

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In The Matter of the Application of

LANDMARK WEST!; ARLENE SIMON, individually
and in her capacity as President of LANDMARK WEST!;
the HISTORIC DISTRICTS COUNCIL; DOCOMOMO
US/New York Tri-State; CHRISTOPHER LONDON; SUE
MELLINS; and SOPHIA DEBOER,

Petitioners-Appellants,

JULIET HARTFORD,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice
Law and Rules

- against -

AMANDA M. BURDEN, Chair of the New York City
Planning Commission; the New York City Planning
Commission; ROBERT R. KULIKOWSKI, Assistant to
the Mayor for the Deputy Mayor for Economic
Development and Rebuilding; ANDREW ALPER,
President of the New York City Economic Development
Corporation; the New York City Economic Development
Corporation; MARTHA K. HIRST, Commissioner of the
New York City Department of Citywide Administrative
Services; the New York City Department of Citywide
Administrative Services; the MUSEUM OF ARTS AND
DESIGN; and HOLLY HOTCHNER, Director of the
Museum of Arts and Design,

Respondents-Respondents

**HOTCHNER
AFFIDAVIT IN
SUPPORT OF
MOTION TO
EXPEDITE
APPEAL**

New York County
Index No. 03/119036

STATE OF NEW YORK)

: SS:

COUNTY OF NEW YORK)

HOLLY HOTCHNER, being duly sworn, deposes and says:

1. I am currently the Director and a Member of the Board of Governors of Respondent Museum of Arts and Design (the "Museum"), formerly known as the American Craft Museum. I have served the Museum in my current capacity since 1996. The Museum is a non-profit modern and contemporary cultural and educational institution dedicated to the collection and exhibition of sculpture and functional objects created in media such as clay, glass, wood, metal and fiber which span the fields of craft, art and design, architecture, jewelry, fashion, interior design, technology and performing arts. The Museum is known for creating exhibitions that showcase emerging artists and new art forms. The Museum is the preeminent institution of its kind in the world.

2. The Museum and I, in my capacity as Director of the Museum, have been named as Respondents in this Article 78 proceeding (the "Museum Respondents"). I submit this Affidavit in support of the City Respondents' motion to expedite this Appeal by having it scheduled for the next Term of this Court and the Museum Respondents' cross-motion to dismiss the appeal, and specifically to explain the Museum's need for a prompt final resolution of this proceeding. This Affidavit is based on my personal knowledge, my review of the Museum's books and records, my discussions with the Museum's staff and the Exhibits annexed hereto. The Museum and I incorporate, and rely on in support of the motion and cross-motion before this Court, the Affirmation, Affidavit and exhibits submitted by the City Respondents in support of their motion to place the appeal on the October Term. For the sake of brevity, the Museum Respondents respectfully refer the Court to the Affidavit of Susan Choi-Hausman, dated July 15, 2004 ("Hausman Aff.") for a complete description of the factual and procedural background of this dispute and the decision of the court below.

3. As I understand it, this proceeding seeks to prevent the New York City Economic Development Corporation (the "EDC") from selling the building located at 2 Columbus Circle to the Museum (the "Building") for its proposed relocation from 40 West 53rd Street by challenging the City's environmental review process in approving the City's disposition of the Building to the EDC. In April 2004, the court below denied the Petitioners' request to invalidate the City's environmental review process and dismissed the proceeding, finding that the City conducted a proper environmental review; the City took a "hard look" at the proposed sale and made a "reasoned elaboration" for its conclusion that the sale would not result in any environmental impact on the area's historic resources. See Hausman Aff., Exhibit A at pp. 10-18. The Petitioners filed a notice of appeal from the court's decision and order on May 17, 2004. Hausman Aff., Exhibit B. I understand that by doing so, the Petitioners reserved their right to appeal from the court's adverse decision. However, Petitioners have not taken any steps to have that appeal heard promptly. To the contrary, Petitioners apparently have determined that delaying the appeal, rather than having it determined on the merits, is in their best interests.

4. The Museum Respondents' counsel has approached Petitioners' counsel and requested that Petitioners schedule their appeal for the November 2004 Term of this Court.¹ Petitioners' counsel is unwilling to do so; they will only agree to schedule the appeal for the January 2005 Term of this Court.

5. I understand that if the appeal is scheduled for the January Term, this Court will not even hear it until next year. That schedule would put the Museum in an untenable

¹ I understand that Petitioners' counsel was first approached by the City Respondents' counsel before the July 4th holiday in an effort to solicit their consent to a prompt briefing schedule. Petitioners' counsel never responded to the City Respondents' request.

position. While I understand that currently there is no injunction or legal impediment prohibiting the City and the Museum from proceeding with the sale, as a practical business matter, until this appeal is concluded (or withdrawn by Petitioners), the Museum cannot fully commit its resources to the proposed sale and refurbishment of the Building.²

6. Petitioners are well aware of this fact, and apparently hope to exploit the Museum's prudent business strategy by delaying this appeal and holding the refurbishment project hostage in the faint hope that the prolonged (and unnecessary) delay will impel one of the parties to walk away from the transaction. There is also no guarantee that Petitioners will continue to refrain from seeking an injunction from this Court – which, if granted, would further delay the project's progress – if the City and the Museum press forward with hearings and the sale (and I am certain that no assurances from Petitioners in that regard are forthcoming).

7. Petitioners' delay in pursuing their appeal is also intended to have a negative impact on the Museum's efforts to raise funds for the refurbishment. See Landmark West newsletter, a copy of which is annexed hereto as Exhibit A. Unfortunately, Petitioners' strategy has somewhat succeeded. Given the uncertain status of the Museum's acquisition efforts by virtue of this potential appeal, the Museum has encountered hesitancy on the part of many donors to contribute before the Museum breaks ground. Moreover, the Museum is unable to mount a public campaign for funds until the Museum takes title to the Building.

8. In preparation for the proposed sale and refurbishment, the Museum has expended, and continues to expend, necessary funds for design and pre-construction costs, so that once the Building sale is consummated, refurbishment efforts can commence promptly.

² For a description of the Museum's proposed renovation, please see a copy of my Affidavit submitted in opposition to the Petition, sworn to on February 5, 2004 and annexed hereto as Exhibit B.

These funds cannot be recouped in the event (although I understand it is unlikely) that the decision of the court below is modified and this expenditure increases daily. Petitioners' delay in pursuing the appeal increases the amount of Museum funds placed at risk of loss in this pre-sale period.

9. Finally, Petitioners' delay in pursuing their appeal unnecessarily deprives the public of access to an important cultural resource. Until this appeal is adjudicated, the Building cannot be refurbished, and until the Building is refurbished, the Museum cannot expand its resources, properly exhibit its collections and bring a distinguished center of cultural and educational activity in the heart of Columbus Circle.

10. I understand that Petitioners' appellate counsel, Mr. Rosenberg, has suggested that petitioners may not proceed with the appeal, based on the results of the EDC and Borough Board hearings scheduled for August. Like the Community Board and other hearings already conducted by the City in following its approval process, we fully expect that the EDC and Borough Board hearings will conclude with approval of the sale. Petitioners acknowledge this likely outcome. Indeed, Petitioners have already publicly stated that they unconditionally intend to pursue this appeal. As set forth in the attached newsletter from Landmarks West dated July 20, 2004, petitioners "fully intend to file" their appeal, and have already raised \$50,000 with which to fund those efforts. See Exhibit A hereto. Moreover, given that the EDC and Borough Board hearings are scheduled for August, Petitioners will know the results of those hearings in advance of the September 7, 2004 filing date for the November Term of this Court.

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**NOTICE OF
CROSS-MOTION
TO DISMISS
APPEAL**

New York County
Index No. 03/119036

PLEASE TAKE NOTICE that, upon the accompanying Affirmation of Charles
G. Moerdler, dated July 22, 2004, and the exhibits annexed thereto, and upon the papers
submitted in support of the motion by the municipal respondents to expedite the appeal, and
upon all the papers and proceedings had herein, Respondents-Respondents The Museum of

Arts and Design and Holly Hotchner (the "Museum Respondents"), will cross-move before this Court at a term of the Appellate Division of the Supreme Court, First Department, 27 Madison Avenue, New York, New York at 10:00 in the morning, on the 26th day of July, 2004 or as soon thereafter as counsel may be heard for an order dismissing the within appeal upon the ground that Petitioners-Appellants failed to file the record on appeal within the time allotted by Section 600.5(d) of the Rules of the Supreme Court, Appellate Division, First Department and granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 22, 2004

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP

By: 

CHARLES G. MOERDLER

Attorneys for Respondents the Museum of Arts and Design, and Holly Hotchner, Director of the Museum of Arts and Design

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SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIRMATION IN
SUPPORT OF
CROSS-MOTION
TO DISMISS
APPEAL**

New York County
Index No. 03/119036

CHARLES G. MOERDLER, an attorney duly admitted to practice before the
Courts of this State, hereby affirms, pursuant to CPLR 2106, that the following statements are
true under penalty of perjury:

1. I am a member of the firm of Strock & Strock & Lavan LLP, counsel for respondents-respondents The Museum of Arts and Design and Holly Hotchner (the "Museum Respondents"). I am familiar with the facts and circumstances of this appeal.

2. I make this Affirmation in support of the Museum Respondents' cross-motion to dismiss this Appeal for petitioners-appellants' failure to file or cause to be filed the record on appeal within the time allotted by Rule 600.5(d) of the Rules of the Appellate Division, First Department.

3. Petitioners-appellants commenced this Article 78 proceeding to halt the sale of Two Columbus Circle from the City of New York to the Museum of Arts and Design, which plans to refurbish and renovate the building. By decision and order entered on April 23, 2004, the Supreme Court, New York County (Tolub, J.) denied the petition and dismissed the proceeding. A copy of the IAS Court's decision and order is annexed hereto as Exhibit A.

4. On April 27, 2004, the Museum Respondents served Notice of Entry of the decision and order upon Petitioners-Appellants. A copy of the Notice of Entry is annexed hereto as Exhibit B.

5. On May 17, 2004, Petitioners-Appellants filed a Notice of Appeal. A copy of the Notice of Appeal is annexed hereto as Exhibit C.

6. Rule 600.5(d) of the Rules of the Appellate Division, First Department, requires that where an appeal is prosecuted upon a record which does not involve a transcript or statement requiring settlement or approval by the court from which the appeal is taken, the record on appeal must be filed or caused to be filed within 30 days after filing of the notice of appeal.

7. This appeal does not involve a transcript, or statement requiring settlement or approval by the court.

8. More than two months have passed since Petitioners-Appellants filed their Notice of Appeal.

9. Petitioners-Appellants have not yet filed the record on appeal, or otherwise perfected their Appeal.

10. Since Petitioners-Appellants have failed to file or cause to be filed the record within the time limit set by Rule 600.5(d) of the Rules of the Appellate Division, First Department, their appeal should be dismissed.

WHEREFORE, for the reasons set forth above, this Court should grant this motion and dismiss the appeal.

Dated: New York, New York
July 22, 2004



CHARLES G. MOERDLER