Matter of Coalition for Fairness in SoHo & NoHo, Inc. v City of New York
2023 NY Slip Op 33457(U)
October 6, 2023
Supreme Court, New York County
Docket Number: Index No. 151255/2022
Judge: Erika M. Edwards

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS **PART** 10M

Justice

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INDEX NO. 151255/2022

In the Matter of the Application of

MOTION DATE 02/10/2022

THE COALITION FOR FAIRNESS IN SOHO AND NOHO, INC., KAY POWELL, AMIT SOLOMON, IAN KERNER, LISA RUBISCH, SARA BERSHTEL, JENNIFER PETTIT, LYNN SCHNITZER, ARTHUR SCHNITZER, CATERINA ROIATTI and ROBERT TRABOSCIA,

MOTION SEQ. NO. 001

Petitioners,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY PLANNING COMMISSION, NEW YORK CITY COUNCIL and ERIC ADAMS, in his official capacity as Mayor of the City of New York,

DECISION AND ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-176 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the court denies Petitioners The Coalition for Fairness in SoHo and NoHo, Inc.'s, Kay Powell's, Amit Solomon's, Ian Kerner's, Lisa Rubisch's, Sara Bershtel's, Jennifer Pettit's, Lynn Schnitzer's, Arthur Schnitzer's, Caterina Roiatti's and Robert Traboscia's (collectively, "Petitioners") Second Amended Verified Petition and denies it without costs to any party.

More specifically, as discussed herein, the court finds that the requirements regarding the conversion costs and $100 per square foot contribution to the Arts Fund set forth in the SoHo/NoHo/Chinatown Rezoning Resolution, also referred to as Special SoHo-NoHo Mixed Use District ("SNX Rezoning"), in Zoning Resolution ("ZR") § 143-13 do not violate Petitioners' constitutional rights as alleged in their Second Amended Verified Petition.

Additionally, pursuant to the parties' Stipulation of Partial Discontinuance ("Stipulation"), dated June 12, 2023, so-ordered on June 16, 2023, and filed as NYSCEF Doc. No. 171, the court denies as moot Petitioners' First Cause of Action and all other claims premised on alleged violations of the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR"), as Petitioners voluntarily withdrew such claims in light of Respondents' representations set forth in said Stipulation.

Petitioners brought this Article 78 and declaratory judgment action in their Second Amended Verified Petition against Respondents City of New York ("City"), New York City Department of City Planning, New York City Planning Commission, New York City Council ("City Counsel") and Eric Adams, in his official capacity as Mayor of the City of New York (collectively "Respondents"). Petitioners challenge amendments to the Zoning Map and Zoning Text to regulate Joint Living-Work Quarters for Artists ("JLWQA') in the SNX Rezoning which was passed by Respondent City Council on December 15, 2021, under City Council Resolution No.: 1889-2021 (NYSCEF Doc. No. 3).

I. SNX Rezoning

The JLWQA use designation was established in 1971 to permit artists certified by the New York City Department of Cultural Affairs to live and work in the same space within SoHo, and later NoHo. Over the years, zoning and legislative enactments regulated conversion of non-residential loft buildings. As the number of certified artists dwindled, the City granted a type of amnesty to JLWQA occupants who did not meet the certified artist requirements and allowed for familial succession rights to JLWQA units, but maintained the certified artist requirement for future non-familial successors. However, the City did not enforce many of the provisions and

non-certified artists who were non-familial successors and unauthorized occupants of JLWQA resided in said units at their own risk of being penalized for noncompliance.

The SNX Rezoning permitted unauthorized occupants of JLWQA to legalize their occupancies by applying to change the use of their units from JLQWA to Residential Use Group 2 ("UG2"), which is unrestricted residential use. However, to obtain a permit for conversion, SNX Rezoning requires a one-time $100 per square foot contribution to an Arts Fund, to be adjusted annually for inflation. The contributions are purported to be used to fortify the artistic legacy of SoHo and NoHo. This fee is a nonrefundable, prerequisite to obtaining a permit, and it is not contingent upon whether the permit is granted.

The relevant portions of ZR § 143-13 state as follows:

- "Conversions to joint living-work quarters for artists, as listed in Use Group 17D, shall not be permitted after December 15, 2021, within the Special SoHo-NoHo Mixed Use District."

- "For joint living-work quarters for artists existing on December 15, 2021, any conversion to a residence shall only be permitted upon certification by the Chairperson of the City Planning Commission to the Commissioner of the Department of Building that instruments in a form acceptable to the City are executed and recorded and that, thereafter, a contribution has been deposited in the SoHo-NoHo Arts Fund. The execution and recording of such instruments and the payment of such non-refundable contribution shall be a precondition to the filing for or issuing of any building permit allowing the conversion a joint living-work quarters for artists to a residence."

- "The contribution amount shall be $100.00 per square foot of floor area to be converted from a joint living-work quarters for artists to a residential use as of December 15, 2021, and shall be adjusted by the Chairperson annually . . . on August 1 of each calendar year" (ZR § 143-13).

II. New York State Amendment

In response to concerns that the SNX Rezoning Resolution adversely affected the rights of non-compliant current occupants of units in SoHo/NoHo neighborhoods, on July 21, 2022, New York State passed Chapter 420 of the 2022 Laws of New York, which amended § 276 of

the Multiple Dwelling Law ("MDL"). The Amendment provided amnesty to occupants of said units whose residences began on or before the enactment of the SNX Rezoning Resolution. It stated in substance that any permanent occupant residing in JLWQA on or before December 15, 2021, shall be deemed to meet JLWQA occupancy requirements with the same rights as a certified artist (Laws of the State of New York State of 2022, Chapter 420).

III. Petitioners' Second Amended Verified Petition

Subsequent to the passage of the State's Amendment, Petitioners filed a Second Amended Verified Petition seeking an order and judgment finding that the SNX Rezoning Resolution was arbitrary, capricious and violative of the New York State and New York City environmental laws, rules and regulations, including SEQRA and CEQR; that it violated the Constitutions of the United States and State of New York; an order annulling and vacating the SNX Rezoning Resolution; enjoining the City of New York from enactment, enforcement, or implementation of the SNX Rezoning Resolution; and for Petitioners' costs, disbursements and reasonable attorney fees for this proceeding.

Petitioners' First Cause of Action involves challenges to the environmental and land use review processes as violative of SEQRA and CEQR, which Petitioners subsequently withdrew.

Petitioners' Second Cause of Action alleges in substance that the City failed to adhere to the provisions of Article 1 § 10 of the United States Constitution by retroactively impairing and interfering with the contractual rights of Petitioners.

Petitioners' Third Cause of Action alleges in substance that the City failed to adhere to Article 1 § 7(a) of the New York State Constitution by confiscating private property without a rational basis and without just compensation, abrogating basic concepts of fairness and justice.

Petitioners' Fourth Cause of Action alleges in substance that the City failed to adhere to the Fifth and Fourteenth Amendments of the United States Constitution, by confiscating private property with malicious intent, without a rational basis and without just compensation, abrogating basic concepts of fairness and justice.

Petitioners' Fifth Cause of Action alleges in substance that the City deprived Petitioners of the equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution and violated the just compensation clause of the United States Constitution by imposing zoning rules and mandatory fees within the SNX Rezoning district which do not exist anywhere else in the City and which impose burdens upon the residents of the SNX Rezoning district to benefit residents outside of the SNX Rezoning district.

IV. The Parties' Stipulation of Partial Discontinuance

Subsequently, the parties engaged in extensive discussions regarding Petitioners' challenges to the City's and State's environmental review processes and the City's Uniform Land Use Review Process, the applicability of certain provisions, the City's implementation of the SNX Rezoning, and the anticipated costs of conversion from JLWQA to UG2 residential use. Following these discussions, the parties entered into a Stipulation of Partial Discontinuance, dated June 12, 2023, and so-ordered on June 16, 2023. Most notably, Respondents demonstrated in substance that Petitioners' fears that the conversion would require exorbitant costs for extensive building-wide renovations were misplaced and that Respondents did not anticipate such a requirement for conversion.

As a result of Respondents' clarifications, Petitioners voluntarily discontinued with prejudice their First Cause of Action and all other claims premised on violations of SEQRA and CEQR (Stipulation at p. 6). Thus, only Petitioners' constitutional claims remain as set forth in

their Second through Fifth Causes of Action. Now, Petitioners primarily argue that the unconstitutionality of the Arts Fund contribution, in conjunction with the costs of conversion, violate the Unconstitutional Conditions doctrine and that it is an unconstitutional exaction.

As discussed in the parties' Stipulation, the SNX Rezoning Resolution was enacted on December 15, 2021, amid concerns that the zoning and land use controls restricted SoHo/NoHo neighborhood's ability to develop into a thriving, diverse and inclusive community and because of the challenges of occupants of JLWQA in finding certified artists to purchase their units because very few certified artists remained (Stipulation at p. 2). Because of the State's legislation, the vast majority of JLWQA occupants are already presumed to be authorized and compliant with the applicable occupancy restrictions (Stipulation at p. 6). Those occupants who took or take occupancy after December 15, 2021, are subject to the certified artist occupancy restrictions set forth in 1971 and amended in 1987, which limit only occupancy and not sale (Stipulation at p. 6). Therefore, the Respondents acknowledged that "absent some agreement between transacting parties, current owners of JLWQA are not responsible for converting JLWQA to residential use prior to sale" and they are not required to inquire about how a future purchaser intends to comply with said occupancy requirements (Stipulation at p. 6). However, the State's Amendment did not change the artist occupancy requirements for subsequent occupants unless family succession rules apply or the unit is converted to unrestricted residential use (Stipulation at pp. 2-3).

In the Stipulation, Respondents also clarified provisions of the law regarding the requirements for conversion from JLWQA to Residential UG2 and addressed Petitioners' concerns that the SNX Rezoning conversion requirements would require current occupants to undergo cost-prohibitive, extensive, building-wide renovations prior to obtaining a new or

amended Certificate of Occupancy for unrestricted residential use. Respondents acknowledged that because the building regulations which apply to JLWQA and Residential UG2 are similar, "the City does not expect that currently compliant JLWQA will require significant construction in order to demonstrate compliance with regulations for UG2," except for the accessibility requirements pursuant to the subsequent enactment of Local Law 58/87 in 1987, which may require occupants to make alterations to their individual unit's door widths, interior paths, kitchens and bathrooms (Stipulation at pp. 4-5).

Additionally, Respondents confirmed that prior to obtaining a new or amended Certificate of Occupancy, an occupant must demonstrate compliance with the building regulations for converted residential units under MDL § 277 and pay the $100 per square foot contribution to the Arts Fund, pursuant to ZR 143-13 (Stipulation at p. 4). Petitioners' made this acknowledgment without prejudice to their remaining claim challenging the constitutionality of said requirement under the Unconstitutional Conditions doctrine (Stipulation at p. 4).

Although Petitioners acknowledged that the State's Amendment resolved their initial arguments regarding an immediate taking of their property, they maintain that the existing residents face mandatory governmental exactions based on the $100 per square foot Arts Fund contribution and the conversion costs which are due upon the sales, alienations, transfers and bequeathments to the general public.

Since Petitioners have not formally withdrawn their other constitutional claims, the court will briefly address them below.

V. Petitioners' Remaining Constitutional Claims

As to Petitioners' constitutional claims, Petitioners allege in substance that the City violated certain provisions of the United States and New York State Constitutions by requiring

current occupants, who were previously determined to be residents of lawful residential units pursuant to JLWQA, and who had valid Certificates of Occupancy, to now be deemed to be occupants of non-compliant or unlawful units, and subject them to fines, penalties, and prohibitive and impossible conversion costs if they attempt to transfer, sell, or bequeath their homes. Petitioners further argue in substance that since the SNX Rezoning requires building-wide conversions to residential use in cooperative buildings, certified artists face the loss of beneficial use and enjoyment of their units. Therefore, the SNX Rezoning is unconstitutional because it rendered previously lawful uses and properly issued Certificates of Occupancy illegal and/or prohibitively confiscatory.

Additionally, Petitioners argue in substance that the SNX Rezoning violates the Fifth and Fourteenth Amendments to the United States Constitution because it excludes or eliminates the economically productive or beneficial uses of Petitioners' homes, including the homes of certified artists, by instituting compulsory and prohibitive conversion costs to legalize the units. Additionally, Petitioners argue that the additional mandatory $100 per square foot fee, which is like a tax that solely and uniquely applies to residents of the SNX Rezoning district, deprives Petitioners of their homes without just compensation in violation of the equal protection guaranteed by the U.S. Constitution. Petitioners further argue in substance that the prohibitive costs of conversion and Arts Fund fee would potentially drive residents of the SNX Rezoning district into insolvency and/or financial hardship, property devaluation, displacement and dislocation rising to the level of an unlawful taking. It also interferes with reasonable investment-backed expectations and in particular, the rights of certified artists, without rational determination or examination in the record. Petitioners further argue in substance that although the State's amendment recognized the pre-existing nonconforming status of non-artists, it failed

to extend full rights of alienation, transfer, sale and bequeathment to non-artists as required under ZR § 52-61.

Petitioners further argue that the just compensation clause of the state and federal constitutions is a matter of "fairness and justice" designed to bar government from forcing a small discrete population to bear public burdens, which based upon equity, should be borne by the public at large (*Armstrong v United States*, 364 US 40, 49 [1960]).

Generally, Respondents argue in substance that the purpose of the SNX Rezoning is to provide a voluntary process for occupants of JLWQA to remove artist occupancy and familial succession restrictions and for non-compliant non-artists to legalize their residences so that they can be sold or transferred to any member of the public. Respondents disagree with Petitioners claims that SNX Rezoning makes their units less marketable and they argue that the removal of JLWQA restrictions increases the value of the property because there are no restrictions as to whom Petitioners could sell or transfer the property. Additionally, Respondents argue that many of the Petitioners are already allowed to market their JLWQA units to non-artists because their units are located in Loft Law buildings, which laws supersede the restricted occupancy requirements of the SNX Rezoning Resolution.

Respondents further argue in substance that any concerns Petitioners had as to the rights of residents of JLWQA at the time the SNX Rezoning was passed have been ameliorated and largely mooted by the State's passage of the legislation legalizing every JLWQA occupancy that existed prior to the rezoning. Respondents also argue that since the vast majority of Petitioners' initial constitutional claims have been resolved, their arguments are now limited to their voluntary conversion if they attempt to sell or transfer their units to an unauthorized occupant, which is insufficient to support their Constitutional Takings claims.

Respondents further argue that Petitioners failed to demonstrate how the costs of voluntary conversion and the Arts Fund contribution deprives them of all economically beneficial use of their property, constituting a regulatory taking under the Fifth and Fourteenth Amendments. Respondents further argue in substance that the Arts Fund contribution was a reasonable compromise to permit unauthorized occupants to legalize their occupancy and benefit the local arts community, which was deprived of the dedicated housing provided to it by the SNX Rezoning.

Additionally, Respondents argue in substance that Petitioners failed to demonstrate how SNX Rezoning interfered with their reasonable investment-backed expectations, as it was not reasonable for the unauthorized occupants to believe that the City's long-standing restrictions would not be applied, despite the City's non-enforcement of them over the years. Petitioners also failed to demonstrate how the character of the SNX Rezoning constitutes a physical invasion, or that it unfairly and impermissibly singles out Petitioners or selected parcels.

In reliance on *Matter of C/S 12th Ave. LLC v. City of N.Y.*, Respondents argue in substance that the relevant inquiry in determining whether a zoning amendment withstands scrutiny under the Equal Protection Clause is whether there is a "rational relationship between . . . disparate treatment of petitioner property owners and a legitimate governmental purpose" (*Matter of C/S 12th Ave. LLC v. City of N.Y.*, 32 AD3d 1, 9 [1st Dept 2006]). Respondents argue in substance that the City had a legitimate governmental purpose in requiring the Arts Fund contribution to convert JLWQAs to unrestricted residential use under UG2s because the contribution ensures the continued vitality of arts in the area. Since the SNX Rezoning removed the amenities of designated housing for artists in JLWQAs and the unlawful occupancies of JLWQA units diminished the availability of dedicated housing for artists in SoHo and NoHo, it

was rational for the City to require the contribution to the Arts Fund for voluntary JLWQA conversions to preserve and support artist communities in Lower Manhattan. Additionally, Respondents argue in substance that the rate of $100 per square foot was rational because it was specifically set to be within the average difference in the sale price between JLWQA to unrestricted units which can be sold to non-artists and other members of the public, which will increase the value of the property.

Subsequent to the State's remedial legislation and the parties' Stipulation, the crux of Petitioners' remaining constitutional challenges involves the determination of whether the mandatory $100 per square foot contribution to the Arts Fund and conversion costs violate Petitioners' constitutional rights, including, but not necessarily limited to, the Fifth Amendment's Takings Clause. Therefore, the court is asked to determine which test, if any, applies and whether or not the SNX Rezoning passes constitutional muster.

Petitioners argue in substance that the court must apply the "unconstitutional-conditions" test for building permits that the United States Supreme Court adopted in the litany of cases including *Nollan v. California Coastal Comm'n*, 483 US 825 (1987), *Dolan v. City of Tigard*, 512 US 374 (1994) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595 (2013). Petitioners argue that the Supreme Court held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of their property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. Petitioners argue that *Koontz* extended the nexus and rough proportionality requirements to governmental monetary exactions. Petitioners further argue that the SNX Rezoning is akin to the exaction in *Koontz* and that the Arts Fund bears no nexus or proportionality to its imposition.

Petitioners further argue that the Supreme Court's decision in *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, determined that a monetary exaction alone qualified as a taking under the Fifth Amendment and that the unconstitutional conditions test set forth in *Nollan*, *Dolan* and *Koontz* applied to legislatively compelled permit conditions and not just administratively imposed ones (*Knight v. Metro. Gov't of Nashville & Davidson Cnty., 67 F4th 816* [6th Cir 2023]).

Respondents argue in substance that the *Nollan/Dolan* nexus and rough proportionality test does not apply to this case, but that the deferential "balancing" test for zoning restrictions as set forth in *Penn Central* applies (*Penn Cent. Transp. Co. v New York City*, 438 US 104 [1978]). Respondents further argue in substance that exactions are adjudicative decisions to condition an application for a land use permit on an individual parcel and not broadly applicable legislation, like zoning and use restrictions, that adjust the benefits and burdens of economic life to promote the common good (*id.* at 124). Respondents further argue in substance that despite the 6th Circuit's decision in *Knight*, the Supreme Court and the Court of Appeals have not extended the heightened exactions test from *Nollan, Dolan* and *Koontz* to zoning use and land use legislative restrictions. Additionally, Respondents argue that even if the heightened standard applied to broad legislative conditions, then it would still not apply to the SNX Rezoning, as the nexus and rough proportionality test only apply where the permitting authority demands that the permit applicant give up the "right to exclude" others from a particular piece of property, or for money "in lieu" of such particularized demand for an easement. Respondents further argue that even if the court were to find that the exactions standard applied to the SNX Rezoning legislation, then the Arts Fund contribution would still satisfy the test.

VI. Analysis

As an initial matter, the court rejects Respondents' argument that the court should decline to consider Petitioners' claim that the $100 per square foot fee represents an unconstitutional condition because Petitioners failed to plead this claim and raised it for the first time in their Memorandum of Law in Support of Second Amended Verified Petition. Upon review of Petitioners' Second Amended Verified Petition, the court finds that although Petitioners failed to specifically allege that the contribution to the Arts Fund was an unconstitutional exaction, Petitioners generally pled in substance that the exorbitant costs of conversion coupled with the $100 per square foot Arts Fund contribution were unconstitutional under their claims alleging an unconstitutional taking for confiscation of private property without just compensation. Therefore, the arguments are inextricably intertwined and the court will consider the substance of Petitioners' claims.

The Fifth Amendment's Taking Clause, as applied to the States pursuant to the Fourteenth Amendment, provides that "nor shall private property be taken for public use, without just compensation" (US Const, 5th Amend).

In *Knight*, the Supreme Court discussed the following three step unconstitutional-conditions test to determine the constitutionality of permit conditions:

1) whether the condition would qualify as a taking if the government had directly required it and if not, then there is no taking (*Koontz*, 570 US at 612);
2) whether there is a "nexus" between the condition and the project's social costs, meaning that the government must impose the condition because of those costs and not for other reasons (*Nollan*, 483 US at 837); and

3) whether there is a "rough proportionality" between the condition and the project, that is, the condition's burdens on the owner must approximate the project's burdens on society (*Dolan*, 512 US at 391).

(*Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F4th 816, 825 [6th Cir 2023]).

The purpose of this analysis is to prevent the government from coercing people into giving up a constitutional right, like a property right, without just compensation (*Koontz*, 570 US at 595-96). It reflects the danger of such coercion while considering the government's legitimate need to offset the public costs of development through land use exactions (*Koontz*, 570 US at 596). It is not dependent upon whether the government approved the permit after the applicant agreed to the condition, or whether the government denied the permit because the applicant refused to comply with the condition (*id.*).

The New York Court of Appeals defined exactions as land use decisions conditioning approval of development on the dedication of property to public use (*Matter of Smith v Town of Mendon*, 4 NY3d 1, 10 [2004]; *Consumers Union of U.S., Inc. v State*, 5 NY3d 327, 354 [2005]). Under the *Nollan/Dolan* test, an exaction is an unconstitutional taking if the condition lacks an "essential nexus" with the state interest for which it is imposed and lacks "rough proportionality" to the impact of the proposed development (*Consumers Union of U.S., Inc.*, 5 NY3d at 354 [internal citations and quotation marks omitted]).

In considering the parties' arguments regarding the correct standard to apply to the SNX Rezoning Arts Fund contribution requirement, the court agrees with Respondents and finds that the nexus and rough proportionality test set forth in *Nollan*, *Dolan*, *Koontz* and *Knight* do not apply to the Arts Fund contribution under the SNX Rezoning legislation because it is not a taking. Additionally, it is not an exactions as contemplated by Supreme Court and Court of

Appeals jurisprudence because it is not a land use decision which conditioned approval of development on the dedication of property to public use. Therefore, Petitioners failed to satisfy the first step in the *Nollan/Dolan/Koontz* three step analysis. As such, the court need not consider whether the remaining steps were satisfied. The court finds Petitioners arguments in support of the application of this heightened standard to be without merit.

In actuality, the court need not discuss whether either test is satisfied because the SNX Rezoning requirements to obtain the permit do not come close to satisfying the threshold questions of whether there was a taking of private property without just compensation or a restriction on all beneficial use of the property necessary to apply either test.

Here, there is no requirement of a physical dedication of property to public use, no easement and no relinquishment of the "right to exclude" anyone. Additionally, even if the court were to apply the exactions analysis set forth in *Knight*, then the test would still be inapplicable because there was no demand to relinquish any portion of Petitioners' property and no "in lieu" fee to avoid giving up such right to exclude.

In all of the cases primarily relied upon by Petitioners to support the application of this test, the governmental entity required an applicant for a permit to dedicate a portion of their property to public use, and in *Knight*, the applicant was offered the choice to pay a fee "in lieu" of giving up such right to obtain the permit.

In *Nollan*, the condition for the applicant to build a larger house on private beachfront property required the applicant to grant an easement so others could pass through the property to access adjoining beaches (*Nollan v. California Coastal Comm'n*, 483 US 825 [1987]).

In *Dolan*, the permit condition for the applicant to build a larger store, parking area and other structure required the applicant to dedicate portions of the property to the government for a greenway and pedestrian/bicycle pathway for members of the public to use.

In *Koontz*, the permit condition for the applicant to develop a portion of property on the Florida wetlands required the applicant to offset the resulting environmental damage of the development proposal by deeding to the government a conservation easement on a portion of the property, or to pay for offsite mitigation (*Koontz*, 570 at 595). Even though monetary exactions were involved, the court stated that the *Nollan/Dolan* test still applied.

In *Knight*, the permit condition was a "sidewalk ordinance" that required landowners who applied for building permits to grant an easement across their land and agree to build a sidewalk on the easement for everyone to use or they could choose to pay an "in-lieu" fee that Nashville would use to build sidewalks in other areas (*Knight v Metro. Gov't of Nashville & Davidson Cnty., 67 F4th 816* [6th Cir 2023]). The court found that the government takes property when it grants an easement to allow strangers to enter it by land, air or sea (*id.* at 823; *Nollan*, 483 US at 831; and *Cedar Point Nursery v. Hassid*, ____US____, 141 S Ct 2063, 2073-74 [2021]). However, the court noted that restrictions on the right to use property rarely triggers the automatic-taking rule and requires the restriction to bar a landowner from engaging in all economically beneficial or productive use of land (*Knight*, 67 F4th at 823 [internal citations and quotation marks omitted]).

In *Cedar Point*, the court determined that a California regulation granting labor organizations the right to access the employer's property to solicit support for unionization constituted an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments (*Cedar Point Nursery*, 141 S Ct 2063).

Thus, all of these cases required the permit applicant to grant an easement or to give up the "right to exclude" as a condition to obtain a permit, which amounted to a taking of their property. The SNX Rezoning does not require such demand and, unlike in *Knight*, there is no "in-lieu" fee requirement. The SNX Zoning simply requires a fee "in-lieu" of nothing.

Additionally, the court finds that the *Penn Central* test does not make SNX unconstitutional rights (*Penn Cent. Transp. Co. v New York City*, 438 US 104 [1978]). In *Penn Central*, the Supreme Court found that New York City's Landmark's Preservation Law did not constitute a "taking" of private property at Grand Central Terminal by the government without just compensation and did not arbitrarily deprive the plaintiffs of their property in violation of the Fifth and Fourteenth Amendments because the law did not interfere with the present uses of the building, nor did it necessarily prohibit occupancy of any of the air space above the building, nor deny all use of the owner's preexisting air rights (*id.*). Additionally, it is not a taking for public use without just compensation when a law operates to deny the ability to exploit a property interest that the owner believed was available for development, or that the law diminished the value of a parcel of privately owned land by restricting its use (*id.* at 130).

The *Penn Central* court noted that the Fifth Amendment's guarantee is designed to bar a government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole (*id.* at 123; *Armstrong*, 364 US at 49). Such consideration depends largely upon the particular circumstances of each case (*Penn Cent. Transp. Co.*, 438 US at 124). Additionally, legislation designed to promote the general welfare commonly burdens some more than others (*id.* at 133). Therefore, the court found that the restrictions imposed were substantially related to the promotion of the general welfare and not

only permitted reasonable beneficial use of the landmark site, but also afforded opportunities further to enhance the building and other properties (*id.* at 138).

Here, the combination of the SNX Rezoning requirements of requiring permit applicants to contribute $100 per square foot to the Arts Fund and the anticipated costs of conversion, should the Petitioners choose to convert their units, falls far short of qualifying as a governmental taking of the property, nor does it bar Petitioners from engaging in all economically beneficial or productive use of land. In this case, the purported restriction on the use of the property is actually an opportunity to remove the residency restriction to permit Petitioners to sell or transfer their property to anyone without having to limit the potential buyers or transferees to certified artists or people previously authorized to occupy the JLWQA units. The removal of the restriction would most likely increase the value of the property.

Therefore, the court finds that there was no such taking under either analysis proffered by the parties.

As to Petitioners' remaining arguments regarding impairment of contractual obligations, the court finds that for the reasons argued by Respondents, Petitioners failed to demonstrate that the SNX Rezoning substantially impaired Petitioners' obligations under their purchase contracts or any other contracts.

The court finds that Petitioners failed to cite to any contract provision or case law to support their claims of contractual impairment and Respondents demonstrated that the cost to convert units to UG2 are not mandatory for residents who occupied the units prior to SNX Rezoning and it would not require the exorbitant costs as feared by Petitioners. Additionally, SNX Rezoning did not significantly change the regulations restricting occupancy prior to SNX Rezoning, so its requirements should have been foreseeable to Petitioners. Therefore, the court

need not consider any other factors required to demonstrate unconstitutional impairment of Petitioners' contractual obligations.

The court finds the remainder of Petitioners' arguments to be unpersuasive and the court denies the additional relief requested.

Therefore, the court denies Petitioners' Second Amended Verified Petition and dismisses it without costs to any party.

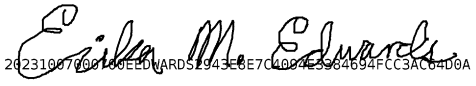
The court has considered any additional argument raised by the parties which was not specifically discussed herein and the court denies any additional request for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies as moot Petitioners' First Cause of Action in their Second Amended Verified Petition and all other claims premised on alleged violations of the State Environmental Quality Review Act and the City Environmental Quality Review, as Petitioners voluntarily withdrew such claims and the court denies the remainder of Petitioners' claims; and it is further

ORDERED that the court denies the remainder of Petitioners' claims and dismisses Petitioners' Second Amended Verified Petition without costs to any party.

This constitutes the interim decision and order of the court.



10/6/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE