SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SAVE OUR PARKS, FRANCES TEJADA, individually and as President of SAVE OUR PARKS, MYRA BELLAMY, GREGORY HILLMAN, ALBERTA D. HUNTER, DONNA JOHNSON, JEWEL LOPEZ, and BRONX COUNCIL FOR ENVIRONMENTAL QUALITY,

Petitioners,

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

Index No. 110836/06

- against-

THE CITY OF NEW YORK, THE PLANNING COMMISSION OF THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and THE NEW YORK YANKEES PARTNERSHIP,

Respondents.

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HERMAN CAHN, J.:

This CPLR Article 78 proceeding alleges violations of the State Environmental Quality Review Act (SEQRA) in connection with the approvals granted to the City of New York (the City) and the New York Yankees Partnership (the Yankees) to construct a new Yankee Stadium in the South Bronx to the north of the existing stadium and on portions of Macomb's Dam and John Mullaly Parks.

Petitioners move for a preliminary injunction enjoining the respondents from removing any mature trees located in the two parks or in or around the footprint of the proposed new site for Yankee Stadium, CPLR 6301. Construction, and the necessary demolition, is scheduled to commence on August 17, 2006. Inasmuch as this application was made to the court on August 3,

2006, it was briefed, heard and determined on an expedited basis.[1]

BACKGROUND

The existing Yankee Stadium was originally built in 1923, at East 157th Street, River Avenue, East 161st Street and Ruppert Place in the South Bronx. The stadium was renovated in the mid-1970's. The Yankees assert that while seating capacity is sufficient, stadium operations have become severely constrained, and the stadium cannot comfortably handle an attendance of greater than 35,000 fans. Further, the existing stadium is not in compliance with the Americans with Disabilities Act of 1990 (the ADA), as well as other similar state and city laws. The stadium currently sits on a ten acre site, while a state-of-the-art facility requires at least thirteen or more acres.

Petitioners do not challenge the need for a new, more spacious modern stadium, and all agree that the current off-street parking is woefully inadequate. What might have been adequate in 1923 or during the mid-1970s, is not adequate in the 21st Century.

The management of the Yankees have sought the construction of a modern stadium. In fact, the Yankees have often stated that if plans for a new stadium are not soon approved, and construction started, it will seek to move the Yankees baseball team to another city, which would enable immediate construction of a new stadium to commence.

To address these concerns, the City and State of New York have been working with the

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[1] The court has not considered the affidavits of Sheila R. Foster, Dr. Jonathan A. Bradlow, and Christian DiPalermo, submitted by petitioners as part of their reply papers, to the extent that these affidavits offer further evidence and arguments in support of petitioners' claims. The court has only considered the reply affirmation of Jeffrey S. Baker to the extent that he responds to arguments raised by, or evidence offered by, respondents in their opposition papers. Azzopardi v American Blower Corp., 192 AD2d 453, 454 (1st Dept 1993); Lazar v Nico Indus., 128 AD2d 408, 409-10 (1st Dept 1987).

Yankees for over a decade to devise a plan for a new stadium and increased parking facilities. The plan agreed upon, which petitioners opposes, required approvals from city, state and federal agencies. The necessary approvals were obtained from each level of government.

The proposed project is for the construction of a new, state-of-the art, stadium and four parking garages providing a net increase of 3,315 parking spaces over the current 6,995 off-street parking spaces. The new stadium, and three of the garages, are to be constructed to the north of the existing stadium, across 161st Street, on portions of two community parks adjacent to the current stadium -- Macomb's Dam and John Mullaly Parks.

The project will replace 22.42 acres of unencumbered parkland with 24.56 acres of replacement parkland, consisting of the existing Yankee Stadium site, adjacent land now used for parking, and waterfront property along the Harlem River. Thus, there will be a net increase of 2.14 acres of parkland and new public waterfront access. The new parkland facilities will include: a running track; a soccer field; little league and softball fields; sixteen tennis courts; nine handball courts; four basketball courts, including one with bleachers; a tot-lot with climbing and play equipment; and areas for the passive enjoyment of the park.

Given the parkland and open space within the city which the proposed project would affect, the New York City Department of Parks and Recreation (Parks Department) acted as the lead agency, under SEQRA and the City's Environmental Quality Review (CEQA) regulations, in weighing the environmental consequences of the project. A Draft Environmental Impact Statement (DEIS) was certified as complete on September 23, 2005. It was distributed and made available for public review. Pursuant to SEQRA regulations and CEQA procedures, a joint public hearing on the DEIS was held on January 11, 2006, following notice to the public and

affected public officials. Written comments on the DEIS were accepted by the Parks Department through January 23, 2006. Substantive comments were then addressed in a Final Environmental Impact Statement (FEIS) issued on February 10, 2006. The FEIS was complex and was over 700 pages.

Included in the FEIS, and in response to public comment on the DEIS, an alternative plan for the specific configuration of replacement park facilities was developed and analyzed. The public comments on the DEIS expressed a desire for a contiguous park area, a concentration of ballfields closer to certain residential areas, and a construction schedule that would maximize availability of recreational facilities during construction. Changes were made to the park program to address these comments. First, the two community ballfields, that had been initially proposed for the waterfront park, were instead moved to the site of the existing stadium, immediately across the street from their present location in Macomb's Dam Park. Second, the tennis concession, which replaces tennis facilities currently located in the southern portion of John Mullaly Park, was moved to the waterfront park parcel. Third, a program and schedule of interim facilities was conceived to ensure that the community would be without recreational facilities for the shortest possible time during construction. The duration of time during which permanent recreational facilities would be unavailable ranges from nine months to four and a half years. FEIS 22-29, Table 22-3. However, an exercise running course is to be available at all times during the construction. FEIS 22-30. Further, at the request of the Bronx Delegation to the City Council, the Parks Department has agreed to provide interim community ballfields.

The local community was given an opportunity to comment on the proposal. Bronx Community Board 4 recommended disapproval of the project. However, the Bronx Borough

President was in favor of the project. The City Council approved the project on April 5, 2006. The project was also reviewed, and recently approved, by the National Parks Department.

Petitioners:

Petitioner Save Our Parks is an unincorporated association of approximately one hundred households of people who live and work in the neighborhoods around Macomb's Dam and John Mullaly Parks. Petitioners Tejada, Bellamy, Hunter, Johnson and Lopez are all residents of the Highbridge section of the Bronx, located to the northwest of Yankee Stadium and to the west of Jerome Avenue. Petitioner Hillman is associated with a local church on 163rd Street and organizes and coaches basketball teams of neighborhood youths, utilizing the facilities at the parks. Petitioner Bronx Council on Environmental Quality is a not-for-profit corporation dedicated to good urban design and promoting the preservation and development of open space in the Bronx.

Petitioners contend that the Parks Department, as the lead agency for the SEQRA review, the New York City Planning Commission and the New York City Council all violated SEQRA in three ways.

First, petitioners argue that the FEIS did not engage in an honest exploration of the impact of the new stadium on the neighboring community's parkland and open space, natural and visual resources. In this regard, petitioners claim that the FEIS failed to consider the value of the parks to the local community. They claim that FEIS completely failed to assess the number of schools, nineteen in all -- both public and private, and schoolchildren, over 15,000 students, in the surrounding communities who lack physical education facilities. Petitioners claim that these schools and schoolchildren rely upon the parks for outdoor recreational opportunities. They

argue that construction of the new stadium will deprive the residents of recreational facilities within easy walking distance for at least four years, and possibly longer. The petitioners note that four or "five years is a very long time in the life of a child in a poor neighborhood, where people suffer from childhood asthma, obesity, diabetes, and they don't have those [other] opportunities." Tr. at 34.

Second, Petitioners argue that the FEIS's discussion of alternatives to the proposed project was "superficial and disingenuous," and did not provide the information necessary to make a rational choice between other options. They contend that reconstructing the existing stadium, by utilizing a portion of the southern section of Macomb's Dam Park, is a viable alternative that was not adequately explored in the FEIS. Petitioners assert that, to reconstruct the existing stadium, the Yankees could share Shea Stadium with the Mets during the construction of the new Yankee Stadium.

Third, petitioners argue that the FEIS does not properly assess and consider the removal of 377 mature shade trees, which represent seventy percent of the mature shade trees in the area, and the impact of the loss of those trees on the local environment and community. They further argue that the proposed program for replacing the lost trees is not definite, may not be feasible, and that there is no enforceable commitment to maintain the sapling trees to be planted and replace dead trees.[2]

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[2] The petitioners also alleges that the FEIS did not engage in an honest exploration of the impact of the new stadium on the surrounding residential community's traffic, air quality and noise levels. See Petition ¶¶ 67, 76-77. This claim is totally unsupported and contradicted in the numerous sections of the FEIS where these issues are raised and analyzed in considerable depth. See, e.g., FEIS, Chapter 15: Parking, Chapter 17: Air Quality, and Chapter 18: Noise.

It is with regard to the trees, that petitioners base their request for a temporary injunction. Petitioners argue that irreparable harm will occur if the city respondents are allowed to commence destruction of the parklands and removal of 377 mature trees, some of which have reached a height of forty feet. They argue that "[w]hile you can replace buildings and restore park land, only God can make a 75 year old tree, and that's not something that gets replaced by putting in a new sapling." Tr. at 10. They further contend that granting a preliminary injunction will result only in a delay in the project, which petitioners argue will still eventually get built. Petitioners assert that if the Yankees have to relocate to another venue, it would be a "minor inconvenience." Petitioners see the preliminary injunction they seek as merely maintaining the status quo until full judicial review can be had on their claims.

Respondents:

The basic arguments against petitioners' position is that the City agencies properly and in great detail analyzed the project and the objections raised thereto. After balancing the needs of the City against any inconvenience and harm to be suffered by the local community, the municipal bodies approved the FEIS. The City respondents argue that the plan contained in the FEIS is fair and that petitioners' arguments are not sufficient to permit the court to derail it.

The Yankees argue that a delay by judicial direction or otherwise would cause them serious harm, to the extent that the project might have to be abandoned.

The Yankees have asserted that their ability to remain in the Bronx, or indeed even in the City at all, is dependant on the current plan proceeding on schedule. Moreover, the Yankees estimate that close to a thousand workers now employed in connection with the operations and games at Yankee Stadium, would lose their jobs if the Yankees left the City. Tr. at 12. This

number does not include the ballplayers themselves, but is an estimate of other people who work in or in connection with Yankee Stadium.

They argue that a significant part of the financing of the new stadium, for which they are paying, has been planned around the issuance of bonds. These bonds, currently scheduled to be sold on August 16, 2006, are based on the costs over a thirty month construction period. The Yankees argue that if a preliminary injunction were issued , the construction period would necessarily be extended, and the cost of construction would rise twelve percent annually. This might add an additional $80,000,000 to the cost of the stadium, which would change the financial structure designed to fund the construction of the new stadium, a financial structure which was two years in development. If this changed, the marketability of the bonds would be put at great risk and their interest charges might well increase. As such, the Yankees have asserted that delay jeopardizes the ability to sell the bonds that are to be the financial source for the funding of the construction of the new stadium. Tr. at 12-13.

In addition to the issuance of the bonds, the Yankees contend that the delay would adversely impact their ability to make the payments required by the bonds. Tr. at 13. They assert that a delay in the schedule would result in the Yankees starting to play in the new stadium later in the 2009 season, which would increase costs by requiring multiple rents and duplicative staffing in multiple stadiums, as well as delaying revenues. Id. Indeed, the Yankees estimate that the delay would cost them not only the $80,000,000 in additional construction costs, but also an additional $28,000,000 in costs to the bond holders and $33,000,000 in costs for maintaining the existing stadium for an extra year. Id. at 15. The Yankees argue that their revenues simply do not meet those additional expenses. Id. at 16.

In addition, the court takes note of the fact that the current Yankee Stadium is not in compliance with the ADA. The federal government entered into an agreement with the Yankees which provided, in part, that a resolution of the disability issues would be in the design of the new stadium, thereby offering appropriate and beneficial advantages to disabled fans who visit Yankee Stadium. This agreement is also based on the new stadium being completed, in compliance with the ADA, by the 2009 season. The Yankees argue that if there is a delay in the new stadium, the federal government would then have the right to reconsider whether the current stadium requires interim construction to bring it into compliance with the ADA. This could result in further expenses, with the Yankees potentially required to be renovating the existing stadium while simultaneously constructing the new one.

DISCUSSION

In order to be entitled to a preliminary injunction, petitioners must demonstrate: (1) a likelihood of success on their claims that SEQRA was violated; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of the equities in their favor. Doe v Axelrod, 73 NY2d 748, 750 (1988); Olympic Tower Condominium v Cocoziello, 306 AD2d 159, 160 (1st Dept 2003).

In reviewing determinations made pursuant to SEQRA, the court must apply a deferential standard of review, i.e., "whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" Akpan v Koch, 75 NY2d 561, 570 (1990). Indeed, "SEQRA allows an administrative agency or governmental body considerable latitude in evaluating the environmental impacts and alternatives discussed in an environmental impact statement to reach a determination concerning a proposed project."

Aldrich v Pattison, 107 AD2d 258, 267 (2d Dept 1985); see also Real Estate Board of New York, Inc. v City of New York, 157 AD2d 361, 363 (1st Dept 1990). In assessing an agency's compliance with the substantive mandates of SEQRA, courts review the administrative record to determine if the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 (1986). The court's role is not to conduct a de novo review of the agency's decision-making process (Jackson, supra at 418), or substitute its judgment for that of the governmental decision-makers. Akpan, 75 NY2d at 570.

In addition, the doctrine of exhaustion of administrative remedies also applies to FEIS challenges under SEQRA. Courts cannot review a determination on environmental matters based upon evidence or arguments not presented during the proceeding before the lead agency. Aldrich v Pattison, 107 AD2d at 267-68; see also Miller v Kozakiewicz, 300 AD2d 399, 400 (2d Dept 2002).

Impact on the Community's Schoolchildren:

Petitioners are barred from raising objections regarding the project's quantitative impact on surrounding schools and schoolchildren from the temporary loss of park amenities because they failed to raise this argument during the administrative review process. Although petitioners contend that their quantitative impact argument was raised during the comment period, the only reference to schools in the FEIS to which they cite is a public comment on the DEIS that the construction will "generate dust, pollution and noise close to a public school, negatively affecting schoolchildren and the elderly." FEIS 25-72. Petitioners have not shown that they, or any of the

public, raised their current issues during the comment period.[3] Project opponents should not be able to withhold particular objections during the SEQRA review process, when the public has been given the opportunity to be heard, and then attempt to ambush the agency with unraised objections in an Article 78 proceeding.

Notwithstanding the above, the court has analyzed and considered the claim, because of the importance of recreational facilities for students and other youth. The court finds that the claim lacks merit. There is no requirement in the CEQR Technical Manual,[4] or under SEQRA generally, that an environmental impact statement include an assessment of the potential impact of a temporary reduction in open space on any particular sector of the population. Jackson v New York State Urban Dev. Corp., 67 NY2d at 420 (rejecting challenge that FEIS did not address particular impacts on the elderly). As such, the FEIS's analysis of the community impact is sufficient, without segregating schoolchildren as a separate group for separate review.

More important than the above, the FEIS contained a thorough analysis of the potential impact to the community as a whole, which necessarily includes schoolchildren. This analysis included a review of the decrease in the amount of parkland and recreational facilities available during the construction period for the new stadium. The FEIS describes in detail the existing

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[3] Of the present petitioners, only John Rozankowski for petitioner Save Our Parks and petitioner Frances Tejada, for the Highbridge Community Life Center, participated in the review process (FEIS 22-2 and 22-3). Mr. Rozankowski's comments were limited to mass transit issues (FEIS 25-62, 25-63, 25-69) and preserving the two parks (FEIS 25-78). Ms. Tejada commented that construction jobs were temporary and not likely to go to Bronx residents (FEIS 25-19), that the replacement parkland was not adequate (FEIS 25-33), and opposed any plan that involved incursion into the parks (FEIS 25-32, 25-78).

[4] The CEQR Technical Manual provides guidelines to lead agencies and private applicants for use in environmental impact assessments in New York City.

community parks' characteristics, condition, and uses. FEIS 4-3, 4-4. It notes that the Macomb's Dam Park ballfields "are used regularly by numerous schools and community organization . . . as well as by local residents." FEIS 4-3. Particular note was made of the heavy use of the northern portions of Macomb's Dam Park by teenagers and youths. Id. The FEIS concluded that the temporary loss of recreational facilities would not be a significant impact for two reasons: (1) the project would develop temporary facilities to minimize to the extent possible the time that recreational facilities within close proximity to the project area would be unavailable to the community; and (2) the FEIS identified a number of parks containing recreational facilities within close proximity to the project area that would be unaffected. FEIS 4-7 to 4-9.

The court's role is not to pull apart each piece of the Parks Department's analyses. The fact that the FEIS did not quantify the number of affected schools and schoolchildren does not render their analysis legally deficient.

Project Alternatives:

In reviewing the sufficiency of analysis of alternatives under SEQRA, the standard to be applied is the "rule of reason." Thus, "not every conceivable . . . alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." Jackson, 67 NY2d at 417. Only a "reasonable range of alternatives to the specific project" must be analyzed. Town of Dryden v Tompkins County Bd. of Representatives, 78 NY2d 331, 334 (1991). The court's role is not to choose among alternatives, or substitute its judgment for that of the governmental decision-makers. Akpan, 75 NY2d at 570. Provided the lead agency considers a reasonable range of alternatives, the "judicial inquiry is at an end." Dryden, 78 NY2d at 334.

Additionally, SEQRA's implementing regulations make clear that alternatives that do not fulfill the project's objections need not be analyzed. 6 NYCRR § 617.9(b)(5)(v); see also Webster Assos. v Town of Webster, 59 NY2d 220, 228 (1983) (alternatives must achieve the same or similar objectives as the project).

Petitioners argue that reconstruction of the existing stadium would only involve taking a portion of the southern section of Macomb's Dam Park. They view this as a more reasonable alternative to the existing project, which involves taking a much larger amount of park acreage. Petitioners also dispute a key reason cited in the FEIS for dismissing this alternative, which is the difficulty of playing at Shea Stadium[5] while the reconstruction of Yankee Stadium takes place. Petitioners contend that the asserted inability of the Yankees to play at Shea Stadium is disingenuous, because the Yankees played at Shea during the reconstruction of their stadium during the 1970's. Petitioners argue that although the FEIS identified parking at Shea Stadium as a problem, because a new stadium for the Mets is being built at the same time, the FEIS fails to adequately recognize that the City owns both stadiums, and there was no discussion of delaying the construction of the new Yankee Stadium until the new Shea Stadium is completed. Petitioners also allege that, in 1998, then Bronx Borough President Fernando Ferrer developed a plan demonstrating that the reconstruction of Yankee Stadium is feasible (Ferrer, *Safe At Home, Yankee Stadium in the Bronx,* 1998). Petitioners note that the FEIS did not consider this as an alternative nor discuss reconstruction other than to say it could not be done.

In fact, however, the FEIS considered the reconstruction alternative, both in Chapter 22

[5] The FEIS concludes, and both sides agree, that Shea Stadium is the only alternative venue that could accommodate a major-league baseball team. FEIS 22-5.

entitled "Alternatives" and in Chapter 25's responses to public comments on the DEIS. FEIS 22-5 to 22-6, 25-78. The Parks Department determined that it was not feasible for a number of critical reasons and/or would not meet the goals and objectives of the project.

First, expansion beyond the footprint of the existing stadium would encroach on the southern portion of Macomb's Dam Park, and the parkland displaced could not be replaced with new parkland and replacement recreational facilities. As a result, displaced community ballfields would have to be located in the waterfront park space, against the stated wishes of the community. FEIS 22-5.

Second, relocation of the Yankees to Shea Stadium was determined to not be possible today, although it had been successfully done in the 1970's. FEIS 22-5. The FEIS noted that the Mets are currently poised to build a new stadium themselves. Their new stadium will be next to their existing facility, which, like Yankee Stadium, is also widely acknowledged to be out of date. Having the two teams share Shea would greatly exacerbate the parking impact of the Shea Stadium project on its community during the construction. Areas of Flushing-Meadows-Corona Park that are needed for parking would be lost during the warm months of the year. In addition, if Shea Stadium were to have twice as many ball games, to accommodate both the Mets' and the Yankees' schedule, these games would conflict with the U.S. Open Tennis tournament. Further, because of significant difference between the two stadiums, as they exist now, "relocation would be particularly disruptive to the Yankees, and could be achieved only at great cost--not only the cost of relocation, but also the costs related to loss of revenue from team sponsors who could not be accommodated at Shea." FEIS 22-6.

Petitioners also propose delaying the reconstruction of Yankee Stadium until Shea

Stadium is rebuilt. However, this ignores the fact that although the City owns both Yankee and Shea Stadiums, it is the two teams that are each paying for their rebuilding, and, therefore, that the financing for each is driving the projects. Waiting for completion of Shea Stadium's reconstruction would require the Yankees to wait an additional four years to even begin their new stadium, and thus to wait eight years until their own reconstruction would be completed. This would not meet the Yankees' objectives and, thus, does not represent a reasonable alternative to the project.

In addition, the Ferrer plan was addressed in the DEIS, and responded to in the FEIS (at 25-79). The Ferrer plan primarily proposed improvements for the area surrounding Yankee Stadium, and did not specify components for the renovation of the stadium itself. As such, this plan lacked "sufficient detail to permit a reasoned analysis as an alternative to the proposed project." Id.

Petitioners also allege that relocating the stadium to a location in the industrial area further south was not seriously considered. However, petitioners admit that the Parks Department properly looked at and eliminated three possible sites near the existing stadium because they were too small. FEIS 22-3 to 22-4, Fig. 22-1; Petition ¶ 85.

Accordingly, petitioners have not demonstrated a likelihood of success on the merits of their claim that the FEIS's discussion of alternatives to the project was "superficial and disingenuous," or that the discussion fails to provide the information necessary to make a rational choice between these other options.

Removal of Mature Shade Trees:

The FEIS addressed and assessed the impact of removing mature trees from the project

area. FEIS 7-2, 9-22 to 9-24. The Parks Department estimated that the project would result in the preservation of 165 trees and the loss of approximately 377 trees. The FEIS provided for the removed trees to be replaced in accordance with the Parks Department's "basal area tree replacement formula." Through this methodology, the removed trees, having a basal, or base, area of approximately 592 square feet, would be replaced by 8,356 trees of a 3.5-inch caliper. The replacement trees would have a total basal area equal to that of the trees removed.

Petitioners contend that the FEIS's determination, that removing mature trees on the project site would not cause significant adverse environmental impact, is arbitrary or capricious. However, the project would seek to retain mature trees wherever possible and includes a replanting program in accordance with the Parks' Department's basal area tree replacement formula, which is designed to replace the ecological value of removed trees and is the mitigation specifically identified in the CEQR Technical Manual. Although there is no doubt that a three and a half inch sapling does not provide the shade and other benefits of a forty foot mature tree, as petitioners' forestry expert contends, SEQRA does not prohibit the cutting down of mature trees. SEQRA merely requires state and local governments to promote efforts which will prevent or eliminate damage to the environment. Environmental Control Law §§ 8-0101, 0109.

According to the affidavit of a deputy director of the Parks Department, the City is committed to undertaking a tree replacement program in accordance with what was presented in the FEIS. Gunther Aff. ¶¶18-24. The Parks Department has plans in place to begin planting approximately 500 to 800 trees in and around the communities surrounding the project area, starting as early as the fall of 2006. Perhaps most importantly, the court notes that trees themselves have no legal protection. Although communities, as a whole, are assessed and

protected by environmental impact statements and reports, there is no legal bar to cutting down trees, when that is necessary to permit a project deemed beneficial to the City, i.e. the larger community, to proceed. The trees are not owed more deference than the community as a whole.

For all of the reasons stated above, petitioners fail to show the likelihood of success on the merits of their claim that the FEIS has not adequately identified and carefully analyzed, and given a reasoned elaboration of the environmental impact issues petitioners raise herein.

Irreparable Harm:

Respondents contend that there is no irreparable harm, because the loss of the parkland is only temporary, there will be a net gain of 2.14 acres of unencumbered parkland, and the loss of the trees will be ameliorated by planting thousands of new trees in the vicinity of the project. At oral argument, petitioners' counsel conceded that the lost parkland can be restored. The court also notes that respondents currently have a permit to cut down only 170 trees, and the harm of losing mature trees could be ameliorated, to some extent, by the planting of replacement trees larger than saplings.

As mentioned above, a temporary inspection would cause respondents irreparable harm.

Balancing of the Equities:

A balancing of the equities clearly favors the respondents. There is a real and significant possibility that delaying the scheduled start of construction will cause significant harm to the Yankees, the City and the residents of the South Bronx, and might well cause the project to be completely terminated.

There is evidence that the entire project could become non-viable if construction is delayed by judicial fiat. Tishman Speyer, the project's Development Manager, avers that the

construction company will not be able to guarantee that the new stadium will be ready for the 2009 season if construction and preliminary site preparation do not commence on the August 17, 2006 date, as planned. Further, the additional cost of construction due to delay could be great. Lon Trost, the Chief operating officer of the Yankees, avers that the team may leave the City if they cannot be assured that the new stadium will be completed by the beginning of the 2009 season. The new stadium is needed by the 2009 season due to settlement agreements entered into as a result of litigation over the current stadium's non-compliance with the ADA and other similar state and city laws. The proposed sale of approximately $930 million of PILOT Bonds and $25 million of Rental Bonds has been scheduled for August 16, 2006, and respondents assert that any delay could have a severe detrimental effect on the project's financial viability, due to the project's financing being based on the current market and interest rate. In addition, the increased revenue, estimated from the 2009 season being played in the new and expanded stadium, is needed to meet the bond obligations.

Finally, petitioners argue that the Yankees are a wealthy and highly successful sports franchise dedicated to staying in New York City and, as a result, that they are unlikely to leave the City. Petitioners also argue that a preliminary injunction, at this time, even if it results in a delay of the construction, will not prevent the Yankees from being in their new stadium by the start of the 2009 season. Petitioners assert that other ballparks in other cities are proposed to be built in less than 30 months, and, therefore, so too can the new Yankee Stadium be constructed in less time than the current schedule requires.

However, none of these arguments are availing. These unsupported and conclusory assertions do not obviate the potential harm alleged and documented in respondents' opposition

papers. The court also notes that although Article 78 proceedings are governed by a four month statute of limitations, the petitioners waited until almost the last day of that period to move for a preliminary injunction. Further, the petitioners raised only the most local of issues in their motion, whereas all the governmental agencies involved, on the city, state and federal level, clearly had an obligation to look at the needs of the City as a whole as well as the local community in arriving at their decision.

Underlying these objections made by petitioners to the siting or even the need for a new stadium, is petitioner's view that the Yankees are not serious in the statement that the team will necessarily move to another city, if the new stadium is delayed. They also disregard the Yankees claims relating to the rising cost that delay will cause, and the very real possibility that such rising cost will completely make the project unfeasible. However, the court is not ready to simply disregard what has been said by the Yankees in these regards. To do so, would be reckless at the very least. After all, it is very possible that the Yankees and their counsel mean what they say when they indicate that the Yankees will have to seek an alternative home if construction here is delayed.

Treatment as a Motion to Dismiss:

The Yankees, at the hearing before the court orally moved to have the court treat the papers submitted in opposition to the preliminary injunction motion, also as a motion for dismiss. Tr. at 36. The City supported the Yankees' motion. Petitioners opposed, arguing that they are entitled to put in papers in opposition to a motion to dismiss. Petitioners further argue that the full record, of the proceedings and the documents that were reviewed by the City in making their determination regarding the project, is not currently before the court.

The court has considered the motion, and finds that since petitioners have not had the opportunity to respond, the court does not have the authority to do so.

For the foregoing reasons, it is hereby

ORDERED that petitioners' motion for a preliminary injunction is denied; and it is further

ORDERED that respondents' cross-motion to convert their papers in opposition to the preliminary judgement to a motion to dismiss is denied, without prejudice.

Dated: August 15, 2006

ENTER: _____/s/_____
J.S.C.