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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

Index Number : 600073/2008

330 WEST 86TH STREET, LLC

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 600073-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memo	1, 2
Answering Affidavits — Exhibits	5, 6, 7
Replying Affidavits	8, 9, 10
cross motion, memo	3, 4

Cross-Motion: ☑ 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.

FILED

JUL 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/25/08

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
330 WEST 86TH STREET, LLC,
Plaintiff,

against

THE CITY OF NEW YORK, 328 OWNERS CORP. and 86TH STREET APARTMENT CORPORATION,
Defendants.
----------X

Index Number 600073/2008
Submission Date April 9, 2008
Mot. Seq. No. 001
Cal. No. 11

DECISION AND ORDER

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Papers considered in review of this motion and cross-motion for summary judgment:

Papers	**Numbered**
Pl. Notice of Motion and Affidavits Annexed, Memo of Law	1,2
City Notice of Cross-Motion, Memo of Law, Aff in Opp.	3, 4
Def. Aff. In Opp to Pl. Motion., Memo of Law	5,6
Pl. Aff. In Opp to Cross-Mot & Reply	7
Pl. Reply Aff. To Non-City Defendants Opp. To Pl. Mot.	8
City Reply Aff in Supp. of Cross Mot and Opp to Mot., Memo of Law	9, 10

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision. Plaintiff, 330 West 86th Street, LLC, moves for summary judgment as to the declaratory relief sought in the complaint. Defendant City of New York cross-moves for summary judgment and dismissal of the complaint. Co-defendants 328 Owners Corp. and 86th Strect Apartment Corporation (co-op defendants), representing the adjacent properties, join with the City in opposition to plaintiff's motion.

Factual and Procedural Background

The premise known as 330 West 86th Street, in the City and County of New York, was formerly owned by the City of New York which acquired it following an in rem tax foreclosure proceeding. The premise, a five-story townhouse built around 1900, is an eight-unit multiple dwelling. At the time it entered the City's inventory, it had many municipal code violations, and was assessed as "deteriorated" and in need of "rehabilitation." It was classified as tending to impair or arrest the growth and development of the municipality and, based on its otherwise marketable condition, was found by the New York City Department of Housing Preservation and Development (HPD) to be a candidate under the Urban Development Action Area Act (UDAAA, codified as Article 16 of the General Municipal Law), for designation as an Urban Development Action Area Project (UDAAP).

The project for this premise, as set forth in the March 16, 1999 New York City Council Resolution No. 673, which tracks the language of UDAAA, consisted "solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings, and does not require any change in land use permitted under the New York City Zoning Resolution" (Not. of Mot. Exh. A, Summons & Ver. Compl., Addendum; see also Gen. Mun. Law § 695 [6] [d]).[1] Thus, under the UDAAA, the City was allowed to dispose of the property "to any person, firm, or corporation qualified pursuant to this subdivision . . . by action of the mayor" (Gen. Mun. Law § 695 [6] [d]). HPD sought and obtained authorizations from the City Council and the mayor's office that waived certain normal procedures and

[1]The City Council Resolution incorporated by reference the HPD Project Summary which stated that the type of project was "conservation." (See, Cross-Mot. Exh. A, Council of City of N.Y. Res. No. 673, p. 1; and addendum, "Project Summary").

requirements normally undertaken for land use determinations, so as to allow conveyance of the property on an accelerated basis. The premise was offered to its occupant-tenants contingent on several requirements as set forth by HPD. The tenants formed a corporation, 330 West 86 Oaks Corp., for the purpose of acquiring title. The New York City Council approved the project and the mayor's office authorized the conveyance of the premise. According to April 4, 2001 affidavit of Nicholas Stavriotis, the Director of the Asset Sales Program of the Division of Alternative Management for the New York City Housing and Preservation Development (HPD), the premise was conveyed on June 22, 1999, under HPD's Asset Sales Program, to 330 West Oaks Corp., as a project under the UDAAA (Not. of Mot. Exh. F, Stavriotis Aff. ¶¶ 1-2). It was sold for $340,000, the price of which was calculated based on its then current income and state of repair. [2]

The Deed, certain language of which is at issue in this action, contains several references to the property's UDAAP designation and sets forth the requirement that the parties comply with the UDAAA requirements.[3] The Deed states, in part:

> WHEREAS, the project to be undertaken by Sponsor ("Project") consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning. . . .

(Deed, unnumbered p. 1). In its habendum clause, the Deed states that the project sponsor, i.e.,

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[2]The non-City co-defendants suggest that the premise was "undervalued," as the tenants/shareholders's corporation was able to obtain a loan of $475,000 to cover the purchase price, and a year later, the City Tax Assessor valued the property at $589,000 (Rosenberg Aff. in Opp. ¶ 12, n. 1; Exh. E, G, I).

[3]A copy of the Deed (hereinafter "Deed"), is appended to the copy of the summons and verified complaint attached as Exhibit A of plaintiff's Notice of Motion, and is Exhibit A of the City's cross-motion, and Exhibit N of the co-defendants' opposition papers.

the tenant/shareholders' corporation, accepted the property subject to all laws and regulations existing at the time of delivery of the Deed, and agreed, in part, to remove all the code violations and hazardous conditions within six months, and to maintain the existing tenants' rents at a fixed rate for two years (Deed ¶ 6).

The tenants' corporation never corrected the code violations. Instead, in February 2001, it sold the premise to plaintiff, 330 West 86th Street, LLC. In anticipation of the sale and in the belief that the plan by the new owner for the premise involved tearing it down and erecting a new much taller structure, the landowner adjacent to the premise, 328 West Owners Corp., one of the co-defendants in this present litigation, commenced an action in New York State Supreme Court, and in relevant part, sought a declaratory judgment that the Deed restricts the use of the land, and that the new owner and any successor or assigns must act within those constraints.[4] The City cross claimed, seeking first a declaration that under the Deed and related statutory requirements, the subject premise could only be used for conservation purposes, or, alternatively, for the rehabilitation or conservation of existing private or multiple dwellings or construction of one to four unit multiple dwellings and, second, a permanent injunction against the owner and any successors from using the premises except in compliance with the terms of the Deed. The language at issue states:

> The agreements and covenants set forth in this Deed shall run with the land and shall be binding to the fullest extent permitted by law and equity. Such covenants shall inure to the benefit of the City and shall bind and be enforceable against Sponsor and its successors and assigns.

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[4]The original caption was later amended to add the present owner of the premise, and was entitled, *328 Owners Corp. v 330 West 86 Oaks Corp., 330 West 86th Street, LLC, and The City of New York*, 2004 NY Slip Op 51828U (Sup. Ct., New York County 2004).

(Deed, ¶ 6). The trial court decision holding, in part, that the restrictions imposed by the Deed run with the land, was appealed, reversed, and ultimately was heard by the Court of Appeals, which issued its decision in April 2007 (*328 Owners Corp. v 330 West 86 Oaks Corp. and the City of New York*, 8 NY3d 372 [2007]). The Court of Appeals reinstated the trial court's determination as to the nature of the Deed's restrictions, noting that the restrictions are also mandated by statute (8 NY3d at 384). Specifically, the Court stated that the particular clause at issue "is not limited to covenants that are set forth in the habendum clause but covers any such covenants discernible from the deed in its entirety and further dictates that they shall 'run with the land' and 'inure to the benefit of the City.'" (8 NY3d at 382).

The Court in addition stated that the Deed's restrictions "need not be 'in perpetuity.' . . . If the project identified in the Deed recitals is accomplished, the restrictions may expire by their own terms." (8 NY3d at 384). The Court noted that "the current or any future owner may seek extinguishment of the land use restrictions under RPAPL 1951 to the extent it desires to make different use of the property." (8 NY3d at 384-385).[5] It also specifically found "little merit" to the City's argument that the property's use should be limited to conservation purposes only (8 NY3d at 385).

1. Plaintiff's Motion

Plaintiff commenced this litigation seeking a declaration both that the Deed's restriction is not enforceable by injunction as to plaintiff's property and that the restriction is now

[5]The court notes the City's argument that these statements that the Deed's restriction is not in perpetuity, and that the owner may seek relief under RPAPL 1951, are dicta, and were not based on arguments briefed by the litigants (Shaw Aff. in Furth. Supp. ¶ 29).

extinguished. It moves for summary judgment on the basis that by the terms of the Deed and as construed by the UDAAA, the project has been accomplished as the premises has been rehabilitated, and therefore the restriction has expired by its own terms. Through the affidavit of Jack Sins, a managing member, plaintiff argues that the building has been repaired and is in good condition and no longer contributes to a blighted condition. It submits affidavits attesting to the state of the building from a licensed architect, a licensed master plumber, and a tenant who has lived in the premises since November 2001 (Not. of Mot. Exh. C, D, E). It includes photographs taken of the apartments, interior stairs and hallways, and the facade (Not. of Mot. Sins Aff. ¶ 18, Exh. I). It also includes uncertified copies of documents from the New York City Department of Finance showing that no real estate taxes were outstanding on November 15, 2007, and Sins affirms that the January 2, 2008 balance has been paid in full (Not. of Mot. Sins Aff. ¶ 9; Exh. G). Plaintiff also submits copies of several computer printouts issued by the New York City Department of Buildings (DOB) which were downloaded on February 11, 2008 (Not. of Mot. Exh. H). Plaintiff argues that they show that there are no "structural or safety-related open violations," and support its argument that the building is in sound structural shape.[6]

Plaintiff concludes that it establishes that, by the terms of the Deed, drafted by the City, the project of rehabilitating the premise has been accomplished, as the building's condition no

