

**Matter of Weeks Woodlands Assn., Inc. v Dormitory
Auth. of the State of N.Y.**

2011 NY Slip Op 32178(U)

July 19, 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: EMILY JANE GOODMAN
Justice

PART 17

Weeks Woodlands Association, Inc

INDEX NO. 110 502/10

- v -

Dormitory Authority of the State of New York

MOTION DATE _____

MOTION SEQ. NO. OJ

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

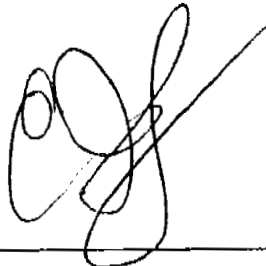
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion
are decided for applicant

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: 7/19/11



J.S.C.
EMILY JANE GOODMAN

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 : 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.:

Motion sequence numbers 002, 003 and 004 are consolidated
for disposition.

This combined Article 78 proceeding and action for a
declaratory judgment involves a construction project being
undertaken by respondents St. Mary's Hospital for Children, Inc.
and St. Mary's Healthcare System for Children, Inc. (together,
St. Mary's) to build a 90,000 square foot addition to their
facility. On January 5, 2011, this court issued a decision in
which it: denied petitioners' motion requesting an order
preliminarily enjoining St. Mary's construction project; granted
the motion to dismiss of the Department of Health (DOH) on the

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).

basis of the statute of limitations; and denied the cross motion to dismiss of respondent Department of Health (DOB) with respect to the applicability of Zoning Resolution (ZR) § 24-111 to the construction project.¹ *Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of New York*, 2011 WL 567974, 2011 NY Misc LEXIS 249 (Sup Ct, NY County 2011).

In motion sequence number 002, respondent Dormitory Authority of New York (DASNY) moves, pursuant to CPLR 3212, for an order granting DASNY partial summary judgment in its favor regarding its legislative authority to issue financing to respondent St. Mary's for the construction project to enlarge its facility.

Petitioners Weeks Woodlands Association, Inc. (Weeks Woodlands), James Chin, Karen Pender, Dominick Withanachihi and Frank Caselli cross-move for a stay of proceedings on DASNY's motion for partial summary judgment and to authorize discovery.

In motion sequence number 003, petitioners move, pursuant to CPLR 2221 (e), to renew their argument that the exception clause in New York City Zoning Resolution (ZR) § 24-111 (a) permits a Floor Area Ratio (FAR) of 1.0 for St. Mary's construction project. As part of motion sequence number 003, petitioners also

¹ The court granted DOB's motion to dismiss with respect to petitioners' two additional claims regarding whether St. Mary's is a hospital or an ambulatory care facility and whether the Cross Island Parkway is parkland or a street, based upon exhaustion of administrative remedies.

seek an order preventing St. Mary's from utilizing a newly constructed access road (the southern access road) directly abutting petitioners' property. On April 28, 2011, this court initially granted an order, requested by petitioners, temporarily restraining petitioners "from engaging in or permitting any continued work on the access road abutting petitioners' property," however, that order was held in abeyance by a stipulated order, dated March 6, 2011.

DOB cross-moves, pursuant to CPLR 3212, for summary judgment in its favor.

In motion sequence number 004, petitioners' move for summary judgment in their favor on the ground that the building permit issued to St. Mary's is invalid insofar as it relies on ZR § 24-111 (a).

DASNY'S MOTION FOR SUMMARY JUDGMENT

In motion sequence number 002, DASNY moves for an order granting partial summary judgment in its favor with respect to petitioners' request for a judgment declaring that DASNY did not have the legislative authority to issue financing for St. Mary's construction project.

DASNY states that it arranged for the financing of St. Mary's addition pursuant to Public Authorities Law §§ 1676 and 1680, which define "dormitories" and "educational institutions." In addition to a list of named institutions, those sections of

the statute 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).

Petitioners cross-move for a stay of DASNY's motion on the grounds that the question of DASNY'S authority has been appealed to the Appellate Division as part of petitioners' appeal of this court's January 5, 2011 decision denying petitioners' request for a preliminary injunction, and that discovery should be permitted prior to a decision regarding DASNY's legislative authority.

Petitioners state that one of the issues they have presented to the Appellate Division in their appeal from the denial of the preliminary injunction is whether the provisions of the Public Authorities Law cited above, pursuant to which DASNY has provided financing to St. Mary's, provide the requisite guidelines for administrative decision making. In their motion papers, petitioners indicated that their appeal would "probably" be heard in the Appellate Division's June Term, and that it would be an uneconomical use of judicial resources to consider DASNY's motion prior to a ruling by the Appellate Division. Apparently, however, the appeal was not included in the June Term. Particularly in light of the fact that it is not clear when

petitioners' appeal will be heard, this court declines to stay consideration of DASNY's motion on that basis.

With respect to their contention that they should be permitted discovery prior to a ruling on DASNY's motion, petitioners refer to their letter of August 23, 2010 to DASNY, in which they requested the following items:

- 1) Form of bond evidencing financing for St. Mary's project, and all related agreements.
- 2) All documents pertaining to the meaning of the term 'certain educational, administrative residential clinical and day programming facilities'
- 3) All documentation pertaining to DASNY's determination that action on the project is Unlisted for purposes of SEQRA.
- 4) All documentation pertaining to DASNY's issuance of a negative declaration under SEQRA for the project.

Letter from Michael S. Gruen to Karen Binder, dated August 23, 2010.

Petitioners also indicate that other matters have not been the subject of disclosure, such as St. Mary's membership in the New York State Rehabilitation Association (NYSRA). Although the court's prior decision stated that it was undisputed that St. Mary's is a member of NYSRA, petitioners now state that, although they chose not to contest the matter of NYSRA membership for the purposes of the motion for a preliminary injunction, "it has not been conceded for other purposes." Affirmation of Michael S. Gruen, dated March 31, 2011, ¶ 8, n 1. In its Verified Answer,

however, DASNY states that St. Mary's is a member of NYSRA.² See Verified Answer, ¶ 29. Petitioners fail to provide any basis for challenging DASNY's Verified Answer, but rather, merely indicate that they wish to take discovery on the matter. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Gasis v City of New York*, 35 AD3d 533, 534-535 (2d Dept 2006). In any case, the court notes that the Directory of Members, which is part of the official website of NYSRA, lists St. Mary's as a member of NYSRA. See <http://www.nyrehab.org/members.php>.

With respect to petitioners' request for documents regarding the statutory language, petitioners do indicate that DASNY provided the bill jacket for the legislation, but contend that the documents shed no light on the meaning of the language in question and that DASNY did not state whether other documents do exist. Here again, petitioners' speculation that documents might possibly exist is insufficient to justify a delay in considering DASNY's motion for partial summary judgment. *Gasis v City of New York*, 35 AD3d at 534-535.

Finally petitioners' earlier request for documents relating to SEQRA are unrelated to the question of whether DASNY has the

² The portions of the answer that relate to St. Mary's are verified by Edwin Simpser, the Executive Vice President and Chief Medical Officer for St. Mary's.

legislative authority to finance St. Mary's project.

In support of their earlier motion for a preliminary injunction petitioners argued that by including the word "certain" in the statutes cited above, the Legislature intended to limit the projects that DASNY could fund, to a subset of projects carried out by NYSRA members. Petitioners further argued that by not providing further guidance defining that subset, the Legislature has impermissibly delegated legislative authority to DASNY.

As this court noted in its January 5, 2011 decision denying a preliminary injunction, "[g]enerally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature." Statutes § 143; *Matter of Hyde*, 15 NY3d 179, 185 (2010). On the basis of the statutory language, the court concluded that "the inclusion of the word certain was only intended to refer to the specified types of programs when conducted by NYSRA members" and 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." *Matter of Weeks Woodlands Assn., Inc. v Dormitory Authority of State of New York*, 2011 WL 567974, 2011 NY Misc LEXIS 249, at *37.

No arguments have been made by petitioners that alter the

court's previous conclusion, as set forth in its January 5, 2011 decision, that sections 1676 and 1680 provide DASNY the authority to finance the type of project involved here when undertaken by NYSRA members and located in the State of New York. Respondent DASNY'S motion for partial summary judgment is, therefore, granted with respect to DASNY's legislative authority to issue financing for St. Mary's construction project, and petitioners' cross motion for a stay is denied.

PETITIONERS' MOTION TO RENEW

St. Mary's is located in an R2 district, which has an FAR of 0.5 for residential uses. Pursuant to ZR § 24-11 the FAR for community facilities in an R2 district is 1.00, however, pursuant to ZR § 24-111 (a), the FAR for community facilities in R2 districts was decreased to that applicable to the residential uses in the district, except "[t]he provisions of this paragraph shall not apply to *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) (emphasis in original).

The proposed enlargement of the St. Mary's facility would increase the size of the facility to a 0.77 FAR. Initially, on October 6, 2008, DOB rejected St. Mary's request for a building permit for the construction project, indicating that the proposed enlargement must comply with an 0.5 FAR. On October 20, 2008,

however, DOB changed its position and approved the building permit, noting that an FAR of 1.0 was approved, and stating that "copy is attached indicating building was built prior to Nov. 15, 1972."

In their prior motion for a preliminary injunction, petitioners argued that the exception clause in ZR § 24-111 (a) only applied to buildings which were in the "pipeline" on November 15, 1972. In its decision dated January 5, 2011, rejecting DOB's motion to dismiss based on failure to exhaust administrative remedies, this court concluded that whether the exception clause applied to St. Mary's was a question of law to be decided by the court. The court further concluded that a literal reading of the exception clause suggests that the clause applies to all buildings whose plans were filed before November 15, 1972, not just buildings that were still under construction or in the planning stages on that date, as petitioners contend. Because the plans for St. Mary's were filed before November 15, 1972, the court concluded that petitioners had failed to establish a likelihood of success on the merits of their claim that the exception clause does not apply to St. Mary's construction project.

Petitioners now seek renewal of their argument that the exception clause does not apply, on the basis of what they term newly discovered evidence that they obtained, pursuant to a

Freedom of Information Law (FOIL) request that they made on December 20, 2010. The evidence submitted by petitioners indicates that on several occasions in 2006, DOB rejected a request by Our Lady of Snow, pursuant to ZR § 24-111 (a), for a building permit for its church that would increase the FAR of the church to more than 0.5, although the original plans for the church were originally filed in 1949. In rejecting Our Lady of Snow's request, DOB stated:

Denied, as per 24-111, the last statement pertaining to bldg plans filed prior 11/15/1972 is intended as vesting provision to allow Bldgs filed prior to the effective date of the zoning amendment to continue in compliance with the prior zoning allowable floor area. Proposed project shall be limited to 0.5 FAR as per 24-111 Z.R.

Requests for reconsideration were denied, indicating that the applicant could seek a variance from the Board of Standards and Appeals (BSA).

Our Lady of Snow did seek a variance from BSA, which was granted, and, therefore, the church never challenged DOB's interpretation of the grandfathering clause in ZR § 24-111 (a).

A motion to renew

shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion.

CPLR 2221 (e) (2) and (3).

Petitioners contend that the information they obtained in

response to their FOIL request, concerning DOB's decision that the exception clause did not apply to the proposed addition to the Our Lady of Snow church, constitutes a new fact not offered on the prior motion that should alter the decision of this court. Petitioners argue that DOB's decision that the exception clause did not apply to Our Lady of Snow, despite the fact that the plans for the original church building were filed in 1949, indicates that DOB's more recent decision applying the exception clause to St. Mary's was arbitrary and capricious. Citing *Matter of Charles A. Field Delivery Serv., Inc.* (66 NY2d 516 [1985]), petitioners further argue that, because DOB did not follow its earlier decision in Our Lady of Snow, and failed to give an explanation for its apparent change in its interpretation of the zoning resolution, its approval of the St. Mary's building permit was arbitrary and capricious, and the building permit must be annulled, as a matter of law.

According to petitioners, they did not provide the information on their earlier motion because the information was in the possession of DOB, and was not previously available to them, despite the fact that they had made an earlier request on August 23, 2010.

Respondents contend that petitioners fail to provide a reasonable justification for not providing the purported new "fact" sooner. DOB contends that petitioners' first document

request was not, in fact, a FOIL request, but rather, a request for documents made to counsel for DOB after this proceeding was filed. According to DOB, that request was narrowly tailored to documents pertaining to DOB's decision regarding St. Mary's, and was not a general request regarding the agency's interpretation of ZR § 24-111 (a). Furthermore, according to DOB, petitioners waited until December 20, 2010 to make their formal FOIL request, that DOB responded to the request on February 11, 2011, and that petitioners then waited five weeks to even pick up the documents that DOB made available. Thus, according to DOB, petitioners failed to exercise due diligence in obtaining the documents and then submitting them to the court.

In response, petitioners argue that their original document request was broad enough to encompass the Our Lady of Snow documents.³ Furthermore, petitioners contend that they had delayed in picking up the DOB documents because when DOB responded to their December 2010 request, the response stated that DOB had "found no documents constituting an interpretation of ZR 24-111 (a)," but that it had located 11 pages of documents "responsive to your request." Letter of Angela Orridge, Records Access Officer to Michael S. Gruen, dated February 11, 2011. For

³ Petitioners' original August 2010 request for documents sought documents "pertaining to DOB's position that St. Mary's is entitled to protection [under the Exception Clause], including, without limitation" documents pertaining specifically to St. Mary's application. Letter of Michael S. Gruen to New York City Department of Law, dated August 23, 2010.

that reason, according to petitioners, they did not believe that any of the documents would be responsive to their request.

Finally, petitioners contend that the handwriting on the Our Lady of Snow documents and the St. Mary's documents appears to be the same, therefore, according to petitioners, DOB must have been aware, both of the conflicting rulings, and the fact that the documents existed.

The court will not speculate about whether the same person wrote the notations on the Our Lady of Snow and St. Mary's documents. However, in light of the fact that the documents in question were in DOB's custody, apparently could not be located by publicly available search tools, and could be encompassed by petitioners' August 2010 document request, the court is not prepared to find that petitioners did not act with due diligence in presenting them to the court.

In addition to requiring that a movant provide a reasonable justification for failing to present the "new" facts on the previous motion, CPLR 2221 (e) governing motions to renew requires that the new fact would change the prior decision. See *Clemons v Glicksman*, 25 AD3d 468 (1st Dept 2006). Here the Our Lady of Snow documents do raise questions about the consistency, or lack thereof, in DOB's interpretation of ZR § 24-111. This court did not, however, rely on DOB's interpretation of the zoning resolution, or give any special deference to the views of

the agency in its January 5, 2011 decision interpreting the zoning resolution. See *Roberts v Tishman Speyer Properties, L.P.*, 62 AD3d 71, 80 (1st Dept), *affd* 13 NY3d 270 (2009) (where "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" [internal quotation marks and citations omitted]). Rather, the court considered the language of the provision itself, and at least, preliminarily concluded that the exception clause was intended to apply to all buildings, the plans for which were filed prior to November 15, 1972, and not merely buildings that were in the pipeline or in the process of being built at that date. The fact that DOB may have interpreted the zoning resolution in an inconsistent manner does not alter this court's analysis of the language of the zoning ordinance, nor, therefore, does it require remand of the matter for an explanation by DOB as in *Knight v Amelkin* (68 NY2d 975 [1986]), or annulment of the building permit, since the permit is consistent with the court's interpretation of the zoning ordinance.

In short, the "new" facts submitted by petitioners on their motion to renew would not alter this court's decision denying petitioners' motion for a preliminary injunction. Therefore, petitioners' motion to renew is denied.

CROSS MOTIONS FOR SUMMARY JUDGMENT OF DOB AND PETITIONERS⁴

DOB cross-moves for summary judgment in its favor, arguing that, as a matter of statutory interpretation, the grandfathering clause in ZR § 24-111 (a) applies to all buildings the plans for which were filed prior to November 15, 1972, and therefore, to the building permit for St. Mary's construction project.⁵

Petitioners move for summary judgment in their favor on their claim that the building permit issued by DOB to St. Mary's is invalid, insofar as it relies upon ZR § 24-111 (a).

Again petitioners point to DOB's rejection of the building permit for Our Lady of Snows church. Petitioners contend that the BSA upheld the action of the DOB when it granted a variance to the church, stating that the planned construction "is contrary to ZR § 24-111." Affirmation of Melanie V. Sadok, dated April 26, 2011, Exh. M at 1 & 3. There is, however, no analysis of section 24-111 by the BSA in its resolution granting Our Lady of Snows the requested variance. As DOB contends, the comment,

⁴ In connection with sequence number 004, Petitioners served papers which they referenced as a cross motion; however, it is, and is treated as, a motion.

⁵ As noted above, DOB previously cross-moved to dismiss the proceeding on the ground of failure to exhaust administrative remedies. In its decision dated January 5, 2011, this court granted that motion to the extent that it ruled that petitioners should have raised two issues before the Board of Standards and Appeals-whether St. Mary's is a hospital or an ambulatory care facility and whether Cross Island Parkway, which abuts St. Mary's property, is parkland or a street. The court denied DOB's motion with respect to the applicability of ZR § 24-111 (a).

which is contained first in a "Whereas" clause at the outset of the BSA decision, and finally, in the "Resolved" clause at the end of the ruling, appears to be little more than a statement of the context in which the application for the variance was made to the BSA.

Petitioners also make two new arguments that they did not make in their papers in support of their original motion for a preliminary injunction or in their motion to renew. First they point to two other sections of the Zoning Resolution (ZR § 11-31 and 11-33) and argue that those sections, which govern building permits issued before an amendment to the zoning resolution, should be used as a model for interpreting the applicability of ZR § 24-111 (a). According to petitioners, sections 11-31 and 11-33 indicate that a project is only eligible for an exception to the particular amendment where a substantial degree of construction has occurred prior to the effective date of an amendment to the zoning resolution and where the grandfathering would not increase the degree of non-compliance. Those provisions apply, however, "except as specifically provided elsewhere in this Resolution." ZR § 11-33. Therefore, they provide limited guidance. Further, the Zoning Resolution approaches the issue of exceptions to new more restrictive requirements in a variety of different ways. Yet another approach to exceptions is contained section 11-271, which relates

to exceptions to requirements prohibiting residential occupancy in buildings in a particular area of New York City. For that section, which creates an exception to the prohibition on dwelling units for buildings with respect to which an application for dwelling units was filed prior to May 18, 1981, it also contains an explicit expiration date for the exception clause of one year from July 23, 1981. Therefore, reference to those sections provide limited, or no, guidance.

Finally, petitioners contend that ZR § 24-111 should be analyzed in the context of the constitutional "Takings Clause" analysis. Under that analysis, a clash occurs between zoning and constitutional principals when zoning goes too far and deprives an owner of substantial value of the property, resulting in a "taking" which requires compensation. According to petitioners, one of the factors used in determining whether a regulatory action constitutes a "taking" is whether the action deprives an owner of "reasonable investment-backed expectations." Petitioners contend that zoning resolutions are to be strictly construed and exceptions to down-zoning must be rejected unless the down-zoning deprives the owner of such reasonable investment-backed expectations. Petitioners further contend that under that principle, the exception to the down-zoning in section 24-111 would only apply to buildings which are in the pipeline at the time of the change in the zoning resolution and not to buildings

completed before the date contained in ZR § 24-111 because the owners of buildings completed by November 15, 1972 could not have a reasonable investment-backed expectation of higher zoning in perpetuity. That constitutional analysis might well be relevant where a property owner is seeking compensation where a change in zoning results in a limitation of the owner's use of its property, but this is not the case here.

Finally, in their most recent submission petitioners contend that for the first time in their reply papers, that DOB treats the relevant clause in section 24-111 (a) as an "exception" rather than a "grandfathering" clause and that this purportedly novel theory should be rejected by the court. The court merely notes that both parties have previously and repeatedly used both the term "grandfathering" and the term "exception" to refer to the clause in section 24-111 (a).

As this court noted in its decision denying the petitioners' motion for a preliminary injunction, in interpreting the grandfathering provision, it does not purport to comment on the policy implications of the provision. For the reasons set forth in that earlier decision, however, the court concludes that the provision applies to all buildings whose plans were filed prior to November 15, 1972, not merely those that were in the pipeline at that point. The Planning Commission can, of course, decide to alter that provision if it concludes, as a policy matter, that

such an exception to the down-zoning is no longer appropriate.

DOB's cross motion for summary judgment is, therefore, granted and the proceeding is dismissed as to DOB, and petitioners' motion for summary judgment is denied.

PETITIONERS' MOTION TO STAY USE OF THE SOUTHERN ACCESS ROAD

Finally, petitioners seek to prevent further use of the southern access road which abuts petitioners' property. According to petitioners, in April and early May, a large number of construction vehicles made use of the road creating loud noise, dust, vibrations, and fumes. Petitioners submit a DVD containing time and date-stamped motion picture footage of the vehicles, as well as photos of some of the vehicles and a log noting 141 trips by a front-end loader made on April 25, 2011. Petitioner James Chin states that on May 4, numerous trips were made by a 22-wheeled concrete pumper truck, cement mixers, large front shovel excavators, and front-end loaders. Affidavit of James Chin, dated May 11, 2011. Petitioners state that, although there is a chain link fence between their property and the southern access road, St. Mary's has not even erected a "dust curtain," as they have to protect the playground which is located on St. Mary's property on the opposite side of the southern access road.

St. Mary's contends that it had always intended to utilize the southern access road and that the impacts of the road were fully studied in DASNY's environmental review of the project,

quoting the following:

Access and Staging: The staging area for materials and equipment would be located on the existing playground adjacent to the north surface parking lot. A temporary construction access road would be located near the southern boundary of the project that would allow access to the south end of the proposed addition. This road would be placed between the property line which abuts the rear yards of several residences and a playground which would be fenced off for safety. The vast majority of construction access would be from the north to avoid disturbance to residences which back onto the southern end of the property.

State Environmental Quality Review Negative Declaration, Notice of Determination of Nonsignificance (Negative Declaration) at 59-60, DASNY Record at R. 0226-0227.

Petitioners concede that the southern access was mentioned in the original environmental studies relating to the construction project; however, they contend that, when they participated in a walking tour of the site on August 4, 2010, they were told by Michael Handler, Senior Project Manager with Turner Construction Company, the Construction Manager for the project, that it would not be necessary to build the southern access road. According to the petitioners, Mr. Handler encouraged them to drop their opposition to the opening of the southern access road, because Turner had changed its mind about constructing the road and another alternative to the road had been selected. See Affidavit of Timothy Vance, dated April 11, 2011, ¶ 2.

As petitioners point out, the reference to the southern

access road in the Negative Declaration is merely a description of the planned road, and not an examination of the potential impacts of that road on the immediate homeowners, or a consideration of any means of mitigation of those impacts, beyond a general statement that the vast majority of construction access would be from another road in order to avoid disturbance of the residences which abut the road. This short statement about the planned road could hardly be said to constitute a "hard look" at the possible impact of the southern access road on the families whose homes abut that access road; rather, it would seem to be no look at all. See *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986).

The Negative Declaration does generally mention the possibility of using mitigation measures for the construction project as a whole, such as temporary noise barriers, quieter back up alarms and the prohibition of vehicle engine idling on the site. See Negative Declaration, at 62-63, DASNY Record, at R0229-0230. It does not, however, specifically consider the use of any of these measures in connection with the southern access road, nor is there any indication that any of those mitigation measures, or other measures, such as the installation of a dust screen, have been undertaken to protect the abutting residences from the impacts of the southern access road.

St. Mary's contends that, although initially the northern access road was used to bring materials and equipment to the

site, that was no longer possible, because after the foundation was poured, the foundation formwork was braced with metal braces which made the eastern end of the road impassable for trucks and equipment. On May 5, 2011, St. Mary's counsel provided the court with a schedule during which the southern access road would be used, which included May 23, to bring in a mobile crane and support trucks, and the weeks of August 15-September 2 to deliver scaffold and materials, and the weeks of January 2-13 to deliver wall materials. Since that schedule was provided, St. Mary's indicated that rain in May had delayed the schedule by approximately one week. St. Mary's further states that the southern access road will only rarely be used other than at the times specified in the letters of counsel.

St. Mary's counsel indicates that "Turner is taking all practical precautions to minimize and mitigate any construction impacts." Letter of Karen Binder to the court, dated May 23, 2011, at 1. No information has been provided, however, indicating what those precautions are, and given petitioners' assertion that Turner has not even installed a dust screen to minimally protect their property from the dust that may be stirred up by the heavy equipment using the road, the court cannot assume that such precautions have been or will be taken. Furthermore, the statements made by St. Mary's counsel and those of the construction supervisor regarding the need for, and duration of, use of the southern access road differ

substantially.

In a letter to the court dated May 5, 2011, St. Mary's counsel, Karen Binder, states that in addition to using the road to bring in backfill, it would be used on May 23, 2011 to bring in a mobile crane, and it would be used for three weeks in the end of August to deliver scaffold and materials, and then again in January for two weeks to deliver wall materials. In contrast, Senior Project Manager Michael Handler stated in his affidavit that after the delivery of backfill and gravel at the end of April, "I expect that the temporary southern access road will be used again in late May to bring in a crane and then it will be used again, approximately two months later, to remove the crane.⁶ Thereafter, the southern access road will only be rarely used." Affidavit of Michael Handler, dated April 7, 2011, ¶ 11. Thus, it is far from clear why the road must be used for three full weeks in August and two full weeks in January. Moreover, St. Mary's has made no guarantees that the use of the road will be limited to the five weeks noted in its letter to the court, nor has it indicated that it has explored any alternatives to using

⁶The court notes that both counsel for St. Mary's and Handler state that the southern access road would be necessary to bring in a mobile crane and claim that at least as of May 5, 2011, there was no crane on the property. See Binder letter, dated May 5, 2011. However, the court also notes that the photographs annexed to the May 11, 2011 affidavit of James Chin, which were taken on April 22, 2011, appear to show a folded mobile crane being brought on to the site via the southern access road.

that road. That effectively leaves those petitioners whose homes directly abut the access road at the mercy of St. Mary's and its contractor, and without any recourse if the contractor decides it would simply be more convenient for them to use the southern access road more frequently than previously indicated.

Particularly given the complete absence of examination of the potential impacts of the use of the southern access road on the immediate neighbors, that is an unacceptable situation.

In a letter to the court of their counsel, Albert K. Butzel, petitioners appear to recognize that some use of the southern access road is necessary, however, they ask the court to restrain St. Mary's and its contractors from using the southern access road for more than 10 additional days "with the right to return to the Court, after notifying the Petitioners, to ask for additional days under truly extraordinary circumstances." Letter of Albert K. Butzel, dated May 11, 2011. Stating that Turner Construction has advised petitioners that work is likely to be carried out on some weekends, petitioners further request that weekend use of the southern access road be prohibited.

For these reasons, the court is ordering a preliminary injunction prohibiting further use of the southern access road, except for the purpose of removing the crane, when it is no longer needed on the site. St. Mary's may apply to the court for additional use of the southern access road, but must present evidence establishing the purpose, duration, and necessity of the

use of that road. In addition, St. Mary's must meet with petitioners concerning the implementation of mitigation measures to reduce the impact of any additional use of the road on the abutting residences.

Accordingly, it is hereby

ORDERED on Motion Sequence 002 that the motion of the Dormitory Authority of the State of New York seeking summary judgment in its favor regarding whether it has the legislative authority to issue bonds to finance St. Mary's construction project is hereby granted; and it is further

ADJUDGED and DECLARED that the Dormitory Authority of the State of New York has the authority to provide financing for the St. Mary's construction project at issue in this litigation pursuant to Public Authorities Law §§ 1676 (2) and 1680; and it is further

ORDERED that petitioners' cross motion for a stay of the Dormitory Authority of the State of New York's motion is denied; and it is further

ORDERED on Motion Sequence 003 that petitioners' motion to renew is denied; and it is further

ORDERED that respondent Department of Buildings (DOB's) cross motion for summary judgment in its favor is granted, and the proceeding is dismissed as to DOB; and it is further

ORDERED that petitioners' motion for a preliminary injunction with respect to the use of the southern access road is

granted, to the extent that further use of the southern access road is prohibited, except for the purpose of removing the crane, when it is no longer needed on the site; however, respondent St. Mary's Hospital for Children may apply to the court for additional use of the southern access road, based upon evidence of the necessity therefore, and after consultation with the petitioners concerning mitigation actions, as discussed in the opinion above; and it is further

ORDERED on Motion Sequence 004 that petitioners' motion for summary judgment in their favor with respect to the applicability of the grandfathering clause of ZR § 24-111 (a) is denied; and it is further

ORDERED that petitioners must provide an undertaking in the amount of \$50,000.

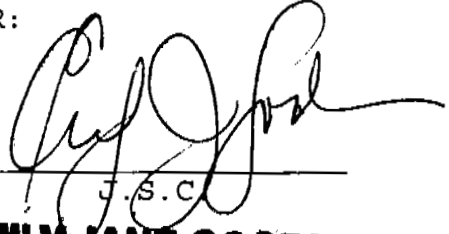
Dated: July 19, 2011

This Constitutes the Decision and Order of the Court.

ENTER:

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).



J.S.C.

EMILY JANE GOODMAN