

Downtown New Yorkers Inc. v City of New York

2020 NY Slip Op 33891(U)

November 24, 2020

Supreme Court, New York County

Docket Number: 158550/2020

Judge: Debra A. James

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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DOWNTOWN NEW YORKERS INC., CHRISTOPHER BROWN, MEGAN KESSLER, and DAEMON O'NEILL,

Petitioners,

INDEX NO. 158550/2020
MOTION DATE 11/16/2020
MOTION SEQ. NO. 001 002 003

For Judgment Pursuant to CPLR Article 78

- v -

THE CITY OF NEW YORK, BILL DE BLASIO, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, and STEVEN BANKS, in his official capacity as Commissioner of the New York City Department of Homeless Services,

Respondents.

RAMONE BUFORD, LARRY THOMAS, and TRAVIS TRAMMELL,

DECISION + ORDER ON MOTIONS

Intervenors/Petitioners,

LOU PASTURES, GARY KOKALARI; ROBERT MONTANO; EMILY SAMUELS; and WEST SIDE COMMUNITY ORGANIZATION, INC.,

Proposed Intervenors/Respondents

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 21, 58, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 171, 235

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 234, 260

were read on this motion to/for PARTIES- INTERVENE

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118,

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were read on this motion to/for

PARTIES - INTERVENE

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of Ramone Buford, Larry Thomas, and Travis Trammell to intervene as petitioners (Motion Sequence Number 002) is granted, but upon such intervention, their petition to restrain respondents City of New York, Bill DeBlasio, in his official capacity as Mayor of the City of New York, the New York City Department of Homeless Services, and Steven Banks, in his official capacity as Commissioner of the New York City Department of Homeless Services, from relocating such petitioners and other persons currently residing at the Lucerne Hotel to the Radisson Hotel is denied on the grounds that this court lacks jurisdiction over the subject matter of such petition, and the temporary restraining order issued on October 19, 2020 is hereby vacated; and it is further

ORDERED that the motion of Louis Pastures, Gary Kokalari, Robert Montano, Emily Samuels, and West Side Community Organization to intervene as respondents is denied, except as to Louis Pastures, for whom the motion is granted, but upon the intervention of such respondent, his verified answer is

dismissed on the grounds that this court lacks jurisdiction over the subject matter of the pleading; and it is further

ORDERED that the petition of Downtown New Yorkers, Inc., Christopher Brown, Megan Kessler, and Daemon O'Neil for a preliminary and a permanent injunction restraining respondents City of New York, Bill DeBlasio, in his official capacity as Mayor of the City of New York, the New York City Department of Homeless Services, and Steven Banks, in his official capacity as Commissioner of the New York City Department of Homeless Services, from opening the Radisson Hotel Shelter as a temporary homeless shelter (Motion Sequence Number 001) is denied on the grounds that such petitioners lack standing to challenge the relocation of residents from the Lucerne Hotel to the Radisson Hotel; and it is further

ORDERED, ADJUDGED and DECREED that this proceeding is dismissed, without costs and without disbursements.

DECISION

Background

Downtown New Yorkers, Inc. is a non-profit organization formed by a group of New Yorkers who reside, work and own property in New York City's Financial District (FiDi), which is near the Radisson Hotel Shelter, and is "committed to community enhancement and preservation". The individual petitioners are residents or homeowners who reside, with their

families, in the FiDi, a couple of blocks to about one-half mile away from the Radisson Hotel.

Petitioners commenced this special proceeding seeking to (1) declare unlawful and annul the plan of the City Respondents to open the Radisson Hotel Shelter as a temporary homeless shelter, and move approximately 235 men currently residing at the Lucerne Hotel Shelter to the "proposed" Radisson Hotel Shelter (Relocation Plan) and (2) to restrain the City Respondents from implementing that Relocation Plan.

Petitioners argue that the Relocation Plan is unlawful because

- the City respondents do not have a registered written contract for use of the Radisson Hotel Shelter as a temporary shelter, because the emergency contract between respondent City Department of Homeless Services (DHS) and the Hotel Association of New York City (HANYC) for use of hotels as temporary shelters expired on October 12, 2020;
- the Relocation Plan is ultra vires the authority of respondent Mayor's Executive Order 101 (EO 101) of March 17, 2020, which exempts City agencies from "following laws and regulations related to procurement of goods, services or construction when an agency head determines in writing that the procurement is necessary to respond to the emergency" threat posed by COVID-19 to the health and welfare of City residents;
- the Relocation Plan is arbitrary and capricious and its de-densification rationale a pretext for the real motive, which is respondent Mayor's irrational accession to the demands of a small group of "dissidents", who live in the Upper West Side (UWS) community and oppose the use of the Lucerne Hotel as a temporary shelter.

The individual petitioners submit affidavits attesting to their personal observations with respect to (1) the number of adult homeless men, the "majority of [whom] suffer from mental [illness] and substance abuse problems", loitering and fighting among themselves in the FiDi neighborhood since their relocation to the Hilton Hotel, an existing temporary shelter in FiDi, and the failure of Project Renewal, which runs the Hilton shelter, to enforce, inter alia, a curfew, and (2) their knowledge of the severe problems that initially existed at the Lucerne with the relocation of 235 single adult men, arising from the lack of planning on the part of the City respondents, which problems would be replicated in FiDi with the move of the men to the Radisson. The supporting papers cite the City's failure to timely notify the FiDi community, including elected officials of the Relocation Plan, and assert that even Project Renewal, the service provider, did not have advance notice. Petitioners note that, over time, since July 2020 when the men were moved to the Lucerne, through the herculean volunteer work of UWS neighbors, who were also initially blindsided by the City respondent's plan to use the Lucerne as a shelter, the problems there have dissipated, the men are stable with counseling services in place there. They urge that it would not be in the best interest of the men, the

FiDi community or the City writ large to move the men once again, disrupting their progress.

Shelter Resident Intervenors

On October 16, 2020, this court denied petitioners' application for an order temporarily restraining the City respondents, finding the petitioners had failed to demonstrate that they would be immediately irreparably harmed by the relocation of the men to the Radisson pending a hearing on their application for a preliminary injunction, and placed the petition on the calendar for an expedited hearing as to whether a preliminary injunction was warranted.

On October 19, 2020, Lucerne Shelter residents Buford, Thomas and Trammell sought to intervene, alleging that they wanted to join the original petitioners in their application to set aside the Relocation Plan. Provisionally granting intervention, this court issued the interim relief enjoining implementation of the Relocation Plan pending a further hearing on the petition, finding that the intervening petitioners would be irreparably harmed if they were forcibly moved to the Radisson Hotel before such hearing. The intervening petitioners, as well a licensed clinical social worker and a board certified internist/addiction medicine physician, who render and/or oversee treatment to and counseling of residents of the Lucerne, attested to the

complex trauma that the men had experienced over their lifetimes, the rejection they had suffered by a “vocal and privileged minority in the surrounding community” when they first arrived at the Lucerne, and how as the result of the work of Project Renewal and many concerned community members, particularly the UWS Open Hearts Initiative, such challenges were overcome, and programs put in place to support the health and safety of the Lucerne residents. The internist/addictive medicine physician described the support, as follows:

“Our clinical team set up audio-visual telehealth monitors to allow Lucerne residents to access addiction and psychiatry services virtually if unable to attend in-person. . . our outpatient treatment program obtained permission from the state to deliver its services at the Lucerne. . . we implemented transportation services for those Lucerne residents who needed assistance to attend visits in person [at] our 3rd Street medical clinic. The community. . .[organized] activities, including donations of food, books, electronics and metro cards, a housewarming committee to support people as they transition to permanent housing, community led 12-step meetings, spiritual walks with community faith leaders, community arts events, exercise classes in the park and voter registration”.

The physician and social worker state that the Lucerne residents have previously been moved due to community objections, and warned of the risk of residents suffering “decompensation” and relapse, if they are forcibly removed because they are unwanted by a minority of their current UWS neighbors, rather than for a legitimate public health concern,

to the Radisson, where some FiDi neighbors, the original petitioners herein, likewise object to their presence.

The three intervening petitioners attest to the progress they have made during their residency at the Lucerne. They assert that among the services that would be upended by the Relocation Plan is the Goddard Riverside Program (GRP), also known as the Green Keepers Program. The GRP, funded through a \$500,000 grant, has offered community service jobs tied to the UWS neighborhood to the intervening petitioners. There would also be no replacement for the access, through the GRP, that the petitioners have to the Goddard Riverside Center, which offers a "safe space for therapeutic programming" supported by community organizations such as UWS Open Hearts Initiation, as well as recreational space. The intervening petitioners point out that most devastatingly, the relationships of trust they have developed with the group leaders and program directors at the Lucerne would be disrupted, and the men forced to "start all over" with new staff at the Radisson.

Before the court are statements from the Manhattan Borough President, UWS Faith and Community Leaders, NYC City Council, Coalition for the Homeless, Legal Aid Society urging that City respondents cancel the Relocation Plan. The undated letter to the Mayor and DHS and Department of Health

Commissioners, signed by members of the New York City Council

states, in pertinent part:

We are writing today to demand that the City place a moratorium on moving DHS shelter residents between hotels and shelters unless such moves further the health and wellbeing of those residents by placing them in single-occupancy hotel rooms and are undertaken with the consent of the residents, unless DHS is responding to transfer requests by individual shelter residents. The moratorium should remain in effect until an effective vaccine for COVID 19 is widely available.

The issue is urgent. DHS has plans to transfer all 240 residents of the Lucerne Hotel in District 5- which opened during the pandemic as a temporary shelter for safety, socially distanced housing- to the Radisson Hotel in District 1. This is a less favorable location due to the lack of supplementary recreational space (which had been generously provided by Goddard Riverside), and the move has no clear genesis in consistent policy.

Uprooting these shelter residents from their homes, however temporary they may be, is not only unjust during a pandemic, it is an alarming threat to public health. We know COVID-19 spreads quickly when large groups are brought together in a confined space and moving via DHS bus guarantees exactly such conditions. Moreover, the move has the potential to create infection networks by exposing people during the moving process and potentially introducing cases to other shelters and schools. If authorities would discourage any large private organizations from conducting a move during the pandemic, why would it conduct mass displacements itself? It is a contradiction for the Mayor to simultaneously ask the Governor to shut down whole neighborhoods, while needlessly scrambling hundreds of vulnerable individuals, many with possible comorbidities, around the map.

Now is the time for caution, not recklessness. We must keep networks and bubbles as small and localized as possible to limit the second wave that's already

brewing. Being able to keep essential movements possible without interruption means severely limiting inessential movements.

We are therefore calling upon the city to implement a moratorium on mass shelter transfers except those being conducted in the interest of public health, such as further de-densifying congregate shelters or moving residents to single-occupancy hotel rooms, or in response to transfer requests by individual shelter residents. This moratorium should remain in place throughout the public health crisis. When transfers resume, we ask that they be inclusive of the residents and their needs in accordance with clearly articulated principles of overall homelessness policy, rather than one-off decisions in response to pressure, whether political or financial. We also ask that, during and after the pandemic, the City invest further in permanent housing and that notice of transfers be provided with significant time to ensure residents can adequately prepare.

New York City's leaders need to demonstrate that public health will always come before private interests."

On October 30, 2020, Lucerne resident Lou Pastures, three UWS residents, and West Side Community Organization, Inc. moved to intervene as party respondents, in support of the Relocation Plan (Motion Seq No 003). With the exception of intervening respondent Lou Pastures, the court provisionally denied the motion of the proposed intervening respondents, i.e., of the other individual UWS residents and the West Side Community Organization, the non-profit formed in response to disorderly activity, including public drug use and other infractions by the shelter residents, which they claim arose when the Lucerne Hotel initially opened as a homeless shelter.

The court granted the intervention as a party-respondent of Lucerne resident Lou Pasture, who stated that he had an interest in the outcome of the lawsuit, as he supported the Relocation Plan, as it would enable him to have a single hotel room at the Radisson, rather than share a room as he is currently at the Lucerne, and to be closer to the 3rd Street medical center. He asserts that

While I certainly haven't spoken with every resident, I do not believe the Proposed Intervenors/Petitioners represent the views of many of the Lucerne residents.

Before I was moved to the Lucerne in late July, I was housed at the Third Street Men's Shelter ("TSMS"), located at 8 East 3rd Street in Lower Manhattan operated by Project Renewal.

TSMS had a variety of medical and supportive services on-site 6 days a week. My primary care provider was on-site, as was my addiction treatment professional. TSMS had an on-site detox center on the second floor that contained approximately 50 beds. TSMS housed a variety of other services as well, including Narcotics Anonymous, social workers and counselors. Medication was delivered each Monday without fail. TSMS also had recreational space that included movies, board games, and books. It also had a garden where residents could relax and take care of plants.

In late July, I was transferred to the Lucerne. The vast majority of residents at the Lucerne share rooms, with about 20 double rooms per floor compared to about 4 single rooms. The Lucerne does not offer the same services that I received at TSMS. At the Lucerne, the only on-site supportive services are twice weekly Narcotics Anonymous meetings and an on-site Director of Housing. Residents are provided with MetroCards and expected to transport themselves to access medical, detox, and recovery services, all of which are located downtown. I also understand that some residents that receive methadone are provided shuttle

service to some remote services, but I am not one of them. As such, I travel by bus twice a week downtown to TSMS to give a urine sample and participate in drug counseling. And unlike at TSMS, at the Lucerne our medication delivery is frequently late and unreliable.

I am not one of the lucky few residents who has a single room. I, like most of us, have a roommate. Being doubled up in a single room does not provide a lot of opportunity for social distancing, and I fear contracting COVID due to my living arrangement. I understand that the new facility to which we are to be moved—52 Williams Street, that I understand is being converted into a permanent shelter—has sufficient space for Lucerne residents to have single rooms there.

Although not moving to intervene, Lucerne resident Reginald Simpkins supports the intervening respondent Pasture's position, stating

I was assigned a room with a roommate at the Lucerne. As I understand it, 52 William Street will offer better and safer housing arrangements, lots of recreational space, and more services on-site or in close proximity to the site than the Lucerne, as a single room occupancy hotel, is able to accommodate. Being doubled up in a single room makes it hard to social distance, and I fear contracting COVID-19 because of this. In addition, through my job, I come into contact every day with members of the public who too often aren't wearing masks. Therefore, I am also concerned about spreading COVID-19 to my roommate. I understand that the new facility downtown where we are going to be moved has sufficient space for residents currently at the Lucerne to have single rooms.

On the other hand, the court is hard pressed to understand how proposed intervening respondent West Side Community Organization and individual residents who are

neighbors to the Lucerne have any interest in the outcome of this proceeding, as for the last few months the Lucerne has been populated by 235 homeless men, whose presence on the UWS is the harm of which they complain, but which harm is not the subject of the proceeding at bar.

The City respondents have filed an Answer. Among attachments to their Answer are copies of the previously referenced Executive Order EO-100; EO 98 dated March 12, 2020, (declaring a local state of emergency due to the COVID-19 global pandemic); Commissioner, NYC Department of Health March 25, 2020 Emergency Declaration for Quarantine and Isolation Sites for New York City Department of Homeless Services ("DHS") Shelter Clients; Project Renewal Contract dated February 12, 2017, for a term of July 1, 2017 through June 30, 2022 to perform services and operate a shelter located at 8 East 3rd Street, New York, New York¹, and Project Renewal Amendment dated November 6, 2020²; The DHC Commissioner

¹The Project Renewal Contract includes several riders, including "THE CONTINUITY OF OPERATIONS PLAN RIDER", which states: "Prior to the commencement of services under this Agreement, Contractor shall submit for the Department's review and approval a written Continuity of Operations Plan (COOP) for its business which indicates its ability to continue the provision of essential services to the Department in the event that a State of Emergency is declared by the Mayor. The vendor should seek guidance from the Department on how to develop a COOP plan. A COOP plan includes, but is not limited to: the identification of an alternate site for business; appointment of alternate personnel for identified essential staff; development of protocols for the safekeeping of vital business records; and, a transportation contingency plan for its employees."

²The Project Renewal Amendment states, in pertinent part,

Determination dated April 22, 2020; the Extension Agreement between DHS and HANYC dated October 14, 2020; and the Use Agreement for the Radisson Hotel: Intended Use as a Relocation Site from October 5, 2020 through June 30, 2021 and Intended Use as an Isolation Site from June 1, 2020 through October 4, 2020.

The March 25, 2020 NYC Department of Health Commissioner Declaration states, in pertinent part:

The Commissioner of DHS is declaring an emergency due to COVID-19 and hereby determines that entering into contracts to provide short-term quarantine and isolation sites as described herein is necessary for the City to respond to novel coronavirus ("COVID-19") emergency. Therefore, DHS will enter into one or more contracts to provide short-term services and operations at quarantine/isolation sites- in addition to DHS's current sites- for (i) DHS shelter clients who either have symptoms of the novel coronavirus or who have been diagnosed with the novel coronavirus .

"WHEREAS, pursuant to the Executive Order 101, the Department entered into certain agreements with hotels to provide services at emergency hotel sites for homeless individuals who have contracted COVID-19, are suffering from the effects of the virus, or to maintain appropriate social distancing within the homeless population ("Hotel Use Agreements"); and WHEREAS, pursuant to the terms of the Agreement and subsequent modifications, the Department reserved the right to ask the Contractor to provide services at additional annex hotel locations that have been established to combat the COVID-19 emergency; and WHEREAS, in accordance with the Paragraph directly above, from May 15, 2020 until July 27, 2020, the Contractor provided shelter services at the Washington Jefferson annex hotel located at 318 West 51st Street, New York, New York; and WHEREAS, on July 27, 2020 the Contractor terminated services at the Washington Jefferson Hotel and relocated to the Lucerne annex hotel, located at 201 West 79 St, New York, New York. Now THEREFORE, the parties agree as follows:

2.a. The Contractor shall provide services at the following hotel annex site(s): The Lucerne Hotel located at 201 West 79th Street, New York, New York and/or the Radisson Hotel located at 52 William Street, New York, NY, from July 27, 2020 until June 30, 2021."

The provision of temporary quarantine/isolation sites for DHS shelter clients... is essential to the safety and well-being of vulnerable populations of the City of New York as the coronavirus may be unwittingly transmitted to people who both enter and exit the shelter system . . . In order to protect these vulnerable clients, DHS intends to engage one or more contractors to provide services in space that has been secured for use as additional quarantine/isolation sites on an emergency basis.

Finally, Attachment 2 to the Use Agreement for Radisson Hotel is a Checklist. The Checklist states in pertinent part

Hotel	Radisson Wall Street
Hotel Address	52 William Street Manhattan New York 10005
Number of Rooms	289
Number of Usable Beds (2 beds per room maximum)	289- 2 Beds in 1 Room only
Number of Beds total	290
Number of Floors	19
Number of Rooms with both microwaves and refrigerators	289 All have both
Number of Rooms with microwave only	289
Number of Rooms with refrigerator only	289
Number of Office Spaces for DHS (minimum of 1/30 rooms)	30 rooms
Meeting Spaces- Number and SF of each	4 meeting Rooms, 1,000 square feet
Dedicated Parking Spots - Included in Rate]	0

DISCUSSION

Downtown New Yorkers, Inc. Petition

Original petitioners Downtown New Yorkers, Inc., et al, allege, variously that the City respondent's Relocation Plan

is unlawful, because, on information and belief, the City does not have a contract for use of the Radisson as a temporary shelter, and any such use exceeds the authority of EO 100 with respect to exemption to the usual procurement rules due to the emergency. There is no dispute that the original DHS/HNY emergency shelter contract expired by its terms on October 12, 2020.

Respondent City, with copies of the extension agreement between DHS and HNYC and the User Agreement for the Radisson Hotel refutes petitioners' claim that current contracts are non-existent. The extension agreement is dated the same date as the original petition was verified under oath. Although the Radisson User Agreement does not indicate what date it was signed, it appears that such agreement was entered into on July 27, 2020, the date that the insurance agent certified the accuracy of the Certificate of Insurance that pertains to such agreement. Such certification date aligns with the intended use of the Radisson, as an Isolation Site for a four-month period under the Agreement, i.e., from June 4, 2020 to October 4, 2020. There is no dispute that prior to the current Relocation Plan, the Radisson Hotel has been used as an "isolation hotel", i.e. a place where homeless persons infected with the COVID-19 virus have been quarantined. The words "Intended Use of the Radisson Hotel as a Relocation Site

from October 4, 2020 to June 30, 2021” of the User Agreement for the Radisson refutes petitioners’ claim that the City respondents never executed such an agreement, and, as argued by the City respondents, its eventual use as a Relocation Site was intended from the commencement of the Radisson User Agreement. Such User Agreement, by its very terms, also demonstrates that the Relocation Plan will enable each of the residents to move from a Lucerne hotel room with two beds and a roommate into a single bed hotel room at the Radisson. In contrast with respondent Mayor’s earlier announcement that, illogically, the residents of the Harmonia Shelter located in the Murray Hill neighborhood would be displaced to make way for the Lucerne residents³, the provision in the Radisson User Agreement for “Intended Use” as a “Relocation Site”, which would enable the de-densification of residents who are currently doubled up at the Lucerne, provides a rational basis for the Relocation Plan.

Petitioners’ claim that the contracts executed as part of the Relocation Plan exceed the authority granted under the various EOs and emergency declarations has some merit, as a strict reading of those edicts refer solely to “symptomatic and asymptomatic COVID-19 shelter clients.” Petitioners argue

³ The City Respondents allege that such Mayoral announcement was a mere “miscommunication”.

that on such basis this court should vacate such agreements as ultra vires. Even if the court were to accept the strict reading urged by petitioners, the City respondents are correct that petitioners have no standing entitling them to such relief. As argued by the City respondents, "for standing [to challenge a government contract award], petitioners must show that they suffered an injury in fact, distinct from the general public" (Matter of Transactive Corp. v New York State Department of Social Services, 92 NY2d 579, 587 (1998) (non-bidder lacked standing to challenge award). Alternatively, petitioners, as taxpayers, would have to argue that the City Respondents acted outside of their authority in issuing a contract at all. See also Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 814 (2003) and E.W. Howell Co, LLC v City Univ. Constr. Fund, 149 AD3d 479 [1st Dept 2017) lv denied 29 NY3d 914. Implicit in the arguments of petitioners is that they have no quarrel with the City, in lieu of awarding a no bid contract to the Radisson, renewing its no bid contract with the Lucerne as a Relocation Site, and removing the Relocation Site intended use provision from the Radisson user agreement. Thus, as taxpayers, who do not allege that the City respondents had no authority to let the contract at all and having not alleged any distinctive injury arising from the purportedly ultra vires letting of the

Radisson User Agreement, petitioners have no standing to challenge the User Agreement with the Radisson.

Petitioners cite several cases that they argue support their claim of standing to challenge the City respondent's determination to contract with the Radisson for use as a Relocation Site as arbitrary and capricious. The court finds all such cases distinguishable on their facts as in each the respondent local government's proposals triggered the ULURP process and environmental impact reviews under CEQR/SEQRA or the proposals required a variance under local zoning laws or building codes. See Rebirth of Bergen Street Block Association v City, 55 Misc3d 1203(A) (Sup Ct, Kings County, 2017) (opening of homeless shelter required CEQR/SEQRA/Fair Share Analysis); Matter of Stop BHOD v City of New York, 22 Misc3d 1136 (Sup Ct, Kings County, 2009) (expansion of prison required CEQR/SEQRA review under ULURP); Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761 (3d Dept 2000) (petitioners challenge determination granting area variances to rehabilitate burned-out property as homeless shelter); West 58th Street Coalition, Inc. v City of New York, 188 AD3d 1 (1st Dept 2020) (petitioners challenged opening of employment shelter for homeless men on grounds that such use was not compliant with the building code); Greentree at Murray Hill Condo v Good Shepherd Episcopal Church, 146 Misc2d 500 (Sup

Ct, NY County, 1989) (petitioners challenge church operation of homeless shelter funded by City on grounds that CEQR/SEQRA review required]; Patterson Materials Corp. v Town of Pawling, 221 AD2d 609 (2d Dept 1995) (challenge to mining operations and validity of local laws restricting same). Despite some speculation that the Radisson Hotel is being situated to ultimately become a permanent shelter, without a doubt, the user contract for the Radisson, which is for a fixed eighth month term, provides for the use of the hotel as a temporary Relocation Site only. Petitioners will certainly have the right to challenge any plan to convert the Radisson Hotel into a permanent shelter for the homeless should the City propose such plan.

Intervening Petitioners' and Respondents' Pleadings

In McCain v Koch, 70 NY2d 109 (1986), an opinion authored by Judge Hancock, the Court of Appeals held that the Appellate Division, First Department, erred when it vacated an order of the trial judge granting destitute families for whom the City undertook to provide emergency shelter, a temporary restraining order and preliminary injunction compelling the City to provide shelter that "satisfies minimum standards of sanitation, safety and decency." In overturning the intermediate appellate court ruling, the Court of Appeals rejected such court's reasoning that "as a matter of law, the

Supreme Court lacked the power to establish minimum standards of habitability". Stated the Court of Appeals:

Supreme Court decided that defendants, having undertaken to provide the homeless with emergency shelter, were obliged to furnish shelter meeting minimum standards. It reasoned that "[i]n a civilized society, a 'shelter' which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all" (127 Misc.2d, at 24, 484 N.Y.S.2d 985; emphasis added) and that in providing subminimum shelter the defendants were, in effect, denying any relief to the homeless in contravention of their statutory and constitutional obligation (see, Tucker v. Toia, 43 N.Y.2d 1, 9, 400 N.Y.S.2d 728, 371 N.E.2d 449). It was because of the absence of any departmental regulation that it was necessary for the court to establish its own minimum standards. Having done so, the court invoked its equitable powers to compel compliance. Therefore, the June 20, 1983 order involved no encroachment on the legislative or executive prerogative. Nor did Supreme Court's later action on June 27, 1984 when it continued the June 20, 1983 minimum standards as part of the preliminary injunction which is now at issue. While as noted, the Commissioner had in the interim promulgated his own standards (18 NYCRR 352.3[g], [h]), there could be no conflict because his regulations are more extensive and stringent than the injunction.

With the adoption of the departmental regulations (18 NYCRR 352.3[g], [h]), there can be no question about the minimum level of habitability which defendants now must meet when they undertake to provide emergency housing. These regulations, which subsume the more general and less rigorous standards in the court order, are, by their terms, binding on local social services districts (18 NYCRR 352.3[h]). Defendants, in arguing that the adoption of the departmental regulations has mooted the issue of Supreme Court's power to grant the injunction, have necessarily conceded that they must follow these departmental standards. Indeed, they are commanded by statute to do so (see, Social Services Law § 20[2][a], [b]; [3][a], [d], [f]; § 34[3][d], [e], [f]; Matter of

Beaudoin v. Toia, 45 N.Y.2d 343, 347, 408 N.Y.S.2d 417, 380 N.E.2d 246). Thus, no issue exists as to the minimum quality of the accommodations presently required by prevailing standards; what remains are questions of compliance and enforcement.”

Id. at 199-120.

A year later, citing McCain, the trial court in Martin A by Aurora A v Gross (138 Misc2d 212, 222 [Sup Ct, NY County 1987, Yates, J.], affd sub nom. Martin A. v Gross, 153 AD2d 812 [1st Dept 1989]), granted plaintiff families a preliminary injunction restraining the defendant City from enforcing a 90-day emergency shelter limit and compelling the City to comply with federal and state statutory and regulatory provisions that required the City to develop protocols and services to prevent the separation of parents from their children, i.e. to avert and shorten foster care placement. In Martin A., the court applied an exception to the exhaustion of administrative remedies doctrine, holding:

The city's additional argument that the doctrine of exhaustion of administrative remedies bars plaintiffs' claims also must fail. As the Court of Appeals has recognized, “[t]he exhaustion rule ... is not an inflexible one.” (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978].) Aggrieved parties do not have to exhaust administrative remedies where it “would be futile ... or ... cause irreparable injury” (supra, at 57). The city does not deny that plaintiffs are entitled to services. The systemic failures which plaintiffs challenge cannot meaningfully be addressed in an administrative hearing. Indeed, the frustration encountered by plaintiffs even after court orders were rendered on their behalf has been well documented. Thus, resort

to administrative remedies would be futile. Additionally, the delays involved in the administrative process might well cause the separation of children from their parents, which constitutes irreparable harm.

Id.

Thus, in McCain, the trial judge ruled that requiring plaintiff families to exhaust their administrative remedies by seeking a Fair Hearing to compel the City to develop protocols and develop services that would avert and shorten foster care placement in face of the 90 day emergency shelter limit would be futile and provide no meaningful relief to such families, who would be irreparably harmed by the separation from their children and the resulting disintegration of the family unit.

Here, this court granted the intervention motions to permit the residents at bar, petitioners Ramone Buford, Larry Thomas, and Travis Trammell, who wish to remain sheltered at the Lucerne Hotel for an unspecified period of time and not be relocated to the Radisson Hotel, and respondent Lou Pastures, who wishes to be moved from the Lucerne Hotel to the Radisson Hotel to intervene in this proceeding. As argued by the intervenors:

CPLR 7802(d) grants the court broader power to allow intervention in a CPLR article 78 proceeding than is provided pursuant to either mandatory or permissive intervention rules in an action (Matter of Bernstein v Feiner, 43 AD3d 1161, 1162 [2d Dept 2007]). The general rule is that intervention should be permitted where the intervenor has a real and substantial

interest in the outcome of the proceedings. (a) "The bases for permissive intervention in Article 78 proceedings are also broader than the bases for standing to originate the proceeding" (6 NY Jur 2d, Article 78 § 223, citing O'Brien v Barnes Bldg. Co., 85 Misc2d 424 [Sup Ct, Suffolk County 1974], affd sub nom. O'Brien v Biggane, 48 AD2d 1018 [2d Dept 1975]).

In the Matter of New York County Lawyers' Association et al. v Bloomberg, 30 Misc3d 161 (Sup Ct, NY Co 2010).

There is no doubt that the intervening residents have a real and substantial interest in the outcome of this proceeding, i.e. a determination where they will live. Notwithstanding such real interest in the outcome, this court now finds that at this juncture, none of the intervening resident parties are entitled to any relief under the law. Unlike the federal and state regulatory "minimum habitability standards" at issue in McCain and the federal and state laws and rules requiring that the City develop protocols and services designed to protect family integrity at issue in Martin A., the intervening resident parties do not cite to any particular services or habitability requirements, whether national, state or local, that the respondent City has breached with the implementation or failure to implement the Relocation Plan. Given that omission, the intervening resident parties cannot show that relegating them to a Fair Hearing after their shelter assignment, should the City fail to provide some required service, would be an exercise in

futility, or that they will suffer any irreparable harm as a result of such shelter assignment. The intervening resident parties' preference for a particular placement is not analogous to the federal statutorily and regulatory required benefits to which the plaintiffs in McCain and Martin A. were held to be entitled. As held in Nuraina v State, 2011 N.Y. Slip Op.32746 (U) (Sup Ct, New York County 2011), the intervening residents have no right to choose their own temporary placements. Thus, such parties have no grievance that is ripe for review, having suffered no harm cognizable under the law, and this court lacks subject matter jurisdiction and the intervening parties' premature pleadings must be dismissed. See Indemini v Beth Israel Medical Center, 4 NY3d 63 (2005).

In conclusion, the court notes that two of the three intervening petitioners have moved into permanent housing. The tireless work and contributions of UWS community members, including non-profit organizations, and that of New York City elected officials, in particular the Manhattan Borough President and her staff, as well as the determination of the residents themselves, all played a role in this very favorable and commendable outcome for these two former Lucerne residents. Such petitioners, each with a home of his own, now lament that the employment opportunities arranged by the UWS

community, specifically by Goddard Riverside, will be lost once the Lucerne shuts down as a temporary shelter. In his affidavit, petitioner Buford states compellingly and eloquently "And a person's job, particularly a homeless person's job, is about more than money; it's about self-worth, making a contribution to society, self-esteem, and a sense that someone in the world believes in you." Buford also attests to how the UWS community largely embraced and welcomed the presence of his fellow Lucerne residents and himself, which has allowed them to thrive.

As the courts stated in McCain and Mark A., federal and state law require that the City respondents provide homeless persons with habitable shelter and certain services to maintain their safety, health and welfare. However, it cannot be gainsaid that the City respondents have no duty under law to provide the types of invaluable support, including gainful employment opportunities, which the UWS community conferred upon many of the men who moved into the Lucerne four months ago.

Nevertheless, Molly Park, First Deputy DHS Commissioner describes the FiDi community organizations, such as FiDi Open Hearts, Trinity Wall Street, and the NYU Arts Healing Program, and service providers such as the Black Veterans for Social Justice, which along with city resources such as services of

the New York City Human Resources Administration Participant Training Opportunity and Career Services, will supplement the work of Project Renewal. Project Renewal has pledged to replicate the successful Lucerne programs for the residents who move to the Radisson Hotel temporary shelter. Though the intervening petitioners and their UWS supporters are unhappy with the prospect that the wheel will not be fully reinvented by the FiDi community, they may take some reassurance and satisfaction with the template that they have forged.

11/24/2020

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: