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You Can Fight City Hall: Battling For Public Projects

BY ADAM LEITMAN BAILEY AND DOV TREIMAN


Adam Leitman Bailey


Dov Treiman

According to an ancient 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. Then, in the second half of the 20th century the historical preservation and environmental movements arose changing everything. Now, not only can you fight city hall, you can win, but 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.

TheRight Battle

The axis of any battle is the Environmental Impact Statement (EIS)1 required under federal, state, and city law. The process requires not just that there be a study of the various impacts, but that the public be given an opportunity to comment on it. A revised study takes comments into account.2 Thus, for the attorney "fighting city hall," the job often lies in preventing litigation, by marshaling what would be adversely affected by the project, having the hard science to show the impact, and making the presentation to the decision makers, in New York City, often 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.3 Generally speaking, opposition to a long-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."4

Jackson v. NY Urban Dev.,5 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.

Our inquiry is tempered in two respects. First, an agency's substantive obligations under 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 FEIS will satisfy the substantive requirements of SEQRA"6

Under Jackson, thelead agency's study does not have to be perfect and absolutely comprehensive, but merely 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 rest rooms with storm proof ones was unable to garner any real sympathy from the courts.7 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. Near the beginning of the environmental movement, an arcane fish's habitat was the undoing of the proposed superhighway on Manhattan's West Side, Westway.8

The Right Plaintiff

We mean the word "plaintiff" generically. This is the person in whose name litigation will take place or who will threaten it. Opponents of DOMA had their perfect plaintiff in the person of a lesbian widow of a decades long relationship.9

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, NEPA does not contain a citizen-suit provision.10 Therefore, in order to have standing, an individual or organization must meet both the constitutional and prudential requirements.11 In Bennett v. Spear, the Supreme Court found that economic injury alone was sufficient to confer standing under the Endangered Species Act.12

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. Tierney13 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."14 The test is similar to one established in Sierra Club v. Morton,15 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 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.16

An unattractive plaintiff risks the label "NIMBY," standing for "not in my back yard,"17 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 199118 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.

The Right Statute

For any project, numerous statutes may overlap in coverage. Environmental statutes alone include the National Environmental Policy Act (NEPA) (42 USC §§4321-4361), New York State's Environmental Conservation Law (codifying SEQRA, the State Environmental Quality Review Act), and New York City's Uniform Land Use Review Procedure (ULURP) (NYC Charter §197-c). All of these laws may apply. Unlike the federal law, New York's SEQRA is not merely a disclosure statute. It "imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts."20

We may add the various historical preservation statutes21 and even non-discrimination statutes. For example, Public Buildings Law §§51 & 52 require municipal projects to refrain from discriminating against handicapped persons. Federal acts may also include the Clean Air Act,22 the Comprehensive Environmental Response, Compensation, and Liability Act23 and the Resource Conservation and Recovery Act.24

The leading case under The Fair Share Criteria, Silver v. Dinkins,25 thoroughly explains the law's purpose: The city must seek to: (1) site facilities equitably by balancing the considerations of community needs for services, efficient and cost-effective service delivery, and the social, economic, and environmental impacts of city facilities upon surrounding areas; (2) base its siting and service allocation proposals on the city's long-range policies and strategies, sound planning, zoning, budgetary principles, and local and citywide land use and service delivery plans; (3) expand public participation by creating an open and systematic planning process; (4) foster consensus building; (5) plan for the fair distribution among communities of facilities providing local or neighborhood services in accordance with relative needs among communities for those services; (6) lessen disparities among communities in the level of responsibility each bears for facilities serving citywide or regional needs; (7) preserve the social fabric of the city's diverse neighborhoods by avoiding undue concentrations of institutional uses in residential areas; and (8) promote government accountability by fully considering all potential negative effects, mitigating them as much as possible, and monitoring neighborhood impacts of facilities once they are built.

Thus, even if there is nothing supposedly wrong with a suggested city construction, the city still has to realistically consider whether it is fair to the particular neighborhood to have that facility in that place. Or, if it is the kind of facility that is nothing but a benefit to its surrounding neighborhood, the city must consider if it is fair to the rest of the city to locate it in the proposed location rather than somewhere else more needing the benefit.

Reviewing a project for what laws it may breach can be potentially nearly as broad as the full body of federal, state, and city law.

The Right Forum

Picking the forum means not only picking the right court—federal or state—but picking the prelitigation battleground, such as the press, street demonstrations, or in politicians' offices.

Courts are bad places to stage these battles. New York State Article 78 proceedings rarely result in overturning agency decisions. Federal agencies' interpretations of NEPA are entitled to substantial deference.26 Rather, courts will uphold permissible agency actions, so long as the agency conducted the requisite "hard look" inquiry during its decision-making process.27

In close calls, courts will look to the twin aims of NEPA, which are: (1) requiring agencies "to consider every significant of the environmental impact of a proposed action;" and (2) "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."28

Finally, delays inherent in the judicial process alone can accord objectants time to build a groundswell of opinion the politicians cannot ignore.29

Conclusion

Thus, in fighting city hall, one must act early and decisively, but also flexibly. 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.

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, P.C. Dov Treiman is a partner at the firm. Alex Luxenburg and Kristy Eagan, summer associates at the firm, assisted in the preparation of this article.

Endnotes:

1. The Second Avenue Subway EIS, as originally drafted, modified and supplemented are all to be found at http://www.mta.info/capconstr/sas/documents.html.
2. See, for example, Second Avenue Subway Final EIS, Chapter 4,http://www.mta.info/capconstr/sas/documents/feis/chapter04.pdf.
3. Page 4-9.
4. CPLR 7803.
5. 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298, 17 Envtl. L. Rep. 20,362 (1986).
6. 67 N.Y.2d 400, 417.
7. http://www.nytimes.com/2013/04/15/nyregion/restroom-on-boardwalk-threatens-luxury-views.html.
8. Sierra Club v. United States Army Corps of Engineers, 701 F. 2d 1011 (2d Cir. 1983).
9. United States v. Windsor, 570 US— (2013).
10. Citizen suit provisions provide private citizens with a right to sue to enforce a statute, essentially "stepping in the shoes" of the government.
11. Bennett v. Spear, 520 U.S. 154 (1997).
12. 520 U.S. 154 (1997). The court found that Article III standing requirements were met, but that prudential "zone of interests" standing requirements" were abrogated by the ESA"s citizen suit provision. Id.
13. 70 A.D.3d 576, 896 N.Y.S.2d 41, N.Y.A.D. (1st Dept., 2010).
14. Matter of Save the Pine Bush v. Common Council of City of Albany, 13 NY3d 297 (2009).
15. 405 US 727, 734 [1972].
16. The authors have private knowledge of a case where NYC only attacked standing because the private respondents did too even though standing was a decisive issue.
17. West 97th-West 98th Streets Block Ass'n v. Volunteers of America of Greater New York, 153 Misc.2d 321, 581 N.Y.S.2d 523.
18. http://www.nyc.gov/html/dcp/html/pub/fair.shtml.
19. Id.
20. Gitlen, "Substantive Impact of the SEQRA," 46 Alb L Rev 1241, 1248).
21. E.g., The National Historical Preservation Act of 1966.
22. 15 U.S.C. §793{c)(l).
23. 42 USC §§9601 et seq.
24. Alabama ex rel. Siegelman v. U.S. EPA, 911F.2d 499, 504 {11th Cir. 1990).

25. 158 Misc.2d 550 (Sup. Ct., N.Y. Co. 1993), aff'd for the reasons stated below, 196 A.D.2d 757 (1st Dept. 1993) lv. den. 82 N.Y.2d 659.
26. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
27. The "hard look" standard of review is not implemented under the corresponding state statute—the New York State Environmental Quality Review Act (SEQR).
28. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143, 102 S.Ct. 197, 201, 70 L.Ed.2d 298 (1981); See Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dept. of Int., 608 F.3d 592, 605 (9th Cir. 2010) (requiring agency to consider potential cumulative effects).
29. Historical analysis will likely conclude that the so-called Ground Zero Mosque was destroyed by the lawsuits it faced, even though those suits ostensibly failed. The authors of this article led the winning team in Brown v. New York City Landmarks Preservation Com'n, 32 Misc.3d 1213 and Forras v. Rauf, 39 Misc.3d 1215, the two cases that judicially challenged the project.