Union Sq. Community Coalition v New York City Dept. of Parks & Recreation
2008 NY Slip Op 31309(U)
May 7, 2008
Supreme Court, New York County
Docket Number: 0105578/2008
Judge: Jane S. Solomon
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SCANNED ON 5/7/2008

[* 1]

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Union Square Community Coalition

- v -

NYC Dept of Parks

INDEX NO. 105578/08

MOTION DATE 4/28/08

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 19 were read on this motion to/for prelim. injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-19
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

FILED
MAY - 7 2008
NEW YORK
COUNTY CLERK'S OFFICE

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SUPPORT OFFICE

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

Dated: 5/7/08

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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UNION SQUARE COMMUNITY COALITION, CAROL GREITZER, GEOFFREY CROFT, MARGARET GONZALEZ, MARJORIE BERK, EDITH SHANKER and LOUISE DANKBERG,

DECISION AND ORDER

For a Judgment pursuant to Article 78 and section 3001 of the Civil Practice Law and Rules,

Petitioners,

Index No. 105578/08

-against-

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, ADRIAN BENEPE, in his Official Capacity as Commissioner of the New York City Department of Parks and Recreation, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS and UNION SQUARE PARTNERSHIP,

Respondents.

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NEW YORK
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JANE S. SOLOMON, J.:

Union Square, situated where Broadway intersects Fourteenth through Seventeenth Streets, comprises a park surrounded by busy roadways. For many years, the Union Square Park remained dilapidated even as the surrounding neighborhood enjoyed an economic boom. The Union Square area is now a mecca for food-loving New Yorkers, both those who seek fine restaurant dining and those shopping for exotic and good-quality ingredients for home use. Three days a week, Union Square Park hosts a farmer's green market (Greenmarket) that rightly has earned a reputation as one of the great fresh food markets of our time.

This action involves a proposal by respondent the New

York City Department of Parks and Recreation (Parks Department) to add a privately operated and perhaps luxury restaurant within Union Square Park itself, at the north end, to the one hundred fifty or more food outlets now located within two blocks of the park.

Petitioners vigorously oppose the proposal. The petition seeks declaratory judgment that the restaurant plan may not proceed without legislative approval under the public trust doctrine, and judgment pursuant to Article 78 holding that the plan was approved in violation of environmental quality review and zoning regulations. They advance several legal theories, which will be addressed below, but the gist of their opposition is that the neighborhood has a lot of restaurants, but not a lot of open space or places for children to play, and the Parks Department's proposal constitutes an unlawful encroachment on the park's recreational purpose in favor of a private, non-park purpose.

This motion for a preliminary injunction, however, involves this issue only tangentially as it relates to considering petitioners' likelihood of success on the merits. Petitioners seek to enjoin respondents from engaging in any site preparation or construction relating to the renovation of the north end of Union Square Park. Another justice of this Court issued a temporary restraining order stopping all work at the

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site. After hearing argument from all counsel, I amended the TRO to allow respondent New York City Department of Buildings (Buildings Department) to issue appropriate permits. The TRO remains prohibiting work on the restaurant and comfort station, and the removal of trees. For the reasons below, the motion for a preliminary injunction is granted in part.

THE PARTIES

Petitioner Union Square Community Coalition (USCC) is an advocacy group established in 1980 with the stated goal of protecting and preserving Union Square Park. The individual petitioners are USCC members who live nearby and use the park on a regular basis.

In addition to the Parks Department, respondents are Adrian Benepe, in his capacity as Commissioner of the Parks Department, the City of New York, the Buildings Department and Union Square Partnership (USP). It appears that the Buildings Department was named a party to provide a basis for preventing it from carrying out administrative tasks in connection with the Union Square project. USP is a non-profit organization comprising a business improvement district and a local development corporation. Over the years, it has provided private funding for gardening, security, general maintenance and facility upgrades in Union Square Park, and has worked with the Union Square residential and business community to promote economic

development and quality of life in the area.

USP engaged consultants to prepare designs for the renovation and participated in arranging $8 million in private financing to help pay part of the project design and construction costs. The private financing includes a $7 million pledge from an anonymous donor. Petitioners do not know the identity of the anonymous donor, but have surmised that it is Danny Meyer, owner of the successful Union Square Café, located on the northwest corner of Union Square, and other neighborhood eateries. They contend that, if true, that would be an improper influence on the decision of how to develop the park, especially if he bids to operate the restaurant. Meyer is co-chair of USP, and he submits an affidavit flatly denying that he is the anonymous donor, or that he will bid on the restaurant concession. The Parks Department has claimed that the anonymous pledge is not contingent on approval of the restaurant proposal.

THE PARK

Union Square Park is approximately 3.6 acres. The park opened in 1839, and was later redesigned by Frederick Law Olmsted and Calvert Vaux, the famed designers of Central Park and Prospect Park. The park is the site of many famous public gatherings, including the first Labor Day march in 1882, and it is listed on the National Register of Historic Places and the State Register of Historic Places. A "Women's and Children's

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Pavilion" was built at the north end of the park in the late nineteenth century. In the 1920s and 1930s, the Pavilion was substantially reconstructed to its present structure, although its use and condition has changed over the years. The Pavilion itself is not listed with state or national historic registers.

The Pavilion has a main floor and a basement. Before preparatory work on the proposed project began (the Pavilion and surrounding area is now fenced off), the east side of the main floor was used by the Parks Department for offices and storage. The west side has public toilets that are in poor condition which could be accessed only by traversing plywood planks because the floors are badly deteriorated. The basement was unused except as a kitchen for a restaurant concession that operated from 1994 through 2007. The restaurant, called "Luna Park", served food and alcoholic beverages in a sunken courtyard outside the south side of the Pavilion. There is no dispute the Pavilion is in a state of disrepair.

To the east of the Pavilion are public toilets (the comfort station), undisputedly in need of renovation. Nearby are two small playgrounds aggregating approximately 5,000 square feet, that petitioner Margaret Gonzalez describes as "severely over-crowded and does not come anywhere close to meeting the needs of the community" (Aff. Of Margaret Gonzalez, annexed to Order to Show Cause, ¶ 2). There are mature shade trees in the

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area as well.

The Greenmarket uses the area immediately north of the Pavilion. The vendors have no running water and no electrical outlets. Consequently, vendors operate gasoline-powered portable generators and run electrical wires from the generators to the food stands for refrigeration and other purposes.

THE PARKS DEPARTMENT'S PLAN

Overall renovation of Union Square Park began in the mid-1980s. The south end of the park was renovated beginning in 2000. Planning of the north end project began in 2002. A plan was presented to Community Board 5, which endorsed the plan by a vote of 29-1 on February 6, 2006. After minor revisions not at issue here, the plan was approved by the Art Commission of the City of New York at a public meeting on July 16, 2007.

Under the plan, the Parks Department will rehabilitate the Pavilion and the comfort stations, reconstruct and expand the playground to a contiguous 15,000 square feet, expand and renovate the plaza north of the Pavilion, remove fifteen mature trees, plant fifty-three new trees and numerous shrubs, install new lighting and provide electrical and water connections for Greenmarket vendors. Petitioners' opposition to the plan is directed at the Pavilion and comfort stations renovation, and tree removal.

The Parks Department plans to remove the comfort

station east of the Pavilion and replace it with a new one, but not until it constructs a new basement. This basement could be used as storage space by the Parks Department, but it also could serve as a kitchen or storage area for the proposed restaurant. The comfort station basement would connect below ground to the Pavilion basement. Petitioners oppose this part of the design because it would facilitate implementation of the restaurant plan, which is the element that most offends.

The Parks Department proposes offering the west end of the renovated Pavilion to a private concession to operate a restaurant on a seasonal basis, open just six months out of the year. For the other six months, the space would be available for community programming. The restaurant concession would use the expanded basement as its kitchen. In the east end of the Pavilion, the comfort station would be rebuilt to comply with the Americans with Disabilities Act. The remainder of the building would be occupied by Parks Department offices and storage space year round (Affidavit of William Castro, Manhattan Borough Commissioner for the Parks Department, ¶ 7). Mr. Castro states that several procedural steps are required before a restaurant may operate from the Pavilion, and it may ultimately be determined that the Pavilion will not be used for that purpose (Castro Aff., ¶ 16). The Parks Department states that its plan will return the Pavilion to its condition and configuration

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before it fell into disrepair, except as necessary to comply with the ADA. (Affidavit of George Kroenert, ¶ 11). The Pavilion will be empty space when the renovation is complete, and compatible with both restaurant and other, unrelated use (id.).

If work is permitted to continue, it is expected that the renovation will be substantially complete in the summer of 2009. The Parks Department has made a commitment to close the playground for only one summer, and to open the new one in the Spring of 2009. The Greenmarket has been moved to southern and western parts of Union Square pending completion of the project. Beginning in November 2008, the southern portion of the park will be used as a holiday market, further crowding and inconveniencing Greenmarket vendors and customers.

The Parks Department estimates that delays caused by an injunction continuing the TRO will cost $500,000 per month in increased construction costs, including the cost of securing the site (Kroenert Aff., ¶ 35).

LIKELIHOOD OF SUCCESS ON THE MERITS

A. Public Trust Doctrine

Under the public trust doctrine, approval is required from the New York State Legislature when there is a "substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored"

(Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 630 [2001], *citing* Williams v. Gallatin, 229 N.Y. 248 [1920]). Even if the proposed construction plainly serves an important public purpose, "dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State. Their 'use for other than park purposes, either for a period of years or permanent, requires the direct and specific approval of the State Legislature, plainly conferred.'" (Friends of Van Cortlandt Park, 95 N.Y.2d at 631, *quoting* Ackerman v. Steisel, 104 A.D.2d 940, 941 [1984], *aff'd* 66 N.Y.2d 833).

Petitioners allege that the Pavilion is being structurally converted to a configuration that is unique for use as a restaurant, and that this change requires Legislative approval because it is a conversion of parkland to non-parkland purposes. They rely on Williams v. Hylan (126 Misc. 807 [Sup. Ct. New York Co. 1926] *aff'd* 217 A.D. 727 [1st Dep't 1926]), where the court preliminarily enjoined the City from leasing space in Battery Park for the erection and maintenance of two refreshment stands. The court found that there were a plethora of food vendors around the crowded park, and that the concession might adversely affect children's use of the park's playgrounds. Petitioners additionally rely on Blank v. Brown (217 A.D. 624 [2nd Dep't 1926]), where the Second Department concluded that the use of parkland in Coney Island for automobile parking was

legitimate because it served "the use of the greater park of which it is a part," but held that using the same parkland for the sale of refreshments was not valid park use because "[i]n the immediate neighborhood there are many places where people who park their cars may procure refreshment" (id. at 629-30).

Petitioners argue that Union Square Park is surrounded by restaurants and food vendors of all price ranges, and that there is "no impelling reason ... why it is necessary to furnish additional facilities ... in a small park apparently already overcrowded" (Williams, 126 Misc. at 813). They also point to the fact that when the City wanted to site a restaurant in Bryant Park, it first sought specific approval from the Statute Legislature (Verified Petition, ¶ 40.) They conclude that under the public trust doctrine the proposed Pavilion reconstruction project also requires approval from the State Legislature.

The Parks Department also argues that restaurant concessions have been granted in other Manhattan parks (including Madison Square Park, Fort Tryon Park, Central Park, Riverside Park and others), and that restaurants in parks provide recreational, health and social benefits that are consistent with park use. In light of the concentration of restaurants of all kinds surrounding Union Square Park, it is not clear what benefit will be provided by another one inside this park.

The Parks Department contends that the renovation is

sought whether or not a restaurant operates from the Pavilion. Notwithstanding that the Parks Department's application to the Buildings Department for a permit states that a restaurant is part of the submitted plan, it claims that the design is open-ended to accommodate a restaurant or other use. Although it recommends the restaurant plan, the determination of whether that plan will go forward is not yet final and is subject to further administrative review.

Accordingly, the challenge to a private restaurant concession in the Pavilion is premature, so the likelihood of success on the merits in the present procedural posture is not strong. However, petitioners' argument that approval by the New York State Legislature ultimately will be required is persuasive, and it may well succeed when ripe.

