

**Matter of Neighborhood in the Nineties, Inc. v City of
New York Bd. of Stds. & Appeals**

2009 NY Slip Op 31936(U)

August 13, 2009

Supreme Court, New York County

Docket Number: 115705/07

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE
Justice

PART _____

Neighborhood in the Nineties
et al.

INDEX NO. 115705-07

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

City of New York et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance*
with the annexed Decision and Order

FILED
AUG 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/09

Lewis Bart Stone
HON. LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50-S

-----X
In the Matter of the Application of NEIGHBORHOOD :
IN THE NINETIES, INC., AARON BILLER, :
ROLANDE CUTNER, LAWRENCE LIBERSTEIN :
CATHERINE BINDMAN, ARMIN KUNZ, KATHY :
PASSERO, SHARON GAFFNEY, MICHAEL :
DiSTASIO, DAVID HENDRICKS, JOHN HUGILL, :
JACQUELINE HOWELL, RICHARD SCHWARTZ, :
ROBERT REMIEN, JUDITH AMORY, EDWARD :
GRIMM, MARINA HIGGINS, JOAN MORGAN, :
JUANITA STREULI, and JAMES and MONA :
CANNING, : :

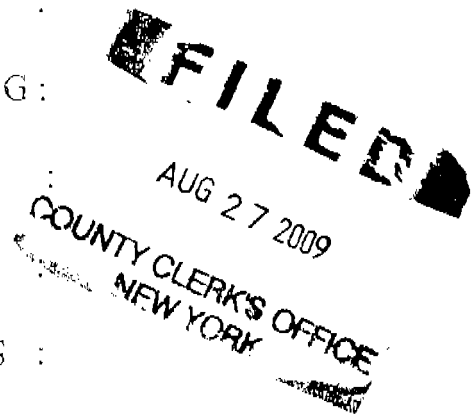
Petitioners, : DECISION AND
ORDER

For a Judgment Pursuant to Article 78 of :
the Civil Practice Law and Rules : Index Number
: 115705/07

-against

CITY OF NEW YORK BOARD OF STANDARDS :
AND APPEALS OF THE CITY OF NEW YORK, :
DEPARTMENT OF HOUSING PRESERVATION :
AND DEVELOPMENT, NEW YORK CITY HOUSING :
DEVELOPMENT CORPORATION, THE LANTERN :
GROUP, INC., LANTERN GROUP FOUNDATION, :
INC., LANTERN INVESTMENT GROUP, LLC, :
319 REALTY SERVICES L.P., 319 WEST LLC, :
ST. LOUIS L.P. AUDUBON HOUSING :
DEVELOPMENT FUND CORPORATION, FRIENDS :
IN THE CITY, INC., MiCASA HDFC, MEL-AP :
HOTEL CORP., IRENE SHREYBERG, CITY :
PLANNING COMMISSION, "JOHN AND JANE :
DOES" 1 -10 and XYZ Corp./LLC/LLP 1-10, : :

Respondents. :
-----X



Hon. Lewis Bart Stone, J.

This proceeding was initially commenced by Petitioners, Neighborhood in the Nineties, Inc., and twenty individuals (collectively the "Petitioners") on January 17, 2008, by Notice of Motion, against the City of New York, various agencies thereof (collectively the "City") and the Lantern Group Inc. ("Lantern") and others alleged to be affiliates of Lantern, pursuant to Civil Practice Law and Rules ("CPLR") Article 78 to set aside a zoning variance (the "Initial Variance") granted to Lantern by a Resolution of the City Board of Standards and Appeals ("BSA") on October 23, 2007 (the "2007 Resolution"), relating to premises at 319 West 94th Street, New York, New York (the "Building") in connection with certain renovations Lantern proposed to make to the Building, which is presently operated as a single room occupancy ("SRO") building.

Petitioners initially advanced the following seven reasons why this Court should set aside the Initial Variance, viz:

1. BSA failed to make the findings required under New York City Zoning Resolution ("ZR") §72-21 before issuing the Initial Variance,

2. Lantern gave insufficient notice under BSA rules of its application for the Initial Variance,

3. Lantern's notice to Petitioners of the hearing on the Initial Variance violated their due process rights under the Fourteen Amendment to the United States Constitution (the "14th Amendment").

4. In granting the Initial Variance, the BSA failed to comply with the "Fair Share Criteria" as required by the New York City Charter ("City Charter").

5. The BSA violated the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law, Art. 8, in issuing the Initial Variance.

6. BSA violated the city's environmental quality review procedure, Mayor's Executive Order 91 of 1977, codified in 43 RCNY Ch. 6, as modified by regulations of the City Planning Commission, codified in 62 RCNY Ch. 5. ("CEQR"), in issuing the Initial Variance.

7. The process by which the Initial Variance was issued violated City Charter §197-c, the City's Uniform Land Use Review Procedure ("ULURP").

The City denied Petitioners' claims and interposed four affirmative defenses., viz:

1. The petition had to be dismissed as against respondents, New York City Department of Housing Preservation and Development ("HPD"), the New York City Planning Commission ("CPC") and the New York City Housing Development Corp. ("CDC") as they did not issue the Initial Variance.

2. The BSA was neither arbitrary nor capricious and the issuance of the Initial Variance was not an abuse of BSA's discretion.

3. Because there had been an appropriate "Negative Declaration," the Initial Variance did not violate SEQRA or CEQR.

4. The notice given with respect to the Initial Variance was appropriate and adequate.

The parties submitted extensive briefs and affidavits in support of their respective positions and the Court heard extensive oral arguments.

Many disputes before this Court involving development and construction issues in New York City involve objections to any change to the neighborhood. Because neighbors have no legal right to prevent a landowner from using or modifying his property in accordance with law, litigation to prevent change regularly asserts that the proposed use or modification was illegal or that developer or owner proposing the change has not received authorization to proceed or that the grant of such authorization was legally flawed. Such is the case here. Lantern had proposed to modernize and slightly expand the Building, to improve it to enable Lantern to serve persons who need substantial social support to maintain their ability to live independently. Petitioners consider these persons (the "Additional Tenants") as socially undesirable additions to their neighborhood because they may have been

homeless by reason of mental illness or other problems. While housing the Additional Tenants represents a change from the actual present operation of the Building as an ordinary SRO, the "new" use is not a "new" use under law as existing zoning fully authorizes persons such as the Additional Tenants to reside in the site as of right, either in the present Building or as it may be rehabilitated pursuant to a variance or in any building which may be built on the site if the Building were demolished. Thus while Zoning Resolution can and does regulate uses to which a property may be put, the Zoning Resolution already allows the Additional Tenants to be residents of the Building. Thus, although the motivation of the Petitioners may be based on their objections to the Additional Tenants, such objection cannot constitute a basis to the object variance here. The variance sought here was not needed to allow the Additional Tenants to reside in the Building and BSA has neither addressed or been asked to address or rule upon any variance to change the existing use restrictions on the Building in the Zoning Resolution.

While Petitioners may not wish to have the Additional Tenants in their neighborhood, as a matter of law, they cannot prevent their presence, and must rely on laws of general applicability to regulate any improper social behavior of Additional Tenants as may reside in the Building.

The Initial Variances Granted

The Initial Variance eased three restrictions otherwise imposed by the Zoning Resolution, two of which affect the exterior configuration of the Building, and one which does not. Although the Building apparently complied with existing building codes and the Zoning Resolution when it was built almost 90 years ago, technological standards, building codes and the Zoning Resolution have all changed since. As is usual with such regulatory changes, preexisting conditions were "grandfathered" and were permitted to continue.¹ Two relevant aspects of the Building fall into these categories. The Building has wood floors and joists, a method of construction permissible when the Building was built. While the Building as so constructed may legally continue, such construction would not be permitted today. Similarly, the Building was built with a rear yard smaller than that now required by the Zoning Resolution for a new building. Such lot coverage, permissible when the Building was built, however, may also legally continue as a non-conforming condition.

The Zoning Resolution also limits the floor area of buildings. Where an existing building does not exceed this limit, additional floor space may be added to the building, up to the legal limit, provided the new addition does not violate other

¹ It is rare, but not unknown, that a change in building codes will require existing buildings to be modified to comply with new requirements. See McCallin v. Walsh, 46 NY2d 808 (1978).

Zoning Resolution limits or increase any non complying configuration. Here, the Building is under this limit and would continue to be below such limit even if the proposed additions are made.

