

To be argued by
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New York County Index No. 100686/06

Supreme Court of the State of New York
APPELLATE DIVISION – FIRST DEPARTMENT

DEVELOP DON'T DESTROY BROOKLYN, et al.,

Petitioners-Plaintiffs-Respondents-
Cross-Appellants,

- against -

EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Defendant-Appellant-
Cross-Respondent,

- and -

FOREST CITY RATNER COMPANIES,

Respondent-Defendant-Cross-Respondent.

**BRIEF FOR RESPONDENT-DEFENDANT-CROSS-RESPONDENT
FOREST CITY RATNER COMPANIES**

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**BRIEF FOR RESPONDENT-DEFENDANT-CROSS-RESPONDENT
FOREST CITY RATNER COMPANIES**

Preliminary Statement

Forest City Ratner Companies (“FCRC”) is a respondent-defendant in this combined special proceeding under CPLR Article 78 and declaratory judgment action, and a respondent on the cross-appeal by petitioners-plaintiffs-respondents-cross-appellants (“petitioners”). The appeal and the cross-appeal are from a decision and order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on February 15, 2006 (R 5-47), and are being heard on an expedited basis.¹

The appeal (R 3-4) is by respondent-defendant New York State Urban Development Corporation, d/b/a Empire State Development Corporation (“ESDC”), from the disqualification of ESDC’s special outside environmental counsel, David Paget and the law firm of Sive, Paget & Riesel, P.C., from representing ESDC in connection with its environmental review of the Atlantic Yards Arena and Redevelopment Project (the “Project”). FCRC supports ESDC’s appeal.

Petitioners’ notice of cross-appeal states that the cross-appeal is from Justice Edmead’s order “insofar as” it “[1] dismissed the Article 78 proceeding

¹ Citations preceded by “R” refer to the Record on Appeal. Petitioners’ notice of cross-appeal is not reproduced in the Record on Appeal, because the appeal and cross-appeal are proceeding on an expedited schedule, and petitioners’ notice of cross-appeal was not served until after the Record on Appeal had been certified.

which challenged the issuance by [ESDC] of the Declaration of Emergency dated December 15, 2005, and [2] denied the injunction against demolition of certain enumerated buildings ...” By contrast, petitioners’ brief characterizes the cross-appeal as being from “a portion of Justice Edmead’s decision which granted the motion [*sic*] of ESDC and [FCRC] to dismiss those parts of the petition that sought to annul a December 15, 2005 ‘Emergency Declaration’ by ESDC” (Pet. Br. at 1).² Petitioners’ brief does not address Justice Edmead’s denial of a preliminary injunction. It thus appears that petitioners have abandoned their challenge to the denial of an injunction, and instead limit the scope of their cross-appeal to challenging the dismissal of the Article 78 cause of action that sought to set aside ESDC’s emergency declaration. Because of uncertainty as to petitioners’ position, however, this brief addresses both the dismissal and the question of whether, even if petitioners’ cause of action to set aside the emergency declaration was viable, denial of a preliminary injunction still was proper and should be affirmed.³

² Citations to “Pet. Br.” refer to the “Cross-Appeal Brief for Petitioner-Respondent.” Although petitioners’ brief refers to “the motion of ESDC and [FCRC]” (Pet. Br. at 1), in fact ESDC and FCRC each made separate motions to dismiss (*compare* R 284-86 *with* R 481-83).

³ Another issue as to which petitioners have created uncertainty is whether they regard FCRC as a party to their cross-appeal. Petitioners refer to FCRC exclusively as a “Respondent” (*see* Pet. Br. at cover and at 1), and characterize their cross-appeal as directed to the “portion” of the motion court’s decision and order that “granted the motion ... to dismiss *those parts of the petition that sought to annul a December 15, 2005 ‘Emergency Declaration’*” (Pet. Br. at 1) (emphasis added). Petitioners’ combined petition and complaint (R 70-148) contained four causes of action, only one of which, the first cause of action (R 89-90), sought to annul ESDC’s emergency declaration. This cause of action was asserted against ESDC alone, although FCRC was a necessary party and should have been named in the cause of action. *See, e.g., Red*

Turning to the merits of the cross-appeal, governing precedents of the Court of Appeals and this Court clearly establish the standard applicable to judicial review of an agency's determination that a proposed action is emergency action and therefore exempt from review under the State Environmental Quality Review Act, Environmental Conservation Law § 8-0101, *et seq.* ("SEQRA"). This case law makes clear that the test is rationality, and that courts may not substitute their judgment for that of the agency. Here, ESDC's determination was amply supported by the evidence that was before ESDC, and therefore was a rational and reasonable exercise by ESDC of its powers and in no way arbitrary and capricious or an abuse of discretion. The five buildings at issue, all of which are vacant, were determined by FCRC's consulting structural engineers – who are recognized experts in matters relating to the structural failure and collapse of buildings – to be structurally unstable and to pose an immediate danger to public safety. The record shows that ESDC personnel, including two experienced professional urban planners who personally had toured the Project site and seen the buildings at issue,

Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals, 5 N.Y.3d 452, 805 N.Y.S.2d 525 (2005); *27th Street Block Ass'n v. Dormitory Authority of the State of New York*, 302 A.D.2d 155, 752 N.Y.S.2d 277 (1st Dep't 2002). Petitioners' pleading also contained two causes of action directed at FCRC but not ESDC – the second (R 90-91) and the fourth (R 92-93) – both of which sought to enjoin FCRC's demolition of the buildings on grounds apparently unrelated to the purported impropriety of ESDC's emergency declaration. The other cause of action in petitioners' pleading – the third (R 91-92) – was asserted only against ESDC and sought disqualification of its environmental counsel. Petitioners' pleading also requested discovery (R 93-94), and the motion court characterized this request as a fifth cause of action, dismissing it as moot (*see* R 6, 47).

carefully reviewed the extensive materials that had been provided to ESDC by FCRC's engineers and determined, on the basis of that information, the engineers' advice, their consultations with other ESDC officials and their own judgment and experience, that the buildings presented an unacceptable threat to public safety and should be demolished.

Frankly, it is irresponsible for petitioners to ask the courts to perpetuate this threat to the safety of innocent members of the public who live or work, or just use public sidewalks, in proximity to these dangerous buildings. There is no legitimate justification for preventing FCRC from eliminating these hazardous conditions. Indeed, these buildings will be demolished whether or not the Project ultimately is approved, because the buildings are not historical resources and are too deteriorated to make their preservation economically feasible. Shoring them up temporarily during environmental review of the Project – which, at least implicitly, is what petitioners are asking this Court to require – would be a pointless waste of resources.

Counter-Statement of Questions Presented

1. Was ESDC's emergency declaration rational and a proper exercise of the agency's discretion?

The motion court correctly answered this question in the affirmative and therefore properly dismissed petitioners' pleading to the extent that it sought to set aside the emergency declaration.

2. Assuming *arguendo* that petitioners' pleading was incorrectly dismissed insofar as it sought to vacate the emergency declaration, should a preliminary injunction be issued to restrain FCRC from demolishing the five vacant buildings at issue?

The motion court did not reach this issue, but even if petitioners had a viable claim to set aside ESDC's emergency declaration, there still would be no justification for enjoining demolition of the buildings at issue.⁴

Counter-Statement of the Case

Petitioners' statement of the facts of the case (Pet. Br. at 7-14) is sufficiently accurate to not require a complete counter-statement. Material inaccuracies are pointed out where relevant below in the argument section of this brief. However, petitioners have failed to mention the following significant facts:

1. In addition to the five vacant buildings that are the subject of this litigation and one additional building as to which FCRC hopes to obtain ESDC's authorization for demolition, FCRC is the owner or contract vendee of *10 other vacant buildings* in the Project's footprint that it does *not* intend to demolish

⁴ As shown above, it is not clear whether petitioners continue to pursue the cross-appeal insofar as it is addressed to the denial of a preliminary injunction.

prior to completion of the Project's environmental review. FCRC is satisfied on the basis of its own examination of these buildings or the advice of its consulting structural engineers that these buildings, although vacant, are not dangerous.

