

**Matter of Chelsea Bus. & Prop. Owners' Assn., LLC
v City of New York**

2011 NY Slip Op 31946(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 113194/10

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

CHELSEA BUSINESS AND PROPERTY OWNERS' ASSOCIATION, LLC

INDEX NO. 113194/10

MOTION DATE _____

- v -

THE CITY OF NEW YORK

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with No answered decision and order.

FILED

JUL 08 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: July 8, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
In the Matter of the Application of
CHELSEA BUSINESS & PROPERTY OWNERS'
ASSOCIATION, LLC, d/b/a CHELSEA FLATIRON
COALITION,

INDEX NO. 113194/10

Petitioner

FILED

For an Order Pursuant to Article 78 of the Civil
Practice Law and Rules

JUL 08 2011

-against-

NEW YORK
COUNTY CLERK'S OFFICE

THE CITY OF NEW YORK; SETH DIAMOND,
Commissioner for the Department of Homeless Services
for the City of New York ("DHS"); GEORGE NASHAK,
Deputy Commissioner for Adult Services for DHS; ROBERT
D. LIMANDRI, Commissioner for the Department of
Buildings of the City of New York ("DOB"); FATMA AMER,
P.E., First Deputy Commissioner for DOB; JAMES P.
COLGATE, R.A., Assistant Commissioner to Technical
Affairs and Code Development for DOB; VITO
MUSTACIUOLO, Deputy Commissioner for the Department
of Housing, Preservation & Development of the City of New
York; BOWERY RESIDENTS' COMMITTEE, INC.;
127 WEST 25TH LLC; and DANIEL SHAVOLIAN,

Respondents.
-----X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Chelsea Business & Property Owners'
Association, LLC, d/b/a Chelsea Flatiron Coalition ("Chelsea Coalition") seeks a preliminary
injunction, enjoining the renovation, interior construction and use of a proposed facility at 127
West 25th Street in New York, New York, until respondents are in compliance with the Zoning
Resolution of the City of New York ("ZR"); the New York City Charter §§ 197-c and 203,

respectively, Uniform Land Use Review Procedures (“ULURP”) and Fair Share reviews; the Administrative Code of the City of New York (“the Administrative Code”) § 21-312 regarding a 200-bed limitation in shelters; reviews under the State Environmental Quality Review Act (“SEQRA”) and the New York City Environmental Quality Review procedures (“CEQR”). The motion also seeks an order compelling the Department of Homeless Services for the City of New York (“DHS”) to register with the Comptroller its contract with Bowery Residents' Committee, Inc. (“Bowery Residents”), for services at the proposed facility¹; compelling City respondents, pursuant to CPLR 7803(1) “to perform obligations enjoined upon them by law;” and pursuant to CPLR 7803(3) revoking and nullifying respondent DOB’s determination regarding the use of the premises.²

The renovations and construction are being performed pursuant to a lease between Bowery Residents and the landlord, non-party 127 West 25th Street, LLC (“West 25th Street”).

¹As described in the notice of motion, Chelsea Coalition sought an order compelling DHS “to make public the contract.” This was clarified as indicated above.

²These grounds and the relief sought in this motion, reflect those asserted in the Article 78 petition, which seeks an order: (1) revoking Bowery Residents construction permits on the grounds that the Department of Buildings (“DOB”) failed to enforce certain provisions of the ZR and of the Administrative Code, and, that DOB's determinations are arbitrary and capricious; (2) compelling respondent Department of Homeless Services (“DHS”) to submit its contract with Bowery Residents regarding the proposed facility to the Comptroller for registration; (3) compelling DHS to conduct a Fair Share review in accordance with Charter § 203; (4) compelling the City to submit the proposed facility to review under ULURP; (5) compelling DHS to conduct environmental reviews under SEQRA and CEQR; (6) preliminarily and permanently enjoining DOB from issuing any construction permits for work on the proposed facility until compliance with all applicable laws has been demonstrated; and (7) preliminarily and permanently enjoining DOB from issuing any certificate of occupancy for the proposed facility or permitting occupancy of the proposed facility until compliance with all applicable laws has been demonstrated.

Bowery Residents is a not-for-profit corporation which provides services, including shelter, to the homeless, and intends to use the building to provide such services under a contract with respondent DHS.

In a decision and order dated January 10, 2011 (“the January 10th decision”), this court stayed consideration of the instant motion to the extent it challenges the issuance by the Department of Buildings (“DOB”) of permits on the grounds that Chelsea Coalition had failed to exhaust its administrative remedies before the Board of Standards and Appeals (“BSA”) and that BSA’s determination may render this proceeding moot.³

As to the remaining grounds for the preliminary injunction, the court denied a request by Bowery Residents to consider those grounds in connection with the petition. In the January 10th decision, the court set a schedule for briefing and oral argument on the remaining grounds, and directed the City respondents to inform the court and the parties of the status of reviews which they asserted were underway, and of the status of the registration of the contract between Bowery Residents and DHS. The decision also directed Bowery Residents to inform the court and the parties of the status of the renovations, and the expected occupancy date. In addition, Bowery Residents committed to giving 30 days notice prior to occupancy of the building.

After oral argument, and submission of this motion, there were numerous communications between the parties and the court, including letters, telephone conferences and

³This court held that on the record before the court, “it could not be said that the DOB determinations at issue, are questions of ‘pure legal interpretations of statutory terms.’ Rather, the legal analysis is fact driven and requires, inter alia, an intricate analysis of criteria for evaluating and categorizing use within the contextual framework of the ZR. Issues of this nature and complexity should be presented in the first instance to BSA, the administrative body with the necessary expertise to consider the underlying merits.” While this motion was sub judice, the BSA issued a decision denying Chelsea Coalition’s appeal.

an appearance for a conference with the court on May 24, 2011. On May 6, 2011, Chelsea Coalition filed an Amended Petition, and at the May 24th conference the court set a schedule for respondents to answer the Amended Petition and for Chelsea Coalition to reply, and scheduled oral argument on the Amended Petition for July 22, 2011. Most recently, in a telephone conference during the last week of June, the court informed the parties that this motion would be decided prior to an expected date for beginning a phased-in occupancy, with the expectation that there would be time to appeal.⁴

The building at issue in this proceeding needed renovations and interior construction in order to implement programs for the homeless which are to be operated by Bowery Residents and located within the premises. The programs include a reception center with 96 beds, a 200-bed shelter and a 32-bed detoxification unit. The Executive Director of Bowery Residents, Lawrence Rosenblatt, in his affidavit, states that the primary goal of the renovation "is to provide temporary, transitional accommodations to New York City's neediest homeless individuals and to help them find permanent housing." According to counsel for Bowery Residents, the plan envisions an "integrated campus," in which part of the premises will be used for providing ancillary services to its temporary residents, many of whom have substance abuse and mental health issues, and part of the premises will be used for professional offices for Bowery Residents' staff. These services include intake assessments, physical and mental evaluations, and certain

⁴Bowery Residents changed the expected date for occupancy a number of times. Since it now states that the date for the beginning of a phased-in occupancy is at the earliest, July 11, 2011, and since this specific date was given on less than 30 days notice, the court, in the exercise of its discretion is ordering that the phased-in occupancy shall not begin before July 15, 2011, so as to provide the parties with time to take an appeal.

treatment and counseling from physicians, nurses and other providers.” Lawrence Rosenblatt describes these services as “ancillary health related components [that] are secondary to and merely supportive of . . . [the] primary purpose . . . [and] the overwhelming majority of staff at the Chelsea facility will be employed in non-medical functions.”

According to the City respondents, pursuant to separate contracts with Bowery Residents, DHS is funding the 200-bed homeless shelter and the 98-bed reception center,⁵ and the 32-bed detoxification program is funded with a combination of federal funds and funds from the New York City Department of Health and Mental Hygiene (“DOHMH”). Additional programs at the site include a New York State Office of Mental Health and (“OMH”) and Medicaid funded case management programs for persons with mental illness; an OMH licensed continuing day treatment program for outpatient mental health services funded by Medicaid and DOHMH; and a Medicaid and DOHMH funded substance abuse services center that is licensed by the New York State Office of Alcoholism and Substance Abuse Services (“OASAS”).

Chelsea Coalition contends that the proposed facility is not a “transient hotel” and “professional offices” as determined by the DOB, but in reality is a “community facility.” In support of this contention, Chelsea Coalition argues that the proposed facility will be a 328-bed, 100,000 square foot in-patient and out-patient drug and alcohol rehabilitation facility and homeless shelter for the mentally ill. Chelsea asserts that the proposed facility is “‘a community facility’ under the ZR such as a ‘non-profit institution with sleeping accommodations,’ a ‘health-

⁵Bowery Residents currently operates the reception center at 324 Lafayette Street in Manhattan.

related facility,' a 'domiciliary care facility' and/or a 'diagnostic or treatment health care facility.'"⁶ Chelsea Coalition contends that the DOB approved the permits by improperly designating the proposed facility as a Use Group 5 transient hotel and Use Group 6 professional offices. According to Chelsea Coalition, while a hotel and professional offices are permitted uses in the area under the ZR, a community facility such as the health care and social services facility at issue here, is not.

In support of its contention that the proposed facility is not a transient hotel within the meaning of the ZR and is in fact a community facility, Chelsea Coalition points out that the facility will not be open to the general public, that medical and counseling services will be provided, and that the plans include nurses' stations and examining rooms. Specifically, Chelsea Coalition asserts that half the building will be devoted to providing medical and various social services, and that the other half will be used for a homeless shelter. Chelsea Coalition also points to four sets of plans Bowery Residents has submitted in connection with the renovations, three to DOB and one set to OASAS. Chelsea Coalition contends that Bowery Residents submitted different sets of plans to different agencies, and as an example, points out that the plans submitted to OASAS detail nurses' stations and examining rooms, while those submitted to DOB do not.

Chelsea Coalition argues that since the proposed facility is a community facility, community oriented processes are implicated. Specifically, Chelsea Coalition asserts that

⁶In support, the petition points to Zoning Regulations §§ 22-13 and 22-14, and Fischer v Taub, 127 Misc2d 518, 525-26 (App Term, 1st Dept 1984).

environmental reviews pursuant to CEQR and SEQRA, and reviews under Fair Share laws and ULURP are required. Chelsea Coalition argues that continued construction without such reviews results in irreparable harm as it deprives the community of input into governmental decision-making provided for under the regulatory schemes of these laws.

In opposition, Bowery Residents contends that DOB properly issued the permits and that different plans result from the evolution of the plans for the project, as it works with individual agencies to address their specific concerns and areas of responsibilities. For example, Bowery Residents alleges that plans submitted to OASAS detail nursing stations as it is the agency which approves operating certification for providing such services. Bowery Residents also contends that the parties dispute certain facts and the relevance of the facts for determining whether the proposed facility is a community based facility. Bowery Residents points to the parties' disagreement as to the relevance of the duration of stay of its clients and the relevance of the percentage of administrative, management, medical and other staff to DOB's determinations.

As to the claims in the petition that the proposed facility is a community facility and continued construction will deprive the community of input into governmental decision-making under CEQR and SEQRA, and Fair Share and ULURP reviews, the City respondents originally argued that, with the exception of claims under ULURP, these claims were unripe, as there had been no relevant City action to mandate reviews under those laws. However, since submission, the City respondents have represented that there has been a Fair Share review, an environmental review under SEQRA and CEQR, an Environmental Assessment Statement, and a determination by DHS that the proposed facility will not result in any significant adverse

environmental impacts. Moreover, the contract between Bowery Residents and DHS has been signed and registered with the Comptroller. Therefore, to the extent Chelsea Coalition seeks a preliminary injunction based on the failure to conduct reviews under CEQR, SEQRA and Fair Share laws, and the failure to register the contract, those issues have been rendered moot.

Since the January 10th decision stayed consideration of the motion for a preliminary injunction with respect to the claims related to DOB's determinations pending the appeal to BSA, and the parties have not yet addressed BSA's denial of that appeal, the only issues which have been briefed and are properly considered at this time, are whether a preliminary injunction should be granted based on petitioner's contentions that DHS failed to conduct a review under ULURP and that the facility exceeds the 200-bed limit for shelters under Administrative Code § 21-312.

As a threshold issue, the court must address respondents' contention that Chelsea Coalition fails to make a sufficient showing that it has standing to sue, as the petition merely states in a conclusory fashion that its members consist of area businesses, property owners and residents, without identifying any of its members or alleging facts establishing that their injury is "real and different" from injury to the public at large.

In cases involving land use matters especially, the Court of Appeals has "long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large." Society of the Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 774 (1991). However, where zoning action is specifically involved, the Court of Appeals holds that a property holder in "nearby" or "close proximity" to premises subject to such action, "may have standing to seek judicial review without

pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity.” Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals, 69 NY2d 406, 409-410 (1987); see Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Commission of the City of New York, 259 AD2d 26 (1st Dept 1999). To establish associational or organizational standing, three elements are required showing that: 1) one or more members of the association or organization has standing to sue; 2) the interests advanced by the association or organization are germane to its purpose so as to satisfy the court that it is an appropriate representation of those interests; and 3) neither the asserted claim nor the appropriate relief requires the participation of the individual members. See Society of the Plastics Industry, Inc. v. County of Suffolk, *supra* at 786.

Here, Chelsea Coalition has sufficiently established standing based on its members’ close or nearby proximity to the proposed facility, as well as their specific claims of injury distinct from that of the general public. It is not disputed that Chelsea Coalition is a limited liability company created for the purpose of challenging respondents’ zoning and other land use actions with respect to the proposed facility, whose membership is comprised of commercial and residential property owners and tenants who live, work or own property in immediate or close proximity to the proposed facility. Specifically, the petition alleges that Chelsea Coalition “was formed . . . by a group of citizens who reside or work and own property in the Chelsea and Flatiron neighborhoods . . . who are concerned with Respondents’ disregard of zoning and other laws governing siting of the proposed facility.” The petition also alleges that Chelsea Coalition “presently has over dozens of members that reside in adjacent buildings or live within close proximity to 127 West 25th Street.”

11]

Chelsea Coalition submits an affidavit from one of its members, Michael L Tracy, who is also a member of its Board of Managers. Mr. Tracy provides the following details as to the composition of Chelsea Coalition's membership:

CFC's membership now numbers in the hundreds, ranging from young families to retirees, from new renters to decades-long home owners. CFC's members reside work and/or own property in Chelsea and Flatiron. Presently, CFC has many members who are commercial and residential property owners and tenants that live, work and/or own property in buildings adjacent to, across the street from, within 400 feet of, in close proximity to and within several blocks of 127 West 25th Street. These properties include: 108-110 West 25th Street, New York, New York; 101 West 24th Street, New York, New York; 134 West 25th Street, New York, New York; 130 West 26th Street, New York, New York; and 107 West 25th Street, New York, New York.

Chelsea Coalition also submits a letter to the Board of Standards and Appeals responding to a request for, inter alia, additional information as to petitioner's standing, which states in pertinent part that the members of Chelsea Coalition will be

directly and adversely affected by the irrevocable change to the character of the community that will result from construction of the Proposed Facility. More specifically, CFC [Chelsea Coalition] and its members will be harmed by the increased population density, traffic congestion, noise, and demand for fire, police and medical emergency services, as well as secondary displacement of neighborhood residents and businesses and reduced property and business values that will result from the construction and operation of the Proposed Facility at the Subject Property. Each of these harms is unique to CFC and its members, both in the financial impact upon them and the interference with the enjoyment of their residences and businesses, and more than satisfies CFC and its members' standing

Based on the foregoing, where Chelsea Coalition's members are owners and occupants of property in nearby or close proximity to the challenged facility, and those members allege that they will suffer actual injury distinct from the general public, the court finds that Chelsea Coalition has sufficiently established that its members have standing to sue. See Sun-Brite Car

Wash, Inc. v. Board of Zoning & Appeals, supra; Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Commission of the City of New York, supra. Chelsea Coalition has also demonstrated the two remaining elements for organizational or associational standing, as the interests sought to be advanced in this proceeding are clearly germane to Chelsea Coalition's purposes, and the participation of the individual members is not required to assert the claims or to afford complete relief. See Society of the Plastics Industry, Inc. v. County of Suffolk, supra at 786; Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Commission of the City of New York, supra at 33. The court therefore concludes that Chelsea Coalition has standing to maintain this proceeding and to seek a preliminary injunction.

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing," 1234 Broadway LLC v. West Side SRO Law Project, ___ AD3d ___, 924 NYS2d 35, 39 (1st Dept 2011). A preliminary injunction will only be granted upon a showing of: 1) the likelihood of ultimate success on the merits; 2) irreparable injury if the preliminary injunction is withheld; and 3) a balancing of the equities tipping in favor of the moving party. See Doe v. Axelrod, 3 NY2d 748, 750 (1988); 1234 Broadway LLC v. West Side SRO Law Project, supra at 39; 61 West 62 Owners Corp. v. CGM EMP LLC, 77 AD3d 330, 334 (1st Dept 2010), mod 16 NY3d 722 (2011). If any one of the three prongs is not satisfied, the motion must be denied. See Doe v. Axelrod, supra at 751. Moreover, "[a] party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts." 1234 Broadway LLC v. West Side SRO Law Project, supra; 61 West 62 Owners Corp. v. CGM EMP LLC, supra at 40 (quoting

Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd, 13 AD3d 334, 335 [2nd Dept 2004]). Also, the purpose of a preliminary injunction is to maintain the status quo, as opposed to determining the ultimate rights of the parties. See Wheaton/TMW Fourth Avenue, LP v. New York City Department of Buildings, 65 AD3d 1051, 1052 (2nd Dept 2009). For the reasons below, the court finds that Chelsea Coalition has not met its burden of establishing entitlement to a preliminary injunction.

As to its argument regarding ULURP, Chelsea Coalition has not established that a review is required. City Charter §197-a provides that a ULURP review is required where the City action falls within one of the categories specified in the section. See Ferrer v. Dinkins, 18 AD2d 89 (1st Dept 1996). Here, Chelsea Coalition argues that a ULURP review is required under Charter § 197-c (a)(11) as an acquisition by the City of real property pursuant to a lease, and under Charter § 197-c (a)(8) as a City project that is part of DHS's housing plan to meet the City's legal requirements to provide housing for the homeless.

Chelsea Coalition argues, inter alia, that provisions in the contract between Bowery Residents and DHS and funding from various City agencies establish the acquisition of real property by the City by lease within the meaning of Charter § 197-c (a)(11). Quoting Ferrer v. Dinkins, Chelsea Coalition asserts that under certain contractual provisions, discussed below, DHS maintains operational and decision-making control of the proposed facility, so that its control so "predominate[s] the use of the land, to the exclusion of the owner's, that the effect on the community will be the same as if the City had taken title to the land." Id. at 94.

As to the contract provisions, Chelsea Coalition points to requirements that Bowery Residents operate the shelter "as part of the City's homeless service system," in accordance with

DHS “policies and procedures,” accept all homeless adults referred to it by DHS, operate at an average of 95% of shelter capacity, and permit access by a court-appointed monitoring agency. Chelsea Coalition also points to contractual provisions compensating Bowery Residents for its services, which provide for payment of \$7.2 million annually, and \$76.1 million over the lease term, and DHS’s acknowledgment that as the lease provides for annual increases in rent over the lease term, that the operating budget for the shelter includes sufficient funds to pay for such increases.⁷ Finally, Chelsea Coalition points out that Bowery Residents does not have contractual termination rights, and points to contractual provisions which require that DHS approve shelter directors and the maintenance superintendent, structural changes to the premises, changes in major program components, and changes in staffing levels.

Generally, the central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed upon rent. See Davis v. Dinkins, 206 AD2d 365 (1st Dept 1994). In Ferrer, where the City’s arrangement with an owner of a motor inn regarding the owner’s operation of a shelter was at issue, the court stated that the question as to whether a ULURP review was required, was “whether or not the arrangement is in the nature of a lease, as indicated by certain key elements . . . Crucial to any determination as to whether the City entered into a lease, is a finding that the City’s occupancy of the land is the functional equivalent of a landowner’s, lacking only the actual transfer of title.” Ferrer v. Dinkins, supra at 93-94.

⁷The contract is initially for a term which runs from September 1, 2010 to June 30, 2021, and may be extended at DHS’s option for an additional two five-year terms.

Here, it cannot be said that the provisions in the contract between DHS and Bowery Residents establish DHS' control over the premises so as to constitute occupancy or control that is "a functional equivalent of a landowner's." *Id.* The lease is between Bowery Residents and West 25th Street. DHS is not a signatory on the lease, nor does it have any obligations under the lease. Bowery Residents bears the risk under the lease for the rent and the risk related to the renovations and interior construction. While DHS must approve structural changes, approval cannot be equated with the right of a landowner to make such changes. Moreover, under the contract, Bowery Residents, not DHS, will operate and control the proposed facility. The contract provisions relied upon by Chelsea Coalition, which refer to operating and monitoring procedures and capacity requirements, govern the contractual relationship between DHS and Bowery Residents. These provisions define the nature and quality of the services Bowery Residents is required to provide, and do not implicate issues of DHS' occupancy of, or control over the premises. *See Plaza v. City of New York*, 305 AD2d 604 (2nd Dept 2003). Similarly, Chelsea Coalition's argument regarding DHS's acknowledgment that the annual budget for the shelter includes funds to pay annual rent increases, contract renewal and termination rights, and requirements that DHS approve major program changes and certain personnel, relate to contractual relations between Bowery Residents and DHS. Based on the foregoing, the court concludes that the contract does not establish that DHS has control of the premises which is "functional equivalent of a landowner's."

As to Chelsea Coalition's argument that DHS's control under its contract with Bowery Residents so predominates the use of the building to the exclusion of the owner's, that the effect on the community will be the same as if DHS had taken title to the premises, the key issue is

“who controls the land.” Ferrer v. Dinkins, supra at 94. The Ferrer court stated that the determination of whether a ULURP review was required, involved “a direct analysis of the City’s use against the ‘absolute surrender of control’ standard.” Id. Applying that analysis, the court found that no review was required as the owner, not the City was operating the inn. Id. As stated above, under the contract, Bowery Residents has control over operating the programs, and under the lease, Bowery Residents has control over the premises. The contractual provisions governing the nature and quality of services Bowery Residents provides, and procedures to insure that such contractual requirements are met, do not alter this determination, nor are they sufficient to establish an “absolute surrender of control.” Accordingly, here, as in Ferrer v. Dinkins, the contract does not warrant a finding that DHS controls the use of the land, and for that reason the proposed facility is not subject to ULURP review as an acquisition of real property by lease.

Nor is the proposed facility subject to ULURP review based on the grounds that the contract is a “housing plan” within the meaning of Charter § 197-c(a)(8). Specifically, Chelsea Coalition argues that the proposed facility constitutes a “housing plan” pursuant to city, state and federal housing law as the City is required by law to provide shelter to the homeless. In support of its position, Chelsea Coalition points to DHS’s Deputy Commissioner Nashak’s statements that the contract with Bowery Residents is part of DHS’s “plans to meet projected needs,” and that “the proposed facility is the result of an RFP [request for proposal] for shelter services subject to a standard form contract that incorporates the Proposed Facility into the City’s homeless services system” and is part of a “fully planned and budgeted expense of the City shelter system.”

Charter § 197-c(a)(8) requires a ULURP review for “[h]ousing and urban renewal plans and projects pursuant to city, state and federal housing laws.” Chelsea Coalition’s argument that the contract for the shelter is part of a “housing plan” as intended by section 197-c(a)(8) is unsupported by any proof. The court agrees with the City respondents, that Deputy Commissioner Nashak’s statements, reflect policy rather than a specific plan. While the purpose of the contract is to provide shelter to the homeless and this purpose is consistent with the City’s obligation to provide such shelter, absent proof that the contract is part of an actual “housing and urban renewal plan,” there is no reasonable basis to find that ULURP review is required under section 197-c(a)(8). See West 97th West 98th Street Block Ass’n. v. Volunteers of America, 190 Ad2d 303 (1st Dept. 1993).

Finally, the court turns to Chelsea Coalition’s argument that the proposed facility violates New York City Administrative Code §21-312(2)(b), which states that “[n]o shelter for adults shall be operated with a census of more than two hundred persons.” Section 21-312(1) defines “census” as the “actual number of persons receiving shelter at a shelter for adults.”

Chelsea Coalition asserts that the proposed facility will shelter more than 200 residents through a combination of programs all run by the same provider in the same building, which include 96 reception center beds and 36 detoxification beds, in addition to the 200 shelter beds. Respondents argue that pursuant to the contract between DHS and Bowery Residents, the only “shelter” that will be housed in the proposed facility will be the 200 bed shelter, and the other programs housed in the facility are detoxification, chemical dependency and mental health counseling facilities, which do not provide “shelter.”

The court agrees with Chelsea Coalition that the 36 detoxification beds and the 96 reception center beds must be included with the 200 shelter beds, so as to exceed the 200 bed limit imposed by the section 21-312(2) (b) of the Administrative Code. The court, however, agrees with respondents that section 21-315 of the Administrative Code creates an exception to the 200-bed limit for “a grandfathered shelter,” which is defined as “a shelter for adults that operates with a permitted census in excess of two hundred persons.” Specifically, respondents rely on section 21-315(a)(6) which provides “[i]n the event a grandfathered shelter is closed, it may be replaced pursuant to” several specified provisions, including provision (6) which states that “[t]he Camp LaGuardia Shelter operating with a census of one thousand seventeen persons . . . may be replaced with two shelters each with a maximum census of four hundred persons.”

While Chelsea Coalition does not dispute that the exception in Administrative Code § 21-315 permits the City to operate two shelters housing up to four hundred persons each as replacements for Camp LaGuardia, it argues that such facility is automatically subject to mandatory ULURP review pursuant to the terms of section 21-315(b). Chelsea Coalition, however, misreads section 21-315(b), which states as follows: “Each new shelter which replaces a shelter listed in subdivision a of this section shall comply with *applicable* statutes, law, rules and regulations, including, but not limited to section 197-c of the New York city charter [ULURP]” (emphasis added). By its clear and express terms, section 21-315(b) simply requires ULURP review, if ULURP is “applicable,” and as the court has determined herein above, ULURP is not applicable to the proposed facility.

As the court has concluded that Chelsea Coalition has not established the likelihood of success on the merits of its claims that a ULURP review is required under the Charter or the

Administrative Code, as a matter of law Chelsea Coalition is not entitled to a preliminary injunction, and the court need not reach the issues of irreparable harm and the balancing of the equities. See Doe v. Axelrod, 73 NY2d 748, 751 (1988).

Accordingly, it is

ORDERED that the motion by petitioner Chelsea Business and Property Owners' Association, LLC, d/b/a, Chelsea Flatiron Coalition for a preliminary injunction is denied, and it is further


ORDERED that respondent Bowery Residents' Committee, Inc. shall not commence occupancy of the building before July 15, 2011.

Dated: July 8, 2011

ENTER:

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE



J. S. C.