

At an IAS Term, Part 50 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of March, 2009.

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,
Justice.

-----X

In the Matter of the Application of STOP BHOD,
an unincorporated association, by and in the
name of its President, FRANK LEPERA,
Verifying Petitioner, and,
WILLIAM C. THOMPSON, JR., in his official
capacity as the New York City Comptroller,
et al.,

Index No. 31301/08

Petitioners,

- against -

CITY OF NEW YORK, et al.,

Respondents.

-----X

The following papers numbered 1 to 24 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and	
Affidavits (Affirmations) Annexed _____	1 - 6
Opposing Affidavits (Affirmations) _____	7 - 9
Reply Affidavits (Affirmations) _____	10
Affirmation of John Knudsen _____	11
Other Papers _____ Memoranda of Law	12 - 14
Stipulation dated December 12, 2009	15
Other Papers _____ Transcript dated January 6, 2009	16
Petitioners' Supplemental Affirmations and Affidavits _____	17 - 23
The City Respondents' Supplemental Affirmation _____	24

Upon the foregoing papers in this CPLR article 78 proceeding brought by petitioners Stop BHOD, an unincorporated association, by and in the name of its president, Frank Lepera; William C. Thompson, Jr., in his official capacity as the New York City Comptroller; David Yassky, individually and in his official capacity as a New York City Council Member; Atlantic Avenue Betterment Association, Incorporated;

Atlantic Avenue Local Development Corporation; Boerum Hill Association; Boulevard East Board of Managers, by and in the name of its authorized board member, Lori Richmond; Brooklyn Vision; Cobble Hill Association; Gowanus Houses Resident Council, Incorporated; and Wyckoff Gardens Association, Incorporated (collectively, petitioners) move, by order to show cause, for a preliminary injunction, enjoining respondents City of New York (the City) and New York City Department of Correction (the DOC) (collectively, the City respondents), and respondent New York State Commission of Correction (State Commission), and each of their officers, employees, consultants, agents, and designees, and all other persons acting on their behalf or in concert with them from: (1) housing any more detainees or prisoners in the Brooklyn House of Detention (the BHOD); (2) granting any approvals for, or awarding any contracts for services relating to the opening and expansion of the BHOD; (3) executing or registering a contract for architectural services related to the expansion of the BHOD with the appropriate City agency; and (4) allocating funds for, or beginning construction in connection with the opening and expansion of the BHOD, until respondents have complied with their regulatory obligations, including a Fair Share analysis under the New York City Charter Sections 203 and 204 and Appendix A to Title 62 of the Rules of the City of New York (RCNY), an environmental impact review under the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR), and a community review process under the Uniform Land Use Review Procedure (ULURP). Petitioners' motion further seeks an order granting them expedited discovery consistent with the discovery requests designated by them as Exhibits 39 through 44.

The BHOD was built by the City in 1957 as a prison. The BHOD is located at 275 Atlantic Avenue, in Brooklyn, New York, directly across the street from and linked by an underground tunnel to the Criminal Court building at 120 Schermerhorn Street. While in

operation, the BHOD was used to accommodate mostly pretrial detainees and to receive new admission detainees from the Brooklyn courts.

The DOC is the City agency responsible for the care, custody, and control of the prisoners committed to its custody by the New York State Criminal Courts and Supreme Courts, Criminal Term. As a result of a declining prison population and economies of scale, the City respondents decided to close the BHOD in June 2003. According to the DOC Commissioner Martin Horn, the BHOD “was selected for closing [in 2003] because compared to [the City’s] other jails, its small capacity meant that its per capita costs were relatively high,” and because “it was more efficient to operate a jail that holds more defendants so that costs are spread over a larger population” (Commissioner Horn Answers Questions About BHOD, Brownstoner, June 5, 2008). In announcing this decision, the DOC Commissioner Martin Horn declared that the closing would save more than \$5 million annually by consolidating operations into Riker’s Island.

No inmates were housed overnight at the BHOD following its closure in June 2003. However, from 2003 to 2008, the BHOD was continuously used to receive new admissions to the DOC’s custody and to transfer criminal defendants being produced for appearances at the Criminal Court at 120 Schermerhorn Street.

The DOC currently has eight housing facilities. Rikers Island holds the vast majority of its inmate population of approximately 12,000 inmates on average per day. According to the City respondents, over the past five to ten years, the DOC’s heavy reliance on Rikers Island to house the City’s inmate population has become increasingly problematic because approximately 4,000 of the beds on Rikers Island are located in deteriorating modular housing built in the 1980’s, which require frequent repairs and maintenance. In addition, due to its location on an island in the East River, Rikers Island inmates are required to make lengthy trips to the borough courthouses, which the City respondents assert, is costly and increases security risk. For these reasons, beginning in early 2005, the DOC started developing plans to decrease the overall capacity at Rikers

Island and to reoccupy and expand the capacity of the BHOD to accommodate a combined total of up to 3,000 inmates.

In 2005, the DOC began approaching elected officials and community groups with its preliminary proposal to reoccupy and expand the BHOD. In November 2006, the City filed a “Citywide Statement of Needs for City Facilities /Fiscal Years 2008 and 2009, which announced that the new BHOD would have a total of 1,719 beds. In 2006, the DOC allocated funds in the City’s fiscal year 2007 Capital Commitment Plan for reopening of the BHOD with an originally proposed 960-bed addition. The DOC later scaled this proposal back to 720 beds so that the addition would fit within the zoning “envelope” space. The DOC states that in response to community requests, it also plans to consider the inclusion of up to 30,000 square feet of ground floor retail space on Atlantic Avenue, and has incorporated into its proposal, among other things, a provision for underground parking and reorientation of the building’s current entrance to State Street. The DOC estimates the costs of a 720-bed addition to the BHOD to be \$450 million.

The City solicited requests for proposals by the New York City Department of Design & Construction’s Two-Stage Request for Proposals, Consultant for Architectural, Engineering Design, and Services During Construction, Renovation and Expansion of the BHOD (the RFP). The RPP listed a pre-proposal conference date of March 28, 2008 with a submission deadline of April 1, 2008.

By letter dated May 21, 2008, the State Commission advised the DOC that since the BHOD was “currently closed,” in order for the DOC to repopulate it, the DOC was required to apply to it for approval. On June 26, 2008, petitioners’ counsel submitted a Freedom of Information Law (FOIL) request to the DOC, requesting a wide variety of information relating to its plan to reopen and expand the BHOD. Petitioners’ counsel also wrote a letter, dated June 26, 2008, to New York City Deputy Mayor for Health and Human Services, Linda Gibbs, who oversees the DOC, informing her of petitioners’

opposition to the City's plan to reopen and expand the BHOD without first conducting legally-mandated public reviews.

By letter dated August 7, 2008, the DOC Commissioner Martin Horn requested approval from the State Commission to reopen the BHOD. The DOC Commissioner Martin Horn, in that letter, stated that the DOC's plan was to reopen the BHOD, but made no mention of the plan for the future expansion of the BHOD.

An August 19, 2008 meeting was held by the State Commission to determine the DOC's request to reopen the BHOD. In noticing this meeting, the State Commission was required to comply with Open Meetings Law §§ 100 et seq. Pursuant to Public Officers Law § 104 (1), where a meeting is scheduled at least one week in advance, public notice of the time and place of a meeting "shall be given to the news media" and "shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting." Under Executive Order No. 3 (29 NY Reg 89 [Jan. 24, 2007]), all "agency and authority meetings that are subject to the Open Meetings Law shall be broadcast on the Internet commencing no later than July 1, 2007."

The petitioners argue that the State Commission posted the meeting to the calendar function of the website EmpirePage.com, as a stated "Commission Meeting" with no further specific identification. The State Commission also posted no press release regarding its August 19, 2008 meeting. There is also no indication that this notice of the August 19, 2008 meeting was actually distributed nor is there any information as to where such notice may have been sent. In addition, the State Commission had failed to broadcast the meeting over the Internet as required by Executive Order No. 3.

The State Commission approved the City respondents' request at the August 19, 2008 meeting. By letter dated September 9, 2008, the State Commission informed the DOC that it had voted to reinstate the maximum facility capacity (formulated pursuant to

9 NYCRR 7040) for the BHOD based upon the DOC's August 7, 2008 request to reopen the facility, which is a total of 759 individual housing units.

As part of the annual budget for the BHOD expansion, the DOC has allocated \$32.5 million for architectural consultant design services to finalize its proposal to expand the BHOD. The consultant design services contract calls for the submission of a design for renovation and expansion of the existing BHOD structure, with an additional 720-bed tower with dormitory style housing and associated support and administrative spaces to be integrated with the existing structure, and the provision of retail space along Atlantic Avenue.

Petitioners are a group of community organizations, elected officials, and residents of neighborhoods in or near Downtown Brooklyn, who state that due to their proximity to the BHOD, they are concerned about its proposed reopening and expansion. Petitioners assert that despite having told community residents as recently as November 13, 2008 that the DOC had no imminent plan to put prisoners back into the BHOD, the DOC secretly filed its August 7, 2008 request with the State Commission to reauthorize the maximum capacity for the BHOD, without the State Commission giving adequate notice to the public pursuant to Public Officers Law §§ 104 and 107, and State Executive Order No. 3 so that they could be heard on the DOC's application. Petitioners further assert that before moving forward with and commencing the BHOD project, the City respondents were mandated by law to comply with the Fair Share Criteria review, environmental review under SEQRA and CEQR, and a community review under ULURP. Petitioners note that despite the City respondents' lack of compliance with any of these legally mandated reviews, the City has already awarded the \$32.5 million architectural services contract.

On November 16, 2008 (just one day before petitioners filed the instant order to show cause), the DOC moved 31 inmates to the BHOD on an overnight basis. According to the DOC, it required these inmates to conduct routine maintenance and repairs of the

facility and the adjacent courthouse holding pens, and also to prepare the existing structure for use as a New York Police Department holding facility to temporarily accommodate pre-arraignment defendants during the planned renovation of 120 Schermerhorn Street.

By stipulation so-ordered on November 19, 2008, the parties agreed that the City respondents could house up to 50 inmates overnight at the BHOD for a work detail, from November 19, 2008 up until this court's decision on this motion. Pursuant to that stipulation, since settlement negotiations between the parties were terminated, the City respondents were permitted to present the architectural design contract to the New York City Office of Comptroller for registration and to take steps to implement that contract following registration. Petitioners filed their petition on December 18, 2008.

The petition contains four causes of action. Petitioners' first cause of action seeks a declaration that the State Commission's action in restoring the maximum facility capacity of BHOD from 0 to 759 was null and void for failure to comply with the Open Meetings Law and Executive Order No. 3. Petitioners' second cause of action seeks a declaration that the City respondents' site selection of the BHOD property for a new and larger detention center is void and invalid due to their failure to conduct a meaningful Fair Share Analysis pursuant to the New York City Charter §§ 203 and 204 and RCNY Appendix A to Title 62, and that they should be enjoined from proceeding with the planned opening and expansion of the BHOD until they have fully complied with the Fair Share Criteria. Petitioners' third cause of action seeks a declaration that the City respondents violated SEQRA and CEQR, and an injunction enjoining them from proceeding with the planned opening and expansion of the BHOD until such time as they have fully complied with SEQRA and CEQR. Petitioners' fourth cause of action seeks a declaration that the City respondents violated ULURP and that the City respondents should be mandated to submit a ULURP application before they may proceed with their expansion plans to place detainees in the closed BHOD. It also seeks an injunction, enjoining the City respondents from proceeding with the planned opening and expansion

of the BHOD until such time as they have fully complied with ULURP. No answer was interposed by respondents, but the City respondents have submitted opposition papers to petitioners' motion. The State Commission, on the basis that there is no claim for injunctive relief as against it, has elected not to submit any responding papers to petitioners' requests for relief. The State Commission did, however, appear at the oral argument held on January 6, 2009 and was given the opportunity to present any arguments it had with respect to its alleged failure to comply with the Open Meetings Law.

Discussion

In addressing petitioners' motion for a preliminary injunction, it is noted that "in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position" (*Walter Karl, Inc. v Wood*, 137 AD2d 22, 26 [1988]; see also *Aetna Life Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Hightower v Reid*, 5 AD3d 440, 440-441 [2004]).

With regards to the expansion of the BHOD and with respect to the factor of a likelihood of ultimate success on the merits, the City respondents concede that they have not conducted Fair Share, SEQRA, CEQR, or ULURP reviews with respect to the reopening and expansion of the BHOD. In addition, the City respondents do not contest that these reviews are applicable to an expansion of the BHOD, and acknowledge that when they move forward with the expansion of the BHOD they will have to comply with ULURP, SEQRA, CEQR, and Fair Share reviews, but argue that this does not apply to reopening of the BHOD.

Further, the City respondents state that despite the existence of the design services contract, the design consultant must prepare an Interim Schematic Report to analyze the existing site conditions and to make recommendations regarding alternative layouts, alternative facade designs, the potential for underground parking, and the feasibility of

various options for vehicular and pedestrian access to the jail and the proposed retail space on Atlantic Avenue. The City respondents assert that this Interim Schematic Report is subject to the approval of the DOC Commissioner Martin Horn, and will be the basis for all final design work, and that no final decisions concerning the BHOD expansion proposal will be made until this report is approved by the DOC Commissioner.

The City respondents also state that they do not yet know whether a zoning change will be needed for the future expansion of the BHOD because architects are still developing plans on this. The City respondents assert that while they will conduct the appropriate reviews in the future, they need not conduct any review now because they have not yet made a final decision on whether or not to expand the BHOD. The City respondents argue that, therefore, the expansion of the BHOD is only a future potential action that is not yet ripe for challenge in this CPLR article 78 proceeding and is non-justiciable. This argument is unavailing. This is not a case where an alleged harm is contingent on a future event which may or may not come to pass (*compare Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 240 [1984]) or where without a final agency action, there is no basis for evaluating whether a controversy exists or whether petitioners will suffer a concrete injury (*compare Matter of Hunt Bros. v Glennon*, 81 NY2d 906, 910 [1993]). All of the submitted evidence, including the City's representatives' own statements point to the fact that the City respondents have already decided to double the size of the BHOD and are in the process of laying the groundwork for the remaking of what is essentially a new, or, at the very least, is a significantly expanded facility. The DOC has already expended capital funds on the architectural design for the expansion of the BHOD and (as noted above), the City has already awarded a \$32.5 million architectural services contract. Thus, petitioners have shown that the point has been reached at which there must be any necessary compliance with the statutory scheme (*see Matter of Tri-County Taxpayers Assn. v Town Bd. of Town of Queensbury*, 55 NY2d 41, 45 [1982]).

The City respondents further contend that petitioners conflate the DOC's need to reopen the BHOD for use in overnight housing of inmates with the DOC's emerging proposal to add on to the jail and combine it with ground floor retail space. The City respondents assert that the repopulation of the BHOD is a separate issue which should be considered distinct from the issue of the expansion of the BHOD. The City respondents characterize this stage of the project as a mere "reopening." They argue that they are not required to perform many of the aforementioned legally mandated reviews when only "reopening," as opposed to expanding an existing facility. The City respondents also claim that the BHOD was never fully closed to use by the DOC, but has been used since 2003 for the processing of inmates appearing at the nearby Criminal Court building on Schermerhorn Street. They argue that the DOC is not required to conduct Fair Share, or SEQRA, or ULURP reviews in order to reoccupy the existing jail at its currently permitted capacity of 759 beds.

It is hereby noted by the court that the City respondents' claim that the BHOD was never closed for five and a half years, however from June 2003, the City respondents were not authorized to house prisoners overnight during the time it was closed, and as advised by the State Commission, the BHOD had zero maximum number capacity in May 2008, and the DOC had to apply to the State Commission for approval in order for it to be permitted to house any prisoners.

The basis upon which the City respondents claim that they may legally reopen the BHOD is the State Commission's approval at the August 19, 2008 meeting. Petitioners on the other hand contend that the August 19, 2008 meeting was held in violation of the Open Meetings Law (Public Officers Law art 7 [§ 100 et seq.]). "The Open Meetings Law [is] to be liberally construed in accordance with [its] purposes" (*see Matter of Gordon v Village of Monticello*, 87 NY2d 124, 127 [1995]). A court has "the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of [the Open Meetings Law] void in whole or in part" (Public Officers Law § 107 [17]). "Good cause" factors

include “insufficient notice” and “improper exclusion of members of the public” (*see e.g. Matter of Goetschius v Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552, 554 [1997]).

Here, petitioners contend that the Empire Page.com website, on which such meetings are published to the public and media, reported a “Commission Meeting” without identifying the specific “Commission” or the subject matter. The other alleged notice was by the State Commission’s counsel at the January 6, 2009 oral argument of a paper posting on a billboard in the State Commission’s Albany office which the petitioners referred to as an unspecified location. Thus, they claim the State Commission has not refuted petitioners’ showing that the public may not have been given adequate notice of the meeting.

The City respondents argue that a lack of proper notice has been held as a mere unintentional technical violation of the Open Meetings Law which should not render the State Commission’s decision invalid. While courts do not overturn decisions based on technical violations or negligent failure to comply precisely with the Open Meetings Law (*see Matter of Roberts v Town Bd. of Carmel*, 207 AD2d 404, 405 [1994]; *Kessel v D’Amato*, 97 Misc 2d 675, 681-682 [1979]), it has been held that where a lack of notice appears to have been “calculated to minimize public awareness” of a “sensitive political decision” relating to “a highly publicized matter,” a court may void the action taken at a meeting (*Matter of Previdi v Hirsch*, 138 Misc 2d 436, 440 [1988]). Good cause to void a decision may also be found where there is “prejudice to the public” (*Warren v Giambra*, 12 Misc 3d 650, 655 [2006]).

In this case, petitioners have made no showing that respondents may have sought to minimize public awareness of this sensitive and controversial issue concerning the reopening of the BHOD. This contention by the petitioner is merely speculative and does not reach the level of setting aside the decision of the Commissioner to reopen the BHOD. The court is not persuaded that the same level of prejudice exists as to the reopening or that the reopening is intertwined with the expansion. The case in which the

court found the type of prejudice to void such decision is one in which the posting of a meeting was done on the same day that the meeting was held (see, *Previdi* 138 Misc 2d 43. This has not occurred in this case.

Petitioners contend that members of the public may have been prejudiced by the lack of proper notice of the August 19, 2008 meeting because they were denied an opportunity to voice their opposition to the decision to increase the maximum facility capacity of the BHOD. They further contend that without proper notice, petitioners were thwarted from attending the meeting and were deprived of their ability to inform the State Commission at that meeting of the City respondents' long term expansion plans in connection with its reason for seeking the reopening of the BHOD. The meeting noticed by the DOC and conducted did not address the issue of expansion but only addressed the DOC's reopening.

With respect to compliance with SEQRA (Environmental Conservation Law § 8), it is noted that SEQRA incorporates "the consideration of environmental factors into the existing planning, review, and decision-making processes of state and local governmental agencies at the earliest possible time" (6 NYCRR 617.1 [c]). The purpose of SEQRA is "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources" (Environmental Conservation Law § 8-0101). "Community character is specifically protected by SEQRA" (*Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 94 [2007]). CEQR applies to any environmental review by the City that is required by SEQRA and implementing regulations 62 Rules of the City of NY (RCNY) § 5-02 (d). CEQR expressly requires "full compliance" with its provisions as a prerequisite to undertaking any proposed action that "may have a significant effect on the environment" (62 RCNY § 6-01). When conducting an environmental review under SEQRA and CEQR, a governmental agency must take a "hard look" at the environmental impacts of its actions before deciding to move forward with a project (see Environmental Conservation Law §§ 8-0101 et seq.; *Matter of Brander v Town of Warren Town Bd.*, 18 Misc 3d 477, 479 [2007]).

The City respondents contend that the repopulation of the existing BHOD facility is a Type II action, which is exempt from SEQRA/CEQR review. A Type II action is “a routine and continuing agency administration that does not reorder priorities in a manner that may affect the environment” (6 NYCRR 617.51 [20]). The City respondents argue that the allocation of existing resources by moving inmates within existing jail space in the correctional system is the typical routine administration which is exempt from SEQRA/CEQR review as a Type II action since it merely involves an administrative decision to reutilize existing jail space. They argue that it is within the DOC’s routine administrative discretion to decide how to distribute its inmate population within and among its correctional facilities.

The City respondents in their argument rely upon *Markowitz v Bloomberg* (2 Misc 3d 558, 568 [2003]), which involved the closing of eight firehouses to help the City cope with severe budgetary constraints, in support of their argument that the reopening of the BHOD is merely a “routine or continuing agency administration,” such reliance is well founded as to the reopening but is misplaced when argued as to the expansion of the BHOD. *In Matter of Markowitz* (2 Misc 3d at 568, quoting 6 NYCRR 617.5 [c] [20]), the Supreme Court, Kings County, specifically noted that environmental review would have to be conducted for “new programs or major reordering of priorities that may affect the environment.”

Under SEQRA, an “unlisted action” requires prior environmental review if it “may include the potential for at least one significant adverse environmental impact” (6 NYCRR 617.7 [a] [1]). Such impacts include “a substantial change in the use, or intensity of use, of land” and “the encouraging or attracting of a larger number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action” (6 NYCRR 617.7 [c] [1] [viii], [ix]).

Petitioners contend that the reopening of the BHOD is part of a major reordering of the City’s priorities that cannot credibly be characterized as “routine administration.” Rikers Island they contend, remains the place where the overwhelming majority of City

prisoners are now housed, and the City's plan to reopen and expand the BHOD will constitute a major reordering of priorities from a policy of centralization to one of decentralization of all jail facilities. The court disagrees.

Moreover, SEQRA notes that "[a]ctions commonly consist of a set of activities or steps." SEQRA (6 NYCRR 617.3 [g]) specifies that "[t]he entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it" (*id.*). SEQRA expressly provides that "[c]onsidering only a part or segment of an action is contrary to the intent of SEQRA." SEQRA defines "segmentation" as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing determinations of significance" (6 NYCRR 617.2 [ag]).

In *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporation Vil. of Southampton* (205 AD2d 623, 626 [1994]), the Appellate Division, Second Department, specifically explained that "for the purpose of determining whether an action will cause a significant effect on the environment, the reviewing agency must consider reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are included in any long-range plan of which the action under consideration is a part." It determined that a "segmented review" was improper (*id.*). Similarly, in *Matter of Teich v Buchheit* (221 AD2d 452, 454 [1995]), the Appellate Division, Second Department, held that where the proposed plan was part of an overall plan for expansion, the failure to consider the proposed plan "in the context of the larger plan of which it [wa]s an integral part. . . constituted an improper segmented review."

Here however, this court does not view the reopening of the BHOD as an integral part of the plan to expand the facility. The reopening of the BHOD is not inextricably linked to a plan to expand the prison to double its size and capacity (from housing more than 750 inmates to almost 1,500) despite the City respondents reference to both activities in the same sentence. The opening serves the purpose of increasing housing capacity in the boroughs

while decreasing overall capacity at Rikers Island. The court must consider the actions of the City respondents which has thus far included reopening and not reconstruction.

It is argued by the petitioners that the City respondents now state that the BHOD's reopening is independent of any potential expansion of it, and that no final determination has yet been made on expansion. The City respondents assert that they need to use the BHOD, independent of the proposed expansion, as a holding facility during the Schermerhorn courthouse renovation, and because aging housing units in Rikers Island require the continued availability of inmate housing capacity. The City respondents' claim, however, is contradicted by the City respondents' expansion plan, which is reflected in the DOC's Fiscal 2009 Capital Budget, prepared in May of 2008, that the DOC has allocated "\$240 million for plans to reopen and expand the [BHOD]."

Petitioners argue that the City respondents' attempt to now seek to distinguish between the concepts of "reopening" versus "expanding" the BHOD, is contrary to prior public statements and admissions, which treat these actions as part of one project. They contend that in all of the 770 pages of public statements, interviews, hearings, and internal communications provided to petitioners in response to their FOIL requests related to the reopening and expansion of the BHOD, respondents never once stated an intention to open the jail without the expansion.

Petitioners contend that the City filed a Citywide Statement of Needs in November 2006, which officially announced its plan to open an expanded facility "by adding 960 beds," which would vastly increase the size of the jail. Moreover, the DOC Commissioner Martin Horn has stated unequivocally that the DOC is moving prisoners into the BHOD not for the mere purpose of repopulating the existing structure there, but rather, to begin its process of placing detainees into a larger, expanded facility.

Additionally, the DOC Commissioner Martin Horn testified before the New York City Council on March 13, 2007 that the BHOD "has been closed since June of 2003 at a cost savings to the City because its small size ma[de] it inefficient to operate." He

specified that under the plan which he outlined to them on that day, the DOC “w[ould] expand and reopen the [BHOD] to accommodate 1,479 Brooklyn inmates.” Also, Deputy Mayor Linda Gibbs, in a letter dated August 13, 2008, referred to the City’s plans as one “to reopen and expand the [BHOD],” and noted that “[t]he City remains committed to this plan.” Indeed, as recently as January 6, 2009, the DOC Commissioner Martin Horn reiterated that the City’s plan was to proceed with the \$32 million architectural contract for the BHOD project.

In view of this evidence, the City respondents cannot maintain, that the expansion of the BHOD is not ripe for judicial review while, at the same time, consistently announcing that it is planning the reopening in order to expand the BHOD. The aforementioned public statements and the record evidence herein collectively confirm that there is a more than planning stage in the City’s BHOD expansion plan.

There is also demonstrated here an expansion of the BHOD, which is a phase of a project to ultimately double the size and capacity of the existing structure. The expansion is a part of the City’s new long-range plan to finally decentralize the City’s correctional facilities. Thus the City does not have to conduct an environmental review with respect to its current reopening of the BHOD but must do so with respect to its expansion. To suggest rather that the City respondents have a legally mandated obligation under SEQRA/CEQR to consider the environmental impacts of both the reopening and the expansion together prior to reopening the BHOD is inaccurate. Petitioners argue that the City respondents cannot simply characterize their action as a routine “reopening” of a prison, where it has already been vacated and closed for 5 _ years and where it has outwardly given the public the impression that it would remain vacated. Petitioners point to changes that have occurred in the surrounding neighborhood during the period of the vacatur of the BHOD. Specifically, petitioners note that there has been a significant increase in residential and commercial development in Downtown Brooklyn, with over \$9 billion in private investment and \$300 million in public

improvements underway, and about 14,000 residential units in the pipeline, as of October 2007. They state that this area has been revitalized and is now thriving.

Petitioners point out that during the City's comprehensive 2004 Downtown Brooklyn rezoning initiative, the City made a voluminous record substantiating its 2004 zoning changes for the neighborhood. However, the lone reference in that record to the BHOD was set forth in the Environmental Impact Statement (EIS), which is the pivotal disclosure document for land use actions. The EIS informed the public that the BHOD "has been recently vacated." As the term "vacated" is commonly defined, it means that the City had "give[n] up possession or occupancy," "cause[d]" it "to be empty or unoccupied," "withdraw[n] from occupancy," "surrender[ed] possession," or "le[ft] or go[ne] away" (Dictionary.com Unabridged, based on the Random House Dictionary [Random House, Inc. 2009]). At oral argument, the court requested information from petitioners on what basis they stated that the City had vacated and permanently closed the BHOD. The response provided for the court failed to produce any documentation supporting their allegations. The City defendants made no representation as to its continued closure and in fact the documents and the representation of continued communication with community leaders and politicians would tend to demonstrate an ongoing discussion about reopening and of the fact that the facility was still conducting business although not housing inmates overnight.

Clearly there is absolutely no statement contained in the record pertaining to the 2004 Downtown Brooklyn Rezoning which, in any way, indicates that the City respondents might reopen this vacated facility for inmate population as an active prison nor is there a statement that they would not. Therefore, petitioners' conclusion that it can be argued that the public could only be left with the impression from that 2004 rezoning record that the BHOD had been permanently closed is nothing more than conjecture.

The City respondents argue that the 2004 Downtown Brooklyn rezoning does not discuss the existence of the BHOD because it did not affect the BHOD as the BHOD was outside the rezoned area and its zoning was not changed in any way in 2004. This court agrees. Although the surrounding Downtown Brooklyn neighborhood was discussed in the 2004 rezoning documents submitted to the court, and the City respondents concede that the word “vacated” reflects that the BHOD was unoccupied, it however does not mean that there could be no reoccupation. Those who contemplated investing in the Downtown Brooklyn neighborhood could not have concluded based on a review of the 2004 Downtown Brooklyn Rezoning record that there would not be an open and active jail housing inmates in that neighborhood. Based upon a review of the 2004 Downtown Brooklyn Rezoning record, it could not be logically anticipated as petitioners contend, that this vacated facility would not open and be repopulated without specific documentation and representation from the City respondents.

Petitioners have submitted a redacted affidavit of a Brooklyn developer who states that he was personally told by an employee of the New York City Department of Housing, Preservation, and Development (HPD) that “the BHOD was closed and that it would not reopen.” The developer explains that he relied on the assurances of City officials that the BHOD would remain closed in investing millions of dollars in the construction of a primarily residential building near the BHOD site. There is however no indication or representation that this individual had the authority to bind the City by that statement or to speak for the City in anyway. Petitioners have also submitted affidavits from six residents of buildings in the vicinity of the BHOD. They attest that when they bought apartments near the BHOD site after its closure, real estate brokers had told them that the BHOD was closed and would not reopen, and that they would not have bought their apartments if they had known that the BHOD might reopen. These reliance may be unfortunate but cannot be imputed to the City. Indeed the City respondents argue that these submissions should not be considered by the court since they do not specifically

identify the real estate brokers who made these statements, the developer, or the HPD employee (who it asserts could not speak for the City). The court must agree.

The City respondents claim that the area surrounding the BHOD was already improving before the BHOD closed, and argue that its reopening will, therefore, not have any significant adverse impact on the development in the neighborhood. Respondents argue that the Atlantic Avenue Local Development Corporation's "Master Plan" for development of Downtown Brooklyn in June 2003, only one month after the announcement that the BHOD was closing, included a map of Downtown Brooklyn, in which the area around the BHOD was labeled "The Gap." That Master Plan stated that one of the development goals was to "minimize the 'Gap'," and listed as an example of "Positive Progress on the Avenue" the "[BHOD] closing." The petitioners argument that the BHOD's reopening may have a significant adverse impact on the development in the neighborhood is based on mere speculation and there is nothing in the record that provides any empirical data to substantiate these conclusion.

The City respondents further contend that there is no "environmental" harm related to this lawsuit, but only economic harm, which SEQRA was not designed to protect. This contention is correct. Petitioners claim that the BHOD will cause an alteration in the character of the neighborhood which constitutes a viable claim under SEQRA (*see Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 366 [1986]). This reliance is misplaced as to the reopening of the BHOD.

Additionally, ULURP, established by NY City Charter §§ 197-c, 197-d, and 200, is the required procedure for public review of certain land use categories in New York City. One category of land use action for which ULURP review is required is a "site selection for [a] capital project (NY City Charter § 197-c [a] [5]).

The City respondents contend that preoccupying the existing BHOD up to its currently existing and permitted capacity is not a "site selection for a capital project" that would require going through ULURP review. The City respondents argue that there must

be an acquisition of land or a change in use for ULURP's "site selection of a capital project" provision to apply.

The City respondents' argument is rejected in part. It is not necessary that there be an acquisition of land or a change in use for ULURP's "site selection of a capital project" provision to apply (*see Matter of Gerges v Koch*, 62 NY2d 84, 92 [1984]; *Matter of Greenpoint Renaissance Enter. Corp. v City of New York*, 137 AD2d 597, 601 [1988]). as in this instant case where expansion of a facility is anticipated, ULURP will apply.

The City respondents further argue that the repopulation of the BHOD to existing capacity is not a new City facility nor a "significant expansion" of an existing facility so as to make the Fair Share Criteria Rules applicable to it (*see* NY City Charter § 203[a]; 62 [A] RCNY § 3 [f]). Fair Share Criteria, however, mandate "an open and systematic planning process in which communities are fully informed, early in the process of the City's specific criteria for determining the need for a given facility and its proposed location . . . and the alternatives for satisfying the identified need" (62 [A] RCNY § 2 [c]). The City respondents assert that the Fair Share Criteria apply to the expansion as opposed to a reopening of the BHOD. The court thus finds, that petitioners have demonstrated a likelihood of ultimate success in the merits as to the expansion proposal of the BDOD.

Further, as to the second requisite factor for a preliminary injunction, "irreparable injury means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue" during the pendency of the proceeding (*Chrysler Corp. v Fedders Corp.*, 63 AD2d 567, 569 [1978]). It is "any injury for which money damages are insufficient" (*Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [1992]).

Where, as here, a regulatory regime is implemented to ensure community involvement in government decision-making or to protect the public from potential harm, the government's failure to follow the law, in itself, constitutes irreparable harm to the

community (*see Connor v Cuomo*, 161 Misc 2d 889, 897 [1994]). Government officials must conduct legally mandated reviews and solicit community input as an integral part of the decision-making process in the land use context. These legally mandated obligations are each designed to protect the community and to allow them input and participation on important land use decisions by the City.

In the case at bar, absent a preliminary injunction, petitioners will be irreparably harmed by the commencement of expansion of the BHOD without the City respondents conducting the legally mandated reviews which are designed to protect the community and to allow community participation and review in significant land use actions (*see Matter of Benvenuto v Village of Millerton*, 10 Misc 3d 770, 773 [2005]). Since it is the court's position that the City respondent have made significant plans for a contractor and are intending to proceed with the expansion of the BHOD then the petitioners have demonstrated irreparable harm. This court is not persuaded by the City respondents' contention that the expansion is not ripe for judicial review. "Where the community's role is limited to recommendation, it is essential that it be empowered to make its recommendations at the very beginning of the land use review process before an action is implemented" (*Connor*, 161 Misc 2d at 897). Petitioners should not be deprived of the opportunity for input and to make recommendations on the BHOD expansion project at the very beginning of the review process (*see Environmental Conservation Law § 8-0109* [4]; *Malley of Marino v Platt*, 104 Misc 2d 386, 389 [1980]).

A preliminary injunction is therefore necessary at to the expansion in order to preserve the status quo, during the pendency of this action, since to do otherwise would thwart the very purposes of the legally mandated reviews (*see Matter of Benvenuto*, 10 Misc 3d at 773).

The City respondents argue that there can be no irreparable harm to petitioners because there has been ongoing dialogue with petitioners and the DOC through correspondence and meetings over the course of several years. Despite the fact that it is

undisputed that there was no agreement between the parties it is absolutely clear that there were discussions on the possible reopening of the facility. However, correspondences and meetings that have taken place are, by no means, a substitute for the legally mandated formal review procedures of SEQRA/CEQR and ULURP with respect to the City respondents expansion of this facility.

With respect to a balancing of the equities, the City respondents have clearly demonstrated the City's need to use the facility. The interest of the City to repopulate and the overriding interest of security and the need to save time and transportation of prisoners outweigh the petitioners' interest for the closure of the facility. Thus, there is a showing that respondents will be harmed in a material way by the granting of a preliminary injunction (*see generally Clayton v Whitton*, 233 AD2d 828, 830 [1996]) with reference to the reopening of the facility. As to the matter of the expansion, in the absence of a preliminary injunction, petitioners would be deprived of any opportunity to voice their legitimate concerns about the City respondents' plans for the BHOD to expand this facility to house 1500 inmates. Petitioners would, thus, be excluded from the project planning process and the City respondents would be less likely to fully and fairly evaluate the potential impact of its future plans for the BHOD. Therefore, the balance of the equities lies in petitioners' favor with reference to the City's expansion (*see generally Matter of Lee v New York City Dept. of Hous. Preserv. & Dev.*, 162 Misc 2d 901, 912 [1994]). Based upon all of the above, the court finds that the granting of a partial preliminary injunction is warranted.

Petitioners also seek expedited discovery, pursuant to CPLR 408. Discovery is available in a CPLR article 78 proceeding where the information is within the exclusive possession and knowledge of the respondents (*see Matter of Pignato v City of Rochester*, 288 AD2d 825, 826 [2001]). Furthermore, expedited discovery is warranted where there is ample need for it (*see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285,

302 [2004]). Here, inasmuch as petitioners have demonstrated this need and their request is uncontested by respondents, the granting of such expedited discovery is warranted.

Accordingly, petitioners' motion, for a preliminary injunction, enjoining respondents City of New York (the City) and New York City Department of Correction (the DOC) (collectively, the City respondents), and respondent New York State Commission of Correction (State Commission), and each of their officers, employees, consultants, agents, and designees, and all other persons acting on their behalf or in concert with them from allocating funds for, or beginning construction in connection with the expansion of the BHOD is granted.

Petitioners' motion for a preliminary injunction, enjoining the City respondents from re opening the BHOD and housing any more inmates in the BHOD during the pendency of this litigation, requiring them to remove the approximately 31 inmates who are currently being housed there is denied.

Petitioners' motion, insofar as it seeks expedited discovery, pursuant to CPLR 408, is granted. All other request by the petitioner is denied.

This constitutes the decision and order of the court.

E N T E R,
J. S. C.