South St. Seaport Coalition, Inc. v City of New York
2022 NY Slip Op 32645(U)
August 5, 2022
Supreme Court, New York County
Docket Number: Index No. 151186/2022
Judge: Arthur Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

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SOUTH STREET SEAPORT COALITION, INC., SAVE OUR SEAPORT, SEAPORT COALITION, CHILDREN FIRST, LINDA HELLSTROM, JAY HELLSTROM, EMILY HELLSTROM, ZETTE EMMONS, COLLEEN ROBERTSON,

Petitioners,

- v -

CITY OF NEW YORK, NEW YORK CITY COUNCIL, NEW YORK CITY PLANNING COMMISSION, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF SMALL BUSINESS SERVICES, 250 SEAPORT DISTRICT, LLC, SOUTH STREET SEAPORT LIMITED PARTNERSHIP,

Respondents.

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INDEX NO. 151186/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 59, 60, 61, 62, 63, 64, 65, 66, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 190, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 277, 278, 279, 282, 283, 284, 285, 288, 289

were read on this motion for PRELIMINARY INJUNCTION/TRO.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 274, 275, 276, 286, 287, 290

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Upon the forgoing papers and for the reasons hereinbelow, petition is denied and dismissed.

INTRODUCTION

In this hybrid CPLR Article 78 Special Proceeding and CPLR 3001 Declaratory Judgment action, petitioners seek to prevent a real estate developer from erecting a 324-foot-tall, 547,000-square-foot building ("the Building" or "the Project" or "the Proposal") on the city block at 250 Water Street, New York, New York ("the Site"), a plot that is located in the South Street Seaport

Historic District ("Seaport") and is otherwise zoned with a 120-foot height limit and a maximum allowable floor area of 312,000-square-feet, despite the fact that the New York City Planning Commission and the New York City Council have approved the Proposal.

Essentially, petitioners argue that respondents have improperly moved development rights from Pier 17 to the Site, exactly like knights on a chess board: two squares up Fulton Street and one square over Water Street, and never mind what lies in between.

THE PARTIES

Individual petitioners consist of five people who live, work, send their children to school, and/or own property in the Seaport, and who are also members of the four community group petitioners, South Street Seaport Coalition, Inc., Save Our Seaport, Seaport Coalition, and Children First.

Government respondents are the City of New York ("the City"), a municipal corporation existing under the laws of the State of New York; the New York City Council ("City Council"), New York City's legislative body, pursuant to the New York City Charter ("City Charter"); the New York City Planning Commission ("CPC"), the city agency charged with the City's orderly "growth, improvement and future development," pursuant to City Charter, Chapter 8; and the New York City Department of Buildings ("DOB"), the city department charged with administering and enforcing zoning regulations, pursuant to City Charter, Chapter 26 (collectively, the "City Respondents").

Respondent New York City Economic Development Corporation is a not-for-profit corporation whose members are appointed by the City's Mayor.

Developer respondents are 250 Seaport District, LLC ("250SD"), which owns the Site and received the land-use approvals challenged herein, and South Street Seaport Limited Partnership ("SSSLP"), both of which are subsidiaries of the Howard Hughes Corporation ("HHC"; collectively with 250SD and SSSLP, "the Developer").

BACKGROUND

A. "AN IMPORTANT PART OF THE LEADING PORT OF THE NATION"

The South Street Seaport, once a central part of the City's bustling harbor, is a small area off of the East River that has had an outsized impact on New York City's role as a world commercial capital. Its waterfront and buildings are redolent of "the Age of Sail," "the Golden Age of Shipping," and "olde New York."

On October 18, 1972, a five-block portion of the Seaport, "a visual catalog of late eighteenth century and nineteenth century urban commercial architecture," was added to the National Register of Historic Places. National Archives, https://catalog.archives.gov/id/75319917 [last accessed Aug. 4, 2022]. Also in 1972 an amendment to the City Zoning Resolution ("ZR") created what was then the Special South Street Seaport District ("SSSSD"). NYSCEF Doc. No. 1 ¶ 46. On December 12, 1978, an expansion of the South Street Seaport Historic District was entered into the National Register to include, inter alia, seven more blocks and two piers. National Archives, https://catalog.archives.gov/id/75319919 [last accessed Aug. 4, 2022].

On May 10, 1977, the New York City Landmarks Preservation Commission ("LPC") designated a ten-and-a-half block area, bounded by the Brooklyn Bridge to the north-east, the East River to the south-east, Fletcher Street to the south-west, and Pearl and Water Streets to the north-west, as the South Street Seaport Historic District, noting, inter alia, the area's "small-scale brick buildings [that] contrast dramatically with the soaring skyscrapers nearby" and also that the Seaport was once "an important part of the leading port of the nation." LPC, http://s-media.nyc.gov/agencies/lpc/lp/0948.pdf [last accessed Aug. 4, 2022]. On July 11, 1989, the LPC designated an extension to the Historic District to include the block bounded by Dover, Pearl, and Water Streets, and Peck Slip. LPC, http://s-media.nyc.gov/agencies/lpc/lp/1646.pdf [last accessed Aug. 4, 2022].

The mostly mercantile 18th and 19th-century buildings that make up the Seaport, which, according to the LPC, include "some of the oldest standing in Manhattan," average 50 feet in height and four- to five-stories; none of them is taller than the current 120-foot zoning limit.

The Site is an entire block south-west of the Manhattan approaches to the Brooklyn Bridge and is bounded by Peck Slip to the north-east, Water Street to the south-east, Beekman Street to the south-west, and Pearl Street to the north-west. Directly across Pearl Street from the Site is Southbridge Towers, consisting of four 27-story residences. From at least the early 1970s to the early 1990s a parking garage and automobile repair shop occupied a significant portion of the site. NYSCEF Doc. No. 260. From the early 1990s to the present an open-air parking lot has occupied the entire Site. Id.

The Proposal would be roughly 270% of the maximum height and 175% of the maximum floor area allowed by the block's current zoning. However, as the LPC noted in 1977, immediately to the south-west of the Seaport there are several tall towers, which now include 199 Water Street (35 stories, 440 feet), 161 Maiden Lane (57 Stories, 651 feet), 151 Maiden Lane (33 Stories, 336 feet) and 161 Front Street (31 stories 230 feet). NYSCEF Doc. No. 131 ¶ 13.

B. OF AIR RIGHTS AND DEMAPPED STREETS

In 1972 the City Zoning Resolution ("ZR") was amended to create the Special South Street Seaport District; and in 1973 the ZR was further amended to include a "Transfer District Map" and to designate certain lots *from* which air rights could be transferred ("granting lots") and other lots *to* which air rights could be transferred ("receiving lots"). NYSCEF Doc. No. 8. In 1998, the CPC and City Council created the "Special Lower Manhattan District," and the Special South Street Seaport District was incorporated into it as "the Special South Street Seaport Subdistrict" ("the Subdistrict"). ZR §§ 91-60 to 91-69.

Meanwhile, between 1970 and 1983, the Board of Estimate amended the City Map (infra) four times to "demap" parts of Fulton, Water, Front, and South Streets to remove vehicular traffic and make them more pedestrian-friendly. NYSCEF Doc. No. 128 at 198-191. Further, on June 20, 1983, the DOB "determined that the portions of demapped Fulton Street and Front Street … do qualify as and shall be deemed to be 'streets' for all purposes currently required by the New York City Zoning Resolution [and] other similar codes ... " NYSCEF Doc. No. 13; See also NYSCEF Doc. No. 10 ("The Department of Buildings shall, in its discretion, determine that the former streets are "streets" for all zoning … purposes."). ZR § 91-62 states that those streets "shall satisfy and apply to all references to streets provided elsewhere in the Zoning Resolution."

As if by alchemy, demapping streets creates development rights. In 1983 the subject rights were transferred to a consortium of banks, the remainder of which, in turn, was "purchased in 2015 by Seaport Development Holdings LLC (now known as the Seaport Development Rights Bank), an affiliate of" 250SD. NYSCEF Doc. No. 74 ¶ 134. From that acquisition, 30,216-square-feet of unused development rights remain, and the Developer is attempting to use all of them for the Proposal. NYSCEF Doc. Nos. 10, 40, and 74.

In 2003, the CPC "downzoned" a 10-block area within the Subdistrict, including the Site, from C6-4, which has no height limit and allows a maximum Floor Area Ratio ("FAR") (total floor area of a building divided by lot area) of 10.0, to C6-2A, which caps building height at 120 feet and FAR at 6.0 to 6.5 (6.0 for commercial use; 6.02 for residential use; and 6.5 for community facility use). ZR § 91-661. The purpose was "to ensure that development at 250 Water Street and other sites occurs at the proper scale." NYSCEF Doc. No. 19. The C6-2A height and FAR limits are still in force.

In 2010 SSSLP took over a long-term lease, amended June 27, 2013, for portions of the Seaport, including Pier 17, which juts out into the East River. NYSCEF Doc. No. 128.

In 2013, the City created a Large-Scale General Development ("LSGD") (infra) encompassing, essentially, Pier 17. NYSCEF Doc. No. 40 at 4. In 2016, the CPC enlarged the LSGD to include the nearby Tin Building. Id.

The majority of the transferred floor area rights the Proposal needs would come from the Pier 17/Tin Building complex. NYSCEF Doc. No. 74 ¶ 156.

C. 250SD PURCHASES AND SEEKS TO DEVELOP THE SITE

In 2018, 250SD purchased the Site, and on September 26, 2019, the Developer held a community workshop in which it tested the waters for the idea of transferring development rights from various sources to the Site. NYSCEF Doc. Nos. 1 ¶ 87 and 138 ¶ 88.

At the end of 2020, the Developer applied to the LPC for a Certificate of Appropriateness ("CoA") to allow for development of the Site, including construction of a 470-foot-tall building. NYSCEF Doc. No. 1 ¶ 94. On May 4, 2021, the LPC issued a "Design Approval Only" CoA for a "multi-story bar tower consisting of four connected volumes of varying heights" up to 324-feet-tall (146-feet under the original proposal but 204-feet over the zoning limit). NYSCEF Doc. No. 88.

On May 13, 2021, 250SD submitted a Land Use Application to the CPC seeking myriad actions, including, inter alia:

1. enlarging the LSGD to include the demapped portions of Fulton, Front and Water Streets;
2. amending the ZR to consider the demapped portions of those streets as "a single zoning lot" for purposes of the LSGD;
3. transferring development rights (including 256,914-square-feet of floor area) from Pier 17 to the Site;
4. transferring development rights (including 30,216-square-feet of floor area) from the Seaport Development Rights Bank to the Site;

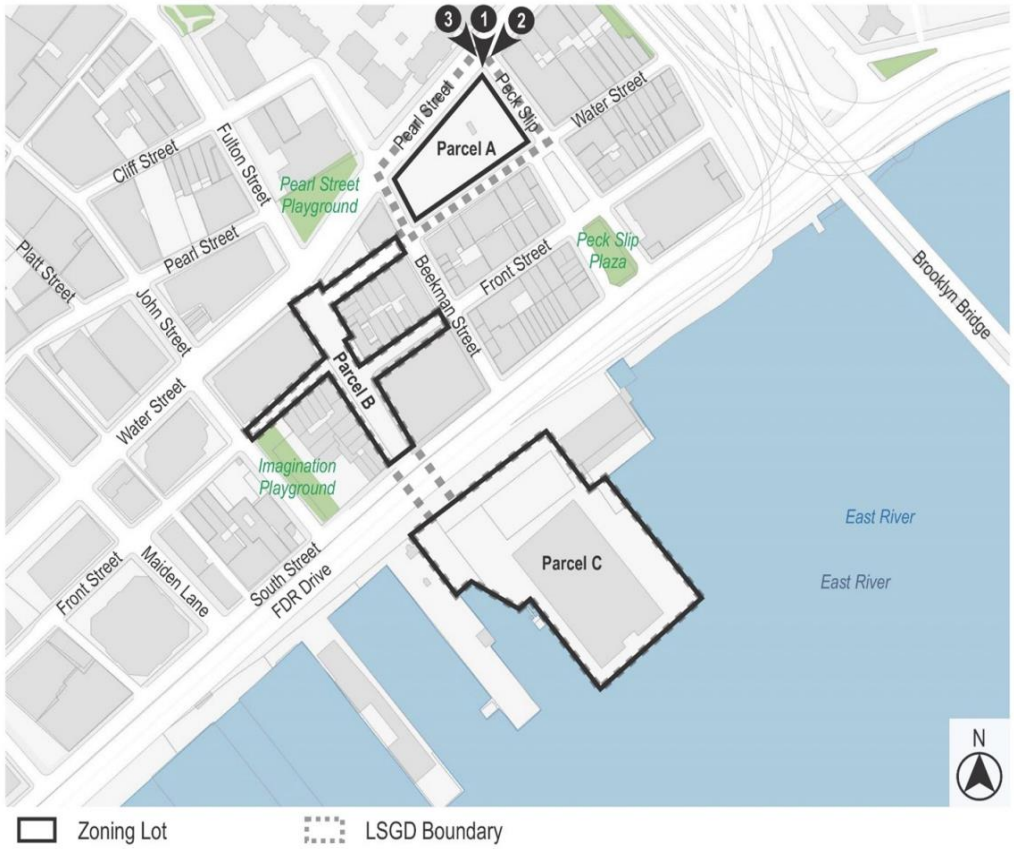
5. issuing a special permit to exceed the C6-2A FAR and height requirements; and
6. allowing the transfer of development rights in the LSGD regardless of zoning lot lines or district boundaries.

NYSCEF Doc. No. 76.

On October 10, 2021 the CPC issued a final Environmental Impact Statement ("EIS") for the Project. NYSCEF Doc. Nos. 89-100.

On October 15, 2021, 250SD amended its Land Use Application to the CPC but still requested permission to combine 250 Water Street ("Lot A" or "Parcel A") with the demapped streets ("Lot B" or "Parcel B") and Pier 17 and the Tin Building ("Lot C" or "Parcel C") into one LSGD, and to move development rights from Lot C to Lot A.

The final proposed LSGD would be the area bounded by the dotted lines, below:



NYSCEF Doc. No. 1.

On October 20, 2021, the CPC approved 250SD's Land Use Application, subject to certain terms and conditions, including, but not limited to, the following: (1) "[the project] shall be developed in size and arrangement substantially in accordance with the dimensions, specifications, and zoning computations [indicated by the applicant]" {in other words, it is approved if you do what you promised}; (2) "the development shall conform to all applicable provisions of the ZR, except

for the modifications specifically granted in this resolution and shown on the plans [filed with the applications]" {in other words, it is approved if you have conformed to the ZR, except when we say you do not have to}; and (3) "such development shall conform to all applicable laws and regulations relating to its construction, operation and maintenance" {in other words, it is approved if you do not do anything illegal}. NYSCEF Doc. No. 40 at 29-31.

On November 3, 2021, the CPC approved an application by the Department of Small Business Services to negotiate an extended lease with SSSLP for certain real property within the Seaport. NYSCEF Doc. No. 50.

On December 9, 2021, the Land Use Committee of the City Council, by a vote of 15-0-1, recommended approving the Proposal. NYSCEF Doc. No. 46.

On December 15, 2021, by a vote of 45-3 (two absent), the City Council passed Resolution 1885-2021, which gave the Proposal a green light. NYSCEF Doc. No. 46. Importantly, the City Council also passed, by the same vote, Resolution 1886-2021, which, as relevant here, added the italicized language below to ZR § 91-68 ("Designated Pedestrian Ways"):

> Within the South Street Seaport Subdistrict, the [streets] listed in this Section are designated pedestrian ways and are governed by paragraph (b) of the definition of street as set forth in Section 91-62 (Definitions):
>
> (a) Fulton Street, between Water and South Streets
>
> (b) Water Street, between Fulton and Beekman Streets
>
> (c) Front Street, between Fulton and Beekman Streets, and between John and Fulton Streets
>
> (d) South Street (the 18-foot-wide strip located on the northwesterly side), between Beekman and John Streets.
>
> *In addition, the designated pedestrian ways referenced in paragraphs (a), (b) and (c) of this Section may be considered a single zoning lot for purposes of the definition of large-scale general development in Section 12-10 (Definitions).*

NYSCEF Doc. No. 46.

In or about late December 2021, 250SD executed and filed an "Affordable Housing Restrictive Declaration" pursuant to which 250SD "agreed" that the Building: (1) would contain no fewer than 70 units of "affordable housing" {meaning rents would be no higher than 40% of the median household income of "the area"}; and (2) would, voluntarily, comply with the City's Mandatory Inclusionary Housing Program, and that these obligations would "run with the land," binding any subsequent owner. NYSCEF Doc. No. 6.

On or about April 25, 2022, DOB approved 250SD's zoning diagram.

As things stand now, the special permit is in place; Lots A, B, and C are all in the same LSGD; ZR § 91-68 has been amended to designate the demapped streets as a zoning lot; and development rights have been transferred from Lot C to Lot A. At least so sayeth the CPC and the City Council.

If built, the Proposal would include approximately (roughly averaging petitioners' and respondents' figures) 370,000-square-feet of residences, 153,000-square-feet of offices, 10,000-square-feet of retail space, and 3,000-square-feet of community facilities.

PROCEDURAL HISTORY

On December 31, 2021, pursuant to City Charter § 643 and RCNY § 101-15, petitioners filed a zoning challenge with the DOB, raising the following eight issues:

1. Lot C and Lot A are not on zoning lots that are "contiguous or … contiguous but for their separation by a street or a street intersection;"
2. Lot B consists of streets, not a zoning lot;
3. A portion of Lot B consists of a portion of a tax lot, not a whole tax lot;
4. The LSGD is not being "used, developed or enlarged as a unit;"
5. The LSGD is not under single fee ownership or an equivalent;.
6. Development rights cannot be transferred from a lot with an existing building;
7. The existing buildings do not form an integral part of the LSGD; and
8. The Pier 17/Tin Building parcel is not a properly formed zoning lot.

NYSCEF Doc. No. 2.

On February 8, 2022, petitioners filed the instant special proceeding, asserting five causes of action:

1. pursuant to CPLR 7803(3) the approvals at issue were affected by errors of law, and were arbitrary and capricious and abuses of discretion, because the Proposal conflicts with the history and purposes of regulation of the area;
2. pursuant to CPLR 7803(3) the approvals at issue were affected by errors of law, and were arbitrary and capricious and abuses of discretion because the Proposal violates the ZR;
3. pursuant to CPLR 7803(3) the approvals violated lawful procedure in myriad ways;
4. pursuant to CPLR 3001 this Court should declare the Project illegal; and
5. pursuant to CPLR 7803(2) and (3) the approvals at issue were affected by errors of law, and were ultra vires, etc., because the Department of Small Business Services lease was approved before its terms were disclosed.

NYSCEF Doc. No. 1.

On February 18, 2022, petitioners applied for an Order to Show Cause, seeking, inter alia, to enjoin and restrain the Project. NYSCEF Doc. No. 59. On February 28, 2022, this Court signed petitioners' Order to Show Cause. NYSCEF Doc. No. 66. On April 22, 2022, the Developer moved, pursuant to CPLR 3212(e), to sever and grant summary judgment dismissing petitioner's declaratory judgment cause of action. NYSCEF Doc. No. 175.

STANDARDS OF REVIEW

CPLR 7803(2), (3), and 7806 authorize the Court to annul an administrative determination that "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" or where the "body or officer proceeded, … without or in excess of jurisdiction," and to "direct or prohibit specified action." CPLR 3001 authorizes the Court to "render a declaratory judgment … as to the rights and other legal relations of the parties." A hybrid special proceeding is an appropriate, and oft used, means to seek Article 78 relief along with closely intertwined declaratory relief. CPLR 3212 empowers the Court to "grant summary judgment as to one or more causes of action, or part thereof, … to the extent warranted."

A. DEFERENCE TO ADMINISTRATIVE AGENCIES

New York courts generally defer to administrative decisions. Inc. Vill. of Lynbrook v N.Y.S. Pub. Emp. Rels. Bd., 48 NY2d 398, 404-05 (1979). A determination "must be upheld if it is not arbitrary and capricious under the circumstances[;] the judicial function is exhausted where a rational basis is found for the administrative determination." 601 Realty Corp. v City of N.Y. Dep't of Health, 269 AD2d 268, 270 (1st Dep't 2000).

Unless the reviewing court finds that an agency exceeded its jurisdiction, violated lawful procedure, acted arbitrarily, or abused its discretion, the court has no alternative but to confirm its decision. Pell v Bd. of Ed. of Union Free School Dist. No. 1, 34 NY2d 222, 231 (1974). "Perceived deficiencies" in formal findings do not invalidate an agency's determination. Comm. to Pres. Brighton Beach & Manhattan Beach, Inc. v Council of City of NY, 214 AD2d 335, 337 (1st Dep't 1995). A reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated." Purdy v Kreisberg, 47 NY2d 354, 358 (1979). As this Court often says, "Judges may not simply second-guess administrative agencies."

However, consistency matters. Matter of 20 Fifth Ave., LLC v N.Y. State Div. of Hous. & Cmty. Renewal, 109 AD3d 159, 160 (1st Dep't 2013) (annulling agency decision "implement[ing] an apparently new policy ... [for] failure to set forth its reasons for altering its policy").

Blackletter law holds that an agency's interpretation of statutory language that is "special or technical and does not consist of common words of clear import" are entitled to judicial deference and must be upheld so long as they are reasonable. Beekman Hill Ass'n, Inc. v Chin, 274 AD2d 161, 167 (1st Dep't 2000). Expert agencies—not courts—possess the authority "to strike … policy balance[s]" when faced with "alternative interpretations of legislative directives." Takako Hatanaka v. Lynch, 304 AD2d 325, 326 (1st Dep't 2003). Thus, an interpretation of the ZR that requires consideration of multiple provisions and a practical understanding of zoning concepts falls well short of the level of clarity that allows a court to disregard the CPC's views. Flacke v Onondaga Landfill Sys., Inc., 69 NY2d 355, 363 (1987).

Petitioners correctly note that:

> where 'the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of the legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.' … In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent.

Matter of Belmonte v Snashall, 2 NY3d 560, 566 (2004) (citation omitted).

When all is said and done, although the words in the subject reports and approvals are used in common parlance, the CPC and City Council would have a more nuanced understanding than this Court of, for example, what it means to be "developed as a unit," or the implications of being a "demapped street" or a "zoning lot," and so this Court must defer considerably to the determinations of those bodies.

Cases are legion that hold that zoning decisions rest with the local legislative body and "will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon [whomever] asserts it." Rodgers v Tarrytown, 302 NY 115, 121 (1951); see also Church v Islip, 8 NY2d 254, 258 (1960) (legislative zoning determinations are "entitled to the strongest possible presumption of validity and must stand if there was any factual basis therefore.").

B. THE ZONING RESOLUTION

New York City has (1) a "City Map," which the Department of City Planning maintains, it is "the official map of the City of New York" and divides the City into streets, blocks, and parks; (2) a "Zoning Map," which is part of the Zoning Resolution and which shows the boundaries of zoning districts; and (3) a "Tax Map."

The ZR is the single, supreme codification of all relevant zoning rules in the City. The municipal respondents describe the ZR in general terms as follows:

> In New York City, the Zoning Resolution helps guide development and informs property owners and the public about permissible property uses on every zoning lot citywide. The City is divided into "zoning districts," each with a set of rules for development. See ZR § 11-122. Different districts allow different uses – such as commercial, residential, or manufacturing – and different limits on height and "bulk" … and [buildings'] relationships to each other and to open areas and lot lines. ZR § 12-10.

NYSCEF Doc. No. 74 ¶ 111. A proposal that conforms to the ZR is "as-of-right."

The CPC may issue "special permits" that waive or modify zoning rules. ZR § 74- 01. For each type of special permit, the ZR provides that the CPC must make certain findings as "a condition precedent to the grant of such special permit." Id. To minimize potential adverse effects of

development enabled by a special permit, the Commission may also "prescribe such conditions and safeguards to the grant of special permits as it may deem necessary." ZR § 74-21.

LSGDs first popped up, in ZR § 12-10, in or around 1989 as "General Large Scale Developments." Pursuant to ZR § 12-10, an LSGD:

> [C]ontains one or more buildings on a single zoning lot or two or more zoning lots that are contiguous or would be contiguous but for their separation by a street or a street intersection … and … has been or is to be used, developed or enlarged as a unit: (1) under single fee ownership or alternate ownership arrangements as set forth in the zoning lot definition in Section 12-10 (DEFINITIONS) for all zoning lots comprising the large-scale general development …
>
> Such zoning lots may include any land occupied by buildings existing at the time an application is submitted to the CPC under the provisions of Article VII, Chapter 4, provided that such buildings form an integral part of the large-scale general development … and provided that there is no bulk distribution from a zoning lot containing such existing building.

ZR § 74-743(a)(1) provides, as here relevant, that:

> For a large-scale general development, the City Planning Commission may permit: (1) distribution of total allowable floor area … under the applicable district regulations within a large-scale general development without regard for zoning lot lines … [and] (2) [the] location of buildings without regard for the applicable … height and setback regulations.

ZR § 12- 01(a) states that, when interpreting the Zoning Resolution, the "particular" section shall control the "general."

C. SPOT ZONING

"Spot zoning" is defined 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, 302 NY at 123-24 (citations omitted). The hallmark of spot zoning is the amending of zoning laws for the benefit of one owner rather than the general welfare of the larger community. Id. The basic test for spot zoning is whether the change is "other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." Collard v Inc. Vil. of Flower Hill, 52 NY2d 594, 600 (1981) (citation omitted).

D. NEW YORK CITY RULES AND REGULATIONS

a. UNIFORM LAND USE REVIEW PROCEDURE

City Charter § 197-c(a) enumerates twelve types of developments or improvements to real property that are required to undergo a Uniform Land Use Review Procedure ("ULURP"), including: "(4) Special permits within the jurisdiction of the city planning commission under the zoning resolution … ; [and] (10) [any] disposition of the real property of the city."

The ULURP process begins when a landowner formally files an application with the Department of City Planning ("DCP"). City Charter § 197-c. The application is then certified by the DCP, provided it has notified affected community boards and the affected Borough president; after which community boards hold public hearings and submit their recommendations to the CPC, which then makes a determination and files its decision with the City Council and the Borough president. City Charter § 197-d.

b. CERTIFICATES OF APPROPRIATENESS

Pursuant to 63 RCNY § 7-02(b)(7):

> If an applicant is also applying to the Commission for a Modification of Use or Bulk, or otherwise applies to the City Planning Commission for a special permit or authorization … the Commission will issue a conceptual or design CoA … for the sole purpose of allowing the City Planning Commission … pursuant to §25-305(b)(1) of the Administrative Code, to act on the application. Upon approval of the special permit [or] authorization and submission of all required drawings and materials to the LPC staff, the Commission will issue the final CoA …

The plain language of the New York City Rules and Regulations expressly allows the LPC to issue a design-only CoA while an application for a special permit is pending. It also acknowledges NYC Admin Code § 25-305(b)(1) and states that the CPC can act on the application based on a design-only CoA.

c. STATE ENVIRONMENTAL QUALITY REVIEW ACT

Pursuant to 6 RCNY § 617.1, the City adopted the State Environmental Quality Review Act ("SEQRA") to "incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies." 6 RCNY § 617.1(c). If it is determined that an action may have an adverse impact on the environment, an EIS must be prepared. Id. Pursuant to 6 RCNY § 617.4 and 6 RCNY § 617.5 there are two types of actions: Type I and Type II. Type I actions are "more likely" (go figure exactly what that means!) to require the preparation of an EIS, while Type II actions do not require an EIS "in most instances" (ditto).

d. CITY ENVIRONMENTAL QUALITY REVIEW

Pursuant to 42 RCNY § 6-01, "[n]o final decision to carry out or approve any action which may have a significant effect on the environment shall be made by any agency until there has been full compliance with the provisions of this chapter." Chapter 6 of the RCNY proceeds to lay out the requirements for submitting a draft EIS, which is subject to a public hearing, and is then converted into a final EIS, reflecting any revisions or updates that occurred during the review process. 43 RCNY 6-10, 6-11.

DISCUSSION

A. DEMAPPED STREETS, ZONING LOTS, OR BOTH?

The City Council's intent in amending ZR § 91-68 could not be clearer: the identified South Street Seaport Streets (including Front, Fulton, and Water) comprising Lot B "may be considered a single zoning lot for purposes of the definition of large-scale general development in [ZR] §

12-10." As the City's legislature, the City Council had an unfettered right to do this; neither petitioners nor this Court can identify any constitutional or other impediment that would invalidate this maneuver, keeping in mind that legislative enactments are presumed constitutional.

Petitioners argue that "a zoning lot must be within a single block, which in turn is bounded by streets, among other things. A street cannot be both a street and a zoning lot." This Court sees no reason why demapped streets cannot be both "streets," to allow pedestrian access and to prevent development thereon and, at the same time, a "zoning lot," to allow the transfer of development rights within an LSGD, especially if the City Council says so, which it did.

Petitioners point out that the demapping process declared the streets to be "streets for all zoning purposes." This Court suspects that the purpose was to ensure that the streets would never be closed to pedestrians (open space being the "sacred cow" of crowded cities; whereas demapping streets can, in some instances, block pedestrian access). In any event, the declarants were the CPC, the Board of Estimate (most of whose powers the City Council now possesses) and the Department of Buildings. Whether these entities did not mean to foreclose the demapped streets from being zoning lots, or just never thought through the future implications (LSGDs apparently did not even exist back then), or have simply changed their tune, they have spoken, and we must abide.

Petitioners argue that "streets" cannot be "zoning lots" because, by definition, zoning lots are bordered by streets. The argument that you cannot border something and, simultaneously, be within the border you are creating, seems facially valid. The problem with this argument is, again, two-fold. One, lawyers and legislators are allowed to, indeed sometimes must, "think outside the box." The fact that a thoroughfare remains a "street for all purposes," even "for all zoning purposes," does not mean that development rights cannot traverse it. Development rights do not impede a street's use "as a street" for ambulation and emergency transportation. And in any event, again, the City Council sets the rules.

Petitioners also rely on ZR § 11-22, which provides as follows:

> Whenever any provision of this Resolution and any other provisions of law, whether set forth in this Resolution or in any other law, ordinance or resolution of any kind, impose overlapping or contradictory regulations over the use of land, or over the use or bulk of buildings or other structures, or contain any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern.

Clearly, the drafters did not want to allow development that exceeds any height or bulk limitation. But allowing the transfer of development rights does *not* exceed any height or bulk limitation. The well-established rule of interpretation that governs here is that the specific (these particular demapped streets shall function as a zoning lot) controls the general (these particular demapped streets shall remain streets for all zoning purposes). When understood in context, and as a practical matter, there is no irreconcilable conflict between streets remaining open and streets over which development rights pass.

Petitioners also argue that as Lot B is a portion of a tax lot it cannot be included in the LSGD. However, pursuant to ZR § 91-68, Lot B *is* a "zoning lot." This amended text provides CPC and DOB with specific and express authority to consider Lot B a "zoning lot." The specific language of ZR § 91-68, making Lot B a zoning lot, controls the general definition of zoning lot in ZR § 12-10.

B. CONTIGUITY REQUIREMENT

Petitioners' most salient argument is that development rights cannot be transferred from Lot C to Lot A because they are not "contiguous." However, an LSGD may contain "two or more zoning lots that are contiguous or would be contiguous but for their separation by a street or a street intersection." ZR § 12-10 (emphasis added). Lots C and B are contiguous because they are separated only by South Street (with, it might be noted, the FDR Drive running over it) and Lots B and A are contiguous because they are separated only by the intersection of Beekman and Water Streets.

Petitioners say that there is an "*absolute prohibition against developing the Streets, obstructing them, or using them for anything other than non-vehicular streets.*" NYSCEF Doc. No. 229 at 6. But the streets are not being developed, they are not being obstructed, and they are not being "used," in the ordinary sense of that term, for anything other than pedestrian walkways (and for emergency vehicles). The subject transfer mechanism does *not* allow private vehicles to barrel through the streets, or allow skyscrapers to be constructed thereon, or allow pedestrian access to be impeded.

Considering the demapped streets as a zoning lot does not harm the streets qua streets.

C. DEVELOPMENT RIGHTS FROM A LOT WITH AN EXISTING BUILDING

Another major tussle is whether development rights can even be transferred from Lot C as, petitioners point out, in May 2021, when 250SD applied for the subject permissions, that lot contained a three-story building and the reconstructed Tin Building, and the definition of LSGD in ZR § 12-10 prohibits bulk transfers from a zoning lot containing existing buildings.

Respondents ingeniously counter that the DCP "rationally" concluded that "existing" is to be determined as of the time the subject LSGD was created, in 2013, and that no buildings existed on Lot C at that time. Indeed, the LSGD *allowed* the subject buildings to be created. "All buildings within the expanded LSGD were authorized and built pursuant to the LSGD itself." Respondents reasonably argue that the purpose of the provision is to preserve existing historic buildings and to prevent creation of the LSGD itself from causing the destruction of such buildings.

In a classic back-and-forth, petitioners claim that buildings did exist on Pier 17 in 2013. Respondents reply that what matters is that when 250SD applied to CPC, all of the existing buildings were created *pursuant* to the LSGD

This Court cannot see any purpose for the subject rule other than to prevent valued buildings from being torn down solely to use the resulting development rights. Transferring development rights from an existing building that is not being torn down *limits* the height of the transferor,

which is in line with historic preservation. Here, the subject transfer will result in construction, not destruction.

D. "USED, DEVELOPED OR ENLARGED AS A UNIT"

Pursuant to ZR § 12-10, the buildings in an LSGD must be "used, developed or enlarged as a unit." Petitioners contend that:

> There is nothing about Pier 17 and the Tin Building on a pier in the East River and the separate, proposed development three upland blocks away at 250 Water Street that make them a unit. The Pier 17 building and the Tin Building were designed and built pursuant to land use approvals granted in 2013 and 2016, which was, of course, before HHC bought 250 Water Street in 2018.

NYSCEF Doc. No. 63.

Petitioners also note that "[n]o development or other changes were proposed to the streets; nor could there be, given the requirements that the streets remain open and not be developed or obstructed by anything more than benches or similar street furniture."

Respondents reply, again ingeniously, or perhaps disingenuously, or perhaps implausibly, that "as a unit" simply means that the LSGD be "treated as if it were a single zoning lot." Thus, the LSGD must "as a whole … comply with the zoning and the approvals."

Infinitely more convincing is respondents' other argument, that an LSGD need not be developed "at a single point in time or as a harmoniously designed whole," and that there is no requirement that the buildings within an LSGD to share a design vocabulary. Instructive is that the CPC found that the transfer of development rights will result in a "better site plan." Whatever thinking went into creation of the original LSGD, the City's thinking now clearly views Pier 17 and 250 Water Street as being "used, developed, or enlarged as a unit," in that development rights are being transferred from the former, on the waterfront, to the latter, a mere few blocks upland (not to the other side of town).

Also persuasive is respondents' argument that:

> petitioners' interpretation would freeze development under LSGDs and render them incapable of expansion, on the basis of an artificial rule that the buildings in an LSGD must be approved and built in one phase. Under this approach, future planning efforts to expand and improve upon an original LSGD would be prohibited.

NYSCEF Doc. No. 190. Furthermore, Pier 17 and 250 Water Street are connected by pedestrian walkways.

Respondents get mawkishly sentimental when describing how Lots A, B, and C will be one big, happy family:

> the proposed development at the Property would be the capstone residential building in the area, serving as an upland gateway to the South Street Seaport, and complementing Pier 17, the Seaport's central commercial development along the waterfront … [It] would provide the residential anchor located in the upland portion of the Subdistrict, with the residential and commercial anchors connected by the area's unique network of pedestrianized ways ...

NYSCEF Doc. No. 179.

At the end of the day, what compels this Court to agree with respondents is that Lots A and C are relatively close and separated only by Lot B (which is open, not obstructed); that development rights from the latter are being transferred to the former (which alone makes them symbiotic); and that this Court should defer to the municipal zoning authorities as to whether this LSGD is being "developed as a unit."

For similar reasons, this Court finds that the existing buildings and the proposal form an integral part of the LSGD. The City is allowing development rights from a waterfront site to be transferred a few blocks inland, pushing height and bulk away from the water. The project could not be built without the existence of Lots B and C, which alone "integrates" them.

E. OWNERSHIP REQUIREMENTS

An LSGD must be "under single fee ownership or alternate ownership arrangements as set forth in the zoning lot definition in [ZR] § 12-10 …"

The parties agree that 250SD owns Lot A in fee; the City owns Lot B in fee; and the City owns Lot C in fee, but an HHC subsidiary has a long-term ground lease for it. Pursuant to ZR § 74-742, applicants for LSGD special permits must own the land or have a written option to purchase. Thus, petitioners ask (in effect), "Where is the single fee ownership?"

The only purpose of this rule that this Court can discern is to avoid conflicts between or amongst co-owners. Here, the Developer and the City are united in interest: they both want the Building built. There are no conflicts on the horizon. Moreover, the phrase "alternate ownership arrangements" is unclear but seems as wide as the Western sky. Furthermore, the Court acknowledges respondents' astute argument that ZR § 74-742's references to "applicant(s)," "owner(s)" and "holders" per se contemplates the possibility of more than one such person or entity.

Finally, this is yet another issue best left to the municipal experts and authorities, and they have resolved it as indicated above.

F. SPOT ZONING

The "spot zoning" doctrine does not derail the Project. For starters, the Project does not entail a zoning change. See Residents for Reasonable Dev. v City of New York, 128 AD3d 609 (1st Dep't 2015). Even if it did:

> If the zoning ordinance is adopted for a legitimate governmental purpose and there is a 'reasonable relation between the end sought to be achieved by the

> regulation and the means used to achieve that end', it will be upheld. An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement … The court will not pass on its wisdom.

Asian Americans for Equality v Koch, 72 NY2d 121, 131 (1988) (internal citations omitted). See also, Z. Brach & Residents for Preserv. of Borough Park Identity v The City of New York, 2022 NY Slip Op 3016(U), 4-5 (Sup Ct, NY County 2022) (rejecting claim of spot-zoning where zoning was "consistent with [the program] to create permanently affordable housing units that aligns with New York City's housing goals").

G. CONSISTENCY AND REASONING

Petitioners are correct that the general drift of the City's land-use actions vis-a-vis the South Street Seaport has been to protect historic buildings and to "preserve the scale and character of the Seaport area," and that the Proposal will do neither. They claim that the approvals "constituted a radical and irrational departure from decades of carefully crafted regulations and should be annulled as arbitrary, capricious, and abuses of discretion."

However, circumstances, and thinking, change. In 2003 the CPC "downzoned" a 10-block area. Eighteen years later the CPC created, and the City Council approved, exception to that zoning for a single one-block area. This is hardly inconsistent, much less a 180-degree reversal. None of the dangers sought to be ameliorated by the subject rule, such as treating similar situations differently; upsetting relied-upon expectations; hanky-panky (i.e., bribery); or precipitate decision-making, are present here.

Zoning and other land use controls are not immutable straightjackets. See Rodgers, 302 NY at 121 ("While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static."). Stability is good; rigidity is bad. Special permits, rooted in Chapter 4 of the ZR, are one device to avoid the latter.

Furthermore, although this Court shares some of the skepticism (indeed, cynicism) of petitioner's counsel as to the touted economic and other benefits of the Proposal, the subject approvals are hardly irrational. The extensive record before this Court, including the numerous reports that accompany the applications and the approvals, overflows with *possible* civic reasons to welcome this project: to develop an unscenic parking lot in a scenic area; to create non-market-rate and market-rate housing in a desirable area well-served by public transportation and with nearby jobs; to create retail and commercial space; to create construction and permanent jobs; to create customers for local businesses; and to create tax revenue.

Respondents note that the subject CPC approval stated that much had changed in 18 years (2003-2021), including "the need for affordable housing." As best this Court remembers, affordable housing was needed in 2003, and, as best this Court can prognosticate, will be needed in 2040; whether the need has increased since then is problematic. But those issues are administrative and legislative, not judicial.

Finally, the 2003 downzoning did not prohibit future special permits. NYSCEF Doc. No. 131. Respondents point out that when the CPC wants to, it can do this, and occasionally it

does. For example, ZR § 74-721 explicitly limits certain special permits in the Special Lower Manhattan District.

H. "AFFORDABLE" HOUSING

This Court hereby acknowledges the sad tales of unfulfilled promises of public benefits tied to discretionary developments described in the second affidavit of urban planner George Janes. NYSCEF Doc. No. 239. There should be better oversight and authority to assure that promises made are promises kept. Here, if the Project is not built, chances are there will not be "affordable housing" on the site for years or decades to come, or ever. For whatever it is worth, however, the Restrictive Declaration filed by the Developer has some "teeth" when it says: "The City may enforce the terms of this Restrictive Declaration through the exercise of remedies at law or in equity." NYSCEF Doc. No. 276. This Court hopes that the City will "bite" if necessary.

I. CERTIFICATE OF APPROPRIATENESS

As soon as the LPC issued a "design-only" Certificate of Appropriateness the Developer was allowed to apply for the subject permissions. The plain language of 63 RCNY § 7-02(b)(7) belies petitioners' argument that the Administrative Code does not contemplate design-only CoA's. Therefore, respondents have followed the procedure laid out in 63 RCNY § 7-02(b)(7) and NYC Admin Code § 25-305(b)(1).

J. ENVIRONMENTAL REVIEWS AND LEASE EXTENSIONS

Petitioners' main issue with the environmental review process is that the EIS was only done for the property at 250 Water Street and did not encompass the application to extend the lease for City-owned property. However, as respondents note, the lease renewal *did* go through a series of public hearings as a part of ULURP; the environmental impact of the lease renewal was considered as a part of the Proposal; and the mitigation efforts identified in that report were enough to satisfy any SEQRA/CEQR requirements. NYSCEF Doc. No. 227.

Additionally, DCP determined that the lease renewal application merely sought to renew and extend the term of an existing lease of City-owned property and thus qualified as a "Type II" action pursuant to 6 RCNY Part 617.5(c)(32), making it exempt from environmental review requirements under SEQRA/CEQR. NYSCEF Doc. No. 227.

CPC and other City agencies have wide latitude in determining which actions require SEQRA/CEQR review. Additionally, once a court is satisfied that an agency has complied with the procedural requirements of SEQRA/CEQR, the only question remaining is "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." Akpan v Koch, 75 NY2d 561, 570 (1990). Here, all this was done.

K. OTHER ISSUES

For purposes of a potential appeal, this Court hereby finds as follows: (1) petitioners' administrative and court challenges were all timely; (2) petitioners have standing; (3) at least some petitioners have capacity to sue; and (4) the doctrine of "exhaustion of administrative remedies" does not bar this case.

This Court has considered petitioners' other arguments and finds them to be unavailing and/or non-dispositive.

THE FINAL ANALYSIS

The subject approvals seem to be the apotheosis of result-oriented, predetermined municipal action. The transfer of development rights from Zoning Lot C; across a heavily traveled thoroughfare (actually two, South Street and the FDR Drive) to Zoning Lot B, which is shaped like a horizontal oil rig in the Gulf of Mexico, which until the 1980s were simply streets, and which, until just last year, were not considered a "zoning lot" at all; and thence, after a 90-degree turn to Zoning Lot A, could be called "Frankenzoning" (right down to the corrugated lot-line borders on the map above, which look like nothing so much as the sutures holding together the skin on Frankenstein's Monster's face). The Building's "four towers on a podium" design does not resonate with the other buildings in the district or with New York's maritime or mercantile history. "Design-wise 250 Water Street could be built anywhere in the city, as there is no connection to the Seaport." Let's face it, the Building will stick out like a sore thumb; if 100 New Yorkers were shown an artist's rendition of the Building and asked where it would best fit in, not one would say, "in the Seaport."

However, the City Council, as the City's legislature, pursuant to its "police powers," has the ultimate authority to determine land use policies and practices and has voted overwhelmingly to allow, indeed to facilitate, the Project. As a practical matter, all it has done is used the statutorily recognized special permit process to allow a building that is taller and wider than sanctioned by zoning imposed almost two decades ago. Judicial interference, on the record presented here, would amount to a violation of the separation of powers doctrine. Courts are not permitted to overrule reasonable administrative, legislative, or executive decisions. The City has the right to decide that the subject development rights make more sense on an inland vacant lot than on a waterfront pier. Why do we elect public officials, and allow them to appoint expert administrators, if not to decide such matters?

Justice Holmes famously wrote, "Men must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143 (1920). Here, if any corners were rounded, the government did the rounding. Although not being able to read petitioners' minds, this Court suspects that, for all their grousing about the approval process, for better, worse, or indifferent reasons they simply do not want the Building built.

Another legal maxim has it that "parties are entitled to a fair trial, not a perfect one." Here, after multiple hearings (including significant "community input"), reports, and decisions, those ultimately responsible for these matters approved the project. The process may not have been perfect, the plan may not be perfect, but a "fair fight" was had, and respondents won.

And, as Bob Dylan famously sang in Subterranean Homesick Blues: "You don't need a weatherman to know which way the wind blows." The winds in this Appellate Division are blowing in favor of development: in City Club of New York v New York City Bd. of Standards and Appeals, 198 AD3d 1 (1st Dep't 2021), reversing 2020 NY Slip Op 30823(U) (Engoron, J.), the Court upheld the design of an Upper West Side skyscraper that arguably violated the ZR far

more egregiously than the design here. See also, Council of City of New York v Dept. of City Planning of City of New York, 188 AD3d 18 (1st Dep't 2020) (upholding development that community groups vigorously opposed), reversing 2019 NY Slip Op 32332(U) (Engoron, J.).

This Court is not empowered to decide aesthetic issues but notes that the Project is right across the street from tall buildings, albeit ones not in the historic district; has its towers modestly set back along Beekman and Water Streets, which will somewhat ameliorate the Building's intrusiveness; and is in the far north-east corner of the district, neither smack dab in the middle of the quaint demapped streets and low buildings that give the Seaport its distinctive character, nor on the waterfront.

Today's case calls for something more, or maybe something different, from the application of hard-and-fast rules to mostly-agreed-upon facts: it calls for "common sense" about "what really matters." The Developer wants to build (and make money); petitioners want to preserve the South Street Seaport (and not to have a megastructure in their backyard); the approval process was problematic; but the City Council overwhelmingly (45-3) sided with the Developer, tipping the balance drastically and settling the matter.

As nature abhors a vacuum, cities abhor unproductive land. After more than half a century and several false starts, housing and other desideratum will occupy 250 Water Street.

CONCLUSION

Petition denied. The Clerk is hereby directed to enter a final judgment denying and dismissing the petition. All motions are denied without prejudice as moot.

8/5/2022
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE