

**Matter of 220 CPS Save Our Homes Assn. v  
New York State Div. of Hous. & Community  
Renewal**

2008 NY Slip Op 31565(U)

June 4, 2008

Supreme Court, New York County

Docket Number: 0106658/2007

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PART 52

PRESENT:

Index Number : 106658/2007

220 CPS 'SAVE OUR HOME'

vs

N.Y.S.D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO.

106658/2007

MOTION DATE

2/27/08

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

PAPERS NUMBERED

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

1, 2

~~Answering Affidavits - Exhibits~~

Cross motions

3, 4

Replying Affidavits \_\_\_\_\_

5-7

2 Cross-Motions;  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~

~~MOTION AND~~ CROSS MOTION(S) ARE DECIDED  
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

PETITION IS HELD IN ABEYANCE  
PENDING FILING OF THE ANSWER

**FILED**

JUN 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

6/4/08

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
In the Matter of the Application of 220 CPS  
"SAVE OUR HOMES" ASSOCIATION, MAHESH  
AGASHIWALA, THEODORE BAER, BERTINA  
BAER, NOLAN BAER, JUDY BECKER, JOHANNA  
BENNETT, MARIEL BENNETT, JACK BIDERMAN,  
ISABEL BARNARD BIDERMAN, BARBARA E.  
BISHOP, MARJORIE CANTOR, TERRY CHABROWE,  
PAULA CHABROWE, CONNIE COLLINS, AMY R.  
COUSINS, CATHY MARSHALL, LAURA McLEOD,  
LORI METZ, BRIGID O'CONNOR, MARVIN PAIGE,  
RONALD PECUNIES, LUCILLE PETINO, BERTRAM H.  
SCHAFFNER, DEBRA LYN SCHINASI, HYMAN  
SCHINASI, JEAN SCHINASI and KALIA SHALLECK,

Index No. 106658/07  
Mot. Date 2-27-08  
Mot. Seq. No. 001

Petitioners,

For a Judgment pursuant to Article 78 of the  
Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and MADAVE  
PROPERTIES SPE, LLC,

Respondents.  
-----X

**FILED**  
JUN 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

<b>Appearances:</b>	<b>For the Petitioners:</b> Jack L. Lester, Esq. 880 Third Avenue Suite 900 New York NY 10022	<b>For the Respondent Madave:</b> Rosenberg & Estis, P.C. By: Luise A. Barrack, Esq. 733 Third Avenue New York NY 10017	<b>For the Respondent DCHR:</b> Gary R. Connor, Esq. By: Sandra A. Joseph, Esq. 25 Beaver Street, Room 707 New York NY 10004
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**PAUL G. FEINMAN, J.:**

The petitioners bring this Article 78 special proceeding for a judgment: compelling the performance of an environmental review by the respondents; enjoining the respondent Madave Properties SPE, LLC (Madave) from proceeding with any eviction proceeding; enjoining the respondent New York State Division of Housing and Community Renewal (DHCR) from

proceeding with their administrative reviews; declaring that the respondent DHCR's administrative review is arbitrary and capricious; and awarding attorney's fees.

In separate notices of cross motion, the respondents DHCR and Madave each cross moves, pursuant to CPLR 3211 (a) (2) and 7804 (f), for an order dismissing the petition. For the reasons set forth below, the cross motions are denied and the respondents directed to file an answer.

### *Procedural and Factual Background*

The petitioners are rent-stabilized tenants of 27 of the 41 apartments in the building located at 220 Central Park South, in Manhattan. The respondent Madave is the landlord. The respondent DHCR currently has pending before it an application by Madave, pursuant to Rent Stabilization Code § 2524.5 (a) (2), to evict the tenants in order to demolish the building and erect, as of right, a new condominium apartment building. The petition asserts that the court should compel the DHCR to conduct a review, pursuant to the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0109), in conjunction with its overall review of the project.

In support of their motions to dismiss the petition, the respondents argue: that the petitioners have failed to exhaust their administrative remedies; that because the respondent DHCR is merely an involved agency, and not the lead agency, it need not undertake a SEQRA review; and that neither the DHCR, nor the unnamed lead agency have any discretion to deny Madave's application.

In opposition to the motions to dismiss, the petitioners argue that the DHCR has discretion in making its determinations and that SEQRA mandates that the DHCR undertake an

environmental review of the project.

*Discussion*

On a motion pursuant to CPLR 7804 (f) to dismiss an Article 78 proceeding for failure to state a cause of action, the court must assume the truth of the allegations in the petition, view them in their most favorable light and determine whether or not, based on the facts alleged, the pleading states a legally cognizable claim (Matter of Northway 11 Communities, Inc. v Town Bd. of Town of Malta, 300 AD2d 786 [3d Dept 2002]).

Environmental Conservation Law § 8-0109 (2) provides that:

All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment.

In Chinese Staff & Workers Assn. v City of New York, (68 NY2d 359 [1986]), the neighborhood residents argued that the City's environmental review was arbitrary and capricious because of the failure to consider, in an environmental impact statement, whether the introduction of luxury housing into the Chinatown community altered the character of the community. The Court of Appeals clearly held that SEQRA includes concerns about the impact a project may have on population patterns or existing community character. The court held that the city's limited view of the parameters of the term "environment" was contrary to the plain meaning of the SEQRA Act, Environmental Conservation Law Article 8.

In this case the petition clearly states a claim under SEQRA. It is alleged that the DHCR is the lead agency with discretion to consider the impact that the project may have on population patterns or existing community character. Whether in fact the DHCR is the lead agency with discretion is a matter which must await further development of the facts.

Turning to the question of whether the petitioners have exhausted their administrative remedies, in Church of St. Paul & St. Andrew v Barwick (67 NY2d 510, 521, cert denied 479 US 985 [1986]) the Court held that:

Ripeness pertains to the administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether harm from it might be prevented or cured by administrative means available to the plaintiff. The focus of the 'exhaustion' requirement, on the other hand, is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted.

In this case, no other administrative avenues are available to review the DHCR's refusal to conduct an environmental impact study. Thus, the exhaustion of administrative remedies doctrine is not implicated here (Matter of Ward v Bennett, 79 NY2d 394 [1992]). An Article 78 proceeding is the proper vehicle by which to compel officials to perform a mandatory duty, such as performing an environmental impact study (CPLR 7803 [1]). A body can be directed to act but not how to act (Klostermann v Cuomo, 61 NY2d 525 [1984]). The action sought to be compelled here, an environmental impact review, is itself non-discretionary under the above-cited provisions of the SEQRA Act. Those provisions require an environmental impact review. Thus, there is a clear legal right to relief and the granting of mandamus relief is entirely proper (Matter of Morrison v New York State Div. of Hous. and Community Renewal, 241 AD2d 34 [1<sup>st</sup> Dept 1998] rev'd on other grounds 93 NY2d 834 [1999]).

Finally, although ministerial acts are specifically exempted from the environmental review requirements of SEQRA (ECL 8-0105 [5] [ii]), the DHCR's determination to either grant or deny an eviction certificate is clearly not an act of a merely ministerial nature. The DHCR's assertion that its determination is merely ministerial, because the sole criterion for issuance of the

permission to evict is whether or not the new building can be built as of right under the applicable zoning, is contrary to the terms of Rent Stabilization Code § 2524.5, which clearly vests discretion in the DHCR to condition the owner's application upon the owner's compliance with specified terms and conditions, and if such terms and conditions have not been complied with, the order may be modified or revoked (Rent Stabilization Code § 2524.5 [e]).

Noncompliance by the owner with any term or condition of the administrator's or commissioner's order granting the owner's application can be brought to the attention of the DHCR's compliance unit for appropriate action, and the DHCR retains jurisdiction for this purpose until all moving expenses, stipends, and relocation requirements have been met (Rent Stabilization Code § 2524.5 [f]).

Accordingly, it is

ORDERED that the cross motions to dismiss the petition are denied; and it is further

ORDERED that the respondents are directed to serve and file their answers within seven days after service upon them of a copy of this order with notice of entry; and the petitioners may re-notice the petition upon service of the answers upon ten days' notice.

This constitutes the court's decision and order on the two cross motions to dismiss. The court's decision on the petition is held in abeyance for the filing of the respondents' answers.

Dated: June 4, 2008  
New York, New York

*Saul H. Friedman*  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUN 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK