

Matter of Greenberg v City of New York

2007 NY Slip Op 33987(U)

December 3, 2007

Supreme Court, New York County

Docket Number: 0100760/2007

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

Index Number : 100760/2007
GREENBERG, JONATHAN
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

X NO. _____
ION DATE _____
ION SEQ. NO. _____
ION CAL. NO. _____

The

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the County Clerk's Desk (Room 4090) to file the judgment.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding is

Article 78
consolidated with the proceeding entitled
Emergency Coalition, et al v. The City of
New York, Index # 102194/07, and the two
proceedings are determined in accordance
with the annexed decision, order and
judgment.

Dated: December 3, 2007

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

----- X

In the Matter of the Application of
JONATHAN GREENBERG and LUTHER HARRIS,

Petitioners,

For a Judgment under Article 78 of the Civil Practice
Law and Rules,

- against -

Index No. 100760/07

THE CITY OF NEW YORK, MICHAEL BLOOMBERG,
in his capacity as Mayor of the City of New York,
ADRIAN BENEPE, in his capacity as Commissioner of the
New York City Department of Parks and Recreation, and
THE NEW YORK CITY DEPARTMENT OF PARKS AND
RECREATION,

Respondents.

----- X
In the Matter of the Application of
EMERGENCY COALITION ORGANIZATION
TO SAVE WASHINGTON SQUARE PARK;
JESSIE McNAB; RAY BRIZZI; SUSAN FURMAN;
DANIEL WEINBERG; NINA REZNICK; JERRY
SITNER; and ROBERT LEVINE,

Petitioners,

For a Judgment pursuant to CPLR Article 78,

- against -

Index No. 102194/07

THE CITY OF NEW YORK; MICHAEL BLOOMBERG,
in his capacity as Mayor of the City of New York;
THE NEW YORK CITY DEPARTMENT OF PARKS AND
RECREATION; ADRIAN BENEPE, in his capacity as
Commissioner of the Department of Parks and Recreation; and
WILLIAM CASTRO, in his capacity as Manhattan Borough
Commissioner of the Department of Parks and Recreation,

Respondents.

----- X

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1B)

MADDEN, J.:

These consolidated Article 78 proceedings, commenced by two residents of Greenwich Village and a neighborhood coalition, concern the plans of respondent New York City Department of Parks and Recreation to renovate and re-design Washington Square Park, particularly its water fountain and surrounding plaza. Petitioners challenge the environmental review process undertaken by respondents for the project pursuant to the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR), *see* ECL § 8-0101 et seq.; 62 RCNY 5-01 et seq., arguing that it was only a cursory analysis and legally insufficient.

Petitioners contend that the Environmental Assessment Statement (EAS) prepared by the Parks Department fails to fully address major facets of the intended project -- neighborhood character, natural resources and construction impact -- and fails to provide the statutorily mandated "hard look" at the relevant areas of environmental concern and "reasoned elaboration" of the basis of respondents' determination. Thus, petitioners argue that, under the statutory scheme of SEQRA and CEQR, the Negative Declaration, which found that the project will not have any significant environmental impact must be nullified, and respondents should be compelled to prepare a comprehensive Environmental Impact Statement (EIS). Specifically, petitioners request an order and judgment (a) nullifying the Negative Declaration issued on November 8, 2006; (b) compelling respondents to prepare an EIS; and (c) enjoining respondents from contracting for or commencing any work on the renovation project.

For the following reasons, the court finds that respondents' SEQRA/CEQR analysis set forth in the EAS prepared by the Parks Department, as the lead agency, is legally sufficient, and

that petitioners have not established that the Parks Department failed to analyze the relevant environmental impacts on the park's trees and birds, pedestrian usage and open space, particularly the historical use of the fountain as a "theater in the round" and the surrounding plaza for artistic performances and political activism. This conclusion is based, in part, on the clear and unambiguous representations of the Parks Department in the EAS that the new adjacent lawns to the reconfigured fountain plaza will be open and accessible for use by the public, including use for artistic and political expression and assembly. As the record indicates that the Parks Department's determination that the proposed renovation project will not have any "significant" adverse effect on the environment is rationally based, the court finds that an EAS and Negative Declaration were properly issued and that a full EIS is not legally mandated.

BACKGROUND

Washington Square Park occupies approximately 9.75 acres of land at the southern end of Fifth Avenue in Greenwich Village. It is designated as a New York City landmark as an integral part of the Greenwich Village Historic District. The park also falls within the neighborhood represented by Community Board 2. Near the center of the park lies a water fountain and surrounding plaza that all parties agree are renowned as gathering places for political and social protests, as well as artistic and entertainment performances.

Based on the conditions in the park and at the request of certain members of the community, the Parks Department conceived a plan to renovate certain features of the park that have fallen into disrepair, to relocate and reconfigure the central fountain and surrounding plaza, relocate certain park elements including statues, pathways, dog runs, and expand certain lawn areas. Specifically, the plans include moving the central fountain approximately 23 feet to the

east, so that it will align with the Fifth Avenue entrance and the park's centerpiece, the Washington Arch. The fountain's stone basin will be restored, and leaking plumbing replaced. The park's two major monuments, the Giuseppe Garibaldi and Alexander Lyman Holley statues, will also be restored and relocated. The work includes re-paving and reshaping park pathways, and expanding lawn areas, which, according to the Parks Department, is being done in order to increase the amount of contiguous lawn and other natural areas by approximately 20%. In addition, certain water, sewer and electric lines, as well as restrooms and the field house, will be replaced. The children's playground, dog runs, and chess tables will all be renovated, while an additional play area for older children and some dedicated Scrabble tables will be added. Finally, the park's existing pipe-rail perimeter fence will be replaced with a four-foot perimeter fence in the post-and-picket style of the original perimeter fence.

The fountain, the central feature of the park, is a circular, sunken area that has a water fountain in the middle, and is surrounded by concrete steps that serve as a seating area. The fountain plaza is a wider, paved area that rings the fountain basin and is slightly below grade from the rest of the park. The proposed renovation of these two areas includes the repair of the fountain's plumbing system, restoration of the fountain's jet pressure, the addition of two side jets, and re-leveling of the fountain plaza to grade. The restored fountain will be constructed with new steps, matching the existing steps that serve as a seating area for the theater in the round, but made from granite. According to the Parks Department, the overall size of the fountain plaza will be decreased by approximately 23%, a percentage disputed by petitioners. As discussed more fully below, a significant issue raised during public consideration of and prior litigation related to the renovation plan, is the size and impact of the reduction of the fountain

plaza and restoration of the fountain jets on the use of the plaza area for artistic and political expression.

The renovation project will be carried out in three distinct phases, each subject to a separate competitive bidding process. Phase I will encompass reconstruction of the fountain and central plaza areas, and work in the park's northwest quadrant. During Phase II, the remaining landscape and pathway work in the other three quadrants will be completed. In Phase III, the park's utility buildings and rest rooms will be reconstructed. However, depending on the availability of funding, Phases II and III could be merged.

This project to renovate the park began in late 2001 when certain members of the Greenwich Village community requested that the Parks Department consider renovating and rehabilitating the park. The Parks Department's preliminary plan was presented to and unanimously endorsed by Manhattan Community Board 2 in December 2003. In January 2005, the Parks Department reached an understanding with the Tisch Foundation whereby the Foundation agreed to donate \$2.5 million toward restoration of the fountain and its surrounding plaza.

According to the Parks Department, in March 2005, George Vellonakis, the Parks Department designer who has been primarily responsible for the project's design, made himself available at a field house inside the park and attended community meetings to discuss the proposed renovations with interested members of the public.

The Parks Department presented more detailed plans to renovate the park to Community Board 2 on two occasions in April and October of 2005. At the first meeting, Community Board 2 endorsed Phase I of the proposed renovations, conditioned on resolving certain issues regarding

the dog runs and playgrounds. In October 2005, Community Board 2 adopted a resolution reaffirming its April 2005 approval of the plans and advocating the start of Phase I as soon as possible.¹ As the park lies within a City-designated historic district, approval by the Landmarks Preservation Commission was required and, after two public hearings, on May 17, 2005 the Commission approved the project. Finally, under the City Charter, Art Commission approval was sought and obtained for restoration work on the City-owned works of art in the park -- the fountain and the Garibaldi and Holley statues.

SEQRA/CEQR establishes a process which requires the consideration of environmental factors early in the planning stages of actions that are undertaken, funded or approved by local, regional and state agencies. Accordingly, the City's plan to renovate the park is subject to an environmental review under these statutes. The statutory framework provides that a lead agency be identified for the environmental review process, that this agency may prepare an EAS and Negative Declaration if the project does not have the potential to result in any significant adverse environmental impact, but that if any such impact is identified, then a full EIS is required. 6 NYCRR § 617.7. Here, the Parks Department served as lead agency for this process.

Petitioners contend that an EAS was only prepared after the City was sued in this court on July 22, 2005 in Emergency Coalition Organization to Save Washington Square Park, et al. v

¹The history of the proceedings before Community Board 2 is delineated in the opinion of the Appellate Division in a separate Article 78 proceeding filed in May 2006 by petitioners Greenberg and Harris and two other residents of Greenwich Village (Greenberg I). According to the decision, the reduction in the size of the fountain plaza has been a subject of dispute since the inception of the plans to renovate the park. While Community Board 2 initially approved the plans, its Parks Committee passed a resolution in October 2005 which opposed raising the fountain plaza to street level and any reduction in the size of the fountain plaza. However, the Community Board approved the revised plans on October 31, 2005 notwithstanding such opposition. Matter of Greenberg v City of New York, 38 AD3d 245, 247-48 (1st Dept 2007).

The City of New York, et al., Index No. 110200/05. That proceeding was discontinued on or about August 15, 2005. Respondents contend that the Parks Department staff initially began preparing the EAS during the first half of 2005. However prompted, a draft EAS was distributed on or about September 1, 2006 to City-affiliated entities with expertise and interest in the potential environmental impacts of the rehabilitation project, including the New York City Department of Environmental Protection, the New York City Department of Transportation, and City Council Member Alan Gerson, whose district encompasses the park and Community Board 2. Respondents contend that the Parks Department reviewed all comments that were submitted, and where appropriate, incorporated them into the EAS.

The Parks Department completed its environmental assessment on November 8, 2006 and issued a Negative Declaration, which, as indicated above, found that the project will have no significant adverse environmental impact. Respondents contend that the 38-page EAS thoroughly describes and analyzes the potential for adverse impacts in twenty different substantive areas, including neighborhood character, natural resources, and construction impacts, that each of these areas was analyzed in accordance with the guidance set forth in the City's CEQR Technical Manual. The EAS includes maps, diagrams and technical reference documents that are annexed as appendices. These appendices include: a series of diagrams of the proposed work; a 114-page Cultural Landscape Report reviewing the park's history and design features; and a detailed "Phase IA Archaeological Assessment" prepared by the design firm of Thomas Balsley Associates specializing in landscape architecture, urban design and site planning.

The Parks Department contends that it issued a solicitation of construction bids for Phase I of the project in March 2006. The bid solicitation included descriptions and diagrams of the

renovation plans, and clearly states that work was subject to an ongoing, but not yet completed, environmental review. On April 20, 2006, the bids were opened and publicly reviewed.

However, respondents allege that as none of the bids fell within the Parks Department's initial cost estimates, the bid package was withdrawn. Due to other litigation, a new bid package was not released until mid-August 2007, inviting bids through mid-September 2007.

Petitioners contend, *inter alia*, that the EAS's description of the project is inadequate to properly assess its environmental impact; that the Parks Department failed to adequately consider how the project will impact on the historical use of the fountain and surrounding plaza for artistic and political expression; its overall impact and its impact during construction on the parks' natural resources, i.e, its trees and migratory birds and open spaces; and the impact of the perimeter fencing and changes to pedestrian pathways.

DISCUSSION

The stated purpose of SEQRA is to ensure that "a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies." 6 NYCRR 617.1(d); see also Matter of Coca-Cola Bottling Co. v Board of Estimate, 72 NY2d 674, 679 (1988). CEQR, which implements SEQRA in the City of New York, requires City agencies to assess the environmental consequences of their decisions to fund, approve or directly undertake an action. Akpan v Koch, 75 NY2d 561, 567 (1990); Rules of the City of New York, Title 62, §§ 5-01 et seq. The environmental review required by SEQRA/CEQR includes not only effects on natural resources and an area's physical environment, but also includes socioeconomic impacts, impacts on neighborhood character, open space and public health. ECL § 8-0105(6); 6 NYCRR 617.2(l); CEQR Tech. Manual, Ch. I(B), §

222; see also Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 365-66 (1986).

Both sides agree that the proposed plan for the renovation of the park is a Type I action as defined by SEQRA.² For Type I actions, SEQRA and CEQR require the preparation of an EAS to make a threshold determination of the significance of such actions and whether a full EIS will be required. See 6 NYCRR § 617.6(a)(2); CEQR Tech. Manual, Ch. I(B), § 121. A Type I action is one that is more likely to require the preparation of an EIS than unlisted actions because this classification carries with it a presumption that the action is apt to have a significant effect on the environment. Barrett v Dutchess County Legislature, 38 AD3d 651, 655 (2d Dept 2007); Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh, 226 AD2d 1031, 1033 (3d Dept 1996), lv denied 88 NY2d 811 (1996); see also 6 NYCRR § 617.4(a)(1); CEQR Technical Manual, Ch. 1(B), § 121 (“[a]lthough it is possible to conclude on the basis of an EAS that a Type I action would have no significant impact on the environment, such a determination is less likely than it is for an unlisted action.”) “If the agency determines that the environmental impact is not significant, it issues a ‘negative declaration.’ In making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects (internal citations omitted).” Spitzer v Farrell, 100 NY2d 186, 190 (2003).

“In assessing the significance of a proposed action under SEQRA, the lead agency must

²The EAS describes the project as a Type I action, citing the SEQRA regulation that defines a Type I action as a project that involves the physical alteration of 10 acres. See 6 NYCRR § 617.4(b)(6)(i). As explained in the affidavit of Joshua Laird, Assistant Commissioner for Planning and Natural Resources with the Parks Department, the reconstruction project will effect both the 9.75 acre park and the surrounding sidewalks for a total of more than 10 acres. Laird Aff. ¶ 7.

‘thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and * * * set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.’” Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone, 100 NY2d 337, 347 (2003), citing 6 NYCRR 617(b)(3), (4).

In reviewing the agency’s determination, “[i]t is not the role of this court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency.” Fisher v Giuliani, 280 AD2d 13, 19-20 (1st Dept 2001), citing Matter of Neville v Koch, 79 NY2d 416, 424-425 (1992); see also Akpan v Koch, 75 NY2d at 571. Rather, judicial review is limited to “whether the agency identified the relevant areas of environmental concern, and took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination (citations omitted).” Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 (1986); see also Matter of New York City Coalition to End Lead Poisoning v Vallone, 100 NY2d at 348; Matter of Merson v McNally, 90 NY2d 742, 751-52 (2001); Chinese Staff & Workers Assn. v City of New York, 68 NY2d at 363.

A. Inadequate Description of the Project

Petitioners argue that the EAS and Negative Declaration omit information that is critical to properly assess the potential impacts from the project. In particular, they object to the fact that the Parks Department failed to include in the EAS the Phase I project specifications as set forth in the bid contract documents, which were prepared in March 2006, prior to the issuance of the EAS and Negative Declaration, and failed to present sufficiently detailed information regarding Phases II and III of the project to properly evaluate whether the project as a whole would result in

significant impacts necessitating the preparation of an EIS.

An agency's compliance with its substantive SEQRA/CEQR obligations is governed by the rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of the particular proposal. Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d at 417. Here, the environment at issue is an existing park and the project involves renovation, reconstruction and relocation of certain elements and amenities within the park. It is within this context that the EAS and Negative Declaration are to be evaluated. Under SEQRA/CEQR, the purpose of the EAS is to provide an assessment of the environmental impact of the project plans, and while the Parks Department, as the lead agency, is required to provide an adequate assessment, it is not required to include every detail of its plans for the project in the EAS. On the other hand, the purpose of the bid and construction documents is to provide to potential construction bidders the Parks Department's contract requirements and specifications in sufficient detail to allow potential contractors to calculate the amount of their bids; they do not analyze environmental impacts, but only implement the analyses and conclusions set forth in the environmental review. Given these different purposes, as well as the volume of and technical detail in the contract documents, petitioners' objections on these grounds are unpersuasive.

In the instant case, as previously stated, the EAS consists of a 38-page report, maps, diagrams and technical reference documents including a series of diagrams of the proposed work, a 114-page Cultural Landscape Report reviewing the park's history and design features, and a detailed "Phase IA Archeological Assessment." The EAS and the diagrams and reports attached thereto describes all three phases of the proposed construction in sufficient detail and the

potential for associated environmental impacts.

The Parks Department did not segment its environmental review of the project, rather it properly issued at the outset an EAS discussing the potential environmental impacts associated with the overall plan for construction. Specifically, the EAS addresses the overall impact of the project, whether it will impair the character or use of the park, the effect on vegetation and fauna and on resident and migratory birds and other wildlife. Furthermore, the EAS discusses requirements that construction activities adequately comply with Department of Environmental Conservation and Health Department regulations for the entire project not limiting compliance to any specific phase.

In opposition to the petitions, respondents submit the affidavits of four Parks Department employees – the affidavits of Charles McKinney, Chief of Design; Joshua Laird, Assistant Commissioner for Planning and Natural Resources; William Steyer, the Director of the Manhattan Forestry Division; and Ralph Musolino, the Parks Department manager responsible for the district that encompasses the park since September 2005. Their affidavits address the various objections raised by petitioners and explain how the Parks Department will implement the analyses and conclusions in the EAS by referencing specific contract provisions and specifications and Parks Department practices. Petitioners argue, on reply, that the Parks Department's submission of affidavits addressing the specific criticisms of the EAS raised by petitioners is improper, constitutes post-hoc rationalization and after-the-fact supplementation of the EAS and constitute admissions that the EAS is incomplete and inadequate. "[A]n agency's responsibility under SEQRA must be viewed in light of a rule of reason'; not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the

agency's responsibility." Matter of Neville v Koch, 79 NY2d at 425. Under this standard, and given the content and purpose of the affidavits, and while the AES must stand on its own, it would be fundamentally unfair if the lead agency could not address factual assertions made by the petitioners and their experts regarding the proposed action in the context of a legal challenge to an EAS.

B. Fountain and Surrounding Plaza

SEQRA and CEQR both require consideration of "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character." 6 NYCRR 617.7(c)(1)(v); CEQR Tech. Manual, Ch. I(B), § 222(5); see also 43 RCNY § 6-06(a)(5). It is not disputed that historically the fountain plaza area has been used as a gathering place for artistic and political expression. Petitioners contend that the percentage of reduction in the paved fountain plaza area and the height of the fountain's plumes of water will effect this historical use.

At the commencement of this litigation, petitioners had claimed that the Parks Department did not adequately disclose to Community Board 2, the Landmarks Preservation Commission and the Art Commission that their renovation plan calls for a 33% reduction in size of the fountain plaza and the installation of a 45-foot jet spray in the fountain itself. This issue has been resolved in Greenberg I. Although the Supreme Court (Goodman, J.) granted the petition to the extent of enjoining the renovation of the fountain and surrounding plaza and directing the Parks Department to resubmit the complete renovation plans to Community Board 2 and the two city commissions for de novo review, the City successfully appealed. By order dated March 8, 2007, the First Department reversed the Supreme Court finding, inter alia, that the

Parks Department's disclosures regarding the proposed changes to the fountain and surrounding plaza were adequate. Matter of Greenberg v City of New York, 38 AD3d at 251. Specifically, the First Department held:

The record demonstrates that apart from the numerous informal discussions regarding the renovation plan both at the park and community forums, in April 2005 the Parks Department made a detailed presentation of the renovation plan to Community Board 2, supported by photographs and schematic drawings of the proposed changes to the fountain and plaza. Although no specific measurements were provided, the diagrams of the plaza were drawn to scale and, consistent with the Parks Department's stated goal, they reflect both an increase in green space and a corresponding reduction in the amount of paved space. In addition, the sketches of the fountain plainly show that its renovated fountain jets would produce a stream of water approaching the interior height of the arch, and thus are sufficient by themselves to constitute notice of the fountain changes. Nor is there any evidence in the record to suggest that the Parks Department either concealed any material information requested by the Board, or that it was even aware that the Board considered the specific measurements of the fountain or plaza to be of such critical importance.

Id.

Thus, the issue before this court as to the proposed changes to the fountain and surrounding plaza is limited to whether the EAS takes a hard look at how the renovation project will impact their historic use. As indicated, petitioners argue that the plans call for a 33% reduction in the size of the fountain plaza and the installation of water jets in the fountain with towering 45-foot water sprays and that these changes will effectively turn the fountain into an ornament and eliminate the heralded and historical function of the fountain plaza as a public and political gathering place for First Amendment activity and impromptu artistic performances.

Petitioners fail to offer any specific evidence supporting their claim that the reduction in the size of the fountain plaza is 33%, as opposed to the 23% cited in the EAS and as the Parks Department's witnesses contend herein and in Greenberg I. In paragraph 21 of the Coalition's

petition, they state that Justice Goodman found that the plaza would be reduced by as much as 33%. However, Justice Goodman stated only that the amount of the decrease was not obvious from the diagrams submitted.³ The Appellate Division did not specifically rule on this point, but stated that the diagrams “reflect both an increase in green space and a corresponding reduction in the amount of paved space.” 38 AD3d at 251.⁴ In any event, the reduction in size of the paved plaza area is, at a minimum, 23% -- a substantial decrease. The Parks Department contends that the three adjacent lawn areas will be available for use as extensions of the fountain plaza and thus, there will be no significant change in the use of these areas.

At the beginning of the EAS, the Parks Department recognizes that “[t]he central feature of the park is the fountain and plaza.” EAS at 8. In its discussion of “neighborhood character,” the Parks Department describes the “unique neighborhood personality” of Greenwich Village as being:

known for its historical and contemporary inspiration of creativity, political resistance, artistic expression and inventive social movements. The Park has served as both a backdrop and (by virtue of its design and setting) an active means of promulgating this unique character. The Park also has a historical and

³ In this case, neither petitioners nor respondents point to any evidence of specific measurements in the record regarding the dimensions of the existing and proposed fountain and surrounding plaza. However, as stated in the affidavit of Amy Freitag, Deputy Commissioner for Capital Projects for the Parks Department (the Freitag Affidavit) originally submitted in connection with Greenberg I, the bid documents depict a reduction of approximately 23% in the size of the fountain plaza. Ms. Freitag further provided diagrams prepared by the Parks Department, which she claims show a 23% reduction (51,233 square feet to 39,419 square feet) in the size of the fountain plaza. The court takes judicial notice of those diagrams, which, although not submitted as part of the record in this case, are part of the official court file in Greenberg I. And while it is not totally clear to this court what specific paved areas surrounding the fountain were included in that calculation, petitioners fail to offer any evidence substantiating their claim of a 33% reduction.

⁴The City alleged in Greenberg I and alleges in the EAS and in this proceeding, that the overall increase in green space is 20%. EAS at 9, 25.

continuing association with music and arts. Many well-known musicians have been associated with either the Park itself as an inspirational source of creativity, or with cultural or social movements to which the park was a backdrop. In addition, the Park has a long-term association with spontaneous and formal music performances by street musicians. The frequency, variety and improvisational character of these performances reflects the Park's unique urban diversity and character. The Park has also served as a source of formal inspiration for many noted visual artists, photographers and writers. In addition, the Park acts as a setting for both planned and unplanned protests, vigils, discussions and other acts of free speech and expression. . . . [T]he fountain area, in particular, has served as a direct catalyst for neighborhood personality. In the words of noted urban activist Jane Jacobs, "we have here (in the fountain circle) one of the most remarkable things in America -- an informal theater in the round" (See Appendix II). There is an unquestioned bond between the Park and Greenwich Village's role in cultural history and contemporary urban society as a place for vibrant and spontaneous artistic, social and political invention.

EAS at 27-28. The EAS further states that the Park was "historically the scene of numerous workers' protest movements and also served as the backdrop for several generations of well-known young bohemian movements." EAS at 23. The Cultural Landscape Report, attached to the EAS, notes that because of the park's location in Greenwich Village, which is generally regarded as a liberal, open-minded community, and being adjacent to the campus of New York University, the park is often used as a gathering space for protests, vigils and demonstrations. Report at 46.

In the Parks Department's view, contrary to the view of the petitioners, who oppose substantial changes to the fountain plaza,⁵ this will continue to be the case in the rehabilitated

⁵The Coalition cites to a "Project for Public Spaces" report which indicates it surveyed the public consensus and concluded that "People like the current park and its character. While people see the need for upgrades of certain current facilities and amenities (pavement, bathrooms, etc.), they like the park the way it is. Use of the park overall is very good -- if not extraordinary." Coalition Petition ¶ 94; Brizzi Aff., Exh. 2. However, this report acknowledges that the areas surrounding the fountain ring, such as the park buildings, stage/petanque court, and playground do not create a supportive edge for major performance activity. Brizzi Aff., Exh. 2: Report at 8.

park. According to the EAS, the new design will relocate two dog runs; one which is directly adjacent to the fountain plaza and the other which is near the plaza, to the park's perimeter which will allow large open lawns to meet the fountain plaza and visually expand the plaza into the open green lawns. EAS at 8. More specifically, the Parks Department represents that:

[t]he defining personality of both the Park and surrounding neighborhood would be retained by the proposed action, as the design promotes passive enjoyment, user experiences, social interaction, and artistic inspiration. The restored fountain will be constructed with new steps, matching the existing but made from granite, to retain the "theater in the round". The jets reflect the original design and the 1970's renovation with jet displays that are manually controlled and a new recirculating pump system that meets current construction codes. In addition, the design also retains the seating walls and niches and other areas such as the Holley, Garibaldi and Arch Plaza for continued spontaneous artistic invention. The adjacent three large lawn quadrants will also allow additional spectators to benefit from these areas.

Id. at p. 28 (emphasis added). Again, under the heading "Usability of Open Space," the Parks Department represents that:

[t]he primary design objectives of the plaza redesign are: to ensure that the plaza will continue to facilitate spontaneous social interaction and passive recreation, ensure compliance with the ADA, improve pedestrian circulation, protect natural resources, and provide areas for assembly both within the plaza and on adjacent lawns.

Id. at 21 (emphasis added).

The Coalition argues that this analysis is inadequate, as the Parks Department fails to discuss the reduction of the size of the fountain plaza, nor is there any consideration given to the impact of the restoration of the fountain on the historic and current use of the fountain and surrounding plaza for public gatherings. However, the EAS specifically addresses this reduction in size in stating that "the area of the new fountain plaza will be no less than 77% of its current size," and that the three new adjacent lawns will allow additional space to accommodate large

demonstrations and performances. EAS at 8, 9, 28. Under the heading “Impairment of Operation,” the EAS again concludes that “[t]he reduction in the size of the fountain plaza, which is anticipated to be no more than 23%, is not expected to impair the ability of the park to host informal musical performances or other gatherings (emphasis added).” EAS at 20. In the “Usability of Open Space” section of the EAS, the Parks Department states that “the fountain and plaza will remain the beacon feature of the park and the plaza will be situated within large open lawns. The re-design will allow sweeping lawns to meet the plaza so that spectators in the plaza will feel that they are in a green park (emphasis added).” *Id.* at 21. Within that same section, the Parks Department states that the primary design objectives of the plaza redesign is to “ensure that the plaza will continue to facilitate spontaneous social interaction.” *Id.* Finally, under the heading “Open Space” in the Negative Declaration, the Parks Department concludes that “Park operations will not be impaired by the proposed action due to, in part, the ability of park users to spill onto three new lawns. The reduction in the size of the fountain plaza will be offset by the addition of these new lawns that are expected to accommodate large demonstrations and performances (emphasis added).” Neg. Dec. at 5.

Based on these representations, the Parks Department has committed to access to the adjacent lawns for park users and large demonstrations and performances, that is, for the historic uses of the plaza. This commitment is specifically stated in the affidavit of Charles McKinney, the Chief of Design for the Parks Department, who avers “as the EAS states, the Parks Department is committed to ensuring the new lawn areas abutting the Fountain Plaza can accommodate ‘a large demonstration’ or ‘an audience for a performance in the fountain plaza.’” McKinney Aff. ¶ 40, quoting EAS at 20.

The Coalition challenges this commitment and argues that the Parks Department has, in the past, denied permits for large protests precisely because newly-renovated grassy areas of Central Park would be damaged, citing United For Peace and Justice v Bloomberg, et al., 5 Misc 3d 845 (Sup Ct, NY County 2004), and National Council of Arab Americans and Act Now to Stop War & End Racism Coalition v The City of New York, 478 F Supp 2d 480 (SD NY Mar. 6, 2007).

In the United For Peace case, while the Parks Department did, in fact, deny a special events permit for a political march and rally on the eve of the 2004 Republican National Convention, there were issues involving both the size of the proposed event, i.e., between 215,000 and 250,000 participants, and the likelihood of severe damage to the lawns of Central Park. 5 Misc 2d at 847. However, in the National Council of Arab Americans case, the District Court has ruled that genuine issues of material fact exist as to whether the Parks Department's purported reasons, one of which was potential damage to Central Park's Great Lawn, for denying a political organization's application for a permit to hold an anti-war rally was pre-textual. What is most troubling to this court is that the district court found "evidence tending to show that rallies are categorically disfavored by" the current city administration. Id. at 493.

Thus, at least one court's preliminary finding lends support for petitioners' concerns that the Parks Department will deny access to the fountain plaza and new adjacent lawns for political expression in the future using damage to the lawns as a pre-textual excuse. However, notwithstanding these concerns, in finding that the EAS is rationally-based, this court presumes that the Parks Department's clear and unambiguous representations both in the EAS and in this proceeding that the adjacent lawn areas are to be used as grassy extensions of the fountain plaza

and will be open and accessible for political protest and artistic expression are true, and that both the Parks Department and the City will be bound by these representations in the future.

In this regard, the Greenberg petitioners raise the concern that “significant fencing” is planned for the adjacent lawns. See Boop Reply Affirm. ¶ 104. As this claim was raised for the first time in petitioners’ reply papers, it has not been addressed specifically by respondents. However, Charles McKinney in his affidavit states that a single post and chain fence that is approximately two and a half feet in height will separate the plaza areas from the lawns (McKinney Aff. ¶ 41), and that interior fencing will include regular openings for users to pass through onto the lawn areas. Id. ¶ 55. Thus, it appears that access to the lawns is, in fact, provided and the lawns will be accessible as extensions of the fountain plaza. Furthermore, prohibiting access to the lawns areas would be directly contrary to the Parks Department’s representations in the EAS and to this court that the lawns will be “open” and that “open space” in the park includes the lawns. See EAS at 8, 19.

Petitioners also take issue with the Parks Department’s determination that the fountain needs to be repaired and that restoration of the fountain jets will not significantly impact the historical use of the fountain and surrounding plaza. However, the EAS provides that “the proposal will not restore the fountain to its original use when it functioned as a passive reflective pool with aquatic flora.” EAS at 25.⁶ Rather, the fountain is merely being restored to its current function as a recirculating system with manually adjustable sprays emanating from a center and side jets. EAS at 9, 25, 28. While the restored fountain’s center jet will be adjustable to between

⁶The Cultural Landscape Report notes that a proposal to turn the fountain into an “ornamental fountain” was rejected back in the 1960’s and that the community voted to retain the existing fountain specifically to keep its character as a theater in the round. Report at 43.

20 and 45 feet, the EAS specifically notes that the jets, as they exist today, if turned on, can reach 35 feet in height, and that this has not impeded park use when the jets are operational. EAS at 25. In her affidavit, Amy Freitag avers that in the 1970's and 1980's, the fountain jets had the capacity for generating a 45-foot-high center plume of water in addition to smaller side jets (Coalition Exh. H: Freitag Aff. ¶ 6), and this did not prevent the use of the fountain area for artistic performances and other gatherings. According to petitioner Ray Brizzi, the proposed 45-foot fountain spray will blow water on audiences and performers even on mildly windy days. However, he also indicates that when a number of people called the city to complain about being sprayed after the fountain was turned on to full pressure following Justice Goodman's decision in Greenberg I, the height was reduced. Brizzi Aff. ¶ 6-a.

The parties are in agreement that the fountain, at present, does not operate all year long, and that it is limited to day-time hours during the summer season (lasting from late May to early October), unless the Parks Department staff are unable to turn on the fountain due to a mechanical problem or staff shortage. Musolino Aff. ¶ 2. There is nothing in the record establishing, as petitioners' counsel maintains, that the fountain, if restored, will operate as a full-time ornamental fountain. While the EAS does not specifically state the hours of operation of the restored fountain, the EAS does state that the renovation will not destroy the heralded use of the fountain as a theater in the round. Moreover, the retention of the steps as seating areas in the fountain supports this representation.

Petitioners' counsel further claims that there is currently no protocol for members of the public to make informal requests for the fountain jets to be turned off. See Boop letter dated September 10, 2007. However, according to the affidavit of Ralph Musolino, requests to turn off

the fountain have been honored for two formal events and approximately one half-dozen informal requests. Musolino Aff. ¶ 10. Certainly this number of requests which have been honored does not establish a practice, and a clear, well-publicized protocol to accommodate such requests to ensure the use of the fountain as a theater in the round would be in keeping, once again, with the City's representations.

As the EAS need not address every conceivable environmental impact, mitigating measure or alternative (Matter of Neville v Koch, 79 NY2d at 425), and based on the representations in the EAS as to the continued use of the fountain as a theater in the round and the use of the lawns adjacent to the fountain plaza for political and artistic expression and assembly, and the court's limited role in a SEQRA challenge, it cannot be said that the EAS failed to address this issue so as to require a nullification of the Negative Declaration.

C. Natural Resources -- Trees & Migratory Birds

Petitioners allege that the EAS fails to state adequately the effect the construction activities will have on the trees and bird life in the park. One indicator of a significant adverse impact is whether the proposal will result in:

the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources.

6 NYCRR 617.7(c)(1)(ii); see also 43 RCNY § 6-06(a)(2); CEQR Tech. Manual, Ch. I(B), § 222(2).

The section of the EAS which discusses the overall impact of the project on the park's trees, states that the number of trees in the park (i.e., 350); the fact that many are between 80 and

100 years old; and which trees are historically significant, i.e., the historic "Hanging Elm" in the northwest quadrant. EAS at 29. The Cultural Landscape Report contains a detailed section on the "Topography and Vegetation" at pages 57 through 60, in which all of the species of trees in the park are identified. It contains an aerial view of the park (figure 34), showing a concentration of trees in the east and west portions of the park, and concludes that the trees are "sufficiently spaced to provide ample shade at all locations of the perimeter and also to provide ample sunlight in the center of the park." Report at 57. This report notes that the eight trees encircling the fountain plaza are smaller, having been planted during the park's 1969 redesign. The report also includes a 2004 survey of the trees in the park and notes that at least one large sycamore maple tree in the northwest quadrant is hollow and possibly dead.

In addition, the EAS provides that "DPR is completing a detailed arbor survey, using guidance from the National Society of Arboriculture, to assess existing tree and root system health. At the professional discretion of a certified arborist, trees which are below accepted health standards will be removed and appropriately replaced." EAS at 29. Existing trees will be pruned under the direction of a certified arborist and the Borough Forester, and no tree removal will be undertaken without the presence of the same. EAS at 37.

The EAS also explains that the proposed action includes increasing the green space in the park by 20% as part of a landscape rehabilitation program which preserves plantings from multiple eras of the park's history, contemplates the introduction of evergreens to enrich the vegetation in the park, creates perennial gardens along the park's perimeter and large open lawns abutting the fountain plaza. EAS at 9, 10, 21, 30.

The Greenberg petitioners argue that the respondents' natural resources assessment in the

EAS misstates the extent of the construction activities on the trees in the park. They contend that the contract drawings, published on March 21, 2006, show that of the 120 trees in the northwest quadrant of the park as many as 40, or 30% of the total number of trees in this quadrant will be permanently removed and the fact that the project involves the removal of trees is not disclosed in the EAS. Greenberg Petition ¶¶ 40-43.

However, the EAS clearly states that the relocation of the fountain and surrounding plaza a distance of 23.36 feet to be aligned with the Washington Arch will require the planting of “new trees.” EAS at 29.

DPR’s proposed action would create a new structural soil for new trees planted in the central plaza to allow for healthier tree root zones. (The major impediment to establishing trees in paved urban areas is the lack of an adequate volume of soil for tree root growth. Soils under pavements are highly compacted to meet load-bearing requirements and engineering standards. This often stops roots from growing, causing them to be contained within a very small useable volume of soil without adequate water, nutrients or oxygen. Consequently, urban trees with most of their roots under pavement grow poorly and die prematurely.)

Id.

Of the eight trees surrounding the fountain, five will be removed, two will be transplanted and one will remain in place. McKinney Aff. ¶ 25. The Parks Department further maintains that the five trees slated for removal are stunted due to poor growing conditions. Id. ¶ 25. Thus, although seven of the smaller trees surrounding the plaza fountain are slated for removal and replacement, as explained in the EAS, the plan involves rehabilitating the planting areas for these trees that are currently adverse to proper tree growth.

As to the claims that 30 - 40 % of the trees in the north west quadrant are to be removed, the contract drawings, particularly sheet no. 4 entitled “Staging and Tree Protection” show only 18 of 120, i.e. 15% of the trees in the northwest quadrant, as slated for removal, a significantly

smaller percentage of the trees in this quadrant than alleged by petitioner. See Boop Reply Affirm., Exh. C thereto. Furthermore, according to the affidavit of Charles McKinney, the Parks Department's Chief of Design, two trees have since been reassessed by the Manhattan Forestry Division and now will either remain in place or be transplanted, thus, reducing the number to 16, 13% of the trees in the quadrant and 4.6% of the trees in the park. McKinney Aff. ¶ 24.

As to the project as a whole, Charles McKinney states that at present, a total of 13 trees are to be removed for project related reasons, 11 trees for health and safety reasons, and that 16 of these trees are to be removed during phase 1, involving the work to be performed in the north west quadrant. McKinney Aff. ¶ 23. This issue must be evaluated in the context of this park renovation project that generally retains the park's existing layout and all of its current uses. Only the plaza trees and a few others are slated to be removed for project-related reasons and the Parks Department maintains that for every tree that is removed, one tree, if not more, will replace it. McKinney Aff. ¶ 24. The EAS addresses this issue in stating that certain trees are to be removed and replaced, identifies a number of these trees, and provides that removal of trees for health related reasons be done at the discretion of a certified arborist.

The Coalition submits the affidavit of Bruce McInnes, a certified arborist, who opines that the proposed construction will result in the "vast degradation" of the tree resources in the park and thus have adverse effect on the remaining trees in the park. However, as noted, the EAS states that "[t]ree protection methods will be used during the construction period to ensure that no damage to existing trees occurs" (EAS at 29), and, sheet no. 4 of the construction documents contains detailed notes the contractor must follow regarding the protections of existing trees and refers the contractor to Article 14 of Section C of the Contract for further tree

protection requirements which will be strictly construed. Finally, the EAS points out that although direct effects for the park's natural resources include soil removal and replacement, these direct effects are temporary as they are construction-related. EAS at 29.

The Parks Department does not dispute, as the Coalition argues, that the benefits that mature trees provide (temperature cooling, UV radiation reduction, carbon storage and sequestration and air pollution removal) cannot be immediately replaced by younger, smaller trees. SEQRA and CEQR address "significant adverse environmental impacts," 6 NYCRR 617.7(c)(1)(ii), which is defined as the "removal or destruction of large quantities of vegetation" (6 NYCRR 617.7[c][1][ii]), and here, this is not contemplated.

The law requires that government ensure a suitable balance of social, economic and environmental factors be incorporated into a renovation project of this kind, and, based on the record before the court, it cannot be said that the Parks Department's determination regarding the park's trees does not ensure a suitable balancing of these factors. As a relatively small number of trees are to be removed and replaced, as more trees are being added to the park, and as the proposed action will create approximately 20% more greenery as a whole, the Parks Department's conclusion that there are no significant adverse impact on the park's natural resources, here, its vegetation, that are likely to occur because of the project is rationally-based.

With respect to the impact on the park's resident or transitory wildlife, the EAS provides:

There are no rare species or critical habitats known to occur on or adjacent to the site based on a review of the New York Natural Heritage files by the NYSDEC Wildlife Resources Center. In addition, except for occasional transient individuals, no federally listed or proposed endangered or threatened species exist within or proximate to the site. Animal species generally include squirrels, migratory and resident fowl, and other well-populated species found in urban parks. DPR has not uncovered any survey data indicating that protected or threatened species (either listed or unlisted) exist within the Park.

EAS at 29.

The Coalition alleges that the park's 350 plus trees provide a habitat for resident birds and animals as well as a stopover place for migratory birds, including possibly threatened and/or endangered species, and point to recent sightings of a red-tailed hawk in the park, who is alleged, by petitioner Nina Reznick, to have made its permanent home there. However, they fail to allege that the Parks Department's conclusion that the project will not significantly impact wildlife in the park or endanger any threatened and endangered species is not rationally based. Indeed, they offer no evidence that red-tailed hawks are endangered species, nor do they allege any "substantial adverse impact" to this species will occur.⁷

The Coalition argues that the Parks Department did not address whether any New York State endangered species of birds use the park and would be impacted. They argue that although the Parks Department did not uncover any data, the Cornell Ornithology Labs e-bird citizen science database indicates that within the past five years, at least three species of birds (Kentucky Warbler, Peregrine Falcon and Northern Harrier), protected either federally or in New York State, have "occurred" in Manhattan. Significantly, petitioners fail to allege that these birds have "occurred" in the park at issue herein or, more importantly, that the proposed renovation plan, calling for a 20% increase in green space will adversely affect these species.

Finally, while petitioners argue that an animal assessment survey should have been performed, the CEQR Technical Manual provides that such an assessment is required only where

⁷The Villager article cited by petitioner Nina Reznick does not say that this hawk makes its permanent home in the park, only that the hawk has been seen regularly there since December 18, 2006 and specifically notes that "there are quite a lot of hawks out there now, including 10 in Central Park alone." Reznick Aff., Exh. 1.

the site is either valuable for wildlife or where it cannot be determined whether the site would have value for any wildlife based on the vegetation (CEQR Tech. Manual, Ch. 3(I), § 325), petitioners fail to establish that either condition applies.

D. Perimeter Fencing & Pedestrian Pathways

Petitioner Greenberg argues that while the EAS notes that the project includes a plan to install permanent perimeter fencing at the street line around the entire park as a major element of the overall project, the Parks Department fails to address these major design elements in the discussion of neighborhood character. Likewise, the EAS's neighborhood character assessment fails to make any mention of another major design element -- the plan to eliminate, re-route and/or diminish an unspecified number of pedestrian pathways which direct and control the flow of pedestrian traffic through and around the park. Specifically, petitioner Greenberg objects to the reduction of the main east-west pedestrian thoroughfare by the addition of large planter boxes and rows of benches alongside the planters down the center of what is a wide, free-flowing walkway. Despite what petitioners contend are "major alterations to the layout of the park," petitioner Greenberg argues that the EAS includes no usage study of the current amount of foot traffic and no analysis of how these changes to these pedestrian pathways will affect park usage.

However, the CEQR Technical Manual provides only that an assessment of neighborhood character is required where the project would result in "substantially different" street scape elements, such being defined to include pedestrian activity and circulation. CEQR Tech. Manual, Ch. 3(H), § 210. Petitioners fail to demonstrate that the replacement of the existing perimeter fence and changes to the pedestrian pathways would result in "substantially different" street scape elements.

The perimeter of the park is presently surrounded by a pipe-rail fence and some wire fencing that are both approximately three-feet tall. See EAS, Appendix II, Figure 29 (illustrating the existing perimeter fence); Laird Aff. ¶ 53. The EAS, in its description of the project, notes that the renovation plan calls for replacement of these fences with a new one, in a post-and-picket style modeled on the five-foot high fence that surrounded the park in the mid-nineteenth century, but reduced in size to approximately three feet, six inches in height. EAS at 9, 19. According to the Parks Department, while the design for the new fence is different than the current one, it serves a comparable purpose -- the open design allows park visitors and passersby to see into the park. Additionally, the Park Department claims that the fence is expected to improve park security and public safety, keep children from running into the street and protect the perimeter plantings. EAS at 19. Since the replacement fence is similar in height and function to the current fences that surround the park, it does not meet any of the threshold criteria warranting further neighborhood character analysis as identified in the CEQR Technical Manual.

Regarding the proposed changes to the park's pathways, a comparison of the diagrams attached to the EAS and the Balsley Report showing the existing and proposed layout of the park reveal that the project will not effect any substantial changes to its internal pathways. As reported in the EAS, the Parks Department is proposing only to remove some of the small paved plazas, remove two mid-block entrances to discourage illegal street crossings into the park, and upgrading the park's benches, providing approximately 25% more of them throughout the park. EAS at 9-10, 21, 34. As for the petitioner's complaints about the addition of large planter boxes to the main pedestrian thoroughfare, the diagrams attached to the EAS depicting the proposed renovations clearly shows that these planters are limited to the areas immediately adjacent to the

relocated fountain plaza and the Holley and Garibaldi statutes, and will be provide almost 50% more space in total for pedestrian usage.

E. ADA Compliance

Petitioners argue that, although the initial driving force of the renovation of the park was to make the park more accessible for people with disabilities, the EAS and Negative Declaration lack any information regarding compliance with the American With Disabilities Act (ADA) and contain only generalities. They further claim that it was only after Greenberg I was filed in 2006 did the Parks Department provide some details regarding ADA compliance in the Freitag Affidavit, submitted as part of the City's answer. The Coalition argues that the Parks Department insists on significantly altering the fountain plaza, claiming it is necessary for ADA compliance, even though they acknowledge that disability advocates are on record as preferring the existing ramps.

As acknowledged by the Parks Department, access for people with disabilities in City parks is a major concern of the Parks Department with respect to all of its parks, and while neither SEQRA nor CEQR provide that this is a specific area of analysis, it is addressed in the EAS. The EAS explains the ways in which the renovation project will allow people with disabilities to make use of new and existing features of the park. The EAS states that the sunken plaza surrounding the fountain will be raised to grade level to provide improved access to park users with disabilities.⁸ EAS at 9. Other improvements include a ramp that will allow

⁸As the Freitag Affidavit explains, in the Park's current layout, the only access routes to the fountain plaza are paved ramps that slope downwards towards the sunken plaza at varying angles of approximately 10 to 16 percent, and these slopes exceed the maximum allowable slope of 8.6 percent under the ADA. The fact that some mobility-impaired advocates seek maintaining the current sloped ramps is not a justification for the Parks Department to ignore ADA

wheelchair access to the new permanent elevated stage to be constructed immediately to the southwest of what is to be called Garibaldi Plaza, a new seating arrangement around the inner fountain plaza area that will improve access for people with mobility limitations or difficulty sitting on high walls, curb cuts that will help wheelchair access to the park's lawn areas, and adjustments to the bench configuration that will allow wheelchair users to sit alongside other park visitors. See EAS at 9, 20-21, 26.

The Coalition, citing federal law, argues that the Parks Department has failed to come up with a transition plan that includes the steps necessary to make City park facilities ADA compliant, and points to a report by the Office of the State Controller, issued in December 2005, critical of the Parks Department's self-evaluation and transition plan for the entire city park system to current federal regulatory standards. However, this report makes clear that the Parks Department was attempting to meet ADA accessibility requirements through new construction and major alteration projects, like the project at issue.

F. Duration, Type and Extent of the Construction

The Greenberg Petitioners argue that the redesign of the park will require closing substantial portions of the park to the public for extended periods of time, and the EAS fails to adequately describe the construction work with any specificity so as to permit the analysis of its impact both as to continuing use of the park and fugitive dust. See Greenberg Petition ¶¶ 59, 91.

To the contrary, the EAS adequately discusses construction impacts due to the project in several different analytic areas such as open space, noise, air quality, traffic, and neighborhood

requirements and does not demonstrate that the Parks Department abused its discretion or acted arbitrarily.

character. It concludes that the “construction activities are designed to present a minimal impact on existing Park users, facilities, natural and historic resources. Wherever possible, the proposed action retains some continuing public usage of the Park by undertaking a carefully-phased construction program that is expected to restrict access to portions of the Park for one-year periods of time.” EAS at 36. The Parks Department notes that all soil excavated during the construction phases of the project will be handled in compliance with applicable New York State environmental regulations (id. at 33), that heavy construction will only be used early in the project for a short time, estimated to be three months, to perform removals and excavations (id. at 36), that construction staging methods and monitoring by the Parks Department’s resident engineer will be undertaken to minimize the release of construction-related dust, and that “DPR anticipates a minimal or insignificant amount of dust emissions” (id.).

G. Other Challenges

Petitioners also attempt to characterize the Parks Department’s March 2006 issuance of a request for contractor bids for Phase I of the project, and its acceptance of a private monetary pledge to help pay for the fountain and plaza, as inappropriate prior to completion of the environmental review process and that the issuance of a Negative Declaration was a foregone conclusion by highlighting statements by the Parks Department staff about the importance of moving forward rapidly on the project.

The Parks Department contends that it is desirous of proceeding expeditiously, in part, to hold down the steadily rising cost of construction and also at the behest of Community Board 2, who professed that the park was in “poor physical condition” and that their “immediate concern” in October 2005 was “that work on Phase 1 of the Plan begin as soon as possible, preferably no

later than Spring 2006.” Respondents’ Exhs. 7 and 8. Petitioners rely on 6 NYCRR § 617.3(a), however, that regulation merely provides that no agency involved in an action may “undertake, fund or approve the action” until it has complied with the provisions of SEQRA. Neither the acceptance of a financial pledge nor the commencement of the bidding process constitutes physical work on the park or a binding commitment to perform such work.

The Coalition argues that the EAS fails to consider the socioeconomic impacts of the proposed action, provides no analysis of anything other than the project site, and that the proper study area for numerous aspects of a CEQR action is, at a minimum, a 400-foot radius around the project site, citing CEQR Tech. Manual, Ch. 3(B) § 322.1 entitled “Indirect residential displacement.” However, as noted in the EAS, “[s]ocioeconomic studies analyze if an action would directly or indirectly change population, housing, or economic activities in a given area.” EAS at 19. The EAS properly concludes that a socioeconomic assessment is not appropriate because “the proposed action would only serve the existing park user population group, and it would not disadvantage or affect any other social group. As an in-kind rehabilitation, the proposed action would not directly or indirectly encourage increased development in the surrounding neighborhood.” *Id.*

While citing the CEQR Technical Manual requiring the Parks Department to consider the socioeconomic profile of the “surrounding area” (Coalition Petition ¶ 98),⁹ the Coalition argues that the Parks Department failed to consider the cumulative impact the project creates by depriving resources from other city parks in other, more economically-disadvantaged

⁹The Coalition fails to cite the relevant chapter of the CEQR Technical Manual that is being quoted at paragraph 98 of their petition.

neighborhoods. This might be a budgetary issue for the Parks Department, however, under the circumstances here, it is not a required analysis of this environmental review under SEQRA or CEQR.

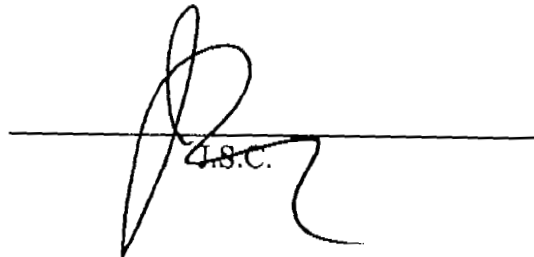
CONCLUSION and JUDGMENT

The record established that respondents complied with the mandates of SEQRA and CEQR and that the issuance of the negative declaration was a proper exercise of discretion. For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that the petitions are denied, and the proceedings dismissed.

Dated: December 3, 2007

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
'1B)