

**Matter of Sterling Place BK-NY Block Assn. Inc. v
City of New York**

2022 NY Slip Op 34463(U)

December 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 510458/22

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of December, 2022.

PRESENT:

HON. INGRID JOSEPH, J.S.C.

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In the Matter of the Applications of

STERLING PLACE BK-NY BLOCK ASSOCIATION INC., NOÉMIE BONNET, and DANIEL SALK,

Petitioners,

For Judgment Pursuant to Articles 63 and 78 of the Civil Practice Law and Rules,

-against-

Index No. 510458/22

CITY OF NEW YORK, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, HOPE STREET CAPITAL LLC, 959 STERLING PLACE GROUND OWNER LLC, and XYZ CORP./LLC,

Respondents,

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The following e-filed papers read herein:

NYSEF Doc. Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-4, 6-7, 49, 55, 60, 69, 72, 75</u>
Opposing Affidavits (Affirmations) _____	<u>117-118, 131, 133, 144, 149, 152, 161</u>
Affidavits/ Affirmations in Reply _____	_____
Letters to Court _____	<u>164, 165, 166</u>

Upon the foregoing papers, petitioners Sterling Place BK-NY Block Association Inc. (Sterling Place Assn.), Noémie Bonnet, and Daniel Salk move pursuant to CPLR

articles 63 and 78, for an order and judgment: (1) annulling the Certificate of Appropriateness (COA), issued on December 9, 2021 by respondent New York City Landmarks Preservation Commission (LPC), allowing the respondents Hope Street Capital LLC (Hope Street) and 959 Sterling Place Ground Owner LLC (959 Sterling) (collectively referred to as the Developer Respondents) to undertake their proposed development project on property located at 955-959 Sterling Place, Brooklyn, New York, and 914-920 Park Place, Brooklyn, New York (the Subject Properties); (2) directing the LPC to conduct a public hearing with respect to the proposed development project on the Subject Properties; and (3) granting petitioners injunctive relief precluding the Developer Respondents from performing any construction, excavation and/or demolition in connection with the COA (motion sequence number 1).

The Developer Respondents move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the petition (motion sequence number 2).

The City of New York, the LPC and the Developer Respondents have submitted answers in this special proceeding. Contrary to petitioners' contentions, raised by their counsel in a letter to the court dated October 7, 2022 (NYSCEF Doc No. 164), respondents answers, along with the appended supporting papers, were timely served on petitioners pursuant to CPLR 7804 (c). In any event, any delay in answering has not prejudiced petitioners because (1) the evidence and arguments regarding the merits of the petition were made in opposition to the motion for a preliminary injunction, and (2) the return date for the petition has since been adjourned (*see Matter of Powers v De Groodt*, 43 AD3d 509 [3d Dept 2007]; *see also Matter of 999 Hempstead Turnpike, LLC v Board*

of Appeals of the Town of Hempstead, 207 AD3d 716, 718 [2d Dept 2022]; *Matter of Castell v City of Saratoga Springs*, 3 AD3d 774, 776 [3d Dept 2004]).

This dispute involves the appropriateness of a December 9, 2021 COA, issued by the LPC, that allows the Developer Respondents to build an apartment complex on a portion of the Subject Properties that was formerly the rear yard of a historic building known as the Brooklyn Methodist Episcopal Church Home for the Aged and the Infirm (Methodist Home). The Subject Properties are located in the Crown Heights North II Historic District (Historic District) and thus any development requires that the LPC issue a COA approving the proposal. The Developer Respondents began the COA process with the submission of a design to the LPC on April 16, 2020. After a presentation before Brooklyn Community Board 8 (Community Board 8) on October 8, 2020, the LPC held a public hearing on October 20, 2020, and held a public meeting on November 17, 2020. At this public meeting, the LPC Chair requested that the Developer Respondents restudy the proposal in view of comments by the LPC Commissioners and submit a revised proposal.

After the submission of the revised proposal, a Member of the City Council sent a letter to the LPC asking the LPC Chair to require the Developer Respondents to resubmit the revised plan to Community Board 8 prior to reappearing before the LPC. The LPC's general counsel, responding on behalf of the LPC Chair, stated that, upon reviewing the Developer Respondents' revised design, it was determined that the revised design was not so substantially different from the original design to require a public hearing and that the revised proposal would thus be presented to the Commissioners at a public meeting.

The general counsel noted that, although the massing had been reduced and design features had been changed to address the Commissioners' comments, the revised design had a similar footprint and scale to the original proposal.

The LPC considered the revised proposal at a March 16, 2021 public meeting. At the meeting, the LPC Chair noted that the changes which, among other things, divided the proposed main building into two separate buildings with a connector, reduced the height of some components, and included setbacks, greatly improved the proposal, but added that there were additional refinements that the LPC would like to see implemented prior to a further meeting on the proposal. At a public meeting held on May 11, 2021, the Developer Respondents submitted additional revisions to their proposal that included some additional setbacks that slightly reduced the overall square footage of the buildings and changed façade materials. After a discussion by the Commissioners, the Commissioners voted to approve the application for the COA, with the proviso that the Developer Respondents work with the LPC regarding material choices. On December 9, 2021, the LPC issued an initial COA allowing the Developer Respondents to commence phase I work relating to curb cuts and foundation work and the Developer Respondents began construction shortly after obtaining permits for excavation and foundation work on December 23, 2021.

Petitioners commenced this proceeding on April 8, 2022, and a few weeks thereafter moved for a preliminary injunction to halt further construction work. In their petition, petitioners assert that the LPC improperly issued the COA on two grounds: (1) that the final design approved by the LPC substantially deviates from the Developer

Respondents' initial proposal such that the LPC was required to reopen the public hearing process and that the LPC's failure to do so was affected by violations of lawful procedure and errors of law; and (2) that the approval of the final design was arbitrary and capricious. Petitioners argued that approval of the latest design was arbitrary and capricious because: (1) the approved design is too large in relation to the size of other buildings in the district; (2) it blocks views of the Methodist Home; and (3) it eliminates much of the open space on the site of the Methodist Home property. In addition, petitioners argue, in their reply papers submitted on their motion for a preliminary injunction, that the LPC's approval of the plan to demolish the southern addition to the Methodist Home was arbitrary and capricious in view of the LPC's prior findings regarding the Methodist Home contained in the Designation Report made at the time the historic district was created.

This court, in a decision dated July 13, 2022, denied petitioners' motion for a preliminary injunction on the ground that petitioners failed to demonstrate the likelihood of success on the merits (NYSCEF Doc No. 113 at 30). This decision provided a full factual background relating to the Developer Respondents development proposals submitted during the COA application process, the Public Hearing and Public Meetings conducted by the LPC, and the December 9, 2021 COA approving the project (*see generally* NYSCEF Doc No. 113).

In reaching its conclusion that petitioners had failed to demonstrate the likelihood of success on the merits, the court found that the LPC's decision not to hold an additional public hearing was not affected by an error of law (*see Matter of Save America's Clocks*,

Inc. v City of New York, 33 NY3d 198, 202-203 [2019]) and rejected petitioners' contention that the changes the Developer Respondents made to their proposal required another public hearing. The court found that a further public hearing was not required because the LPC demonstrated that it had a rational basis for finding that these changes did not constitute a substantial deviation from the original proposal (*see Matter of Maxtone-Graham v Landmarks Preserv. Commn. of City of N.Y.*, 1 AD3d 295, 296 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]) (NYSCEF Doc No. 113 at 25).

With respect to the approval of the COA, the court found that the Developer Respondents' revised proposal was responsive to the concerns of the Commissioners and attempted to address at least some of the concerns raised by the public. In addition, the LPC considered the architectural, historical, and other factors relevant to the determination with respect to the context of the proposal in association with the Methodist Home, neighboring buildings on Sterling Place, and other buildings in the neighborhood, and laid out its reasoning in the COA, this court found that petitioners failed to show that the LPC's decision granting a COA, which was made following an extensive deliberative process, lacked a rational basis or was arbitrary or capricious (*see Matter of Save Gansevoort, LLC v City of New York*, 158 AD3d 483, 485-486 [1st Dept 2018], *lv denied* 31 NY3d 947 [2018]; *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 306 AD2d 113, 114 [1st Dept 2003], *lv granted* 100 NY2d 514 [2003], *appeal dismissed* 2 NY3d 727 [2004]; *Matter of Committee to Save Beacon Theater v City of New York*, 146 AD2d 397, 405-

406 [1st Dept 1989]; *see also Matter of Save America's Clocks, Inc.*, 33 NY3d at 207-209) (NYSCEF Doc No. 113 at 27-28).

With respect to petitioners' arguments regarding the demolition of the south addition to the Methodist Home, the court found that they were improperly raised for the first time in petitioners' reply papers relating to the motion for a preliminary injunction. Nevertheless, the court still addressed the merits of the issue and found that the LPC's Designation Report contained no suggestion that any of the features of the south addition had historical or architectural import. The court also found that the LPC's findings, contained in the COA, that the south addition had been altered over time, contained no significant architectural features and was in a deteriorated condition provided a rational basis for approving the demolition of that portion of the Methodist Home (*see Matter of Save Gansevoort, LLC*, 158 AD3d at 486; *Matter of Citineighbors Coalition of Historic Carnegie Hill*, 306 AD2d at 114; *Matter of Committee to Save Beacon Theater*, 146 AD2d at 405; *see also Matter of Save America's Clocks, Inc.*, 33 NY3d at 207-209) (NYSCEF Doc No. 113 at 29).

At the time this court decided petitioners' motion for a preliminary injunction, foundation work for the new apartment complex was largely completed, but demolition of the south addition to the Methodist Home had not begun. However, since this Court's denial of Petitioner's motion, the work has progressed, and counsel for the Developer Respondents asserts, in her October 7, 2022 affirmation in opposition to the petition, that she viewed the project from the sidewalk and observed that above ground work had commenced and that the south addition to the Methodist Home had been demolished.

Although petitioners filed a notice of appeal relating to this court's denial of the motion for a preliminary injunction, nothing in the record suggests that petitioners attempted to obtain a stay or any injunctive relief from the Appellate Division in relation thereto. Under these circumstances, any issue with respect to the demolition of the south addition has been rendered moot in view of the representation by counsel that the south addition has now been demolished (*see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729 [2004]; *Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 747 [1st Dept 2012], *affd* 20 NY3d 919 [2012]; *William Israel's Farm Coop. v Board of Stds. & Appeals of City of N.Y.*, 25 AD3d 517, 517 [1st Dept 2006]). While counsel's representations that the construction of the apartment complex has moved beyond the foundation stage and now involves above-ground construction work suggest that the project may be approaching a point where the work cannot be readily undone without undue hardship, such representations do not suggest that the work is substantially complete and do not contain sufficient detail to warrant finding that the work cannot be undone without substantial hardship. As such, the Developer Respondents have failed to demonstrate that the petition is moot (*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* 100 NY2d 533 [2003]; *cf. Matter of Sierra Club v New York State Dept. of Envtl. Conservation*, 169 AD3d 1485, 1486-1487 [4th Dept 2019]; *PSEG Long Is., LLC v Town of E. Hampton*, 154 AD3d 703, 705 [2d Dept 2017]; *Matter of Weeks Woodlands Assn., Inc.*, 95 AD3d at 747).

In reviewing the petition, the Developer Respondents' motion for summary judgment and the respondents' answers with supporting papers, this court finds that, aside from the issues relating to the south addition, which are now moot, the petition must be denied and dismissed for the reasons stated in the July 13, 2022 order denying the motion for a preliminary injunction. Namely, this court finds that petitioners have failed to demonstrate that the LPC's decisions not to hold another public hearing and to grant the COA were made without a basis in law, lacked a rational basis, or were arbitrary or capricious. In addition, if the court were to address the issues relating to the demolition of the south addition to the Methodist Home, it would likewise find that petitioners, for the reasons stated in the July 13, 2022 order, failed to demonstrate that the determination allowing its demolition was made without a basis in law, lacked a rational basis, or was arbitrary or capricious.

This conclusion is further supported by the Appellate Division, Second Department's recent decision in *Matter of Hilbertz v City of New York* (___ AD3d ___, 2022 NY Slip Op 06804 [2d Dept 2022]). In *Matter of Hilbertz*, the Second Department found that the Supreme Court below erred in finding arbitrary and capricious the LPC's grant of a COA for a project involving renovations to an historic mansion and the replacement of a 1930s era addition with a new L-shaped residential structure that would extend into a garden/greenspace area (*Matter of Hilbertz*, 2022 NY Slip Op 06804, *1). In contrast to the Supreme Court, the Second Department found that the LPCs' findings allowing both the removal of a historically insignificant addition and the construction of a new building that reduced the size of the garden were rational (*Matter of Hilbertz*, 2022


NY Slip Op 06804, *2). In doing so, the Second Department stated, “[i]n determining otherwise based, inter alia, on its ‘disagree[ment]’ with these findings and prioritization of certain impacts of the project over those the [LPC] elected to prioritize in the exercise of its professional expertise in matters of architecture, history, and other fields relating to the goals of the Landmarks Law, the court improperly substituted its judgment for that of the [LPC]” (*Matter of Hilbertz*, 2022 NY Slip Op 06804, *2). Based on the determination in *Matter of Hilbertz*, this court finds that, based on the COA and the entirety of the administrative record, any finding that the LPC acted arbitrarily or capriciously in the instant matter would likewise involve an improper substitution of this court’s judgment for that of the LPC.

Finally, in view of these findings requiring the dismissal of the petition, this court has not addressed the Developer Respondents’ assertion that dismissal is also required by laches and petitioners’ failure to join a necessary party.

In light of the foregoing, the petition (motion sequence number 1) is denied and dismissed. The Developer Respondents’ motion for summary judgment (motion sequence number 2), which was based on the Developer Respondents assertions that the petition should be dismissed based on laches and the failure to join an indispensable party, is denied as academic.

This constitutes the decision, order and judgment of the court.

ENTER



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice