

**Neighborhood in the Nineties, Inc. v City of New York**

2019 NY Slip Op 31258(U)

May 1, 2019

Supreme Court, New York County

Docket Number: 161788/2018

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LYLE E. FRANK** PART IAS MOTION 52EFM

*Justice*

-----X  
INDEX NO. 161788/2018  
NEIGHBORHOOD IN THE NINETIES, INC., MARLON  
MOCTEZUMA, ADAN ANGEL, HILDA SOTO, FLOR SOTO  
MOTION DATE 04/17/2019  
Petitioner, MOTION SEQ. NO. 001 002

- v -

THE CITY OF NEW YORK, STEVEN BANKS, PRAXIS HOUSING  
INITIATIVE, INC., ESPLANADE 94 LLC D/B/A HOTEL  
ALEXANDER,

**DECISION AND ORDER**

Respondent.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 18, 19, 20, 21, 23,  
24, 25, 26, 27, 28, 29, 30, 33, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63,  
64, 65, 66, 67, 68, 69, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 92, 94

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39,  
40, 41, 42, 43, 71, 85, 86, 87, 88, 89, 90, 91, 93, 95

were read on this motion to/for DISMISSAL.

Preliminarily, it should be noted that the parties of consented to convert the above  
entitled action into an Article 78 proceeding.<sup>1</sup> As such, the Court will issue its decision  
accordingly.

This proceeding arises from respondent, The City of New York's ("City"),  
implementation of a homeless shelter for adult families that has been contracted with respondent  
PRAXIS HOUSING INITIATIVE, INC ("Praxis") to operate in a building owned by respondent  
ESPLANADE 94 LLC d/b/a HOTEL ALEX ANDER ("Esplanade") at 306 West 94th Street.

This shelter would have up to 220 residents in up to 110 units. There would be no residents of

<sup>1</sup> At oral argument on April 17, 2019, both sides informed the Court that they agreed that the matter was now to  
proceed as an Article 78 proceeding, since the New York City Comptroller registered the contract, it was now a final  
determination and thus ripe for an Article 78 proceeding.

this shelter under 18, and each unit would house 2 people who are related to each other. The building has 6 residents from its prior use as a single room occupancy location, with such residents continuing to reside at this location, protected from eviction by the laws of rent stabilization. These residents would not be managed by Praxis but would continue to operate as tenants of Esplanade.

The petitioners requested this Court to enjoin any expansion of the shelter beyond what Justice Saunders had previously allowed, while the underlying Article 78 proceeding was being decided. The respondents objected to this and requested Justice Saunders' order to be fully lifted. This Court issued an interim order that decided that the shelter could be expanded to 150 residents in 75 units pending the decision on this proceeding.

#### *Standard of Review*

In this proceeding, the Court must determine whether DHS's determination to open the 94th Street Shelter has a rational basis. *See* NY CPLR § 7803(3). In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (see CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

#### *Discussion*

Petitioner's Article 78 petition is denied. Thus, respondent's, City, motion to dismiss is denied as moot. In analyzing this petition, the Court first notes what is not in dispute. At oral argument, the respondents stated that they were not challenging standing in this case. In addition, as discussed above, it was disclosed that the New York City Comptroller has registered the contract in question, and thus, that part of the petitioner's petition is now moot.

Petitioner contends that there are four major issues that give rise to the instant petition. The Court finds that all of them favor the respondents. The arguments will now be dealt with in turn.

### Zoning

The petitioner argues that the building in question falls under the R-1 occupancy group or Use Group 5 under the zoning resolution. The respondents dispute that fact, arguing that the shelter complies with current zoning for that location. It is this Court's position that there is presently no zoning violation. There appears to be little dispute that the threshold question is whether this is a location where people reside for more or less than 30 days. The petitioner takes the position that by its very nature as a shelter, being temporary housing, that this location violates the zoning classification. However, as freely acknowledged by both sides, the vast majority of the families that have been housed at this location since it opened in December remain at this location, which is much more than thirty days. It therefore appears that even though the shelter is not considered permanent housing for those residing in the shelter, it nonetheless should not be considered transient housing for purposes of zoning.

### New York City Administrative Code Section 21-312(2)(b)

The petitioners also challenge the scope of the shelter, which as contracted for, would reach a maximum of 220 residents in 110 units. The petitioners claim this would violate City

law which mandates a maximum of 200 residents at an adult shelter. The respondents argue that law is inapplicable to the instant matter. Both sides cite the history of the enactment of this law in supporting their position. In addition, the City notes that adult families are not permitted to reside in congregate housing, citing New York City Administrative Code Section 21-124(b)(1).

The Court agrees with the respondents' position. The problem that Admin. Code Section 21-312(b)(2) appeared to address was the barracks style housing of shelter residents, pursuant to the myriad evidence of the legislative history provided by the City. In addition, it does not stand to reason that Admin. Code Section 21-312(b)(2) would be addressing barracks type conditions among adult families, as this is an issue separately addressed for adult families pursuant to section 21-124(b)(1). The Court does not believe that the City Council in enacting 21-312(b)(2) meant to stop adults who are related from being sheltered together. Therefore, this Court does not find that the statute in question is applicable.

Fair Share

The Court also rejects the petitioner's contention that the "Fair Share" review was somehow improperly applied. It is well settled law that the City's Fair Share analysis does not mandate a particular outcome. See *Community Planning Bd. No. 4 v Homes for the Homeless*, 158 Misc 2d 184, 191 [Sup Ct, NY County 1993]. Moreover, a Fair Share analysis had recently been done for the area and had been found to be sufficient. At oral argument, when asked why this Court should deviate from the previous analysis, petitioner's counsel said there were now other facilities on the block, though apparently, none of these facilities are homeless shelters operated by Department of Homeless Services. Nonetheless, these representations, standing alone, are insufficient for this Court to find that the Fair Share analysis done by the City was flawed.

However, even if they were, the respondents demonstrated the lengths that they went to comply with the fair share requirement, including their analysis to the number of facilities within the Community District 7 area, the proximity of facilities to the proposed shelter location, and the community outreach that occurred.

Arbitrary and Capricious Standard

Petitioners make the contention that because there are existing building code violations at this location, that this makes the decision by the City to house homeless families at this location arbitrary and capricious.<sup>2</sup> This Court rejects that contention. The Court is satisfied by the City's recitation of the open building code violations, particularly that none of the violations pose a threat to the residents of 306 West 94th Street nor do they inhibit the full opening of the shelter. Accordingly, it is hereby

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

<u>5/1/2019</u> DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	LYLE E. FRANK, J.S.C.	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<b>HON. LYLE E. FRANK J.S.C.</b>	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> DENIED		<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT

<sup>2</sup> Standing alone, these warranty of habitability charges would not be actionable in an Article 78 proceeding, so this Court interprets them to be part of the overall Article 78 challenge to the City's action.