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

PRESENT: _____ PART 1A

Index Number : 103638/2009

JAKOBSON PROPERTIES,

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 X No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding/ declaratory judgment action is dismissed in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room

Dated: AUG 09 2010, 2010

ALICE SCHLESINGER J.S.C.

Check one: X 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: IAS PART 16

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In the Matter of the Application of

JAKOBSON PROPERTIES, LLC,

Petitioner-Plaintiff,

Index No. 103638/09
Motion Seq. No. 001

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment,

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITY PLANNING and CITY PLANNING COMMISSION,

Respondents-Defendants.

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SCHLESINGER, J:

Petitioner Jakobson Properties, LLC commenced this hybrid Article 78 proceeding and declaratory judgment action to challenge certain aspects of a rezoning plan (the Rezoning Plan) approved by the City on November 19, 2008 for neighborhoods in the East Village and the Lower East Side located in Manhattan Community District 3 (the Rezoning Area). The Rezoning Area covers approximately 111 blocks bounded by East 13th Street on the north, Houston, Delancey and Grand Streets on the south, Avenue D on the east, and Bowery and Third Avenue on the west.

Since at least the 1960's, the Area was primarily zoned R7-2.[1] Under the Rezoning Plan at issue here, the wider streets (more than 75 feet wide) and the avenues were rezoned R7A, and the midblocks and narrow streets (less than 75 feet

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[1] The "R" designation indicates that the district is zoned for general residential use, with supporting uses such as community facilities. The numbers and letters following the "R" govern the permitted height and bulk of the buildings in the district.

wide) were rezoned R8B, with one exception. That one exception is the three-block section of the midblock between Avenues A and B from East 4th Street to East 7th Street where petitioner's property is located; that area alone was rezoned from the original R7-2 designation, which contained no building height restrictions and allowed a residential floor area ratio (FAR) of 3.44, to R7B, which imposed a building height restriction of 75' base and 60' maximum wall height and reduced the FAR to 3.0.[2]

Petitioner alleges that when deciding upon that R7B designation for the three-block area alone and imposing the significant building restrictions noted above, the respondents failed to comply with the governing State and City environmental review laws. In opposition, respondents contend that petitioner lacks standing to challenge the Rezoning Plan, and they assert that the Plan was properly promulgated and is valid in all respects.

Petitioner has Standing to Challenge the Rezoning

The threshold issue in any lawsuit is standing. As respondents properly note, to have standing to challenge a zoning or land use decision, the plaintiff "must show that it would suffer direct harm, injury that is in some way different than that of the public at large." *Society of the Plastics Industry v County of Suffolk*, 77 NY2d 761, 774 (1991). Respondents assert in their Answer (at ¶133) that petitioner has failed to satisfy this criterion in that, while Jakobson asserts in general terms that it owns property in the Rezoning Area, a review of public records appears to belie that claim.

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[2] The FAR, or "floor area ratio," is defined in §12-10 of the Zoning Resolution as "the total floor area on a zoning lot, divided by the lot area of the zoning lot. (For example, a building containing 20,000 square feet of floor area on a zoning lot of 10,000 square feet has a floor area ratio of 2.0." Thus, a higher FAR effectively permits a larger building relative to the lot size.

In its Reply (at ¶4), petitioner asserts that Jakobson Properties, LLC is the managing member of 532 East 5th Street Associates, LLC, the entity that owns 530 and 532 East 5th Street. Those properties are located in the Rezoning Area. "For the sake of clarity and correctness," Jakobson asks the Court to amend the caption to include 532 East 5th Street Associates, LLC as a party petitioner. The request is appropriate, and the Court grants it.

Respondents nevertheless maintain a second objection to standing; that is, that petitioner's complaint that the rezoning limits its ability to upgrade its buildings is a complaint of economic, rather than environmental, injury, which is an inadequate basis for standing (Answer at ¶134). In support of this claim, respondents cite cases such as *Mobil Oil Corp. v Syracuse Indus. Development Agency*, 76 NY2d 428 (1990). In *Mobil Oil,* the Court of Appeals held that an owner of real property near the site of a proposed mall construction project lacked standing to challenge the adequacy of the environmental review undertaken in connection with the project, stating (at p 433) that: "To qualify for standing to raise a SEQRA [State Environmental Quality Review Act] challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."

Mobil Oil is readily distinguishable from the case at bar. There, Mobil owned real property in the redevelopment area where it had placed petroleum tanks and distribution terminals. Mobil claimed that the environmental review process had not been properly completed in that the reviewing agencies had failed to consider secondary and cumulative impacts such as the increased cost of fuel to users and local taxpayers should a relocation of Mobil's facilities be required. The court rejected the claim, not only

on the ground that it was too speculative in nature, but also because the claim was not directly related to the project at issue, relating instead to a broader potential plan for redevelopment that had not yet been considered in the review process.

Significantly, the Court of Appeals in *Mobil Oil* specifically reaffirmed its prior ruling confirming standing in *Matter of Har Enterprises v Town of Brookhaven,* 74 NY2d 524 (1989), and distinguished it based on the "close nexus" of the property owner to the challenged rezoning. In *Har,* like here, the petitioner was the owner of property that was the subject of a zoning change. In explaining the distinction between its decisions in *Har* and *Mobil*, the Court of Appeals explained as follows (at p 434-35):

> In *Har*, we held that a property owner whose land was targeted for rezoning had a "legally cognizable interest in being assured that the town satisfied SEQRA" and that the owner consequently had standing to bring a SEQRA challenge, even absent a showing of specific environmental harm (*id.* at 529). Based on our holding in *Sun-Brite [Car Wash v Board of Zoning and Appeals*, 69 NY2d 406] that a property owner, by virtue of an especially close relationship to the subject property, may have standing to seek judicial review absent a showing of special damages, we stated in *Har* that "if any party should be held to have a sufficient interest to object [to an inadequate SEQRA review] — without having to allege some specific harm — it is an owner of property which is the subject of a contemplated rezoning." *(Matter of Har Enters. v Town of Brookhaven, supra* at 529). Indeed, we noted in that case that to deny standing would insulate planning and zoning decisions of the kind involved in *Har* from judicial review, which would clearly be inimical to the public interest (*id*).

The rationale in *Har* supports petitioner's assertion of standing in the case at bar. Petitioner owns property in the Rezoning Area that was directly affected by the rezoning. As noted above, the rezoning imposed on petitioner's property a building height limit that did not previously exist, as well as increased FAR restrictions. This impact is sufficient to allow petitioner to proceed with this lawsuit.

Petitioner's Challenge is Denied on the Merits

Turning to the merits of petitioner's claim, this Court is not persuaded by petitioner's claim that the respondents failed to comply with the governing laws when the City approved the Rezoning Plan at issue in this case. To analyze the claims, some discussion of the planning process is required. The process is explained in detail in the affidavit of Edith Hsu-Chen, Director of the Manhattan Office of the Department of City Planning (DCP), attached to respondents' Answer.

The promulgation of the Rezoning Plan at issue here began in 2005 when the Department of City Planning held a meeting in response to concerns expressed by the community about a need for rezoning and more affordable housing in the area. (Hsu-Chen Aff. at ¶17). The buildings in the community at that time were predominantly tenements ranging from four to seven stories in height, many of which dated back to the 19th and early 20th centuries, with ground floor commercial uses providing local retail and services (¶8). However, because the zoning then in place based on the 1961 Zoning Resolution did not include building height limits, developers in recent years had begun constructing tall condominium buildings and hotels, some rising as high as 21 stories and towering at least ten stories above the neighboring tenements (¶11).

According to Hsu-Chen, the City recognized a need for rezoning "to replace the outmoded zoning so as to preserve the low- to mid-rise character of the East Village and Lower East Side neighborhoods and to provide opportunities for new housing, where appropriate." (Aff. at ¶9). Consistent with this goal, the City sought to map "contextual zoning districts to regulate the height and bulk of new buildings, their setback from the street line, and their width along the street frontage, to produce buildings that are more consistent with existing neighborhood character." (¶13).

What followed was a process lasting some three years of additional public meetings, review and consideration of differing proposals offered by City Planning and community groups, including Community Board 3, the preparation of a Draft Environmental Impact Statement (DEIS), further meetings and revisions to the DEIS, and the preparation of a Final Environmental Impact Statement regarding the Rezoning Plan ultimately put forth by City Planning for approval. That process was governed by the City's Uniform Land Use Review Procedure (ULURP), codified in Section 197-c *et seq.* of the City Charter, as well as the State Environmental Quality Review Act (SEQRA), codified as Article 8 of the New York State Environmental Conservation Law. New York City's procedures for implementing SEQRA are set forth in the City Environmental Quality Review (CEQR), codified at Title 43, Chapter 6 of the Rules of the City of New York, as modified by regulations at 62 RCNY §5.

As our Court of Appeals has repeatedly confirmed, compliance by the "lead agency" City Planning with SEQRA's mandate is significant for several reasons:

> SEQRA is designed to promote "efforts which will prevent or eliminate damage to the environment and enhance human and community resources" (ECL 8-0101) by injecting "environmental considerations directly into governmental decision making; thus the statute mandates that '[s]ocial, economic, and environmental factors *shall be considered together in reaching decisions on proposed activities*'."

Har, 74 NY2d at 528, quoting *Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679 (with emphasis added), citing ECL 8-0103(7); *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 415; Governor's Mem. 1975 NY Legis Ann. at 438; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 206.

Nevertheless, judicial review is limited. A court may not "weigh the desirability of the action"; rather, the "limited issue for review is whether the decision makers identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination." *Har*, 74 NY2d at 529, quoting *Matter of Jackson*, 67 NY2d at 417; *see also, Matter of Save the Pine Bush, Inc. v Common Council of City of Albany,* 13 NY3d 297, 306 (2009).

In the case at bar, City Planning prepared a detailed EIS consisting of 27 chapters analyzing the effects of the Rezoning Plan and potential impacts in categories such as land use, socioeconomic conditions, community facilities and services, open space, historic resources, natural resources, traffic and parking, transit and pedestrians, air quality, noise, and neighborhood character. (Respondents' Memorandum at p. 28, see also Administrative Record). Petitioner does not attack the EIS as a whole. Rather, the focus is on the analysis of the rezoning from R7-2 to R7B of the three midblocks near Tompkins Square Park where petitioner's property is located. With respect to that particular aspect of the plan, City Planning concluded that the rezoning would not have a significant adverse effect on the environment because it was decreasing, rather than increasing, the potential for development by imposing building height limits that did not previously exist. Petitioner claims that City Planning erred in reaching that conclusion in various respects.

In its first cause of action, petitioner asserts that respondents violated SEQRA by failing to identify a reason, rationale or basis for rezoning these three midblocks R7B, while rezoning all other midblocks with the less restrictive R8B designation.[3] According

[3]The R8B zoning on the other midblocks permits higher-density development than the R7B zoning assigned to petitioner's property. (See Aff of Hsu-Chen at ¶23).

to petitioner, respondents failed to identify the relevant areas of environmental concern in that three-block area, failed to took a "hard look" at them, and failed to set forth in the EIS a "reasoned elaboration" justifying the "disparate" treatment. In its second cause of action, petitioner contends that respondents' actions violate constitutional and statutory mandates governing zoning in that the decision was made "as a matter of convenience for politically expedient reasons"; i.e., to appease the community, end their objections, and secure their approval of the Rezoning Plan. The third cause of action effectively parrots the first, but is framed in terms of the "arbitrary and capricious standard" in CPLR Article 78 instead of as a request for declaratory relief.

Similarly, the fourth and fifth causes of action parallel the first, but they are framed as violations of SEQRA. In addition, in the fourth cause of action petitioner identifies specific omissions in respondents' alleged "hard look", such as failing to evaluate the ramifications of the rezoning on petitioner's properties, misrepresenting the impact on the character of the surrounding neighborhood, "systematically relying on irrational assumptions" and incorrectly using or ignoring available data. In the fifth cause of action, petitioner adds that respondents failed to adequately consider alternatives, including the "no action" alternative of leaving the zoning designation R7-2 as it had been before the Rezoning Plan was introduced.

This Court has carefully reviewed the submissions by both parties, including the supplemental submissions requested by the Court to allow the respondents to delineate how the EIS addressed the socioeconomic impacts of the three-block rezoning and to allow petitioner to delineate why that analysis did not satisfy the requisite "hard look." Bearing in mind the limited role of judicial review discussed above, this Court is

compelled to reject petitioner's claim that respondents failed to comply with either the procedural or the substantive dictates of the controlling environmental laws. This Court could go on for pages, as did the parties, detailing the process followed here. While there is no doubt that City Planning revised its original rezoning proposal to take into account community objections, public hearings and revisions in response to comments are a well-recognized and important part of the environmental review process. The record does not support petitioner's assertion that some sort of "deal" was made in contravention of the governing law.

As to the substance, that is, City Planning's decision to rezone this three-block area differently than the other midblocks, respondents have explained their analysis and reasoning in sufficient detail to convince this Court that City Planning identified the relevant areas of environmental concern, took a "hard look" at them, and set forth a "reasoned elaboration" in keeping with the dictates by the Court of Appeals. As explained in the affidavit of Ms. Hsu-Chen submitted on behalf of City Planning (at¶22), before deciding upon the specific zoning for the subject areas, the agency examined the characteristics of the subject area and compared it to other midblocks:

> DCP concluded that the subject area is characterized by low-scale development built at lower densities than in other midblock portions of the Rezoning area. This is largely due to the fact that the majority of lots within the subject area have deep rear yards. DCP then compared the characteristics of the subject area to different zoning district designations to ascertain which zoning district would ensure that new development would be consistent with the subject area's building patterns. Based on this review, DCP determined that since the majority, i.e., approximately 60%, of the subject area was consistent with the parameters established by an R7B district, such district was appropriate. Specifically, DCP determined that approximately 94% of the lots in the subject

> area complied with the R7B districts's maximum building height limit of 75 feet, and 58% of the lots complied with the R7B district's maximum FAR of 3.0.

Ms. Hsu-Chen further explained in her affidavit (at ¶23) why City Planning decided that the R8B zoning assigned to the other midblocks was not appropriate here:

> DCP also determined that mapping an R8B district in the subject area would not be appropriate. To this end, DCP determined that since the majority of the buildings in the subject area were built to 3.0 FAR or less, that mapping the area as an R8B district, which permits a maximum FAR of 4.0, would not maintain the low-rise, medium-density character of deep rear yards of the subject area; rather it would permit construction that could result in mid-rise, higher-density development without deep rear yards. Accordingly, DCP proposed that the area should be rezoned as an R7B district and not as an R8B district, as was applied to the remainder of the mid-blocks north of Houston Street.

Lastly, City Planning explained (at ¶24) why it concluded that the R8B zoning was appropriate for the other midblocks:

> By contrast with the subject area, the lots in the remainder of the mid-blocks north of Houston Street were appropriate for an R8B designation. R8B districts permit a maximum FAR of 4.0 and impose a height limitation of 75 feet. Approximately 72% of these lots complied with the R8B district's maximum permitted FAR of 4.0, and 98.5% complied with the R8B district's height requirements. Conversely, only 41.3% of the lots in the R8B district complied with the R7B's maximum permitted FAR of 3.0. Given this low compliance rate, mapping an R7B district in these areas would have been inappropriate.

Recognizing, as this Court must, that "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively," this Court accepts the analysis and reasoning offered. *Real Estate Board of New York, Inc. v City of New*

York, 157 AD2d 361, 363 (1st Dep't 1990), quoting *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363-64.

Turning now to the issue whether respondents considered all relevant socioeconomic impacts when determining that the rezoning of petitioner's property would not have a significant effect, this Court is guided by cases such as the First Department's decision in *Real Estate Board of New York, Inc. v City of New York*, 157 AD2d 361 (1990). The specific issue presented there was whether the City of New York "fully complied with the applicable environmental laws when it issued a negative declaration as to the need for an environmental impact statement with respect to the proposed zoning amendment." 157 AD2d at 363. The rezoning created a special garment center district to preserve the existing character of the area and stem the conversion of manufacturing space into offices, with particularly strict limits placed on midblock spaces.

The lower court had found that the City had failed to comply with environmental laws in not analyzing "the potential for environmental changes if the preserved manufacturing space was not rentable as such and remained vacant", but the Appellate Division reversed. In so doing, the court stated that it was not arbitrary or capricious or a violation of environmental laws for the agency "to ignore speculative environmental consequences which might arise." *Id.* at 364, quoting *Matter of Industrial Liaison Comm. v Williams*, 72 NY2d 137, 143. The court further found (at p 364) that the City had "fully complied with the Court of Appeals mandate in *Chinese Staff,* which requires the consideration of socioeconomic impacts under CEQR (but, significantly, does not necessarily require the preparation of an environmental impact statement where such

impacts are reasonably determined not to have a significant effect on the environment within the meaning of CEQR)." In so stating, the court placed particular emphasis on the fact that the rezoning was "designed to *preserve* rather than *change* the existing neighborhood character. (*Id* at p 365, emphasis in original).

The same analysis applies here. As the rezoning of petitioner's property preserved the existing characteristics of the neighborhood and limited future development, it was not arbitrary or capricious for City Planning to conclude that the change would not have any socioeconomic impacts. The rezoning posed no threat of increased traffic or noise or of an increased demand on community or natural resources, as it was effectively preserving the status quo.

Wholly unavailing is petitioner's claim (Reply Memo at p 8) that "the Rezoning effectively created a moratorium on new building in the Amendment Area, and failed to recognize the socioeconomic impact of the same in its review." The rezoning does not in any way prevent interior renovations and the general upgrading of the building. What is more, if a building in the Rezoning Area is not currently built to the maximum permitted FAR of 3.0, the owner can demolish the building and construct a larger one under the rezoning. (Aff of Hsu-Chen at ¶¶50-51).

In fact, respondents note in their April 15, 2010 submission that petitioner has demolished its buildings and has secured the necessary approval to construct a new six-story building, which is presently under construction on both lots. It is of no moment that petitioner may not have precisely the same development opportunities as the owners of buildings in the R8B districts, as that concern is not relevant under the environmental laws. What is relevant is a comparison of future conditions with the rezoning in place

(Future Action Condition) and future conditions under the status quo (Future No-Action Condition). Under that analysis, it is beyond dispute that the 1961 zoning, if left unchanged, would have continued to permit high-rise, high-density buildings with significant socioeconomic impacts on the community. In any event, the difference between the two midblock zoning designations is not so significant as to lead to a deterioration of petitioner's property and a substantial upgrading of the properties in the other districts, as petitioner contends.

Accordingly, it is hereby

ORDERED that petitioner's request for leave to amend the caption to include 532 East 5th Street Associates, LLC as a party petitioner is granted; and it is further

ADJUDGED that the petition is denied and this proceeding is dismissed, including all causes of action sounding seeking declaratory relief.

Dated: August 9, 2010

J.S.C.

ALICE SCHLESINGER