

**Weeks Woodlands Assoc., Inc. v Dormitory Auth. of  
the State of New York**

2011 NY Slip Op 30286(U)

January 5, 2011

Sup Ct, NY County

Docket Number: 110502/10

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN  
Justice

PART 17

WEERS WOODLANDS

INDEX NO.

110502/10

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

DORMITORY AUTHORITY

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

*hybrid proceeding/answer and cross motions are denied or adjourned*

**FILED**

JAN 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/5/11

*[Signature]*  
J.S.C.  
**EMILY JANE GOODMAN**

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 17

-----X

In the Matter of the Application of

WEEKS WOODLANDS ASSOCIATION, INC.,  
JAMES CHIN, KAREN PENDER, DOMINICK  
WITHANACHIHI and FRANK CASELLI,

Petitioners,

For judgment pursuant to Article 78 and  
Section 3001 of the Civil Practice Law  
and Rules,

Index No. 110502/10

-against-

DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK, NEW YORK STATE DEPARTMENT OF  
HEALTH, NEW YORK CITY DEPARTMENT OF  
BUILDINGS, ST. MARY'S HOSPITAL FOR  
CHILDREN, INC. and ST. MARY'S HEALTHCARE  
SYSTEM FOR CHILDREN, INC.,

Respondents.

-----X

EMILY JANE GOODMAN, J.S.C.:

**FILED**  
JAN 18 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

This is a combined Article 78 proceeding and action for a declaratory judgment and injunctive relief, pursuant to CPLR 3001 and 6301. Petitioners Weeks Woodlands Association, Inc., James Chin (Chin), Karen Pender (Pender), Dominick Withanachihi (Withanachihi) and Frank Caselli (Caselli) seek a declaration that the current project of respondents St. Mary's Hospital for Children, Inc. and St. Mary's Healthcare System for Children, Inc. (collectively, St. Mary's) to build a 90,000 square foot addition to their hospital for children in Bayside Queens, New York, is unlawful, and to enjoin the construction of the addition. Petitioners move for a preliminary injunction against

any construction, or any issuance or sale of bonds or other financial instruments to finance the construction, or, if such bonds have been sold, enjoining the disbursement of the proceeds to support the construction, pending the final outcome of the case.<sup>1</sup>

In two separate cross motions, respondents New York State Department of Health (DOH) and New York City Department of Buildings (DOB) cross-move to dismiss the petition. In papers filed jointly, the Dormitory Authority of the State of New York (DASNY) and St. Mary's oppose both petitioners' motion for a preliminary injunction and their amended verified petition. Though they have not filed a motion to dismiss, in their Memorandum of Law, they ask that the amended petition be dismissed.

Petitioner Weeks Woodlands Association, Inc. (the Association), is a citizens' advocacy group devoted to preserving the character and appearance of the Weeks Woodlands neighborhood. It represents the neighborhood and its residents before local legislative and administrative bodies in matters relating to zoning, traffic, construction and parking matters, and meets regularly to consider issues that impact the environment, safety, and character of the neighborhood. The Association, which

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<sup>1</sup> Petitioners' application for a temporary restraining order was heard by Justice Debra A. James, who denied the application on August 20, 2010.

allegedly has approximately 130 members, many of whom live in close proximity to St. Mary's, has focused on the efforts of St. Mary's to expand its physical plant.

Petitioners Chin, Pender, and Withanachihi and their families live in homes which are immediately adjacent to the St. Mary's property. Chin is the vice president of the Association. Petitioner Caselli and his wife live directly across the street from the proposed construction access road.

#### **BACKGROUND**

St. Mary's has operated a 97-bed hospital for children on an eight-acre campus, at 29-01 216<sup>th</sup> Street, Bayside, Queens, since the early 1950's. The neighborhood in which St. Mary's is located is made up of single-family detached homes. It is zoned R2A and R1-2, and is bordered on the east by the Cross Island Parkway. According to St. Mary's, its current building, which was built in 1950, remained largely unchanged until the mid-1980's when a fifth story was added. St. Mary's now seeks to add a five-story 90,000 sq. ft. addition, which will be situated east of the existing building, abutting that building on one side of the addition. St. Mary's intends to maintain the existing number of beds in the hospital, but to move the majority of patients from their existing four-bed rooms to single or double rooms; to create a rehabilitation wing; to move the existing public school (P.S. 23Q), that operates for St. Mary's in-patients, from

temporary trailers housed on the property to inside the hospital; and to add approximately 55 parking spaces to the spaces that are now maintained on the property, both to accommodate the additional employees who will be working at the facility, and to decrease the use of on-street parking. St. Mary's also intends to modernize the infrastructure of its existing facility, particularly the heating/ventilation/air conditioning (HVAC), mechanical, electrical, plumbing, and other systems.

Petitioners allege that over recent years, St. Mary's has increased ambulatory programs that bring bus and other traffic through the neighborhood. According to petitioners, at one point St. Mary's allowed its building to be used by a college, contrary to applicable zoning, but that activity was discontinued.

Petitioners further allege that in 1994, St. Mary's sought approval for an expansion plan that would have added 48,000 sq. ft. to its facilities, but the plan was dropped, due in part to community opposition.

#### **DOH INVOLVEMENT**

In December 2006, allegedly with no notice to the community, St. Mary's filed an application for a Certificate of Need (CON) with DOH to permit the construction of an addition and to renovate its existing facilities. On January 24, 2008, a meeting of the DOH project review committee was held, at which approval of the CON was recommended, subject to review by the State

Hospital Review and Planning Council (SHRPC) of DOH. In its analysis of the project submitted to the SHRPC, DOH designated the project a Type I project, pursuant to the State Environmental Quality Act (SEQRA), and indicated that the Borough of Queens should be the lead agency for the project. The meeting of SHRPC was held on February 7, 2008. Both meetings were open to the public. Petitioners allege that, only at that time, did members of the public, including adjacent neighbors, learn of the plans for the proposed building project. According to petitioners, however, hundreds of letters were sent to St. Mary's opposing the project. See letters of opposition annexed as Exhibit D to Affidavit of Thomas M. Jung, Director of Division of Health Facility Planning of the Office of Health Systems Management, DOH.

On February 20, 2008, DOH approved the CON for a project with an estimated cost of \$103 million, subject to, among other things, submission of documentation "confirming all necessary local zoning and land use approvals have been granted prior to the Department's issuance of approval to commence construction." Letter to Edwin Simpser, Executive Vice President, St. Mary's Hospital for Children from James W. Clyne, Jr., Deputy Health Commissioner, DOH, Jung Aff., Exh. E.

Approximately two years later, on March 29, 2010, St. Mary's submitted an application with updated construction costs. On

April 9, 2010, DOH approved a revision to the 2008 CON permitting an increase in the project costs, and, according to petitioners, also permitting a redesign of the facility with a significant increase in its size. On June 10, 2010, DOH found that the contingencies specified in the February 20, 2008, approval had been met, and issued a letter approving construction.

#### **DASNY INVOLVEMENT**

According to petitioners, St. Mary's application for a CON indicated that it planned to seek tax-exempt financing for the project from DASNY, however, minutes of an October 28, 2009 meeting of DASNY indicated that, at that point, DASNY was not authorized to provide financing for St. Mary's unless special legislation was passed. Apparently, however, sometime after October 28, 2009, St. Mary's became a member of the New York State Rehabilitation Association, and, on May 12, 2010, the DASNY board of directors adopted a resolution "to proceed to take the necessary action to prepare the appropriate documents to provide for the financing" of St. Mary's project, in the amount of approximately \$107 million of tax-exempt and/or taxable bonds. See R0032-R0034<sup>2</sup>.

On May 21, 2010, DASNY wrote to a variety of State and City agencies, indicating that if did not receive written objection

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<sup>2</sup> "R" citations refer to citations to the Record prepared by DASNY.

from an involved agency within 30 days, it would assume the role of lead agency, pursuant to SEQRA, and enclosing a copy of an Environmental Assessment Form (EAF) - Part 1, prepared for DASNY on behalf of St. Mary's, relating to the St. Mary's project. The letter also stated that DASNY had made a preliminary determination that the proposed project was an "unlisted action" rather than a "Type 1 action" as DOH had initially concluded. R0036-R0037.

On May 31, 2010, Memorial Day, DASNY published a notice in the New York Times, pursuant to the Tax Equity and Fiscal Responsibility Act (TEFRA) (26 USC § 147 [f]), indicating that a public hearing would be held concerning the issuance of bonds, but, according to petitioners, no notice was given to the local community or published on DASNY's website, or in local publications. The public hearing was conducted on June 15, 2010, at DASNY's office in New York City.

One week later, on June 22, 2010, DASNY approved and posted a Negative Declaration Notice of Determination of Nonsignificance (Negative Declaration), pursuant to SEQRA, indicating that the proposed construction would result in no significant adverse impacts on the environment, and, therefore, no environmental impact statement (EIS) would be prepared.

On June 23, 2010, DASNY adopted a final resolution approving bond financing for St. Mary's construction project, and on July

8, 2010, Governor David Patterson signed the "Approval of the Governor of the State of New York for the Issuance of Tax-Exempt Bonds." According to DASNY, bonds have now been sold for the project.

#### DOB INVOLVEMENT

On October 6, 2008, St. Mary's sent a letter to DOB seeking confirmation that, pursuant to section 24-111 (a) of the Zoning Resolution of the City of New York (ZR), the floor area ratio (FAR)<sup>3</sup> for St. Mary's was permitted to a maximum of 1.0. In the letter, St. Mary's indicated that it intended to enlarge its main building and that the proposed enlargement would bring the FAR to approximately 0.77. According to St. Mary's, in R2 districts, the maximum FAR for community facilities is generally 1.0 (see ZR § 24-11). On February 28, 1973, however, ZR § 24-11 was modified by ZR § 24-111 (a), which decreased the FAR for community facilities to that of the FAR for the residential area, or 0.5 FAR. ZR § 24-111 contains an exception for buildings for which plans were filed with the DOB prior to November 12, 1972 which states that "this provision shall not apply to buildings for which plans were filed with the Department of Buildings prior to

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<sup>3</sup> Floor area ratio is defined in the Zoning Resolution as follows: "'Floor area ratio' is the total *floor area* on a zoning lot, divided by the *lot area* of that 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). ZR § 12-10.

November 15, 1972, including any subsequent amendments thereof."  
(ZR § 24-111 (a) [emphasis added]).

In its letter to DOB, St. Mary's indicated that a new building application was filed on its behalf in 1948, and the Certificate of Occupancy (C of O) for the building was issued in 1952. Applications to enlarge the building were filed with DOB in 1983 and 1984. St. Mary's asserted that its planned project is an enlargement of the hospital and related facilities and that, therefore, the exception contained in ZR § 24-111 (a) applies, and that the appropriate FAR is 1.0.

On October 6, 2008, in a notation on St. Mary's letter, DOB denied St. Mary's request, indicating that the proposed construction must comply with the 0.5 FAR, or that St. Mary's must secure approval from the Board of Standards and Appeals (BSA) for a FAR greater than 0.5.

Approximately two weeks later, on October 20, 2008, in an additional notation on the St. Mary's letter, the requested FAR of 1.0 was approved with the notation, "copy is attached indicating building was built prior to Nov. 15, 1972." There was no indication of why DOB changed its determination.

On May 10, 2010, St. Mary's filed a Zoning Resolution Determination Form with DOB requesting a determination that the Cross Island Parkway be considered a public park, and that, therefore, the height and setback regulations applicable to a

street do not apply to the planned construction.

On May 13, 2010, DOB ruled as follows:

OK to accept the Grand Central Parkway (*sic*) which is adjacent to the eastern lot line of this property to be parkland. Therefore it is ok to consider the land running parallel with the Parkway to be a side yard. Building must not encroach on the sewer easement. You may have to comply with 24-551 Required side yards for tall buildings in low bulk districts.<sup>4</sup>

ZRD1: Zoning Resolution Determination Form, Annexed to Reply Affirmation of Michael S. Gruen as Exh. A, at 8.

The amended verified petition alleges that on July 12, 2010, DOB issued building/work permits for certain work connected with the construction of the new building.

#### PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

Because it is a drastic remedy, in order to obtain a preliminary injunction, petitioners must show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 (1990); *Matter of*

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<sup>4</sup> The court notes that the DOB response refers to the Grand Central Parkway rather than the Cross Island Parkway. Petitioners argue that that error raises a question of fact regarding the validity of DOB's determination that the eastern lot line for the project constitutes parkland. In its letter to Counsel for petitioners dated October 12, 2010, and discussed *infra*, however, DOB identifies the Parkway in question as the Cross Island Parkway. The Court therefore concludes that the DOB reference to the Grand Central Parkway was in the nature of a typographical error. In any case, as discussed further below, at most the reference to the Grand Central Parkway would raise a question of fact that should appropriately be resolved by the Board of Standards and Appeals, rather than by the court.

*Non-Emergency Transporters of New York, Inc. v Hammons*, 249 AD2d 124, 127 (1<sup>st</sup> Dept 1998). Before considering petitioners' motion, however, the court will consider the cross motions to dismiss of DOH and DOB.

#### **DOH CROSS MOTION TO DISMISS**

Petitioners assert two causes of action against DOH, failure to conduct an environmental review when it approved the CON for the construction project in February 20, 2008, and when it approved modifications of the CON on April 9, 2010, in violation of SEQRA (first cause of action) and failure to provide notice and opportunity for a public hearing in connection with its review and approvals of the CON.

DOH submits the affidavit of Thomas M. Jung, Director of the Division of Health Facility Planning at the Office of Health Systems Management, DOH, who states that St. Mary's submitted an application for approval of its modernization plan on December 28, 2006. The application, which included an Environmental Assessment prepared by St. Mary's, was scheduled for review by the State Hospital Review and Planning Council (SHRPC) which, pursuant to Public Health Law § 2802, makes recommendations to the Commissioner of Health concerning construction applications. As part of the proposal provided to SHRPC, DOH stated with respect to Environmental Review, "[t]he Department has deemed this project to be a TYPE 1 Action and the lead agency shall be

the county of Queens or the authority having jurisdiction." St. Mary's Hospital for Children, # 062417, at 13, Exh. C to Affidavit of Thomas M. Jung.

With respect to its February 2008 determination that the project was a Type 1 action but that Queens County or the authority having jurisdiction, rather than DOH, was the lead agency, DOH contends that its conclusion was consistent with the SEQRA regulatory scheme which states that among the criteria used to designate the lead agency are "whether the anticipated impacts of the action being considered are primarily of statewide, regional or local significance, i.e., if such impacts are of primarily local significance, all other considerations being equal, the local agency involved shall be lead agency." 10 NYCRR 97.7 (d) (1) (i).

St. Mary's was notified that pursuant to the Open Meetings Law, its application would be reviewed by the Project Review Committee of SHRPC in a meeting on January 24, 2008, which would be open to the public, and that a subsequent public meeting of SHRPC would be held on February 7, 2008. Although Jung does not state the manner in which the public was notified of these meetings, annexed to his affidavit are numerous letters to DOH dated late January and early February 2008, from members of the public, including petitioners Chin, Pender, Withanachihi, opposing St. Mary's application for a CON.

Jung states that following SHRPC's positive recommendation of the project, DOH gave contingent approval of the application on February 20, 2008, including the following contingency, among others: "Submission of written documentation acceptable to the Department, confirming all necessary local zoning and land use approvals have been granted, prior to the Department's issuance of approval to commence construction."

According to Jung, DOH approved the updated costs on April 9, 2010, and on June 21, 2010, DOH found that the contingencies contained in the February 20, 2008 contingent approval had been met, and issued a letter approving construction.

In support of its motion to dismiss the proceeding, DOH first argues that the proceeding is time-barred against DOH, because its approval of the CON occurred in February 2008, and, thus, the claims against DOH are untimely under the applicable four-month statute of limitations.

Although petitioners contend that DOH's approval of the CON without conducting a full environmental review violated SEQRA, they also contend that the statute of limitations was tolled until April 8, 2010, when DOH approved the updated costs for the project. The court concludes, however, that this case is much like that of *Matter of Young v Board of Trustees of Vil. of Blasdell* (89 NY2d 846 [1996]), where, in December 1993, the village passed a resolution authorizing the lease of village

property for the construction and operation of a solid waste transfer facility, and then, in September 1994, it issued a negative declaration in connection with a permit for a solid waste facility on the leased property. Petitioners challenged both actions, contending that the Village violated SEQRA twice, when it authorized the lease without environmental review and when it made the negative declaration in connection with the permit application. The Court of Appeals concluded that the two challenged actions were separate, that the challenge to the validity of the lease was time-barred and the statute of limitations for the resolution was not "renewed" because of the later negative declaration. So too, here, when DOH in February 2008 approved the CON it "committed itself to 'a definite course of future decisions'" (*id.* at 848-849, quoting 6 NYCRR 617.2 [b] [2], [3] [additional citation omitted]), and petitioners' challenge DOH's February 2008 decision is time-barred.

With respect to the DOH's April 9, 2010 approval of the updated costs, the court agrees with DOH that the April 9, 2010 approval did not constitute a full new approval that tolled the statute of limitations on the February 2008 approval of the CON, or that triggered an independent SEQRA review. Thus, petitioners' challenge to DOH's actions is untimely and must be dismissed. Moreover, the court agrees with DOH that the issue of a lack of environmental review in connection with its April 9,

2010 approval is of no import given that DASNY did assume the role of lead agency and conducted a review, pursuant to SEQR. Because the challenge is time barred, it is not necessary to reach DOH's arguments regarding mootness, standing and lack of personal jurisdiction over DOH based upon an alleged failure to serve the office of the Attorney General. However, in light of the fact that the individual petitioners all live adjacent to or directly across from the project site, the court concludes that they do have standing (see *Matter of King v County of Monroe*, 255 AD2d 1003, 1003 (4<sup>th</sup> Dept 1998), and given the full participation of the Attorney General's office from the inception of this litigation, any alleged deficiency in serving the Attorney General's office has been cured.

#### **DOB CROSS MOTION TO DISMISS**

Petitioners assert a single cause of action against DOB for failure to comply with applicable zoning resolutions.

DOB moves to dismiss the amended petition on the basis that petitioners have failed to exhaust their administrative remedies. DOB argues that petitioners were required to appeal to the Board of Standards and Appeals (BSA) from the building permit issued by DOB on July 12, 2010. In their papers opposing DOB's cross motion, petitioners conceded that they have not exhausted their administrative remedies, but they asserted that they have not done so, only because they are faced with immediate and

irreparable harm.

Rather than appealing to the BSA, regarding DOB's issuance of a building permit, on August 10, 2010, counsel for the petitioners wrote to Mr. Ira Gluckman, Queens Borough Commissioner, DOB, challenging the building permit on three bases: 1) failure of St. Mary's to post the plans for the planned project on the DOB's Information System/website; 2) failure of the proposed project to comply with the 0.5 FAR applicable to the residential area as required by ZR § 24-111 and inapplicability of the "grandfathering" exception in the zoning resolution which would permit a FAR of 1.0; and 3) improperly treating St. Mary's as a hospital, rather than an ambulatory care facility, and, arguing that the latter would not be permitted in an R2A zone at all.

On August 19, 2010, counsel for the petitioners again wrote to Commissioner Gluckman, supplementing their earlier letter and challenging DOB's May 11, 2010 decision to accept the Cross Island Parkway as a side yard, thereby reducing the amount of set-back required from the easterly property line.

On October 12, 2010, Commissioner Gluckman wrote to counsel for petitioners reiterating DOB's October 20, 2008 ruling that the grandfathering provision in ZR § 24-111 (a) permitting a 1.0 FAR applies, because the plans for the original St. Mary's building were filed in 1948. Commission Gluckman also rejected

petitioners' contention that St. Mary's is improperly characterized as a Use Group 4 non-profit hospital, indicating that the current certificate of occupancy for the premises is for a Use Group 4 hospital and accessory uses and that the proposed uses for the enlargement serve admitted patients. Finally Commissioner Gluckman rejected petitioners' claim that the Cross Island Parkway abutting the eastern boundary of St. Mary's property is a "street" as defined by ZR § 12-10. Rather, according to Gluckman, the parkway meets the definition of "public park" and, therefore, the front yard requirements and maximum front wall height and setback requirements under the zoning resolutions that would apply to a property located on a "street" are not triggered. Petitioners have indicated that they intend to appeal DOB's October 18, 2010 decision to the BSA.

On October 29, 2010, following a conference called by this court concerning the applicability of the grandfathering provision in the zoning resolution, petitioners submitted a letter to the court seeking to withdraw their previous concession concerning exhaustion, and arguing that, where an issue of law is involved, exhaustion is not required. On November 1, 2010, DOB responded, arguing that petitioners should not be permitted to change their position many weeks after the papers for both sides had been submitted. DOB further argues that, having taken the position that the petition must be dismissed because of

petitioners' failure to exhaust administrative remedies, DOB has not briefed the zoning issues on the merits. DOB further argues that, in any event, the cases that petitioner cites are at odds with the body of law which states that the Board of Standards and Appeals has the specialized knowledge and expertise to address zoning issues and that exhaustion is necessary. Finally, DOB contends that there are no pure issues of law before the court.

Generally exhaustion of administrative remedies is necessary and the BSA is the ultimate administrative authority charged with enforcing zoning resolutions. *Matter of Wilkins v Babbar*, 294 AD2d 186, 187 (1<sup>st</sup> Dept 2002), citing *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 (1996).

Where the question is one of law, however, exhaustion is not necessary. *Matter of Sievers v City of New York, Dept. of Bldgs.*, 146 AD2d 473 (1<sup>st</sup> Dept 1989); *Rosenberg v 135 Willow Co.*, 130 AD2d 566 (2d Dept 1987). Furthermore, where petitioners are seeking injunctive relief, the failure to exhaust is not fatal to plaintiffs' claim. See *Haddad v Salzman*, 188 AD2d 515, 516 (2d Dept 1992).

The question of whether the grandfathering exception to the down-zoning provision in ZR § 24-111 (a) applies to the expansion of a building built before 1972 is one of law, to be determined by the court in the first instance. It is for this reason that the court directed the parties to appear on October 12, 2010 to

address the question relating to the applicability of ZR § 24-111 (a). Furthermore, in light of the court's request, DOB should have been aware that the court intended to consider the applicability of ZR § 24-111 (a) to the St. Mary's project. Thus, DOB's motion to dismiss based upon lack of subject matter jurisdiction is denied to the extent that the issue of the applicability of the grandfathering provision is to be decided by the court, but is otherwise granted.

Petitioners have also raised two other issues regarding zoning matters: whether St. Mary's is a hospital or an ambulatory care facility, and whether the Cross Island Parkway is parkland or a street. These issues regarding the character of the St. Mary's facility and the definition of the Cross Island Parkway and, therefore, the height and setback requirements under applicable zoning resolutions, involve questions of fact which are within the expertise of the BSA, and exhaustion with respect to those matters is required. *Matter of Wilkins v Babbar*, 294 AD2d 186, *supra*. Therefore, the court will not address those matters at this time.

With respect to the application of the grandfathering provision to the St. Mary's expansion, petitioners argue that the essence of zoning is to develop comprehensive plans to meet the needs of a community and that property owners in a zoning district must be treated uniformly. They further contend that

although grandfathering exceptions are sometimes made for existing structures that would violate new rules, in order to protect the property owners against unjust financial losses, because of the importance of uniformity in zoning, those exceptions are construed narrowly and against property owners. *See Matter of Albert v Board of Stds. and Appeals of City of N. Y.*, 89 AD2d 960, 962 (2d Dept 1982) ("the judiciary does not hesitate to give effect to restrictions on nonconforming uses due to the strong policy favoring the eventual elimination of those uses").

Finally, petitioners submit portions of a New York City Department of City Planning (DCP) document containing certain proposed modifications of the New York City Zoning Resolutions. *See Resolution Proposed Key Terms Clarification Zoning Text Amendment* dated September 27, 2010.

One of the proposed text modifications would eliminate the grandfathering provision from ZR § 24-111 99 (a).<sup>5</sup> The DCP document, which describes the amendment as a clarification, states: "Paragraph (a) amended to delete obsolete provision." *See Table 2: Clarifications and Modifications Consistent With Department of Buildings Practice.*

Petitioners contend that this reference to the obsolescence

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<sup>5</sup> By letter dated December 21, 2010, petitioners advised the court that the deletion of the grandfathering provision is now being held in abeyance as a result of this litigation.

of the grandfathering provision means that the provision was only intended to protect buildings that were "in the approval pipeline on November 15, 1972," but not projects to be built 40 years later. According to petitioners, DCP used the word "obsolete" to describe the grandfathering provision, because now, forty years later, no buildings whose plans were filed before November 15, 1972 could still be in the construction pipeline, and, therefore, there was no longer a need for the grandfathering provision.

The DCP documents supporting the proposed amendment to the Zoning Resolution could be interpreted as petitioners argue. However, another provision in that same set of documents suggest a different possible interpretation of ZR § 24-111 (a).

One purpose of the proposed modifications is to propose "text modifications that are necessary to clarify the intent of the Zoning Resolution, resolve conflicting regulations, or bring a regulation into accordance with current Department of Buildings practice." See Key Terms Clarification Text

[http://www.nyc.gov/html/dcp/html/key\\_terms/index.shtml](http://www.nyc.gov/html/dcp/html/key_terms/index.shtml)

Among the proposed amendments is the redefinition of the term "building." According to the DCP document, one problem with the current definition of "building" "is that a new building that is constructed so that it abuts an existing building on the same zoning lot is considered an 'enlargement' in zoning terms." *Id.* This could be read as suggesting that ZR § 24-111 (a) applies to

the St. Mary's building project because it abuts to, and therefore is an enlargement of, a building whose plans were filed with DOB prior to 1972. Further, one of the proffered reasons for the proposed amendments include the avoidance of undesirable outcomes, and therefore, the amendment may have been proposed because, as a policy matter, older buildings (buildings whose plans were filed prior to 1972) should no longer be given special protection, and that, in the future, community facilities in R1 and R2 districts should not be permitted to be enlarged to the extent that they would exceed the 0.5 FAR that applies to residential buildings in those districts. Therefore, the proposed amendment sheds little light on the proper interpretation of the current provision.

Regardless of whether the court believes, as a policy matter, that an exception to the down-zoning for community facilities should not apply to buildings that were already completed well before the time the provision went into effect, a literal reading of the grandfathering provision would appear to apply to *all* buildings whose plans were filed with DOB prior to November 15, 1972, whether or not they were completed then. Petitioners would effectively have the court insert language into ZR § 24-111 (a) modifying the word "buildings" so as to apply the provision only to buildings still under construction or in the planning pipeline, the plans for which were filed with DOB prior

to November 15, 1972. However, under the rules of statutory construction, when the court is ascertaining the intent of the legislature, it must first look to the literal reading of the act itself (see Statutes § 92 [b]), and "the statutory language is generally construed according to its natural and most obvious sense" (Statutes § 94), and "new language cannot be imported into a statute to give it a meaning not otherwise found therein." See Statutes § 94, Comment, citing among others, *Matter of Daniel C.*, 99 AD2d 35 (2d Dept), *affd* 63 NY2d 927 (1984).

Furthermore, according to the DCP documents supplied by petitioners, because the proposed construction abuts (even if minimally) the original hospital building, under the existing zoning resolution it is considered an enlargement of the original building. The text of the grandfathering provision exempts from the down-zoning "buildings for which plans were filed with the Department of Buildings prior to November 15, 1972, including any subsequent amendments thereof" (ZR § 24-111 [a]), thus, it would appear to apply to the enlargement of the St. Mary's building.

The court, therefore, concludes that petitioners have failed to establish a likelihood of success on the merits of their argument that the grandfathering provision does not apply to the proposed enlargement of the St. Mary's hospital building, and their motion for a preliminary injunction on that basis must be

denied.<sup>6</sup>

**OPPOSITION OF DASNY AND ST. MARY'S**

In their motion for a preliminary injunction, petitioners focus on two of their causes of action against DASNY's failure to comply with SEQRA, and an absence of legislative authority to finance the St. Mary's addition.

"SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making.'" *Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 (2004), quoting *Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679 [1988]). The regulations promulgated pursuant to SEQRA classify certain specifically described actions as Type I (6 NYCRR 617.4) or Type II (6 NYCRR 617.5) actions, which are presumed to require environmental review. Other specifically described actions are designated as Type II actions, which require no further

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<sup>6</sup> In their letter to the court dated October 18, 2010, petitioners also argue that the proposed construction should not be considered an extension of the old building and, therefore, entitled to be built as-of-right, because there is only a minimal connection between the two structures, and because the functions of the new and old structure are different and "the need for additional space has been created by new services that are quite distinct from the old." Letter to Hon. Emily Jane Goodman, from Albert K. Butzel, dated October 18, 2010, at 3. Even if the connections can be considered minimal, this does not alter the court's conclusion that petitioners have failed to demonstrate a likelihood of success on the issue of applicability of the grandfathering provision.

environmental review by the lead agency. 6 NYCRR 617.3 (f). All other actions which are not specified as Type I or Type II actions are considered "unlisted" actions. 6 NYCRR 617.2 (ak). Type I and "unlisted" actions require the preparation of an EAF, "whose purpose is to aid an agency 'in determining the environmental significance or nonsignificance of actions' (6 NYCRR 617.2 [m]; see also 617.6 [a] [2], [3])." *Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d at 519. Pursuant to SEQRA, the agency "principally responsible for carrying out, funding or approving" the proposed action is considered the "lead agency" pursuant to ECL § 8-0111 (6) and 6 NYCRR 617.2 (u), and it must initially determine whether the proposed action may have a significant effect on the environment as provided in ECL § 8-0109 (2), (4) and 6 NYCRR 617.2 (u). *Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of New York*, 72 NY2d at 680.

In its initial approval of the CON, DOH indicated that the proposed expansion of St. Mary's was a Type I action and indicated that the Borough of Queens should be the lead agency. Ultimately, however, DASNY, the agency principally responsible for funding the project through the issuance of tax-exempt bonds, designated itself as the lead agency.

DASNY apparently disagreed with DOH's conclusion that the project was a Type I action, concluding, at least preliminarily,

that the project was an unlisted action. See Letter from Matthew A. Stanley, Senior Environmental Manager, DASNY to Ms. Jodi Siegel-Stein, Dated May 21, 2010, at 2, R0037. DASNY prepared an 11-page EAF - Part I, Dated May 19, 2010, and a detailed 66-page SEQRA Supplemental Report, dated June 2010. On the basis of the information contained in those reports, DASNY concluded that the project would not create any significant adverse environmental impacts and that the preparation of a full-blown Environmental Impact Statement (EIS) was not necessary. On June 22, 2010, DASNY issued a 26-page Determination of Nonsignificance (Negative Declaration).

Petitioners also contend that DASNY failed to coordinate with other involved agencies, as required by SEQRA. According to Matthew A. Stanley, the Senior Environmental Manager in DASNY's Office of Environmental Affairs, however, he sent copies of a lead agency request letter and the EAF - Part I describing the project to the offices of, including, but not limited to, the Mayor, Queens Borough President and the Director of Planning, the respective New York City Councilperson, State Senator, State Assembly Member, New York City Department of City Planning, New York City Department of Environmental Protection, New York City Department of Transportation, New York State Department of Environmental Conservation, New York State Department of Health, and the New York State Office of Parks, Recreation and Historic

Preservation. See Stanley Affidavit, ¶ 16; R0038-0039. Although the mailing did not go to specific neighbors of St. Mary's, it did go to the Chair and District Manager of Queens Community Board 11.

Citing *Matter of Hell's Kitchen Neighborhood Assoc. v City of New York* (Feinman, J., index No. 108333/09 May 10, 2010), petitioners contend that DASNY's actions were inadequate, because DASNY did not include the DOB in its notification. In the *Hell's Kitchen Neighborhood Assoc.* case, the court annulled the lead agency's negative declaration, because it failed to designate the New York State Department of Environmental Conservation (DEC) as an interested agency, despite the fact that a permit issued by DEC was required for a the project. Here, given the fact that a building permit from DOB was necessary before construction could begin, and important issues exist regarding zoning resolutions applicable to the project, DASNY should have identified DOB as an involved agency and kept it informed throughout the process. The failure to make DOB a part of the process was not fatal, however, (*see Matter of King v County of Monroe* (255 AD2d at 1004), since DOB has not objected, and both the EAF and Supplemental EAF relied on determinations by DOB, thereby incorporating DOB in the process.

Petitioners also contend that, particularly in light of DASNY's characterization of the Cross Island Parkway as parkland

for the purposes of the zoning resolutions relating to setback and height, the agency should have deemed the action a Type I, rather than an unlisted action. Petitioners further argue that an Environmental Impact Statement (EIS) must be prepared for Type I actions, and that DASNY's characterization of the action as an unlisted action and, therefore, its failure to prepare an EIS, violated SEQRA. However, both Type I and unlisted actions require the preparation of an EAF, which was prepared for the St. Mary's project, and on the basis of an EAF prepared for either type of action, the lead agency "may issue a negative declaration where it concludes 'that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant' (6 NYCRR 617.7 [a] [2])." *Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d at 520.

Petitioners further challenge the EAF prepared on the basis that it "fundamentally misapprehended" (Amended Verified Petition, ¶ 51) the zoning requirements applicable to the project, and, that it answered "no" to the question "Do you know of any public controversy related to potential adverse environmental impacts associated with your proposal?"

With respect to the issue of zoning, the SEQRA Supplemental Report discusses ZR § 24-111 and the potential applicability of the 0.5 FAR. The report concludes that pursuant to section 24-

111 (a) of the zoning resolution, a FAR of 1.0 is applicable to the project, noting that in October 2008, the DOB confirmed the applicability of the 1.0 FAR.

This court has previously concluded that petitioners have failed to establish a likelihood of success on the merits with respect to their claim regarding DOB's October 2008 approval of the applicability of a 1.0 FAR. Petitioners have therefore also failed to establish a likelihood of success on the merits regarding DASNY's adoption of DOB's interpretation of the zoning requirements applicable to the project.

With respect to the question of community controversy regarding the project, although DASNY was concededly aware of "community concerns" regarding the project (see e-mail from Jack Homkow to James Chin, dated June 22, 2010, at R0087), in light of the examination of substantive environment concerns in both the EAF and the SEQRA Supplemental Report, answering "no" to the question regarding community controversy is not sufficient to deem the EAF inadequate. Although troublesome, the court cannot say that this statement was fatal to the process.

Petitioners also allege that DASNY failed to take a hard look at the neighborhood character, vehicle traffic, zoning, negative visual impacts of the project, and the impacts of construction that would burden the adjoining neighbors. See *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400,

417 (1986) (the court "may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination").

In its discussion of Land Use, Zoning and Public Policy, the SEQRA Supplemental Report discusses the character of the neighborhood as well as the zoning issue. According to the City Environmental Quality Review (CEQR) Technical Manual, a neighborhood character assessment is necessary when it appears that the proposed project would have more than a moderate effect on several elements which make up the neighborhood: Land use, urban design, visual resources, historic resources, socioeconomic conditions, traffic and noise. CEQR Technical Manual at 3H-1. The SEQR Supplemental Report looks at those categories, and concludes that the project would not introduce a new land use, there are no historic resources affected by the project, it would not displace any local residents, businesses, or employees, or result in substantially new development that is markedly different from what is now existing in the area, and would not result in a significant number of new vehicle trips, or result in significant noise impacts. SEQR Supplemental Report, at 58, R0225. Petitioners specifically challenge the assertion that the proposed addition would be "in residential scale" (*id.*); however, given the fact that the proposed project will be of approximately

the same size as the current hospital building and will be located to the east of the existing building minimizing its visibility from most of the neighborhood, petitioners have not demonstrated that the use of the term "residential scale" is fatal to the examination of neighborhood character in the SEQR Supplemental Report and does not amount to a failure to take a "hard look" at the issue.

Regarding the matter of zoning, although petitioners disagree with the analysis of the applicable zoning resolution, the issue is certainly examined in the SEQR Supplemental Report, and the analysis is consistent with that of DOB, the agency primarily responsible for determining the applicability of zoning resolutions. R0172-R0176.

With respect to the issue of traffic, petitioners contend that the new building will result in an increase in ambulatory services, and, therefore, a substantial increase in traffic. According to the SEQRA Supplemental Report, and the affidavits of Edwin Simpser, Executive Vice President and Chief Medical Officer for St. Mary's, Matthew A. Stanley, however, no new services are planned in connection with the project<sup>7</sup> (R0215, Simpser Affidavit

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<sup>7</sup> Petitioners' contention that there will be increased activity as a result of the larger floor area of the building arises in other contexts as well. For example, they also contend that the increase in activity will have an impact on neighborhood character. Petitioners do not provide any evidence for their contention, however, and particularly in light of St. Mary's statement that there will be no new activities, petitioners' speculations are insufficient to challenge the Negative

¶ 18, and Stanley Affidavit ¶ 53), and therefore, according to the Supplemental Report, there will be only a minimal increase in vehicle trips in connection with the new staff. R0214-R0216. Although St. Mary's expects to add 68 new staff members as a result of the project, the added staff will be somewhat offset by the decrease in existing staff, because approximately 20 human resources staff will be relocated to office space off-campus. Stanley Affidavit ¶ 53; SEQR Supplemental Report, R0215. Moreover, the new staff members are expected to work on staggered shifts like the existing staff, and therefore, the trips of the net 48 additional staff members to the facility and concomitant need for parking will be staggered throughout the day. The SEQR Supplemental Report also noted that the 55 new parking spaces on St. Mary's property, will not only provide parking for the new staff members, they will help to decrease the use of off-campus parking (R0215), which is now a concern of the neighborhood. According to the City Environmental Quality Review (CEQR) Technical Manual, "if the proposed action would generate fewer than 50 peak hour vehicle trip ends, a need for further traffic analysis would be unlikely." CEQR Manual, 30-2. Thus, the conclusion that a detailed traffic and parking analysis is not needed would appear to be consistent with the CEQR Manual, and it cannot be said that St. Mary's and DASNY failed to take a hard

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Declaration on that basis.

look at the issue of traffic.

The SEQRA Supplemental Report, devotes four pages of discussion to the impacts of the construction activities, including but not limited to the impact on air quality and noise, including discussion of measures that would be taken to minimize construction dust and the use of noise mitigation efforts. See SEQRA Supplemental Report at R0226-0230. The visual impacts of the project are discussed in the SEQRA Supplemental Report's treatment of Urban Design and Visual Resources, in which the report notes, among other things, that the new construction would be partially shielded from the community because of its placement to the east of the existing building. *Id.* at R0198-0199; see also discussion of Alternative Design Configurations, *id.* at R0232. Thus, the court concludes that DASNY took a sufficiently "hard look" at the areas specified by petitioners.

Finally, petitioners contend that DASNY did not have the proper legislative authority to provide for the financing of the St. Mary's addition. According to DASNY, it arranged for the financing for St. Mary's project pursuant to Public Authorities Law §§ 1676-1680. Sections 1676 and 1680 define "dormitories" and "educational institutions" which DASNY may finance. Both sections list numerous institutions by name, ranging from institutions such as the Brookdale Hospital Center to the Lincoln Center for the Performing Arts, Inc., as well as categories of

institutions, such as "any non-profit institution or hospital at which the training of nurses is provided by a program approved by the department of education of the state of New York," without specifying the types of projects for which those institutions can seek funding. Public Authorities Law §§ 1676 & 1680. The definitions of dormitories and educational institutions also include

[n]ot-for-profit members of the New York State Rehabilitation Association, for the acquisition, financing, refinancing, construction, reconstruction, renovation, development, improvement, expansion and equipping of certain educational, administrative, residential, clinical and day programming facilities to be located in the state of New York.

Public Authorities Law §§ 1676 (2) (b) & 1680 (1) (emphasis supplied).

It is undisputed that St. Mary's is a member of the New York State Rehabilitation Association (NYSRA). Petitioners contend, however, that by including the word "certain" in the definition of what projects DASNY can fund through the issuance of bonds, the legislature intended to limit those projects to a subset of projects carried out by NYSRA members. Petitioners further contend that, having failed to specify the subset of projects that could be funded, the legislature impermissibly delegated legislative authority to DASNY. Citing *Matter of Medical Society of State of N.Y. v Serio* (100 NY2d 854 [2003]), petitioners argue that the power to legislate is limited to the legislature, and,

therefore, the statutory authority to issue the bonds is invalid. The court notes that the *Medical Society* case also stands for the proposition that an administrative agency's interpretation of the statute it administers will generally be upheld if it is not irrational or unreasonable. *Id.* at 863-864.

Although the statutory provision challenged by petitioners is far from exemplary legislative drafting, under accepted principles of statutory construction, "statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature." Statutes § 143. See *Matter of Hyde*, 15 NY3d 179, 185 (2010) ("it is 'presumed that no unjust or unreasonable result was intended and the statute must be construed consonant with that presumption.'" [citation omitted]). Here, the legislature intended to enable DASNY to fund not all programs carried out by NYSRA members, but rather those programs for the "acquisition, financing, refinancing, construction, reconstruction, renovation, development, improvement, expansion and equipping" of "educational, administrative, residential, clinical and day programming facilities"<sup>8</sup> in New York. Nothing in the legislative history suggests that the legislature sought to further limit the programs of NYSRA members which could be funded. Thus, the court

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<sup>8</sup> As DASNY points out, clinical and day programming facilities were added to that list by a 2003 amendment to the statute. See Session Laws, ch. 580, § 3 (2003).

concludes that the inclusion of the word "certain" was only intended to refer to the specified types of programs when conducted by NYSRA members. The court further concludes that the type of construction program being undertaken by St. Mary's falls within the types of programs specified in sections 1676 and 1680, and that DASNY had the statutory authority to issue the bonds for the project.<sup>9</sup>

Accordingly, it is hereby

ORDERED that petitioners' motion for a preliminary injunction is denied; and it is further

ORDERED that the cross motion of the New York State Department of Health to dismiss the amended petition against it is granted, and the petition is severed and dismissed as to that respondent; and it is further

ORDERED that the cross motion of the New York City Department of Buildings to dismiss the amended petition based upon lack of subject matter jurisdiction is denied to the extent that the issue of the applicability of the grandfathering provision is to be decided by the court, and is otherwise

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<sup>9</sup> The court appreciates the excellent work product of the attorneys in this case.

granted.


Dated: January 5, 2011

**FILED**

JAN 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



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J.S.C.

**EMILY JANE GOODMAN**