

**STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE**

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**In the Matter of the Application of  
THE CAMPAIGN FOR BUFFALO HISTORY  
ARCHITECTURE & CULTURE, INC.,**

**Decision & Order**

**Petitioner,**

**Index #: 816904/2021**

**vs.**

**CITY OF BUFFALO and  
ADM MILLING, CO.,**

**Respondents**

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***Colaiacovo, J.***

Previously, this Court ruled that before it could reach a decision on whether Petitioner was entitled to a preliminary injunction in this Article 78 proceeding, a fact-finding hearing was necessary. This Court concluded that the hearing would be “limited to the issue of how the City reached its decision and,

specifically, whether the Commissioner had a rational basis for issuing the Order for the demolition.” See Decision & Order, December 30, 2021. A fact-finding hearing was held on January 3, 2022, and the Court’s decision is as follows.

### **Fact-Finding Hearing**

The only witness to testify was James Comerford, the Commissioner for the Department of Permit and Inspection Services for the City of Buffalo. By stipulation, the Court received the following exhibits:

Court’s Exhibit #1	Letter from Fire Department Commissioner William Renaldo
Court’s Exhibit #2	Notice of Condemnation
Court’s Exhibit #3	Photograph - Great Northern Elevator, Northern Wall
Court’s Exhibit #4	Photograph - Richardson Complex
Court’s Exhibit #5	Photograph - Richardson Complex
Court’s Exhibit #6	Order to Remedy
Court’s Exhibit #7	Photograph - Debris Field, Great Northern Elevator
Court’s Exhibit #8	Decision, Department of Labor, “Variance” for Controlled Demolition of unsound structures with friable and non-friable asbestos.

James Comerford is the Commissioner of Permits and Inspection Services for the City of Buffalo (hereafter “City”). Prior to becoming Commissioner, Comerford had an extensive career of public service in the City. He first began employment with the City as a building inspector in 1979. In 1983, he became Director of the

Department of Permits and Inspection Services and previously served as Commissioner in 1985. Upon becoming the City's representative to the Pilot Field construction project, he resigned as Commissioner. He subsequently was a construction manager for a private company for twelve years. In 2007, he returned to the City as Deputy Commissioner before again becoming Commissioner in 2010.

Comerford testified to the responsibilities of a building inspector. He noted that building inspectors are code enforcement officers and are certified by New York State. Code compliance, Comerford explained, often deals with safety issues. He stated that as Deputy Commissioner, he oversaw the management of the day-to-day operations of the Department and was placed in charge of the City's "Five for Five" program where he oversaw the demolition of 15,000 vacant buildings and structures. He testified that he was also involved in evaluating structures for emergency demolition. This, he noted, he did "thousands of times". He testified that he ordered as many demolitions as he did reject applications for demolition. Each demolition depended on individual circumstances. However, in evaluating larger structures, such as the one here, fire hazards and safety issues were greater concerns that needed to be evaluated. Upon becoming Commissioner again in 2010, he noted that he oversaw all demolitions and was responsible for issuing condemnation letters.

In 2021, and at the time of the wall collapse at the Great Northern Elevator, Cathy Amdur was the Deputy Commissioner and Tom Broadfuhrer was the Assistant Director of the Department. Amdur, who oversaw the day-to-day operations and managed all department chiefs and inspectors, has a degree in engineering and had significant municipal experience, previously working in the City's Public Works Department. Broadfuhrer, in addition to being Assistant Director, is a certified code enforcement officer and has a special expertise in building demolition. Though serving as Assistant Director for the last five years, Broadfuhrer has been a certified building inspector for the past 25 years.

With respect to the Great Northern Elevator, Comerford testified that he was quite familiar with the property in light of his extensive service in the city. He stated that on December 12, 2021, he was notified by Amdur and Broadfuhrer that the northern wall of the building collapsed during a windstorm on the evening of December 11, 2021. He advised his team to conduct an assessment and determine whether there existed a danger of collapse.

To ascertain the extent of the damage, the City wished to deploy its drone. However, on Monday, December 13, 2021, it was determined to be still too windy for the drone and its use was postponed until Tuesday, December 14, 2021. On December 13, 2021, the City issued an "Order to Remedy". In its Order, the City directed ADM to "provide the City of Buffalo with a Statement of Intent on the repair plan or demolition to the damaged section of the building within five

days.” Subsequently, Comerford stated that he met with Brian Melber, legal counsel for ADM, and John Schenne, an engineer and geologist retained by ADM to discuss the Order to Remedy. He noted he wanted to know of ADM’s intentions as to the building’s future.

On December 14, 2021, the drone footage was obtained by the City and reviewed by Comerford. Comerford testified that the footage provided a closer view of the damage to the interior of the elevator as well as the cupola, which has also been referred to as the “headhouse”. On December 15, 2021, Comerford reached out to William Renaldo, Commissioner of the City of Buffalo Fire Department, and asked that he evaluate the property to determine whether there was a basis for an emergency demolition. When asked why he involved Commissioner Renaldo, Comerford stated that he wanted someone to tell him the building could be salvaged. Comerford also testified that that he received the engineering report from John Schenne, on behalf of ADM, on December 15, 2021 as well.

Comerford received the recommendation letter from Commissioner Renaldo on December 17, 2021. See Court’s Exhibit #1. In the letter, Commissioner Renaldo found the building to be unstable and that “the size and scope of the building present a multitude of life safety hazards to both workers at the site, and civilians due to the building’s close proximity to the waterfront and increased attractions to the area.” Id. Noting the hazards the building

posed to the adjacent waterway, railways, and commercial traffic, as well as the potential collapse and risk to firefighters should they be needed, the Commissioner determined that the “risk versus reward is simply too high and is therefore recommend[s] that the building be taken down via emergency demolition.” Id.

In light of the drone footage that documented the compromised nature of the northern wall, the engineering report, the Fire Commissioner’s letter, as well as the results from the investigation performed by his Department, Comerford issued his condemnation letter on December 17, 2021. See Court’s Exhibit #2. In his notice of condemnation, Comerford found the Great Northern Elevator to be “structurally unsound and in imminent danger of collapse.” Id. In particular, he testified that the hole in the northern wall compromised the integrity of the wall and is failing. He noted that the masonry lacked reinforcement, which could lead to further collapse. He also testified that his team found, and the drone footage confirmed, stress cracks on the eastern wall and that the wall facing the Buffalo river had begun to “bow”. Further, the cupola lacked adequate cantilever support and the metal sheeting to the cupola was not adequately fastened to the structure. While Comerford was careful not to predict when the building would collapse, he opined that the grain elevator’s condition, taken as a whole, constituted a safety hazard, could not be repaired, and posed an

immediate danger. Thus, Comerford testified that he was justified in issuing the emergency demolition order.

Comerford was quick, again, to note the deliberative process his team engaged in before making the condemnation decision. Noting the unique quality and historic nature of the building, he testified that he wanted to make sure everything was done properly and thoroughly before issuing the demolition order. However, it became quite clear that the windstorm damage was pervasive, rendering the building unstable. He noted that further collapse into the river would be “catastrophic” and that a nearby business, General Mills, also located on Ganson Street, utilized the railway that runs right next to the Great Northern Elevator. In addition, Comerford noted that under current code, all walls must be designed and constructed to withstand 115 mph winds. Because this most recent storm was not a north-eastern windstorm, which otherwise would have struck the northern portion of the structure head on, the damage could be more calamitous should such a weather event occur.

During petitioner’s cross-examination, Comerford acknowledged that neither he nor any member of his staff are engineers or architects. While noting his deputy commissioner possesses an engineering degree, she is not licensed. He testified that he did speak with Gwen Howard, the Chair of the Preservation Board and herself an architect, about the wall collapse and a pending emergency declaration and possible demolition. He noted that after reviewing all of the

potential options with Howard, she remained adamant that the site should not be condemned or demolished.

Comerford testified that throughout his deliberative process, he certainly took into consideration the “unique” quality of the building and its historic significance. When asked if the building’s damage could be abated or repaired, Comerford was quick to state that “he does not provide solutions” but instead evaluates buildings to determine whether they meet the standard for an emergency demolition.

He did testify that if the condition did not constitute an emergency, the matter would have been referred to housing court or the historic preservation board for remedial action. However, he was quite adamant that it was his opinion that the building could not be repaired or abated and met all requirements for an emergency demolition.

Comerford testified as to certain properties that he “saved” from demolition during his time as Commissioner. These included historic properties located on High Street. He noted that he worked and consulted with Jesse Fisher, the Executive Director of the Preservation Board, to save those buildings. He also testified that often he would consult with engineer Edward Tredo before demolishing a structure. He also identified Volker’s Bowling Alley and a Sewing Building that he attempted to salvage, noting their historical uniqueness. However, here, he was quite certain that given the condition of the building, he



did not need to go outside the City to reach the conclusion that the building posed an imminent risk and required demolition.

Comerford also testified that he denied ADM's previous request for an emergency demolition a year and a half ago. At that time, however, the walls were not compromised as they are now. Comerford was quick to note that the large, gaping hole in the northern wall of the building, compromised masonry, and stress cracks in the remaining walls now, unlike before, constitute a basis to justify an emergency demolition. The drone footage of the interior of the building after the partial wall collapse shows that there is no wall support that would prevent any further deterioration. Notwithstanding Petitioner's argument that the building could be saved, Comerford concluded that it is likely the building will collapse and, if so, such an event would pose a significant risk to public health and safety.

As to the cupola and the missing metal sheeting, Comerford explained that ADM cannot hire any contractors who can re-attach the sheeting without jeopardizing the safety of their workers. Because of the height of the cupola, and the structural unsoundness of the underlying building, Comerford testified that ADM cannot adequately fix and repair the sheeting issues.

Though presented with several different alternatives to demolition by Petitioner, Comerford was unequivocal that the condition of the building reached the point of being a heightened public and health safety risk which

necessitated demolition. Because further collapse is the major concern, which he believes is supported by his team's inspection, the drone footage, and the Fire Commissioner's letter, Comerford testified this constitutes an emergency and justifies demolition under his authority.

During ADM's cross examination, Comerford acknowledged that his decision was made independent of any recommendations made by ADM. He noted "I have said no to ADM before and would do it again." However, this time, the decision to demolish was supported by all the evidence his department gathered. Comerford again went through bullet points in Court's Exhibit #2 which, he opined, rendered the structure structurally unsound and in imminent danger of collapse. He further noted that it was possible that the entire headhouse could blow off the structure as well as individual metal sheets that, he insisted, continue to pose a safety risk to those in the surrounding area.

While he testified that he could not predict the future, on re-direct, Comerford stated that he had sufficient information to render his decision and nothing more was needed. Comerford explained that this was not an easy decision to reach given the unique and historic nature of the Great Northern Elevator. In light of that fact, Comerford "wanted to be very thorough on reaching a conclusion."

Upon the conclusion of Comerford's testimony, the City called no further witnesses, and the hearing was concluded. Each party was given the opportunity

to make further argument before the Court reserved decision on the question of whether to issue a preliminary injunction.

### Standard of Review

The limited issue before the Court is whether Petitioner is entitled to a preliminary injunction. It is well settled that on a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction. Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005); Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). If any one of these three requirements are not satisfied, the motion must be denied. Faberge Intern., Inc. v. Di Pino, 109 A.D.2d 235 (1<sup>st</sup> Dep't. 1985). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. However, it is not to determine the ultimate rights of the parties. As such, absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint. Reichman v. Reichman, 88 A.D.3d 680, (2<sup>nd</sup> Dep't. 2011); SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727 (2<sup>nd</sup> Dep't. 2005). In addition, preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief. SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d at 727, supra. However, the

decision whether to grant or deny a preliminary injunction is within the sound discretion of the Court. Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942 (2<sup>nd</sup> Dep't. 2009).

The Court must evaluate the preliminary injunctive standard in the context of the requirements under Article 78 of the CPLR. Article 78 of the CPLR is the main procedural vehicle to review and challenge administrative action in New York. On judicial review of an administrative action under CPLR Article 78, a court must uphold the administrative exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." Matter of Pell v. Board of Ed. Union Free School District, 34 N.Y.2d 222 (1974). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231; See also Jackson v. New York State Urban Dev Corp., 67 N.Y.2d 400 (1986). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. Matter of Pell v. Board of Education, 34 N.Y.2d at 231. The Court's function is completed on finding that a rational basis supports the administrative determination. See Howard v. Wyman, 28 N.Y.2d 434 (1971). "Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion."

Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72 (1<sup>st</sup> Dep't. 1985) aff'd 66 N.Y.2d 1032 (1985); Matter of Savetsky v. Zoning Bd. of Appeals of Southampton, 5 A.D.3d 779 (2d Dep't. 2004).

As noted previously, the only issue before this Court is whether Commissioner Comerford's decision to issue the emergency demolition order had a rational basis. If the Court finds that such a determination was not rational, then a preliminary injunction is warranted as Petitioner is likely to prevail on the merits of its petition. If, however, the Court finds that there was a rational basis to support the demolition order, a preliminary injunction cannot be issued since Petitioner will not be able to demonstrate the success of the ultimate relief they seek.

#### Decision

The Court finds that the Commissioner did have a rational basis in rendering his decision to condemn the Great Northern Elevator and order its demolition. The Commissioner's testimony evidences the deliberative and thoughtful process his department undertook before, ultimately, condemning the Great Northern Elevator and ordering its demolition.

Though noted previously, Commissioner Comerford, once learning of the wind damage caused on December 11, 2021, ordered his team to complete an on-site investigation of the property. This was supplemented by aerial footage from its drone. The drone footage exposed the interior damage caused by the

northern wall collapse. The drone footage also showed the stress fractures in the eastern wall and the bowing of the wall adjacent to the river. Comerford noted that he met with ADM after the department issued its Order of Remedy. The report of John Schenne, an engineer and geologist retained by ADM, identified many of the same concerns Comerford's inspectors noted in their on-site and aerial inspection. In particular, Schenne noted that the exterior walls were not designed or built to withstand the wind loads in its location. In referencing the walls, Schenne stated

“[t]hey were built 125 years ago using bricks and soft lime mortar with no reinforcing steel or control joints...the soft lime mortar has undergone long term degradation over 125 years. The partial collapse of the north wall on December 11, 2021 demonstrates the structural deficiencies of this brick exterior and exacerbates them, increasing the likelihood of additional collapse of the structure.”  
Affidavit of John Schenne, P.E., P.G., ¶19.

In addition, Schenne reported to Comerford that because the mortar was not adhered to the bricks, the structural steel at ground level was corroded, and the headhouse steel foundation was compromised, the structure was unsound and in imminent danger of collapse.

Comerford also contacted the Fire Commissioner to evaluate the property. He did so after calling the situation a “bubble case”. In explaining what he meant by “bubble case”, Comerford testified that he wanted to explore every alternative to demolition given the unique historical nature of the building. The Fire Commissioner reached the same conclusion that Schenne and the building

inspectors did - that the building was in imminent danger of collapse and constituted a public health and safety risk.

Comerford also reached out to the Historical Preservation Board, in particular Gwen Howard, who is an architect. He advised her of the steps being taken, his preliminary findings and solicited her opinions. While he described her response as “advocacy”, it is not as if Comerford brazenly dismissed her opinion as Petitioner suggests.

After the Fire Commissioner concluded that the Great Northern Elevator constituted a safety risk, and upon considering all of the evidence collected six (6) days after the initial collapse, Comerford made the emergency decision to order its demolition. This was not a rushed judgment or race to raze the building. Instead, the actions taken by Comerford exhibits the reflective and deliberative process that ultimately led to the inescapable conclusion that the building, in its precarious condition, required demolition.

The fact-finding hearing was helpful to the Court in developing the record more fully, especially in understanding Comerford’s perspective in how he reached his conclusion. Further, his testimony regarding his long history of service in this department, familiarity with historic buildings, attempts to salvage unique structures, and even denying efforts to raze damaged properties was tremendously helpful. It is well established that the “trial court, which had the opportunity to view the demeanor of the witnesses, [is] in the best position

to gauge their credibility.” Massirman v. Massirman, 78 A.D.3d 1021 (2<sup>nd</sup> Dep’t. 2010). It is equally established that “[i]n a non-jury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court’s sound discretion.” Goldstein v. Guida, 74 A.D.3d 1143 (2<sup>nd</sup> Dep’t. 2010). Thus, the trial court’s assessment of the credibility of witnesses and evidence is afforded great weight on appeal. See Alper v. Alper, 77 A.D.3d 694 (2<sup>nd</sup> Dep’t. 2010). The Court found Comerford to be extremely credible and gave his testimony significant weight.

Taken together, the submissions previously made to the Court as well as the testimony of Comerford, the Court finds that the City had a rational basis when rendering its emergency decision to condemn and order the demolition of the building. As noted previously, “where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion.” Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72 (1<sup>st</sup> Dep’t. 1985) aff’d 66 N.Y.2d 1032 (1985); Matter of Savetsky v. Zoning Bd. of Appeals of Southampton, 5 A.D.3d 779 (2<sup>d</sup> Dep’t. 2004). The Court finds that there exists no basis to disturb the decision reached by the City given the rational basis it had when issuing its emergency order to demolish the Great Northern Elevator. See also, Halperin v. City of New Rochelle, 24 A.D.3d 768 (2<sup>nd</sup> Dept. 2005).



Courts have routinely affirmed efforts to demolish structures that are deemed to be unsafe and dangerous. In Wolk v. Reisem, the Fourth Department found that “[i]n the face of a clear threat to the public health and safety, the governmental duty to its citizens and civil servants to protect such vital interests must take precedence over the aesthetic and historical concerns expressed by [the Preservation Board].” 67 A.D.2d 819 (4<sup>th</sup> Dept. 1979). As in Wolk, the threat of imminent danger of collapse and public safety concerns were fully established by the documents and testimony submitted to the Court and the demolition of the structure was permitted.

In Historic Albany Found. v. Fisher, the Third Department was asked to consider a trial court’s determination that a building commissioner’s determination that a building was unsafe and issuance of a demolition permit was not arbitrary. Like the Buffalo City Code, namely §103-38 and 17-2(j) that vests the Commissioner broad authority to act whenever an unsafe building poses a threat to public safety, the Albany Commissioner exercised his emergency powers by ordering the demolition of a building he found “to constitute an immediate danger to the health, safety and welfare of the public, and adjacent properties and occupants therein.” 209 A.D.3d 135 (3<sup>rd</sup> Dept. 1995). The Third Department affirmed the trial court’s decision, noting that “the Building Commissioner is empowered to order a demolition whenever a building is a direct hazard or an immediate danger to the health, safety or welfare...of the public.”

Id. at 138. Here, the City of Buffalo affords the Commissioner similar authority in emergency situations. Contrary to Petitioner's argument, once an emergency is determined, no referral to the Preservation Board is required. Instead, after an emergency is determined, the Commissioner has the exclusive authority to issue a demolition order. The record clearly establishes that this is an emergency and, thus, the Commissioner acted within his authority to issue the demolition of the Great Northern Elevator. See also Historic Albany Found. v. Coyne, 159 A.D.2d 73 (3<sup>rd</sup> Dept. 1990); Matter of Greenpoint Renaissance Enter. Corp. v. City of New York, 137 A.D.2d 597 (2<sup>nd</sup> Dept. 1988).

In light of the extensive record before it, the Court cannot, and will not, substitute its judgment for that of the Commissioner, as his determination is neither arbitrary, capricious or contrary to the law. See Hauser v. Town of Webb, 34 A.D.3d 1353 (4<sup>th</sup> Dept. 2006). Further, the Court must give deference to factual evaluations made that are within an agency's area of expertise. See Violet Realty, Inc., v. City of Buffalo Planning Board, 20 A.D.3d 901 (4<sup>th</sup> Dept. 2005); City of Rensselaer v. Duncan, 266 A.D.2d 657 (3<sup>rd</sup> Dept. 1999).

Considering the emergency that existed at the time and still currently exists, having found that the Commissioner's decision had a rational basis, and as such, not deemed to be arbitrary or capricious, the Court cannot grant Petitioner a preliminary injunction. Accordingly, this request is hereby DENIED.

In light of this determination, the Petition is hereby **DISMISSED** in its entirety. The Temporary Restraining Order is hereby **VACATED**.

It is regrettable that the Court is required to make this determination. As it noted during oral argument, the Great Northern Elevator is part of our City's landscape. However, the present condition of the building as well as the damage sustained during the December windstorm renders this decision rather straightforward. Had this building not been allowed to deteriorate after years of, at best, inaction, and at worst, neglect, perhaps this structure could have been saved. Yet, the Court can only consider the record as it presently exists. That record includes the fact that more than half of the northern wall has collapsed, the building is over 123 years old and in a general state of disrepair that renders it unsafe. Perhaps those committed to the high ideals of preservation should identify historical structures that need to be addressed now, as opposed to waiting until they are endangered. Further, owners of buildings, especially Fortune Five Hundred companies that purchase historic buildings and are aware of their overall condition at the time of their purchase, should do more than cosmetic repairs, but instead avail themselves of certain tax credits and resources that will help salvage treasures such as the Great Northern Elevator instead of allowing them to become a blight and a threat to the safety of the community. Also, maybe the City should be more aggressive in preserving historic buildings and identifying structures that require more than passive care.

Had any of these steps been taken, the Great Northern Elevator might have withstood the windstorm that ultimately proved its demise.

Interestingly, this issue has generated a significant debate about necessity of historic preservation and whether the Great Northern Elevator is worth saving. The National Parks Service notes,

Historic preservation is a conversation with our past about our future. It provides us with opportunities to ask, "What is important in our history?" and "What parts of our past can we preserve for the future?" Through historic preservation, we look at history in different ways, ask different questions of the past, and learn new things about our history and ourselves. Historic preservation is an important way for us to transmit our understanding of the past to future generations.<sup>1</sup>

Preserving our past benefits our community's culture and identity. While unfortunately the Great Northern Elevator cannot be salvaged due to the hazard it presents to the public and the surrounding area, this should not doom other similarly important structures to a similar fate. These decisions rest in the hands of those who are charged with the high responsibility of public service and those who champion these worthy causes.

This shall constitute the Decision and Order of the Court.



Hon. Emilio Colaiacovo, J.S.C.

ENTER  
Buffalo, New York  
January 5, 2022.

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<sup>1</sup> "What is Historic Preservation?", National Park Service, [What is Historic Preservation? - Historic Preservation \(U.S. National Park Service\) \(nps.gov\)](https://www.nps.gov/learn/what-is-historic-preservation/)