[* 1]

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

PRESENT: JUDITH J. GISCHE PART 10

Justice

Bd Managers Alfred

INDEX NO. 114992/09

MOTION DATE

-v-

MOTION SEQ. NO. 001

D of CM Planning.

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 ☒ No

Upon the foregoing papers, It is ordered that this motion

* #002 + #003 consolidated for decision

MOTION IS DECIDED 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 141B).

Dated: AUG 16 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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In the matter of the application of
ALFRED CONDOMINIUM,

Petitioner-Plaintiff,

for an order and judgment pursuant to Article 78 of the CPLR

-against-

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, *in his official capacity as Mayor of NYC,* **CITY COUNCIL OF THE CITY OF NEW YORK, DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, CITY PLANNING COMMISSION OF THE CITY OF NEW YORK AND FORDHAM UNIVERSITY,**

Respondents-Defendants.

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DECISION/ ORDER
Index No.: 114990-2009
Seq. No.: 001, 002, 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
MOTION SEQ #1	
Alfred Petition, SG affid in support of petition (sep backs)	1, 2
Exhs to SG affid (sep volumes)	3,4,5
City answer w/DK affirm, RD affid	6
Exhs to City answer (sep volumes)	7,8,9
Fordham's answer, appendix	10
Fordham opp to petition w/DAC affirm, exhs	11
Alfred reply to City w/SG affid, exhs	12
Alfred reply to Fordham w/SG, exhs	13
MOTION SEQ #2	
Coalition n/m amicus curiae, JAW affirm	14
City response w/ACG affirm	15
Coalition reply	16

MOTION SEQ #3

ESD/Park n/m amicus curiae w/ALB affirm 17
City response w/ACG affirm 18
ESD/Park reply 19

Transcript OA 6/3/10 20

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a special proceeding commenced by petitioner (sometimes "Alfred Condominium") under Article 78 of the CPLR. The City respondents and Fordham University ("Fordham") have separately answered the petition. Two nonparties have brought motions to file *amicus curiae* briefs with the court, addressing the parties' dispute and in support of the petition. One of the motions is brought by The Coalition for a Livable West Side ("Coalition") (motion sequence no. 2). The other motion is brought by The Committee for Environmentally Sound Development, Inc. and the Park River Democrats ("Committee") (motion sequence no. 3). Although separately moving, the two organizations raise similar arguments as to why their briefs should be considered by the court and the relief sought by petitioner granted.

The City of New York, Michael R. Bloomberg, in his official capacity as Mayor of NYC, The City Council of the City of New York, Department of City Planning of the City of New York, City Planning Commission of the City of New York City ("City respondents") and Fordham oppose the petition and the motions by the *amici* to have their briefs considered.

An Article 78 proceeding is a special proceeding; it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are

raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

The motions are consolidated herein for consideration and decision in one decision/order which is as follows:

Summary

Alfred Condominium is a residential tower standing at the west end of Fordham's Manhattan campus in Lincoln Square. Fordham proposes to further develop its property and has secured the needed approvals from the City respondents. Alfred Condominium is challenging the various actions taken by the City Planning Commission of the City of New York City ("CPC") which were voted on and approved by the City Council of the City of New York ("Council") on June 30, 2009, allowing Fordham's project to proceed. The approvals are being challenged on the basis that respondents' decisions, determinations and actions are arbitrary, capricious and an abuse of discretion. Furthermore, Alfred Condominium seeks a declaration that any future plans for development on Fordham's campus must be restricted in height to 200 feet or 20 stories high, covering no more than 35% of the land, because those limitations are set forth in a forty (40) year old urban renewal plan and covenants running with the land.

Background

As part of a large urban renewal scheme in 1957, the City Planning Commission ("CPC") approved an urban renewal plan designated as Lincoln Square ("LSURP").

Pursuant to the LSURP, a 13 block area deemed to have substandard housing, etc., was to be cleared and redeveloped through eminent domain. The project was financed by private sponsors, the Federal government and the City. Among the permitted uses identified in the LSURP were collegiate facilities, multi-family residences and commercial and retail stores and shops. The LSURP placed restrictions on the heights of buildings in the area and established bulk and population density requirements. A number of city blocks were eliminated to create four "super blocks," which were to be auctioned to the private sponsors.

Fordham (one of the "private sponsors") entered into a land disposition agreement ("LDA") with the City to bid for and acquire one of those superblocks. It was anticipated that "the collegiate center [would] represent a major contribution in helping to meet the ever-increasing demands for higher educational facilities; [and that] the need to expand college and university facilities is unquestioned and urgent..."

By resolution adopted November 26, 1957, the LDA was approved by BOE and the superblock extending from 62nd to 60th streets and bounded by Amsterdam and Columbus avenues ("the collegiate property" or "campus"), was sold at auction to Fordham for the price of $2,241,610.

The LDA incorporates the LSURP and, itself, contains limitations on how the campus can be developed and used by Fordham, its successors and assigns. The original LDA also requires that the project be completed in five (5) years. These limitations (and others) are reiterated in the February 28, 1958 deed ("deed") transferring ownership from the City to Fordham:

"The party of the second part [Fordham], by acceptance of

this deed, covenants and agrees for and on behalf of itself, its successors and assigns, of the land conveyed or any part thereof, and any lessee of the land conveyed or any part thereof:

(a) To carry out and erect the Project in accordance with the [LDA approved by] the Board of Estimate on November 26, 1957...

(b) To devote the land for the uses specified in the Urban Renewal Plan adopted by the Board of Estimate on November 26, 1957 ... contained in Schedule A of the [LDA] . . . This covenant is to run from the date of conveyance for a period of forty (40) years from the date of the completion of the project as said completion is defined in Paragraph 304 of the [LDA]...

(c) That from the date of conveyance for a period of forty (40) years from the date of completion of the Project, as said completion as defined in Paragraph 304 of the [LDA] ... the land conveyed herein shall not be used for any use other than the uses specified therefor in the Urban Renewal Plan contained in Schedule A attached to the [LDA]... or contrary to an limitation or requirements of the Urban Renewal Plan adopted by the Board of Estimate on November 26, 1957...

(d) That from the date of conveyance for a period of forty (40) years from the date of completion of the Project, as defined in Paragraph 304 of the [LDA]... no change shall be made in the Project, as set forth in the Urban Renewal Plan... without the consent of the City Planning Commission and the Board of Estimate..."

When Fordham purchased the superblock at auction it "[agreed] to undertake and carry out, in accordance with the provisions of this Agreement, the Collegiate Project . . ." This included relocation of all the tenants, demolition of existing structures, and construction of "such education buildings and facilities, including classrooms, libraries, assembly, lecture hall, dormitories, student and faculty activity facilities, together with

cultural and recreational facilities, of the general nature shown in the Site Plan . . ." at Schedule F. Schedule F is apparently missing, but respondents contend another document, "Appendix I - Site Plan," is the same thing. Referring to Schedule F, the LDA provides that the site plan only shows "possible buildings, building locations and other site details that are recommended . . ." and it was "not intended that they nor any of them shall necessarily be the plans finally utilized for construction of the Project and that the actual buildings, building location and other site details will be further developed..."

Section 304 of the LDA defines "completion of the project" as: "the date on which all residential tenants are relocated, all other occupants removed, all existing buildings and structures demolished an there shall have been issued by the Department of Buildings of the City of New York certificates of occupancy for all the buildings provided for in the Site Plan of the Project..."

By 1966, Fordham had only built one building on its campus (the law school). The City and Fordham agreed to amend the LDA. The 1966 amendment to the LDA provides that "[Fordham] has constructed one of the facilities ... and is about to commence the construction of an additional facility on said Site . . ." Furthermore, the 1966 amendment to the LDA provides that "notwithstanding the provisions of Section 304 or any other provision of the December 24, 1957 agreement, the time within which [Fordham] shall construct the improvement and complete the project is extended to March 31, 1968 . . ." The 1966 amendment to the LDA also amended the restrictions on land use:

> "508 [a]...A covenant that the grantee, its successors and assigns ...will and shall carry out the project as in this Agreement provided, and will and shall devote such land to the uses specified in the Urban Renewal Plan contained in Schedule A...as such Plan may be amended from time to

> time. Said covenant is to run for the duration of the controls of the Amended Urban Renewal Plan and shall expire January 27, 2006..."

Section VIII of the 1966 amendment to the LDA amended paragraphs 508 and 509 and section IX added an entirely new paragraph 509-A:

> "509-A...it is intended and agreed, and the deed shall so expressly provide, that the agreement and covenants provided in Paragraph 508 hereof shall be covenants running with the land and that they shall... be binding, to the fullest extent permitted by law and equity, for the benefit of and in favor of, and enforceable by, the City and any successor in interest to the Collegiate Site or any part thereof, and the owner of any other land (or of any interest in such land) in the [LSURP] ... It is further intended and agreed that the agreements an covenants provided in subdivision (a) of Paragraph 508 shall remain in effect for the period of time stated therein (at which time such agreements and covenants shall terminate)..."

Thus, rather than having the land restrictions "run from the date of conveyance for a period of forty (40) years from the date of the completion of the project . . ." the amended covenants gave a definite termination date: will "expire on January 27, 2006." Fordham later conveyed property to the Dormitory Authority of the State of New York for the construction of dormitories; the restrictive covenants were included in that deed, which also set forth the revised expiration date of January 27, 2006.

Since 1957, the LSURP has been amended five (5) times. The most recent amendment was adopted by the CPC November 8, 1989 ("5th amendment of LSURP"). The 5th amendment of the LSURP followed a public hearing and environmental reviews. The amendment allowed Fordham to sell part of its campus (lot 35) to a private developer for construction of a "market rate residential and commercial building." Ultimately, the deal with the private developer did not go forward.

Thereafter, Fordham also obtained a "Certificate of Completion" from the City of New York acting through its Department of Housing Preservation and Development ("HPD certification"). The June 25, 1990 certificate states that Fordham has "carried out and completed the Project upon the Premises [Tax Block and Lot 1132 - 1, 10, 20] in accordance with the Provisions of the Agreements [12/25/57 and 4/7/66] . . ." The City also certified that Fordham " completed the Project upon the Premises in accordance with the provisions of Paragraph 304.A of the Agreements . . ."

Under Fordham's new project, seven (7) new academic buildings, two (2) new residential buildings, two (2) garages and one loading dock will be built on the collegiate property ("master plan"). The master plan will provide 2.35 million square feet of additional gross floor space and is expected to be completed in two phases. Phase I will be completed by 2014 and phase II by 2032. Demolition of some of the existing structures is anticipated. Each of the anticipated academic building is in excess of 20 stories, the tallest being 34 stories. One of the residential tower is 50 stories; the other is 52 stories. The original LSURP limited the height of building in the residential area to "180 feet or 20 stories" and land coverage in the collegiate area to "35%."

Under its current zoning (C4-7), the area in which the campus is located can be developed, as of right, to a floor area ratio ("FAR") of 10. In connection with the master plan, Fordham applied for and obtained special permits from the City Planning Commission (Zoning Resolution 82-33) to waive and/or modify regulations governing height and setback, minimum distances between buildings, courts and minimum distances between legally required windows and wall or lot lines.

The City contends the master plan, as it presently stands, was developed slowly and methodically, after much investigation, countless modifications, and thorough community involvement. Fordham separately contends that not only was the process methodical, it was unduly protracted because everything they wanted was met with resistance by the community and the petitioner. The respondents attest to the countless hearings, meetings and applications which preceded the City's final approval of the master plan. In June 2007, the City's Department of City Planning, Environmental Assessment and Review Division ("EARD") ordered the preparation of an environmental impact statement and directed a hearing because of the possible "significant adverse impacts on socioeconomic conditions in the vicinity of the affected area . . .community facilities and services . . . publicly accessible open space ... shadow impacts ... historic resources ..." and numerous other concerns expressed in its June 20, 2007 "Positive Declaration." Alfred Condominium participated in that environmental impact hearing and was allowed to make pre-hearing submissions.

Although Fordham contends the covenants and restrictions on land use contained in the LDA have now expired, Alfred Condominium and the *amici* present a number of arguments about why they have not expired, but even if they did expire, why Fordham should not be permitted to deploy the master plan that the City respondents have now approved. Alfred Condominium argues that the process leading up to the Council's resolution approving the master plan is flawed because it is based upon "false alternative scenarios" and that the environmental impact statements failed to consider the legally permissible alternatives. Alfred Condominium and the *amici* contend that allowing

Fordham to build up its property in the manner proposed will only add to the congestion in the Lincoln Square area, worsen the traffic problems in that area, and cast shadows over the entire district. Petitioner and the *amici* contend these approvals are in violation of the LSURP, the land use limitations in the LDA and the deed, and State and local laws.

Alfred Condominium denies that the 1966 amendment to the LDA altered the covenants in the deed. Petitioner also contend the fundamental premise of the LSURP cannot be changed, and even if the durational controls have expired, equity demands that Fordham not be permitted to benefit from having failed to "complete the project," although Alfred Condominium concedes no one knows exactly what the now missing/lost site plan included (Schedule F).

Alfred Condominium also advances other arguments, including that: [1] the primary effect of the City's approval of the master plan is to advance religion because of Fordham's Catholic and Jesuit affiliations, [2] the approval violated the takings clause and its state counterpart and; [3] it also violated the urban renewal law. Petitioner claims further that the master plan should never have reached the voting stage because some of the applications were incomplete and should not have been certified as complete.

The arguments by the *amici* are closely aligned with one another. They contend that the master plan is so far removed from the spirit of the LSURP that to allow the proposed development would be an insult to all the residents who lost their homes to eminent domain in 1957. Like the petitioner, the *amici* argue the Alfred Condominium will be landlocked and dwarfed by a fortress of buildings.

In addition to substantively opposing the petition, respondents argue that Alfred Condominium lacks standing to maintain this action because there is a clear restriction in the LSURP and 1966 amendment to the LDA as to who can enforce those obligations. Furthermore, according to respondents, Alfred Condominium is neither a signatory to nor a third party beneficiary of the LDA.

Applicable standard of law

In an Article 78 petition, a reviewing court is limited to determining whether the agency determination is arbitrary and capricious or an abuse of discretion (In the Matter of Pell v. Board of Educ. of Union Free School Dist., 34 NY2d 222, 230-231 [1974]). Thus, the judicial reversal or annulment of the administrative order, etc. (here, the decision of the City Planning Commission and New York City Council) is only warranted if it is not supported by substantial evidence and was arbitrary, capricious and an abuse of discretion. A determination is arbitrary and capricious if it is untenable as a matter of law. However, it the determination is rationally based, judicial review is narrow, and the court must uphold the determination (In the Matter of Pell v. Board of Educ. of Union Free School Dist., 34 NY2d at 231).

Discussion

Standing

The court concludes that Alfred Condominium has standing to challenge respondents' action. As more fully set forth below, petitioner has geographical proximity to the collegiate area and the potential for direct harm by the use of the land, as

approved, by the City respondents (Brunswick Smart Growth, Inc. v. Town of Brunswick, 73 AD3d 1267 [3rd Dept 2010]).

Unlike Mendel v. Henry Phipps Plaza West, Inc. (6 NY3d 783 [2006]), the case principally relied upon for respondents' argument that the Alfred Condominium lacks standing to maintain this action, this is a special proceeding pursuant to Article 78. Here, petitioner is not directly seeking enforcement or reformation of the LDA, but challenging the administrative decisions made by the City respondents to allow the Fordham master plan to proceed which, according to petitioner, should have *included* consideration of the LDA and other documents (petitioner claims) still restrict Fordham's use of its land.

Although the Alfred Condominium was built in 1987, the site previously housed a high school that sold its property to the developer that built the Alfred Condominium. The high school was within the area designated under the LSURP and identified by name as a site to "be improved . . . ," and the Alfred Condominium is a successor in interest of the high school. By its express terms, paragraph 509-A of the 1966 amendment to the LDA provides that the agreements and covenants are "binding, to the fullest extent permitted by law and equity, for the benefit of and in favor of, and enforceable by, the City and any successor in interest to the Collegiate Site or any part thereof, and the owner of any other land (or of any interest in such land) in the Urban Renewal Area [i.e. the LSURP] which is subject to the land use requirements ..."

Finally, the interests expressed by Alfred Condominium are arguably within the "zone of interest" protected by SEQRA and petitioner has alleged facts that its occupants/tenants will be adversely affected by the City respondent's decision to let

Fordham proceed with its master plan (Ecumenical Task Force of Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency, 179 A.D.2d 261 [4th Dept 1992] *lv den* 80 N.Y.2d 758 [1992]; *also*, Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, 13 N.Y.3d 297 [2009]; Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6 [1975]). Therefore, petitioner has the requisite standing to maintain this summary proceeding against the respondents (also, Coalition Against Lincoln West, Inc. v. Weinshall, 21 A.D.3d 215 [1st Dept 2005]).

Amici Curiae Motions

In deciding whether to grant amicus curiae status, the court considers whether: 1) the parties are adequately represented, and if not, whether the movant could remedy such deficiency, 2) the movant would bring to the Court's attention law or arguments that might otherwise escape its consideration an; 4) the amicus brief would otherwise be of special assistance to the Court (N.Y.Ct.Rules, § 100.3 [B] *et seq.*; New York State Senator Kruger v. Bloomberg, 1 Misc. 3d 192 [Sup Ct N.Y. Co 2003]). It is, however, ultimately up to the court's discretion to allow or deny the motion to file an *amicus* brief. Furthermore, in cases involving questions of important public interest, leave to file such a brief is generally granted (Colmes v. Fisher, 151 Misc. 222 [Sup Ct. Erie 1934]).

Although Fordham (and to a lesser extent the City) argues that the *amici* have failed to demonstrate why their proposed *amici curiae* briefs are anything more than a restatement of what Alfred Condominium very capably argues, for much the same reason that petitioner has standing to maintain this action, the organizations seeking permission to have their briefs considered should also be heard (*see*, Coalition Against Lincoln West,

Inc. v. Weinshall, *supra*; Kaur v. New York State Urban Development Corp., 14 N.Y.3d 868 [2010]). The organizations present broader concerns than those of the petitioner and respondents have not shown they are prejudiced in any way by the court granting the *amici's* motions. Therefore, the motions by the Commission and the Coalition are granted and their *amici* briefs are considered.

The merits of the petition

Alfred Condominium seeks the annulment of the June 30, 2009 vote by the City Council and the City Counsel resolutions issued that day approving Fordham's project on the basis that the master plan was not well considered, the analysis techniques used in approving the master plan were flawed, if not outright misused, and the City had no right to amend the restrictive covenants. The second prong of the attack on the determination and resolution is that Fordham was never relieved of its obligation to build its campus in conformance with the site plan in the original LDA which carried over from each amendment to the LSURP over the years. Petitioner denies that the project was completed and therefore, that the 1990 "certification" by HPD was a "post hoc fix issued to cover up the [City's mistakes]" in approving the 5th LSURP amendment.

CPLR § 217 requires that any proceeding seeking judicial review of an agency's determination be commenced within four (4) months after it is made. Any argument by petitioner that its petition is timely is only correct insofar as Alfred Condominium is challenging the City's approval of the master plan (see, Stop-The-Barge v. Cahill, 1 NY3d 218 [2003]; Coalition Against Lincoln West, Inc. v. Weinshall, *supra*). However, to the extent that petitioner claims it was aggrieved by the approval of the 5th LSURP, the

certification by HPD, or any other prior administrative action, determination, etc., Alfred Condominium's challenge[1] should have come within four (4) months of those actions (*see*, Stop-The-Barge v. Cahill, *supra*). Petitioner cannot challenge them now as those claims are time barred.

Alfred Condominium's argument that the application process was flawed and relied on falsehoods is primarily based on its fundamental disagreement with the respondents about whether the covenants and restrictions on land use imposed by the LDA as amended in 1966, expired on January 27, 2006. Petitioner raises a number of reasons why the LDA and/or LSURP could not be amended or modified. These arguments however, ask that the court to disentangle events that long preceded Fordham's master plan and are well beyond the statute of limitations to be challenged at this time. The 1966 amendment to the LDA established a termination date of January 27, 2006 for the LDA, superceding the more ambiguous and subjective ("forty [40] years from completion . . .") language in the 1957 LDA. Thus, by their express terms, the covenants and restrictions in the documents setting forth Fordham's obligations expired on January 27, 2006.

Under the LDA "completion of the project" is defined as: "the date on which all residential tenants are relocated, all other occupants removed, all existing buildings and structures demolished an there shall have been issued by the Department of Buildings of the City of New York certificates of occupancy for all the buildings provided for in the Site

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[1]The court is not, however, making any decision as to whether Alfred Condominium had standing to maintain any prior action, only that the time to do so has expired.

Plan of the Project..." According to petitioner (and the *amici*), Fordham deliberately underdeveloped the collegiate property, essentially "banking" it, until the land restrictions had expired. Alfred Condominium points out that without a copy of Schedule F, which is referenced in the LDA and 1966 amendment to the LDA, there is no way to know the extent of the "project" that was approved in 1957 was whether it was "completed" – that is, whether Fordham built everything it had promised to build when it acquired the land at auction.

There is no dispute that Fordham completed the project insofar as it was required to remove the existing tenants from the collegiate area and demolish the structures that needed to be removed from the blighted area. Fordham also obtained certificates of occupancy for the buildings that it built. There is, however, a dispute about whether Fordham was obligated to build all the structures identified in the site plan and what those structures are. Alfred Condominium argues that without a copy of the site plan (Schedule F) there is no way to know what the project consisted of and therefore, there is a triable issue about whether the project is "complete." This argument, however, places an undue emphasis on the term completion and completely overlooks events that took place in 1990. Therefore, the absence of (or at least a dispute over what constitutes) the site plan identified in the LDA as Schedule F does not raise an issue of fact requiring a trial of the petition for the reasons that follow (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

In referring to Schedule F in the 1957 LDA, the agreement provides that Schedule F (i.e. the site plan), only shows "possible buildings, building locations and other site

details that are recommended . . ." (emphasis added). The LDA also states that it was "not intended that they nor any of them shall necessarily be the plans finally utilized for construction of the Project and that the actual buildings, building location and other site details will be further developed..." Consequently, the site plan was exemplary of what could be developed at the collegiate, not precatory and, therefore, the project was "complete," at least when the land restrictions expired on January 27, 2006.

On the other hand, even if Alfred Condominium is correct, that Fordham undertook and was obligated to build all the buildings on the site plan, HPD certified the project as "complete" in 1990, well before the January 27, 2006 expiration date of the land restriction covenants. In its 1990 certificate, HPD states that Fordham "carried out and completed the Project upon the Premises [Tax Block and Lot 1132 - 1, 10, 20] in accordance with the Provisions of the Agreements [12/25/57 and 4/7/66] . . ." Thus, HPD's certification is proof the project was complete as soon as 1990. HPD's 1990 certification is an agency determination and it is not subject to a collateral attack in this action. If petitioner was aggrieved by HPD's determination, it should have challenged it then[2] within the time provided under CPLR § 217. That time has long since expired.

Further claims by petitioner, that it parted with the property, the grantor (City) was without power to modify or alter the terms of the covenants to change the term of the obligations from "forty years" after completion to a date certain, is rejected. The terms and conditions of Fordham's 1957 land acquisition were set forth in the LDA and in the

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[2]Again, the court is not deciding the issue of whether Alfred Condominium had standing to maintain any prior action against HPD, only that the time to do so has expired.

deed which contained a restrictive covenant running with the land. The LDA was itself incorporated by reference in the deed and both documents state that the land use cannot be changed "without the consent of the City Planning Commission and the Board of Estimate..." Thus, not only did the grantor retain the power to alter the covenants, the grantor and grantee (i.e. City and Fordham) later agreed to alter the covenants in the LDA, and therefore, the deed, pursuant to the power expressly reserved to the City in these documents (see, Columbus Park Corp. v. Department of Housing Preservation and Development of City of New York, 80 N.Y.2d 19 [1992]). Any argument by petitioner that this action could not be taken by the City and Fordham because it was an effective alteration or modification of the LSURP, attacks actions taken decades ago which cannot now be challenged (CPLR § 217; *see*, Stop-The-Barge v. Cahill, 1 NY3d 218 [2003]; Coalition Against Lincoln West, Inc. v. Weinshall, *supra*).

The City did not, as petitioner argues, simply turn a blind eye to the potential adverse impact of the proposed master plan. To the contrary, the EARD (Environmental Assessment and Review Division) ordered the preparation of an environmental impact statement and directed a hearing to examine the possible significant adverse impacts the proposed plan would have. The Final Environmental Impact Statement ("FEIS") reflects public comments made during the comment period and at the public hearing, as well as comments from other administrative bodies and agencies. The FEIS provides a detailed analysis of such issues as: noise, traffic, shadows, density and public health. Also considered are the three positive alternatives: no action, an "as of right" alternative, and a "no unmitigated impact alternative." Under the "as of right" alternative, based upon its

current C4-7 zoning, Fordham would still have the right to build, without any special permits from the CPC, up to a FAR of 10 – and up to a FAR of 12, with a "bonus." Nonetheless, petitioner, itself 38 stories tall, (and the *amici*) contend Fordham should be restricted to a FAR of 7, effectively curbing Fordham's development of its land.

Although the Alfred Condominium (and the *amici*) contest the conclusions drawn from these studies and contend there are better alternatives that should have been considered, the FEIS shows that alternatives were, in fact, considered and that the agency took the requisite "hard look" (Coalition Against Lincoln West, Inc. v. Weinshall, 21 AD3d at 223). SEQRA does not require that every conceivable alternative must be considered before an EIS will be considered acceptable (Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483 [1st Dept 1982] *aff'd* 60 N.Y.2d 805 [1982] *reard den* 61 N.Y.2d 670 [1983]). The FEIS contains a reasonably detailed analysis of the various issues affecting the community, their objections, and a weighing of the pros and cons of the different alternatives under consideration. Furthermore, the CPC made significant changes to the plan proposed by Fordham following consultations with the Manhattan Borough president and CB7 (*see,* Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400 [1986]).

Statements by the petitioner, that Fordham acquired its land at a subsidized price, subject to its obligation to building a planned campus, completely ignore that the master plan includes academic buildings and dorms, not just the two residential towers, that seem to be the lightning rods for the parties' most vigorous disputes. Furthermore, the history of the LSURP is that the Lincoln Square area was blighted and the revenue to

rehabilitate it was raised in no small part through private sponsors (like Fordham) who would help the City by relocating the tenants, demolishing the existing structures, and constructing (in Fordham's case) "such education buildings and facilities, including classrooms, libraries, assembly, lecture hall, dormitories, student and faculty activity facilities, together with cultural and recreational facilities . . " to transform the area (see, LDA ¶ 304). The master plan is entirely harmonious with those goals (*see*, Kaur v. New York State Urban Dev. Corp., —NY3d— [2010], 2010 Slip Op 05601 [6/24/10]).

Other arguments of a constitutional dimension, including the fact that Fordham has Jesuit and Catholic affiliations, interject unnecessary issues into this proceeding which long ago were resolved by the City allowing Fordham to be a private sponsor/purchaser of the collegiate land in 1957 (*see*, 64th Street Residences, Inc. v. City of New York, 4 NY2d 268 [1958]).

Fordham's application was for special permits to modify the height and setback requirements applicable to their property, not for a change in how the property is zoned. The New York City Council is empowered to review land use issues and approve zoning changes, housing and urban renewal plans, community development plans and the disposition of city-owned property (http://council.nyc.gov/html/about/about.shtml). Furthermore, the Department of City Planning of the City Planning Commission is charged with the review of land use applications and assists both government agencies and the public by providing policy analysis and technical assistance relating to housing, transportation, community facilities, demography and public space. Therefore, the matters that the Council and CPC determined are well within their expertise (*see*,

Teachers Ins. & Annuity Assn. of Am. v. City of New York, 185 AD2d 207 [1992], aff'd 82 NY2d 35 [1993]).

The Commission and Council's approval of the master plan comports with due process. Persons affected by the master plan had an opportunity to be heard in a meaningful manner at a meaningful time, well before the decision to approve the plan was made (see, Kaur v. New York State Urban Dev. Corp., —NY3d— [2010], 2010 Slip Op 05601 at 17 [*citing*, Matthews v. Eldrige, 424 US 319, 333 [1976]). The function of the court in deciding a petition brought pursuant to Article 78 is to determine, whether based upon the proof adduced before the body making a determination whether the determination made had a rational basis or it was arbitrary and capricious. Petitioner has failed to show that the City respondents' actions, decisions and determinations which were voted on and approved by the City Counsel June 30, 2009 were made in violation of lawful procedure. The approval had a rational basis. Consistent with the court's decision, the petition must be denied.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by The Coalition for a Livable West Side ("Coalition") (motion sequence no. 2), to submit an amicus brief is granted and the brief is considered; and it is further

ORDERED that the motion by The Committee for Environmentally Sound Development, Inc. and the Park River Democrats ("Committee") (motion sequence no. 3),

to submit an amicus brief is granted and the brief is considered; and it is further

ORDERED, DECLARED AND ADJUDGED that the petition of Alfred Condominium is hereby denied and this summary proceeding dismissed.

This constitutes the decision, order and Judgment of the court.

Dated: New York, New York
August 16, 2010

So Ordered:

Hon. Judith J. Gische, JSC

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 141B).