2. As ESDC recognized, the outside structural engineering firm that advised FCRC – and then ESDC – that the five buildings pose an immediate danger and should be demolished “enjoys a well deserved reputation as one of the best engineering firms in the City of New York, if not the country” (R 291 [¶ 12]). Furthermore, during the course of a question-and-answer session that followed a long oral presentation that was accompanied by more than 70 Power Point slides – a presentation that was made by FCRC's lead engineer to representatives of ESDC and the Metropolitan Transportation Authority (the “MTA”) – an engineer “stated that he believed that no responsible engineer could conclude that the buildings in question should not be taken down” (R 291 [¶ 12]).

3. While ESDC was considering FCRC's request for an emergency declaration allowing demolition of these buildings, the responsible ESDC personnel were cognizant of the fact that “vacant and deteriorated buildings often present a potential risk of harm to public health and safety, because they have been known to collapse suddenly and without warning,” as had been true, only a few months earlier, in the case of a vacant building in the nearby Fort Greene section of Brooklyn, the side of which had “collapsed suddenly and landed on a

neighboring bodega,” killing a young woman and injuring six other people, including a City firefighter (R 292-93 [¶ 15]).

4. FCRC made clear to ESDC that it intends to demolish these buildings whether or not the Project is approved, and such demolition “is an action that a property owner in New York City is entitled to take as of right, for any reason or for no reason at all” (R 295 [¶ 20]). Therefore, although FCRC’s intention to demolish the buildings even if the Project is not approved is “not strictly relevant to the issue of the threat posed by these buildings to public health and safety,” ESDC recognized that to require FCRC to preserve these buildings temporarily “would in fact be pointless and wasteful” (R 295 [¶ 20]).

Prior Proceedings

Petitioners commenced this litigation by filing their pleading (R 70-148) on January 18, 2006 (R 161-62). On the following day, they presented to Justice Edmead a proposed order to show cause (R 56-58) to bring on a motion for a preliminary injunction, and to temporarily restrain (1) FCRC from “taking any steps or action with reference to the demolition of the properties located in the footprint of the Project,” and (2) ESDC from “issuing a Final Scoping Document for the Atlantic Yards Project,” which was the next step in ESDC’s ongoing environmental review under SEQRA (R 58). Although the application for a TRO was presented *ex parte*, Justice Edmead required petitioners to notify ESDC and

FCRC. The Justice held a hearing on January 19 (R 163-90), at the conclusion of which she ruled that “there will be no stay and no TRO” (R 189), observing that she did not “see a sufficient showing of the likelihood of success on the merits or irreparable harm” (R 182). The court then established a briefing schedule, setting the preliminary injunction motion down for a hearing on February 14.

Prior to the hearing, ESDC and FCRC each moved pursuant to CPLR 7804(f) and 3211(a) to dismiss the respective causes of action that had been asserted against them (R 284-480 and 481-752). In addition, four tenants of 479 Dean Street, a building within the Project’s footprint, moved by order to show cause to intervene as petitioners (R 191-261), and three elected officials – Council Member Letitia James, State Senator Velmanette Montgomery and Congressman Major R. Owens – moved for permission to appear as *amici curiae* in support of petitioners (R 262-83).

FCRC opposed the proposed intervention (R 753-59). FCRC consented to the elected officials’ appearance as *amici curiae* but submitted the affidavits of several other elected officials (Brooklyn Borough President Marty Markowitz, State Assemblyman Roger L. Green, State Senator Carl Andrews and Congressman Edolphus Towns) and two respected local community leaders (Bertha Lewis, the Executive Director of the New York chapter of ACORN, and the Reverend Herbert Daughtry, Chairperson of the Downtown Brooklyn

Neighborhood Alliance), all of whom attested to their support of the Project and their opposition to petitioners' motion for an injunction (R 760-800). In addition, Borough President Markowitz claimed authorship of the Project, having suggested to FCRC's President, Bruce Ratner, that he acquire the New Jersey Nets professional basketball team and build a new sports arena for the team in Brooklyn (R 761 [¶ 3]). The Borough President also submitted letters in support of the Project from numerous other elected officials (R 764-89), including Senator Schumer (R 764), City Comptroller Thompson (R 786), the City's Public Advocate (R 787), and several members of the Legislature and the City Council.⁵

On February 14, Justice Edmead heard oral argument for nearly three hours (R 801-917). At the outset of the hearing, petitioners withdrew their request for an injunction restraining ESDC from issuing its final scoping document (R 804). At the conclusion of the hearing, the Justice announced her decision from

⁵ Although concededly controversial, the Project enjoys broad community support, because it will transform a deteriorated swath of land near the heart of downtown Brooklyn, attract new visitors and businesses to Brooklyn, create thousands of new housing units (a substantial portion of which will be affordable housing) and generate economic development, including thousands of jobs and billions of dollars of tax revenues. In addition, FCRC's affiliates have entered into a pioneering Community Benefits Agreement with a coalition of local community organizations (R 561-633). The agreement obligates the FCRC affiliates to, among other things, implement extensive job training programs with preferences for low-income residents of surrounding neighborhoods, ensure that a substantial proportion of construction contracts are awarded to minority and women-owned businesses, provide relocation to comparable new apartments within the Project at comparable rents to those tenants who now live on the Project's site, and assure that 50% of the new rental housing in the Project is affordable housing. These provisions are intended to benefit those components of the local community that historically have suffered from unemployment and inadequate housing.

the bench (R 915-17) and distributed her written decision and order (R 5-47). In brief, the Justice (1) dismissed the first and second causes of action, which are the ones on the basis of which petitioners sought to enjoin demolition of the five buildings, (2) granted the third cause of action to the extent of disqualifying ESDC's outside environmental counsel and directing ESDC to retain new counsel within 45 days, (3) granted the fourth cause of action to the extent of declaring that a 1939 deed restriction created an easement of passage over a portion of one parcel, but dismissed the cause of action to the extent that petitioners sought to enjoin demolition of the building on that parcel, (4) denied as moot petitioners' application for leave to obtain discovery, and (5) denied the motion by residents of 479 Dean Street for leave to intervene.

Inssofar as the demolition is concerned, the Justice held that, “[a]pplying the appropriate legal standard, a review of the record before this Court leads to the conclusion that the ESDC’s determination that proposed demolition of the Buildings is a Type II ‘emergency’ action, not subject to SEQRA review, is a reasonable interpretation of applicable statutes and is supported by the record “ (R 38). The Justice went on to describe the considerable evidence that had been considered by ESDC in reaching its determination, including the engineers’ oral and slide presentation, the engineers’ subsequent formal report, the consultations among ESDC officials, the key decision maker’s tour of the site and her extensive

experience (R 38-39). The Justice also concluded that petitioners' contention that ESDC should have conducted an "independent" evaluation was not supported by applicable regulations or case law and was "legally insufficient" (R 36-37). The Justice therefore held that ESDC's emergency declaration "was not arbitrary and capricious and had a rational and substantial basis in the record" (R 40). The Justice's decision and order was entered on February 15 (R 5).

On February 17, ESDC served and filed a notice of appeal (R 3-4) from the Justice's decision and order insofar as it disqualified ESDC's environmental counsel. On the same day, ESDC applied to this Court for an expedited briefing schedule, and the parties agreed to such a schedule, subject to the Court's approval. On February 21, in accordance with the agreed-upon schedule, ESDC served and filed the Record on Appeal and its opening brief.

On the same day, petitioners served and filed their notice of cross-appeal, moved in this Court for a stay pending appeal that would enjoin demolition of the five buildings, and applied for an immediate emergency stay of demolition, which was denied by Justice Friedman of this Court. At the same time, Justice Friedman approved the parties' expedited briefing schedule. On March 6, the parties were advised telephonically that petitioners' motion for a stay pending appeal would be denied in an order to be issued on March 9. The Court has

scheduled oral argument on ESDC's appeal and petitioners' cross-appeal for March 23.

The Disqualification of ESDC's Environmental Counsel

As a technical matter, FCRC is not a party to ESDC's appeal from the disqualification of its outside environmental attorneys. As a practical matter, the motion court's determination of this issue actually injures FCRC by delaying the environmental review, and potentially injures FCRC by removing from the process an attorney who is widely regarded as the preeminent environmental lawyer in New York. Therefore, FCRC supports ESDC's appeal.

The motion court's disqualification of David Paget and his law firm is premised, at least in part, on the fundamental misperception that the relationship between FCRC and ESDC is essentially adversarial. Petitioners state that they "do not consider themselves as adversaries in the SEQRA review of the project" (Pet. Br. at 27). Contrary to petitioners' insinuations, *the same is true of the relationship between FCRC and ESDC*. While their relationship certainly is arm's length, they share a common interest in implementing an environmental review process that complies with SEQRA, and that yields a final determination that will be upheld if it is subjected to judicial review.

FCRC and ESDC both have worked with David Paget and his firm on prior matters. They both view him as possessing an unparalleled depth of

experience in compliance with SEQRA in connection with complex projects, as well as recent relevant familiarity with environmental issues relating specifically to development in downtown Brooklyn.

In December 2003, FCRC commissioned Paget and his firm to begin working on SEQRA compliance for the Project. At that time, FCRC and ESDC both foresaw that eventually, when the review of the Project advanced to the point where ESDC declared itself the lead agency under SEQRA and assumed formal responsibility for SEQRA compliance, ESDC would retain Paget as its environmental counsel (R 500-01). In fact, a draft letter agreement that was prepared by ESDC and sent by an in-house ESDC lawyer to FCRC's outside counsel at Fried Frank Harris Shriver & Jacobson LLP on February 2, 2004 (R 635-39), confirmed that FCRC had asked ESDC to "authorize and/or oversee," among other things, "[l]egal services to be provided" by Paget's law firm "in connection with the environmental analysis of the Project" (R 635 [¶ 1]), the costs for which were to be borne by FCRC (R 636 [¶ 2]). Paget and his firm remained the environmental attorneys for FCRC in connection with the Project until October 2005, when ESDC declared itself the lead agency and retained Paget's firm.⁶ The representation by Paget and his firm of FCRC and then ESDC thus was

⁶ At all times, the Fried Frank firm was counsel to FCRC for the Project, with the responsibilities of Melanie Meyers, a partner at the firm and former counsel to the New York City Planning Commission, including, among other things, involvement in the environmental review of the Project (R 512 [¶ 1]).

consecutive, not (as the motion court and petitioners characterize it) simultaneous, and was consented to by both FCRC and ESDC from the outset.

SEQRA itself recognizes the collaborative, rather than adversarial, nature of the relationship between a project's sponsor and the lead agency. Both the statute and its implementing regulations provide for the sponsor and the agency to share information, to review the same drafts of documents, and to work together to identify potential adverse environmental impacts and ways to mitigate them.

The statute thus provides that the lead agency may request and use environmental reports or other information submitted by the project sponsor. ECL § 8-0190, subd. 3. The regulations provide that the lead agency should “make every reasonable effort to involve project sponsors ... in the SEQR process.” 6 NYCRR § 617.3(d). The same regulation provides that the lead agency and the sponsor should engage in “early consultations” in order to “narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing on the impacts and alternatives requiring an in-depth analysis in an EIS.” *Id.*

The non-adversarial nature of the process is further demonstrated by a statutory provision that allows the project's sponsor, not the lead agency, to decide whether the sponsor or the lead agency actually will prepare the EIS. ECL § 8-

0109, subd. 4; *see also* 6 NYCRR § 617.9(a)(1). Similarly, either the project sponsor or the lead agency may initiate the scoping process. 6 NYCRR § 617.8(a).

Practice under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (“NEPA”), also is instructive, because SEQRA was modeled after NEPA. *See, e.g., Aldrich v. Pattison*, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23, 29 (2d Dep’t 1985); *H.O.M.E.S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 832 (4th Dep’t 1979).

Because it is common for outside environmental consultants to work for the same clients or agencies repeatedly, the federal government’s Council on Environmental Quality (“CEQ”), which oversees implementation of NEPA, has promulgated a regulation that requires a consultant who works on an EIS under NEPA to file a disclosure statement stating that it has “no financial or other interest in the outcome of a project.” 40 CFR § 1506.5(c). However, CEQ has specifically stated that a consultant need not be disqualified from preparing the EIS if it “has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision.” *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (March 23, 1991).⁷

⁷ Under NEPA, even *if* a consultant has an interest in the outcome of a project, it would not require disqualification if the agency exercises sufficient supervision over the consultant’s work.

Paget's sequential work for FCRC and then ESDC is completely in keeping with this collaborative relationship that is an inherent part of an appropriate environmental review process under both NEPA and SEQRA. His disqualification was an inappropriate intrusion by the motion court in a proper ongoing environmental review.

Argument

I.

ESDC'S EMERGENCY DECLARATION WAS RATIONAL AND AMPLY SUPPORTED BY THE RECORD

ESDC's determination that demolition of the buildings was an emergency action exempt from SEQRA was rational and supported by the record, which shows that ESDC's determination was anything but arbitrary and capricious. The five buildings at issue are vacant and dilapidated, and an expert structural engineer found each one to be structurally unsound and in danger of collapse, which would injure innocent members of the public. ESDC based its emergency declaration on this compelling evidence, as well as its own knowledge and experience, which it was entitled to do under SEQRA.

The ultimate issue before Justice Edmead – and before this Court – is the rationality of ESDC's determination that demolition of the buildings was an

See, e.g., Associations Working for Aurora's Residential Environment v. Colorado Department of Transportation, 153 F.3d 1122, 1129 (10th Cir. 1998).

emergency action exempt from SEQRA. On judicial review of an agency's determination that an action is exempt from SEQRA as emergency action, the question "is not whether [the court] would conclude that a limited emergency exists," but "rather whether the determination by the [agency] that such an emergency exists was irrational or arbitrary or capricious." *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 20, 466 N.Y.S.2d 668, 671 (1983). See also, e.g., *Silver v. Koch*, 137 A.D.2d 467, 469-70, 525 N.Y.S.2d 186, 188-89 (1st Dep't), *app. dsmssd.*, 71 N.Y.2d 889, 527 N.Y.S.2d 771 (1988); *Greenpoint Renaissance Enterprise Corp. v. City of New York*, 137 A.D.2d 597, 601, 524 N.Y.S.2d 488, 491 (2d Dep't 1988); *New York State Thruway Authority v. Dufel*, 129 A.D.2d 44, 47, 516 N.Y.S.2d 981, 983 (3d Dep't 1987). The *de novo* review of the emergency declaration that petitioners in effect seek would be improper. In *Silver v. Koch*, this Court specifically held that the IAS court had "abused its discretion in ordering a hearing to determine whether an emergency exists." 137 A.D.2d at 469, 525 N.Y.S.2d at 188.

SEQRA and the State regulations that implement it (6 NYCRR Part 617) give the "lead agency" – here, ESDC – the authority to determine whether an emergency exists.⁸ Ordinarily, SEQRA requires that, when an agency undertakes,

⁸ Under SEQRA and the implementing regulations, where multiple governmental agencies have some responsibility for an "action," one of them must assume paramount responsibility by declaring itself the "lead agency." 6 NYCRR § 617.6(b)(2).

funds or approves an “action,” it must determine whether the action may have a significant adverse environmental impact and, if so, must prepare an Environmental Impact Statement (“EIS”). ECL § 8-0109, subd. 2; *see also* 6 NYCRR § 617.1(c). However, the SEQRA regulations classify various specified actions as “Type II” actions that, by definition, are exempt from environmental review. These regulations expressly provide that “emergency actions” are “Type II” actions exempt from environmental review. The regulations’ list of “Type II” actions thus includes:

emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance practicable under the circumstances to the environment.

