

**Chelsea Piers Management, Inc. v Chapin**

2003 NY Slip Op 30187(U)

January 2, 2003

Supreme Court, New York County

Docket Number: 107446/02

Judge: Ronald A. Zweibel

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RONALD A. ZWEIBEL  
*Justice*

PART 50 Q

*Chelsea Bus Mgt*  
- v -  
*Debra Chapin*

INDEX NO. 107446/02  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for an order pursuant to CPLR A 7.7

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying decisions, order and judgment.*

ENTER:

**SCANNED**  
JAN 27 2003

MOTION/CASE IS TECHNICALLY REFERRED TO JUSTICE

Dated: JAN 08 2003

*Ronald A. Zweibel*  
HON. RONALD A. ZWEIBEL J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50Q

-----X  
CHELSEA PIERS MANAGEMENT, INC.,

Petitioner, :Index Number 107446/02  
Decision, Order & Judgment

-against-

DIANA CHAPIN, as Executive Director of:  
the New York City Water Board,  
NEW YORK CITY WATER BOARD, and :  
NEW YORK CITY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, .

Respondents. :

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ZWEIBEL, J.:

Petitioner Chelsea Piers Management, Inc. ("CPM") seeks a judgment, pursuant to Section 7805 of the Civil Practice Law and Rules overturning as arbitrary and capricious and without basis in law a determination of the respondent New York City Department of Environmental Protection ("DEP") to rescind a credit totaling \$218,525.63 previously granted to CPM for erroneous sewer charges, DEP's determinations denying CPM's appeal of that determination, including the final determination of Diana Chapin, Executive Director of the New York City Water Board ("Water Board"), dated June 21, 2000 and the determinations set forth in the affidavit of DEP Deputy Commission Elizabeth C. Collins, sworn to December 14, 2001 and directing respondent New York City Department of Environmental Protection ("DEP") to reinstate the sewer charge credit of \$218,525.63 previously granted to CPM with interest. CPM argues that the \$218,525.63 sewer charge credit to CPM should be

reinstated because DEP cannot lawfully charge Chelsea Piers for sewer services it did not provide during the period that Chelsea Piers 59 and 60 were not properly connected to the New York City sewer system because of errors and/or omissions by DEP's agents and employees and through no fault of its own. Respondents oppose the petition challenging the determinations rendered by DEP upholding the imposition of sewer charges billed to CPM, arguing that DEP's final determinations upholding the charges for sewer usage are rational and proper in all respects and therefore, should be upheld by this Court and the petition dismissed.

After considering all the affidavits, exhibits and memoranda submitted by the parties, the Court agrees with CPM that the determinations rendered by DEP upholding the imposition of sewer charges billed to CPM must be overturned and the matter remanded to DEP for further proceedings.

#### Background

Chelsea Piers L.P. is the Master Lessee of the Chelsea Piers, including Piers 59 and 60, pursuant to the Master Lease of Chelsea Piers with the New York State Department of Transportation ("NYSDOT"), dated June 24, 1994. Under the Master Lease, CPM has no responsibility for the sewer and wastewater lines running out of Chelsea Piers, which remain the responsibility of DOT as the Lessor. Article 10, section 10.1 of the Master Lease provides that:

Lessee shall not be responsible for any actions or obligations under the Agreement with respect to the main sewer overflow discharge lines running in an east-west direction.

By letter sent to CPM engineering consultants in July of 1995, DEP informed CPM that CPMs' wastewater lines were properly connected to the New York City sewer system. This letter from the Chief of the Permit Control Section of DEP's Division of Sewer and Regulation Control, stated in pertinent part:

This is in reply to your letter requesting a dye test to ascertain whether the subject property is connected to the street sewer. This Division's House Connection Inspection Unit has conducted the test and determined that the subject premises is connected to the combined sewer in West Street.

Based on this determination, CPM claims to have believed its wastewater lines were properly connected to the New York City sewer system. Allegedly in reliance on this letter, CPM paid for sewer charges totaling \$218,525.63 recorded by meter No. N84000116 for the wastewater lines emanating from piers 59 and 60.

On October 19, 1999, a DEP official, Peter Brancone, advised CPM that dye tests had shown that wastewater from Chelsea Piers was not entering the New York City sewer system. CPM contacted the property owner, NYSDOT, which is responsible for the sewer connection, and asked it to take immediate steps to correct any problem.

On October 21, 1999, DEP issued the first of forty-four daily violations it ultimately issued to CPM for an alleged "unlawful

connection to a storm sewer." Although NYSDOT promptly took steps to correct the problem, because of delays in obtaining the necessary permits and other difficulties, the necessary work was not completed until December 3, 1999. CPM's appeal from the imposition of the DEP fines is currently pending before the New York City Environmental Board.'

In October of 1999, Peter Brancone of the DEP had a conversation with Michael Braitto, General Manager of CPM, wherein Brancone agreed that DEP could not properly charge a customer for sewer services it did not provide, and that CPM should not have been billed for the time period that the wastewater lines from Piers 59 and 60 were not properly connected to the New York City sewer system. Accordingly, on November 19, 1999, DEP issued a credit to CPM for sewer charges in the amount of \$218,525.63 that CPM had paid during the period of July 1995 to December 1999.

By letter dated December 29, 1999, Anthony Brandefine of DEP

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'According to Chelsea Piers, the waste line problem originated in the 1960's when a State or City contractor mistakenly connected a 12 inch pipe carrying wastewater from Chelsea Piers 59 and 60 to the outflow side rather than the upstream side of sewage regulating chamber No. N50 belonging to DEP located at 18<sup>th</sup> Street on the West Side Highway. Chelsea Piers further alleges that since sometime in the 1960's, both DOT and DEP have had in their possession drawings showing that this pipe was incorrectly connected to the outflow side rather than the upstream side of the sewage regulating chamber. Despite being on notice of this problem, both DOT and DEP failed to take any corrective action for over 30 years. During this period the principal occupant of Pier 59 was the New York City Department of Sanitation.

informed CPM's Michael Braitto that the sewer charges of \$218,525.63 had been reinstated. The letter did not explain how DEP could bill CPM for sewer services that DEP never provided. By letter dated February 7, 2000, CPM appealed DEP's determination to rescind the \$218,525.63 credit to DEP Deputy Commissioner Lawrence E. Schatt. By letter dated February 24, 2000, Deputy Commissioner Schatt denied Chelsea Piers' appeal.

By letter dated March 23, 2000 to Diana Chapin as Executive Director of the New York City Water Board, CPM appealed Mr. Schatt's refusal to reinstate the \$218,525.63 sewer charge credit on the ground that it was arbitrary and capricious and without basis in law. By letter dated June 21, 2000, Water Board Executive Director Chapin denied CPM's appeal and affirmed Deputy Commissioner's Schatt's refusal to reinstate the \$218,525.63 credit for erroneous sewer charges that DEP had previously granted CPM.

On October 19, 2001, CPM commenced an Article 78 proceeding challenging as arbitrary and capricious respondents' decision to rescind the credit of \$218,525.63 previously given CPM for sewer charges. The matter was captioned Chelsea Piers Management, Inc. v. Diana Chapin, as Executive Director of the New York City Water Board, New York City Water Board and New York City Department of Environmental Protection, Supreme Court, New York County, Index number 121746/00 ("prior Article 78 proceeding"). In its verified petition, CPM alleged facts in support of its claim that the

improper connection of the wastewater lines to the sewer system was the fault of respondents' agents and employees, and no fault of CPM. In their verified answer, respondents "denied knowledge or information sufficient to form a belief as to the truth" of the factual allegations. On August 23, 2001, a Decision and Order ("Decision") was rendered in the prior Article 78 proceeding. In that the Decision, the Court determined that the record and the basis for the Water Board's determination was "unclear" in several respects, including the circumstances under which petitioner was found to be disconnected" from the City sewer system. The Court remanded the matter to the Water Board with a direction that it clarify the legal and factual bases for respondents' determination. The water Board was directed to clarify whether its legal contention is that sewer charges are due from a property owner without regard to whether the property owner knowingly failed to connect or illegally disconnected from the sewer system. The Court further directed that "[i]f the Water Board's position is that knowing conduct is a condition for the imposition of charges under the regulation, then the Board shall make additional findings of fact as to whether petitioner engaged in such conduct and, if so, the Board shall set forth the basis in the record for such finding.', Finally, the Water Board was further directed "to clarify its position on the effect of the July 1995 DEP letter on petitioner's liability for sewer charges."

Following remand, respondents' served CPM with an affidavit sworn to December 14, 2001 by Elizabeth Collins, the Deputy Commissioner of DEP's Bureau of Customer Services, which purported to provide the factual and legal "clarification" mandated by the Court's Decision and Order. Respondent's assert in the Collins affidavit:

Charges are imposed whether a property owner failed to connect or illegally disconnected itself from the wastewater system. As stated in the final determination of the Water Board's Executive Director Diana Chapin..., the intent of this rule is to remove any financial incentive to disconnect from the sewer system and the rule is enforced to prevent potential hazard to the public health. Therefore the charges are imposed even where there is no evidence that could establish that an owner affirmatively disconnected itself from the wastewater system.

Respondents further asserted that:

The Court additionally requests clarification of the Water Board's position on the effect of the July 1995 DEP letter... on petitioner's liability for sewer charges. The letter states that a dye test indicated that the property was connected to the wastewater system. However, a subsequent, DEP inspection conducted in 1999 revealed that an outflow pipe was improperly connected, and therefore the subject premises was not in fact, connected to the wastewater system. It is the Water Board's position that the July 1995 letter does not effect [sic] the petitioner's obligation to pay sewer charges.

Thereafter, CPM brought the instant CPRL Article 78 proceeding.

## Discussion

In the instant Article 78 proceeding, CPM argues that since it is undisputed that CPM did not knowingly fail to connect or illegally disconnect from the New York City sewer system, and that CPM relied in good faith on DEP's July 1995 letter advising CPM that it was properly connected to the New York City sewer system. Furthermore, CPM relied on respondents' determination that they are still entitled to collect \$218,525.63 for sewer services they concede were never delivered because of errors and omissions by respondent's own agents and employees, and through no fault of CPM, was arbitrary and capricious and amounted to a taking of property without due process of law in violation of the State and Federal Constitutions.

In an Article 78 proceeding, a court is not to disturb an agency's determination unless it is arbitrary and capricious or without sound basis in reason and is generally taken without regard to the facts" (Pell v. Board of Education of Union Free School District No. 1, 34 N.Y.2d 222, 231 [1974]); Westmoreland Apt. Corp. v. New York City Water Board, 294 A.D.2d 587 [2d Dept. 2002]) . If an agency's determination has a rational basis, it is not to be disturbed by a court (see Sullivan County Harness Racing Assn., Inc. v. Glasser, 30 N.Y. 2d 269 [1972]).

Although the interpretation of regulations made by an agency responsible for their administration is generally to be accorded

deference, an agency is not thereby freed of the obligation to read those regulations reasonably and rationally (see Mutual Redevelopment Houses, Inc. v. New York City Water Board, 279 A.D.2d 300, 301 [1<sup>st</sup> Dept. 2001]; Matter of Howard v. Wyman, 28 N.Y.2d 434 [1971]). Moreover, an administrative agency cannot extend the meaning of the statutory language to apply to circumstances not intended to fall within the statute (see Perry Thompson Third Co. v. City of New York, 279 A.D.2d 108, 115 [1<sup>st</sup> Dept. 2000]). DEP's interpretation that CPM was liable for both charges and for services not rendered despite being affirmatively led to believe by the agency that they were properly connected to the New York City sewer system, despite the fact that CPM is not the real property owner (NYSDOT is), but the tenant, and somehow they made use of a storm drain, which is not one of the enumerated parts of a sewer system, is unreasonable under the circumstances of this case and irreconcilable with the plain meaning of the governing regulation. Indeed, reading the statute relied upon by DEP, it appears to this Court that NYSDOT, and not CPM is the correct party to fine under the plain meaning of the statute.

Appendix "A" of Title 15 of the Rules of the City of New York, entitled "New York City Water Board, Water and Wastewater Rate Schedule-July 1, 1999," establishes and promulgates wastewater rates to be charged by DEP. Pursuant to Part III of Appendix "A" entitled "Wastewater Rates and Charges," charges are imposed in

cases where an owner is not connected to the system, but is legally required to be connected. It provides, as follows:

#### Section 1. General Provisions

The owner of any parcel of real property connected, or required to be connected to, the wastewater system, including but not limited to real property connected with the Wastewater System by means of a private sewer or drain, and any person benefitting from the use of, or services furnished, rendered or made available by the Wastewater System, whether or not the owner of any parcel of real property connected or required to be connected to such system, shall pay a wastewater charge for the use of, or services furnished, rendered or made available by, the Wastewater System. In instances where a property is required to be connected and has not connected, charges will be assessed six months after notification that a sewer has been installed and made available. In instances where a property has connected to the Wastewater System, charges are assessed from the date of connection.

Pursuant to the New York City Administrative Code § 24-514, the sewer system is defined, as follows:

§ 24-514 Sewer rents. a. Sewer system, defined. As used in this section the term "sewer system" shall mean and include the sewers, manholes, intercepting sewers, sewage pumping, treatment and disposal works, and any other plants, works or equipment and accessories within the city, which are used or useful in connection with the collection, treatment or disposal of sewage and waste, and which are owned, operated or maintained by the city as part of the public Sewer system. (Emphasis added.)

b. Imposition and computation of sewer rent or charge. 1. In addition to any other fees or charges provided by law, the owner of any parcel of real property connected with the sewer system, including but not limited to real property connected with the sewer system by means of a private sewer or drain emptying into the sewer

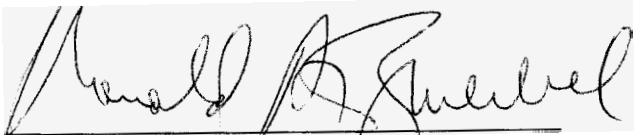
System, shall pay a sewer rent or charge for the use of the sewer system....

It is clear to this Court that DEP did not wish to engage in a battle with another agency, namely, the NYSDOT, who as owner of the property, was "required to be connected<sup>N</sup> to the wastewater system, and who under CPM's lease was solely responsible for the sewer and wastewater lines in question. Moreover, since it appears that this problem has existed since sometime in the 1960's, long before CPM came into the picture, the Court is not sure DEP should not be estopped in this particular proceeding from charging CPM for services it should have long known it was not providing and actually misleading CPM into believing were being properly provided to CPM. In any event, to claim that CPM should pay the same amount for a storm drain as for full use of the sewer system is not rational.

Accordingly, the motion to annul the determinations of respondents is granted and the matter is remanded to DEP for further proceedings in accordance with this decision.

This constitutes the decision, order and judgment of this Court

ENTER :



RONALD A. ZWEIBEL, J.S.C.

Dated: January 2, 2003