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[6]Plaintiff includes several pages of print outs (Not. of Mot. Exh. H). An undated page shows 14 DOB violations, 9 of which remain open, and 8 open Environmental Control Board (ECB) violations, and notes that there is 1 open ECB "Work Without a Permit" violation. The other pages show, variously, that as of January 19, 2007, there were nine DOB violations; that as of December 19, 2007, there were no boiler violations, and that there was a hearing scheduled on January 24, 2008 concerning eight ECB violations, all of which concerned an unauthorized placement of a promotional sign on the building fire escape.

longer fits the statutorily defined description of a property of concern to the City (Not. of Mot. Sins Aff. ¶¶ 20, 21). In sum, pursuant to the UDAAA, the building does not any longer exhibit "substandard, insanitary, deteriorated or deteriorating conditions, factors, and characteristics, with or without tangible physical blight," the existence of which "constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and maintenance and constitutes a negative influence on adjacent properties impairing their economic soundness and stability." (Gen. Mun. Law § 691).

2. The City's Cross-Motion

The City cross-moves for summary judgment and dismissal of the complaint, and sets forth several arguments. It argues initially that the restrictive covenant reflects the determination of the City Council and the mayor as to the implementation of the UDAAA at this location, and is not justiciable. It also challenges plaintiff's assertion that the premises has been "rehabilitated" in compliance with the law, and argues that even if the building has been "rehabilitated," this alone is insufficient to extinguish the restrictive covenant. It refers to the determination that the premise was disadvantageous to the community, and the decision to value the property at its then-current income and condition and to sell it for a lesser amount, rather than on the open market with a valuation based on a potential income stream, and argues that these decisions were based on the belief that this course of action would best benefit the community's long-term future.

The City further argues that it is not plaintiff's choice as whether to rehabilitate, conserve,

or redevelop the premise, noting that the UDAAA grants *municipalities* the rights and powers to determine on what terms, and by what methods the statute's purpose of correcting, eliminating or preventing the development and spread of blight should be accomplished (Cross-Mot. Shaw Aff. ¶ 33). The City concedes that the Court of Appeals held that the Deed did not restrict grantee's property use to conservation purposes only, but argues that the Court did not thereby invalidate conservation as a purpose, and that plaintiff's argument that the restriction is extinguished based solely on "rehabilitation" is too narrow a reading of the Deed and the statute's intent (Cross-Mot. Shaw Aff. ¶ 34).

In support of this branch of its argument, the City points to the Building Condition Survey undertaken by an HPD project manager in about June 1999, in connection with the conveyance of the premise. The survey reveals that the premise was, at that time, in "generally good condition," with "[l]ittle more than cosmetic work . . . needed, and no structural or systems work was necessary" (Cross-Mot. Sternberg Aff. ¶¶ 2, 9). According to the project manager, the survey results "reflected significant work by the City, including a new roof, new windows, and a heating plant that was one year old" (Cross-Mot. Sternberg Aff. ¶ 6). The City now argues that the fact that the building was in relatively good structural shape at the time of its conveyance, strongly suggests that plaintiff's argument, based solely on its having "rehabilitated" the building, is too narrow in focus, and does not address the long-term planning goals of the municipality (Cross Mot. Shaw Aff. ¶ 70). It cites the affidavit by the Associate Commissioner of the HPD's Division of Management and Disposition, who explains that the reason for selling a building with post-sale covenants, under UDAAA or other statutory schemes such as the Urban Renewal Law and the Private Housing Finance Law, is to implement the legislative intent and

specific requirements of those statutes (Cross-Mot. Hendrickson Aff. ¶ 5).

The City also questions whether "rehabilitation" can, as a matter of law, include the concept of destruction of the thing rehabilitated. It contends that the covenant represents the City's goal of providing long-term benefits to the community as a whole, and that rehabilitation is meaningful only if the property is utilized in its improved condition for a "significant" period of time (Not. Of Cross-Mot. Shaw Aff. ¶ 14). It thus argues that the Restrictive Covenant's reference to "rehabilitation or conservation of existing private or municipal dwellings" should be understood as "rehabilitation *and* conservation of" such dwellings, and that allowing plaintiff to tear down the building only a few short years after rehabilitating it, would nullify the purpose of conservation.[7]

In addition, the City argues in addition that plaintiff's attempt to have the restrictive covenant declared already extinguished must fail, as plaintiff has not and cannot satisfy the statutory test set forth in sections 1951 and 1953 of the Real Property Actions and Proceedings Law (RPAPL). The adjacent property owners, the co-op defendants, advance similar arguments in their opposition to plaintiff's motion for summary judgment. The City argues that other than the building allegedly being fully rehabilitated, plaintiff has not alleged that the long term goals of the City have changed so as to extinguish the restrictive covenant (Cross-Mot. Shaw Aff. ¶¶ 41-44). Nor has it alleged that the City does not actually or substantially benefit by continuing enforcement of the restrictive covenant (Cross-Mot. Shaw Aff. ¶ 47). The City argues it would

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[7]The City focuses on the seven months between the Court of Appeals decision holding that plaintiff was "responsible for the breaches of its predecessor with respect to the duty to rehabilitate the blighted property" (8 NY3d at 834), and the commencement of this current litigation, while plaintiff contends that the premise were rehabilitated since the end of 2001.

be seriously and substantially injured were the restriction extinguished, as that would compromise the City's long-range planning goals. As to the balance of equities, the City argues that plaintiff has not stated that it cannot make a profit with the restriction in place, and contends that continuing enforcement of the restriction would still allow plaintiff to further rehabilitate or conserve the premises, or to construct a one to four unit dwelling, although not, admittedly, to enjoy "speculative profits that might be gleaned by development free of the Restrictive Covenant" (Cross-Mot. Shaw Aff. ¶ 47).

All defendants argue, alternatively, that summary judgment is inappropriate because no discovery has been provided by plaintiff such as plans, written agreements with contractors, bills for work performed, or proof of payment to support the statement by plaintiff's Sins that the building has been completely rehabilitated (*see* Co-op Def. Memo of Law at 23). Defendants seek to determine not only whether the premise is fully rehabilitated, but whether the work was done lawfully and, if not, then to require plaintiff to pay necessary fines and file proof of completion of the work (*see* Cross-Mot., Jubran Aff.). They argue that the contractors' affidavits provided by plaintiff are conclusory, and do not sufficiently address the issue of various outstanding violations, in particular certain apparent outstanding HPD violations issued against the building as of March 2, 2008, which entail three hazardous and two immediately hazardous Housing Maintenance Code (*see* Rosenberg Aff. in Opp. ¶ 52, pp. 19-22; Exh. GG). Building code violations are in express derogation of the Deed.

3. General Municipal Law Article 16 (The Urban Development Action Area Act)

The Urban Development Action Area Act (UDAAA) was enacted in 1979 based on Legislative findings that in many municipalities there are areas acquired by the municipalities

either through their urban renewal powers or as the result of the failure of the previous landowners to meet their real estate taxes or other obligations, which are characterized by substandard conditions, and which hamper economic development and growth of the community, and tend to result in disuse, deterioration, and hazards which perpetuate the existence of blight, and discourage builders and investors from developing such areas (McKinney's Cons. Laws of NY, Book 23, Art. 16, sec. 690, p. 550, Historical and Statutory Notes, citing Section 1 [a] of L. 1979, c. 505). The UDAAA is designed to protect and promote the safety and health of the people and to promote sound economic growth and development by providing incentives for the correction of substandard conditions (Gen. Mun. Law § 691). The statute grants municipalities the rights and powers to correct, eliminate, or prevent these conditions through "the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas for residential, commercial, industrial, community, public and other uses." (Gen. Mun. Law § 691).[8] The Act seeks to eradicate blighted areas that constitute "a serious and growing menace. . . contribute[ ] increasingly to the spread of crime, juvenile delinquency and disease, necessitate[ ] excessive and disproportionate expenditures of public funds . . . and constitute[ ] a negative influence on adjacent properties impairing their economic soundness and stability" (Gen. Mun. Law § 691).[9] It is "essential to the public interest," that municipalities use these legislated rights

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[8]The Act also seeks to assure that minority owned businesses participate in projects undertaken through the statute, in particular in projects involving the construction of one to four family residences (Gen. Mun. Law § 691).

[9]The question of whether an area is substandard and insanitary so as to justify clearance, replanning, etc., is left to the determination of the local authorities, and courts may review their findings, if at all, only on a limited basis (*Kaskel v Impellitteri*, 306 N.Y. 73, *rearg denied* 306 N.Y. 609 [1953], *cert. denied* 347 U.S. 934 [1954]).

and powers and expend public funds, to correct such conditions and to eliminate or prevent blight (Gen. Mun. Law § 691).

In New York City, the New York City Charter requires the City to sell or lease any real property it owns only with the approval of the mayor, after appraisal and review, and only for the highest marketable price at a public auction by sealed bids, unless it is sold pursuant to a local development corporation (NYC Charter § 384 [1-5]). The HPD's Division of Alternative Management Program (DAMP), "provides an alternative to traditional City ownership and management of residential buildings," and administers several discretionary programs for alternative management of City-owned buildings, including the Asset Sales Program (Not. of Mot. Exh. F, Stavriotis Aff. ¶ 3). The Asset Sales Program involves properties that are determined by HPD to be "marketable" to the private sector in an "as is" condition at market value (Stavriotis Aff. ¶¶ 3, 7-8). Sale of these properties allows HPD to conserve the City's resources for use in the many City-owned buildings which are in need of substantial rehabilitation (Stavriotis Aff. ¶ 8). The Asset Sales Program, and all of the programs under DAMP, have the goals of "divesting the City of its portfolio of residential rent property, returning such buildings to responsible tax-paying private ownership, and maintaining affordable housing" (Stavriotis Aff. ¶ 3). Properties that are earmarked as UDAA Projects, fall under the Asset Sales Program (Stavriotis Aff. ¶ 11).

Under the UDAAA, if the project to be developed on municipal land consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without changes in land use, the City is allowed to bypass the normal process set forth in the Charter at section 197-c (Uniform Land Use Review Procedure) which

requires community, borough, City Planning Commission and City Council review. The UDAAA allows the City to sell property at negotiated or set prices without a public auction to any person, firm, or corporation designated by the New York City Housing and Preservation Development (HPD) and approved by the City Council (Gen. Mun. Law §§ 695, 694 [5]).[10]

A project designated under the Act, will have a "project summary" which includes "a statement of proposed land uses; proposed public, semipublic, private or community facilities or utilities; a statement as to proposed new codes and ordinances and amendments to existing codes and ordinances as are required or necessary to effectuate the project; a proposed time schedule for the effectuation of such project, and such additional statements or documentation as the agency may deem appropriate." (Gen. Mun. Law § 692 [6]).[11]

4. Real Property Actions and Proceedings Law §§ 1951 and 1953 (Discharge of Encumbrances)[12]

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[10]Under the Administrative Code, the rental units of a building previously subject to rent stabilization, which enters the City's inventory and is later sold, remain subject to rent stabilization, with the tenants paying the last rents charged by the City (NYC Admin. Code § 26-507 [a]; *see, Cousins v Neighborhood Partnership Housing*, NYLJ 7/30/2003, p.18 c. 4 [Sup. Ct., New York County 2003]).

[11]As noted above, the Project Summary concerning the premises was incorporated by reference into the City Council Resolution, and stated that the type of project was "conservation." It indicated that "proposed time schedules" were "not applicable"(see, Cross-Mot. Exh. A, Council of City of N.Y. Res. No. 673, p. 1; and addendum, "Project Summary").

[12]RPAPL § 1953, referred to by both sets of litigants, concerns reverter to and reentry by the grantor of the property. Subsection (2) allows that where a breach of a special limitation has occurred, the entity who would have had a possessory estate or right of entry except for the limitation to maintain an action in Supreme Court to compel conveyance. According to subsection (3), this relief is granted only "*to protect a substantial interest in enforcement of the restriction*, established by the person or persons in whose favor the relief was granted." (Emphasis added).

Section 1951 of the Real Property Actions & Proceedings Law states that no restrictions on the use of land created by a covenant or other means, "shall be enforced by injunction or judgment compelling a conveyance of the land burdened by the restriction, and that a restriction will not be declared or determined to be enforceable, "if at the time the enforceability of the restriction is brought into question, *it appears that the restriction is of no actual and substantial benefit* to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, *either because the purpose of the restriction has already been accomplished* or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason." (RPAPL § 1951 [1], emphases added). If the court finds that the restriction is of no actual and substantial benefit to the persons seeking its enforcement, based either on the fact that the purpose of the restriction was already accomplished or cannot be accomplished, or by reason of changed conditions or other causes, "it may adjudge that the restriction is not enforceable by injunction . . . and that it shall be completely extinguished upon payment, to the person or persons who would otherwise be entitled to enforce it in the event of a breach at the time of the action, of such damages, if any, as such person or persons will sustain from the extinguishment of the restriction." (RPAPL § 1951 [2]).

Legal Analysis

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept.

2000]). The moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, it shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Where pertinent facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge or control of the moving party, and may be revealed through pretrial discovery, summary judgment should be denied (*Baldasano v Bank of New York*, 199 AD2d 184 [1st Dept 1993]).

New York favors the free and unobstructed use of real property. "[C]ovenants restricting use are strictly construed against those seeking to enforce them," with courts enforcing restraints only where their existence is established with "clear and convincing proof" (*Witter v Taggert*, 78 NY2d 234, 238 [1991]). The party claiming that a restrictive covenant is unenforceable bears the burden of proof (*Birt v Ratka*, 39 AD3d 1238, 1239 [4th Dept. 2007], citing *New York City Economic Dev. Corp. v T.C. Foods Import & Export Co., Inc.*, 19 AD3d 568, 569 [2d Dept. 2005]; *Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 433-434 [2004]; *Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 266 [1981]). Failure to establish that the restriction is of no "actual and substantial benefit" is fatal to a movant seeking extinguishment of a restriction (*see, Garrett v Village of Asharoken*, 185 AD2d 873 [2d Dept. 1992], citing *Orange & Rockland Utilities, Inc.*, 52 NY2d 253, and *Board of Educ., East Irondequoit Centr. Sch. Dist. v Doe*, 88 AD2d 108 [1982]). "[T]he issue is not whether [the party seeking to enforce] obtains *any* benefit from the existence of the restriction but whether in a balancing of equities [the restriction] can be said to be, in the wording of the statute, 'of *no* actual and *substantial* benefit'" (*Orange &*

Rockland Util., 52 NY2d at 266 [emphases in original, quoting RPAPL 1951 [1]); *see Cody v Fabiano & Sons*, 246 AD2d 726, 727 [3d Dept.], *lv denied* 91 NY2d 814 [1998]; *Deak v Heathcote Assn.*, 191 AD2d 671, 672 [2d Dept. 1993]).

Plaintiff seeks summary judgment on the basis that under RPAPL 1951, the restrictive covenant is extinguished because the purpose of the restriction, which it argues was to require rehabilitation of the building, has been accomplished. There is no definition of "rehabilitation" in the UDAAA, or in the General Municipal Law as a whole. The term "rehabilitation" is defined in at least two New York statutes addressing housing. The Public Authorities Law, in the sections pertaining to the State Mortgage Agency, defines "rehabilitation" as "[r]epairs, alterations or improvements of a housing accommodation designed to raise the housing standards therein or, in the case of other real property, designed to provide needed improvements therein." (Public Auth. Law § 2426 [10]). The Private Housing Finance Law, a statute that addresses the need for increased low-income housing through investment by private free enterprise (Private Housing Finance Law § 11), defines "rehabilitation" in sections concerning loans to owners of multiple dwellings by private investors and municipalities, rent regulation of multiple dwellings that have been rehabilitated with certain types of private funds, and rent regulation of multiple dwellings aided by certain federal housing assistance programs. As to those three sections, the termed is defined as "the installation, replacement or repair of heating, plumbing, electrical and related systems, or elimination of conditions dangerous to human life or detrimental to health, including nuisances . . . or other rehabilitation or improvement of existing multiple dwellings" (Private Housing Finance Law § 801 [7], and § 607 [5]; § 608 [5]). Elsewhere in the Private Housing Finance Law, the Affordable Home Ownership Development Program (which defines

"home" as "a one to four family dwelling . . . or an owner occupied unit in a cooperative or a condominium"), defines "'rehabilitation' or 'home improvement'" as "all work necessary to bring a structure into compliance with all applicable laws and regulations including but not limited to the installation, replacement or repair of heating, plumbing, electrical and related systems and the elimination of all hazardous and immediately hazardous violations in the structure in accordance with state and local laws and regulations of state and local agencies." (Private Housing Finance Law ¶ 1111 [1], [6]). Furthermore, "rehabilitation or home improvement may also include reconstruction or work to improve the habitability or prolong the useful life of residential property." (Private Housing Finance Law ¶ 1111 [6]).

Although these definitions may not be "imported" into the UDAAA (*see, Matter of New York City Coalition for the Preserv. of Gardens v Giuliani*, 175 Misc. 2d 644, 664 [Sup.Ct., New York County 1997], *aff'd* 246 AD2d 399 [1st Dept. 1998]), they are instructive that in statutes concerning housing, the Legislature has expressed a concern for strict compliance with the relevant codes and building laws. Even without a specific definition of rehabilitation provided in the UDAAA itself, it cannot be found as a matter of law that plaintiff has fully rehabilitated the premise. The affidavits of the plumbing and heating contractor and the architect state that the present condition of the building is sound and in compliance with all codes, but there is certain conflicting evidence tending to show that some building violations remain in existence or were in existence at the time these affidavits were drafted. There is no discussion in either affidavit of what work was done by plaintiff to rehabilitate the building. Although plaintiff offers the affidavit of managing member Sins, who sets forth a list of the work done by plaintiff and compares that list with what was described in the Sternberg Affidavit and the 1999 Building

Survey as work needing to be done, plaintiff offers nothing to substantiate this claim of work done, such as invoices or contracts. Given that the building was in "generally good condition" at the time of its sale by the City (Cross-Mot. Sternberg Aff. ¶ 7), but was nonetheless categorized as a UDAAP building in deteriorated shape, plaintiff must establish that the physical status of the premises complies with the intendment of the grantor of the Deed.

Even were the court to find as a matter of law that the building has been rehabilitated, plaintiff must also establish that, under section 1951 of the RPAPL, the City has "no actual and substantial benefit" in the restriction such that the balance of equities is in its favor. Plaintiff argues that the "actual and substantial benefit" test is met by the fact that the purpose of the restriction has been accomplished. However, there is at least a question as to whether this too narrowly interprets the purpose of the UDAAA and the restrictive covenant. As stated by the Court of Appeals in this matter, although "the requirements of offering renewal leases and correcting code violations are finite in nature," the "durational restraint of General Municipal Law § 695. . . is not meant to restrain the ongoing duty to conserve, rehabilitate or reconstruct within the constraints of the deed and UDAAA" (8 NY3d at 384, citation omitted). Furthermore, given the building's generally good condition at the time of its initial sale to the shareholders' corporation, there is a question as to whether the other goals of the UDAAA should be inferred in reading the restrictive covenant and the Deed as a whole, in particular the long term planning goals of the municipality. For instance, although not explicit in the statute, there is an apparent desire on the part of the City's HPD when employing the Asset Sales Program as a whole, to maintain the premises as "affordable" housing (see Not. of Mot., Exh. F, Stavriotis Aff. ¶ 3 ["goals" include "maintaining affordable housing"]). This is also evidenced in the premise's

HPD Project Summary, attached to the City Council Resolution, indicating that the purpose of the project is "conservation."

It thus cannot be said based on the papers before the court, that in balance, the equities are such that the City would not continue to benefit actually and substantially, by keeping the restriction alive. In fact, plaintiff, who bought the building in full knowledge of the covenant, does not explicitly explain what detriment it would face, were the restrictive covenant continued, although potential lost profits can be assumed. As it has not demonstrated an entitlement to summary judgment on this or any basis, plaintiff's motion is denied.

The City cross-moves for summary judgment and dismissal of the complaint on several grounds. In the first instance, it argues that the issue is not justiciable. "Justiciability is an 'untidy' concept but it embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions" (*Jiggetts v Grinker*, 75 NY2d 411, 415 [1990] [citing in general, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:4, at 357]). Thus, "[b]road policy choices, which involve the ordering of priorities and the allocation of finite resources, are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere" (*Jiggetts,* at 415, citing *Jones v Beame*, 45 NY2d 402 [1978]; *Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990 1976]). Courts will not venture into areas where they are "ill-equipped to undertake the responsibility and other branches are far more suited to the task" (*Jones v Beame*, 45 NY2d at 408). Thus, in *Jones v Beame*, the Court held in part that it was inappropriate for the courts to "intervene and reorder priorities, allocate the limited resources available, and in effect

direct how the vast municipal enterprise should conduct its affairs," as concerns the City's managing of its zoos during a time of fiscal crisis (*Jones v Beame*, 45 NY2d at 407). The *Jones* Court also held that it was improper for the courts to address the "dumping" of mentally ill patients into the communities, as the policy involved not only fiscal issues but theories of deinstitutionalization, and required legislative and administrative action. Similarly, where a petitioner challenged the City's regulation requiring parking on alternate sides on Saint Patrick's Day, the court held that as the power to regulate parking is expressly delegated to the municipality by statute, the designation of holidays on which alternate side parking regulations are suspended is a legislative prerogative upon which the courts should not intrude (*Santiago v Riccio*, 170 AD2d 340 [1st Dept. 1991]). Where parents and citizens challenged the decision of the Chancellor of the Board of Education to close a junior high school, the petition was dismissed because the determination of whether to close a school is part of the duty imposed on the Chancellor to determine how best to educate the students, and these educational policy determinations are nonjusticiable (*Ferrer v Quinones*, 132 AD2d 277, 282-283 [1st Dept. 1987], *app. withdrawn* 72 NY2d 914 [1988]).

However, in *Jiggetts*, it was held that the Social Services Law imposes a statutory duty on the Commissioner of Social Services to establish shelter allowances that bear a reasonable relation to the cost of housing in New York City, and the plaintiff who claimed that the Commissioner failed to perform that duty presented a justiciable controversy involving the alleged failure of the executive branch of the government to comply with the directions of the legislative branch. Similarly, in *Matter of Dental Society of State of N.Y. v Carey*, 61 NY2d 330, 335 (1984), as the issue was whether the medical services reimbursement schedule promulgated

by the State properly met the Federal standard, and did not involve fixing rates for dental services nor determine budgetary priorities, it was within the traditional competence of the courts to decide.

The City argues that plaintiff, contrary to the principle that each department of government should be free from interference in the lawful discharge of duties expressly conferred (City Memo of Law, at 12, quoting *Matter of New York State Inspections, Sec. & Law Enforcement Empl. v Cuomo*, 64 NY2d 233, 239 [1984]), seeks to have the court intervene in the decision made by the City Council and the mayor concerning the UDAAP status of the building and the necessity that the Deed contain a restrictive covenant so as to meet the City's long term needs. This, it argues, is a collateral attack on a determination made by the City Council and the mayor in a legislative or executive capacity, and is non-justiciable.

Plaintiff argues that it does not seek to challenge City's designation of the premises as a project under the UDAAA, or its conveyance to the shareholders' corporation pursuant to the accelerated procedure provided in the UDAAA (Pl. Aff. in Opp. ¶ 29). It contends that once the transfer under the UDAAA was accomplished, the political and executive processes regarding the disposition of the property ended, and the issue now is only whether the purpose of the Deed's restrictions has been accomplished and the restriction extinguished (Pl. Aff. in Opp. ¶ 30). It distinguishes the cases cited by the City by arguing that here, there is no executive, management, policy, or fiscal determination of the City at issue, nor are there issues regarding "questions of judgment, allocation of resources and ordering of priorities, or the manner in which the City addresses complex social and governmental problems." (Pl. Aff. in Opp. ¶ 30, 32).

In response, the City argues that it is not merely a question of interpreting the Deed, but

whether plaintiff can impinge on the resolution of the City Council that the project was to be "disposed of and developed upon the terms and conditions of the Project Summary," which, as noted above, indicate that the purpose of the conveyance was conservation without deadline (City Reply Memo at 3). The City argues that to allow the plaintiff to successfully challenge the Deed would eviscerate the purpose of the project by solely focusing on rehabilitation and eliminating the City's goals of conservation.

The "line separating the justiciable from the nonjusticiable has been subtle" (*Jones v Beame*, 45 NY2d at 408). Here, the City's arguments that plaintiff challenges its policy making is not persuasive. Plaintiff evokes its statutory right to seek a declaration that the restrictive covenant is extinguished, based on the language of the Deed. The issue here concerns the interpretation of certain terms in the Deed, and the court may properly handle the matter. Accordingly, the cross-motion to dismiss the complaint on the ground of non-justiciability is denied.

Where the party seeking enforcement moves for summary judgment and dismissal, it assumes the burden of proving that the restrictive covenant is enforceable (*Birt v Ratka*, 39 AD3d at 1239) (holding that where plaintiff sought enforcement, and moved for summary judgment and dismissal of defenses and counterclaims, she assumed the burden of proving that the restrictive covenant was enforceable). Thus, as concerns the cross-motion, the City bears the burden of establishing that the restrictive covenant remains enforceable.

The City first argues that part of the bargain in conveying the property under the UDAAA, is that the restrictive covenant remains in force in perpetuity, and that RPAPL §§ 1951 and 1953 are not available to the premises' owner (Shaw Reply Aff. ¶¶ 13-15). It points out that

the Deed does not mention any expiration date for the restrictive covenants, and that the Project Summary set forth in connection with the transfer of this property indicated that "proposed time schedules" were "not applicable." Although this latter fact is noteworthy, it also seems not to comply with the statute which requires that for each project, the project summary shall include, among other items, "a proposed time schedule for *the effectuation of* such project" (Gen. Mun. Law § 692 [6], emphasis added). This language suggests that the drafters of the UDAAA assumed a discrete, albeit potentially lengthy, period of time during which UDAA Projects would remain not fully accomplished, but not that UDAA Projects would never reach completion. Under equitable principles, invoked by plaintiff, the position of the City that a UDAAA property is forever encumbered, no matter what occurs with the premises, is untenable (*see, National Tradesmen's Bank v Wetmore*,124 NY 241, 251 [1891] ["'there is no wrong without a remedy'"]). As set forth above, there are questions of fact concerning whether the premise has been rehabilitated pursuant to the intent of the Deed, and whether the restrictive covenant in this Deed remains necessary to the long range planning of the City. The City has not proffered evidence, such as an affidavit by someone with actual knowledge, or a certified study of the area, to show that the restrictive covenant remains necessary. As it has not established its claim to continued enforcement, the cross-motion for summary judgment and dismissal of the complaint on the basis that the restrictive covenant remains in force, is denied.

The City also states that the municipality uses the accelerated UDAAP mechanism "quite frequently," and all those conveyances all include a combination of rehabilitation, conservation, or the construction of one to four unit dwellings (Cross-Mot. Hendrickson Aff. ¶¶ 4-5). It argues that a finding for the plaintiff will harm the ability of the City to employ this statutory prerogative

for improving the municipality, and that long-range planning involving the conveyance of properties under the UDAAA will be seriously impaired. However, the City is the drafter of these deeds and other conveyance documents, and certainly has the ability to more explicitly craft terms that express its intent and explicate the terms of the agreement. A significant part of the issue here is that the Deed does not include a definition of "rehabilitation," nor explicitly set forth the entirety of the project goals, if there are, in actuality, other goals beyond rehabilitation of the building. Thus, even if the restriction is extinguished here, there is no reason that in the future the City could not protect its policy goals as embodied in other premises by better draftsmanship. It is therefore,

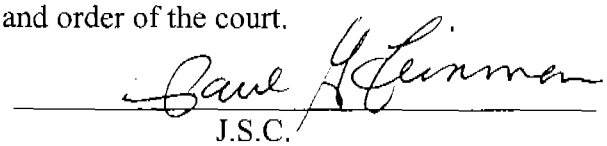
ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross-motion for summary judgment and dismissal is denied; and it is further

ORDERED that the parties are to submit a stipulation setting forth a discovery schedule to be "so ordered" by the Court on or before July 28, 2008 or, in the alternative, shall appear for a preliminary conference at which the scope and timing of production of discovery will be addressed, on July 30, 2008 in Supreme Court, 80 Centre Street, room 289, at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: June 25, 2008
New York, New York



J.S.C.

HON. PAUL G. FEINMAN