The COOPERATOR®
The Co-op & Condo Monthly

2014 January

Co-ops and Condos Can Be Successful

By Adam Leitman Bailey

According to a well-worn truism, "You can't fight City Hall." In the old days, that was true—particularly when it came to public works projects. If the city wanted to do it, there was no one to say 'no,' except at the ballot box, when it was generally too late. However, that situation changed in the second half of the 20th century, when the historical preservation and environmental movements arose. Now, not only can you fight City Hall, you can win—just not every time. Battling against City Hall's army of lawyers requires picking the right battle, the right plaintiff, the right statute, and the right forum. Between the Second Avenue Subway, the Waste Disposal Center and the large structure of toilets in Brooklyn blocking resident's views to name a few, there has never been a time in co-op and condo history where buildings have needed to fight City Hall.

The Right Battle

The axis of any battle is the Environmental Impact Statement (EIS) required under federal, state, and city law. The process requires not just that there be a study of the various impacts of a given public project, but that the public be given an opportunity to comment on it. A revised study takes comments into account. Thus, for the attorney "fighting City Hall," the job often lies in preventing litigation, by marshaling the parties that would be adversely affected by the project, having the hard science to show the impact, and making the presentation to the decision makers—which in New York City often includes the local community boards.

However, community board input is not determinative. For example, opponents of the Second Avenue subway convinced Community Board 9 to oppose the use of eminent domain to acquire land for the project. The EIS noted but overrode the objection. Generally speaking, opposition to a long-awaited or popular project is going to be the wrong battle. Objectors normally contest such overrides using CPLR Article 78 that usually requires a showing that the agency was "arbitrary and capricious."

Jackson v. NY Urban Dev., is a hornbook for New York's entire law on environmental review of municipally-sponsored projects. Environmental Conservation Law at ECL 8-0105(6) requires projects to consider "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." Since under the ECL, every state and municipal agency is a potential sponsor of a project, all of them may be the "lead agency" to prepare an EIS.

Jackson explains: More particularly, in a case such as this, courts may, first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine 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. Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process.

Any inquiry is tempered in two respects. First, an agency's substantive obligations under the State Environmental Quality Review Act (SEQRA) must be viewed in light of a rule of reason. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a final environmental impact statement will satisfy the substantive requirements of SEQRA." Under Jackson, the lead agency's study does not have to be perfect and absolutely comprehensive—it just has to be reasonable.

The battle has to be intrinsically important, not merely important to the client. A recent battle in Brighton Beach to replace the Superstorm Sandy-destroyed restrooms with storm-proof ones was unable to garner any real sympathy from the courts. Not only had the city done nearly everything required of it in proposing the project, it was a project so small in square footage as to be exempt from most environmental review.

However, well prepared objectors can defeat a major project for a not particularly popular reason. In the earlier days of the environmental movement, an obscure fish's habitat was the undoing of the proposed Westway superhighway on Manhattan's West Side.

The Right Plaintiff

We mean the word "plaintiff" generically. This is the person in whose name litigation will take place, or who will threaten litigation.

To bring a judicial proceeding, the first issue is "standing." Strictures of establishing standing vary considerably with which law is the basis of the attack.

Unlike many environmental statutes, the National Environmental Policy Act (NEPA) does not contain a citizen-suit provision. Therefore, in order to have standing, an individual or an organization must meet both the constitutional and prudential requirements. In Bennett v. Spear, the Supreme Court found that economic injury alone was sufficient to confer standing under the Endangered Species Act.

For projects under the jurisdiction of the New York City Landmarks Preservation Commission, standing to attack the commission is nearly impossible to establish. Citizens Emergency Committee to Preserve Preservation v. Tierney held, "A general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case." Establishing standing for environmental issues can be easier.

To gain standing under SEQRA and challenge a governmental action that threatens a natural resource, the plaintiff must prove "that he or she uses and enjoys [the] natural resource more than most other members of the public." The test is similar to one established in Sierra Club v. Morton, where the Supreme Court held that an injury to a particular plaintiff's "aesthetic and environmental well-being would be enough [to establish standing]."

Anyone actually living near a noisy, polluting project will have standing. Objectors who appear as victims are more likely to garner court and media sympathy and be so perfect a plaintiff, the agency may be afraid to attack standing.

A less appealing or sympathetic plaintiff risks being labeled a "NIMBY," standing for "not in my back yard," used pejoratively to describe an objector as one who regardless of the abstract good of the project, objects to the quality of life or adverse land value impact the objector foresees for the objector

New York City codified NIMBY-like considerations under the "Fair Share Criteria" adopted by the New York City Planning Commission in 1991 required under New York City Charter §203. The commission writes, "In fact, there is hardly a neighborhood in the city, no matter what the income level, that does not

believe it is 'oversaturated' by burdensome facilities of one kind or another or, at the very least, overlooked when it comes to distributing benefits."19 The battle for "Fair Share" is also better fought in the community boards than in the courts.

Conclusion

Thus, in fighting City Hall, one must act early and decisively, but also flexibly. A board's counsel fighting a project needs to not only know the law, but to be prepared with facts, figures, scientific and historical studies, a well-chosen plaintiff and above all, a well-chosen battleground.

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