

**East Harlem Alliance of Responsible Merchants v
City of New York**

2010 NY Slip Op 30023(U)

January 7, 2010

Supreme Court, New York County

Docket Number: 117242/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 117242/2008
EAST HARLEM ALLICANE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 117242/08 & 603828/08
MOTION DATE 9/2/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion refer Petition under Art. 78

PAPERS NUMBERED

Petition 1-2
Answer 3

*See papers numbered
on Index No. 603828/08,
Motion Seq. No. 001

Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*petition and motion decided in accordance
with accompanying decision, order and judgment.*

Dated: 1/7/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
EAST HARLEM ALLIANCE OF RESPONSIBLE
MERCHANTS, UPTOWN HOLDINGS, LLC,
HERON REAL ESTATE CORP., YORY, LLC,
AND HEE NAM BAE,

Plaintiffs-Petitioners,

-against-

Index No. 603828/08

Index No. 117242/08

Decision and Order

CITY OF NEW YORK, CITY COUNCIL OF THE CITY
OF NEW YORK, CITY PLANNING COMMISSION
OF THE CITY OF NEW YORK, CITY OF NEW
YORK DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, NEW YORK CITY ECONOMIC
DEVELOPMENT CORP., and DEPARTMENT OF
SANITATION OF THE CITY OF NEW YORK,

Defendants-Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

This declaratory judgment action (Index No. 603829/08) and Article 78 proceeding (Index No. 117242/08) are consolidated for disposition.¹ Defendants-respondents (“respondents”) move to dismiss or, alternatively, for summary judgment, on the grounds that: (1) the court lacks subject matter jurisdiction over some of the claims asserted herein; (2) the complaint fails to state a cause of action; and, the plaintiffs-petitioners (“petitioners”) failed to join necessary parties. Alternatively, respondents move for summary judgment on the ground that the pleadings do not raise any material issues of fact.

¹ Petitioners term this a “hybrid proceeding,” and assert that the County Clerk insisted that two index numbers must be purchased, rather than allow petitioners to file a single set of papers as one action.

The proceeding and petition challenge certain determinations by respondents with respect to an urban renewal plan in East Harlem. Specifically, petitioners challenge resolutions of the New York City Council that were enacted on October 7, 2008 (the “Resolutions”) to approve the 15th Amendment (the “Amendment”) to the Harlem-East Harlem Urban Renewal Plan (the “Plan”). In a decision and order dated June 1, 2009 (the “June 2009 Order”), this court denied petitioners’ request for an order preliminarily and permanently enjoining respondents the City of New York (the “City”) and the City’s Department of Housing Preservation and Development (“HPD”) from conducting a hearing or any proceedings pursuant to the New York Eminent Domain Procedure Law (“EDPL”) concerning the acquisition of certain properties or engaging in any further process purporting to review the public purpose to be served by the acquisition of certain properties. On April 20, 2009, the City held an EDPL hearing, pursuant to EDPL §§ 202 and 203; this rendered part of the application moot. This court declined to enjoin the City from continuing with the EDPL Article 2 process by enjoining the City from issuing findings and a determination.

Petitioner East Harlem Alliance of Responsible Merchants is a non-profit voluntary association whose individual members are merchants and owners of real property and businesses in East Harlem. Uptown Holdings, LLC (“Uptown”) is a domestic limited liability company that owns real property located at 213-223 East 125th Street; the property is currently occupied by a two-story commercial structure containing an automotive repair business that has been in operation for thirty years, and a not-for-profit counseling center on the second floor. Heron Real Estate Corp. (“Heron”) is a domestic corporation that owns property located at 2449 Second Avenue; the property is leased to BP Products, N.A., which operates a service station. There is also a billboard stanchion on the

property. Petitioner Yory, LLC ("Yory") is a domestic limited liability corporation that owns real property located at 230 East 127th Street, which contains a five-story commercial structure that houses a business called Cycle Therapy; Cycle Therapy is in the business of providing motorcycle showrooms, sales and repairs. Petitioner Hee Nam Bae owns property located at 2315 Third Avenue, which contains a one-story commercial structure that is leased to a family owned and operated commercial laundry and retail dry cleaning establishment. This facility is alleged to be the sole production facility for six other locations. Bae also owns property located at 208 East 126th Street, which is a parking lot, and owns property that is leased to a recycling company. It is alleged that there are plans for the construction of a two-story commercial building, but that these plans have been placed on hold because of respondents' plans.

Factual Background

The facts are taken from the court's June 2009 Order:

On November 20, 1968, the City of New York City Planning Commission ("CPC") enacted the Plan, which designated approximately 150 blocks in Harlem and East Harlem for redevelopment and rehabilitation. Over the last forty years, the Plan was amended fourteen times. It is the actions of respondents in enacting the 15th amendment to the Plan and the approval of the East 125th Street Project (the "Project") that petitioners challenge.

The Project would re-zone and redevelop three parcels of land situated over two full blocks within the perimeter boundary of the Plan. While petitioners acknowledge that most of the land is owned or controlled by the City, HPD, or other related municipal entities, petitioners also own property within the Project area. Some of petitioners' properties were specifically excluded from the Plan at its inception, but were added to the Plan in the 15th Amendment.

On March 17, 2008, HPD and the New York City Economic Development Corp. ("EDC") submitted the application for the 15th Amendment to the Plan, pursuant to the New York City Uniform Land Use Review Procedure ("ULURP"). The Project was

submitted for approval simultaneously with the proposal to amend the Plan, and various other related actions. The City and HPD scheduled and conducted a series of public hearings. There was also an environmental review process to assess the environmental impact of the Project.

The ULURP process culminated in approval by the CPC on August 27, 2008, and approval by the New York City Council on October 7, 2008. The August 27, 2008 CPC resolution authorized the Project to go forward. The authorization contains an amendment to the Plan to enable the acquisition of the privately-owned parcels in the Project area.

After this petition was filed and just after respondents filed their responsive papers, HPD issued a notice, pursuant to EDPL §§ 201-204, of a public hearing to be held on April 20, 2009, in connection with the acquisition of certain properties and "to review the public use to be served by the [Plan] and its impact on the local environment and residents." It is this hearing that petitioners sought to enjoin, together with any continuation of the EDPL process, on the ground that the City has already conducted this review pursuant to ULURP and, therefore, is exempt from any further procedures under the EDPL.

Of the twenty-seven lots that comprise the East 125th Street Project (the "Project"), twelve are owned by HPD; four are owned by the City; and the remaining eleven are owned by non-City entities, including a lot owned by the Metropolitan Transportation Authority and the lots owned by petitioners. The City owns or controls 81% of the Project site. To proceed with the Project, the City must acquire the Project site property owned by the non-City entities, by means of eminent domain, if necessary. As of the commencement of this proceeding, HPD had not yet conveyed property to the New York City Economic Development Corporation ("EDC") and the condemnation process had not begun. Once all of the lots are owned by the EDC, the EDC will convey the lots to the developer.

Although the lots owned by Uptown, Bae and Yory are inside the general boundary perimeter of the Plan, these lots were excluded from the Plan at its inception, and were not made part of any of the fourteen prior amendments to the Plan. Petitioners assert that the Amendment to the Plan to add these three new parcels owned by Uptown, Bae and Yory was enacted “solely for the improper purpose of simply enabling condemnation of those [Petitioners’] properties in connection with the E125 Project, and without any proper and necessary factual basis or legislative findings.” They argue that the purpose of the Amendment was to “confer a private benefit on politically connected private parties, and without any proper and required factual basis or legislative findings.” Petitioners contend that respondents “secretly” selected a politically-connected developer prior to the August 27, 2008 submission to the CPC, but did not announce the selection publicly until after the October 7, 2008 approval by the City Council.

The developer, East Harlem M/E/C LLC, consists of Archstone-Smith and General Growth Properties (“General Growth”). Also involved is Carey Group LLC (the “Carey Group”), which was announced originally as part of the development team, but has more recently been named as a “consultant” to the team. Petitioners allege, on information and belief, that the Carey Group is led by Michael Carey, the former President of the EDC, and the son of former Governor Hugh Carey. Petitioners contend that the entities comprising East Harlem M/E/C LLC made payments to the Carey Group of approximately \$300,000 to lobby the EDC and City Council. Petitioners further assert that at the time the CPC and City Council voted in favor of the Project and the Amendment, these developers were in perilous financial conditions and, indeed, still are. Petitioners point out that General Growth filed for bankruptcy protection on April 16, 2009, and claim that General Growth

has now pulled out of the development project altogether. Petitioners cite to a New York Times article in which the developers state that they will begin residential construction but “hold off on retail,” which petitioners claim confirms their contention that there is no requirement that the Project go forward at all, and that the financial difficulties of the developers renders the claimed benefits of the project “illusory and speculative, if not entirely impossible.”

Petitioners note that the Amendment provides only that the site “will be developed with not less than 700 housing units, not less than 30,000 square feet of institutional uses, and not more than 770,000 square feet of commercial uses.” No specific requirements are set forth, and there is no mechanism to insure that any particular development plan is utilized. By way of example, petitioners point to language in the Resolutions that the Project “‘could’ include up to 1,000 units of housing, and that 30% of the housing units are ‘targeted’ to be for low income.” The October 18, 2006 Request for Proposals (“RFP”) provides that the EDC can make any changes that it deems appropriate, so long as the Project remains within the parameters and objectives.

The Allegations

Petitioners allege that defendants amended the Plan illegally; operated in secret to select a politically-connected development team; manipulated the ULURP process by circumventing lawful procedures to avoid community opposition; violated New York State and City environmental review laws; violated the New York State Constitution; and, engaged in a form of eco-terrorism to acquire petitioners’ properties at the lowest possible price. Petitioners seek to annul the actions that were taken to approve the Amendment to the Plan, and to approve the Project. Petitioners seek a

permanent injunction prohibiting respondents from taking any action in furtherance of the proposed project and related actions, claiming that the approval process was defective because the properties are not blighted and because the City failed to make any formal finding that the acquisition of the properties was “necessary” in order to effectuate the Plan. Petitioners also asserted two causes of action against the Department of Sanitation—the ninth and tenth causes of action—concerning a temporary salt pile located at 208 East 127th Street (Block 1791, Lot 1). Petitioners have withdrawn the ninth and tenth causes of action as moot, since the salt pile was removed after the submission of the motion. The eleventh cause of action challenged the public use, benefit or purpose of the proposed taking; in their answer, respondents assert that this claim is premature, since condemnation proceedings have not yet begun. While it was true that at the time this proceeding was commenced, condemnation proceedings had not yet begun, a hearing was scheduled for April 20, 2009. Petitioners sought to enjoin the hearing, which this court denied, in the June 2009 Order. On June 12, 2009, HPD issued its Determination and Findings Statement, pursuant to EDPL § 204. HPD determined that the City should exercise its power of eminent domain to acquire the properties that are part of the Project site. Petitioners then commenced a proceeding in the Appellate Division, which raises their claim under EDPL § 207, seeking to annul the June 12, 2009 determination. Since the Appellate Division has exclusive jurisdiction of claims under EDPL § 207, the eleventh cause of action is dismissed.

Discussion

In an Article 78 proceeding, the court must decide whether the challenged determination has a rational basis in law. C.P.L.R. § 7803(4); Matter of Sullivan County Harness

Racing Ass'n. Inc. v. Glasser, 30 N.Y.2d 269, 277 (1972); Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967). This court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Pell, 34 N.Y.2d at 231 (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

As the court recognized in Matter of Develop Don't Destroy (Brooklyn) v. Urban Development Corp., 59 A.D.3d 312, 324 (1st Dep't 2009), "it does not matter whether we would be inclined to agree with petitioners; we are bound to defer to the agency to which the determination has been legislatively committed." While the instant matter was sub judice, the First Department decided Kaur v. New York State Urban Development Corp., ___ A.D.3d ___, 2009 WL 4348472 (1st Dep't Dec. 3, 2009). Kaur seemingly rejects any standard of deference to the agency's determination. In this regard, Kaur contradicts the First Department's holding in Develop Don't Destroy, supra, and the Court of Appeals' holding in Goldstein v. New York State Urban Devel. Corp., ___ N.Y.3d ___, 2009 WL 4030939 (Nov. 24, 2009), that the courts should not supplant the determination of the agency. The Court of Appeals noted that "[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the judiciary of grounds to interfere with the exercise."

Goldstein, supra, at _____. What is at issue here, as in Goldstein, is “a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary.” As the Goldstein court concluded, “[t]his is not a sufficient predicate for us to supplant respondent’s determination.” Id.² Similarly, this court is without authority to “supplant” the determination of respondents that the Project site is ripe for government redevelopment. Id. Petitioners are asking this court to find that the determination lacks foundation in the record, is arbitrary and capricious, or is an abuse of discretion. As set forth below, none of petitioners’ eight remaining causes of action provide a basis for the determination to be set aside.

Before proceeding with the Project, respondents commissioned a blight study, which was conducted by STV Incorporated, and was completed on January 16, 2008 (the “Blight Study”). The Blight Study documented the conditions in the entire six-acre area, in addition to analyzing the individual blocks and lots. The Blight Study found that 42% of the Project Site is vacant space, comprised of parking lots and vacant land, and that the area contains “abandoned, vacant,

² This is similar to the standard enunciated by the Supreme Court when land is taken under Eminent Domain. The Court has made it clear that it will not “second-guess [a] City’s determinations as to what lands it needs to acquire in order to effectuate [a] project.” Kelo v. City of New London, Conn., 545 U.S. 469, 488-89 (2005). In Kelo, the Court reaffirmed that once a determination is made that the taking is for a “public use” within the meaning of the Fifth Amendment to the United States Constitution, it

‘is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.’

Kelo, supra, 545 U.S. at 489, quoting, Berman v. Parker, 348 U.S. 26, 35-36 (1954).

substandard, underutilized and/or obsolete buildings and structures characterized by physical deterioration, high levels of code violations, defective construction, outmoded design, lack of proper sanitary facilities, and/or inadequate fire or safety protection.” As to those blocks with construction, nine of the ten blocks within the area of the Blight Study are built to less than allowable zoning floor areas, and two blocks are built to less than 25% of the allowable zoning floor area. According to the Blight Study, more than 67% of the buildings are rated in fair, poor or critical condition. The Blight Study concludes that an amendment to the Plan to allow the Project to proceed would

enable the City to remove blight, maximize appropriate land use; remove or rehabilitate substandard and unsanitary structures; remove impediments to land assemblage and orderly development; strengthen the tax base of the City by encouraging development and employment opportunities in the Area; provide new housing of high quality and/or rehabilitated housing of upgraded quality; provide appropriate community facilities, parks and recreational uses, retail shopping, and, provide a stable environment within the Area that will not be a blighting influence on surrounding neighborhoods.

The Blight Study provides ample support for the determination that the Project Site is underdeveloped and that the area is ripe for development. See, Goldstein, supra. The fact that certain specific buildings in the area are not blighted or otherwise in poor condition, as was true of both petitioner Susette Kelo’s property in Kelo v. City of New London, Conn., 545 U.S. 469, 488-89 (2005), and of the downtown Brooklyn area at issue in Goldstein, supra, is not a reason to set aside the determination. The law is well established that

‘[o]nce it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area.’ *In re G. & A. Books, Inc.*, 770 F.2d 288, 297 (2d Cir. 1985). This is ‘because “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.”’ *Rosenthal*, 771 F.2d. at 46 (quoting *Berman*, 348 U.S. at 35, 75 S.Ct. 98). The public-use requirement

will be satisfied as long as the purpose involves 'developing [a blighted] area to create conditions that would prevent a reversion to blight in the future.' *Kelo*, 545 U.S. at 484 n. 13, 125 S.Ct. 2655. (emphasis omitted).

Goldstein v. Pataki, 516 F.3d 50, 60 (2d Cir. 2008) (italics in original; emphasis omitted).

Petitioners further assert that the study is flawed and, at most, demonstrates the failure of the City to maintain its own properties in the area, which the City now attempts to use as a pretext to take petitioners' private property. Petitioners engage in a multi-pronged attack of the Blight Study. At the same time, however, petitioners also claim that the Blight Study was not used to justify the Resolutions. Petitioners assert that the Blight Study was not even entered into the record or considered before the Resolutions were passed on August 27, 2008. Even if their claims as to the lack of merit of the Blight Study are true, by petitioners' own argument, any alleged flaws in the Blight Study are irrelevant if it was not even considered.

Similarly, the fact that specific properties were not found to be "substandard or insanitary" (General Municipal Law § 502[3]) does not invalidate respondents' determination. Contrary to petitioners' contentions in the first cause of action, there is no requirement in the Urban Renewal Law that the inclusion of certain properties be "necessary" to effectuate the Project; rather, all that is required is that the area is "appropriate for urban renewal." Gen. Mun. Law § 502(9).

In their second cause of action, petitioners assert that respondents violated Article XVIII, § 6 of the New York State Constitution by describing the Project as a civic and commercial

venture with a housing component. Rather, according to petitioners, the Project is primarily an affordable housing project; petitioners contend that the retail development component is now on hold, since General Growth dropped out of the Project. The allegation that the Project violates Article XVIII, § 6 of the New York Constitution, because the residential portion of the Project is not solely restricted to low-income housing, is without merit. In Goldstein v. New York State Urban Devel. Corp., *supra*, the Court of Appeals rejected the narrow construction of this section that petitioners seek to apply here:

It does not seem plausible that the constitutionality of a project of this sort was meant to turn upon whether its occupancy was restricted to persons of low income. While the creation of low income housing is a generally worthy objective, it is not constitutionally required under article XVIII, § 6 as an element of a land use improvement project that does not entail substantial slum clearance. To hold otherwise would in many cases arbitrarily tether land use improvement to the creation of low rent housing and, in so doing, encumber, in a manner plainly without the framers' contemplation, the exercise of one of article XVIII's "separate grants of power".

Goldstein, supra, ___ N.Y.3d at ___ (citation omitted). For these reasons, the second cause of action is dismissed.

In their third cause of action, petitioners contend that respondents illegally circumvented § 384(b)(4) of the New York City Charter. Petitioners assert that the EDC "conspired" with HPD to create a sham application by designating HPD as the lead agency of the Project to give HPD the power to dispose of city-owned property, thereby avoiding review by the Borough Council and local City Council members. Rather, petitioners assert that EDC was the "real" lead agency, and that disposition of properties to the EDC requires § 384 review, which was

not done. Similarly, the fourth cause of action alleges that respondents attempted to conceal the process because of community opposition to the Project. Specifically, it is alleged that respondents deliberately concealed information about the developer or about specific plans concerning the Project. In response, the respondents assert that § 384(b)(4) is not the sole or exclusive method to convey property to a local development corporation. Thus, the City argues, this claim fails as a matter of law. In addition, the City asserts that the extensive record of the review process demonstrates that the City did not violate the law.

Respondents are correct in both respects. Nothing in § 384(b)(4) can be read to require the procedures thereunder to be the exclusive mechanism for a conveyance of property. Respondents point to both General Municipal Law § 507 and § 695 as additional provisions authorizing the City to convey urban renewal property. With respect to the ability for officials and members of the community to voice opinions as to the Project, Manhattan Borough President Scott M. Stringer submitted his recommendation on or about July 2, 2008. The Borough President's recommendation sets forth his opinion that the applications were premature and should await approval until a final developer and development program are established. Written testimony opposing the Project was submitted by Community Board 11, community-based groups, and individuals.

As to petitioners' claims concerning the developer that was selected, respondents maintain that the EDC was under no obligation to announce the selected developer before the City Council vote. Respondents assert that the determination to delay the announcement of the

development team was made to leverage conditions more favorable to the City. Respondents now acknowledge that one of the original members of the development team, General Growth, has withdrawn from the Project. But, respondents insist that the withdrawal of this member does not necessarily affect the viability of the Project, which has reportedly been awarded funding from various sources. To the extent that petitioners allege that the developers are under no obligation to build the Project as conceived and approved, respondents assert that there are mechanisms in place to insure that the development proceeds as envisioned, including a provision in the deed requiring certain construction and use requirements to be met. If the developers fail to satisfy these obligations, respondents maintain that the EDC can, as it has in the past, take legal action to reclaim the property. For all of these reasons, the third and fourth causes of action are without merit.

Respondents move to dismiss petitioners' fifth cause of action, brought under General Municipal Law § 51, both procedurally and on the merits. Petitioners maintain that the motion must be denied, and that they should be allowed discovery. With respect to the procedural aspect of the motion to dismiss, respondents assert that the pleadings are defective, because petitioners failed to name the individual officers as parties. See, Landmark Westl v. City of New York, 9 Misc. 3d 563, 575 n.16 (Sup. Ct. N.Y. Co. 2005), citing Stein v. Brown, 125 Misc. 692, 694 (Sup. Ct. Westch. Co. 1925). While it is true that, pursuant to C.P.L.R. § 1001(a), persons or entities who ought to be parties if complete relief is to be accorded "shall be made plaintiffs or defendants," petitioners' failure to name these entities is not a separate ground for dismissal. The court may always order a party who should be joined as a party. C.P.L.R. § 1001(b).³

³ This court further notes that it appears that petitioners failed to file a bond, as required when bringing an action under § 51, but this defect may be cured nunc pro tunc, and is not a ground for dismissal. Resnick v. Town of Canaan, 38 A.D.3d 949, 952 (3d Dep't 2007).

Turning to the merits of the claim, § 51 provides a cause of action for taxpayers who allege evidence of fraud, corruption, or illegality by the government or a governmental agency. As respondents point out, petitioners have failed to allege that any agency or individual committed a fraudulent, corrupt or illegal act. The § 51 challenge is based on the determination challenged in this proceeding. But, a § 51 action lies “only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.” Mesivta of Forest Hills Instit., Inc. v. New York, 58 N.Y.2d 1014, 1016 (1983), quoting, Kaskel v. Impellitteri, 306 N.Y. 73, 79, rearg. denied and mot. to amend remittitur granted, 306 N.Y. 609 (1953) cert. denied, 347 U.S. 934 (1954). Mere allegations of illegality alone are insufficient. Bettors v. Knabel, 288 A.D.2d 872 (4th Dep’t 2001), rearg. denied, 737 N.Y.S.2d 911 (Table), 2002 WL 185567, lv. to app. denied, 98 N.Y.2d 659 (2002). Rather, “to state a cause of action under General Municipal Law § 51, ‘special allegations of waste tied to corruption have been required.’” Bettors, 288 A.D.2d at 872, quoting, Montecalvo v. City of Utica, 170 Misc. 2d 107, 111 (Sup. Ct. Oneida Co), aff’d, 233 A.D.2d 960 (4th Dep’t 1996), app. dismissed, 89 N.Y.2d 938 (1997). Petitioners’ allegations fail to rise to the level to sustain an action under § 51. Therefore, the fifth cause of action is dismissed.

The sixth, seventh and eighth causes of action contend that the Final Environmental Impact Statement (“FEIS”) did not sufficiently consider the potential significant adverse environmental impacts of the Project. Specifically, petitioners assert that respondents failed to consider alternatives to the Project; failed to consider the impact of the Metropolitan Transit Authority (“MTA”) Bus Depot Expansion Alternative (the “Depot Alternative”); and, failed to

consider the Project in a single environmental review, by improperly segmenting the Project's environmental review from other area projects.

To the extent that claims concerning the adequacy of the MTA's Depot Alternative, the lack of consideration of alternatives to the Project, and the alleged segmentation of the environmental review were not raised by petitioners at the public hearings, respondents are correct that these claims cannot be considered here for the first time. "Judicial review of administrative determinations is confined to the 'facts and record adduced before the agency.'" Matter of Yarbough v. Franco, 95 N.Y.2d 342, 347 (2000), quoting, Matter of Fanelli v. New York City Conciliation & Appeals Bd., 90 A.D.2d 756, 757 (1st Dep't 1982), aff'd for reasons below, 58 N.Y.2d 952 (1983). These claims may be dismissed on this basis alone, as not being properly before the court. Turning to the merits of these claims, they fail as a matter of law.

In the sixth cause of action, petitioners contend that one of the alternatives—the MTA Depot Alternative—was not adequately considered by respondents. In the eighth cause of action, petitioners allege that respondents violated SEQRA and CEQR by their failure to search for and examine alternatives to the Project, as approved. Title 6 N.Y.C.R.R. § 617.9(b)(5)(v) provides that all draft environmental impact statements must contain

a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. The range of alternatives must include the no action alternative. The no action alternative discussion should evaluate the adverse or beneficial site

changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action. The range of alternatives may also include, as appropriate, alternative:

- ([a]) sites;
- ([b]) technology;
- ([c]) scale or magnitude;
- ([d]) design;
- ([e]) timing;
- ([f]) use; and
- ([g]) types of action.

The only requirement, as set forth above, is that the “no action alternative” must be addressed. There is no requirement that any other specific alternatives be evaluated, although there is an option to discuss a range of alternatives.

Judicial review of a lead agency’s SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination “was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” C.P.L.R. § 7803(3); Matter of Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996). “An agency’s compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals.” Matter of Bronx Envtl. Health & Justice, Inc. v. N.Y. City Dept. of Envtl. Protection, 2005 WL 1389360 at * 5 (Sup. Ct. Queens Co. 2005), citing, Jackson v. N.Y. State Urban Development Corp., 67 N.Y.2d 400, 417 (1986). “Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA.” Jackson, 67 N.Y.2d at 417, quoting, Aldrich v. Pattison, 107 A.D.2d 258, 266 (2d Dep’t 1985). But,

the court must ensure that due consideration has been given to relevant environmental factors. See, Bronx Env'tl. Health & Justice, supra.

Here, the FEIS considered three additional alternatives, in addition to the required "no action" alternative: an as-of-right alternative; a no impact alternative; and, the MTA Depot Alternative. The as-of-right alternative was rejected, because it would preclude development of affordable housing, and was deemed insufficient to attract the same commercial and retail uses. The MTA Depot Alternative was thoroughly considered, and the FEIS concluded the this alternative would be more compatible with the overall mixed-use program for the Project Site. The effects on air quality and traffic were considered, and no adverse impact was found on air quality. The traffic analysis concluded that relatively similar amounts of traffic would result, and there would be little adverse impact. Indeed, it was found that the number of bus movements would be reduced.

In the seventh cause of action, petitioners challenge the use of two separate reviews for the Corridor Rezoning project and the Project at issue. Petitioners contend that respondents improperly engaged in a "segmented review" when analyzing the two renewal projects separately, despite their claim that both projects were spearheaded by the EDC and their claim that the Corridor Rezoning project relied on certain aspects of the Project that were yet unapproved.

Segmentation is considering only a portion or segment of an action, and is contrary to the intent of SEQRA. 6 N.Y.C.R.R. § 617.3(g)(1). When a lead agency believes that circumstances warrant a segmented review, the supporting reasons must be set forth and the agency

must demonstrate that the segmented review “is clearly no less protective of the environment.” *Id.* The City asserts that the separate environmental reviews of the 125th Street Corridor Rezoning and the Project were entirely appropriate, because the projects are separate projects with different goals and objectives. First, the Corridor Rezoning was approved by the Department of City Planning, while the Project was approved by the EDC. Indeed, the City asserts that the projects could not have been considered together, since the Corridor Rezoning project was approved by the City Council on April 30, 2008, while the Project was not even submitted to the CPC for review until August 27, 2008. Moreover, the Corridor Rezoning was not located on the lots at issue in this matter. In any event, the City points out that the FEIS considered the effects of the Corridor Rezoning on the land use, commercial and retail space, and affordable housing. The FEIS determined that the two projects would complement each other, since both were expected to strengthen the retail and commercial areas.

Given the limited scope of a court's judicial review of compliance with SEQRA, this court finds that due consideration was given to the environmental factors. For the aforementioned reasons, the challenges to the environmental review process are without merit, both on procedural grounds, for failure to exhaust administrative remedies, and on the merits. Therefore, the sixth, seventh and eighth causes of action are dismissed.

Based on the foregoing, petitioners allegations as to why respondents' determination must be set aside are devoid of merit. The challenged determinations are upheld. As the Court of Appeals recognized in Goldstein, supra,

[i]t may be that the bar has now been set too low—that what will now pass as ‘blight,’ as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.

Goldstein, supra, ___ N.Y.3d ___. This court determines that respondents’ determination was not made in violation of lawful procedures, was neither arbitrary nor capricious, and was not affected by an error of law.

The Article 78 proceeding and declaratory judgment action are both dismissed. The Clerk of the Court is directed to enter judgment in favor of respondents on both actions, Index Number 603828/08 and Index Number 117242/08. This constitutes the decision, order, and judgment of the court.

Dated: January 7, 2010



JOAN B. LOBIS, J.S.C.