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

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

ERIC W. ALLISON, et al.

INDEX NO. 107949/2011

MOTION DATE

- v -

NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, et al.

MOTION SEQ. NO. 001 + 002

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for preliminary injunction and to dismiss the petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2-3, 4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants respondents' motion and cross-motion to dismiss the petition to the limited extent set forth, otherwise denies their motion and cross-motion, and also grants petitioners' motion for a preliminary injunction to the limited extent set forth, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(5) and (7), 6301, 6311(1), 6312(a), 7804(f).

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/18/11

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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In the Matter of the Application of
ERIC W. ALLISON, KEVIN J. FARRELLY,
TED NARDIN, THEODORE GRUNEWALD, and
CITIZENS EMERGENCY COMMITTEE TO
PRESERVE PRESERVATION,

Plaintiffs-Petitioners, Index No. 107949/2011

For a Judgment Pursuant to Article 78
and Sections 3001 and 6301 of the
Civil Practice Law and Rules

- against - DECISION AND ORDER

NEW YORK CITY LANDMARKS PRESERVATION
COMMISSION, VORNADO REALTY TRUST,
510 FIFTH AVENUE LLC, 510 FIFTH EAT
LLC, VORNADO REALTY, LP, and VNO 510
FIFTH LLC,

Defendants-Respondents

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APPEARANCES:

For Petitioners
Albert K. Butzel Esq. and Michael S. Gruen Esq.
247 West 34th Street, New York, NY 10001

For Respondent New York City Landmarks Preservation Commission
Amy Weinblatt, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

For Respondents Vornado Realty Trust, 510 Fifth Avenue LLC, 510 Fifth EAT LLC, Vornado Realty, LP, and VNO 510 Fifth LLC
Maria T. Vullo Esq. and Aliza J. Balog Esq.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 6th Avenue, New York, NY 10019

LUCY BILLINGS, J.S.C.:

This proceeding requires the court to determine what interests and injuries New York City's Landmarks and Historic Districts Preservation Law protects, so as to confer standing for

persons without a property or contractual interest in the landmark, which would confer standing absent the statutory protection. This determination in turn requires the court to ascertain whether, under the landmark preservation statutes, it may recognize the types of interests and injuries the Court of Appeals has recognized as conferring standing under environmental preservation statutes. This court concludes that the controlling authority dictates recognition of similar interests and injuries, that otherwise the landmarks preservation statutes would provide no more rights than property or contractual interests would provide, and that one individual petitioner and the organizational petitioner of which he is a member show that they meet the requisite standards.

Petitioners seek to enjoin respondents Vornado Realty Trust, 510 Fifth Avenue LLC, 510 Fifth EAT LLC, Vornado Realty, LP, and VNO 510 Fifth LLC (Vornado respondents) from their partial demolition and remodeling of the Manufacturers Trust Company (MTC) Building, referred to as the iconic "glass house," at 5th Avenue and 43rd Street in New York County. The building's exterior was designated a landmark in 1997. Among its unique attributes are its transparency and seamless transition between its exterior and interior, providing a full view of its interior from the exterior, yet the interior was designated a landmark only recently, in February 2011. Only three months later, May 19, 2011, respondent New York City Landmarks Preservation Commission (LPC) issued a Certificate of Appropriateness under

the Landmarks and Historic Districts Preservation Law (LPL), N.Y.C. Admin. Code § 25-305, permitting alterations of the interior features, as well as less extensive alterations of the exterior features, that give the building its landmark status. Petitioners also seek to reverse or annul LPC's issuance of that Certificate of Appropriateness. C.P.L.R. § 7803.

Insofar as the court does not grant the petition immediately, petitioners move for a preliminary injunction prohibiting the Vornado respondents from their partial demolition and remodeling of the MTC Building pending a final determination of the petition. C.P.L.R. §§ 6301, 6311(1). The Vornado respondents move to dismiss the petition based on petitioners' lack of standing, laches, and failure to state a claim. C.P.L.R. §§ 3211(a)(5) and (7), 7804(f). See C.P.L.R. § 3211(a)(3). LPC cross-moves to dismiss the petition based on petitioners' lack of standing. C.P.L.R. §§ 3211(a)(7), 7804(f). See C.P.L.R. § 3211(a)(3).

I. STANDING TO MAINTAIN THIS PROCEEDING

A. Petitioner Allison

In determining motions to dismiss based on lack of standing, the court accepts the allegations of the verified petition and petitioners' affidavits as true. Rhodes v. Herz, 84 A.D.3d 1, 3 n.1 (1st Dep't 2011); Trustees of the Plumbers Local Union No. 1 Additional Sec. Benefit Fund v. City of New York, 73 A.D.3d 530, 531 (1st Dep't 2010); Hammer v. American Kennel Club, 304 A.D.2d 74, 78 (1st Dep't 2003); Shui Kam Chan v. Louis, 303 A.D.2d 151,

152 (1st Dep't 2003). On these bases, among the individual petitioners, Professor Eric Allison alone shows his standing to maintain the petition's claims, because Allison has taken distinct advantage of the landmarked site, differently from the public at large. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 305-306 (2009); Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 774 (1991); Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d 576 (1st Dep't 2010). He regularly visits and leads walking tours to the MTC Building to teach his architectural students about the unique qualities of the building as an American masterpiece of mid-20th century modernism exemplifying the International Style. He emphasizes the transparency and integration of the exterior and interior through their uninterrupted plate glass expanses and coordinated design. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305.

Because the MTC Building's interior is fully visible from the exterior, rendering the exterior indistinguishable from the interior, a significant feature supporting the landmark status of each, the interior as well as the exterior is an urban environmental resource viewed primarily from the outside. Thus Allison's tours to the building, even if to view it only from the exterior, encompass use, study, and enjoyment of the interior as well.

Petitioner need not reside or work near the landmarked site

to maintain standing. Id.; Brunswick Smart Growth, Inc. v. Town of Brunswick, 73 A.D.3d 1267, 1268 (3d Dep't 2010). The observable, palpable modifications respondents have proposed and permitted will directly curtail Professor Allison's professional use and enjoyment of the unique site integral to his teaching and course of study: his profession. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 775; Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d 576.

B. The Standards Supporting Allison's Standing

Although Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, addresses protection of a natural rather than an architectural resource under the State Environmental Quality Review Act (SEQRA), N.Y. Envtl. Conserv. Law (ECL) §§ 8-0101 to 8-0113, landmark preservation could not be more closely analogous to SEQRA. Both the LPL and SEQRA address preservation of the environment; the LPL preserves the urban environment; and SEQRA specifically includes "objects," ECL § 8-0105(6), and "resources of historic or aesthetic significance" in the definition of the environment to be preserved. 6 N.Y.C.R.R. § 617.2(l). While common, undefined interests in the environment may not confer standing to challenge an environmental injury, injury to a particular petitioner's aesthetic and environmental well-being, activities, or pasttimes and his "desire to use or observe, even for purely aesthetic purposes, is undeniably a cognizable interest" for purposes of standing. Lujan v.

Defenders of Wildlife, 504 U.S. 555, 562 (1992). See Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000); Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305; Save Our Main St. Bldgs. v. Greene County Legislature, 293 A.D.2d 907, 909 (3d Dep't 2002).

Since Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, its standards have been employed to assess standing specifically under the LPL:

> In environmental or preservation matters, standing may be established by proof that agency action will directly harm the petitioner's members in their use or enjoyment of the natural resources or area in question.

Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d 576 (emphases added). Although Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d 862, 864 (3d Dep't 1996), well over a decade before Save the Pine Bush, held that educational use of a landmarked site did not confer standing, Save the Pine Bush's standards now apply to standing under the LPL. Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d 576.

The First Department's application of Save the Pine Bush does cite Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d at 864, but only for the point that a petitioner needs more than a mere appreciation of and interest in preserving the protected historic or landmarked site to establish standing. Petitioner organization in Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d at 576-77, failed to meet the

requisite standard by showing that LPC's action would directly affect the organization's members "differently from any other members of the public" in their use or enjoyment of property being considered for landmark designation, id. at 577, the same standard the Third Department now applies for standing to challenge land use. Brunswick Smart Growth, Inc. v. Town of Brunswick, 73 A.D.3d at 1268; Save Our Main St. Bldgs. v. Greene County Legislature, 293 A.D.2d at 909. See Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305-306; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 774. In fact, directly to the contrary, the petition in Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d at 577, alleged "that petitioner's members and members of the public are similarly affected." Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305, nevertheless accepts the relevance of educational uses to establish standing: the very criterion conferring standing was that the petitioners "use the Pine Bush for recreation and to study and enjoy" the site's unique features. See id. at 301.

Standing is not so strict as to be "insuperable." Id. at 306. If petitioners maintained a property, contractual, business, or financial interest in the MTC Building that was injured by its remodeling, that interest and injury would confer standing independently, regardless of the LPL. Therefore standing under the LPL must be based on an interest and injury beyond an impact on property, contractual, business, or monetary

rights and interests. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, defines the parameters of one such interest and injury, one within which petitioner Allison's interest in preserving the landmarked MTC Building and an injury to the landmark's aesthetic, architectural, and historical character and value, on which his professional teaching and course of study regularly focus, fits.

In stark contrast to the value and protection of property, contractual, business, or monetary rights and interests, the LPL specifically recognizes that improvements on real property,

> having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements . . ., and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural, and historic values represented by such improvements . . . .

N.Y.C. Admin. Code § 5-301(a). The "protection, enhancement, perpetuation and use of . . . improvements" that "reflect elements of the city's cultural, social, economic, political and architectural history" is "a public necessity" and among the LPL's express purposes. Id. § 5-301(b). Its salient companion purposes are to "foster civic pride in the beauty and noble accomplishments of the past" and "promote the use of . . . landmarks, interior landmarks . . . for the education, pleasure and welfare of the people of the city." Id.

Professor Allison's focus on the MTC building's aesthetic, architectural, and historic value as one of the finest products

of modernism in the International Style from the mid-20th century unquestionably embodies the interest the LPL is intended to protect and perpetuate, quite apart from property, contractual, business, or financial interests. Any uprooting of the building's value by failing to preserve it directly causes an irreplaceable loss to his civic pride in and professional use and study of the building as a beautiful, magnificent, and renowned accomplishment in the city's cultural and architectural history. Nothing in the current record suggests that his use, study, and enjoyment of the MTC Building has been of less frequency, intensity, or duration than the petitioners' visits to the Pine Bush or is otherwise distinguishable so as to negate his standing.

Finally, essential elements of this challenge set it apart from Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d 862, where the petitioners were "educators at Cornell's College of Architecture, Art and Planning who espouse a fond appreciation for Sage Hall and have managed to use the characteristics of the structure in their respective courses of instruction." Id. at 863. This description alone indicates their having "managed to use the characteristics of the structure in their . . . courses," id., was not necessarily a use of Sage Hall itself, observed live, and was secondary to their appreciation for the building, which "does not rise to the level of injury different from that of the public at large for standing purposes." Id. at 864. See Save the Pine Bush, Inc. v. Common

Council of City of Albany, 13 N.Y.3d at 305-306; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 774; Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d at 576-77.

Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d at 864, continues: "Nor does the use of a building as a demonstrative teaching tool constitute a 'use' sufficient to confer standing." The court reached this conclusion for two reasons. (1) The diminution of the petitioner Ebert's use of Sage Hall "as a teaching tool is not, without more, within the zone of interest sought to be promoted or protected by . . . SEQRA." Id. (emphases added).

> (2) While neither Ebert nor her students will be able to "observe" Sage Hall as it existed prior to being renovated, nothing about the project prohibits Ebert from continuing to teach about the architectural history of Sage Hall nor others from learning about same.

Id.

First, the court held that use of a building as a teaching tool by itself was insufficient. As set forth above, Professor Allison does allege much more. For example, he leads walking tours to the MTC Building; he teaches not just about its demonstrative qualities and architectural history, but about its unique qualities and unique place in architectural history. Most distinctively, the transparency and integration of the interior and exterior must be experienced through the live observation that the visits afford.

> These are in-depth study tours. . . . They focus heavily on . . . how a building or landscape affects the

> person experiencing it. Thus we discuss the statements that owners and architects were making and the impact on the streetscape and the passers by.

Aff. of Eric Allison ¶ 4 (July 19, 2011). The tours help students understand not only architectural history, but also:

> a key preservation concept: significance in the sense of the intrinsic values of a building making it worthy of preservation. . . . to assess whether to protect it, to allow modifications, or to guide restorations.
>
> . . . I also point out the communicative elements that make the design rather unique among International Style buildings, focussing especially on the front-and-center safe deposit vault door which very succinctly symbolizes financial and physical security and fulfills the function of the more traditional bank design which imparts that sense through heavy masonry architecture.

Id. ¶¶ 4-5. In sum, the MTC Building is a "showcase" of "the promise of the early manifestation of the International Style as it remediated the principles of the Bauhaus." Id. ¶ 5.

Such effects and such intensive study beyond architectural history were nowhere suggested in Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d 862. Nor would the use of photographs, models, or textual descriptions to which the court's conclusion there would relegate the petitioners suffice to carry on the experience and impact of Professor Allison's visits. That conclusion reflects the petitioners' failure to show their teaching and learning about Sage Hall's architectural history would be curtailed through use of photographs, models, or textual descriptions as "teaching tools," without live observation of the building.

Second, despite the inclusion of "objects," ECL § 8-0105(6), and "resources of historic or aesthetic significance," 6

N.Y.C.R.R. § 617.2(l), in the environment to be preserved under SEQRA and the close analogy between natural and architectural resources as components of the environment, the promotion and protection of landmarks under the LPL encompass its own purposes and values beyond SEQRA. In fact, had the petitioners in Heritage Coalition v. City of Ithaca Planning & Dev. Bd., 228 A.D.2d 862, sought protection of Sage Hall under the LPL, and the renovation significantly impaired their use, study, and enjoyment of the building's landmark qualities, the petitioners may have secured the standing under the LPL that they could not secure under SEQRA, because the LPL provides further protection. The LPL's recognition of "the finest architectural products of distinct periods," N.Y.C. Admin. Code § 5-301(a), protection of cultural and architectural elements of history, and promotion of "civic pride" in beautiful and noble past accomplishments, of education, and of pleasure may have cast a net that captured actual injury to those petitioners' use, study, and enjoyment of landmarked features. Id. § 5-301(b).

C. The Other Individual Petitioners

Applying these standards, the membership of petitioners Farrelly and Nardin in the Columbia and Princeton University Clubs near the MTC Building does not confer standing. Although the club memberships give Farrelly and Nardin a reason to frequent the vicinity of the MTC Building, and they both take walks past the MTC Building, frequent proximity does not establish an injury different from the public at large. Save the

Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305. They do not claim to have obtained their club memberships to facilitate visiting the landmark, nor that they will cancel their memberships or that the memberships will be devalued due to modifications of the landmark. In fact Farrelly and Nardin do not even claim that they specifically visit the landmark, rather than merely walking past it because they have other reason to frequent the neighborhood.

Nardin's claim that the owners of the publishing business of which he is the chief executive officer chose its location to be near the MTC Building does not support his standing. Neither Nardin's employer nor any of the business' owners is a party to this proceeding. Nardin does not claim to be an owner of the business or even that he was involved in its choice of location or that the location influenced his acceptance of employment there.

Petitioner Grunewald alleges only that he was actively involved in seeking landmark protection for the site. Although that course of action demonstrates his appreciation of and interest in the MTC Building, effects on mere appreciation and interest do not establish the injury essential to standing. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 305-306; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 774; Citizens Emergency Comm. to Preserve Preserv. v Tierney, 70 A.D.3d at 576-77. Grunewald does not allege his use of the site akin to Allison's special use.

D. The Organizational Petitioner

Petitioner Citizens Emergency Committee to Preserve Preservation also establishes standing. At least one of the Citizens Emergency Committee's members, Allison, a founder of the organization and member of its Steering Committee, establishes standing. New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 775; Citizens Emergency Comm. to Preserve Preserv. v. Tierney, 70 A.D.3d 576. He alleges that his activity as a member of Citizens Emergency Committee reflects his special appreciation of and interest in the MTC Building's architecture and transparency. Citizens Emergency Committee further alleges that its members opposed the Vornado respondents' proposal to LPC to remodel the MTC Building and continue to oppose the demolition and construction now underway, demonstrating an active interest in preserving the building's interior.

The activity and interest of Citizens Emergency Committee's membership is thus representative of this petition's claims to preserve the MTC Building as originally landmarked; in fact the claims here are entirely germane to the organization's core purpose: to preserve preservation. New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d at 211; Rudder v. Pataki, 93 N.Y.2d 273, 278 (1999). The organizational petitioner thus shows that it represents and will promote the interests and objectives the petition seeks to effect and maintains a stake in the petition's adjudication. Rudder v. Pataki, 93 N.Y.2d at 278;

Transactive Corp. v. New York State Dept. of Social Servs., 92 N.Y.2d 579, 587 (1998); Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 772, 775. Finally, nothing indicates that the relief requested requires further participation of Citizens Emergency Committee's individual members. New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d at 211; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 775.

E. Conclusion

Consequently, the court denies respondents' motion and cross-motion to dismiss the petition by petitioners Allison and Citizens Emergency Committee to Preserve Preservation based on their lack of standing. The court grants the motion and cross-motion to the extent of dismissing the claims by petitioners Farrelly, Nardin, and Grunewald. C.P.L.R. §§ 3211(a)(7), 7804(f). See C.P.L.R. § 3211(a)(3). Since standing is not merely a pleading requirement, but is also an indispensable element of petitioners' proof, if ultimately respondents establish that the sworn allegations of petitioners Allison and Citizens Emergency Committee are untrue or otherwise rebut them, the petition will fail. Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 306. See Lujan v. Defenders of Wildlife, 504 U.S. at 561.

II. LACHES IN COMMENCING THIS PROCEEDING AND SEEKING RELIEF

The Vornado respondents, who claim petitioners' laches, bear the burden to plead and prove laches. Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165, 173 n.4 (2002).

See C.P.L.R. § 3018(b); Rosenthal v. City of New York, 283 A.D.2d 156, 161 (1st Dep't 2001); Stassa v. Stassa, 73 A.D.3d 1157, 1158 (2d Dep't 2010); Estate of Claydon v. Ehring, 65 A.D.3d 723, 724-25 (3d Dep't 2009). Laches does not bar the petition, because petitioners did not unreasonably delay initiating their claims. EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d 45, 54-55 (1st Dep't 2004); Cohen v. Krantz, 227 A.D.2d 581, 582 (2d Dep't 1996). See Schulz v. State of N.Y., 81 N.Y.2d 336, 348-49 (1993); Philippine Am. Lace Corp. v. 236 W. 40th St. Corp., 32 A.D.3d 782, 784 (1st Dep't 2006); Bailey v. Chernoff, 45 A.D.3d 1113, 1115 (3d Dep't 2007); Save the Pine Bush v. New York State Dept. of Envtl. Conservation, 289 A.D.2d 636, 640 (2d Dep't 2001). To the contrary, Grunewald and Citizens Emergency Committee, through its membership, began to secure legal counsel and financial sponsorship for litigation expenses the day after the meeting April 19, 2011, when LPC approved alteration of the MTC Building. Petitioners did not even wait until LPC issued its Certificate of Appropriateness a month later or until the Vornado respondents obtained the further requisite permit to begin demolition June 1, 2011. Petitioners proceeded diligently to retain attorneys; identify individual co-petitioners with comparable interests and concrete injury; and prepare, file, and serve a comprehensive, cogent, factually and legally supported petition and motion for an immediate injunction July 11, 2011. Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 172. See Citineighbors Coalition of Historic Carnegie Hill v. New York

City Landmarks Preserv. Commn., 2 N.Y.3d 727, 728-29 (2004); Bailey v. Chernoff, 45 A.D.3d at 1115; Save the Pine Bush v. New York State Dept. of Envtl. Conservation, 289 A.D.2d at 640.

The Vornado respondents' application of laches would limit the petition's claims to petitioners who have retained attorneys readily at hand or have the resources to immediately retain the services of a law firm capable of instant, massive absorption and output. Petitioners were required neither to retain such capability nor to anticipate that the Vornado respondents would contract for a rapid deadline for construction and proceed immediately to undertake demolition and construction. Respondents may not use their own urgencies and haste to insulate themselves from potentially meritorious claims. See Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn., 2 N.Y.3d at 729; Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 172; Parkview Assoc. v City of New York, 71 N.Y.2d 274, 282 (1988); GRA V, LLC v. Srinivasan, 55 A.D.3d 58, 62-63 (1st Dep't 2008).

Although laches may apply to delays shorter than a year, Schulz v. State of N.Y., 81 N.Y.2d at 348; Bailey v. Chernoff, 45 A.D.3d at 1115, petitioners promptly sought a preliminary injunction against respondents' construction, Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 172, rather than waiting until it was complete or close to completion, Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn., 2 N.Y.3d at 728-29; Bailey v.

Chernoff, 45 A.D.3d at 1115; Save the Pine Bush v. New York State Dept. of Envtl. Conservation, 289 A.D.2d at 640; Save the Pine Bush v. City Engr. of City of Albany, 220 A.D.2d 871, 872 (3d Dep't 1995), or simply protesting the extent of the construction. Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 174. See Schulz v. State of N.Y., 81 N.Y.2d at 348-49. In contrast, they sought the injunction even before the actual construction, as the Vornado respondents conceded at oral argument July 26, 2011, that in fact, even at that point, they still had not obtained the requisite construction permits that would allow them to proceed past the demolition phase. See Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 172; Rosenthal v. City of New York, 283 A.D.2d at 161; Stassa v. Stassa, 73 A.D.3d at 1158.

Moreover, as long as the challenged modifications are capable of being undone without undue hardship, as the court's temporary restraining order has assured here, the challenge may be maintained. Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d at 173; EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d at 55; FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d 145, 146 (1st Dep't 2004); Rosenthal v. City of New York, 283 A.D.2d at 161. See Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn., 2 N.Y.3d at 729; Stassa v. Stassa, 73 A.D.3d at 1158. Even if respondents' reliance on the Certificate of Appropriateness has caused substantial and irreparable harm, laches will not estop

LPC from correcting a past error and enforcing the LPL, despite the harsh results, rather than continuing a judicially determined contravention of the law. Parkview Assoc. v City of New York, 71 N.Y.2d at 282; GRA V, LLC v. Srinivasan, 55 A.D.3d at 61-62. An increased potential loss to respondents over the time elapsed would not create an inequity that would justify denying petitioners injunctive relief to which they otherwise are entitled, especially where it is their only adequate remedy, and as long as a desire to inflict greater loss did not motivate any delay. EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d at 55.

The short, four months statute of limitations applicable to this proceeding, C.P.L.R. § 217(1), itself almost defies a laches defense. It ensures in the first instance against stale claims. Greater N.Y. Health Care Facilities Assn. v. DeBuono, 91 N.Y.2d 716, 721 (1998); New York city Health & Hosp. Corp. v. McBarnette, 84 N.Y.2d 194, 206 (1994); Solnick v. Whalen, 49 N.Y.2d 224, 232 (1980); Rosenthal v. City of New York, 283 A.D.2d at 159. Even a "nine-month delay is simply too short to be so great or of such characteristics as to amount to a waiver or abandonment." EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d at 55 (citation omitted). No reported controlling authority over the past 15 years or more, for example, has barred a petition for review of an administrative determination based on laches in commencing the proceeding when the statute of limitations had not expired. See Save the Pine Bush v. New York State Dept. of Envtl. Conservation, 289 A.D.2d at 640; Save the Pine Bush v.

City Engr. of City of Albany, 220 A.D.2d at 871-72. Although that period is now close to expiration, respondents weighed the risk against their business incentive not to wait for that period to expire, but to proceed immediately, at their own risk, to undertake costly work, despite the obvious opposition by members of the public, including Grunewald and petitioner organization's members, at LPC's hearings and meetings. E.g., Cohen v. Krantz, 227 A.D.2d at 582-83; Ryan v. Borg, 201 A.D.2d 550 (2d Dep't 1994). See Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Presery. Commn., 2 N.Y.3d at 729; GRA V, LLC v. Srinivasan, 55 A.D.3d at 62-63; Bailey v. Chernoff, 45 A.D.3d at 1115. Respondents continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success.

The progression of demolition or construction well may affect the practicality of injunctive relief possible and the balance of hardships that warrants such relief. Nevertheless, respondents have not met their burden to plead and prove laches so as to set precedent and require dismissal of this proceeding seeking review of respondent LPC's determination and challenging the Vornado respondents' actions pursuant to it. Rosenthal v. City of New York, 283 A.D.2d at 161; Stassa v. Stassa, 73 A.D.3d at 1158; Estate of Claydon v. Ehring, 65 A.D.3d at 724-25. Therefore the court denies their motion to dismiss the petition based on petitioners' laches.

III. STANDING TO ENFORCE THE LPL AND SPECIFICALLY THE CERTIFICATE OF APPROPRIATENESS

A. The Statutory Enforcement Scheme

Administrative Code § 25-317.2(a) authorizes LPC to issue orders to any person who appears to be in charge of or involved in work on a landmark to stop the work, upon a reasonable belief that work is being performed in violation of the LPL. LPC may request the assistance of the New York City Police Department or Department of Buildings in enforcing the orders. N.Y.C. Admin. Code § 25-317.2(a)(2). Administrative Code § 25-317.2(c) authorizes LPC's recovery of a $500 civil penalty for each day of noncompliance with its orders.

"Upon the violation of any provision" of the LPL, in addition to any violation of "any stop-work order," "or whenever any person is about to engage in . . . any act or practice that may constitute a violation" of the LPL, LPC may request the City Corporation Counsel, and the Corporation Counsel is authorized,

> to institute all necessary actions and/or proceedings to restrain, correct or abate such violation or potential violation, to compel compliance with such order and/or seek civil penalties.

Id. § 25-317.2(d)(1) (emphases added). The Corporation Counsel institutes these actions on behalf of the city and may seek provisional and injunctive as well as other relief. Id. § 25-317.2(d)(2). In addition to enforcement by LPC, the Police Department, and the Department of Buildings, LPC may designate other city agencies to enforce any provisions of the LPL. LPC, the Police Department, the Department of Buildings, and other

designated agencies all may do so either through the means specified above or by instituting criminal actions. Id. § 25-317.2(f).

The criminal penalties apply broadly: $500-10,000 fines and 30 days to one year of imprisonment, depending on the violation, increasing upon repeated violations, and each day in violation a separate offense. Id. § 25-317. The civil penalties for violation of the LPL or an order based on specified provisions of the LPL may be even heavier: the property's fair market value or twice the cost of replicating protected features, again increasing upon repeated violations, and each day in violation a separate offense. Id. § 25-317.1. The statutory scheme establishes administrative tribunals for recovery of these penalties. Id. § 25-317.1(b).

B. Petitioners' Claims

Where LPC has issued a Certificate of Appropriateness permitting demolition, reconstruction, or alteration of any part of a landmark, Administrative Code § 25-305(a)(3) prohibits work in violation of the certificate. Petitioners seek specifically to enforce Administrative Code § 25-305 to remedy the Vornado respondents' alleged violation of the Certificate of Appropriateness governing the MTC Building, by exceeding the work authorized, as well as to enforce all respondents' compliance with various provisions of the LPL in the issuance and implementation of the certificate.

Although Administrative Code § 25-317.2 unquestionably

authorizes LPC, city agencies, and the Corporation Counsel to enforce the LPL, including Administrative Code § 25-305, § 25-317.2 neither expressly includes nor expressly excludes a right of action to enforce the LPL by non-governmental parties such as petitioners. Where a New York State or City statute neither provides nor forbids such a private right of action, it may be implied if (1) petitioners are "of the class for whose particular benefit the statute was enacted"; (2) "a private right of action would promote the legislative purpose"; and (3) "such a right would be consistent with the legislative scheme." Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d 32, 38 (1999); Mark G. v. Sabol, 93 N.Y.2d 710, 719 (1999); Sheehy v. Big Flats Community Day, 73 N.Y.2d 629, 633 (1989). See CPC Intl. v. McKesson Corp., 70 N.Y.2d 268, 276 (1987); Rhodes v. Herz, 84 A.D.3d at 9; Hammer v. American Kennel Club, 304 A.D.2d at 79.

Determination of the second criterion in itself involves a two-part inquiry: (a) the legislature's objective and then (b) whether a private right of action would promote that objective. Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 38; Rhodes v. Herz, 84 A.D.3d at 10. Even where the legislative objective is to benefit the whole population, here for example, New York City, or at least a class that includes petitioners, and liability to private parties would encourage compliance with the legislation and deter unlawful conduct by respondents and other similar parties, a private right of action rests on the third, critical criterion. Thus, even where private enforcement would

promote the statutory purpose, satisfying the second criterion, private enforcement still may be inconsistent with the statutory scheme, failing to meet the third criterion. Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 39-40; Mark G. v. Sabol, 93 N.Y.2d at 720; CPC Intl. v. McKesson Corp., 70 N.Y.2d at 276-77; Rhodes v. Herz, 84 A.D.3d at 10, 13. See Delgado v. New York City Hous. Auth., 66 A.D.3d 607, 608 (1st Dep't 2009).

None of respondents contends that the first two criteria are not satisfied here. Petitioners, on the other hand, do not contest that Administrative Code §§ 25-317 to 25-317.2 impose their own "comprehensive," Mark G. v. Sabol, 93 N.Y.2d at 720; Rhodes v. Herz, 84 A.D.3d at 4, or "extensive," Rhodes v. Herz, 84 A.D.3d at 11, "potent official enforcement" mechanisms, Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 40, including "broad regulatory and remedial powers" to intervene and prevent violations of the LPL "at the first indication" of proscribed conduct and to institute administrative, civil, and criminal prosecution. CPC Intl. v. McKesson Corp., 70 N.Y.2d at 277. See Rhodes v. Herz, 84 A.D.3d at 5-6, 10-11; Hammer v. American Kennel Club, 304 A.D.2d at 79-80; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 128 (1st Dep't 2002). Consistency with the LPL's purpose includes consistency with this enforcement scheme. CPC Intl. v. McKesson Corp., 70 N.Y.2d at 277. Especially where the proscribed conduct constitutes a misdemeanor, N.Y.C. Admin. Code § 25-317, and the legislation specifies the means for enforcing those provisions, it is entrusted to the law enforcement

agencies, such as the Police Department and Corporation Counsel, and civil remedies such as injunctive relief ordinarily are unavailable to private parties to prevent criminal offenses. Hammer v. American Kennel Club, 304 A.D.2d at 79-80.

Thus the court well might conclude that a right of action by private parties with different motivations and approaches from the official enforcement authorities may cause a divergent allocation of enforcement resources and disserve the goal of consistency, Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 40; Mark G. v. Sabol, 93 N.Y.2d at 720; Rhodes v. Herz, 84 A.D.3d at 10, 13, so that only those expressly authorized officials may seek remedies for violations of the LPL. E.g., CPC Intl. v. McKesson Corp., 70 N.Y.2d at 277; Delgado v. New York City Hous. Auth., 66 A.D.3d 607, 608 (1st Dep't 2009); Hammer v. American Kennel Club, 304 A.D.2d at 80-81. Yet the court equally may conclude that a private right of action coalesces smoothly with the statutory scheme; that an enforcement scheme's capacity always may be increased; and that, especially given constraints on resources, an infusion of strength may be necessary for the statutes' optimal operation. Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 40; Rhodes v. Herz, 84 A.D.3d at 13.

The most significant party that might express a position on this critical issue has not voiced any viewpoint. Certainly, were LPC to take the position that a private right of action would supplement LPC's implementation of the statutory scheme or enhance its effectiveness, that view would bear heavily on the

court's conclusion. Without that input, the court may not conclude that the LPL's official enforcement mechanisms, however comprehensive and potent, do not accommodate a private right of action by petitioners, even to enforce Administrative Code § 25-305 to remedy an alleged violation of the Certificate of Appropriateness.

Regarding enforcement of respondents' compliance with other provisions of the LPL in the issuance and implementation of the certificate, whether petitioners' enforcement may interfere with the statutory scheme, precluding a private right of action, may be of little consequence here. Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 40; CPC Intl. v. McKesson Corp., 70 N.Y.2d at 277; Rhodes v. Herz, 84 A.D.3d at 10, 13. Petitioners have instituted this proceeding pursuant to C.P.L.R. § 7803, through which they may mandamus the LPC to perform any enforcement duty required of LPC under the LPL or New York City Charter § 3020. C.P.L.R. § 7803(1). If LPC has determined not to enforce the statutes or their implementing regulations, petitioners may claim that determination violated statutory or regulatory procedures; was arbitrary, irrational, or an abuse of discretion, C.P.L.R. § 7803(3); or, based on the entire administrative record, was unsupported by substantial evidence. C.P.L.R. § 7803(4). See Frank v. DaimlerChrysler Corp., 292 A.D.2d at 128. Finally, petitioners similarly may claim that any other determination by LPC, such as issuance of the Certificate of Appropriateness for the MTC Building, violated statutory or

regulatory procedures; was arbitrary, irrational, or an abuse of discretion, C.P.L.R. § 7803(3); or, based on the entire administrative record, was unsupported by substantial evidence. C.P.L.R. § 7803(4).

While these avenues provide petitioners a remedy even to enforce the Certificate of Appropriateness, the LPL also provides them a remedy to protect against violations of the statutes without seeking injunctive relief themselves. They may seek LPC's imposition of civil or criminal penalties through a complaint to the LPC upon a reasonable belief that work is being performed in violation of the LPL. N.Y.C. Admin § 25-317.2(a); Hammer v. American Kennel Club, 304 A.D.2d at 80. Again, if LPC determines that no such violation has occurred or for any other reason determines not to enforce the LPL, petitioners may seek judicial review of that determination pursuant to C.P.L.R. § 7803(1), (3), or (4). Frank v. DaimlerChrysler Corp., 292 A.D.2d at 128.

For the above reasons, at this juncture, the court denies the Vornado respondents' motion to dismiss petitioners' claims to enforce the Vornado respondents' compliance with the Certificate of Appropriateness governing the MTC Building and to enforce all respondents' compliance with the LPL in the issuance and implementation of the certificate. C.P.L.R. § 3211(a)(7). The court provides LPC an opportunity to express a position on whether private enforcement of the LPL may interfere with the statutory scheme that authorizes enforcement by LPC and companion

governmental officials and agencies, but does not expressly grant them exclusive authority. Uhr v. East Greenbush Cent. School Dist., 94 N.Y.2d at 40; CPC Intl. v. McKesson Corp., 70 N.Y.2d at 277; Rhodes v. Herz, 84 A.D.3d at 10, 13. Given the alternative avenues for relief outlined above, petitioners also may clarify the extent to which they rely on an implied private right of action. Respondents then may seek dismissal of petitioners' enforcement claims in the ultimate determination of the petition. C.P.L.R. §§ 3212(b); 7806.

IV. FAILURE TO STATE A CLAIM

The Vornado respondents further maintain that petitioners do not even state a claim that LPC's issuance of the Certificate of Appropriateness for the MTC Building violated statutory or regulatory procedures; was arbitrary, irrational, or an abuse of discretion, C.P.L.R. § 7803(3); or was unsupported by substantial evidence. C.P.L.R. § 7803(4). The survival of petitioners' claim that LPC's determination is unsupported by substantial evidence, according C.P.L.R. § 7803(4)'s very terms, must depend on the entire administrative record. C.P.L.R. § 7804(f); Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d 100, 102-103 (1984); Camacho v. Kelly, 57 A.D.3d 297, 298 (1st Dep't 2008); Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d 142, 144 (1st Dep't 2008); Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144, 153 (1st Dep't 2006). See Hemphill v. New York City Hous. Auth., 272 A.D.2d 267 (1st Dep't 2000). While the

Vornado respondents may attempt to show that, even based on the pieces of that record presented by the petition, substantial evidence supports LPC's determination, what may appear substantial in a limited context may be insubstantial in the context of the record as a whole. Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d at 102; Camacho v. Kelly, 57 A.D.3d at 299; Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d at 145-46; Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d at 153.

The same concern applies here to petitioners' claims that LPC's determination was arbitrary or irrational or violated statutory or regulatory procedures. C.P.L.R. § 7803(3). What may appear rational in a limited context may be rendered irrational when the record reveals abundant evidence directly to the contrary. Camacho v. Kelly, 57 A.D.3d at 299; Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d at 144. See Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d at 102. While pieces of the record may comply with the applicable law, other parts may solidly support petitioners' claims that LPC reached its determination through procedures and actions that violated the law. Id.; Camacho v. Kelly, 57 A.D.3d at 299; Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d at 146; Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d at 150, 153.

For example, the Vornado respondents point out that LPC's certification of their remodeling to enable their use of the previously unused MTC Building comports with Administrative Code § 25-301(a)'s purpose of continuing a landmark's use and § 25-301(b)'s purpose of promoting use, purposes petitioners readily acknowledge. See N.Y.C. § 25-309(a)(2)(c). Yet the pieces of the record currently presented do not address such fundamental questions as:

> why the remodeling was necessary to accommodate a retail clothing business as a tenant;
>
> why two tenants were necessary, in turn necessitating a division of the unified space and additional entrances, breaking up the uninterrupted facade, a significant feature supporting the landmark status;
>
> why no other or single tenant, equally lucrative but requiring less remodeling, was interested in the first two floors at this highly desirable location; or
>
> why the freestanding escalators running parallel to 5th Avenue must be moved, for the prospective tenant or any other tenant, their location representing another significant design component unifying the first and second floors.

Insofar as petitioners claim LPC's determination does not answer these questions or otherwise adequately set forth its reasons for granting the Certificate of Appropriateness, the Vornado respondents rely on the extensive administrative process explaining why LPC granted the certificate. N.Y.C. Admin. Code § 25-315. Without that administrative record, however, it is impossible to discern definitively whether it in fact shows substantial supporting evidence, rationality, and the absence of any violation of Administrative Code § 25-307, § 25-308, § 25-

313, or § 25-315, delineating the factors and procedures that govern issuance of the certificate and the contents of LPC's determination. The current record does not even establish the precise document that constitutes the final determination. Nor may the court consider respondents' affidavits or other evidence, even if in admissible form, to defeat petitioners' claims upon a motion to dismiss them pursuant to C.P.L.R. § 3211(a)(7). Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001).

In sum, the court will not dismiss any claims on their merits before allowing respondents to answer. C.P.L.R. § 7804(f); Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d at 102-103; Camacho v. Kelly, 57 A.D.3d at 298; Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d at 153. First, the facts currently are not so fully developed and presented as to establish the absence of any factual dispute bearing on the claims. C.P.L.R. §§ 409(b), 7804(h), 7806; Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d at 102-103; Camacho v. Kelly, 57 A.D.3d at 298; Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d at 153. Nor do the current facts permit a conclusion based on undisputed facts demonstrating (1) substantial evidence supporting LPC's issuance of its Certificate

of Appropriateness, C.P.L.R. § 7803(4); (2) that LPC's determination was rational; and (3) that LPC reached its determination through procedures and actions in full compliance with applicable law. C.P.L.R. § 7803(3). See C.P.L.R. §§ 409(b), 7804(f), 7806; Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d at 102-103; Camacho v. Kelly, 57 A.D.3d at 299; Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d at 145-46; Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d at 150, 153.

V. PRELIMINARY INJUNCTION

Given that petitioners demonstrate at least one or more meritorious claims, and all the claims by petitioners Allison and Citizens Emergency Committee to Preserve Preservation survive dismissal at this juncture, the court converts its temporary restraining order dated July 26, 2011, to a preliminary injunction, for the reasons given in that prior decision and the reasons just stated. C.P.L.R. §§ 6301, 6311(1), 6312(a); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 271-72 (1st Dep't 2009); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d 413, 414 (1st Dep't 2007); FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d at 146; Putter v. Singer, 73 A.D.3d 1147, 1149 (2d Dep't 2010). The preliminary injunction shall be effective upon petitioners providing an undertaking or other security of $370,000 in favor of the Vornado respondents by August 31, 2011, at 5:00 p.m., or,

if after that date, five business days after notice to respondents that petitioners have provided the required undertaking or security. C.P.L.R. § 6312(b). As this injunction is likely to be of less limited duration than the temporary restraining order, the five days will allow respondents, which understandably may not have sought to increase the undertaking while the injunction was not in effect, to seek an increase. Any request for an increase must be by a motion, which may be by an order to show cause, upon a showing, by admissible evidence, that the injunction will cause respondents more than a potential loss of one month's net rental income, the basis for the current $370,000 requirement.

The preliminary injunction shall prohibit the Vornado respondents from undertaking demolition, removal, physical alteration, or other work affecting building components of the first two floors of 510 5th Avenue, New York County, that is irreversible or incapable of restoration to the original condition with replacement materials identical to the original materials. If the materials are not replaceable, these respondents shall preserve the original materials for restoration to their original use or shall maintain them in place. The injunction does not apply to maintenance or repairs that do not alter the building's structure or finishes.

The Vornado respondents have not demonstrated that this limited injunction will impose undue hardship on them, Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d 600, 607

(1995); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 273; drastically upset the status quo, Putter v. Singer, 73 A.D.3d at 1149; or materially interfere with their ability to undertake their remodelling and leasing of the MTC Building space. Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607; Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 273. Nevertheless, they have shown, without petitioners showing to the contrary, that this injunction is enough to protect against any immediate and irreparable injury to petitioners from the demolition and construction that respondents initiated. C.P.L.R. §§ 6301, 6312(a); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 271-72; OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d at 414; FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d at 146; Putter v. Singer, 73 A.D.3d at 1149. See Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607;

VI. DISPOSITION

To recapitulate, the court grants respondents' motion and cross-motion to the extent of dismissing the petition by petitioners Farrelly, Nardin, and Grunewald; otherwise denies the motion and cross-motion; and grants petitioners' motion for a preliminary injunction to the limited extent set forth above. C.P.L.R. §§ 3211(a)(5) and (7), 6301, 6311(1), 6312(a), 7804(f). Respondents shall serve and deliver to the court at 71 Thomas Street, Room 204, any answer to the petition within 10 days after

service of this order with notice of entry. C.P.L.R. §§ 3211(f), 7804(f). Petitioners shall serve and likewise deliver any reply within 10 days after service of an answer. C.P.L.R. § 7804(d) and (f). The court then will schedule a further hearing on the petition to determine the extent of permanent relief to be granted.

In reaching this decision, the court has not considered any arguments or evidence offered after submission and oral argument of the motions and cross-motions, especially when all parties' consent was not obtained as of the oral argument or even afterward. Any request for a modification of this decision, any claim of noncompliance with this decision, or any other request for relief must be by a motion, which may be by an order to show cause.

This decision constitutes the court's order on petitioners' motion for a preliminary injunction and respondents' motion and cross-motion to dismiss the petition. The court will provide copies to the parties' attorneys.

DATED: August 18, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.