Lantern's proposed reconstruction of the Building, however, ran into three Zoning Resolution constraints which would prevent Lantern's proposed project from proceeding as-of-right. Lantern wishes to replace the wood floors and joists of the Building with steel and concrete to improve the Building's safety and its fire rating. This proposed change faces two problems. First, making the change requires the replacement of 83% of the floor area; under law, only 75% may be replaced "as of right." Accordingly, one of the three variances sought was to permit Lantern to replace an additional 8% of the Building's floor with steel and concrete.

The second problem arises in that the new steel and concrete floors require a thicker floor structure. If each floor was merely replaced with new thicker floors, ceiling heights would be reduced to under eight feet, an undesirable size. Lantern proposed to reset each floor slightly higher to compensate for this additional floor thickness to provide minimum eight foot ceilings throughout the Building. To do so, Lantern will have to raise the building's roof slightly, and in doing so, the Building would violate the "sky exposure plane" requirements of the Zoning Resolution which requires that that portion of the Building above 85 feet at the front be built within a

plane running towards the rear at a specific angle as set forth in the Zoning Resolution. To accommodate their plan, Lantern sought a variance to allow this sky exposure plane limitation to commence at 88 feet above the ground, an increase of three feet.

While Lantern has the right to add additional floor area to the Building, and could, as of right expand the floor area of the Building by adding such space over the present roof in a manner compliant with the sky exposure plane limitations discussed above without increasing any non-compliance, Lantern, however, wishes to add only three stories to the building, but in a way which would continue the existing non-conforming rear yard wall from the existing top of the Building to the top of these three new floors.² This in effect, would "expand" the non-compliance. Lantern has committed to operate the Building on a not-for-profit basis after renovation and to provide social support facilities for the tenants of the Building and has agreed to seek subsidies to do so.

City Charter §666 authorizes BSA to "vary the application of the zoning resolution" in accordance with the Zoning Resolution and pursuant to City Charter §668. ZR §71-21 establishes standards and criteria which BSA must consider before

² Even with the additional bulk, the number of SRG units would be decreased by eight or nine units under Lantern's plan, as each unit in the renovated Building will be larger than they are now.

granting an application for a variance, and requires BSA to make five findings "as a condition to the grant of any such variance," except for applications for a variance by a not-for-profit entity, where only four findings are required. In granting the Initial Variance, the BSA, finding that the Lantern was a not-for-profit entity, purported to make the four other findings required by ZR §71-21.

Petitioners contend that the fifth finding also had to be made and attacked all BSA findings as arbitrary and capricious and made in violation of law and in violation of proper procedures. Petitioners also initially sought to challenge at least some BSA findings on the grounds that such findings were not based on substantial evidence in the record. (ZR §71-12 requires BSA findings to be "supported by substantial evidence or other data considered by the Board in reaching its decision"). At oral argument, being made aware of CPLR §7804(g) which requires challenges pursuant to CPLR Article 78 on the grounds that the challenged determination was unsupported by substantial evidence on the record, to be referred to the Appellate Division, Petitioner voluntarily withdrew such claim.³

Thus, the Court's inquiry is limited to whether the BSA findings were arbitrary and capricious, or in violation of law or proper procedures.

³ Accordingly, this Court need not address whether the BSA hearing was an evidentiary hearing to which CPLR §7803(4) applies.

The parties were heard on oral argument on March 25, 2008.

At such argument the Court was made aware that certain notice requirements of BSA Procedure §1.06(g) relating to notices to be given to tenants of 319 West 94th Street prior to the BSA hearing on Lantern's variance application had not been materially complied with. On April 9, 2008, the City advised the Court that it would reopen the BSA proceeding "to cure any perceived differences in the notice requests" and thereafter, on May 13, 2008, BSA held a new hearing on Lantern's variance application. As the City thus effectively withdrew the challenged Original Variance and as Lantern was not by reason of such withdrawal prevented from re-applying to the BSA for the same variance, and because the Court was familiar with the matter, the parties stipulated that this proceeding and Petitioners' challenge would remain with this Court in abeyance until the new hearing had been completed and until the BSA had acted after such new hearing and that Petitioners would be free to reassert any objection to any action taken by BSA after such new hearing. Although it was expected that BSA would act promptly, BSA did not issue a new resolution setting forth its findings and decisions (the "2008 Resolution") until July 15, 2008. BSA Bulletin No. 29, vol. 93. The 2008 Resolution re-authorized the same variances (the "Final Variance") as had been authorized by the 2007 Resolution. However, the 2008 Resolution also set forth extensive additional findings and citations to case law which

were not included in the 2007 Resolution, growing to roughly twice the length of the 2007 Resolution. Petitioners' challenge to the 2008 Resolution raised many new issues, and Respondents sought and obtained extensions to reply. In its submissions Petitioners initially included extensive additional material addressing matters which could not have been considered by BSA at the time the Final Variance was granted because they occurred after the time the 2008 Resolution was adopted. In response, Respondents sought, by Order to Show Cause, a ruling of this Court to preclude consideration of such additional material to relieve Respondents of the need to address them in their reply papers. On the return of such Order to Show Cause, Petitioners conceded that they could not rely on matters which could not have been before BSA when it issued the 2008 Resolution and that neither Respondents nor the Court were required to address such additional material. Accordingly, this Court has not considered the additional material.

The delays and the extent to which the asserted issues have proliferated in this matter, however, created a practical problem for the resolution of this dispute by this Court when the matter was finally submitted to it for decision late in 2008. By reason of age limits imposed upon the judiciary in the New York State Constitution, this Judge, as a Judge of the Court of Claims, had been obliged to retire at the end of calendar year 2008. Because the issues in this proceeding were so extensive and

because the parties were unable to agree to reduce them to a manageable few and because the complicated and extensive record was so voluminous, this Court could not be assured that it would be able to resolve this controversy in a proper and orderly manner before it was no longer in a position to do so. Thus, rather than proceeding to the arguments of the parties and to attempt to decide this case before the Constitutional door closed, and then, if unsuccessful in such attempt, assign the matter to another judge, this Court determined that it was proper, in the interest of avoiding further delay, to reassign the matter immediately to another judge who could entertain oral argument or rule on the record otherwise then submitted. The matter was therefore on November 21, 2008, returned to the Clerk of this Court for reassignment to a different justice of the Supreme Court in accordance with the regular procedures of such Clerk. Subsequently, the matter was reassigned.

Subsequent to such reassignment this judge was appointed to a vacancy in the Supreme Court, confirmed by the New York State Senate and certificated pursuant to NY Constitution Art. 6, Section 25, to continue to serve in 2009.

The judge to whom the case had been assigned, after considering the extent of the prior proceedings and the voluminous record, subsequently, in 2009, in the interest of judicial economy, reassigned this proceeding to this Court for decision with the consent of this Court.

This Court has since held a further hearing for the argument of the parties and has been the recipient of many post-hearing letters from them.

At the hearing no party agreed to withdraw any argument made and accordingly, this matter has now been submitted for decision on all matters in contention.

After reviewing all such arguments and submissions, this Court has determined that Petitioners' motion should be denied and the Petition dismissed. The Court will address below the issues raised by Petitioners and why none support any action of this Court to the contrary.

1. New and Old Issues

Petitioners have not only reiterated the same objections they interposed to the Initial Variance but have added new claims and objections to the Final Variance. One new objection is that Lantern presented evidence at the BSA hearing in support of its application for the Final Variance which had not been submitted at the earlier hearing held in connection with the Initial Variance.

In making this argument, Petitioners appear to want it both ways, i.e., complaining that Lantern submitted additional material at the hearing on the Final Variance but at the same time Petitioners raised new issues and objections to the grant of the Final Variance, not raised against the Initial Variance. When the initial

Variance was withdrawn and the application was resubmitted to BSA, this Court made it clear that either party was free to present what they wished to BSA at the hearing on the Final Variance and, on the return of this matter to this Court (assuming BSA were to grant the Final Variance, which the parties expected would eventually occur and which in fact did occur) and to raise any issue or objection. Accordingly, the fact that Lantern may have submitted additional or other material to BSA, or urged different argument in the hearing on the Final Variance is irrelevant. As the Initial Variance was withdrawn, the proceedings under which it was granted, was a nullity in all respects. The sole question for this Court here is whether the Final Variance, the process in which it was granted and the findings of BSA in the 2008 Resolution may be successfully challenged under CPLR Art. 78. To the extent Petitioners may have been able to show that any material presented by Lantern to BSA at the second hearing constituted statements inconsistent to those presented by Lantern at the first hearing in order to challenge the credibility of statements made by Lantern at the second hearing, they had opportunity to do so. Whether inconsistencies existed and what weight BSA should give them if they did exist in evaluating Lantern's credibility at the second hearing, were issues for BSA to resolve. This Court has no power under CPLR Art. 78 to review evidentiary conflicts resolved by BSA. Further, as Petitioners do not challenge BSA's decision for want

of substantial evidence on the record to support its determinations, this Court may not consider any contention as to weight or sufficiency of any evidentiary matter. The fact that BSA made additional findings in the 2008 Resolution in excess of the findings made in the 2007 Resolution is also unexceptional. As BSA was aware of the objections raised by Petitioners in their challenge of the Initial Variance, it is not surprising that BSA addressed such issues and revised, refined and expanded their findings to support their conclusions. However, as the 2008 Resolution is the act of BSA which has been challenged, it is to the 2008 Resolution that the Court must direct its attention.

2. Scope of this Court's review

As Petitioners commenced this proceeding under CPLR Art. 78, and have acknowledged that they are not challenging BSA's acting on the grounds that they were unsupported by substantial evidence on the record, this Court's inquiry is limited to whether any action of BSA in connection with the Final Variance "was made in violation of a lawful procedure, was affected by an error of law, or was arbitrary or capricious." CPLR §7803(3).

As this Court has found that BSA complied with law and procedures to which it is bound and has not acted arbitrarily and capriciously, this Court is required to dismiss the petition. The Court has no jurisdiction to consider the wisdom or

advisability of the Final Variance or to consider whether this Court might have reached a different conclusion on the merits of Lantern's application or weighed the objections of Petitioners on the merits of the grant of the Final Variance in a different manner. Those choices are those of BSA and are not the province of this Court.

Petitioners have indeed raised issues in this proceedings which fall into these permissible areas of inquiry under CPLR Art. 78, although certain of the objections raised involve mixed questions under these permissible areas.

Petitioners' objections relating to notice involve assertions that BSA failed to follow its own procedures (discussed under 3-a below) and that the notice violated Federal constitutional norms, thus violating legal requirements discussed under 3-b below. Petitioners' objections relating to the Multiple Dwelling law is an assertion that the Final Variance was issued in violation of law. This contention is addressed in Section 4 below.

Petitioners' contentions that the Final Variance was adopted in violation of the Uniform Land Use Review Procedure (ULURP") and/or in violation of the Fair Share Criteria are objections addressed to procedural requirements. BSA concedes that it did not comply with these two requirements, but asserts that neither apply. Whether ULURP or Fair Share Criteria apply to the 2008 Resolution will be addressed in Sections 4 and 6 below.

Petitioners' contention that the Final Variance was adopted by BSA in violation of SEQRA and CEQR because no environmental impact statement had been prepared, raises issues of both procedural compliance and issues of arbitrary and capricious action. The parties concur that the issue of variances by BSA are subject to both SEQRA and CEQR. Respondents assert, and Petitioners do not dispute, that both SEQRA and CEQR require Environmental Impact Statements but such requirement is inapplicable where BSA has made a proper Negative Declaration. Although BSA made a Negative Declaration, Petitioners challenge such Negative Declaration as improperly made. As a Negative Declaration is itself a BSA determination, the grounds for the review of such decision is again limited to whether such determination was made in violation of law or procedure or was arbitrary or capricious. These issues are addressed in Section 5 below.

Petitioners also challenge BSA's action to grant the Final Variance. This attack addresses alleged procedural lapses relating to whether BSA made the requisite findings required by the zoning law, whether the findings made were in violation of the law or were arbitrary and capricious. Issues relating to these findings will be addressed in Section 9 below.

Finally, Petitioners assert that because of certain other factors, BSA's grant of the Final Variance was improper. In Section 10 this Court will address such issues.

3. Notice Issues

a. Under BSA Rules

While Petitioners' January 17, 2008 Petition asserted that the notice given with respect to the Initial Variance did not fully comply with BSA Rules of Procedure, the withdrawal of the Initial Variance, the re-noticing of Lantern's application and the holding of a new hearing by BSA, rendered Petitioners' objection to notice lapses in the issuance of the Initial Variance moot.

Petitioners now contend that certain other BSA notice requirements⁴ relating to notices to owners of residential cooperatives and condominiums located within 400 feet of the site of which is subject of the Final Variances were not satisfied. Under BSA Rules §1.06(g), BSA must give notice of a BSA hearing on a variance application to all "affected property owners," who are defined to include "all owners of property with a radius of 400 feet from the center of lot which is the subject matter of the application." Id. The Rules further provide that for cooperative and condominium buildings "notice of the public hearing shall be posted in the common areas of the building and given to the business office of the cooperative or

⁴ The notice objection which caused the withdrawal of the initial Variance related to a different aspect of BSA notice rules. As such objection is no longer being asserted by Petitioners, this Court may assume that such notice problem was cured by the notice given in connection with the 2008 hearing.

condominium which should then be requested to notify its residents in its customary manner." Id.

Petitioners assert, "on information and belief," that such required notice was insufficient as the Supplemental Record does not reflect that Lantern "either (i) directed the business offices to notify the residents of or (ii) posted notices or arranged for the posting of notices in the common areas of coop or condo buildings owned by" 277 River Arms Realty Association, LLC, 677 Tenants Corp. and 670 Apartments Corp.

The buildings owned by 661 Tenants Corp and 670 Apartments Corp. are located respectively at 670 and 677 West End Avenue. BSA correctly notes that such buildings, as shown by the site map (Record 9), are over 400 feet distant from the center of the lot for which the variance was sought. The record further includes a copy of a memorandum sent to the management company for 227 Riverside Drive, the only one of such three buildings identified by Petitioners which is located within 400 feet of Lantern's site, identifying such building and directing its management company to provide the requisite notice. (Record 1325). Thus, while Petitioners' assertion that managing agents "for some of the condos" were not told which buildings were affected could be true for 670 and 677 West End Avenue, no notice was required to be given to unit owners in such buildings. As Petitioners' allegations

as to notice is on information and belief as well as only applying to "some" of the three named buildings does not, in the light of the record of proper notice having gone to the managing agent of 277 Riverside Drive, meet Petitioners' burden to establish that the notice given to 277 Riverside and its owner was insufficient. Any insufficiency in the notice to unit owners in the other two buildings, for whom notice is not required, is irrelevant.

Accordingly, Petitioners' challenge to the Final Variance on the grounds of insufficient notice under BSA Rules must be rejected.

b. Under the US Constitution

Petitioners challenge, the notice given with respect to the proceeding before the BSA in connection with the Final Variance under the due process clause of the 14th Amendment. As this Court has found that Petitioners have not sustained their claim that the notice given did not comply with the Notice requirements of the BSA Rules, this claim essentially asserts that the BSA notice requirements themselves do not pass constitutional muster under the 14th Amendment.

The 14th Amendment provides, *inter alia*, that "nor shall any State deprive any person of life, liberty, or property without due process of law." It is clear that notice in a judicial proceeding by which one's property rights may be adversely affected as a part of due process, and that notice in such a proceeding must meet certain

minimum standards. Petitioners cite Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) in support of their argument. This Court concurs with Petitioners that Mullane is the controlling precedent.

Under Mullane, which considered the adequacy of notice given to beneficiaries in a judicial accounting by a trustee of common trust funds, the Supreme Court held notice by publication alone inadequate under the 14th Amendment. The Court did not find any particular type of notice required, but suggested that the standard should be whether the notice was “reasonably calculated to reach those who could easily be informed.” 339 U.S. at 319. Under such standard, the written notice actually given here, which was given to “owners of property within a radius of 400 feet from the center of the lot” which is the subject matter of Lantern’s application under the ZR would have been adequate under the Mullane test, assuming property rights were at stake.

However, in the absence of a proceeding which may affect a property right or impose a penal sanction, the 14th Amendment leaves States to their own as to what notice is required to be given to persons who may have a non-property concern as to other governmental decisions. While under State law, States may adopt notice requirements before governmental actions not involving property rights or penal sanctions are taken to allow public comment, such notice requirements have no

constitutional dimension under the due process clause of the 14th Amendment.

Neighboring property owners, absent restrictions of record or easements whether of record or otherwise, have no property interest in adjacent parcels.⁵ Thus, Petitioners have no property rights at stake in an application by a land owner for a zoning variance in the City under New York law. While zoning may confer practical benefits on a parcel by restricting the use, bulk or area of other parcels in the area, the owner of the non-benefitted parcel has no vested property right in the zoning of another parcel or the grant of a zoning variance for such other parcel.

Accordingly, the notice given prior to BSA's sanctions did not violate the 14th Amendment.

4. New York Multiple Dwelling Law ("MDL") issues

Petitioners assert that BSA acted improperly in approving the Final Variance because the Building is a multiple dwelling, and the proposed project would violate certain provisions of the New York Multiple Dwelling Law ("MDL"), relating to fire proof construction. To support their position, Petitioners cite decisions of the courts and BSA requiring BSA to adhere to the MDL when reviewing determinations of the

⁵ Although New York does not recognize property rights in nearby parcels *per se*, New York recognizes that owners of nearby properties have concerns and requires notice of a zoning action be given to nearby property owners so that decision makers can consider their concerns in exercising a zoning function, such as the grant of a variance to an applicant, New York law also confers standing on such owners to challenge a zoning decision. However, such consideration or standing does not accord nearby property owners a property right in the applicant's property.

City Building Department. However, BSA has here made no determination to authorize construction in a way inconsistent with the MDL. Further, Lantern has not yet submitted plans to the Building Department for its project and there is no basis for this Court to speculate that Lantern will submit improper plans or to speculate further that the Building Department will approve an improper submission or further to speculate that, in such event, BSA, if such approval were challenged before it, would not follow the MDL or its own precedent. Thus, as BSA has rendered no decision on this issue, its decision to issue the Final Variance may not be attacked on the speculative ground that a future decision on a review of a Department of Building determination might violate the MDL or be arbitrary and capricious.

Petitioners claim is based on their assertion that the building, which is presently a tenement building, when reconstructed with the additional floors would violate two provisions of the MDL which set limits on the height of a tenement building. Petitioners further assert that, as the MDL is a State law which would apply to overrule local zoning laws. BSA acted improperly in granting the Final Variance.

The two alleged violations relate to building height limits based on street width and the number of stories in the Building. In support of Petitioners' contentions, Petitioners cite a portion of MDL §211(1) which states:

"No tenement shall be increased in height so that its

height shall exceed by more than one-half the width of the widest street upon which it stands. Except as otherwise provided in subdivision four of this section, no non-fireproof tenement shall be increased in height so that it shall exceed five stories."

However, the uncited remainder of MDL §211(1) states:

"Except that any tenement may be increased to any height permitted for multiple dwellings erected after April eighteenth, nineteen hundred twenty-nine, if such tenement conforms to the provisions of this chapter governing like multiple dwellings erected after such date."

Thus, to the extent that the renovation of the Building brings it into compliance with MDL requirements for buildings constructed after April 18, 1929, its height is unconstrained by MDL §211(1) provisions relating to the width of the adjacent street or the number of stories in the Building.

To begin the renovation of the Building so as to add the additional floors, Lantern must by law obtain a permit from the New York City Department of Buildings ("DOB"). DOB is the City agency which under the City Charter enforces building codes and laws governing the construction and alteration of buildings. Thus, to have any basis in law, Petitioners' objection speculates that Lantern will submit plans to the DOB for a permit in violation of this proscription by not including such changes as may be necessary to bring the Building in conformity "to the provisions of ...[the MDL] governing like multiple dwellings erected after" April 18, 1929, and

further speculate that DOB will improperly permit Lantern to do so. Even to the extent this Court, in reviewing the propriety of the grant of the Final Variance by BSA under CPLR could consider this speculation, the record is devoid of any factual basis evincing that the speculated events might be expected to occur.

Opponents to development may not invoke speculation to delay development by presuming, without further proof, future wrongdoing by a developer and compound the speculation by assuming and presuming, without further proof, that a governmental body charged with overseeing any aspect of the development will not act properly should the developer transgress. Accordingly, Petitioners may not challenge the Final Variance by speculation as to future BSA decisions.⁶

Not only is Petitioners' conjecture speculative without any basis for such speculation, it is also fully negated by the Resolution itself, the final paragraph of which expressly conditions the Final Variance on the condition:

"That the Department of Buildings must assure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code,⁷ and any other relevant laws under its jurisdiction irrespective of any plan(s) configuration(s) not related to the relief granted."

⁶ This rejection of Petitioner's speculations is without prejudice to any rights Petitioners may have, either procedurally and substantively, to challenge any future determination of BSA relating to the Building.

⁷ The New York City Building Code is a portion of the City Administrative Code.

Thus, by its terms, the Final Variance, by adopting the applicable provisions of law (which would include any applicable provisions of the MDL) expressly negates Petitioners' contention that by granting the Final Variance BSA violated the MDL.

5. ULURP

ULURP requires certain procedural steps be taken by a City agency making certain decisions relating to land and land use. Petitioners seek to set aside the Final Variance on the grounds that BSA failed to follow these ULURP requirements. Respondents concede that they did not follow ULURP procedure but assert compliance with the ULURP procedures was unnecessary as ULURP was inapplicable.

ULURP creates a complex procedural process for the approval by the City or a City agency of "changes approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation" in twelve specified circumstances. City Charter §197-c. Petitioners assert that BSA's action related to either or both a "site selection for a capital project" or a "housing project" which are two of such twelve. City Charter §197-c(a)(5) and (8). BSA, in the 2008 Resolution, reciting that Petitioners provided no evidence to support such position, found that it did not have to consider the issue of ULURP.

City Charter §197-c(a)(5) makes “site selection for capital projects pursuant to section two hundred eighteen” of the City Charter subject to ULURP. As a capital project of the City is a project which the City takes on ownership position, such requirement is inapplicable to Lantern and Lantern’s project.

City Charter §197-c(a)(8) also makes “housing and urban renewal plans and projects pursuant to city, state and federal housing laws” subject to ULURP. Although several cases have considered whether projects similar to Lantern’s for the rehabilitation of SRO’s so that the city may place troubled homeless persons, the case binding this court on this issue is the decision of the First Department in West 97th-98th Sts. Block Assn. v. Volunteers of America, 190 AD2d 303 (1st Dep’t 1993). In addressing the assertion of the petitioners in such proceeding that renovation of an SRO owned by a non-for-profit entity which was to receive city referrals of homeless from the city did not require the conduct of ULURP review by reason of City Charter §197-c(a)(8), the First Department stated:

The challenged referral and service contracts cannot, under any reasonable construction of the law, be found to be for “the use, development or improvement of real property” (see, Matter of Silver v. Koch, 137 AD2d 467, 468, *lv denied* 73 NY2d 702, wherein the court held that “[t]he employment of Pier 36 to moor a prison barge, temporarily, has not changed its preexisting use”). In the instant situation, the building at issue was previously utilized as an SRO and will continue to be an SRO. Only

the identity of some of the tenants will change, and plaintiffs distort the meaning of the statute by insisting that a shift in the composition of the residents at 305 West 97th Street, no matter how inconsequential, requires the implementation of a review procedure. Moreover, the referral of the homeless to, and the provision of necessary services at, one SRO hardly constitutes the type of "plan" envisioned by the ULURP scheme since the disputed contracts do not involve the use of real property nor contemplate any general housing strategy." 190 AD2d at 309.

Under such authority this Court must reject Petitioners' prayer to set aside the Final Variance for BSA's failure to comply with ULURP.

6. SEQRA and CEQR

Petitioners also challenge the grant of the Final Variance on the grounds that the process under which BSA approved the Final Variance violated both SEQRA and CEQR. SEQRA and CEQR each address the process which governmental agency must follow before making a discretionary determination which may have a material adverse environmental effect.

CEQR was adopted by the City to implement SEQRA for decisions by City agencies. As Petitioners have not questioned whether CEQR properly implements SEQRA, this Court will consider CEQR compliance to be effectively compliance with SEQRA. Further, Petitioners effectively concede that CEQR is somewhat more restrictive than SEQRA by arguing that CEQR imposes certain

additional requirements not imposed by SEQRA, this Court need only address whether CEQR has been complied with, for if it has, SEQRA has also been complied with.

The grant of a zoning variance by BSA is among the discretionary acts which are contemplated to be potentially subject to CEQR. However, CEQR recognizes that not all zoning variances may or will have a material adverse effect on the environment and effectively empowers BSA to make an initial assessment as to whether a particular variance might have a material adverse environmental impact.

If the initial assessment is that the variance may have such an impact, an Environmental Impact Statement ("EIS") must be prepared and considered by BSA when making its decision on the application for the variance.

43 RCNY §6-07(b) provides "if the lead agencies determine that the proposed action will not have a significant effect on the environment, they shall issue a Negative Declaration." For zoning variances in the City, BSA is the lead agency. If BSA makes a Negative Declaration, no EIS need be prepared or considered in connection therewith.

The preparation of an EIS is both time consuming and expensive, and may run to hundreds to thousands of pages and cost thousands or even hundreds of thousands of dollars and months to prepare. Accordingly, a Negative Declaration that no EIS

is required, can speed up and reduce the cost of the review process, and may well be determinative as to whether of a particular project may be economically viable and its proponent willing to proceed. Thus, a decision to require an EIS may effectively derail a project and prevent it from happening.

While Petitioners do not dispute that BSA may issue a Negative Declaration in a proper case, they assert instead that BSA improperly issued the Negative Declaration here. If they are correct, as CEQR would not have been complied with, the Final Variances would have to be set aside. BSA counters that it properly determined to issue the Negative Declaration.

BSA's decision to issue a Negative Declaration may be reviewed in an Article 78 proceeding upon the usual grounds and limitations. As BSA's initial Negative Declaration was not made on a record after a hearing, Petitioners may only attack the initial Negative Declaration on the grounds that it was arbitrary and capricious or made in violation of law or procedure. This procedural sequence is inherent under CEQR. As under CEQR BSA's decision to issue the Negative Declaration had to be made prior to the hearing as a failure to issue a Negative Declaration would have required the EIS to be prepared before the hearing could be held.

CEQR does prevent non governmental persons such as Lantern from taking action pursuant to existing law, even if such action may have a material adverse

impact on the environment. Thus in evaluating the BSA action and its impact on the environment under CEQR, BSA is only required consider the incremental impact of the proposed variance over the impacts of otherwise existing law as a base line.

BSA's procedure under which it determines whether to issue a Negative Declaration requires the applicant (Lantern here) to submit material sufficient to enable BSA to conduct an Environmental Assessment of the project. The CEQR Technical Manual which sets forth guidelines for use by City agencies in applying CEQR, lists 23 separate "environmental" areas of potential concern, as well as a statement that "other significant effects" are to be considered. Technical Manual 3A-1. Here Lantern submitted its material and following its review of such material against the areas of concern listed in the CEQR Technical Manual, BSA, on April 10, 2007, issued an Environment Assessment Statement ("EAS") (CEQR No. 07BSA075M), and on the basis of such EAS, issued a Negative Declaration.

BSA re-addressed its April 10, 2007 issuance of the Negative Declaration and reiterated in the 2008 Resolution, that its Negative Declaration was proper and set forth a series of its findings relating thereto.

The 2008 Resolution recited that BSA considered all of the 23 areas of concern, required to be analyzed under CEQR Technical Manual well as the EAS, before issuing the Negative Declaration on Lantern's application. The 2008

Resolution further recited that at the hearing on the Final Variance, Petitioners disputed BSA's findings only with respect to seven of the twenty-three areas of concern, and set forth what findings BSA had made as to each of these seven areas to support its Negative Declaration. As Petitioners again raised the same issues in their Petition, this Court will only address such seven areas in this Decision and Order. The seven areas which Petitioners at the BSA Hearing assert were not appropriately addressed were "Socioeconomic Conditions," "Shadows," "Neighborhood character," "Hazardous Materials," "Air Quality," "Noise" and "Public Health." They will be discussed below.

a. Socioeconomic Conditions.

Petitioners contend that BSA improperly failed to require an EIS to consider Socioeconomic Conditions which Petitioners assert would arise as a result of the Additional Tenants becoming residents of the Building. While CEQR includes Socioeconomic Conditions as a possible environmental issue to be addressed, the CEQR Technical Manual, however, only requires such inquiry where, as a result of the variance, the population of the site to which the variance relates would be increased by more than 200 persons. As Lantern's proposal contemplates that the current 149 SRO dwelling units in the Building will be reconfigured to 140 larger SRO units, effectively reducing the number of residents, rather than increasing them

notwithstanding the additional area to be added to the building, this Court finds that BSA's determination that the threshold for considering "Socioeconomic Conditions" under the CEQR Technical Manual was not met was not arbitrary and capricious.⁸

Further, while an inquiry into "Socioeconomic Conditions" may be properly directed to the environmental impact of an increase in the number of people added to a neighborhood as a result of a variance, it is not clear that it would be proper for BSA to consider who those people may be. The First and Fourteenth Amendments to the United States Constitution, Article I, §§3 and 11 of the State Constitution, the New York Human Rights Law (Executive Law Art. 15), the Civil Rights Law and the City Human Rights Law (NYC Administrative Code §8-107 et seq.), the Americans with Disabilities Act (42 USCA § 12101), et seq., collectively forbid discrimination by reason of race, creed, color, national origin, sex, marital status, sexual orientation and disability. Any inquiry which may impinge on these strong policies of non-discrimination under the rubric of "environmental" concerns would be highly questionable. Thus, BSA could have hardly be found to have been arbitrary or capricious in rejecting a construction and expansion of the concepts of "socioeconomic impacts" to these issues beyond the provisions of the CEQR

⁸ Although not an issue before the Court, a finding under such guidelines requiring an EIS for this reason could, on the other hand, be arbitrary and capricious.

Technical Manual as Petitioners suggest they should.

b. Shadows:

The shadow to be cast by a proposed building as a result of a variance may in certain cases constitute an adverse environmental impact which must be addressed in an EIS. Because every building protruding above ground level casts a shadow, and because at dawn and dusk, in the absence of adjacent buildings (which might occur in the future) such a building would cast an infinite shadow, the question of the materiality of an adverse impact of a shadow is central as to whether an EIS must address "Shadows." CEQR regulations define the type of Shadows which are and are not deemed material for this purpose. Such regulations deem an issue of Shadows material where the shadow impinges on a public accessible open space, a historic landscape or other historic site, but only if the features which make the resources significant depend on sunlight. It may also be material if the shadow falls on an "important material feature and adversely affects its uses or threatens the survival of important vegetation." Shadows over sidewalks and other buildings are not deemed significant.

BSA considered these shadow issues and determined that the issue of shadows did not require an EIS. As the sole portion of the Final Variance which relates to the external configuration of the Building would permit a shorter (albeit squatter)

building rather than the taller building which is allowed as of right on the site, this Court finds that BSA was, under the circumstances, neither arbitrary nor capricious in finding that the Final Variance would not result in a material adverse environmental impact by reason of shadows so as to require the preparation of an EIS to address such issue. Petitioners' mere assertion that the Building may cast shadows over neighborhood playgrounds and "other building" property, without addressing how such shadows adversely affect the use of the playground or threatens the survival of significant vegetation is insufficient to raise an issue over this finding. The mere casting of some or more shadows on other buildings or the sidewalk is not, for the purpose of requiring an EIS, material.

c. Neighborhood Character:

Petitioners contend that because the layout of the Building as it is to be constructed and the presence of the Additional Tenants would materially adversely affect the "Neighborhood Character," and as "Neighborhood Character" is an issue which is to be dealt with in an EIS, BSA improperly issued the Negative Declaration. BSA found that even extending the Building to the contemplated 12 stories would hardly compromise neighborhood character as there were 15 to 21 story buildings within 400 feet of the site. As the notice provisions of BSA rules provide that certain notice must be given to property owners (including coop and condo unit owners) of

buildings within 400 feet, it was neither arbitrary nor capricious for BSA to apply similar standard when considering the heights of buildings in the neighborhood in a determination of neighborhood character. To the extent “neighborhood character” is another way of objecting to the Additional Tenants, this Court’s analysis of the propriety of BSA’s refusal to consider such issue under socioeconomic factors is equally relevant here.

d. Hazardous Materials, Air Quality, Noise and Public Health:

Petitioners assert that an EIS should have been prepared to address these issues which Petitioners assert would, by reason of the contemplated work to be performed on the Building, have a material adverse environmental impact.

Material renovation of a building will inherently involve some noise and dust. Further, such work may involve the use of dangerous but legal and regulated materials and substances during construction, and may further involve the removal or abatement of such or other substances or conditions which pre-exist at the construction site. Demolition as-of-right and construction up to as-of-right levels as well as-of-right use of the property are already part of the existing legal configuration, and in the absence of a variance, the noise and dust inherent would occur. To the extent such projected activity is neither prolonged or unusual the CEQR Technical Manual recognizes that such impacts may be ignored in determining whether an EIS

is required, unless the project is a large scale construction project with a long construction period. Under such standard this Court finds that BSA was not arbitrary nor capricious to find that the extent and duration of this project, constituting the renovation of a single 75 foot wide building, would not require an EIS to address construction period perturbations of the neighborhood and its environment. Construction related ill effects are highly regulated. Speculation that construction would not be carried out in conformity with such laws and controls and permitting regimes, would itself be arbitrary and capricious.

Petitioners also cite asbestos, lead paint, vermin and toxic mold as issues to be addressed in an EIS. These issues are routine problems of buildings in New York. The decision to grant the variance would not affect these problems in any way, except to the extent construction were to take place. These construction problems will at most be short term problems and there is no basis to believe such problems are materially different from similar problems in other older buildings. The principle that short term construction impacts for small scale projects do not require an EIS are equally applicable here. Accordingly, this Court finds that BSA was not arbitrary or capricious in issuing a Negative Declaration.

Petitioners reiterate claims as to the failure of BSA to consider asbestos, lead paint, toxic mold and vermin at the Building independent of EIS issues as a general

objection to the grant of the Final Variance. These claims will be addressed separately below.

7. Fair Share Criteria

Petitioners challenge the Final Variance on the grounds that BSA violated the Criteria for the Location of City Facilities ("Fair Share Criteria") adopted by the City Planning Commission, effective July 1991, pursuant to the mandate of City Charter §203. The Fair Share Criteria were adopted to promote an equitable distribution of public facilities among city neighborhoods by requiring City agencies to consider certain issues when they either select sites for new City facilities or substantially change existing city facilities.

Although BSA is a City agency for this purpose, BSA did not consider the Fair Share Criteria in granting the Final Variance. However, under the Fair Share Criteria, BSA is not required to consider the Fair Share Criteria if Lantern's project is not a "city facility." Two cases, Planning Bd. No. 4. Homes for the Homeless, 158 M2d 184 (Sup. Ct. NY Cty) and West 97th-West 98th Streets Block Assn. v. Volunteers of America, 190 AD2d 303 (1st Dep't 1993) have discussed this very issue.

In both Planning Bd No. 4 and West 97th-West 98th Streets Block Assn. cases, the Courts rejected claims that proposed projects of not-for-profit development to house homeless persons, similar to the Additional Tenants, on Manhattan's West Side,

could be challenged under the Fair Share Criteria.⁹ Such projects, as will be Lantern's project here, were to have been financed by City loans and that the City was expected to pay or subsidize rents for the homeless to be housed. The relationship between the City and Lantern here is indistinguishable for this purpose from the relationship between the City and Volunteers of America and Homes for the Homeless, the respective not-for-profit developers involved in the two cited cases.

Petitioners also cite West 97th-West 98th Streets Block Assn. To support their contention that the project would be a "city facility" for Fair Share Criteria. However, their citation is to the decision at Special Term, which decision was reversed on this point by the First Department.

Following these cases this Court finds that Lantern's proposed project is not a "city facility," and accordingly, that the Fair Share Criteria are inapplicable. Accordingly, Petitioners' challenge to the grant of the Final Variance on the grounds of violation of the Fair Share Criteria must be rejected.

8. Lead Paint, Asbestos and Toxic Mold

Petitioners assert that the Final Variance should be set aside because Petitioners submitted evidence at the hearing that the Building is "infested with lead paint,

⁹ In West 97th - West 98th Street Block Assn., the First Department reversed a finding of Supreme Court, New York County (155 Misc.2d 521) that city funding of a private project established a basis for a claim under the Fair Share Criteria.

asbestos and toxic mold," and that BSA did not take such facts into consideration in issuing the Final Variance.

It is wholly unremarkable that the Building, built almost a century ago, contains lead paint and asbestos. Lead was for many years a common ingredient in paint used for both interior and exterior painting of residential buildings in the City until its deleterious impact on health was generally recognized and slowly addressed by regulation about fifty years ago. Asbestos, heralded at the 1939 World's Fair as a miracle material, was widely used as fireproofing, as an insulator, in automotive brake shoes, and as a component of flooring. When asbestos was discovered some time after World War II, to be carcinogenic when friable and inhaled, such uses were discontinued.

Lenders, including governmental funding agencies, now address the legacy problems of the presence of these substances by conditioning new loans to buildings containing these materials on addressing these problems. Further, recognizing that the very removal or abatement of these substances may create an independent hazard, the City has adopted strict regulations for the performance of such work. However, because so many buildings in the City predate the time when the use of such substances were discontinued, many buildings still contain them and the abatement of both substances during the course of building work conducted in these older

building has become a common procedure to be conducted under strict City health and safety requirements.

Toxic mold is a more recently recognized health hazard. That such mold should be controlled and abated in building is not questioned. To the extent the Building contains toxic mold, its existence is irrelevant to the approval of the Final Variance as any toxic mold in the Building must be addressed and abated, whether or not the Final Variance was granted.

Practically, as abatement of lead paint, asbestos and toxic mold may require the removal or disposal of affected building elements and will in any event, involve substantial costs, the approval of the Final Variance will more likely result in the proper abatement of these substances at the Building than not, as such approval should lead to a substantial reconstruction of the Building. It is highly likely on the other hand that without the grant of the Final Variance, Lantern's project to renovate the Building will not be funded.

To the extent that the impacts of these three substances were required to be considered by BSA in granting the Final Variance, they were. In the 2008 Resolution took note of the presence of substances at the Building¹⁰ and indicated that the usual

¹⁰ The 2008 Resolution recites: "Whereas with respect to hazardous materials and noise impacts, the opposition argues that demolition of the building during construction would expose existing residents to lead paint, asbestos, toxic mold and bacteria."

laws of the City would apply to their correction during the course of the completion of the project. Petitioners' contention that BSA ignored these issues therefore cannot be sustained. Such consideration and the additional finding that such problems were to be abated in accordance with applicable governmental regulations further remove any basis for this Court to find that the Decision of BSA to grant the Final Variance on this ground was arbitrary and capricious.

9. Final Variance was not arbitrary and capricious

The Court must now address the ultimate issues raised by Petitioners, whether the 2008 Resolution may be challenged under CPLR Art. 78 because (1) BSA failed to make findings required by ZR §71-21, (2) the findings were arbitrary and capricious and, (3) whether in light of the findings made by BSA and other matters before BSA, BSA's decision to grant the Final Variance was itself arbitrary and capricious.¹¹

For BSA to grant a variance, ZR §72-21 provides:

"Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

¹¹ Petitioners waived any challenge to whether the decision to adopt the Final Variance was supported by substantial evidence on the record.

(a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to an inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with use or bulk provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

(b) that because of such physical conditions, there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;

(c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however, where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and

(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum

variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for."

BSA made each of the above findings (the Required Findings") in the 2008 Resolution. Such Required Findings will hereafter be referred to separately, as "Finding (a)" "Finding (b)," "Finding (c)," "Finding (d)" and "Finding (e)," tracking the subdivision of ZR §72.-21 to which they relate. Upon the basis of such findings and other findings set forth in the 2008 Resolution, BSA granted the Final Variance.

For Finding (a), BSA found:

"the unique physical conditions cited above, when considered in the aggregate and in light of the Lantern Group's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations."

For Finding (b), BSA found:

"the applicant need not address ZR §72.-21(b) since it is a not-for-profit organization and the development will be in furtherance of its not-for-profit mission."

For Finding (c), BSA found:

"[the grant of the Final Variance] will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare."

For Finding (d), BSA found:

"the hardship herein was not created by the owner or a predecessor or in title."

For Finding (e), BSA found:

"the requested wall height, sky exposure planes, setback, rear yard and floor area demolition waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs."

Thus, as BSA made the Required Findings, Petitioners may not challenge the Final Variance on the grounds that BSA failed to adopt them.

Petitioners also attack each of the Required Findings on the grounds that they were themselves improperly made.

The standard by which this Court under CPLR Art. 78 may review such assertions is, however, limited to two issues, viz, whether any such finding was made in violation of law or was arbitrary and/or capricious.¹² After addressing Petitioners' objections to each of these findings, this Court has determined it has no basis under CPLR Article 78 to set aside any of the Required Findings. The reasons follow:

Finding (a):

¹² The Court of Appeals in Cowan v. Kern, 41 NY2d 591 (1977) made it clear that "courts may set aside a Board's determination only where the record reveals illegality, arbitrariness or abuse of discretion..." Phrased in another way, the determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record."

Petitioners assert that a determination of uniqueness must be solely based on the physical configuration of the zoning lot as compared to others in the area. BSA, in its findings found that the uniqueness "refers not only to land but to buildings as well...and further that the obsolescence of a building is well established as a basis for a finding of uniqueness," citing Homes for the Homeless v. BSA, NYLJ 7/23/04; VOB Realty (USA) Ltd. v. Chin, 291 AD2d 248 (1st Dep't 2002); Commco Inc. v. Amelkin, 109 AD2d 794 (2d Dep't 1985); and Dwyer v. Polsinello,¹⁵ 160 AD2d 1056 (3d Dep't 1990). These cases support BSA's position. In VOB Realty (USA) Ltd., the First Department stated "We reject petitioners' contention that the requirement of "unique physical conditions" in New York City Zoning Resolution §72-21(a) refers only to land and not buildings."

In Commco the Second Department, in upholding a decision of the Town of Huntington Zoning Board of Appeals, stated:

"the requirement that the hardship be due to unique Circumstances may be met by a showing that the difficulty Complained of relates to existing improvements on the land which are obsolete or deteriorated." 109 AD2d at 796.

In Dwyer the Third Department, in upholding a hardship variance granted by the City of Rensselaer Zoning Board of Appeals against the contention that it was

¹⁵ Incorrectly cited in the Resolution as Polsinello v. Dwyer.

arbitrary and capricious, stated:

“The second prong of the test, that of unique circumstances, has also been met in that the record disclosed that the building is an obsolete school whose use is no longer necessary.” 160 AD2d at 1058.

Petitioners further contend that the term “unique” requires BSA to find, in effect, that no other buildings in the area have similar characteristics, and presented evidence that other buildings in the neighborhood may have similar physical layouts. Uniqueness, however, may be based on the obsolescence of the Building. As the Building is not fully fireproof and may have lead paint and asbestos as Petitioners not only admit but assert as a reason for not granting the Final Variance, Petitioners submissions support, rather than controvert the fact of the Building’s obsolescence. As obsolescence is a permissible basis under First, Second and Third Department decisions for a finding of uniqueness, this Court finds that this challenge to BSA’s finding may not be sustained.

Finally, Petitioners’ assert that “uniqueness” in this context must be considered under the traditional dictionary definition of “unique,” viz:

“1. One and only; single, sole. 2. Different from all others, having no like or equal. 3. Singular; unusual, extraordinary; rare; still regarded by some as an objectionable usage.” Webster’s New York Dictionary of the American Language.

The Court of Appeals adopted this “objectional usage” in Douglaston Civic Assn., Inc. v. Klein, 51 NY2d 963 (1980), in which the Court of Appeals, considering the term “unique” under the ZR, stated:

“Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship, (Beatrice Block Club Assn. v. Facen, 40 Mich App. 372, 380-382; see Matter of Jayne Estates v. Raynor, 22 NY2d 417, 425; 2 Anderson, New York Zoning Law and Practice 33, §18.24; 3 Rathkopf, Law of Zoning and Planning, p 38-15, §38.02). What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land.” 51 NY2d at 965.

Petitioners cite Clark v. Board of Zoning Appeals, 301 NY 86, cert den. 340 U.S. 933 (1951) to the contrary.

However, Clark is not controlling precedent. Clark was decided by the Court of Appeals prior to Douglaston. Thus, Douglaston being the most recent determination of this issue, controls, even over the dictionary definition. Further, Clark was decided under the Town Law which is inapplicable to BSA and the City. Whatever may be the precedential value of Clark as to the meaning of “unique” under the Town Law, the Court of Appeals in Douglaston has made it clear that such

meaning does not apply to the ZR.

While Petitioners may have presented evidence that other buildings in the area may share a similar hardship condition, such a showing by itself would not be sufficient under this Douglaston test to preclude BSA from finding “uniqueness.” Thus, Petitioners’ attacks on Finding (a) as arbitrary and capricious, or in violation of law accordingly, cannot be sustained.

BSA, in the 2008 Resolution, also set forth an additional or alternative basis for Finding (a), i.e., that BSA had also “considered the programmatic needs of a not-for-profit applicant as to how such needs create practical difficulties when coupled with unique physical conditions,” citing several prior BSA rulings where BSA took the same approach. Although no Court has apparently addressed this BSA construction of the Finding (a) requirement to permit such consideration, earlier BSA decisions constitute authority for BSA's conclusions here. As BSA is the agency initially responsible for the construction of the ZR, its construction of the ZR in the absence of Court decisions to the contrary must be deferred to by this Court unless clearly erroneous. Further as the 2008 Resolution addressed this issue in a manner consistent with its prior rulings on other applications, BSA’s determination to consider such factor in this case cannot be deemed arbitrary or capricious. Accordingly, this Court also cannot sustain Petitioners’ challenge to Finding (a) as

there are two alternate bases to support Finding (a), and either may support such finding.

Finding (b):

Finding (b) requires BSA to address whether a applicant for a variance may obtain a reasonable economic return from the property absent the variance, but expressly excludes not-for-profit applicants. Here, BSA, finding that Lantern was a not-for-profit applicant, determined that no finding addressing the economic return of the Building was required.

Petitioners assert that BSA's determination that Lantern was a not-for-profit Entity was arbitrary and capricious, on various grounds, including the bona fides of Lantern's assertion that it was a not-for-profit entity and an extensive discussion on the misuse of not-for-profit status by others to benefit from this portion of the zoning resolution.

BSA made no inquiry as to whether any one may make money on the proposed renovation of the Building. As the New York Non-For-Profit Corporation Law ("NPCL") allows not for profit corporations to be formed for non-charitable uses as well as for charitable uses, and as ZR §72.-21 (b) does not differentiate between charitable or non-charitable not-for-profit corporations, petitioners' objection for this purpose must fail. The sole criteria in applying Finding (b) is whether Lantern is both

the applicant and a not-for-profit entity. Petitioners do not contend that Lantern will “flip” the project, and thus is not the real applicant in interest. BSA, relying on public records of the Secretary of State found that Lantern was a non-for-profit corporation. Petitioners' arguments at best are that Lantern may somehow be a "bad" not-for-profit entity, or might somehow violate the rules for charities is misplaced. The sole inquiry is whether Lantern is, in fact, a non-for-profit applicant.

Further, the differentiation between for-profit and not-for-profit applicants under Finding (b) itself has a rational basis. In making Finding (b), in the case of a for-profit applicant, BSA must consider whether a reasonable return is possible without the requested variance. Such concern may be relevant as a failure of the zoning to permit a reasonable return to an owner may constitute a basis to challenge the zoning as a taking under the Fifth Amendment to the United States Constitution or under Art. 1 §7 of the State Constitution. For a not-for-profit applicant, such concern is irrelevant as by definition, such an applicant by electing to be a not-for-profit may be deemed to have expressly been established to forgo such a return.

Accordingly, as BSA found that Lantern was a not-for-profit applicant and as Finding (b) relates to all not-for-profit applicants and imposes no standard as to which not-for-profit entities may qualify thereunder, Petitioners' objection with respect to BSA's determination that Finding (b) had not been made, may not be sustained.

Finding (c).

Petitioners assert that BSA's action in making Finding (c) was arbitrary and capricious. Finding (c) requires BSA to determine that the grant of the variance will neither "alter the essential character of the surrounding neighborhood" nor "impair the use or development of adjacent properties" nor "be detrimental to public welfare."

BSA made a series of additional findings in the 2008 Resolution, upon which it based Finding(c). These additional findings address the physical impact of the Building, as varied by the Final Variance on the neighborhood finding, the final Variance relatively minor vis a vis, the physical attributes of the area. As the floor area demolition portion of the Final Variance cannot affect any aspect of the exterior of the building, such variance could have no effect on the neighborhood. While the sky exposure plane portion of the Final Variance which allows raising the point of commencement of the sky exposure plane from 85 to 88 feet above ground level might have some effect to the visual presentation of the neighborhood, any change in possible street wall continuity would be less than 4%. The third aspect of the Final Variance, the rear yard variance, would not be visible from the street. Finally, the record is devoid of any material to suggest that the Final Variance would impair the use or development of adjacent properties or be detrimental to the public welfare. Accordingly, this Court finds that BSA's determination of the Final Variance would

not impair the character of the neighborhood or impair the use or development of adjacent properties or be detrimental to the public welfare not to be arbitrary or capricious.

Petitioners also assert that BSA in making Finding (c) violated the law, citing Charisma Holding Corp. v. Zoning Board of Appeals, 266 AD2d 540 (2d Dep't 1999) to support their position that not only physical configuration but use that must be considered in making Finding (c). In Charisma, the Town of Lewisboro Zoning Board of Appeals ("Lewisboro ZBA") conditioned its grant of an area variance on the placement of a new structure at a particular location on the site in question so as to mitigate the effect of the variance on a neighbor.

In Charisma, the Second Department reversed Supreme Court, Westchester County, which had required Lewisboro ZBA to grant the area variance to allow the construction of an automobile body shop on the northern portion of a property, as applied for. A variance was required because the proposed building would increase the lot coverage to 69% from 60%. The Lewisboro ZBA had conditioned its approval of the variance on locating the new facility on the property away from the residential area on which the lot abutted to mitigate its impact on nearby residences. Petitioners assert that by permitting the Lewisboro ZBA to consider the use of the property in connection with the grant of a bulk area variance, Charisma required BSA to consider

the use of the Building in making the (c) Finding.

In the 2008 Resolution, BSA, acknowledging Petitioners' reliance on Charisma, found Charisma not to require BSA to "assess the purported impacts of new residents to a residential neighborhood in connection with a variance application which seeks only bulk¹⁴ waivers."

The Lewisboro ZBA acted under New York Town Law ("Town Law") §267-b(3) which set forth the findings a town zoning board of appeals must make before granting an area variance. The required finding under Town Law §267-b(3) analogous to the (c) Finding, required the Board to "take into consideration... whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance." While Town Law §267-b(3) is analogous, is not identical. For example, Town Law §267-b(3) talks of a "detriment to nearby properties" while ZR §72-21(c) speaks of a substantial impairment of "the appropriate use or development of adjacent properties." These standards, as might be expected in zoning laws relating to mainly rural towns as compared to the overwhelmingly urbanized New York City, are different, and the Town Law is expressly inapplicable to zoning decisions in New York City which are governed by the ZR. Thus, the Second Department's statement

¹⁴ The term area variance and bulk variance are effectively the same.

in Charisma that “we disagree with the Supreme Court that the relevant statutory balancing test can be properly applied without consideration of the proposed use” is directed to a different statutory balancing test than is applicable here. The Court also notes that Petitioners elsewhere cite differences between Town Law and the ZR, where they wish to distinguish cases, but have not noted the differences here, where they wish to rely on a case decided under the Town Law.

Thus, Petitioners’ contention that BSA had to consider “use” when making Finding (c) under the ZR cannot be sustained, either on the basis that it was arbitrary and capricious or in violation of law.

Finding(d):

Petitioners assert that the BSA Finding(d) was improperly made as BSA found the hardship asserted by Lantern was self inflicted because Lantern purchased an obsolete Building, subject to the zoning restrictions now being sought to be modified.

The resolution of this issue depends on the meaning of “self created” hardship. The Court of Appeals held in Fiore v. Zoning Board of Appeals, 21 NY2d 393 (1968) that purchasing a parcel of land burdened by an obsolete building is not a self created hardship. Accord, Citizens State Bank v. Bd. of Zoning Appeals, 238 AD2d 874 (3d Dep’t 1997); Matter of Commerce Inc. v. Amelhar, 109 AD2d 794 (2d Dep’t 1985),

and Dwyer, supra. For this purpose the self-creation of a hardship relates to acts of an applicant or its predecessor in title in violation of the then existing law. Here the non-fireproof floors were fully legal when they were installed and the rear yard non-conformity was fully legal when the Building was built. The purpose of Finding (d) is to prevent an applicant from seeking a variance to legalize what the applicant or the applicant's predecessor in interest had wrongfully or illegally done, not to address the situation where the passage of law or time had created a situation requiring relief. Petitioners further assert that by overpaying for the building, Lantern created their own hardship. In making this argument Petitioners fail to note that the second clause of ZR §72.-21(d) provides:

"where all other required findings are made, the purchase of a zoning lot subject to the restriction sought to be varied shall not itself constitute a self-created hardship."

This provision makes it clear that BSA may not consider the purchase itself or the price paid as an aspect of self created hardship. Thus, Petitioners' objection to Finding (d) cannot be sustained.

Finding(e):

During the course of its negotiation with BSA, and community groups, Lantern reduced the scope and extent of the variances sought, until the point where BSA granted the particular three variances constituting the Final Variance, finding

they were the minimum required to afford relief. ZR §72.-21(e) recognizing that by the nature of the process, an applicant for a zoning variance will probably ask for more, but settle for less, expressly allows BSA to grant a lesser variance than the variance applied for to minimize the non-conformity.

Petitioners' attempt to seize upon this natural process to accuse Lantern of lying and perfidy for initially asking for more on the theory that Lantern's statement in its application that the variance Lantern sought was the minimum variance needed to achieve their program was shown to be false.

This view contradicts the structure of ZR §72.-21 (e) which assumes that the minimum suggested by the applicant is only a starting point for the analysis and negotiation. Petitioners' own behavior in its submissions to BSA and this Court also exaggerates positions, avoids stating facts and some sections of ZR §72.-21 when they are unhelpful or contradictory to their own positions, is no different. Lantern and petitioners are and have been adversaries before both BSA and this Court. While there are limits as to what constitutes unfair and inappropriate behavior of adversaries in such proceedings, the decision maker (BSA and the Court in this context) regularly sort out the wheat from the chaff.

While to those objecting to development, all developers may be perceived as devils incarnate (and the City when supporting a developer, the devil's handmaiden)

such characterization is unhelpful to the Court in resolving disputes relating to development. The Court must sort out and decide the merits of the litigants' case under law and ignore the catcalls of persons whose difficulty is with the law, which often permits and sometimes encourages development. Opponents of development are free to seek amendments to the law to freeze the entire community in amber, but absent their success in doing so, this Court must apply the law as it is, which does permit change if proper procedures are followed, which this Court has found to be the case here.

10. The Ultimate BSA Decision, the Grant of the Final Variance

Although BSA made the Required Findings, they had to make one more decision in determining whether to grant the Final Variance, *viz*: that, considering such Required Findings and other matters to be considered, it was appropriate and advisable to grant the Final Variance.

Here, Petitioners argue that issues relating to asbestos, lead paint, toxic mold and other building problems were so important so as to make BSA's decision to grant the Final Variance arbitrary and capricious. This Court finds Petitioners' argument without merit. The Final Variance, sub species aeternatatus, is almost trivial. Further, discussed above, BSA could have well considered the impact of asbestos, lead paint, toxic mold, vermin and other building specific ills of old age and

obsolescence to be better addressed by a substantial reconstruction of the Building which would be more likely assured by the grant of the Final Variance. On this basis the Court finds Petitioners have failed to establish that the final act of BSA was arbitrary or capricious, and must dismiss the Petition.

11. Dismissal of certain parties Respondent

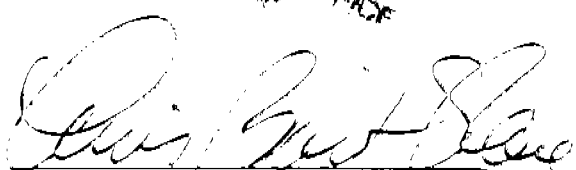
Finally, the City Respondents seek the dismissal of the Petition as against the Department of Housing Preservation and Development, the New York City Housing Development Corporation (collectively the "Other Agencies"), the City Planning Commission on the ground that they are not proper parties Respondent in a proceeding to challenge the determination of BSA to issue the Final Variance. As this Court has determined to dismiss the Petition for the reasons above set forth, it is unnecessary to address this contention and the Court declines to do so.

The Petition is dismissed.

This is the Decision and Order of the Court.

DATED: AUGUST 13, 2009
NEW YORK, NEW YORK

FILED
AUG 27 2009
COUNTY CLERK'S OFFICE
NEW YORK


Hon. Lewis Bart Stone
Justice of the Supreme Court