Westwater v New York City Bd. of Standards & Appeals
2013 NY Slip Op 32515(U)
October 15, 2013
Supreme Court, New York County
Docket Number: 100059/13
Judge: Michael D. Stallman
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

In the Matter of the Application of

ANGELA K. WESTWATER, SPERONE WESTWATER, INC., SPERONE WESTWATER GALLERY, LLC and WEST ONE, LLC,

Petitioners,

- v -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, THE CITY OF NEW YORK and CHRISTIE LAND ASSOCIATES LLC, 10 STANTON OWNERS LLC, and 215 CHRYSTIE LLC,

Respondents.

INDEX NO. 100059/13

MOTION DATE 5/29/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 8 and memoranda of law were read on this Article 78 petition

Notice of Petition; Verified Petition; Affidavit in Support; Affidavit of Service | No(s). 1; 2; 3; 4

Verified Answer—Affirmation of Service; | No(s). 5-6; 7-8
Verified Answer—Affirmation of Service;
Record of Proceedings before the Board of Standards and Appeals

Upon the foregoing papers, this Article 78 petition is decided in accordance with the annexed memorandum decision and judgment.

UNFILED JUDGMENT
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).

HON. MICHAEL D. STALLMAN

Dated: 10/15/13
New York, New York

, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION IS ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ANGELA K. WESTWATER, SPERONE WESTWATER, INC., SPERONE WESTWATER GALLERY, LLC and WEST ONE, LLC,

Index No. 100059/13

DECISION AND JUDGMENT

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

- against -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, THE CITY OF NEW YORK and CHRISTIE LAND ASSOCIATES LLC, 10 STANTON OWNERS LLC, and 215 CHRISTIE LLC,

Respondents.

----------X

HON. MICHAEL D. STALLMAN, J.:

Petitioners challenge the authorization by the Board of Standards and Appeals (BSA) of the City of New York (City) for the construction of a 25-story hotel/residential building in the neighborhood near Houston Street and the Bowery in Manhattan. Specifically, petitioners seek an order:

> (1) reversing and annulling BSA's decision, certified on December 13, 2012 (Decision), approving an amendment to a variance and site plan for property known as 2-26 Stanton Street, New York, New York (Stanton Street Property);

(2) directing BSA to undertake an environmental review of the impacts of the proposed construction;

(3) enjoining respondents from proceeding before complying with applicable law; and

(4) awarding petitioners their fees and disbursements.

BSA and the City (together, City Respondents) seek dismissal of the petition, as do respondents Chrystie Land Associates LLC (Chrystie Land), 10 Stanton Owners LLC (10 Stanton), and 215 Chrystie LLC (collectively, Owner Respondents).

Background and Procedural History

Allegations of the Petition

Petitioner Angela K. Westwater (Westwater) is the co-owner of the Sperone Westwater Gallery (Gallery), located at 257 Bowery, New York, New York (257 Bowery). Petitioner West One, LLC (West One) is the owner of 257 Bowery. Petitioner Sperone Westwater, Inc. (Sperone Westwater) is sole owner of West One, and has a majority ownership interest in Sperone Westwater Gallery, LLC, which operates the Gallery.

Respondent BSA is a municipal agency of the City. It reviews applications for variances from the City's zoning resolutions, and it issued the Decision, the subject of this Article 78 proceeding. Respondent City is a municipal corporation

and has ultimate responsibility for land use actions within its bounds. Respondents Christie Land and 10 Street were (and may still be) the owners of the Stanton Street Property, and the applicants for the present action. Respondent 215 Chrystie acquired from Christie Land the portion of the Property where the new building is proposed to be built and plans to develop that portion of the Stanton Street Property with the new building (petition, ¶¶ 5-8a).

The interior of the Gallery includes large floor-to-ceiling windows on its rear (eastern) facade, which provide natural light essential to the display of art within it. Petitioners allege that the proposed building will block the light that the Gallery has enjoyed and depends on, and will have other negative impacts on the Gallery and its owners (*id.*, ¶ 3).

The Stanton Street Property is located just south of Houston Street, with frontage on Stanton Street, Chrystie Street, and the Bowery (*id.*, ¶ 9). In January 1970, the City established the "Cooper Square Urban Renewal Plan" (Renewal Site) for a five-block area that included the Stanton Street Property (*id.*, ¶ 10). Years later, a private developer proposed to develop the Stanton Street Property with a nine-story, 85-foot high apartment development. Because the development did not comply with the setback requirements of the applicable zoning resolution, the developer was obligated to secure a variance from BSA (*id.*, ¶ 11).

On November 16, 1982, BSA granted the variance (1982 Variance) and approved a site plan (Site Plan) (*id.*, ¶ 12). The City approved a land disposition agreement conveying the Stanton Street Property to the private developer. The developer entered into an agreement with the U.S. Department of Housing and Urban Development to maintain the apartment complex as Section 8 subsidized housing for 20 years (later extended to 2015) (*id.*, ¶ 13). The developer developed open space areas to serve the apartment complex, including a landscaped area with walks, benches, and a play facility. Over the ensuing 30 years, the Renewal Site began to be redeveloped and upgraded with new buildings, but only one of the new buildings, the New Museum, exceeded 130 feet (*id.*, ¶¶ 14-15).

In May 2012, Chrystie Land applied to BSA for what it categorized as a "minor amendment" to the 1982 Variance, which would permit the developer to build a 25-story mixed-use hotel and residential building, 289 feet in height and containing 195,000 square feet of floor area. The new construction would substantially displace the landscaped open space and play area. Petitioner alleges that it would cast shadows across the adjacent Sarah Delano Roosevelt Park and the nearby Liz Christy Community Garden (Liz Christy Garden), and interfere with direct daylight to the Gallery. An environmental assessment or other environmental analysis was never undertaken or provided (*id.*, ¶ 17).

The developer claimed the new building to be "as-of-right," but the City Department of Buildings rejected the application for a building permit and required amendment of the Site Plan. The developer submitted its application to BSA as a minor amendment, which was placed on the "Special Order Calendar" (SOC). Thus, direct notice of the application and public hearing was not given to neighboring property owners, including petitioners. BSA held a public hearing on the application on October 16, 2012. Petitioner assert that they were alerted at the last minute, and attended the hearing, but had no time to analyze the application or develop focused testimony. BSA gave the petitioners until November 5, 2012 (later extended to November 19) to submit additional information. However, BSA did not agree to continue the public hearing and announced that it would make its decision on December 11, 2012 (*id.*, ¶¶ 18-20).

Between October 16 and November 19, 2012, petitioners alerted others within the community, resulting in a series of letters opposing the building from artists such as Chuck Close and Kiki Smith, institutions such as the New Museum and the Rauschenberg Foundation, business interests such as Keith McNally, the owner of Pulino's restaurant, and community groups such as the Bowery Stanton Block Association, the Liz Christy Garden and the Lower East Side Preservation Initiative. Petitioners made a detailed submission alleging BSA's obligation to

comply with the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR). On November 26, 2012, the developer's attorneys responded. Petitioners attempted to respond to the developer's legal arguments, but BSA refused to accept the letter on the ground that there was no provision in its scheduling for petitioners' further response (*id.*, ¶¶ 21-23). On December 11, 2012, BSA approved the amendment of the Site Plan, setting forth its reasons in the Decision (*id.*, ¶ 24). Shortly thereafter, the developer sold the Property for $50 million (*id.*, ¶ 18).

The petition contains three causes of action. The first cause of action alleges that, because of the potential for a significant environmental impact, BSA was required to comply with SEQRA and CEQR by taking a "hard look" at the potential impacts and requiring either an environmental assessment or an environmental impact statement. Instead, BSA asserted that this was a "Type II Action," which, by definition, would have no environmental impact. BSA apparently took the position that its approval was ministerial, involving no discretion on its part; petitioners assert that the BSA had full discretion to approve or reject the amendment to the Site Plan. Petitioners allege that BSA's approval violated SEQRA and CEQR and was otherwise arbitrary and capricious and an abuse of discretion.

The second cause of action alleges that BSA failed to comply with its rules and applicable law relating to amendments of previously granted variances, mischaracterized the application as one for a "minor amendment," and otherwise violated the law, including SEQRA and CEQR. It alleges that the amendment is incompatible with the 1982 Variance, because the proposed building would be out-of-scale with surrounding buildings and the low- and mid-rise character of the neighborhood and would also have an adverse effect on the Sarah Delano Roosevelt Park and the Liz Christy Garden, both of which are essential features of the neighborhood.

The third cause of action alleges that, following the October 16, 2012 public hearing, BSA accepted further input from opposition groups and individuals, but notwithstanding these submissions, BSA's commissioners never discussed in public, at a meeting, hearing, or otherwise, including at its public meeting of December 10 or at its December 11 meeting when it voted, the substance of the objections. Petitioners allege that BSA thereby violated the "Open Meetings Law," which mandates that an agency's discussions of business must be undertaken in public at a public meeting or public hearing. Petitioners argue that, given the length and detail of the Decision, it is inconceivable that at one time or another, BSA commissioners did not discuss the merits of the application, but it did not do

so in public, as evidenced by the silence of the commissioners at the December 10 and December 11 meetings. Petitioner asserts that any such discussion or deliberation by the Commissioners as a group violated the Open Meetings Law and invalidated its Decision.

Allegations of the Answers

In their verified answer, the City Respondents state that BSA adopted the resolution in 1982 granting the variance from applicable height and setback regulations (known as the sky exposure plane)[1] of the zoning resolutions for portions of the then-proposed nine-story residential apartment building. The Site Plan in the variance application depicted 40,388 square feet of open space, of which 7,677 square feet was used for residential parking, and 32,711 was landscaped, but the approval did not mention any requirement that the open space (the site of the new building) be maintained as a condition of the variance (City Respondents Answer, ¶ 51).

Floors 1 through 18 of the new 25 story building would be for hotel use, while floors 19 through 25 would be for residential apartments. Together, the

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[1] The City's Department of City Planning's "Zoning Glossary" defines "sky exposure plane" as "a virtual sloping plane that begins at a specified height above the street line and rises inward over the zoning lot at a ratio of vertical distance to horizontal distance set forth in district regulations. A building may not penetrate the sky exposure plane which is designed to provide light and air at street level, primarily in medium- and higher-density districts."

existing building and the new building will have 179,894 square feet of residential floor area, and 3.15 floor area ratio (FAR) and 162,150 square feet of hotel floor area (2.84 FAR), for a total of 342,044 square feet, (5.99 FAR), within the restrictions of the zoning regulations which permit a maximum of 3.44 FAR for residential development and a maximum of 6.0 FAR. Respondents assert that this would be "as-of-right" but for the changes to the Site Plan submitted with the 1982 Variance, and that the new building (and the subject "minor" amendement) complies with all zoning requirements, including height, setback, and open space, and no variance of any zoning provision is required (*id.*, ¶¶ 55-56).

BSA placed the application for a "minor" amendment on the SOC calendar seeking to substitute the new site plan, reflecting the new building (*id.*, ¶ 58). Public hearings were held as to the application. Counsel for petitioners opposed the application, arguing that it was a "massive," not a "minor" development, and that it should have been placed on the BSA zoning calendar, subject to a full environmental review (*id.*, ¶ 65).

According to BSA Chair, Meenaski Srinivasan, BSA has discretion as to what matters are placed on the SOC calendar, and the new building would be as-of-right, such that if the 1982 Variance did not exist, the same building could be built without any variance (*id.*, ¶ 68). After members of BSA reviewed the entire

record, at its meeting on December 11, 2012, BSA approved the application, and on December 13, 2012, issued its Decision. BSA considered and addressed the objections made by the opposition and found that environmental review was not required because (1) the application was appropriately classified as a minor amendment and heard on the SOC calendar, (2) the question before the BSA was limited to whether the amendment disturbs the findings and conditions of the original variances, and (3) that such finding is of a ministerial nature and therefore exempt from SEQRA/CEQR (*id.*, ¶ 74).

The answer of the Owner Respondents notes that a subway easement encumbered the site by affecting the placement of the building, thereby causing the need for the 1982 Variance. The unique physical condition made it difficult to comply with the height and setback regulations to the existing building, and the new building will not implicate the 1982 Variance (Owner Respondents Answer, ¶ 57; "Record of the Proceedings Before the Board of Standards and Appeals" [BSA Record] at 21).

Owner Respondents state further that the present application would not undermine the findings in 1982, because the surrounding area was then so economically depressed that the unused development rights had no value, and BSA was not likely to have contemplated its use in granting the 1982 Variance.

The area is now "part of a lively mixed-use neighborhood that contains a myriad of residential, commercial and community facility uses" (*id.*, ¶ 58).

Arguments

In support of the petition, petitioners argue that (1) BSA violated SEQR/CEQR in failing to undertake or require the developer to undertake an environmental evaluation of the impacts of its action; (2) BSA violated its own rules and applicable law in approving the Site Plan amendment; and (3) BSA violated the Open Meetings Law in approving the amendment to the variance.

In separate memoranda, the City Respondents and Owner Respondents argue that (1) the Decision satisfies the applicable standard of review; (2) BSA's designation of the amendment as minor was consistent with applicable law and was rational; (3) BSA properly determined that its ministerial action did not require environmental review under SEQRA and CEQR; and (4) the decision-making process was conducted in compliance with the Open Meetings Law.

Discussion

"In reviewing administrative proceedings in general and SEQRA determinations in particular," courts are "limited to considering 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" (*Chinese Staff &*

Workers Assn. v City of New York, 68 NY2d 359, 363 [1986], quoting CPLR 7803 [3]). Where the agency's determination is rational and supported by substantial evidence[2], its determination must be upheld (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 238 AD2d 200, 200 [1st Dept 1997], *affd* 91 NY2d 413, 418-419 [1998]). Such is the case here. The respondents have demonstrated entitlement to dismissal of the petition.

Of paramount importance in this proceeding is whether the action is deemed a "Type I" or "Type II action," as defined in the regulations. A Type I action will generally require a thorough environmental review whereas a Type II will not.

> "The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS [Environmental Impact Statement] than Unlisted actions. All agencies are subject to this Type I list"

(6 NYCRR 617.4 [a]).

In contrast, a Type II action does not require environmental review under SEQRA (*Branch v Riverside Park Community LLC*, 74 AD3d 634 [1st Dept], *lv denied* 15 NY3d 710 [2010]). 6 NYCRR 617.5 provides:

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[2] Substantial evidence is considered by trial courts in evaluating whether an administrative determination has a rational basis (*see e.g. Kettaneh v Board of Stds. & Appeals of City of N.Y.*, 85 AD3d 620, affirming trial court's decision that BSA's validation of a proposed zoning variance was supported by substantial evidence; *see also Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 238 AD2d 200). In this context, the issue of substantial evidence does not necessitate transfer to the Appellate Division pursuant to CPLR 7803 (4) and 7804 (g).

> "(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies."

Petitioners contend that the approval of the amendment was either a Type I action or, at a minimum, an Unlisted action[3] having a significant environmental impact. In support, petitioners cite 6 NYCRR § 617.4 (b) (6) (v) and (10).

617.4 (b) (6) (v) (6) provides:

> "(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:
>
> * * *
>
> (6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:
>
> * * *
>
> (v) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area."

617.4 (b) (10) provides:

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[3] An Unlisted action is defined as all actions not identified as a Type I or Type II action in part 617, "or in the case of a particular agency action, not identified as a Type I or Type II action in the agency's own SEQR procedures" (6 NYCRR 617.2 (ak).

> "(10) any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR 62, 1994 (see section 617.17 of this Part)."

Petitioners argue that the proposed construction exceeds 25 percent of the threshold of 240,000, or 60,000, because the new building will consist of 195,000 square feet, and be "substantially contiguous" to the City's Sara Delano Roosevelt Park. However, 617.4 (b) (10) expressly refers to "Unlisted actions." The amendment to the 1982 Variance is a Type II listed action. 6 NYCRR 617.5 (c) (19) provides:

"(c) The following actions are not subject to review under this Part:

* * *

> (19) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)."

As persuasively argued by respondents, the amendment can be deemed minor and "of a ministerial nature involving no exercise of discretion," because it will not change any of the conditions of the 1982 Variance pertaining to height and setback authorized by the variance, and construction of the new building will

not create any noncompliance (*see Fisher v New York City Bd. of Stds. & Appeals,* 71 AD3d 487, 487-488 [1st Dept 2010]). Thus, BSA's "decision to consider the variance as amended without conducting a new analysis pursuant to New York City Zoning Resolution § 72-21 (pertinent to applications for new variances)" was not arbitrary or capricious (*id.* at 487 [1963 variance granted on findings that the section 72-21 requirements had been satisfied, the modification did not change any conditions of the variance pertaining to the building and side and rear yards that the variance authorized, and the lot merger will not create a new noncompliance]; *see also Matter of East 91st St. Neighbors to Preserve Landmarks v New York City Bd. of Stds. & Appeals*, 294 AD2d 126, 126 [1st Dept 2002] [BSA granted "an amendment to a previously granted zoning variance to allow respondent Sacred Heart to erect an 85 foot high, 3,268 square foot tower to be located in a portion of the side yard between the school's buildings located at 1 and 9 East 91st Street"]).

Both BSA in its Decision, and respondents in their memoranda, rely heavily on *Fisher v New York City Bd. of Stds. & Appeals* (21 Misc 3d 1134[A], 2008 NY Slip Op 52345[U] [Sup Ct, NY County 2008], *affd* 71 AD3d 487). Petitioners distinguish *Fisher v New York City Bd. of Stds. & Appeals,* arguing that it "did not involve the plan to eviscerate previously-identified open space," thereby

undercutting one of the conditions on which the original variance was granted" and it "did not involve a building that would cast shadows across a City park or an action identified in the SEQRA regulations as Type I" (petitioners reply memorandum at 7).

As to the distinction that the 1982 Variance was allegedly granted on the condition that the open space remain open, the BSA Record shows that the only condition was that the nine-story building adhere to the drawings pertaining to the sky exposure plane (*see* BSA Record at 77-78 containing BSA minutes of the resolution approving of the 1982 Variance, dated November 16, 1982). As for the second distinction - the creation of shadows across a City park - the petitioners in *Fisher v New York City Bd. of Stds. & Appeals* also claimed that the merger of the two lots would adversely affect the neighborhood, although the decision does not state the specific concerns (21 Misc 3d 1134[A], 2008 NY Slip Op 52345[U], *1). The third distinction about this being a Type I action has been addressed above.

BSA's characterization of the amendment to the 1982 Variance as minor is supported by substantial evidence, and, therefore, it should be upheld (*Kettaneh v Board of Stds. & Appeals of City of N.Y.*, 85 AD3d 620, 621 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 919 [2012]). "In reviewing such determinations, courts consider substantial evidence only to determine whether the

record contains sufficient evidence to support the rationality of the Board's determination" (85 AD3d at 621 [internal quotation marks and citation omitted]).

As set forth in the Decision, the conditions for the original variance still exist, namely the location of the subway tunnel that restricted the placement of the existing building which, in turn, required the height and setback variance. The amendment to the 1982 Variance will not affect these findings, nor will it conflict with the applicable zoning regulations presently in place (Decision at 2). Petitioners do not dispute that there is zoning compliance (*see* petitioners' memorandum at 11 ["It may be that under the zoning, the Tower could be built 'as of right'"]).

Moreover, the dimensions of the new building will adhere to applicable rules pertaining to FAR for a mixed use building (residential and commercial). The new building will be constructed in an open space that has not been developed over the 30-year period only because, as determined by BSA, the surrounding area was economically depressed, and there is no evidence to indicate that maintaining the open space was a condition of the 1982 Variance (Decision at 2-3).

Notwithstanding that BSA followed regulations concerning FAR and zoning in making its determination, petitioners urge the court to mandate that it undertake an environmental review. At best, this would be an unproductive

exercise. As stated by the Court of Appeals:

> "An agency that is empowered to consider only criteria that are unrelated to any environmental or land use concerns clearly would not be aided in its decision by the receipt of this highly technical and environmental-specific information. Furthermore, preparation of an EIS [Environmental Impact Statement] would be a meaningless and futile act, since an agency vested with discretion in only a limited area could not deny a permit on the basis of SEQRA's broader environmental concerns"

(*Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 327 [1993]). Even if the agency has some discretion, where that discretion is limited, and unrelated to environmental concerns, then "preparation of an [environmental impact statement] would be a meaningless and futile act" (*Matter of Island Park, LLC v New York State Dept. of Transp.*, 61 AD3d 1023, 1028 [3d Dept 2009] [Department of Transportation (DOT) Commissioner has certain discretion confined to consideration of the safety issues presented by the particular crossing at issue, and is unrelated to the environmental concerns that may be raised in an environmental impact statement; DOT could not, on a finding that the public safety could be insured only by closing a crossing, refuse to order such closure on the basis of SEQRA's broader environmental concerns], quoting *Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 327).

Petitioners complain about the new building as to its height, its blockage of natural light into the Gallery, the increased casting of shadows on the nearby Sarah

Delano Roosevelt Park, and the added burdens to the community resulting from the influx of new residents, whether they be tenants on floors allocated for residential use, or transient guests on floors allocated to the hotel. But petitioners have not shown how any of these factors violate zoning regulations, or negate respondents' assertion, and BSA's findings, that the new building represents an as-of-right construction. To be sure, these are legitimate concerns to the residents of the neighborhood and the owners of the Gallery. But the court's role in this proceeding is to evaluate whether the agency adhered to applicable laws and regulations, and not to substitute its judgment for that of the agency as to environmental concerns, i.e., will the community be adversely affected by the variance. "Despite petitioner's numerous challenges, 'it cannot be said that there was an absence of substantial evidence to support the Board's findings'" (*Matter of Torri Assoc. v Chin*, 282 AD2d 294, 295 [1st Dept] [citation omitted] [upholding BSA's findings as to each of the five requirements necessary to issue the proposed variances], *lv denied* 96 NY2d 718 [2001]).

Because the 1982 Variance was granted upon the requisite findings that the standards set forth in Zoning Resolution § 72–21[4] had been satisfied, and the

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[4]The City's Zoning Resolution § 72–21 contains five requirements that must be satisfied for the issuance of a new variance (*see Matter of West Vil. Houses Tenants' Assn v New York City Bd. of Stds. & Appeals*, 302 AD2d 230, 230 [1st Dept 2003], *lv dismissed in part, denied in part* 100 NY2d 533 [2003]).

amendment to the variance is minor, BSA "properly approved the amended variance on a less rigorous showing than would have been required had the application before it been for an entirely new variance" (*Matter of East 91st St. Neighbors to Preserve Landmarks v New York City Bd. of Stds. & Appeals*, 294 AD2d at 127). "BSA is comprised of experts in land use and planning," and "its interpretation of the Zoning Resolution is entitled to deference. So long as its interpretation is neither irrational, unreasonable nor inconsistent with the governing statute, it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-419 [1998] [internal quotation marks and citation omitted]).

In its Decision, BSA noted that since the 1982 Variance was approved, the neighborhood has experienced mixed-use construction including: (1) a 14-story building with 360 apartments on a "former Cooper Square URP site" (2003); (2) a nine-story building with 206 apartments one block to the North on another "Cooper Square Site" (2005) and a seven-story building with 90 units (2007); (3) a 12-story building with 212 dormitory units for New York University at 1 East 2nd Street; (4) two 12-story and one 10-story building on East Houston Street within three blocks of the site; and (5) a 16-story building two blocks South of the site (2005) (Decision at 2-3). Although the proposed 25-story building would be the

taller than any of the others cited, it does not appear that it would be of a height that would make it incongruous with the surrounding neighborhood. Again, this issue is not before the court.

Moreover, the new building will be partially used as a hotel, and the area has seen the construction of several hotels, including (identified in the Decision either by name or location): (1) the Bowery Hotel (16 stories and 190 feet); (2) the Standard Hotel (21 stories and 224 feet); (3) the Thompson LES Hotel (20 stories and 208 feet); (4) the Hotel on Rivington (20 stories and 194 feet); (5) 353 Bowery (24 stories and 210 feet); (6) 66 First Avenue (towers of 21 stories and 197 feet and 21 stories and 195 feet); (7) 40 First Avenue (21 stories and 193 feet); (8) 207 East Houston (23 stories and 276 feet); (9) 101 Ludlow (17 stories and 230 feet); and (10) 62 Essex Street (23 stories and 229 feet) (Decision at 3).

Petitioners remark that the City's Sara Delano Roosevelt Park "would be cast in shadow by the new building" (*see e.g.* petitioners' reply memorandum at 2). This assertion assumes that the park is not currently affected by shadows, and appears to overstate the effect of shadows that might be created by the new building. Petitioners' own commissioned shadow study shows that a portion of the park is already subject to shadows, albeit the shadows would increase somewhat depending on the time of the year. The increased shadows on the park were

noticeable in the May 6th/August 6th and June 21st studies, but not particularly noticeable in the December 21st and September 21st/March 21st studies (*see* BSA Record at 327-330). Assuming, however, that the court were to agree that *any* increase in shadows over a public park is undesirable, it may not substitute its judgment for that of the agency, because it is not its role to "'weigh the desirability of any action or [to] choose among alternatives'" (*Akpan v Koch*, 75 NY2d 561, 570 [1990], quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]).

In this regard, petitioners' reliance upon *Matter of Lane Constr. Corp. v Cahill*, 270 AD2d 609 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000]) is misplaced. Petitioners cite *Matter of Lane* for the proposition that, even if BSA lacks discretion under the zoning resolution, it has discretion under SEQRA itself to reject the application or require mitigation to minimize adverse impacts.

In *Matter of Lane*, petitioner, a mining company, challenged the determination of the Deputy Commissioner of Environmental Conservation denying its application for a mined land reclamation permit to operate a hard rock quarry in Rensselaer County. Subsequent to petitioner's submission of a draft environmental impact statement pursuant to SEQRA, the Department of Environmental Conservation (DEC) issued a draft permit and an Administrative

Law Judge (ALJ) concluded that the proposed project would fully comply with DEC's regulatory requirements, and recommended approval. The Deputy Commissioner accepted the ALJ's analysis and findings, but denied the permit based on the overall record concluding "that the project's impacts on the historical and scenic character of the community including visual and other impacts on the community cannot be sufficiently mitigated" (*id.* at 610).

The petitioner argued that DEC's refusal to adopt regulatory standards or criteria applicable to mining projects relating to visual standards rendered the Deputy Commissioner's determination arbitrary and capricious, as was the fact that the determination was unsupported by substantial evidence. The Third Department found that the "absence of regulations concerning visual standards governing mining operations pursuant to the Mined Land Reclamation Law . . . assuming such could be promulgated, would have no bearing on the Deputy Commissioner's determination." Moreover, it held that DEC's determination was supported by substantial evidence, and had a rational basis. It confirmed the agency's determination.

According to petitioners, *Matter of Lane* shows that BSA had the authority to deny the application based on environmental concerns even if it had no discretion under the zoning resolution (petitioners' reply memorandum at 5).

However, the essence of *Matter of Lane*, as it applies here, is that, "even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the Deputy Commissioner provided that the administrative determination is properly supported by the record" (270 AD2d at 611). In *Matter of Lane*, the Court found that the administrative determination was "properly supported by the record" (*id.*). The court here is similarly persuaded that there is no basis for the court to substitute its judgment for that of the BSA. In sum the BSA determination, including that the subject development is as of right, has a rational basis of being supported by substantial evidence.

The Court does not find that respondents violated the Open Meetings Law (Public Officers Law § 100 *et seq.*). The Open Meetings Law requires that public body meetings conducting public business, other than executive sessions, "be open to the general public" (*see* Public Officers Law §§ 102, 103 [a]).

> "In enacting the Open Meetings Law, the Legislature sought to ensure that 'public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy'"

(*Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522, 528 [2005], quoting Public Officers Law § 100).

BSA placed the matter on the SOC calendar pursuant to 2 RCNY 1-07.1 as

an amendment to a variance, rather than the "BZ calendar" which is for new zoning variances, thereby exempting the application from the requirement of performing an environmental impact quality study pursuant to SEQRA and CEQR (*see Fisher v New York City Bd. of Stds. & Appeals,* 71 AD3d at 488 ["because BSA's approval of the application was ministerial in nature, it was not an 'action' requiring an environmental impact quality study"]). 2 RCNY 1-07.1 pertains to the following types of applications:

> "(a) Applications related to previous grants:
>
> > (1) Amendment: Applications may be filed on the SOC calendar for amendments to: (1) a pre-1961 use grant pursuant to ZR §§ 11-412 or 11-413, (2) a pre-1961 bulk grant, (3) a post-1961 variance pursuant to ZR §§ 72-01 or 72-22, (4) a post-1961 special permit pursuant to ZR §§ 73-01 or 73-04, or (5) a transient parking waiver. Amendments may include but are not limited to changes to the Board-approved plans or resolution"

(*id.*). The application to amend was properly placed on the SOC calendar because it fell within subdivision (3). Moreover, a review of the BSA Record establishes that respondents complied with the mandate that the public be given an opportunity to participate in the proceedings.

The BSA Record consists of 488 pages. It includes the requisite findings, set forth in six single-spaced pages, that BSA used in making its determination and arriving at the Decision (*see Matter of Kingsley v Bennett*, 185 AD2d 814,

815-816 [2d Dept 1992]). In addition to the six-page Decision, the BSA Record contains copies of: (1) "Project Data Statement"; (2) the SOC application with supporting documentation; (3) BSA "Notice of Comments"; (4) the applicant's response to the notice of comments; (5) revisions to the application; (6) notice of hearing letters; (7) letter from Manhattan Community Board 3 approving the application; (8) applicants' response to BSA's email request; (9) letter from the law firm Gonzalez Saggio Harlan advising of its representation of petitioner Sperone Westwater in opposition to the application; (10) transcript of proceedings before the BSA (October 16, 2012); (11) letter from Sperone Westwater seeking more time to oppose; (12) letters from residents and businesses in the vicinity opposing the application; (13) letter from Albert K. Butzel, counsel for petitioners, in opposition; (14) letter from Sperone Westwater in opposition with exhibits, including colored graphic of building heights, graphic study of proposed development, shadow study, gallery history, and photographs; (15) letter from counsel for applicant in response to opposition letters; (16) submission from counsel for applicant providing case law and cited documents; (17) transcript of proceedings before the BSA (November 27, 2012); (18) corrected architectural plans with cover letter; and (19) transcript of proceedings before the BSA (December 11, 2012). A review of the BSA Record supports respondents'

assertion that petitioners were given an adequate opportunity to participate, and did so participate in the hearings and the process overall.

Petitioners allege that, given the length and detail of the Decision, it is inconceivable that at one time or another, BSA commissioners did not discuss the merits of the application, but it did not do so in public, as evidenced by the silence of the commissioners at the December 10 and December 11 meetings. The claim that BSA made its Decision by conferring in private is based on speculation, and even if so, that would not automatically void the Decision (*see Matter of Cunney v Board of Trustees of the Vil. of Grand View, N.Y.*, 72 AD3d 960, 961-962 [2d Dept 2010] [Court agreed with petitioner's assertion that the zoning board of appeals of the Village of Grand View violated the Open Meetings Law by failing to vote on the application in public session, but petitioners failed to show good cause to void the determination and the record did not suggest that the failure to comply with the precise requirements of the Open Meetings Law was anything more than mere negligence]). Furthermore, considering the "substantial public input" at the hearing and the parties' "extensive documentary submissions,"[5] and

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[5] *See* letter from Gonzalez Saggio Harlan advising of its representation of petitioner Sperone Westwater in opposition to the application; letter from Sperone Westwater seeking more time to oppose; letters from residents and businesses in the vicinity opposing the application; letter from Albert K. Butzel, counsel for petitioners, in opposition; and letter from Sperone Westwater in opposition with exhibits, including colored graphic of building heights, graphic study of proposed development, shadow study, gallery history, and photographs.

in the corresponding absence of any indication that BSA intentionally violated the Open Meetings Law, petitioners failed to establish good cause warranting the exercise of the court's discretionary power to invalidate the determination (*Matter of Oakwood Prop. Mgt., LLC v Town of Brunswick*, 103 AD3d 1067, 1070 [3d Dept], *lv denied* 21 NY3d 853 [2013]; *see also Matter of Imburgia v Procopio*, 98 AD3d 617, 619 [2d Dept 2012] [petitioner must show good cause to invalidate agency determination]).[6]

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of this Court.

Dated: October 15, 2013
New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

[6] Moreover, the Court observes that nothing in the Open Meetings Law or otherwise requires that the drafting and editing of the BSA Decision, whether by Commissioner or staff, must be done at meetings open to the public.