

Practice Update

# Motion for a Preliminary Injunction Filed in Gowanus Neighborhood Rezoning Litigation

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By Richard G. Leland

As expected, two citizens' groups and several individuals filed an Article 78 proceeding in the Supreme Court, Kings County, seeking to annul the recently enacted Gowanus Neighborhood Rezoning. The case has been assigned to Justice Consuelo Melendez.

The issues raised in the petition are principally environmental. They include several claims under the State Environmental Quality Review Act (SEQRA) and CEQR, New York City's regulatory scheme for implementing SEQRA, as well as claims under the National Environmental Policy Act and the National Historic Preservation Act. As of this date, the City has not responded to the petition and its time to do so has not started to run.

The petitioner's main substantive claim is that the City's Environmental Impact Statement did not adequately study the impacts that significant development in the Gowanus Neighborhood would have on water quality due to what are known as Combined Sewer Overflows (CSOs) – contamination caused by the confluence of sanitary and stormwater overflows into the Gowanus Canal during periods of heavy rain. They also allege impacts to traffic, noise and other environmental review categories. They

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also raise certain procedural claims regarding the SEQRA/CEQR process.

The City has moved to dismiss the case on procedural grounds based on the four-month statute of limitations applicable to Article 78 proceedings. The petitioners filed the case within four months of the final approval of the rezoning but failed to serve the petition and a notice of petition on the City within the 15 days of the date when the statute of limitations would have expired. Nor did they ask the court for an extension of the time to serve the papers. The applicable statute allows the court to excuse this default for “good cause” or “in the interests of justice.” In their response to the motion to dismiss, the petitioners have cross-moved for an extension of the time to serve the notice of petition and petition and have argued that their delay was justified by the fact that the case was not assigned to a particular judge within the 15-day period and, more importantly, that the “interests of justice” militate in favor of having the case proceed on the merits. The motion and cross-motion are scheduled to be heard in September. If the cross-motion is granted, the case will proceed on the merits.

On June 9, the petitioners filed a motion for a preliminary injunction, seeking to stop all construction on projects that are in compliance with the rezoning, unless and until the Court grants such a motion, the City is free to issue permits allowing for development consistent with the new zoning. The motion is scheduled to be heard on June 29th and the City’s opposition papers are due on June 22. A typical Article 78 proceeding can take anywhere from three to sixth months from final submission before the Supreme Court renders a decision. In addition, an unsuccessful party has a right to an appeal to the Appellate Division, First Department, which typically subsumes up to an additional year to be decided. Akerman is closely following the progress of this case.

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