

SHORT FORM ORDER

Sean

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. IRA B. WARSHAWSKY

Justice.

TRIAL/IAS PART 22

SHEFFIELD TOWERS REHABILITATION AND
HEALTH CARE CENTER, LLC, a proposed Liability
Company to be formed, WEST LAWRENCE
ASSOCIATES, INC., a proposed Corporation to be
formed, ARON CYTRYN, JACK FRIEDMAN, SIMON
PELLMAN, STEVEN ZAKHEIM, NAOMI SHERMAN,
MAURICE RAZDIK, CAROL FRIIA, Individually and
as proposed members and/or shareholders of,
SHEFFIELD TOWERS REHABILITATION AND
HEALTH CARE CENTER, LLC, a proposed Limited
Liability Company to be formed, and WEST LAWRENCE
ASSOCIATES, INC., a proposed Corporation to be
formed,

Plaintiffs,

NASSAU COUNTY
INDEX NO. 018703/00
MOTION DATE: 1/5/01
MOTION SEQUENCE:001,002

-against-

THE HONORABLE ANTONIA NOVELLO, AS
COMMISSIONER AND ON BEHALF OF THE
DEPARTMENT OF HEALTH, THE STATE OF
NEW YORK AND JOHN DOE "1" through
JOHN DOE "5", BEING COUNCILS AND/OR
AGENCIES UNDER THE AUSPICES OF THE
NEW YORK STATE DEPARTMENT OF HEALTH,

Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Notice of Cross Motion	X
Answering Affidavits	X
Replying Affidavits	
Memoranda of Law: Plaintiff's/Petitioner's	X
Defendant's/Respondent's	XX

This motion by plaintiff for a preliminary injunction pursuant to P.H.L. § 2801-c and the cross-motion by defendant for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint is determined as follows.

Plaintiff in this action seeks a declaratory judgment that a moratorium on the processing of applications for the establishment and construction of nursing homes, declared by defendants, is unlawful. By application brought on by show cause order, plaintiff moves for relief under section 2801-c of the Public Health Law enjoining the enforcement of the aforesaid moratorium against plaintiff. Plaintiff is the proposed owner and operator of a nursing home to be constructed in what is known as the historic, Brooklyn Water Works property in Freeport, Long Island. Despite an application for approval to incorporate, construct and operate a nursing home in December of 1991, and the issuance of a Certificate of Need (C.O.N.) and approval to proceed in 1993, the project was reconfigured in the intervening years. A 15 bed ventilator unit dependent service, critical care service, and new members were added to the proposed corporation. It was assigned a new application with a new project number in April of 1997.

On December 7, 1999, the Public Health Council (pursuant to PHL § 2810-a), and the Commissioner of the Department of Health (pursuant to PHL § 2802), with the advice and consent of the State Hospital Review & Planning Council and the Health Systems Agency in the plaintiff's jurisdiction, issued a resolution proposing to approve the project providing nine certain contingencies were met and conditioned upon construction starting by June 1, 2001 and finishing by June 1, 2003. The contingencies, minus one, were satisfied almost immediately. The remaining contingency, and by practical definition necessarily the last, was in review on the date the moratorium was declared.

On August 3, 2000, the Director of the DOH Office of Hospital Systems Management, Wayne Osten, announced a moratorium on the processing of all approved projects in the nursing home pipeline. (Hereinafter "pipeline projects"). On the strength of a 1997 "State Hospital Review and Planning Council's Workgroup Report on Subacute Care" the Commissioner determined that new standards should be implemented for determining need

throughout the State for nursing homes. The aforesaid report concluded that there may be a surplus of such facilities to care for the elderly. There was also, at that time, a change in State laws concerning fiscal assessments of Medicaid recipients which would impact plaintiff's project.

Although there was seemingly some confusion about whether the moratorium affected plaintiff's project when it was announced, a letter from Mr. Osten, dated August 24, 2000, subjects plaintiff's project to the moratorium as it does 19 other pipeline projects. The issue now before this court is to determine whether the inclusion of plaintiff's project fits the paradigm both articulated and inferred to accomplish the stated goal of reevaluating for need, approvals granted in the early 1990's but for some reason stalled and indefinite as to time of completion.

Plaintiff contends, *inter alia*, that its project is improperly and irrationally classified with the other "pipeline projects" and that to halt the processing of its application constitutes a violation of Article 28 of the Public Health Law for which it is entitled to a preliminary injunction.

Specifically, the last contingency to be met under the December 1999 resolution requires approval by the U.S. Department of Housing and Urban Development (H.U.D.) of the project's financing. H.U.D. has issued a position that it will process no further any project subject to the moratorium. Plaintiff contends, and it is not controverted by defendants, that a hiatus in H.U.D. review, of indefinite duration, will render the present information obsolete. The preparation of a new submission will be costly in terms of time and money and if construction costs increase, either due to the passage of time or because of the fragile condition of the building, it may signal the demise of the project here at the final part of the process.

The court has reviewed the arguments and evidence submitted ably by counsel for both parties. For the reasons that are set forth below, the court finds that the plaintiff's contention that the classification of plaintiff's project with the other projects to which the moratorium applies has no foundation in reason and fact and constitutes a violation of the

Public Health Law. Accordingly, it is the decision of this court that plaintiff's project, Project No. 962495B, should not be classified as a pipeline project as defined in the moratorium and should be processed in accordance with Article 28 of the Public Health Law.

In his announcement of August 3, 2000, Mr. Osten identified the common factors of the pipeline projects and highlighted among those factors certain of particular concern to the Council in permitting the expenditure of further energies in light of an apparent surfeit of beds in the field.

The general paradigm was a project which first received approval in the early or mid-1990s, when a need for beds was perceived, a failure to have begun construction, and two missed construction deadlines, with a recent request for an extension for the July 1, 2000 deadline.

Mr. Osten stated these factors applied to most, but not universally all, of the pipeline projects. He then stated: "In considering whether to extend the [construction] deadline or to move to terminate the approval of these applications for failing to meet contingencies several factors needed to be considered . . ." Consideration was primarily of the developing trends in the nursing home industry which might obviate the need for beds perceived in 1990.

Patently, the moratorium was aimed at any nursing home project which required action by the Council, either for more time to go forward or to abort. Plaintiff's project was not in that situation. Until it received word from H.U.D., it did not need any action from the Council. Nor was it perilously close to its start construction date.

In a sworn affidavit submitted on the motion, Mr. Osten defines the class of projects to which the moratorium applies as "those that the Public Health Council has approved or contingently approved but that have not yet received the Department's approval to begin construction." Aff. W.M.O., at Para 26. To the view of the court the definition is over broad, imprecise and is not calibrated to the goals of the moratorium.

Plaintiff's project may be differentiated from the broad class of nursing home projects

which were not ready to build in the months prior to July 1, 2000 nor have apparently proceeded on schedule since the early 1990's. It's approval was not old, neither was the project stalled.

Plaintiff did not apply for an extension of a construction start date given in the approval granted in December of 1999. Plaintiff has not sought to enlarge its time to meet the nine specified contingencies and no contingency dates are overdue. It has final zoning approval and has satisfied all contingencies except H.U.D. approval. Since receiving contingent approval on its amended application in December of 1999, it has apparently proceeded without delay. Finally, and of some importance, the very study upon which DOH relies was issued in 1997 before the resolution to propose plaintiff's project was issued in December of 1999. Although DOH may reappraise need at any time, Hamptons Hospital & Medical Center v Moore, 52 N.Y.2d 88 (1981), see also Dobbs Ferry Hospital Association v Whalen, 62 A.D.2d 999 (2d Dept 1978), and a governmental agency cannot be estopped from appraising need after issuing an approval, Id., the fact that the diminished need for nursing home beds was suspected before plaintiff received approval to continue with its project sets it apart from the other projects which were approved prior to that date. It is for these reasons that plaintiff argues it should not be included in the moratorium and will be severely impacted by a halt in the process at this late date when they are in compliance.

This court finds accordingly, without passing on the integrity of the moratorium, that plaintiff has established a violation of Article 28 of the Public Health Law by the cessation of processing plaintiff's establish and construct Certificate of Need application for a nursing home. The court finds that the inclusion of Sheffield Towers in the class of projects which required in July of 2000 an extension or termination from defendant is irrational and without foundation in fact, and that the moratorium should not apply to plaintiff.

Now, therefore, it is, **ORDERED**, that the defendant is preliminarily enjoined from including plaintiff's project in the moratorium issued on August 3, 2000. The defendant is directed to proceed with the processing of plaintiff's application under Article 28 of the Public Health Law. The defendant is further directed to issue written confirmation in a timely

manner that the moratorium does not apply to plaintiff's proposed facility to be forwarded to the U.S. Department of Housing and Urban Development.

Plaintiff is not required to, and therefore has not, in the motion sub judice, made out its claim on the first and second cause of action that the moratorium is unconstitutional and violation of State Laws, rules and regulations. However, the Court is satisfied that plaintiff has stated a claim for such declaratory relief sufficient to withstand defendant's motion to dismiss and the motion is, accordingly, denied.

Dated: January 12, 2001



J.S.C.

ENTERED

JAN 18 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**