

**Sutherland v New York City Hous. Dev. Corp.**

2008 NY Slip Op 31274(U)

April 30, 2008

Supreme Court, New York County

Docket Number: 0114415/2007

Judge: Shirley W. Kornreich

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ON 5/2/08  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 114415/2007

SUTHERLAND SUSAN

vs  
NYC HOUSING DEVELOPMENT CORP.

Sequence Number : 002

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 2/28/08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

his motion to/for dismiss + x

*motion to dismiss*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits + petition (see 1)

PAPERS NUMBERED

1-3

4-7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAY 05 2008

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 4/30/08

HON. SHIRLEY WERNER KORNREICH  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
SUSAN SUTHERLAND, IAN SUTHERLAND,  
XIOMARA HAYES and EUGENIO MARTINEZ,

Index No. 114415/07

Petitioners,

DECISION & ORDER

-against-

NEW YORK CITY HOUSING DEVELOPMENT  
CORPORATION and AMP APARTMENTS, INC.,

Respondents.

-----X  
SHIRLEY WERNER KORNREICH, J.

In this Article 78 proceeding, petitioners challenge a determination by respondent New York City Housing Development Corporation (HDC), dated June 26, 2007 (Negative Declaration), which found that the environment would not be affected by a loan that funded the reservation for low income families of 59 out of 269 units in a previously approved market rate rental apartment building. This proceeding was commenced on December 20, 2007, almost one year after construction commenced. Petitioners allege that the Negative Declaration must be vacated because the loan triggered review under the New York State Environmental Quality Review Act (SEQRA) and the New York State Parks, Recreation and Historic Preservation Law (HPL).<sup>1</sup> Prior to answering, respondents HDC and AMP Apartments, LLC (AMP), moved and cross-moved to dismiss on the ground that petitioners lack standing to maintain the petition.

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<sup>1</sup> SEQRA is codified as Environmental Conservation Law (ECL), §8-0101 et seq. and its implementing regulations are contained in 9 NYCRR §617.1 et seq. HPL is codified as HPL §14.01 et seq. and its implementing regulations are contained in 9 NYCRR §426.1 et seq.

### *Background*

By lease dated November 8, 2005 (Lease), The Cathedral Church of St. John the Divine in the City and Diocese of New York (Cathedral) conveyed to Avalon Bay Communities, Inc. (Avalon Bay), premises located on the southeast portion of the Cathedral's grounds or close (Close). Respondent AMP is a subsidiary that was formed by Avalon Bay to develop the premises. The record contains only Article 20 of the Lease, but it is undisputed that it contained an agreement for Avalon Bay to develop a portion of the land owned by the Cathedral, including an apartment building located at 401 West 110<sup>th</sup> Street, containing 296 market rate rental apartments (Building). The Cathedral sits on a 13-acre site. According to petitioners, Building's construction removed gardens, stone cliffs, older trees, a basketball court and a playground. The basketball court and playground may be replaced, but in reduced size.

The Building faces the north side of Cathedral Parkway, also known as West 110<sup>th</sup> Street, in the City of New York, Borough of Manhattan, facing apartments in buildings on the south side of Cathedral Parkway, 412 and 424 West 110<sup>th</sup> Street, in which petitioners reside. Three of the petitioners are long time residents, having lived in their apartments 18 and 32 years.<sup>2</sup> It is undisputed that petitioners had direct views of the Cathedral and Close from their apartments, which are now obstructed by the Building. Prior to its construction, Susan Sutherland could see the gardens and Close trees, as well as hear the resident peacock. Her affidavit states that the Building is "grossly inconsistent architecturally and historically" to the Cathedral and the surrounding area. Xiomara Hayes describes "watching a family of falcons gliding along the Cathedral roofline to perch on the pinnacle statue of the Archangel Gabriel..." although it is not clear whether that sight was visible

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<sup>2</sup> The third petitioner, Eugenio Martinez, does not state when he moved in.

from her apartment window.

Community opposition to the proposed development resulted in an amendment to the Lease, dated August 11, 2006 (Amendment). The Amendment, altered Article 20 of the Lease to provide that Avalon Bay would “diligently endeavor to cause the Initial Construction to constitute an 80/20 Building.” An 80/20 building is one that is 80% percent market rate and 20% affordable housing, defined as housing for families earning 50% or less of the adjusted median income. If Avalon Bay could not “obtain approval or bonding capacity” to construct an 80/20 Building, the Amendment provided that the Lease would remain in full force and effect, including Avalon Bay’s right and obligation to develop the premises. In other words, the Building would be constructed whether or not Avalon Bay received financing to facilitate the construction of 59 affordable units. On November 2, 2006, respondent HDC passed a resolution (Funding Resolution) authorizing the issuance of bonds for the Building in an amount not to exceed \$115,000,000.00, on a partially tax exempt basis. According to petitioners, construction began in January 2007 and is projected to take two and one half years to complete. Affidavit of Susan Sutherland, sworn to on January 11, 2008, ¶7. Hence, funding by HDC was approved in November 2006, prior to the commencement of construction.

Respondents allege that the market rate Building was constructed as of right and received all necessary permits and approvals from the City of New York. In HDC’s Reply Memorandum of Law, p. 3, fn. 2, it contends that it complied with SEQRA and the HPL in the issuance of the loan to AMP. The Negative Declaration issued on June 26, 2007. It found that the funding by HDC would have no environmental impact for the following reasons:

4. Description of Proposed HDC Action:

The provision of financing the construction [sic] of one 18-story building with a total

of 296 residential units plus subcellar and cellar, and a 168-space garage to serve tenants of the new building and the Cathedral Church of St. John the Devine [sic].... As a result of the funding assistance the ground lessee and the ground lessor have agreed that twenty percent of the residential units would be reserved for families earning up to 50% of the adjusted median income, while the remaining units would be for market-rate rentals. Should this assistance not be available the building would be developed as a 100% market rate rental development. A MARKET RATE RENTAL DEVELOPMENT IS PERMITTED ON THIS SITE IRRESPECTIVE OF THIS NOTICE AS EVIDENCED BY THE APPLICANT'S RECEIPT OF ALL RELEVANT NEW YORK CITY APPROVALS AND PERMITS AND THE COMMENCEMENT OF CONSTRUCTION PURSUANT TO SUCH APPROVALS/PERMITS PRIOR TO THE ISSUANCE OF THIS NOTICE....

**6. Reasons Supporting This Determination:**

See the Environmental Assessment Statements for this project which set forth the environmental review. HDC has thoroughly analyzed this project using the criteria set forth in 6 NYCRR 617.7(c) to determine whether the project may have significant adverse impact on the environment.

A comprehensive review has determined that the project will be consistent with all guidelines outlined in the CEQR Technical Manual. No adverse socioeconomic effects are expected from the renovation and conversion of new housing. Appropriate analysis has determined that the project is not expected to have a significant impact upon the surrounding area. There will be no impact on cultural resources, and no significant issues involving hazardous materials were identified. No significant adverse impacts were found to be created due to the project.

The following facts concerning the history of the Cathedral and Close are not in dispute. In 1997, the New York State Office of Parks, Recreation and Historic Preservation (OHP) evaluated the Cathedral, the Close and other structures within it, and found that the Cathedral was eligible for inclusion in the National Register of Historic Places (National Register). In 1978, OHP nominated the Cathedral for inclusion in the National Register. On February 9, 2007, the OHP wrote a letter to STV Incorporated<sup>3</sup> stating that the Cathedral campus (the Close) where the Building is located had been determined to be eligible for listing on the State and National Registers of Historic Places. The

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<sup>3</sup> The record does not disclose the relationship between STV Incorporated and this proceeding.

letter further stated that the Building would have an adverse impact upon the Cathedral and Close.

Petitioners claim that the harm that they have suffered is the loss of their views of the historic Cathedral and Close, as well as the effect on their neighborhood of the loss of the historic resources. They contend that the November 2006 Funding Resolution triggered historical and environmental review and that it is irrelevant that without the funding the Building would have been built as of right:

The relevant fact is not that the project would be built with or without HDC funding, but that the project is being built with HDC funding. The construction of a project and funding for a project are aspects of an integrated action for SEQRA purposes. There is nothing in SEQRA to suggest that a project which can be built without review under SEQRA because no discretionary state action is required for construction (as is the case here) therefore can be funded by state action without review under SEQRA notwithstanding that the project adversely affects the environment.

Memorandum of Petitioners in Opposition to Motions of Respondents to Dismiss the Petitioner, dated Jan. 15, 2008, p. 4.

Respondents counter that petitioners' alleged injuries do not result from HDC's funding. They assert that petitioners have not suffered an injury in fact with a nexus to the challenged funding because without it, the Building will still be there, all of the apartments will be rented at market value, the losers will be 59 low income families and the winner will be respondent AMP – not petitioners.

#### *Discussion*

The Court of Appeals has devised a two-part test for determining whether a party has standing:

First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must

fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.

*N.Y. State Ass'n. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). The plaintiff must show an injury that arose from the challenged administrative determination. *Transactive Corp. v. New York State Dep't. of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998).

#### A. Standing under SEQRA

In land use matters, standing requires an additional showing that the aggrieved party will suffer a direct harm that is different from that of the public at large. *The Society of Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d 761, 774-775 (1991). The loss of a scenic view is an injury in fact sufficient to confer standing. *Matter of Ziembra v. City of Troy*, 37 AD3d 68 (3<sup>rd</sup> Dept. 2006), *app. den.* 8 NY3d 806 (2007). In a SEQRA claim, the zone of interest test requires a party to demonstrate that it will suffer an environmental injury because the purpose of SEQRA is protection of the environment. ECL §§8-0101 and 8-0103.

SEQRA defines "environment" to mean physical conditions which will be affected by a proposed action, including effect upon land, flora, fauna, noise, objects of historic or aesthetic significance, and existing community or neighborhood character. An environmental impact statement (EIS) under SEQRA must be prepared before a state agency takes an action that "may include the potential for at least one significant adverse environmental impact." 9 NYCRR §617.7(a)(1). A project supported, in whole or in part, through loans or other forms of funding assistance by an agency is defined as an "action" under SEQRA. ECL §8-0105(4)(i); 6 NYCRR 617.2(b)(1)(ii). An EIS is not required where "there will be no adverse environmental impacts...." 9 NYCRR §617.7(a)(2). HDC is a public benefit corporation created pursuant to the New York State Private Housing Finance Law, §653. As such it is a "state agency" pursuant to

SEQRA. 6 NYCRR §617.2(ah).

A Type I action under SEQRA is one that is more likely to require preparation of an EIS. 9 NYCRR 617.4(a). Funding by an agency of an action “occurring wholly or partially within, or substantially contiguous to, any historic building, structure, [or] site ... that has been proposed by the New York State Board on Historic Preservation for recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register of Historic Places” is a Type I action. 6 NYCRR 617.4(b)(9).

Type II actions listed in 6 NYCRR 617.5(c) are not subject to environmental review. 6 NYCRR 617.5(a). Subsection (c) exempts from SEQRA review “official acts of a ministerial nature, involving no exercise of discretion,” ECL §8-0105(5)(ii) and 6 NYCRR § 617.5(c)(19),<sup>4</sup> which includes the issuance of as-of-right building permits, *Matter of Schum v. City of NY*, 161 A.D.2d 519 (1<sup>st</sup> Dept. 1990); *Citizens for Preservation of Windsor Terrace v. Smith*, 122 A.D.2d 827 (2<sup>nd</sup> Dept. 1986). Respondents’ contention that the Building was constructed as of right is an argument that goes to the merits of petitioners’ SEQRA claim, not standing. Respondents’ claim that the funding has no nexus to petitioners’ injury ignores the fact that the Negative Declaration deprived them of the right to administrative review under SEQRA of possible mitigation measures.

*B. Standing under the HPL*

Similarly, petitioners’ now-obstructed views of the Cathedral are sufficient to allege an injury in fact, different from that of the general public, in the zone of interest, historic

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<sup>4</sup> The text of the regulation is more explicit, providing that the environmental review is not required for “official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant’s compliance or noncompliance with the relevant local building or preservation code(s).”

preservation, sought to be protected by the HPL. Under HPL §14.09, historical review must occur “prior to funding of any project by a state agency” where the project “will cause any change, beneficial or adverse, in the quality of any historic, architectural ... or cultural property” that is listed on the State or National Register. Hence, the zone of interest is the protection of historic, cultural and architectural resources. As under SEQRA, a public benefit corporation, such as HDC, is a state agency under the HPL. 9 NYCRR §426.2(p).

Petitioners have standing because they allege an adverse affect on their views from their apartments of property listed on the State Register. This is an injury different in kind from that of the public at large and is squarely within the zone of interest protected by the HPL. The February 9, 2007 letter of OHP found that the Building would have an adverse affect on the Cathedral and Close. Petitioners suffered an injury because they were deprived of administrative review under the HPL, which might have mitigated their injuries.

*Conclusion*

Respondents’ argument, that the funding did not confer standing because it did not cause the loss of petitioners’ views, is flawed. It fails to acknowledge the statutory language in both SEQRA and HPL that funding of a project by a state agency that affects the environment or historic resources is an action triggering administrative review to mitigate harmful effects. In addition, it ignores that HDC funding was approved before construction commenced. Essentially, respondents are arguing that because the construction is nearly completed (a fact that petitioners dispute), the funding was not the source of petitioners’ injuries. This argument is foreclosed by precedent.

The Court of Appeals has held that “relief remains at least theoretically available even

after completion of the project, ... structures changing the use of property most often can be destroyed” and “a race to completion cannot be determinative, and cannot frustrate appropriate administrative review.” *Matter of Dreikausen v. Zoning Board of Appeals*, 98 NY2d 165, 172 (2002). Completion, or substantial completion, raises issues of mootness, laches or vested rights, which are fact-driven inquiries. *Id.* The court need not reach these issues at this juncture because the motions before the court are based exclusively on standing.

Respondents urge that without the funding, the Building will still be built, but will be leased at 100% market rate. This theory would nullify the provisions of SEQRA and the HPL that defines the agency action of funding as the trigger for administrative review. Indeed, a similar issue was discussed in a recent case, *Gunthorpe-Hardee v. Dormitory Authority*, 13 Misc.3d 1244A, *affirmed*, 41 AD3d 144 (1<sup>st</sup> Dept. 2007), *appeal den.*, 9 NY3d 810 (2007), in which the respondent Dormitory Authority had withdrawn funding to avoid SEQRA review, but later provided refinancing, a year and a half after the building was completed with private financing. The trial court held that the refinancing was a Type II action, specifically exempt under SEQRA pursuant to 6 NYCRR 617.5(c)(23), noting that private funding followed by agency refinancing was an “end-run round the SEQRA requirement,” but that a court is limited to the application of statutory provisions. *Id.* The lower court’s decision was affirmed unanimously. In the case before this court, the funding has not been withdrawn and, therefore, petitioners have standing to raise both SEQRA and HPL violations. Whether or not the Building was properly approved as of right is an issue that goes to the merits, not standing. Accordingly, it is

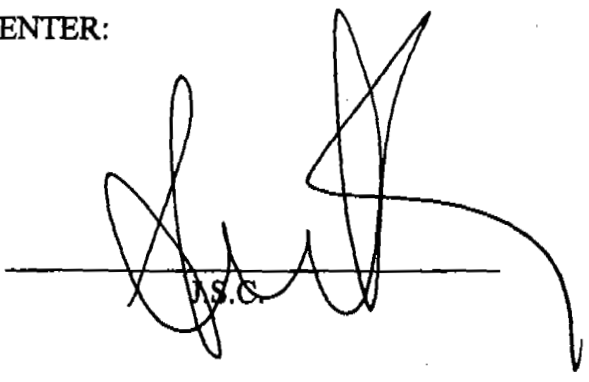
ORDERED that the motion and cross-motion to dismiss the petition are denied; and it is

further

ORDERED that respondents New York City Housing Development Corporation and  
AMP Apartments, LLC, are directed to answer the petition within twenty days of service upon  
them of a copy of this order with notice of entry.

Dated: April 30, 2008

ENTER:



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is written over a horizontal line that has the letters "U.S.C." printed on it.

**FILED**  
MAY 05 2008  
NEW YORK  
COUNTY CLERK'S OFFICE