At an IAS Term, Part 72 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of November, 2003.

PRESENT:

HON. HERBERT KRAMER,

Justice.

PARK PLAZA HOMEOWNERS ASSOCIATION INC., et al.

PLAINTIFFS,

- AGAINST -

INDEX NO. 32292/03

STEINER EQUITIES GROUP LLC, et al.

DEFENDANTS.

The following papers numbered 1 to 18 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 6
Opposing Affidavits (Affirmations)	12 - 13
Reply Affidavits (Affirmations)	14 - 17
Further Affidavit (Affirmation)	18
Other Papers	

Upon the foregoing papers, plaintiffs Park Plaza Homeowners Association Inc., Brooklyr Villas Condominium, Arnold and Esther Walter, Mario Teitlebaum, Agnes Lefkowitz, Jacob Edelman, Berl Rosenberger, William Klagsbald, Norman and Leah Strulovitz, and Carmelo Gonzalez move for an order, pursuant to CPLR 6311, granting a

preliminary injunction enjoining defendants Steiner Equities Group LLC (Steiner Equities), Steiner Building NYC, LLC (Steiner NYC), Car-Win Construction Inc. (Car-Win) and Eponymous Associates LLC (Eponymous) from proceeding with the construction of a film studio at Building sites **294** and **296** (the site) at the former Brooklyn Navy Yard (the Navy Yard) until such time as they prepare a Draft Environmental Impact Statement (DEIS) and the United States Environmental Protection Agency, the New York State Department of Environmental Conservation (NYDEC), and the New York City Department of Environmental Protection (NYCDEP) review the project and certify that no threat to the environment or to public health will be caused by the construction.[1]

Facts and Procedural Background

This dispute involves the proposed development of a film studio in a portion of the Navy Yard, which is located in the Williamsburg section of Brooklyn. From the early **1800s** until **1966,** the Navy Yard, which consisted of over **300** acres along the East River, was utilized for a major manufacturing operation where the United States Navy constructed and repaired naval vessels. **It was conveyed to the City of New York** (the City) **in 1966** and was subleased to defendant Brooklyn Navy Yard Development Corporation (BNYDC), who subleased the site to New York Studios (NY Studios) in **1999.** The Navy Yard is now utilized as an industrial park that consists of approximately **40** buildings, with over **3.8**

[1] When plaintiffs obtained the order to show cause that commenced this proceeding on September **8,2003,** they were granted a temporary restraining order that stayed construction at the site. By order dated September **11,2003,** the day after it was served, the temporary restraining order was vacated by the Appellate Division, Second Department.

million square feet of enclosed space and operates as dry docks; piers; and facilities for ship building, furniture design and manufacturing, electronic distribution, jewelry making, and warehouse operations.

In their complaint, plaintiffs* contend that the redevelopment of any portion of the Navy Yard is an "action" pursuant to the New York State Environmental Quality Review Act, the New York State Environment Conservation Law, and accompanying state regulations (collectively referred to as SEQRA) and the New York City Environmental Quality Review Act (CEQRA). These regulatory provisions require that an applicant who proposes a development that may have a significant impact upon the environment to prepare a DEIS. Defendant New York City Department of Business Services (DBS) has heretofore been designated as the "lead agency" in order to determine whether any development would require a DEIS, or that a DEIS would not be required, in which case a "negative declaration" would be issued.

Buildings **294** and **296** had previously been utilized for the cleaning and etching of **plated** steel, which **required the use of "pickling tanks" filled with muriatic** and **hydrochloric** acid. **As** early as March **1994,** a portion of the Navy Yard had been designated as a "potential hazardous waste site" and NYSDEC classified two areas as potential sites requiring remediation under the New York State Superfund Law (the Superfund Sites). The

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[2] Plaintiffs include two residential condominium associations and several individual residents of the area; plaintiffs believe that the health and safety of the community will be jeopardized by the environmental conditions and public health **risks** created by the project.

site is in the immediate vicinity of these two Superfund Sites, one being 13 acres in size and the other 18, which sites contain benzene, polychorinated biphenous (PCBs), lead, and petroleum. The report for the area also indicated that the contamination in the soil and groundwater poses a threat to the environment, to human health, and to immature fish and shellfish in the East River. Accordingly, on May 5,1998, BNYDC and the City entered into a Voluntary Cleanup Agreement (the VCA) with NYSDEC.[3]

In 1998, NY Studios approached BNYDC and the DBS with a proposal to construct a film studio on the site and in December 1998, an Environmental Assessment Statement (EAS) was submitted. The EAS allegedly provided virtually no information concerning environmental contamination and threats to public health. On August 12,1999, DBS issued a negative declaration in which it indicated that "no significant effects upon the environment which would require an Environmental Impact Statement are foreseeable'' in regard to the development of the site, so that no DEIS needed to be prepared (the Negative Declaration).

In January 2003, the sublease between NY Studios and BNYDC was assigned to the present subtenant, Eponymous, and its parent companies, Steiner Equities and Steiner NYC (hereinafter collectively referred to as "Steiner"). Plaintiffs assert that the sublease also obligated BNYDC to assign $21 million which it had obtained from the City to Steiner for use in the proposed development of the site. The subleasees and their contractors, including

[3] As is relevant here, the VCA indicates that reports and investigations of the site confirmed hazardous waste disposal and included possible soil and groundwater contamination from PCBs, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), lead, and other heavy metals.

defendant Car-Win, have commenced construction, which involves major demolition of the existing structures and excavation of the underlying soil, roads, and utilities. Plaintiffs also allege tha an investigative report prepared on behalf of Steiner by Quay Consulting, LLC (Quay) in March **2003** (the Quay Report) disclosed that the site was previously used for the construction of metal ship hulls and that the construction process involved toxic chemicals and pickling tanks; that there were heavy metals and polyaromatic hydrocarbons (PAHs) in the soil under Building **296;** and that the groundwater contains SVOCs which violate New York drinking water standards.

By letter dated July 31, 2003, plaintiffs requested that DBS rescind the Negative Declaration. This request was premised upon: (1) an investigative report required by NYSDEC that revealed that pickling tanks were formerly located at the site, that there are heavy me als and PAHs in the soil, and that the groundwater contains SVOCS; **(2)** the site is in close proximity to a Superfund Site containing hazardous levels of PCBs, lead, petroleun, and benzene in the groundwater and soil; and **(3)** that the United States Navy has acknowledged that a portion of the Navy Yard was a hazardous waste disposal area and contains isbestos, lead paint, and PCBs; approximately 500 Navy Yard worker:, have commenced litigation in regard to asbestos. The letter also noted that since excavation has commenced, there is an increased possibility of airborne contaminants reaching the communi'y. The complaint alleges that plaintiffs received no response to this letter.

Plaintiffs' Contentions

In support of their application for a preliminary injunction, plaintiffs rely upon an affidavit from Mostafa el Sehamy, the president of Hydro Environmental Corp., a firm retained by plaintiffs to investigate environmental and public health issues related to the construction. Therein, el Sehamy concludes that based upon his firm's visits to the site and review of pertinent information, the proposed construction site likely contains carcinogenic toxins including benzene, PAHs, PCBs, and metals such as lead. Excavation work at the site is creating dust, which likely contains the carcinogenic toxins that may become airborne or tracked off-site via truck and/or car traffic and migrate to the surrounding area. In addition, groundwater at the site has been documented as containing the same carcinogenic toxins; the Orthodox Jewish community utilizes the groundwater in mikvah baths and matzoh baking. The groundwater is also in direct contact with the East River; people may catch and eat contaminated fish, being unaware of the possible deadly consequences. Thus, the site constitutes a threat to the environment and to public health and no construction or cleanup should proceed until a DEIS has been prepared.

Plaintiffs also rely upon affidavits from Mr. Walter and Mr. Strulovitz in which each alleges that he and his family reside in close proximity to the site and is fearful of the chemicals in the air, soil, and water.

Defendants' Contentions

Steiner

In opposition, Steiner alleges that to date, it has spent approximately $50 million on construction, equipment, labor, supplies, and other expenses at the site. The one day that the temporary restraining order was in effect resulted in 81 people being out of work and a lost one-day payroll of $67,200. If a preliminary injunction is granted, ongoing daily expenses will total approximately $52,000, including the cost of rent, interest, and security; in addition, firm contracts for necessary materials are in place. Further, as is alleged by Gerald J. Heilmann, P.E., a vice president of Steiner *NYC*, if the buildings are not enclosed before winter, large expenditures will be required to protect the work already completed, the cost of which could approximate $3,136,000. Heilmann further alleges that if construction is halted, the large, partially-built structures will be unstable and will create imminent safety hazards.[4] Finally, as is alleged by Jay Fine, the president and CEO of Eponymous, if completion is delayed, an entire season of television production will be lost, which could cost 300 jobs and $3 million; if Steiner is unable to book motion pictures, lost bookings could cost 700 jobs and *$5* million; and loss of the commissary and catering operations could cost 14 lost jobs and $3 million.

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[4] For example, temporary steel shores are installed throughout the structure to support pieces of pre-cast concrete weighing as much as **30** tons. If the concrete is not permanently affixed, the collapse of a single piece could cause serious injury and/or death, particularly since the site is adjacent to the main Navy Yard thoroughfare.

In addition, the environmental hazards relied upon by plaintiffs in seeking the injunction have been known to the government and to the community for years. The site is presently being cleaned under the supervision of the NYSDEC and the agency is satisfied with the progress that is being made.[5] In addition, plaintiffs have known about the proposed construction since at least 1998; demolition of the previously existing buildings began in April 2000 and was completed in May 2001; construction of the new structure began in the summer 2301; the projected completion date is June 2004; the construction is visible to the surrounding neighborhood; and extensive publicity has surrounded the project. Plaintiffs, however, offer no explanation as to why they waited until this time to challenge the project.

Steiner also asserts that environmental monitoring has been conducted during the construction in accordance with a plan approved by DEC, which has confirmed that the work poses no dangers to the community. These findings are corroborated by Ira Whitman, P.E., a professional engineer and a consultant for Eponymous, in an affidavit in which he alleges that testing at the site during August 2003 revealed acceptable levels for particulate matter and for VOCs. He is accordingly of the opinion that the construction does not pose a threat

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[5] Steiner further alleges, in reliance upon correspondence between NYSDEC and plaintiffs, that plaintiffs have previously raised the same objections, which were rejected. In fact, by letter dated August 23, 2002 from the NYSDEC to plaintiffs' counsel, the agency stated that:

> "Please be aware that the Department is taking an active role in the investigation and remediation of the Brooklyn Navy Yard. We believe that all of the concerns referenced in [your Notice of Intent to Sue] are being dealt with through either an existing Voluntary Agreement or a Consent Order."

to health and safety of the plaintiffs or other persons in the vicinity. The findings are also evidenced by test results fiom the Langan Engineering and Environmental Services, Inc., which also indicated the presence of no harmful levels of contaminants in August 2003. The Quay report similarly found that the construction poses no increased risk to public health.[6]

Steiner further alleges that plaintiffs ignore the fact that the EAS made full disclosure of the contamination existing at the site, since it referred to the VCA. In addition, although plaintiffs assert that the proposed construction site is "in the immediate vicinity" of Superfund Sites, the two parcels so designated are entirely distinct and are not contiguous. Further, although el Sehamy refers to previously existing contamination at the site, he does not link those pre-existing conditions to the work on the studio project. Moreover, although el Sehamy expresses concern over the dust being created, the above discussed monitoring reveals no such problems. Steiner also notes that construction of a film studio in the Navy Yard is consistent with the City's plan for development of the area,

With regard to the legal issues raised, Steiner contends that this proceeding is time barred pursuant to the four-month Statute of Limitations, since the Negative Declaration forming the basis of plaintiffs' complaint was issued on August 12, 1999. In the alternative, if a preliminary injunction is granted, plaintiffs should be required to post a bond of

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[6] More specifically, the Quay report found that the proposed work will eliminate all potential exposures (dermal contact, inhalation, and ingestion) to soils and ground water; that there is no increased risk to public health from groundwater; and that there are no exposure pathways (dermal, inhalation and ingestion) to the groundwater aquifer systems at the site, since ground water in not used for potable or industrial systems at the site due to the elevated salinity.

$3,136,009 to cover the costs that would be added if construction is delayed so as to prevent enclosure prior to winter, plus at least $52,000 for each day that the injunction continues, to compensaie Steiner for the carrying costs while construction is halted.

The City

In opposition to plaintiffs' motion, the City also argues that the four-month Statute of Limitations has expired; that no new facts are alleged by plaintiffs in support of their motion; that the proposed construction plan does not imperil the health of the residents of the area; and that a sizable bond should be required if plaintiffs are granted a preliminary injunction. The city further notes that NYSDEC was aware of the possibility of contamination when BNYDC entered into the VCA in March **1998** and that BNYDC completed the investigation called for by that agreement and submitted its findings; no hazardous wastes were found to be present in dangerous levels. BNYDC has also proposed a remedial action work plan for the site; pursuant thereto, NYSDEC accepted the film studio buildings as a cap over the fill beneath the site after a public comment period that closed last month.

The City further asserts that the designation of the Superfund Sites was made in January 2002, after the DBS accepted the EAS at issue herein; the four-month Statute of Limitations for the challenge of the EAS based upon the designation accordingly expired in May 2002. In addition, the Superfund Sites are outside the 274 acres in the Navy Yard, entirely distinct from the site, more than **1,000** feet away, and do not border directly upon the site.

The City also relies upon an affidavit from Nicholas **A.** Mann, the managing principal of Quay. Mann asserts that DEC recently determined that the low-level soil contamination at the site is consistent with the background soil conditions in the Navy Yard, so that there is no evidence of contamination. In addition, soil and groundwater at the site has been throughly investigated during the past two years pursuant to the **VCA.** Mann also asserts that the site investigation report prepared by Whitman Companies in September 2001 revealed that the soil under Building **296** contained **PAHs** marginally above DEC cleanup guidelines and that the groundwater contains low-level concentrations of metals and **VOCs** which exceed guidelines in a limited number of cases; the groundwater contamination does not affect public health, since it is not used for drinking water. Supplemental testing conducted by Quay in September 2002 found no hazardous wastes in the area where the pickling vats had been located. Finally, DEC approved a remedial action plan for the low-level contamination at the site on September 24, 2002.[7]

The City also joins in Steiner's contention that halting construction at this stage of the project would create a public safety hazard. In addition, the project giving rise to this litigation concerns the construction of 280,000 square feet of buildings and is expected to create the equivalent of 1,000 permanent jobs; for many years, the City has accordingly supported the development of the Navy Yard as an important employment center.

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[7] The plan provides that the eight to ten inch concrete and steel foundation **of** the studio will prevent human exposure to soil and requires a deed restriction limiting use **of** the site to industrial and commercial purposes, prohibits the use **of** groundwater as drinking water, and prohibits soil excavation without the approval of DEC and Department of Health.

Plaintiffs' Reply

In reply, plaintiffs reiterate their arguments and add that Quay is headed by Mann, who is also the acting environmental manager for BNYDC. Hence, Mann is reviewing the reports filed by his firm on behalf of BNYDC. In addition, the Freedom of Information (FOIL) requests that plaintiffs made to BNYDC and DBS in August 2003 have been denied on the ground that BNYDC is "not a corporation withing the definition" of FOIL and DBS does not have any of the requested documents, which plaintiffs allege support their claim of a cover-up.

Plaintiffs also submit a lengthy affidavit from Stuart A. Klein, an attorney who was retained by local residents in January 2001 to investigate the proposed construction. Therein, Klein alleges that construction at the site has proceeded in violation of many state and local requirements.[8] Klein further discusses numerous communications that he had with various City and agency officials and many alleged assurances that he received that the project would not progress in the absence of necessary approvals and investigations, as well as opinions

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[8] Klein alleges, among other things, that the terms of the VCA have been violated; that Steiner failed to secure planning certification from the City; that Steiner failed to file plans for the removal of asbestos with the Environmental Protection Agency; that the City improperly and illegally increased its participation in the project from $8 million to $28 million; that the 1999 sublease between BNYDC and NY Studios, the amended 2003 sublease between BNYDC and Steiner, and the deed restriction required therein were executed without approval pursuant to the Uniform Land Use and Review Procedure (ULURP) of New York City Charter § 197-c; that the construction contract should have been subject to municipal bidding requirements; and that the assignment of the sublease was made in violation of its terms in that no City Vendex forms were filed, which forms should have revealed Douglas Steiner's federal misdemeanor conviction for breaking into a judge's chambers, thereby prompting an investigation into whether the assignment was proper.

rendered by these individuals that the project was not in compliance with existing laws. Plaintiffs also submit an affidavit from Abe Perlstein, the secretary of the Brooklyn Villas Condominium, wherein he alleges that the construction work was not visible to plaintiffs until June **2003.**

Preliminary Injunction

It is well settled that in order "to obtain the drastic remedy of a preliminary injunction, a movant must demonstrate **(1)** a likelihood or probability of success on the merits, (2) irreparable harm if the injunction is denied, and **(3)** a balance of the equities in favor of granting the injunction'' ***(Peterson*** v ***Corbin,*** 275 AD2d **35, 37,** ***lv dismissed*** **95** NY2d **919,** citing ***Aetna Ins. Co.*** v ***Capasso*****, 75** NY2d **860;** ***W.T. Grant Co.*** v ***Srogi,*** **52** NY2d **496).** "'Preliminary injunctive relief is a drastic remedy which will not be granted "unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant"'' ***(id.,*** quoting ***Nalitt*** v ***City of New York,*** **138** AD2d **580, 581,** quoting ***First Natl. Bank v Highland Hardwoods,*** **98** AD2d **924, 926).** Thus, "[a] movant's burden of proof on a motion for a preliminary injunction is particularly high" ***(Council of City of New York*** v ***Giuliani,*** **248** AD2d 1**, 4,** ***lv dismissed in part, denied in part*** **92** NY2d **938).** Injunctive relief is also available pursuant to **6** NYCRR **617.3** (a), which provides that "[n]o agency involved in an action shall carry out, fund or approve the action until it has complied with the provisions of SEQRA" ***(see generally Williamsburg Around the Bridge Block Assn v Giuliani,*** **223** AD2d **64, 74).**

Failure to Exhaust Administrative Remedies

As a threshold issue, the court recognizes that in reviewing a determination made pursuant to SEQRA, "'it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency"' *(Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating,* 291 AD2d 40, 54, *lv denied* 97 NY2d 613, *lv denied* 98 NY2d 608, quoting *Matter of Fisher v Giuliani,* 280 AD2d 13, 19-20). In actions seeking such review, however, it has been recognized that:

> "SEQRA contains no provision regarding judicial review, which must be guided by standards applicable to administrative proceedings generally: 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]; *see, Matter of City of Schenectady v Flacke,* 100 AD2d 349, 353, *lv denied* 63 NY2d 603; *Matter of Environmental Defense Fund v Flacke,* 96 AD2d 862). In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively."

(Jackson v New York State Urban Dev., 67 NY2d 400, 416). In discussing the nature of the proceeding to be utilized in asserting that a decision was made in violation of SEQRA, it has been held that "the proper remedy is a CPLR article 78 proceeding either in the naiure of certiorari, in the case of a determination of a quasi-judicial nature, or in the nature of mandamus to review, in the case of an administrative determination" *(Connell v Town Bd.*

of Town of Wilmington, 113 AD2d 359,363, ***affd*** 67 NY2d 896). Thus, the role of the court is not to make de novo environmental determinations, but to review the actions of the appropriate administrative agencies to insure compliance with the provisions of SEQRA ***(see generally Stryckers Bay Neighborhood Council v City of New York,*** 144 AD2d 283 [it was error for the court to order respondents to prepare an EIS absent an administrative determination that the subject project would have a significant impact on the environment, since courts must limit their review to whether the appropriate agencies identified the relevant areas of concern, took a "hard look" at them and made a "reasoned elaboration'' of the basis of their determination]; ***Aldrich*** v ***Pattison,*** 107 AD2d 258,267 [the "hard look" standard of review for SEQRA determinations does not authorize the court to conduct a detailed de novo analysis of every environmental impact of, or alternative to, a proposed project which was included in, or omitted from, a FEIS]).

From this it follows that plaintiffs' request for judicial intervention will likely be dismissed as premature, since there is no indication that DBS responded to plaintiffs' demand thnt it rescind its Negative Declaration, ***so*** that the court does not have before it any administrative determination to review ***(see e.g. Steinberg v Sea Gate Assn.,*** 118 AD2d 558 [property owner's action for a permanent injunction directing defendant to remove a jetty on adjoining beach-front property was properly dismissed for failure to exhaust adminisirative remedies where the Army Corps of Engineers had not yet determined whether to issue an after-the-fact permit, and if the property owner was dissatisfied with the determination, her

proper avenue of review was through administrative channels]; ***Brighton Residents Against Violence to Children v Town of Brighton,*** 191 Misc 2d 261, 271 [since the underlying determinations necessary to the appropriate land use and/or environmental siting decision of the subject facility were never made, the determination of the Planning Board must be annulled for the process to proceed de novo]; ***Committee for Envtl. Sound Dev. v City of New York,*** 190 Misc 2d 359, 376 [petitioners' challenge to the issuance of a work permit was dismissed on the ground that they failed to exhaust administrative remedies where they did not claim that they appealed to the Board of Standards and Appeals as required by the City Charter]).

It is also necessary that plaintiffs pursue their administrative remedies prior to seeking judicial intervention, since it is well settled that judicial review of an administrative determination is confined to the facts and record adduced before the agency ***(see e.g. Yarbough v Franco,*** 95 NY2d 342, 347, quoting ***Matter of Fanelli v New York City Conciliation & Appeals Bd.,*** 90 AD2d 756,757; ***accord Kelly v Safir,*** 96 NY2d 32, ***rearg denied*** 96 NY2d 854). Moreover, "[w]here environmental matters are involved . . . it is particularly important to allow the administrative agency possessing the requisite expertise to exercise its authority to hear the evidence on the issues, make findings and state the reasons for its action on the record prior to judicial review of the determination" (*Aldrich,* 107 AD2d at 268; ***see generally Miller v Kozakiewicz,*** 300 AD2d 399 [courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments

that were not presented during the proceedings before the lead agency]; *Timber Ridge Homes v State*, 223 AD2d 635, *lv denied* 88 NY2d 802 [landowner's failure to apply to DEC for a permit exempting it from a moratorium on development on the claim of a regulatory taking without due process or just compensation was premature where the claim hinged upon factual issues that were reviewable at the administrative level, since the establishment of an administrative record is a necessary prerequisite to a claim that is based on a regulatory taking]; *Village of Harriman v Town Bd. of Town of Monroe*, 153 AD2d 633 [judicial review of the issue raised by petitioner regarding the alleged failure of one of its wells during the running of well interference tests was precluded, since the record established that petitioner failed to raise this issue during the administrative review process]).

Thus, although none of the parties raised this argument, the court finds the issue renders the possibility that plaintiff will succeed on the merits of this action remote.

Statute of Limitations

It is well established that where a complaint concerns a respondent's noncompliance with SEQRA, the four-month Statute of Limitations applicable to allegations of SEQRA violations applies *(Young v Board of Trustees of the Village of Blasdell*, 89 NY2d 846,848, citing *Matter of Save the Pine Bush v City of Albany*, *70* NY2d 193,202-203; *accord Village of Pelham v City of Mount Vernon Indus. Dev. Agency*, 302 AD2d 399, *lv denied* 100 NY2d *505; Concerned Port Residents Committee v Incorporated Village of Sands Point*, 291 AD2d 494; *Mule v Hawthorne Cedar Knolls Union Free School Dist.*, 290 AD2d 698). Further,

the running of the Statute of Limitations is triggered when the subject agency commits "itself to 'a definite course of future decisions'" ***(Young,*** 89 NY2d at 848-849, quoting 6 NYRR 617.2[b] [2], [3]). Stated differently, the Statute of Limitations begins to run when a respondent's "decision-making process with respect to the project was complete and petitioners became aggrieved by the SEQRA violation of which they complain" ***(id.*** at 849), or "when the agency adopts plans committing itself to a course of action which may affect the environment'" ***(Lighthouse Hill Civic Assn. v City of New York,*** 275 AD2d 322, 324, ***lv denied*** 95 NY2d 768, quoting ***Matter of Monteiro v Town of Colonie,*** 158 AD2d 246, 249).

Herein, upon issuance of the Negative Declaration, DBS and the City were committed to the construction of the film studios. Thus, DBS 's "issuance of a negative declaration completed the environmental review process for the purposes of calculating the timeliness of petitioner'sjudicial review proceeding" ***(Stop-The-Barge v Cahill,*** 298 AD2d 817, 819, ***lv granted*** 99 NY2d 509). From this it follows that plaintiffs' proceeding seeking review of the Negative Declaration must have been commenced within four months of its issuance to be timely[9] ***(see e.g. Mule,*** 290 AD2d 698; ***Town of Bnhylon v New York State Dept. of Transp.,*** 250 AD2d 771; ***Matter of Cathedral Church of St. John the Divine v Dormitory Auth.,*** 224 AD2d 95, 99, ***lv denied*** 89 NY2d 802). Accordingly, since DBS issued its

[9] In the alternative, the DBS committed itself to a course of action when the proposed construction project was funded and/or approved. Although the parties do not provide the court with sufficient information to determine these dates, the facts clearly establish that both final funding and/or approval occurred more than four months before this action was commenced.

Negative Declaration on August **13,** 1999 and this action was not commenced until September **2003,** it is likely that the action will be dismissed as time barred, even if recommenced after DBS issues a determination with regard to rescinding the Negative Declaration.

Extension of Statute of Limitations by 6 NYCRR 617.7 (f)

In so holding, the court rejects plaintiffs' contention that the Statute of Limitations did not begin to run until July **31,2003,** when their counsel wrote a letter demanding that DBS rescind the Negative Declaration pursuant to **6** NYCRR **617.7 (f).**[10] Most significantly, by its terms, the regulation contemplates recision of a negative declaration only in thr early stages of a project, or prior to the decision to undertake, fund, or approve the subject action. Herein, the Negative Declaration was issued over four years before the demand for rescission was soug it, construction is well underway, and it is projected that construction will be completed in June **2004.** Further, as is alleged in Steiner's papers, it has already expended

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[10] 6 ***NYCRR*** **617.7** (f) provides that:

> (1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at **its** discretion, may amend a negative declaration when substantive:
>
> > (i) changes are proposed for the project; **or**
> >
> > (ii) new information is discovered; or
> >
> > (iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

over $50 million dollars, and at least $28 million was committed by City no later than January 2003. Thus, plaintiffs reliance upon 6 NYCRR 617.7 (f) is misplaced. Similarly, plaintiffs fail to point to any changes to the proposed construction or to any new facts or changes in circumstances that would trigger application of 617.7 (f).[11]

Moreover, even if the court found that the Statute of Limitations began to run fiom the time that plaintiffs requested that DBS rescind the Negative Declaration, "'[t]he period in which action is to be taken cannot be indefinitely extended by delaying the demand. An allegedly aggrieved party who does not proceed promptly and make a formal demand may be charged with laches"' ***(Blue v Commissioner of*** *Social Serv.*, 306 AD2d 527, 527 [citations omitted]). That case went on to hold that "'[t]he reasonable time requirement for a prompt demand should be measured by the four-month Statute of Limitations of CPLR article 78, and thus a demand should be made no more than four months after the right to

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[11] Although not so articulated by plaintiffs, it appears that Klein's affidavit was submitted in an effort to establish that new facts have developed and circumstances have changed since the Negative Declaration was issued. This affidavit, however, is insufficient for several reasons. In the first instance, most of Klien's allegations do not pertain to issues that are relevant to a determination of whether the Negative Declaration should be rescinded. Similarly, plaintiffs are not likely to succeed in this action premised upon Klein's attempt to establish that the City and/or the State should be estopped from finding that no violations exist or that rescission is not required on the grounds that their agents represented that violations occurred or assured him that construction would not commence until compliance was obtained, since it is well settled that a governmental subdivision cannot be held answerable for the unauthorized acts of its agents ***(see e.g. Granada Bldgs. v City of Kingston,*** 58 NY2d 705, 708, ***rearg denied*** 58 NY2d 825; ***Public Improvements v Board of Educ.,*** 56 NY2d 850; ***see generally Barrett v Messer,*** 212 AD2d 383; ***Chinatown Apts. v New York City Tr. Auth.,*** 100 AD2d *824)*. In the alternative, mere settlement negotiations, requests for further information, or statements that a matter is being investigated, are not predicates for an estoppel ***(see e.g. Lichtenstein v Goldin,*** 166 AD2d 320; ***see generally Green v Albert,*** 199 AD2d 465).

make the demand arises'" ***(id.,*** quoting ***Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.,*** 265 AD2d 838, 839, ***lv denied*** 94 NY2d 758). Accordingly, plaintiffs herein would not likely be permitted to wait over four years to demand that the Negative Declaration be rescinded ***(see generally Connell,*** 113 AD2d 359).

In so holding, it is also recognized that courts have been circumspect in allowing the Statute of Limitations governing challenges to administrative determinations to be extended. For example, the court rejected a claim that the statutory period should run from the denial of a request for an administrative declaration, finding the request to be a subterfuge to revive a time-barred claim ***(Sierra Club*** v ***Power Auth.,*** 203 AD2d 15). Similarly, the argument that respondents' failure to provide notice and an opportunity to be heard prior to the issuance of a negative declaration tolled the four-month Statute of Limitations until petitioners became aware of the project's potential impact on them was rejected ***(see Mule,*** 290 AD2d 698, 699; ***see generally McGrath*** v ***Town Bd. of Town of N. Greenbush,*** 254 AD2d 614, 617, ***lv denied*** 93 NY2d 803 [petitioner was not aggrieved by the alleged deficiencies in the published notice, since she **received actual notice** of the proposed amendment and attended the public hearing]). It has also been held that contingencies relating to further investigation do not render a **SEQRA** determination nonfinal where they concern mitigation of the potentially adverse effects of the construction upon archaeological artifacts (***see J.B. Realty Enter. v City of Saratoga Springs,*** 270 AD2d 771, ***lv denied*** 95 NY2d 758). Similarly, subsequent proceedings do not serve to extend the Statute of Limitations ***(see generally Mule,*** 290 AD2d

698 [a subsequent hearing held in response to the public's requests for reconsideration of a project did not renew the Statute of Limitations where the agency declined to reconsider the location or other merits of the project]; ***South Bronx Clean Air Coalition v New York State Dept. of Transp.***, 218AD2d 520, ***lv denied*** 87NY2d **803** [the limitations period commenced to run at the time that the State Comptroller approved a DOT lease with the developer and the alternative proposal was finally rejected, rather than at the time that the subsequent environmental review was approved]; ***Ferrer*** v ***Appleton***, 190AD2d 146, ***lv denied*** **82** NY2d 662 [the four month Statute of Limitations began to run when the construction permit was issued in October 1989, not from the time that a revised application was accepted on some unspecified date in June 19921).

Laches

In the alternative, plaintiffs' demand for a preliminary injunction is denied on the ground of laches (***see Stockdale*** v ***Hughes,*** 189AD2d 1065 [petitioners' challenge was found to be barred by laches in a case where neighbors attempted to obtain cancellation of a developer's building permits for construction of an apartment complex **where** the developer began construction promptly after issuance of permits, where neighbors had been aware of construction and they did not seek cancellation until the complex had been substantially completec, and where many units in the complex were already occupied]). In so holding, the court noted that '[i]t is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis

for asserting the defense of laches, particularly in the area of land development" (***id.*** at 1067 [citations omitted]).

In applying the related doctrine of mootness in land development cases, it has been recognized that while

> "a race to completion cannot be determinative, and cannot frustrate appropriate administrative review, courts have found several factors significant in evaluating claims of mootness. Chief among them has been a challenger's failure to **seek** preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation."

(*Dreikausen* v ***Zoning Bd.*** *of* ***Appeals*** ***of*** ***City*** *of* ***Long Beach,*** 98 NY2d 165, 173 [citations omitted]). Thus, relief is routinely denied under circumstances where no preliminary injunction was obtained to preserve the status quo during the pendency of the litigation and appeal, so that the construction at issue was completed prior to resolution of the dispute (***see*** *e.g. Group for* ***South Fork*** v ***Planning Bd.*** *of* ***Town*** *of* ***Southampton,*** 306 AD2d 281; ***Hudson Valley Nursery*** v ***Planning Bd.*** *of* ***Town*** *of* ***Orangetown,*** 306 AD2d 283; ***Padavan*** v ***City*** *of* ***New York,*** 291 AD2d 561; *Imperial Improvements* v ***Town*** *of Wappinger Zoning Bd.* ***of Appeals,*** 290 AD2d 507). Herein, plaintiffs have been aware that the commencement of construction was imminent since the Negative Declaration was issued in August 1999 and there is no indication in the papers before the court that Steiner was not moving forward as expeditiously as possible. Nonetheless, plaintiffs waited until September 2003 to commence

this litigation and seek injunctive relief, after Steiner expended $50 million and the structure is near completion[12]

Common Law Causes of Action

In view of plaintiffs' failure to address the issue of how their conclusory assertions that the construction project may cause contamination in the surrounding areas, and hence may result in health and/or environmental risks, supports their causes of action premised upon nuisance, negligence and/or trespass, the pleading of these claims is similarly insufficient to support the finding that plaintiffs are likely to succeed on the merits.

Irreparable Harm

Plaintiffs also fail in their burden to show that they will suffer irreparable harm if a preliminary injunction is not issued. Most significantly, as noted above, plaintiffs present no data to support the claim that contamination has been found to exist or has worsened during the three years that the project has been under construction. Plaintiffs' claim of irreparable harm is also significantly undermined by Perlstein's assertion that residents in the area were not aware that construction had begun until July 2003; since the phases of construction most likely to create health risks or increase contamination have already been completed, any health risks should have been obvious and readily documented by plaintiffs if significant danger existed.

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[12] In this regard, Perlstein's assertion that plaintiffs were unaware that construction had begun until July 2003 is found to be unpersuasive, since given the scope of the work performed, it is incredible that there was not an increase in noise or traffic that would put area residents on notice that construction had begun *(see generally Stockdale, 189* AD2d 1065).

Balancing of the Equities

Plaintiffs have also failed in establishing that the balancing of the equities tips in their favor. As noted above, Steiner has already expended approximately $50 million on the project and they project that the cost of delay occasioned by the issuance of a preliminary injunction to be over **$3** million in increased construction costs, in addition to $52,000 per day in fixed costs. In contrast, plaintiffs rest their argument exclusively upon the unsupported conclusion that contamination may increase and may pose health and environmental risks in the area, contentions that are belied by Steiner's empirical testing at the site. Thus, while plaintiffs have not demonstrated any potential harm in the absence of a preliminary injunction while, on the other hand, if a preliminary injunction is granted, Steiner will lose millions of dollars, and the success of a project endorsed by City and expected to create a significant number of new jobs will be jeopardized.

Conclusion

Accordingly, plaintiffs' motion for a preliminary injunction is denied. The court therefore does not reach the issue of whether plaintiffs should be required to post a bond, or the appropriate amount of such bond.

The foregoing constitutes the decision and order of the court.

E N T E R ,

J. S. C.

HON. JUSTICE HERBERT KRAMER