6 NYCRR § 617.5(c)(33).

The record demonstrates that ESDC’s determination that demolition of the buildings was an emergency action was rational, not arbitrary or capricious, and amply supported by the evidence before ESDC:

1. FCRC engaged a prominent outside engineering firm, LZA Technology (“LZA”), to inspect those buildings in the Project’s footprint that appeared to FCRC’s personnel to be potentially dangerous. LZA’s assessment of the buildings was led by James W. Feuerborn, Jr., P.E., an engineer with extensive experience in the structural failure and collapse of

buildings; his resume is in the record (R 640-45). LZA recommended the immediate demolition of six vacant buildings that FCRC owned or was in contract to purchase. Ten other vacant buildings in the Project site were determined not to pose an immediate danger (R 492 [¶ 18], 506 [¶ 5], 848-49). Therefore, based on its own examination or LZA's recommendations, FCRC is not seeking to demolish these buildings prior to completion of the SEQRA review of the Project.

2. On November 2, 2005, Feuerborn made an extensive oral presentation to representatives of ESDC and the MTA (R 38, 291 [¶ 11], 517 [¶ 14]). Rachel Shatz, ESDC's Director of Planning and Environmental Review, and other ESDC officials attended the presentation, as well as David Paget and an associate. An in-house lawyer from the MTA as well as the MTA's outside environmental counsel, Stephen L. Kass of Carter, Ledyard & Milburn LLP (R 517 [¶ 14]), also attended. Feuerborn's presentation included more than 70 Power Point slides (R 340-401) and was followed by a long question-and-answer session. In response to one of the questions, an LZA engineer expressed the opinion that "no responsible engineer could conclude that the buildings in question should not be taken down" (R 291 [¶ 12]). The presentation and question-and-answer period lasted at least 90 minutes and possibly as long as two hours (R 518 [¶ 15]).

At the end of the presentation, those in attendance agreed that the case for demolition was compelling, and ESDC asked FCRC to instruct LZA to prepare a comprehensive written report (R 291-92 [¶13], 518 [¶ 15].)

3. LZA's comprehensive written report is dated November 7, 2005 (R 97-140), and was sent to ESDC on November 8, 2005 (R 402-03). It set forth in detail the physical conditions of the five buildings and the reasons that demolition was warranted.⁹ The LZA report recommended that all five of the buildings "be demolished because they pose an immediate threat to the preservation of life, health and property" (R 99; *see also* R 106, 112, 116, 118, 126). The LZA report observed that, as to 608-620 Atlantic Avenue, "[a] portion of the rear roof of one of the buildings has collapsed," the "timber flooring in the buildings are all severely deteriorated and appear to be on the verge of collapse," and "major structural deterioration is occurring and ... the structures are unsafe" (R 99, 133). As to 461 Dean Street, the LZA report concluded that "the major structural support system of the building is substantially compromised and that the structure is unsafe" (R 107, 135). The report concluded that the building at 463 Dean Street contains a three-story structure that is "extremely dangerous and could

⁹ One of the buildings that was a subject of the November 2nd LZA presentation, 622 Pacific Street, was omitted from the November 7th LZA written report due to difficulties that FCRC was having with its owner (R 509-10 [¶ 15].

collapse at any time,” and a four-story structure that also is severely compromised (R 112, 116, 136). As to 585-601 Dean Street, the report observed that “the major structural support system of the building is substantially compromised and that the structure is unsafe” (R 119, 137). The LZA report also concluded that the building at 620 Pacific Street “is extremely dangerous and could collapse at any time” (R 127, 140). As to each of these buildings, the LZA report warned that, “[i]f there was ever a fire or emergency in this structure it would be extremely dangerous for fire or emergency personnel to enter the structure” (R 100, 107, 112, 116, 119, 127).

4. The individual at ESDC who had principal responsibility for making the emergency declaration was Rachel Shatz, ESDC’s Director of Planning and Environmental Review. Shatz and an ESDC Senior Planner had “toured the project site” and “were aware that [it] contained a number of vacant, boarded-up, and deteriorated buildings” (R 292 [¶ 15]). Furthermore, although Shatz is not an engineer, she has “more than twenty years’ professional experience in the field of urban planning, development and environmental review” (R 288 [¶ 3]), and has held her present position as ESDC’s Director of Planning and Environmental Review for more than ten years (R 288 [¶ 4]). Therefore, Shatz was entitled to use her own

experience and judgment in evaluating the presentation by Feuerborn, the LZA report and the condition of the buildings at issue.

5. At the time that the emergency declaration was under consideration, Shatz also was aware of the fact that only a few months earlier, in May 2005, the side of a vacant building in the nearby Fort Greene section of Brooklyn had collapsed, killing a woman and injuring six other persons, including a City fire fighter (R 292-93 [¶ 15]). Shatz also recognized that winter was approaching, and that winter increases the stress on structurally unsound vacant buildings due to the further deterioration caused by freezing and thawing, the additional structural load that results from snow and ice accumulations, and the risk that teenagers or homeless adults will enter a vacant building for shelter and start a fire that will increase the risk of a building collapse and endanger the lives of fire fighters and other emergency personnel (R 292-93 [¶¶ 15-16]).

6. Shatz also recognized that it would be “pointless and wasteful” to try to stabilize or shore up these buildings, and that, even if the Project is not approved, FCRC had “clearly expressed its desire to demolish these buildings, which is an action that a property owner in New York City is entitled to take as of right, for any reason or for no reason at all” (R 295 [¶ 20]).

7. Before issuing the emergency declaration, Shatz consulted with the ESDC Senior Planner who, like her, had toured the site, and also with several other ESDC executives – *i.e.*, ESDC’s General Counsel, ESDC’s Project Attorney for the Project, ESDC’s Senior Vice President for Real Estate and ESDC’s Chief Operating Officer – and all of the people with whom she consulted agreed that issuance of the emergency declaration was appropriate (R 294 [¶ 18]).

The foregoing evidence plainly is more than sufficient to support the emergency declaration as a rational and reasonable determination that was well within the bounds of ESDC’s lawful discretion.

Furthermore, in transmitting the emergency declaration to FCRC, Shatz cautioned FCRC that, in accordance with 6 NYCRR § 617.5(c)(33), “FCRC must cause the least change or disturbance to the environment that is practicable under the circumstances,” and that “any *additional* physical activities at the Project site are fully subject to SEQR and its implementing regulations” (R 144) (emphasis added).

As the Court of Appeals made clear in *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d at 20, 466 N.Y.S.2d at 671, and as this Court recognized in *Silver v. Koch*, 137 A.D.2d at 469-70, 525 N.Y.S.2d at 188-89, the test for sustaining the emergency determination is rationality. As petitioners

concede, this standard presents “a low level of review” (Pet. Br. at 21). There is no merit to any of the contentions advanced by petitioners to challenge the rationality of the emergency declaration:

1. Petitioners argue that, because ESDC and FCRC cross-moved to dismiss their pleading, the motion court was deprived of a “certified” record and therefore unable to undertake an adequate review of the emergency declaration (Pet. Br. at 37). However, CPLR 7804(f) explicitly authorizes a respondent in an Article 78 proceeding to “raise an objection in point of law by setting it forth in his answer *or by a motion to dismiss the petition, made upon notice within the time allowed for answer*” (emphasis added). Similarly, CPRL 3211(a)(1) authorizes the defendant in a plenary action to move to dismiss the complaint on the ground that “a defense is founded upon documentary evidence ...” On a motion to dismiss, moreover, the factual allegations in the pleading that are refuted by documentary evidence are not entitled to the favorable inferences that otherwise apply. *See, e.g., Caniglia v. Chicago Tribune-New York News Syndicate Inc.*, 204 A.D.2d 233, 233-34, 612 N.Y.S.2d 146, 147 (1st Dep’t 1994); *Franklin v. Winard*, 199 A.D.2d 220, 220, 606 N.Y.S.2d 162, 163 (1st Dep’t 1993).¹⁰

¹⁰ Petitioners’ insinuation that there was something improper about the cross-motions to dismiss is particularly without merit in view of the fact that petitioners never served respondents with a summons, a notice of petition or an order to show cause bringing on the petition. Instead, they commenced litigation by filing their pleading and serving an order to show cause that only brought on their motion for a preliminary injunction (*see* R 56-58). Therefore, ESDC and FCRC

Furthermore, while petitioners claim that there are “gaps” in the record due to the fact that ESDC and FCRC moved to dismiss rather than answered, the only purported “gap” that they identify is the omission from the record of reports on some of the five buildings that LZA prepared at an earlier time (Pet. Br. at 39). Petitioners speculate that these reports may have indicated that some of the buildings were not dangerous as of that earlier time (*id.* at 39), but petitioners have no evidence whatsoever to support this speculation. In any event, these reports are irrelevant, because, as petitioners concede, there is no evidence that they ever were submitted to ESDC. In addition, as the motion court recognized, ESDC was not “required to evaluate previous inspections of the buildings,” because “there is no such requirement in Part 617.5(c)(33),” and the evaluation of whether the necessity for the proposed demolition “is ‘immediate’ logically would rest on the *most recent assessment* of the condition of the buildings,” not some earlier assessment (R 37) (emphasis added).

2. Contrary to petitioners’ assertions (Pet. Br. 39-40), ESDC was entitled to rely on LZA, the expert engineering firm that was retained by FCRC, and was under no obligation to retain its own engineers to conduct a duplicative investigation. Petitioners point to no statute, regulation or case law that would

never were obligated to serve answers, and were entitled to respond to petitioners’ motion for a preliminary injunction with cross-motions to dismiss petitioners’ pleading.

compel ESDC to conduct such an investigation, as the motion court itself recognized (R 37) [“there is no such requirement in Part 617.5(c)(33), and petitioners failed to cite to any authority in SEQRA, or by case law, for this position”)].¹¹ As the motion court also recognized, SEQRA and the implementing regulations explicitly authorize lead agencies such as ESDC to use “an environmental report submitted by an applicant,” so long as they “make their own independent judgment of the scope, contents and adequacy of” the EIS (R 37). “Therefore, since the ESDC is permitted to utilize either an environmental report submitted by an applicant or an *outside resource or work* in connection with a Type I action,” which requires a comprehensive environmental review, then, *a fortiori*, “ESDC would likewise be able to utilize an engineer’s report submitted by the applicant to undertake a Type II emergency action,” which is exempt from environmental review (R 37) (emphasis in original).¹²

¹¹ Petitioners’ reliance on *Historic Albany Foundation v. Breslin*, 282 A.D.2d 981, 724 N.Y.S.2d 113 (3d Dep’t 2001) (*see* Pet. Br. at 40), is misplaced. The case involved officially designated historic buildings that, by reason of their particular legal status, were subject to an affirmative duty of preservation.

¹² Petitioners’ assertion that the eight-page engineers’ affidavit that they submitted to the motion court (R 149-56) is the only sworn statement by a “qualified individual” in the record (Pet. Br. at 14) is irrelevant. The comprehensive presentations and reports of LZA were before ESDC when it made its determination to issue the emergency declaration, and those materials, although unsworn, are more than enough to sustain ESDC’s determination as rational and proper, particularly inasmuch as ESDC recognized LZA as “enjoy[ing] a well deserved reputation as one of the best engineering firms in the City of New York, if not the country” (R 291 [¶ 12]). Furthermore, the affidavit testimony of petitioners’ engineer was only to the effect that, inasmuch as he had not been able to observe the interiors of the buildings, he could not give a “definitive opinion” as to whether the buildings could be preserved (R 150-51 [¶ 5], 152 [¶ 15]).

3. Petitioners also argue that the pace at which FCRC has moved toward demolition of these buildings is inconsistent with the conclusion that there is an emergency (Pet. Br. at 40-41). However, the fact that the buildings have not yet been demolished – and have not yet collapsed – does not make them any less dangerous, or somehow show that they are safe. As this Court has recognized, “[e]mergency actions” are exempt from SEQRA “even if the emergency has existed for a significant period of time.” *Midtown South Preservation and Development Committee v. City of New York*, 130 A.D.2d 385, 387-88, 515 N.Y.S.2d 248, 250 (1st Dep’t 1987). *See also Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc. 2d 500, 509, 550 N.Y.S.2d 981, 987 (Sup. Ct. N.Y. Co. 1989).

4. Nor is there merit to petitioners’ argument that ESDC should have considered alternatives other than demolition (Pet. Br. at 40-41). As pointed out by the motion court, the issue on review of ESDC’s emergency determination is not “whether other potentially preferable alternatives exist” (R 36). The applicable SEQRA regulation requires the “least change or disturbance *practicable under the circumstances*.” 6 NYCRR § 617.5(c)(33) (emphasis added). Here, nothing short of demolition of these buildings is “practicable under the

This tentative and equivocal opinion is hardly sufficient to render ESDC’s reliance on LZA’s definitive and well-documented conclusions irrational.

circumstances.” As ESDC recognized, it would be “pointless and wasteful” to require FCRC to stabilize or shore up these buildings, because the buildings are without “historic significance” and “would be demolished regardless of whether or not the proposed Atlantic Yards project is eventually approved” (R 295 [¶ 20]).

5. Finally, petitioners argue that, because the motion court determined that ESDC’s special outside environmental counsel, David Paget and his law firm, should be disqualified from representing ESDC in connection with the Project, Paget and his firm had a conflict of interests that tainted the emergency declaration (Pet. Br. at 9, 24-25, 42-43). There is no merit to this assertion, because petitioners cannot identify any shortcoming in the emergency declaration, let alone how that ostensible shortcoming was the result of Paget’s purported conflict of interests. On a challenge to an administrative determination, “merely alleging bias is not sufficient to set aside” the agency’s decision. *Yoonessi v. State Board for Professional Medical Conduct*, 2 A.D.3d 1070, 1071, 769 N.Y.S.2d 326, 328 (3d Dep’t 2003). *See also, e.g., Sunnen v. Administrative Review Board for Professional Medical Conduct*, 244 A.D.2d 790, 791, 666 N.Y.S.2d 239, 241 (3d Dep’t 1997), *lv. to app. denied*, 92 N.Y.2d 802, 677 N.Y.S.2d 72 (1998). Instead, the administrative determination should be upheld unless there is “a factual demonstration” that supports the allegation that the “outcome flowed from” bias. *Maglione v. New York State Department of Health*, 9 A.D.3d 522, 523, 779

N.Y.S.2d 319, 321 (3d Dep't 2004). The same principles apply here, where the challenge is based on a purported conflict of interests rather than "bias." Inasmuch as petitioners have failed to identify any defect in the emergency declaration, let alone a causal connection between that defect and the purported conflict of interests, their contention is without any merit.

Significantly, the motion court, which concluded that Paget and his law firm were subject to disqualification on the basis of the appearance of a conflict of interests, did not see the emergency declaration as having been tainted by the possible conflict, and it rejected petitioners' effort to undermine the integrity of the emergency declaration by tying it to the conflict as inappropriate "spinning" (R 813). That conclusion was correct.¹³

The record demonstrates that ESDC's emergency declaration was amply supported by the evidence before ESDC.

¹³ Petitioners' presentation of the facts regarding Paget's role is completely unfair. Petitioners assert that the "affidavits demonstrate that [Paget] identified for FCRC and ESDC a means to avoid the prohibition on demolishing the buildings by using the emergency exception and essentially invited FCRC to submit a rationale upon which ESDC could rely" (Pet. Br. at 42). However, the only evidence in the record is the affidavit of Melanie Meyers (R 512-18), a partner at Fried Frank Harris Shriver & Jacobson LLP, which at all times has functioned as FCRC's over-all outside counsel with respect to the Project. Meyers's testimony is that, in discussions that "began in the spring of 2005" (R 515 [¶ 8]) – *i.e.*, at a time when Paget was acting as counsel to FCRC, not ESDC – Paget "expressed the view that, if there was a *basis* upon which it could be determined that the demolition of the buildings could *properly* be considered a 'Type II action' under the applicable SEQRA regulations, the demolition could *properly* proceed prior to completion of the EIS" (R 516 [¶ 9]) (emphasis added). There was nothing improper about this analysis of the law, which, as the motion court recognized (R 35-36), in fact was correct.

II.

EVEN IF ESDC'S EMERGENCY DECLARATION WERE TO BE INVALIDATED, IT STILL WOULD BE IMPROPER TO ISSUE AN INJUNCTION TO PREVENT DEMOLITION

Even assuming *arguendo* that ESDC's emergency declaration somehow was improper, there still would be no basis for an injunction against demolition of the buildings at issue. Petitioners still would not succeed on the merits, because there is an alternative basis for the conclusion that the demolition is exempt from SEQRA. Furthermore, petitioners cannot show either of the other elements required to grant an injunction. Petitioners will not suffer irreparable harm in the absence of an injunction, and the balance of the equities – as well as the public interest – clearly favors not issuing an injunction. *See, e.g., Aetna Insurance Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918 (1990). Therefore, the decision of the motion court should be affirmed even if the emergency declaration is annulled.

A. Petitioners Cannot Succeed on the Merits, Because Demolition Is Exempt From SEQRA Even In the Absence of an Emergency

Even if demolition of the five buildings is not emergency action under 6 NYCRR § 617.5(c)(33), there is another exemption that allows the demolition to

proceed without an environmental review.¹⁴ The statute provides that an “action” that is subject to environmental review does not include “official acts of a ministerial nature, involving no exercise of discretion.” ECL § 8-0105, subd. 5(ii). The regulations implementing SEQRA specifically recognize that the issuance of a construction-related permit that does not entail discretion is a ministerial act not subject to SEQRA. Under the regulations, “Type II” actions that are exempt from environmental review include:

official acts of a ministerial nature involving no exercise of discretion, *including building permits and historic preservation permits where issuance is predicated solely on the applicant’s compliance or noncompliance with the relevant local building or preservation code(s).*

6 NYCRR § 617.5(19) (emphasis added). *See also, e.g., Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 599 N.Y.S.2d 218 (1993); *Committee to Save Washington Square, Inc. v. Dormitory Authority of State of New York*, 281 A.D.2d 770, 722 N.Y.S.2d 112 (3d Dep’t 2001); *Filmways Communications of Syracuse, Inc. v. Douglas*, 106 A.D.2d 185, 484 N.Y.S.2d 738 (4th Dep’t), *aff’d*, 65 N.Y.2d 878, 493 N.Y.S.2d 309 (1985).

The issuance of permits allowing demolition of buildings in New York City is a ministerial act that fits squarely within this exemption. Under the

¹⁴ Justice Edmead did not address this contention in her decision (R 5-47), but she disparaged it at the oral argument (R 856-69). FCRC continues to maintain that the argument is correct.

City's Building Code, the Department of Buildings has no discretion in deciding whether to issue a demolition permit and must issue the permit if the statutory requirements are satisfied. *See* N.Y.C. Admin. Code § 27-167, *et seq.* An unrefuted recitation of the procedures that apply to the issuance of demolition permits is set forth in the affidavit of Robert P. Sanna, a Registered Architect (R 519-21). According to that affidavit, upon submission of the completed application and demonstration that all statutory requirements (including the elimination of any asbestos, the discontinuance of all utility services, and notification to adjoining property owners) have been satisfied, the Department of Buildings normally issues the demolition permit within 24 hours (R 520-21 [¶¶ 4-5]).

The courts that have examined this issue all agree that the issuance of a demolition permit in New York City is a ministerial act involving *no* discretion on the part of the Department of Buildings and, therefore, is always exempt from SEQRA. *See, e.g., Herald Square South Civic Ass'n v. Consolidated Edison Co. of New York*, No. 101667/03, 2003 WL 24132999 (Sup. Ct. N.Y. Co. March 24, 2003) (Faviola, J.) (holding that issuance of a demolition permit is as-of-right, involving no discretion and no inquiry into the nature of the proposal or its impact on surrounding areas); *79th Street Mount Neboh Preservation Committee v. McGough*, N.Y.L.J., June 1, 1983, p. 7, col. 1 (Sup. Ct. N.Y. Co.) (Myers, J.)

(“The issuance of a demolition permit is an activity which is specifically exempt from the provisions of SEQRA”) (copy attached). *See also Gold v. City of Poughkeepsie*, 118 A.D.2d 829, 500 N.Y.S.2d 228 (2d Dep’t 1986), *lv. to app. denied*, 68 N.Y.2d 609, 508 N.Y.S.2d 1026 (1986) (holding that the issuance of a demolition permit is not subject to SEQRA).

FCRC therefore would be entitled to demolish these buildings upon issuance of demolition permits from the Department of Buildings, and without ESDC’s approval.¹⁵

¹⁵ The contention that 6 NYCRR § 617.3(a) limits FCRC’s otherwise as-of-right entitlement to demolition permits is incorrect. This regulation provides, in pertinent part, that “[a] project sponsor may not commence any physical alteration *related to an action* until the provisions of SEQR have been complied with” (emphasis added). However, the demolition of these buildings is not “related to” the Project. FCRC’s decision to demolish these buildings results from the fact that the buildings are dangerous. Once the buildings have been demolished, the land on which they now stand can be redeveloped regardless of whether the Project is approved. *See State v. Sour Mountain Realty, Inc.*, 183 Misc. 2d 313, 703 N.Y.S.2d 854 (Sup. Ct. Dutchess Co. 1999), *aff’d*, 276 A.D.2d 8, 714 N.Y.S.2d 78 (2d Dep’t 2000) (the State would not succeed on the merits of its claim under 6 NYCRR § 617.3(d) that the installation of a snake-proof protective fence was a physical alteration related to the owner’s proposed project) (*dictum*). The law relating to “segmentation” under SEQRA also is instructive. “Segmentation” is the improper division of a single action into multiple components to avoid an environmental review of the over-all effects of the entire action. *See* 6 NYCRR § 617.2(a). However, where actions have independent utility from one another, their separate consideration under SEQRA is proper. *See, e.g., Village of Tarrytown v. Planning Board of Village of Sleepy Hollow*, 292 A.D.2d 617, 741 N.Y.S.2d 44 (2d Dep’t), *lv. to app. denied*, 98 N.Y.2d 609, 746 N.Y.S.2d 693 (2002); *Ortiz-Arroyo v. Cooper Union for the Advancement of Science and Art*, No. 116465/02, 2003 WL 23901236 (Sup. Ct. N.Y. Co. Aug. 8, 2003); *Flax v. Ash*, 142 Misc. 2d 828, 538 N.Y.S. 2d 891 (Sup. Ct. N.Y. Co. 1988). Here, demolition of the five buildings has independent utility from the Project.

B. Petitioners Will Not Suffer Any Irreparable Harm If the Injunction Does Not Issue

For a number of reasons, petitioners will not be irreparably harmed if the buildings are demolished.

First, these buildings will be demolished one way or another, whether or not the Project is approved, because they are not recognized historic resources and their condition is too deteriorated to make their preservation economically feasible (R 295 [¶ 20]).

Second, none of the petitioners lives in the buildings, all of which are vacant, and only one petitioner lives in a building that adjoins one of the buildings to be demolished (R 522). Most of the petitioners live outside the Project's footprint (R 523). The only allegations of harm that were made by petitioners in their papers in the motion court is that they oppose *the Project*, that the *Project* will adversely affect the environment and the character of their community, and that the demolition will create a "public perception" that the Project has been or will be approved and will give FCRC a "psychological advantage" and discourage further opposition to the Project (R 72-81 [¶¶ 6-20], 90 [¶ 67]).

SEQRA does not protect petitioners from "psychological" harm, or justify an injunction on the basis of speculation about the ultimate outcome of an ongoing administrative process. As the Court of Appeals has made clear, to bring a SEQRA claim, petitioners must show that (1) they will suffer an environmental

harm that is in some way different from that suffered by the public at large, and (2) the alleged injury falls within the “zone of interest” that SEQRA seeks to protect or promote. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 762, 570 N.Y.S.2d 778, 785 (1991). See also, e.g., *Mobil Oil Corporation v. Syracuse Industrial Development Agency*, 76 N.Y.2d 428, 559 N.Y.S.2d 947 (1990); *Made From Scratch, Inc. v. City of New York*, 200 A.D.2d 439, 607 N.Y.S.2d 242 (1st Dep’t), *lv. to app. denied*, 83 N.Y.2d 755, 612 N.Y.S.2d 378 (1994). Psychological harm is simply not a legally cognizable environmental injury that falls within SEQRA’s zone of interests.

Furthermore, petitioners cannot obtain relief on the basis of speculation about the ultimate outcome of an ongoing environmental review process. CPLR 7801 specifically provides that “a proceeding under this article may not be used to challenge a determination which is not final.” Consistent with this principle, an agency’s compliance with SEQRA normally is not ripe for judicial review until the agency makes its final determination approving or disapproving the underlying proposal. See, e.g., *Pheasant Pond Owners Ass’n, Inc. v. Board of Trustees of Incorporated Village of Southampton*, 285 A.D.2d 597, 728 N.Y.S.2d 190 (2d Dep’t 2001); *Rochester Telephone Mobile Communications v. Ober*, 251 A.D.2d 1053, 674 N.Y.S.2d 1989 (4th Dep’t 1998); *Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 655 N.Y.S.2d 172 (3d Dep’t 1997).

In view of this fundamental principle, speculation that demolition somehow may have an effect on ESDC's final determination is no basis for judicial intervention. Similarly, it is no basis for an assertion of irreparable harm, inasmuch as the SEQRA process is ongoing and eventually will produce a final determination that at this point no one can predict with any assurance.¹⁶

**C. The Balance of the Equities and the Public
Interest Clearly Favor Denial of an Injunction**

The balance of the equities overwhelmingly favors denial of an injunction. As shown above, petitioners will not suffer any irreparable harm if an injunction does not issue and the buildings are demolished. By contrast, FCRC will be exposed to substantial harm if demolition is not allowed to proceed.

If just one of these buildings were to collapse, the consequences could be catastrophic and could include death or serious personal injury to innocent members of the public, or substantial property damage, or both. The financial exposure to FCRC therefore is enormous. Petitioners certainly are neither willing

¹⁶ In their papers in support of their motion for a stay in this Court, petitioners asserted for the first time that demolition will harm them because it will alter the neighborhood and the streetscape. Of course, petitioners may not raise arguments in this Court that they failed to raise in the motion court. *Sean M. v. City of New York*, 20 A.D.3d 146, 795 N.Y.S.2d 539 (1st Dep't 2005); *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 534 N.Y.S.2d 374 (1st Dep't 1988). In making this claim, petitioners adopted a contention that had been made in the motion court by the proposed intervenors (R 253, 256, 258, 260), all of whom live in a single building within the Project's footprint; their motion for leave to intervene was denied (R 47), and they have not appealed. Most of the petitioners live outside the Project's footprint, and their assertions about the neighborhood or the streetscape do not allege a harm that is different in degree or kind from what is experienced by members of the general public. *See, e.g., Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d at 774, 570 N.Y.S.2d at 785.

nor able to post a bond in an amount sufficient to protect FCRC from the financial exposure to which such a catastrophe could subject it. For that reason alone, FCRC should be allowed to proceed with demolition.

Furthermore, the public interest is a relevant consideration that courts take into account on a motion for injunctive relief. *See, e.g., Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 628 N.Y.S.2d 375 (2d Dep't 1995); *DePina v. Educational Testing Service*, 31 A.D.2d 744, 745, 297 N.Y.S.2d 472, 474 (2d Dep't 1969). Health and safety are clearly important examples of such public interest considerations. *See, e.g., Delaware County Board of Supervisors v. New York State Department of Health*, 81 A.D.2d 968, 439 N.Y.S.2d 741 (3d Dep't 1981); *Barney v. City of New York*, 83 App. Div. 237, 241, 82 N.Y.S. 124 (1st Dep't 1903).

Here, enjoining demolition would deliberately place at risk the lives and safety of the innocent members of the public who live and work in the buildings that adjoin the buildings at issue, who walk on the public sidewalks in front of those buildings, and who stand at the bus stop in front of the building at 608-620 Atlantic Avenue. It also places at risk fire fighters and EMS workers who may be called upon to enter one of these buildings should a fire, collapse or other emergency occur. This potential harm to the public plainly outweighs the potential harm to petitioners, which, as discussed above, is non-existent.

In short, even if ESDC's emergency determination somehow is annulled, the motion court's determination still should be sustained, and demolition of these buildings should be allowed to proceed.

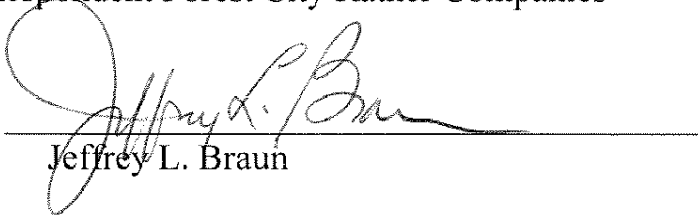
Conclusion

For the foregoing reasons, the motion court's decision was correct and should be affirmed insofar as it dismissed those portions of petitioners' pleading that challenged ESDC's emergency declaration and the demolition of the five buildings, and insofar as it denied petitioners' motion for an injunction against the demolition.

Dated: New York, N.Y.
 March 7, 2006

Respectfully submitted,

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March 7, 2006

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Justice Greenfield

LaLONE v. GERBER—The balance of equities persuades this court that no temporary receiver should be appointed at this time. Should it be proven that defendants are guilty of wrong doing, they may be held to account hereafter. See memorandum on file.

RAIM v. TANCO REALTY CORP.—Motion granted to the extent indicated in memorandum on file. Settle order.

Justice Kirschenbaum

NOVAK & CO. v. CITY OF N.Y.;
Badillo v. Friedman—Orders signed.

Justice Lane

BERMAN v. FIRST HOUSING CO., INC.—Motion granted. Settle judgment. See memorandum on file.

BERMAN v. SECOND HOUSING CO., INC.—Motion granted. Settle judgment. See memorandum on file.

BERMAN v. THIRD HOUSING CO., INC.—Motion granted. Settle judgment. See memorandum on file.

BERMAN v. FOURTH HOUSING CO., INC.—Motion granted. Settle judgment. See memorandum on file.

BERMAN v. FIFTH HOUSING CO., INC.—Motion granted. Settle judgment. See memorandum on file.

COMERFORD v. Life Ins. Co. of America; **SCHULMAN v. LaTulipe Fashions;** **LeSAVOY v. Harnes;** **FREE v. Fond Cab Corp.;** **KAMIEN v. Sulzberger-Rolfe, Inc.**—Orders signed.

Justice Myers

79TH STREET MT. NEBOH PRESERVATION COMMITTEE v. MCGOUGH, JR.—The petitioners move for a preliminary injunction to prevent the demolition of the former Mount Neboh Synagogue building ("Building") at 130 West 79th Street in New York City. This Building has not been used as a Jewish house of worship since 1979.

Prior to its designation as a landmark on Feb. 9, 1982, the Building had been sold to the Greater New York Corporation of Seventh Day Adventists. On March 25, 1981, the Seventh Day Adventists entered into a contract to sell the Building to Alexander Edelman ("Edelman"), who thereafter transferred title to the property to 130 West 79 Street Associates ("Associates") on Dec. 7, 1981. Associates is a limited partnership of which Edelman is the sole general partner.

Edelman's plans, upon acquiring the property, were to construct, "as of right" a 17-story, 74-unit apartment building where the former synagogue Building now stands.

An application for a demolition permit was filed by Associates with the Department of Buildings on Dec. 18, 1981. Plans for the project were prepared and filed and construction was set to begin in February, 1982. This initial Department of Buildings' demolition permit was thereafter withdrawn pending a determination by the Landmarks Preservation Commission ("Commission") whether to designate the Building as a landmark.

A second demolition permit was subsequently filed with the Department of Buildings in May, 1982. After a public hearing and over the objections of Edelman and Associates, the Commission had voted on Feb. 9, 1982 to designate the former synagogue Building as a landmark.

On May 3, 1982, Edelman filed with the Commission, on behalf of Associates, an Application for a Certificate of Appropriateness to demolish the Building, on the ground that the Building was incapable of earning a reasonable return, as defined in the Landmarks Law. Pursuant to the Landmarks Law, Chapter 8-A of the New York City Administrative Code, the Commission is not only empowered to designate landmark properties, but to regulate construction, reconstruction, alteration and demolition of any landmark site. See Secs. 207-2.0 and 207-4.0, New York City Administrative Code ("NYCAC").

Where an owner seeks to demolish a landmark on the ground of insufficient return, he is required to apply for a Certificate of Appropriateness pursuant to the procedures set forth in Sec. 207-8.0 of the NYCAC. After the Commission takes various steps which are set forth in that particular section, and if all of the requirements have been met, the Commission must grant the building owner permission to demolish by issuing what is termed a "Notice to Proceed". NYCAC Sec. 207-8.0(i)(4)(b).

After making the necessary findings and following each of the steps set forth in the Landmarks Law, the Commission voted on demolition. However, this notice to proceed was not issued by the Commission until on or about May 17, 1983, due to the various orders which were granted in the proceeding, "The Committee to Save Mount Neboh v. N.Y.C. Landmarks Preservation Commission." Subsequent to the issuance of this notice to proceed on or about May 17, 1983; the Department of Buildings issued a demolition permit to Associates.

Petitioners herein challenge the issuance of the demolition permit by the Department of Buildings on the following grounds: (1) that the Department of Buildings was required to prepare a project data statement pursuant to section 5 of the Mayor's Executive Order No. 91 (Aug. 24, 1977) ("CEQR"); and (2) that the Department of Buildings was required to comply with the provisions of the New York State Environmental Conservation Law sections 8-0101 et sequitur ("SEQRA") prior to issuing a demolition permit to Associates. Neither of these contentions has any merit.

Petitioners' arguments that the Department of Buildings was required to prepare a project data statement pursuant to CEQR, and to comply with the provisions of SEQRA, are unsupported by the clear terms of those statutes. SEQRA and CEQR provide that certain types of governmental actions require thorough administrative review prior to implementation. However, both enactments specifically exempt certain types of activities from the requirement of a formal environmental review. The issuance of a demolition permit is an activity which is specifically exempt from the provisions of SEQRA and CEQR.

Both SEQRA and CEQR apply to any "action" of an agency, as that term is defined in those acts. SEQRA specifically provides that, "actions do not include: . . . (ii) official acts of a ministerial nature, involving no exercise of discretion . . ." (sec. 8-0105(5), SEQRA). Similarly, CEQR defines "ministerial action" as "an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the action, although such law may require, in some degree, a construction of its language or intent" (sec. 1(1), CEQR). Section 15 of CEQR further provides that "ministerial actions never require the preparation of an EIS [environmental impact statement]."

Section 4(e) of CEQR provides further that ministerial actions shall appear on a list compiled, certified and made available for public inspection by the lead agencies (the Department of Environmental Protection and the Department of City Planning of the City of New York). Such a list has been certified and duly adopted pursuant to CEQR for ministerial activities of the Department of Buildings. The issuance of a demolition permit is specifically included activity which has been certified by the lead agencies as "ministerial."

Accordingly, under the express terms of SEQRA and CEQR, the Department of Buildings was not required to conduct any type of environmental review or to prepare a project data statement or environmental impact statement ("EIS").

Furthermore, since the Building is not an historic resource, as specifically defined in CEQR and the State Regulations, therefore, Section V of Buildings Department Directive No. 6 is inapplicable and there is no requirement that an EIS have been prepared prior to the issuance of a demolition permit.

It is clear that after a notice to proceed with demolition was issued by the Commission following the filing of an application for a certificate of appropriateness, that the issuance of a demolition permit by the Department of Buildings was a ~~mere ministerial act involving no discretion~~. Accordingly, the Department of Buildings was not required to prepare a project data statement pursuant to section 5 of CEQR; nor was it required to comply with the provisions of sections 8-0101 et sequitur of SEQRA prior to issuing a demolition permit to Associates.

This is the third motion for a preliminary injunction to prevent demolition of the Building. The first two such motions were made, and denied, in a previously filed action entitled, "Committee to Save Mount Neboh, et al. v. New York City Landmarks Preservation Commission, et al.," Index No. 4107-83, Supreme Court, New York County. The denial of the first of the two prior motions was affirmed by the Appellate Division, First Department on May 12, 1983. On May 17, 1983, Judge Bernard Meyer refused to issue an interim injunction against demolition pending determination of a motion by plaintiffs in "Committee To Save Mount Neboh" for leave to appeal to the Court of Appeals from the Appellate Division's decision. The second of the two prior motions was denied by this court on May 18, 1983. Thereafter, on May 20th, the day demolition was scheduled to commence, the present petitioners started this proceeding and made the motion now before this court. (Although the order-to-show-cause signed herein on May 20 does not refer to a preliminary injunction, such relief is requested in the supporting affidavit of John Delmar, petitioners' counsel.)

Plaintiffs in "Committee To Save Mount Neboh" challenged a decision made on Feb. 8, 1983 by the Commission to issue to Associates a notice to proceed with demolition of the Building, because it

is a New York City landmark. Associates had purchased the Building, prior to its designation as a landmark, for the purpose of constructing a 17 story apartment building on the site. The Commission's decision was the penultimate step in a nine-month long process conducted pursuant to the Landmarks Preservation Law, NYCAC sections 206-1.0 et sequitur, whereby Associates established its right to proceed with demolition and construction based on a showing that it could not earn a "reasonable return" on the Building in its present state. One of the purported bases for the challenge to the Commission's action in determining to issue a notice to proceed was the Commission's alleged failure to prepare an environmental impact statement (EIS) pursuant to the provisions of the SEQRA, which is set forth in Article 8 of the Environmental Conservation Law.

After issuance by the Commission of the notice to proceed (which took place on May 17, 1983 following the expiration of an interim injunction pending appeal which was issued by the Appellate Division), the final administrative act necessary for Associates to exercise its right to demolish the Building in order to earn a reasonable return on its property was the issuance, also on May 17th, of a demolition permit by the Department of Buildings. The sole apparent basis for the present proceeding by petitioners is a claim that the Department of Buildings violated SEQRA and also CEQR by failing to prepare an EIS in connection with the decision to issue a building permit—the same basis on which the Commission's decision was attacked in the prior action. Although the former action was directed at a decision by the Commission, while petitioners attack the follow-up action of the Department of Buildings, the arguments made to the courts in the prior action as to the inapplicability of SEQRA, which led to the denial of the previous preliminary injunction motions, also apply here. Furthermore, even if there had been no prior action, it is clear that the Department of Buildings acted properly in granting Associates a demolition permit.

The injunction sought by petitioners would substantially increase the losses suffered by Associates as a result of the prior litigation. It is alleged that delays caused by that lawsuit have already cost Associates almost \$200,000. It is alleged that interest costs in the event of further delay would amount to more than \$2,000 per day.

The courts of this state require a party seeking a preliminary injunction to demonstrate: (1) the likelihood that it will ultimately succeed on the merits at trial:

(2) that it will suffer irreparable injury if preliminary relief is not granted; and (3) that the equities, on balance, favor granting the injunction (Hartford v. Resorts International, Inc., 43 A. D. 2d 828 [1st Dept., 1974]; Picotte Realty, Inc. v. Gallery of Homes, Inc., 66 A. D. 2d 978 [3d Dept., 1978]; Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853 [Sup. Ct., N. Y. County, 1979]). Petitioners here have not satisfied any of these requirements.

The motion for a preliminary injunction is denied and the temporary injunction is vacated on the merits.

Additionally, the motion for a preliminary injunction must be denied because the order-to-show-cause does not request it and further because a preliminary injunction may be granted only in certain actions (CPLR sec. 6301) and there is no action pending between the parties to this motion.

Although the order-to-show-cause requests certain relief pursuant to article 78 CPLR, and for collateral injunctive relief, no petition has been served or filed. Without serving such a petition, an article 78 proceeding has not been commenced and is not pending. Therefore, this motion cannot be entertained.

~~Although in the prior actions and proceedings other members of the community sought to prevent the demolition of the Building and not the petitioners named on this motion, the issues raised, argued and determined were substantially the same and should not be relitigated (Goldstein v. Consolidated Edison Co., — A. D. 2d —, NYLJ, 5-19-83, p. 3). There must be an end to litigation.~~

As much as I deplore the destruction of that beautiful edifice, I must and do deny the motion in all respects. Settle order.