

**Stop Irresponsible Frick Dev. v New York City Bd. of Standards & Appeals**

2020 NY Slip Op 34163(U)

December 15, 2020

Supreme Court, New York County

Docket Number: 154171/2020

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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INDEX NO. 154171/2020

STOP IRRESPONSIBLE FRICK DEVELOPMENT and JANE BERGERE,

MOTION DATE 11/16/2020

Petitioners,

MOTION SEQ. NO. 002 003

- v -

THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS, and THE FRICK COLLECTION,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 82, 86, 87

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

ORDER

Upon the foregoing documents, it is

ADJUDGED that the Amended Petition (Motion Sequence No. 1) is DENIED and the proceeding is dismissed, without costs and without disbursements to respondents; and it is further

ORDERED that petitioners' motion for a preliminary injunction (Motion Seq. No. 2) is DENIED as moot.

DECISION

In this proceeding brought pursuant to CPLR Article 78, petitioner seeks an order annulling and vacating a resolution of the municipal co-respondent that permits the non-profit museum co-respondent to carry out construction which involves the demolition of a portion of the museum interior. Petitioner asserts that the determination was arbitrary and capricious in that respondents failed to comply with municipal and state laws. Respondents have answered and oppose the petition and the relief sought therein. For the reasons that follow, the court shall deny the petition.

Petitioner Stop Irresponsible Frick Development brings this proceeding as a self-described "unincorporated association . . . consist[ing] of Frick neighbors, preservationists, museum members, and people who attend Frick Concerts and other events on a regular basis as well as individuals living and working in close proximity to the Frick." The Amended Petition also names Jane Bergere, a member of the association, and "a regular attendee of The Music Room", as an individual petitioner.

Respondent Frick Collection (Frick) is a State-chartered fine art museum and research center located on premises at with frontage on Fifth Avenue and 70<sup>th</sup> and 71 Streets in Manhattan.

Municipal respondent New York City Board of Standards and Appeals (BSA) is charged under the New York City Charter with making determinations pursuant to the Zoning Resolution.

The Amended Petition seeks to annul and vacate a Resolution of the BSA dated March 17, 2020 and filed May 11, 2020, (the "Resolution") which granted, with conditions, an application by respondent Frick for a variance pursuant to NY City Zoning Resolution § 72-21. As stated by the Resolution (NYSCEF Doc. No. 39, citations omitted),

This is an application for a variance under Z.R. § 72-21 to permit—partially in an R10 zoning district within the Special Park Improvement District and partially in an R8B zoning district within the Limited Height District 1A—the enlargement of an existing landmarked building used as a museum and library that would not comply with zoning regulations for height, lot coverage, rear yards, street-wall location and setback, and rear-yard equivalent. This application is brought by The Frick Collection (the "Museum"), an educational institution located in a New York City designated individual landmark building that serves as a historic house and art museum and research center with reference library that provides fellowship programs for graduate students and scholars, student internships, workshops for researchers and specialists, lectures and symposia, guided school visits, and after-school programs.

The Resolution in pertinent part describes the subject premises

The Premises are located on the east side of Fifth Avenue, between East 70th Street and East 71st Street, partially in an R10 zoning district within the Special Park Improvement District and partially in an R8B zoning district within the Limited Height District 1A, in Manhattan. With 201 feet of frontage along Fifth Avenue, 272 feet of frontage along East 70th Street, 275 feet of frontage along East 71st Street, and 55,928 square feet of lot area, the Premises are improved with an existing

building with 100,295 square feet of floor area (the "Building").

The Building was originally designed as a single-family residence completed in 1914, was then enlarged to permit its conversion to a house museum with research library (the "Library") by 1935, and has since been expanded to include a subterranean storage vault in 1941, a pavilion and garden in 1977 (the "Pavilion"), and a portico enclosure in 2011.

Located in the Upper East Side Historic District, the Building is an individual landmark designated by the New York City Landmarks Preservation Commission in 1973 and a National Historic Landmark designated by the United States Secretary of the Interior in 2008.

The Resolution describes the proposed project (the "Project")

stating

The applicant proposes to enlarge the Building in the R8B portion of the Premises with a net increase of 11,105 square feet of floor area to 83,000 square feet (2.8 FAR), resulting in a proposed building with a total of 111,400 square feet of floor area (the "Proposed Building").

The Proposed Building would reflect an increased height over the museum from 54'-3" to 68'-2", set back 88'-9" from East 70th Street and 36'-2" from East 71st Street; a southward enlargement of 22'-6" to the library; and an increased height over the Pavilion of 5'-7", set back from the existing street wall by 11'-0". The Proposed Building would also increase lot coverage above the Pavilion from 69.4 percent to 75.8 percent.

The Proposed Building could not be constructed as of right in the Premises' R8B portion because the enlargement exceeds the 60'-0" height limit, increasing the Building's degree of noncompliance, see Z.R. § 24-591; exceeds lot coverage of 70 percent by exceeding the 23'-0" height exemption over the Pavilion, see Z.R. § 24-11; encroaching into the Premises' 3'-0" interior-lot portion, where a 30'-0" rear yard is required, increasing the Building's degree of noncompliance, see Z.R. §§ 24-33 and 24-36, as well as increasing the degree of noncompliance for the required rear-yard equivalent on the through lot portion, see Z.R. §§ 24-33 and 24-382; and not including either vertical extensions of the street walls above the Pavilion along East 70th Street

and above the museum along East 71st Street or 50'-0" minimum setbacks along both streets, see Z.R. §§ 23-661 and 23-662.

Supporting the final decision of the unanimous BSA, the

Resolution further stated

Ultimately, as the Board explained before its vote, the Board has taken a hard look at all areas of potential environmental concern, as documented in the Final Environmental Assessment Statement. Its review has incorporated concerns raised by the Opposition relating to the effect of the proposed action on historic and cultural resources (including the Music Room and other interior spaces) and potential construction impacts on sensitive receptors (including noise and air quality). Over the course of its review, the Board requested additional information, clarification, and documentation from the applicant and sought input from other agencies on their fields of expertise.

With respect to the potential for significant adverse environmental effects related to historic and cultural resources, the Board has analyzed the effects the proposed project would have on the Building's interior using appropriate technical standards. Cognizant of arguments in favor of the Music Room's preservation in place and its removal, the Board notes that, while the Music Room is part of the 1934 renovation and falls within the 1912-1935 period of significance, the National Register report is silent as to the Music Room's architectural significance. Notably, comments from the Opposition and the public in favor of preservation of the Music Room have focused on the music programming—not on the Music Room's quality as an architectural form, as belonging to a long or important architectural past, or embellished with noteworthy architectural finishes (as compared to those finishes seen throughout other parts of the 1935 expansions or in exhibition spaces). Instead, the Music Room's primary importance to the Opposition relates to its use for music performances. However, use of the space and guarantee of the Museum's continued music programming is not subject to regulation under the Board's environmental review or its zoning authority, even were the Music Room to remain unaltered. Additionally, considering the Music Room's relation to circulation, the Museum's visitors do not encounter the

Music Room as part of the sequence of spaces devoted to gallery viewing. The 1934 expansion and conversion from the 1914 residence into a house museum also included significant demolition work, including removal of the original porte-cochère and library, and relocation of the Boucher Room in the interest of creating an enhanced museum experience. Consistent with that tradition, the project as proposed would similarly enhance the Museum's spatial sequences and exhibition experience. Consequently, on balance the Board has concluded that the proposed project would not have a potential for significant adverse effects on the historic or cultural resource as a whole.

\* \* \*

No other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable. Accordingly, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

\* \* \*

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby issue a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1997, as amended, and makes each and every one of the required findings under Z.R. § 72-21 to permit—partially in an R10 zoning district within the Special Park Improvement District and partially in an R8B zoning district within the Limited Height District 1A—the enlargement of an existing landmarked building used as a museum and library . . .

Petitioner sets forth two arguments as its grounds for the vacatur of the municipal respondent's resolution. Petitioner argues that the respondents violated the New York State Environmental Review Act ("SEQRA") and New York City's procedures implementing SEQRA, the City Environmental Quality Review ("CEQR") process. The second argument is that the BSA failed to comply with ZR §72-21(e) in not granting the "minimum

variance necessary to afford relief." Both of these arguments are based upon petitioner's assertion that the BSA failed to take into account the Project's impact upon items of "special historical or aesthetic interest or value" which in this case petitioner asserts should have included the Project's proposed elimination of the Music Room. See Teachers Ins. and Annuity Ass'n of Am. v City of New York, 185 AD2d 207, 208 [1st Dept 1992], affd 82 NY2d 35 [1993] (consideration of designation of interior architectural features is specifically authorized under the Landmarks Preservation Law).

Petitioner contends with respect to the former argument that the proposed elimination of the Music Room renders the BSA's "negative declaration" arbitrary and capricious and that an Environmental Impact Statement was required for the Project.

With respect to petitioner's latter argument, it is alleged that the BSA failed to consider alternatives to the proposed Project which would have required variances that did not impact the Music Room.

The respondents argue in opposition that the BSA properly determined that there was no material adverse environmental impact and that a negative declaration was warranted based upon Frick's final Environmental Assessment Statement (EAS), which, they argue, fully explored and analyzed any impacts from the Project. Respondents also counter that consideration of

alternative means of executing the project were not required under the statute and that the variances sought were not related to the internal environmental impacts alleged by petitioner but were limited to the external bulk of the Project, which Project was itself a result of the accommodation and amelioration of possible environmental impacts that would be caused by some of the alternatives to the Project.

As to the petitioner's challenge pursuant to SEQRA and CEQR,

It is well settled that SEQRA "is a legislative attempt to ensure that state and local agencies consider the environmental impact of their proposed actions" (Matter of Spitzer v Farrell, 100 NY2d 186, 190 [2003]). An agency's "initial determination . . . under SEQRA and CEQR is whether an EIS [environmental impact statement] is required, which in turn depends on whether an action may or will not have a significant effect on the environment" (Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 364 [1986]). "In making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects" (Farrell, 100 NY2d at 190). Where an agency determines that an EIS is not required, it will issue a "negative declaration" (id.). "Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion" (id. [internal quotation marks and brackets omitted]).

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (Akpan v Koch, 75 NY2d 561, 570 [1990], quoting CPLR 7803 [3]). "In assessing an agency's compliance with the substantive mandates of the statute,

the courts must 'review the record to determine whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination' " (id., quoting Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986]).

Matter of Chinese Staff v Burden, 19 NY3d 922, 923-24 (2012).

The petitioner's argument that the BSA failed to adequately assess the environmental impact of the Project as required by SEQRA and CEQR is based upon the alleged failure of the BSA to consider the Project's elimination of the Music Room.

Petitioner presents evidence that the Music Room has historical and artistic significance of the type which required the BSA to issue a positive declaration. However, the court agrees with the respondents that the final EAS prepared by Frick and the extensive evidence in the record before the BSA are sufficient to support the BSA's negative declaration.

The court appreciates the submissions made by the petitioner with the respect to their urging of the artistic and cultural importance of the Music Room, with its irreplaceable design features<sup>1</sup> uniquely representing a "19<sup>th</sup> century music

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<sup>1</sup> In his opposing affidavit (NYSCEF Document No. 81), the Deputy Director and Chief Operating Officer of the Frick states that "elimination of the Music Room will not preclude its future re-creation. In accordance with the Frick's historic practice, selected sample design components of the Music Room's finishes will not be destroyed but will be salvaged, meaning that they will be removed with meticulous care, accessioned into the Frick's archives, and preserved in an offsite storage facility where they will be carefully maintained for potential use

salon"; its incomparable acoustics; and the performances by "many of the century's greatest artists", "including New York debuts of nationally and internally acclaimed musicians" that it has housed since concert series began in 1935.<sup>2</sup> However, the standard of review as set forth in the cited authorities is not whether there is evidence in the record supporting the petitioner's view, but is whether the Resolution is based on a reasonable view of the record before the BSA. As stated by the Court,

A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence . . . The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often times sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies. For this reason, a reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board. It matters not whether, in close

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elsewhere. In addition, the Frick will preserve and store samples of the original finish materials in its archives, and will carefully and fully document the room's architecture and finishes in accordance with recognized professional historic preservation standards. In that way, it will be possible to recreate or replicate the Music Room in the future if there is a desire to do so."

<sup>2</sup>Petitioner appends a sample of letters submitted to the municipal respondent by a host of accomplished and celebrated "musicians, composers and aficionados of music throughout the world", who roundly decry the imminent demolition of the Music Room.

cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.

Matter of Pecoraro v Bd. of Appeals of Town of Hempstead, 2 NY3d 608, 613 (2004) (internal citations and quotations omitted).

Not only did the BSA identify the Music Room as a place that was possibly impacted by the Project, the BSA also extensively analyzed the nature and extent of the possible impacts, consulted with other agencies and experts, sought public input including that of Project opponents, and then set forth its reasons for resolving the issue in the manner it did. In such a circumstance, the court is not at liberty to substitute its own judgment for that of the BSA.

Importantly, with respect to the historical and architectural significance of the Music Room as alleged by the petitioners, the record contains correspondence that shows the New York City Landmarks Preservation Commission (LPC) reviewed the EAS and concurred with its determination that the Project had no significant adverse impact upon artistic and historical resources, a fact that the BSA explicitly and appropriately relied upon in adopting the Resolution. While the petitioner apparently disagrees with the conclusion reached by the LPC, the BSA and this court must give deference to the opinion of the LPC in matters involving historic preservation. See In re Save

Gansevoort, LLC v City of New York, 158 AD3d 483, 485-86 (1<sup>st</sup> Dept 2018), lv to appeal denied sub nom. Save Gansevoort, LLC v City of New York, 31 NY3d 947 (2018) (where historical and/or aesthetic interest of buildings is implicated Supreme Court correctly accorded due deference to the Commission's expertise). The record before the BSA contains multiple correspondence and comments by the LPC with respect to all the historical and preservation-related environmental impacts of the Project, indicating a thorough review of the impacts that satisfies the "hard look" SEQRA and CEQR standard. See Landmark West! v Burden, 15 AD3d 308, 308-309 (1<sup>st</sup> Dept 2005) (in making negative declaration it was appropriate for lead agency to seek input from agencies with relevant expertise, including New York City Landmarks Preservation Commission, which had twice declined to designate property landmark).

As to petitioner's argument that the BSA's grant of the variance was arbitrary and capricious, the Court has set forth the standard with respect to this court's review of the BSA's determination to grant a variance as follows:

It is well settled that municipal zoning boards have wide discretion in considering applications for variances, and judicial review is limited to determining whether the board's action was illegal, arbitrary or an abuse of discretion (Matter of Ifrah v Utschig, 98 NY2d 304, 308 [2002]; Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437 [2000]). Thus, a determination by a zoning board should be upheld if it has a rational basis and is supported by substantial

evidence (Matter of Ifrah at 308). 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" (Matter of Sasso v Osgood, 86 NY2d 374, 384 n 2 [1995]).

"In order to issue the variances here, the BSA was required [under section 72-21 of the New York City Zoning Resolution] to find that the proposed development met five specific requirements: that (a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the "minimum variance necessary to afford relief' is sought" (Matter of SoHo Alliance, 95 NY2d at 440; see NY City Zoning Resolution § 72-21). "[I]n questions relating to its expertise, the BSA's interpretation of the [Zoning Resolution's] terms must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (Matter of Toys "R" Us v Silva, 89 NY2d 411, 418-419 [1996] [citations and internal quotation marks omitted]).

Kettaneh v Bd. of Standards and Appeals of City of New York, 85 AD3d 620, 621-22 (1<sup>st</sup> Dept 2011).

The variance sought by Frick in this case concerns the fact that the Project exceeds the "as of right" developmental potential of the subject zoning in terms of height, lot coverage and setbacks. The petitioner asserts that ZR §72-21(e) was violated because the BSA failed to require Frick to present alternatives to the Project that were less impactful upon the Music Room.

However, decisional law has imposed special balancing considerations for courts to consider when evaluating the validity of zoning variance requests by educational institutions, which includes museums such as Frick.

"The controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare. Although the special treatment afforded schools and churches stems from their presumed beneficial effect on the community, there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals. In those instances, the application may be properly denied. There is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects."

Matter of Cornell Univ. v Bagnardi, 68 NY2d 583, 595 (1986).

While the petitioner argues that BSA should have limited any variance to the minimum necessary to not disturb the historical and cultural resource represented by the Music Room, such an argument misstates the legal test applicable to the BSA's consideration of a variance application by Frick, as an educational institution.

The preservation of structures and areas with special historic, architectural or cultural significance is surely an important governmental objective. But the public interest in historical preservation does not as a matter of law override competing educational interests, which by their very nature also are "clearly in furtherance of the public morals and general welfare" (Matter of Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 526, 154 N.Y.S.2d 849, 136 N.E.2d 827).

As a consequence of their inherently beneficial nature, educational institutions have long "enjoyed special

treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would otherwise not have been allowed" (Cornell, 68 N.Y.2d at 593, 510 N.Y.S.2d 861, 503 N.E.2d 509

Trustees of Union Coll. in Town of Schenectady in State of N.Y.  
v Members of Schenectady City Council, 91 NY2d 161, 165-66  
(1997).

In support of its application for a variance Resolution states that the Frick submitted a "'Programmatic Needs Report' that outlines the Museum's educational program, sets forth the programmatic deficiencies it faces in the Building, details how the Proposed Building would alleviate these deficiencies, and explains how alternate design solutions would not accommodate the Museum's program." The BSA was entitled to consider the submissions by the Frick as to the needs of its educational function and to balance those needs against the public policy in favor of the preservation of historical and cultural resources.

Petitioner here merely challenges the Proposal based upon its effect on the Music Room, but nothing in the standard of review applicable to variances under ZR §72-21(e) requires the BSA to focus on singular impacts rather than the entirety of a project's benefits and impacts.

As further stated by the Court,

The decision to restrict a proposed educational use can only be made after the intended use is evaluated against other legitimate interests, with primary consideration

given to the over-all impact on the public welfare. A municipality's pursuit of other legitimate objectives, such as historic preservation, does not diminish the importance of striking a balance between the important contribution made to society by educational institutions and the inimical consequences of their presence in residential neighborhoods. Thus, like traditional residential zoning ordinances, those designed to further an historic preservation purpose are not immune from the deliberative process that must precede the restriction of educational uses. Rather, proposed educational uses must be weighed against the interest in historical preservation, as well as other legitimate, competing interests, to determine how best to serve the public welfare.

Trustees of Union Coll., supra, 91 NY2d at 166. In this case, Frick supported its variance application by demonstrating programmatic need in its essential cultural educational functions including the maintenance of the performances which are the object of the petitioner's challenge. The BSA was authorized to "strike a balance" between competing compelling societal concerns of preservation and education and petitioner has failed to show here that the BSA did so in a manner that was anything other than deliberative. Thus, the BSA employed and complied with an appropriate standard of review in considering the scope of the variance sought and ultimately granted with conditions as reflected in its Resolution.

This court's decision denying the petition moots the application for a preliminary injunction.

12/15/2020

DATE

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE