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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-167 (Sub-No. 1094)A



CHELSEA PROPERTY OWNERS -- ABANDONMENT -- PORTION OF THE
CONSOLIDATED RAIL CORPORATION'S WEST 30TH STREET SECONDARY TRACK
IN NEW YORK, NY

FRIENDS OF THE HIGH LINE, INC.'S OPPOSITION TO
CHELSEA PROPERTY OWNERS' MOTION FOR AN ORDER AUTHORIZING
ABANDONMENT OF THE HIGH LINE

Chelsea Property Owners wants to demolish an historic 1.45 mile-long elevated rail line in lower Manhattan called the High Line. It cannot do so until it demonstrates that it has satisfied an ICC-imposed condition to indemnify Conrail -- the High Line's owner -- for any demolition costs that exceed \$7 million. Chelsea Property Owners' latest draft demolition agreement does not satisfy the surety condition; even if it did, federal law may nevertheless prevent demolition of the High Line because the line is eligible for inclusion on the National Register of Historic Places. The motion for an order authorizing abandonment should be denied.

BACKGROUND

In 1989, a group of property owners and developers with economic interests adjacent to the High Line, known as the Chelsea Property Owners ("CPO"), asked the Interstate Commerce Commission to authorize adverse abandonment of the High Line over Conrail's objections. See Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corp.'s W. 30th St. Secondary Track in New York, NY, 8 I.C.C.2d 773 (1992). In 1992, the Commission conditionally authorized abandonment of the High Line, requiring CPO to "post an

appropriate surety bond or similar security to ensure payment of any demolition costs exceeding \$7 million.” Id. at 792.¹

For years, CPO and Conrail tried, but failed, to agree to financial terms that would allow CPO to meet the surety condition, consummate the abandonment, and bring down the High Line. In 1999, CPO asked the Board to authorize immediate abandonment, over Conrail’s continuing objections, on the grounds that CPO had met the Commission’s surety condition. It tendered a draft indemnity bond and an unsigned contract with an entity willing to demolish the High Line for less than \$7 million. See Docket No. AB-167 (Sub-No. 1094)A, Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corp.’s W. 30th St. Secondary Track in New York, NY, Decision served July 14, 1999, p. 3. The Board denied CPO’s request, finding that the tendered documents did not satisfy the condition imposed in 1992 because the proposed indemnification commitment was “subject to both definite, substantial exclusions and indefinite, potentially substantial exclusions.” Id. at 5. In particular, CPO’s 1999 proposal excluded indemnification for the costs of removing portions of the High Line that pass over or through buildings and for the expenses of complying with any environmental or other laws. Id.

CPO continued its efforts to satisfy the 1992 surety condition. By late 2001, CPO had drafted a new demolition agreement, to be signed by the City of New York, other governmental agencies, the railroad interests, and a number of other parties. Among other things, this latest draft agreement states that the parties will condition closing on the purchase of

¹ The terms of the easement pursuant to which it operated the High Line require Conrail to absorb the costs of demolishing the line. See Docket No. AB-167 (Sub-No. 1094)A, Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corp.’s W. 30th St. Secondary Track in New York, NY, Decision served Aug. 29, 2002, p. 1.

environmental liability insurance that will name the railroad interests as insureds. See CPO Motion, Ex. 1, at 8.

On August 14, 2002, CPO presented its latest draft demolition agreement to the Board. In its motion for an order authorizing abandonment of the High Line, CPO asks the Board to find that the draft agreement satisfies the surety condition the Commission imposed in 1992 and to authorize Conrail, "upon title closing under the Settlement Agreement," to abandon the High Line. CPO Motion at 9.

On August 16, 2002, Friends of the High Line, Inc. ("Friends") filed a petition to reopen this proceeding on the grounds that new evidence and changed circumstances show that the Commission's consideration of impacts on historic structures and on the environment, conducted 13 years ago, is outdated and inaccurate. See Docket No. AB-167 (Sub-No. 1094)A, Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corp.'s W. 30th St. Secondary Track in New York, NY, Friends of the High Line, Inc.'s Petition to Reopen the 1992 Abandonment Decision, filed Aug. 16, 2002. In its petition to reopen, Friends explained that the Board must consider evidence showing that the High Line is an historic structure that merits inclusion in the National Register of Historic Places. Id. at 15-27. Friends also described significant developments that cast doubt on the results of the Commission's earlier environmental study, including evidence that partial demolition of the High Line would have environmental impacts that the Commission did not consider in 1992. Id. at 27-40.

In a separate court proceeding, the City Council of the City of New York, along with Friends, the Manhattan Borough President, and others, sought a declaratory judgment that CPO's latest demolition proposal is subject to New York City's Uniform Land Use Review

Procedure ("ULURP") and that, until the proposal undergoes ULURP review, the City's participation in the proposed agreement is unlawful. The New York Supreme Court for New York County agreed. Earlier this year it issued an order holding that the City must complete the ULURP review process before it may issue permits or otherwise authorize demolition. New York City Council v. City of New York, 2002 WL 554192, No. 122270/01 (N.Y. Sup. Mar. 12, 2002), slip op. at 7 (attached as Exhibit A). CPO has appealed this ruling. Oral argument is scheduled for October, and Friends understands that the Appellate Division is likely to issue its decision no sooner than late this year or early next year.

ARGUMENT

The draft demolition agreement CPO has presented to the Board with its motion does not satisfy the 1992 surety condition. This proposed agreement cannot be fully executed, because a court has ruled that the City of New York's participation in the demolition process is unlawful. In addition, the draft agreement on its face does not ensure that the railroad signatories will be liable for only \$7 million in demolition costs, because it does not contain adequate protections against environmental liability. Moreover, destruction of the High Line may be prohibited by the National Historic Preservation Act. CPO's motion should therefore be denied.

1. CPO's Draft Agreement Cannot Be Fully Executed. The version of the draft demolition agreement that CPO attached to its motion is not signed by anyone. The motion makes no representations about who (if anyone) has already signed the document, who (if anyone) has agreed to sign, or who (if anyone) has refused to sign. Thus, it is uncertain whether the proposed agreement will ever become effective.

In fact, it is clear that at this time the City of New York cannot comply with obligations under the proposed agreement, because the New York Supreme Court has ruled that the City's participation in the demolition project is unlawful. The High Line crosses public streets and sidewalks and runs over two pieces of property owned by the City. See New York City Council v. City of New York, 2002 WL 554192, slip op. at 2, n.3. The court held that the City must receive ULURP approval before participating in the demolition of the High Line. See id., slip op. at 7. The court noted that "there are few recent Manhattan projects which so appropriately fit within the broad purpose of ULURP to provide for public review of land use projects that will have a 'significant impact on the community' . . . and ULURP review for this project is required under the terms of the City Charter." Id.

The ULURP review process "allows the community to measure the impact of the proposed land use and, where possible, identify alternatives." Id., slip op. at 2 (citations omitted). Under this process, the City must seek the input of the community surrounding the High Line.² In addition, the City Council must approve the City's participation in the demolition project. New York City Charter § 197-d (Exh. G to Friends' Petition to Reopen). There are serious doubts, however, about whether the current City Council will approve the City's participation in the demolition agreement. In April 2001, the City Council passed a unanimous resolution opposing demolition of the High Line and asking the Governor of the State of New

² Many members of the community oppose the demolition project. Nine of the entities or individuals who own property directly adjacent to the High Line are opposed to demolishing the structure, and have opted out of CPO's demolition plan. See Friends' Petition to Reopen at 39-40 & n.124 (citing Ex. Q of CPO's Settlement Agreement). In addition, numerous other individuals, citizens groups, and elected officials are opposed to demolition. See, e.g., id. at 17-25.

York, the Mayor of the City of New York, and the Metropolitan Transit Authority “to take all necessary steps to obtain a Certificate of Interim Trail Use from the United States Surface Transportation Board in connection with ‘railbanking’” the High Line. See Friends’ Petition to Reopen at Exh. E.³ Just this past summer, Gifford Miller, the Speaker of the City Council, told a group of preservationists that he and the City Council had “personally urged Mayor Bloomberg and the members of his administration to make saving the High Line a top priority” Id. at Exh. F.

At a minimum, CPO’s motion is premature. Without ULURP approval and the City Council’s permission to proceed, CPO cannot obtain all the necessary signatures and finalize its draft demolition agreement. Any order the Board were to issue now would be merely a second conditional abandonment order, this one conditioned on either a reversal of the New York court’s ULURP decision or on satisfactory resolution of the ULURP process. In these circumstances, the Board should deny the motion on the ground that CPO has failed to satisfy the 1992 surety condition.

2. The Agreement Lacks the Necessary Protections Against Environmental Liability. The substance of CPO’s draft demolition agreement also falls short of what is required under the Commission’s 1992 decision, particularly with respect to environmental liability.⁴

³ On April 7 of this year, Mayor Bloomberg commissioned a Feasibility Study to help the City determine whether to support CPO or to support “efforts to convert the structure into an elevated public greenway.” Id. at Exh. A.

⁴ Apart from the issue of environmental liability, it remains uncertain whether the complicated arrangements described in the proposed agreement effectively ensure that the liability of the railroad interests for the costs of demolition will be limited to \$7 million. CPO has not submitted any opinions of counsel confirming this point.

CPO represents that the parties have agreed to buy "an environmental insurance policy in the amount of \$30 million naming Conrail and the other Railroad Signatories as insureds respecting environmental damage, if any, to properties bordering . . ." the High Line. CPO Motion at 6. It appears, however, that no such insurance has yet been purchased. Nor does CPO's motion or the proposed agreement contain assurances that the parties have identified an underwriter willing to sell such a policy, or that any such underwriter would write a policy containing terms satisfactory to the railroad interests.⁵

Moreover, at this point, it is simply unclear what the environmental mitigation costs will be and whether they may exceed the limits of the proposed environmental insurance policy. As explained in Friends' petition to reopen, the ICC's 1989 environmental study is seriously outdated. A new environmental assessment could create substantial new financial obligations. It is simply premature to conclude that, assuming the proposed insurance policy is put in place, the policy will ensure that the liabilities of the railroad interests will not exceed \$7 million.

⁵ Exhibit N-3 to the draft agreement does not contain the policy language, so it is unclear what the terms will be.

It has become more difficult for New York City property owners to obtain insurance coverage since the September 11 attacks. "Insurers in Manhattan are not writing new policies and when they do are limiting risks and raising premiums as much as 300 percent . . ." Katherine Roth, Getting Insured in New York Tougher, AP Online, Aug. 22, 2002. This affects environmental insurance coverage as well as building insurance coverage, in part because of the rising cost of reinsurance on high-risk policies since last year. See Robert W. Mitchell, Buyers Brace for Hard Pollution Market, National Underwriter Property & Casualty-Risk & Benefits Management, Oct. 22, 2001 ("While the environmental market had already been on a downswing in terms of capacity . . . the Sept. 11 disaster increased the pace of the decline . . . [and] environmental insurance premiums [are] at 20-to-35 percent above rates last year . . .").

The Board previously refused to issue a final abandonment order for the High Line because CPO failed to submit an agreement that adequately protected the railroad interests from environmental liability. See Chelsea Property Owners, Decision served July 14, 1999, p. 3. For the same reason, CPO's current motion should be denied.

3. Federal Law May Prohibit Demolition of the High Line. As shown in the petition to reopen that Friends has filed in this proceeding, the Commission's assumption that demolishing the High Line would promote economic development, and its conclusion that no public use of the property is feasible, are outdated and must be re-examined. See Friends' Petition to Reopen at 28-36. In addition, since 1992 it has become clear that the High Line is eligible for inclusion on the National Register of Historic Places; furthermore, the High Line passes directly through several structures that are either already listed on the National Register or are eligible for inclusion on the Register. See id. at 15-26. In these circumstances, the Board should reexamine whether federal law permits it to issue a final abandonment order that provides the basis for destruction of the line.

It makes no sense to grant CPO's motion in light of the questions the Board must consider in connection with the petition to reopen. Should the Board reopen this proceeding, as we believe it must, it will take time for the Board's staff to review the many historic preservation and environmental issues Friends has raised. We believe it is likely that, upon conclusion of such a review, the Board will determine that federal law prohibits demolition of the High Line.

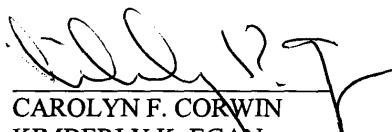
The uncertainty that surrounds CPO's draft demolition agreement itself is sufficient reason for the Board to stay its hand. The prospect that the Board will conclude that

demolition of the High Line would be contrary to federal law simply reinforces the conclusion that CPO's motion should be denied.

CONCLUSION

CPO has failed to make an adequate showing to support an order authorizing immediate abandonment of the High Line. At a minimum, CPO's failure to show that its demolition proposal will receive ULURP approval (or will not be subject to ULURP review), its failure to show that the proposed demolition agreement will adequately protect the railroad interests from environmental liability, and the prospect that federal law may prevent demolition of the High Line render its motion premature. The motion should be denied.

Respectfully submitted,



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September 6, 2002

Certificate of Service

I, Kimberly K. Egan, certify that on this 6th day of September, 2002, I caused a copy of the Friends of the High Line, Inc.'s Opposition to Chelsea Property Owners' Motion for an Order Authorizing Abandonment of the High Line to be served by first class mail on the parties listed below:

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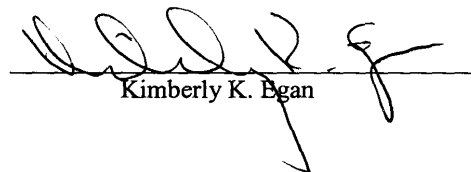
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Slip Copy
 2002 WL 554192 (N.Y.Sup.), 2002 N.Y. Slip Op. 40062(U)
 (Publication page references are not available for this document.)

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Supreme Court, New York County, New York.
 I.A.S. PART 8.

NEW YORK CITY COUNCIL, C. Virginia
 Fields, in her official capacity as
 Manhattan Borough President, Friends of the
 Highline, Spears Building
 Condominium, Zazel Loven, Paula Cooper,
 Rowann Gilman, Sara Fitzmaurice, and
 Rod Durso, Petitioners,

For a Judgment Under Article 78 of the CPLR
 v.

CITY OF NEW YORK, Rudolph Giuliani, in his
 official capacity as the Mayor of
 the City of New York, New York City Department
 of Buildings, Respondents.

Chelsea Property Owners Association and Edison
 Mini-Storage Corporation,
 Intervenor-Respondents.

Index No. 122270/01

Dated: March 12, 2002

City council and property owners brought article 78 proceeding against city, challenging Department of Building's issuance of demolition permit, seeking order declaring city's uniform land use review procedure was applicable to any proposal to demolish or alter elevated railway, and seeking order enjoining city from obtaining such permit. The Supreme Court, New York County, Lebedeff, J., held that: (1) agreement under which railway was transferred to city was acquisition by city of real property, warranting review under city's uniform land use review procedure, and (2) agreement under which city would demolish railway involved a project necessitating changes in the city map, warranting review under city's uniform land use review procedure.

Petition granted in part.

[1] MUNICIPAL CORPORATIONS ☞224

268k224

Agreement under which railway was transferred to city by railroad was an agreement for acquisition by city of real property, within the meaning of city charter, defining real property as all lands, including easements, warranting review of agreement under city's uniform land use review procedure; railway was

an easement when acquired, regardless of the future use of such property under agreement.

[2] ZONING AND PLANNING ☞159 414k159

Agreement under which city would acquire elevated railway from railroad and then demolish railway involved a project necessitating changes in the city map, warranting review of agreement under city's uniform land use review procedure; pursuant to statute, when railway was built, the railroad was required to file a plan for the railway to be incorporated into the city map, so that removal of the railway would necessitate changes in city map.

[2] ZONING AND PLANNING ☞191 414k191

Agreement under which city would acquire elevated railway from railroad and then demolish railway involved a project necessitating changes in the city map, warranting review of agreement under city's uniform land use review procedure; pursuant to statute, when railway was built, the railroad was required to file a plan for the railway to be incorporated into the city map, so that removal of the railway would necessitate changes in city map.

DIANE A. LEBEDEFF, J.:

This Article 78 proceeding brought against the City of New York (the "City") seeks an order declaring the City's Uniform Land Use Review Procedure ("ULURP"), a community review process defined in New York City Charter ("Charter") § 197-c, is applicable to any proposal to demolish or alter the Highline, an unutilized elevated railway which extends down the west side of Manhattan from 34th Street to Gansevoort Street. As ancillary items of relief, pending completion of the ULURP process, petitioners ask that respondents be enjoined from applying for, or approving, any permits to demolish or otherwise alter any portion of the Highline, as well as that the Department of Buildings be ordered to revoke any previously issued demolition permit, and to refrain from issuing any new demolition permit.

Petitioners are the New York City Council, [FN1] Manhattan Borough President C. Virginia Fields, Friends of the Highline, Spears Building Condominium, and five individual property owners or residents who live or work within sight of the

(Publication page references are not available for this document.)

Highline. Petitioners primarily support community involvement in the examination of all alternate treatments of the Highline, including possible preservation and conversion of the area into a public space under the Rails-to-Trails Act, if applicable (see, 16 USC § 1247[d]).

FN1. Respondents contend that petitioner City Council lacks the capacity to bring this proceeding, because it did not vote to authorize the litigation. However, the Speaker of the City Council has the power to authorize the commencement of a lawsuit in the name of the City Council (*Council of the City of New York v. Giuliani*, 183 Misc.2d 799, 705 N.Y.S.2d 801 [Sup. Ct. Queens Co. 1999]). The current Speaker of the City Council, Gifford Miller, avers that in December, 2001, then-Speaker Peter Vallone authorized the commencement of this proceeding, and that Mr. Miller has authorized the continued litigation of this proceeding.

Respondents are the City, former Mayor Giuliani, in his then official capacity, and the New York City Department of Buildings. The intervenor-respondent Chelsea Property Owners Association ("CPO") is a consortium of property owners whose property underlies, surrounds or is adjacent to the Highline, including Edison Mini-Storage Corporation; they contend that the Highline is a dilapidated, dangerous nuisance that can be demolished with absolute safety and they label proposed alternative uses of the Highline as "pipe dreams." They favor demolition of the elevated structure and subsequent private development of their property.

The City of New York recently reached an Agreement [FN2] under which all property owners of servient estates, including the City of New York, [FN3] would receive from New York Central, the current owner of the Highline, a surrender of the easement encumbering their property, and the segment of the Highline that is over, or runs through, their property. The Highline could then be demolished, and the City streets and the other servient properties beneath the Highline restored. The Agreement requires the parties thereto to share the cost of any demolition, with New York Central to contribute \$7 million.

FN2. The Agreement so referenced is a contract entitled Agreement for Voluntary Abandonment and for Charitable Contribution (the "Agreement"). It was

entered into on December 20, 2001, and was delivered to an attorney for New York Central, which has remained the title-holder of the Highline. The parties to the Agreement are the City (and several agencies), New York Central Lines, LLC ("New York Central"), which is the owner of the Highline, and Conrail Inc. ("Conrail"), Consolidated Rail Corp., CSX Corporation ("CSX") and a subsidiary thereof, CSO, and 22 private owners of property over, or through which, the Highline runs pursuant to easement in favor of the railroad companies.

FN3. In addition to the public streets and sidewalks traversed by the Highline, the City owns two properties, one on Gansevoort Street, and a second on Little West 12th Street, that are under the Highline.

In order that there be a public examination and resolution of the future treatment of the Highline, Petitioners seek invocation of the ULURP review process. Petitioners maintain that the City was required to submit the Agreement to the ULURP procedures because the Agreement has three features which require ULURP treatment: (1) the Agreement entails "[c]hanges in the city map" as specified in Charter § 197-c (1) (first cause of action); (2) the Agreement provides for the "[a]cquisition by the city of real property" covered by Charter § 197-c (11) (second cause of action); and (3) the Agreement provides for "[i]mprovements in real property the costs of which are payable other than by the city pursuant to section two hundred twenty" under Charter § 197-c (7) (third cause of action).

ULURP requires that, with regard to twelve specified categories of action, any "applications by any person or agency for changes, approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure" involving the Department of City Planning, affected community boards, affected borough presidents, the City Planning Commission, and the City Council (Charter § 197-c [a], and see subdivisions [b] through [m]). "[T]he purpose of such review is to identify, at the earliest possible stage, those activities that will have a significant impact on the community. A ULURP review allows the community to measure the impact of the proposed land use and, where possible, identify alternatives" (*Ferrer v. Dinkins*, 218 A.D.2d 89, 93,

635 N.Y.S.2d 965 [1st Dept. 1996], citations omitted; see, generally, State Charter Revision Commission for New York City, "Planning for Land Use Recommendations" [March 26, 1975], and *Starburst Realty v. City of New York*, 125 A.D.2d 148, 157, 512 N.Y.S.2d 60 [1st Dept. 1987], and *Orth-O-Vision, Inc. v. City of New York*, 101 Misc.2d 987, 1005, 422 N.Y.S.2d 781 [Sup.Ct.N.Y.Co.1979].

The resolution of competing contentions concerning the applicability of ULURP is governed by well-settled principles of statutory interpretation. The court must "begin with the plain meaning of the words used in the statute (see, *Giuliani v. Hevesi*, 90 N.Y.2d 27, 39, 659 N.Y.S.2d 159, 681 N.E.2d 326 [1997]). Then, in giving effect to these words, 'the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to "defeat the general purpose and manifest policy intended to be promoted" ' " (*Council of City of New York v. Giuliani*, 93 N.Y.2d 60, 68-69, 687 N.Y.S.2d 609, 710 N.E.2d 255 [1999], quoting *People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313 [1937]).

Background

The Highline starts at West 34th Street between 11th and 12th Avenues, proceeds down 12th Avenue to 30th Street, runs due East along 30th Street to 10th Avenue, carves a straight line down 10th Avenue through Clinton (formerly known as Hell's Kitchen) and Chelsea, and thereafter bends to follow the inward curve of the waterfront from 18th Street until it terminates at Gansevoort Street in the Meat Market District of Greenwich Village. Along its entire length, it is two blocks or less away from the newly redeveloped and still evolving Hudson River riverbank. The Highline is 1.45 miles long and 30 to 60 feet wide.

The Highline has its historical roots in a railroad grade crossing elimination process necessitated by the development of the automobile, which was explained in *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565 (1930), as follows:

"The public policy of the state of New York, as expressed in the Constitution and in statutes, is to abolish the grade crossings of steam railroads. The enormous increase in the amount of traffic upon the highways, due to the advent of the automobile, calls for some action in behalf of the public Welfare to reduce the peril and the danger

occasioned by the meeting of the tracks and the street. While realizing the necessity for a change, the people of this state also recognize that it would be impossible and impracticable for the railroads to reconstruct these crossings so as to run over or underneath the highways at their own expense. The people have evidenced a willingness to share the burden, by adopting in 1925, amended in 1927, an amendment to the state Constitution [authorizing \$300 million in state debt for such eliminating street level railroad crossings]." (253 N.Y. at 348, 171 N.E. 565.)

Subsequently, New York City's railroad crossings, and the procedure for their elimination, specifically was addressed by the legislature between 1926 and 1929:

"Following this constitutional amendment, the Legislature passed chapter 510 of the Laws of 1926, superseded by chapter 677 of the Laws of 1928, amended by chapters 431 and 681 of the Laws of 1929, to be known as 'New York City Grade Crossing Elimination Act.' ... All the crossings are not to be eliminated at once, but the work is to proceed gradually by the selection of certain crossings, which may be changed during the calendar year, on application of the board of estimate of the city. Notice of the proposed action of the Transit Commission in ordering these changes is to be given under the terms of the act to the railroads affected and also to any person or persons deemed by the commission to be interested in the proceeding. The Transit Commission shall direct how the elimination shall be made, and shall approve of the contracts for, as well as supervise the construction of, the work." (253 N.Y. at 349, 171 N.E. 565.)

Pursuant to these provisions, in 1934, as a result of New York Central's West Side Improvement Project, Manhattan's West Side Line became a 13-mile long elevated rail line at a cost of \$110 million, a portion of which was paid with City and New York State funds (see, Petitioners' Exhibit B, and the New York City Grade Crossing Elimination Act, L. 1928, Ch. 677). The elevated track ran to and through buildings and warehouses, without disrupting street traffic, and reduced danger to pedestrians and motorists. The project eliminated 105 street crossings and added 32 acres to Riverside Park.

By the mid-1970s, the elevated track was no longer regularly used for freight service, and, in 1982, Conrail, the then-owner of the line, eliminated all the stations and facilities on the line. In 1989, the Chelsea

Property Owners Association ("CPO") commenced an adverse abandonment proceeding before the Interstate Commerce Commission ("ICC"; see *Chelsea Property Owners-- Abandonment-- Consolidated Rail Corp.*, 7 I.C.C.2d 991 [1991]). Generally, in such a proceeding, property owners with a reversionary interest in a rail line seek the issuance of an abandonment certificate, over the objections of the railroad, so as to allow local or state condemnation proceedings, after which the encumbrance on the property can be removed.

The ICC found that the Highline was no longer used as a commercial rail line, noted that no one had proposed any other alternative public use, and ordered Conrail to abandon the line on the condition that the line not be demolished until the CPO posted a surety bond to ensure the payment of any demolition costs that exceeded \$7 million. The ICC's decision was affirmed on appeal in 1994 (*Consolidated Rail Corp. v. Interstate Commerce Commn.*, 29 F.3d 706 [D.C.Cir.1994]). To date, CPO has not posted the required security bond, and, accordingly, the Surface Transportation Board, an independent regulatory agency and successor to the ICC's powers on railroad abandonment issues, has not issued a certificate of abandonment.

In 1997, CSX and Norfolk Southern Corporation acquired Conrail, and, in 1999, CSX acquired the operating rights to the Highline. In April of 1999, the City sued Conrail and other railroad entities to compel repair to the Highline (*The City of New York v. Conrail, Inc.*, 99 Civ. 2982 [MBM]); in the same month, several of the property owners sued the same entities for the same purpose (*Edison Mini-Storage Corporation v. Conrail, Inc.*, Sup. Ct. N.Y. Co., Index No. 10817/99), which matter was removed to federal court.

In 1999, the City and the New York City Economic Development Corporation started negotiations on a plan for "abandonment and demolition" of the Highline, which concluded with the agreement which is the subject of this litigation (Affidavit of Joseph T. Gunn, Assistant Corporation Counsel, para. 1). In late 2001, the City and over 20 private and public landowners reached an agreement under which all property owners of servient estates would receive from New York Central the segment of the Highline structure above or within their property and the easement encumbering their property (see Answer, Exhibit A, Exhibit G-2 to the Agreement). The Agreement cannot close for at least 121 days after it

has been signed and delivered, and several conditions must occur before closing.

Petitioners, along with other community groups and public officials, have urged that the Highline should become a public space. The possible public use of the Highline as a pedestrian promenade with gardens, walking paths and bike paths, similar to the Promenade Plantée in Paris, a former elevated rail viaduct near the Bastille opera house (see, Petitioners' Exhibit X), was endorsed by a Resolution of the City Council passed on July 26, 2001, and supported by Representative Jerrold Nadler and State Senator Thomas K. Duane (Petition, Exhibits G, H and K). Indeed, every one of the seven Democratic and Republican candidates in the recent mayoral primaries and election, have opposed demolition of the Highline (see, Petition, Exhibits D, F, and H-R). For example, Mayor Michael R. Bloomberg, when a candidate, stated that the Highline offered "opportunities ... as a catalyst for urban planning of the highest calibre" and that "option[s] must not be removed from consideration prematurely" (Petition, Exhibit F). The Petitioners also urge that the demolition proposed by Respondents would endanger the structural integrity of nearby buildings (see, Petition, Exhibit C).

No one doubts that if the Highline were to be eliminated, the adjacent buildings and areas would experience renovation and new construction, and--most significantly--entirely new uses and occupancies would become possible. Respondents wish to engage in such development free of ULURP review, while Petitioners, who are not attempting to maintain the *status quo*, seek to invoke the urban planning process with its opportunity for community input in order to reach a fully considered and publicly acceptable treatment of the Highline. Either alternative--private development or planned development based upon the results of a public review process--will produce an outcome charting a new course for land use and development of a large area of Manhattan.

"Real Property" and ULURP

[1] Because ULURP review is mandatory only when an issue involves "the use, development or improvement of *real property* subject to city regulation" (Charter § 197-c [a]; emphasis added), and because one type of project which calls into play ULURP review is a proposal involving the "[a]cquisition by the city of *real property*" (Charter § 197-c [a][11]; emphasis added), the first step in

approaching the arguments raised is to focus upon the City Charter's definition of the term "real property." The parties disagree as to whether "real property" is involved in the transfer to the City of (1) the legal acquisition and then extinguishment of New York Central's easement over such properties and public space, and (2) the possessory rights to the physical Highline itself above two City-owned properties and over City-owned streets and sidewalks.

The general definition section of the City Charter defines "real property" simply as a term which "includes real estate, lands, tenements and hereditaments, corporeal or incorporeal" (Charter § 1150 [12]). In relation to capital budget projects, the Charter repeats and expands upon this definition of "real property" as follows:

"all lands and improvements, ... all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and right, interest, privilege, easement and franchise relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise." (Charter § 210 [8]; emphasis added.)

A plain language interpretation of these statutes leads to the conclusion that the easements are, as a matter of law, "real property" within the statutory definitions.

As to the easements, they are clearly "real property" within the Charter definition. The term "incorporeal hereditament" embraces an "intangible right in land, such as an easement" (Black's Law Dictionary, p. 730 [7th Ed. 1999]). Other relevant City Charter language, as quoted above, is consistent with such an interpretation. Because the ULURP review is triggered by an "acquisition" without limitation on the disposition of such property, it does not matter that, following such acquisition, the easement is extinguished by merger of the dominant and servient interests (see, as to merger generally, *Alfassa v. Herskowitz*, 239 A.D.2d 307, 657 N.Y.S.2d 1003 [2d Dept. 1997]). Respondents' desire to ignore that an easement must be acquired before it is merged, while an understandable litigation posture, is contradicted by the Agreement's recital that the easements will be "conveyed to all owners of the servient properties" and that the New York Central and Conrail will "convey at the closing of title ... the easements and the Highline" (p. 4 and p. 5, most capitalizations removed).

Nor is the lease termination analogy posed by

Respondents sufficiently comparable to defeat the conclusion reached here. Respondents posit that, if ULURP review were required here, ULURP procedures would have to be followed every time a leasehold ends with surrender. Respondents' contention fails to recognize the typical pattern that, in the ULURP review of a lease and its essential terms (Charter § 197-c [a][10]; *Matter of Dodgertown Homeowners Assoc., Inc. v. City of New York*, 235 A.D.2d 538 [2d Dept. 1997]), such terms generally include termination provisions and address the disposition of improvements. Here, by contrast, no aspect of the proposed transaction has ever been approved pursuant to ULURP and this court does not find it necessary to opine on the result which might be reached by another court faced with a case involving a lease surrender where the lease had not received ULURP review.

As to the elevated railway, because the law as to easements is so explicit, the court does not find it necessary to consider the more abstract question of whether the Highline, without regard to easements, is "real property." If the Highline becomes a capital budget project, work on the Highline clearly would appear to fit within the capital budget definition of "real property," which includes "all lands and improvements" (Charter § 210 [8]; emphasis added).

For the purposes of this cause of action, the existence of the easement is sufficient. That the Highline exists and would be demolished merely adds a compelling feature to the issues posed herein regarding ULURP review (see, *Council of the City of New York v. Giuliani*, *supra*, 183 Misc.2d at 799, 705 N.Y.S.2d 801, surrender of facility to City, for purpose of demolition, subject to ULURP). Again, that a proposal would call for demolition of such real property is not determinative, because "acquisition of real property" triggers ULURP review, regardless of the use to which the transferred real property will be put. Further, the practical importance of combining consideration of the easements and the Highline is underscored by the Agreement's recital that the property owners "believe the value of their respective Servient Properties (other than the public streetbeds constituting a portion of the City Servient Properties) would be substantially enhanced ... [if] the easements are conveyed ... and the Highline is thereafter demolished or removed" (p. 4).

Based on the foregoing, the Court concludes that the Agreement provides for the City's acquisition of real property, as that term is defined by applicable law,

and, accordingly, that the Agreement is subject to the provisions of ULURP.

The City Map and ULURP

[2] Petitioners also assert that the Agreement and possible Highline demolition involve a project necessitating "[c]hanges in the city map," which is another category for which ULURP review is mandated by the City Charter (Charter § 197-c [a][1]; see also Charter § 199, providing, in subdivision a, a "project affecting the city map and no addition to or change in the city map" or, in subdivision b, "a proposed addition to or change in the city map" is subject to review under the ULURP provision). The parties debate whether the Highline is an actual feature of the City Map, such that demolition of the Highline necessarily would involve a change in the City Map.

On this point, it is necessary to emphasize that there is no single City Map continuously updated by a diligent governmental map maker. Rather, the City Map is a compilation of thousands of maps filed in the offices of the Borough Presidents, the City Department of Transportation, the City Planning Department, and other governmental offices.

As relevant here, since at least 1901, the governing laws have permitted the private submission of maps for inclusion in the City Map, but such submissions generally cannot be incorporated officially into the City Map until approved by the relevant lead agency, the identity of which has changed over the years, as explained in *DiBiasi v. City of New York*, 19 A.D.2d 323, 327, 242 N.Y.S.2d 942 (2d Dept.1963), which is the leading decision comprehensively detailing the City Map process and its history. The construction of the Highline was done pursuant to chapter 677 of the Laws of 1928, which contained a special provision, section 5 (5), mandating the filing of a map of the Highline without such City approval by the then lead map agency, the Board of Estimate and Apportionment:

"[u]pon entry of any order by the [transit] commission approving the [the final elevated crossings], any change in the location of the railroad shown upon the enlarged plan, and any change in the lines or grades or both of any street, avenue ... or place shown upon the enlarged plan, shall be deemed to be duly authorized and the map or plan of the city shall be deemed to have been changed accordingly without any further action on the part of the city or such railroad

corporation. The original of such enlarged plan shall remain on the files of the commission and copies thereof certified by the secretary of the commission shall be filed with the board of estimate and apportionment of the city" (Emphasis added.)

That the filing was done is demonstrated by a set of documents entitled "Plans and Profiles Prepared Pursuant to Chapter 677 of the Laws of 1928, as Amended, for the Alteration of the Highway-Railroad Grade Crossings of the New York Central Railroad Company" ("the Plan"), bearing proof of filing with appropriate agencies, portions of which appear at petitioners' Exhibit U. As this recital makes clear, there was a pre-existing City Map and the legislature directed the filing of the Plan to be a part of the City Map, while dispensing with the need for local officials to subject the Plan to their approval. The Plan remained on file in 1977 with the city map documents [FN4] and there is no assertion that it is not on file today.

FN4. Anthony Gulotta, a licensed professional engineer, who worked for and with the City for 32 years, including serving as Consulting Engineer to the Manhattan Borough President and Chief Engineer to the City Department of Transportation, avers that, when he worked for the Manhattan Borough President, he reviewed every change made to the Map for Manhattan since 1811, and inventoried every individual map that comprised the Map for Manhattan, including the maps referenced here, which plainly show the Highline.

Respondents urge that the Plan is merely "informational." This contention ignores both that the Plan was filed pursuant to a specific legislative direction and that the 1989 Charter provides that the "city map is hereby continued" (Charter § 198 [a]).

Absent some indisputable legal authority supporting removal the Plan from inclusion in the City Map, the Plan remains a part of the Map (see, McKinney's Statutes § 381 [1991], "Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect"). No matter how worthy of general respect might be the views of Robert Gochfeld, a supervisor in the Technical Review Division of the City Department of Planning, who takes the position that the Highline is not a proper feature for inclusion in the City Map, his

lay views are not a legal basis for disregard of the underlying legislative directive.

In closing on this point, it must be noted that in stating the features which are mandated to be on the City Map, Administrative Code of the City of New York § 25-102, in relevant part, requires New York City to keep a city map which includes "all parks, playgrounds, streets, courtyards abutting streets, bridges, tunnels and approaches to bridges and tunnels," as well as streets. There is legal support for the argument that the Highline is one of those physical structures which is required to be portrayed on the City Map, i.e., a bridge. The Court of Appeals has determined that an elevated railway, used only for railroad traffic and passing over a street, is properly classified as a "bridge" (*People ex rel. Lehigh Valley Ry. Co. v. Woodworth*, 296 N.Y. 288, 290, 292, 73 N.E.2d 26 [1947]). This authority gives some support to a view that the passage of the current Charter provision using the term "bridge" might well embrace an elevated railway, because of the general principle of statutory construction that "[r]ules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires" (*Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 355, 171 N.E. 565 [1930]).

Given the foregoing, the court determines that the provisions of ULURP are applicable to the proposal to demolish the Highline and the determination to forego ULURP review was undertaken without "lawful procedure" and was an "error of law."

Projects Paid by Other Than New York City

The third cause of action rests upon the requirement that ULURP processes must be applied to "[i]mprovements in real property the costs of which are payable other than by the city pursuant to section two hundred twenty" (Charter § 197- c [7]). However, Charter § 220 pertains only if an owner makes application for City Council authorization of a proposed improvement and the "work [that] shall be done for the account of or at the sole cost and expense" of persons other than the City (Charter § 220 [2]).

Here, no owner has made such application and the

Agreement provides that the City will bear a portion of the cost of demolishing the Highline. Accordingly, this ULURP provision is found to be inapplicable and this third cause of action is severed and dismissed.

Conclusion

For the reasons given above, the petition will be granted to the extent that ULURP review is directed to proceed under the first and second causes of action. It is the determination of this court that the decision to forego ULURP review was undertaken in violation of lawful procedure and was an error of law. Surely, there are few recent Manhattan projects which so appropriately fit within the broad purpose of ULURP to provide for public review of land use projects that will have a "significant impact on the community" (*Ferrer v. Dinkins, supra*, 218 A.D.2d at 94, 635 N.Y.S.2d 965) and ULURP review for this project is required under the terms of the City Charter.

As ancillary items of relief, petitioners also have requested an order (1) directing the Department of Buildings to revoke any demolition permit that it has already issued, (2) directing the Department of Buildings to refrain from issuing any further permits for demolition of the Highline, and (3) to enjoin Respondents from applying for, or approving any permits to demolish or otherwise alter any portion of the Highline absent ULURP review. While City action permitting or authorizing actual demolition should be stayed pending the completion of the ULURP process, the court denies the application to the extent it seeks (i) a restriction upon the City's ability to take action or otherwise address any specific emergency condition endangering life, health and safety, and (2) that Respondents be precluded from the contemporaneous pursuit of other legally permitted steps, such as application to a non-City agency regarding railroad abandonment and related issues.

Settle order and judgment on ten days' notice.

2002 WL 554192 (N.Y.Sup.), 2002 N.Y. Slip Op. 40062(U)

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