/2022
DATE

FRANK NERVO, 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