B. Article 78

Petitioners have not demonstrated that they are likely to succeed on their Article 78 claims based on the Parks Department's alleged failure to comply with the State Environmental Quality Review Act (Environmental Conservation Law, §8-0101, et seq. [SEQRA]), City Environmental Quality Review Act (CEQRA), the Uniform Land Use Review Procedure (ULURP) and applicable zoning resolutions.

As a threshold matter, petitioners may be unable to establish that they have standing to assert these claims under

Article 78. It is likely that petitioners will not be able to show that they stand to suffer an injury that distinguishes them from the public at large (see, Lee v New York City Dep't of Housing Preservation and Development, 212 AD2d 453 [1st Dep't 1995]).

Under SEQRA and CEQRA, and their implementing regulations, the Parks Department, as the lead agency for this project, is required to determine whether the project should be classified as Type I, Type II, or Unlisted (see 6 NYCRR § 617.6[a]). A Type I project is likely to result in adverse environmental impacts, and therefore an environmental impact statement (EIS) must be prepared. A Type II project involves the replacement, upgrade or reconstruction of a structure, in kind, on the same site, subject to some restrictions (6 NYCRR § 617.5[c][2]). If the project is designated Type II, no further action is required under the SEQRA or CEQRA, and no EIS must be prepared.

A project is not Type II if it involves the "construction or expansion" of a non-residential structure or facility exceeding 4,000 gross square feet, or involves a change in zoning or a use variance (6 NYCRR § 617.5[c][7]). The Pavilion is said to be 3,875 square feet, but when the comfort station and its basement are considered, the total exceeds 4,000 gross square feet. Naturally, petitioners consider the entire

project as involving a single structure or facility. The Parks Department contends renovation of the Pavilion is not a "construction or expansion" subject to the limitation, and the comfort station and basement portion of the project are only 2,551 square feet. Moreover, the Pavilion has housed a food and beverage service since 1994, so there is no change in use.

Without deciding the issue, it appears that the Parks Department is more likely to succeed on the merits of petitioners' claim that it failed to designate the project as Type I and create an EIS, and all that such a designation would entail. Moreover, the removal and replacement of trees in this context is likely to qualify as a Type II activity.

Under New York City Zoning Resolution 11-13, no building permit may be issued with respect to a public park that has been transferred, or relinquished from control of the Parks Department, until a zoning district for that property has been adopted and becomes effective. On its face, the subject plan does not contemplate transferring or relinquishing control of the Pavilion such that ZR § 11-13 is invoked. Petitioners also are unlikely to succeed on their claim under ULURP, in which they argue that the plan involves a major concession under 62 RCNY §7-02(h) that would trigger a further review process. That rule involves concessions of 2,500 square feet or more, or fifteen percent of the total area of the park, neither of which appear to

be involved here.

Respondents also argue credibly that the Article 78 claims are time barred because final determinations approving the project exclusive of a restaurant were made more than four months before this action was commenced (CPLR 217[1]), which was not meaningfully rebutted by petitioners' counsel at oral argument.

BALANCE OF THE EQUITIES

Respondents submit the affidavits of Susan Kramer and Gail Fox, both long-time neighborhood residents who formerly served as co-chairs of USCC. They do not share petitioners' opinion regarding the desirability of a restaurant. More importantly, however, they highlight that the old playground equipment has been removed, and that neighborhood children need the renovated recreation space. The proposed playground will be three times the size of the playgrounds it replaces, will have up-to-date equipment, and will be more accessible to children with disabilities (Kramer Aff., ¶ 4). The Parks Department has committed to installing the new playground by next year, which will be impossible if the injunction petitioners seek is granted. It is difficult to see how petitioners' interests can outweigh the clear interest of neighborhood children for this new, expanded playground.

The proposed renovation would benefit the Greenmarket and its users by providing electrical and water connections, and

reducing or eliminating the reliance on gasoline powered electric generators. Also, the comfort stations were inadequate before construction began, and will remain closed until their renovation is completed. The replacement and upgrade of the comfort stations is badly needed, including that part of the project that will make the Pavilion comfort stations ADA compliant. A broad injunction would disrupt the Greenmarket, harming vendors and customers alike. Petitioners have not articulated any countervailing harm they will suffer, except their general notion that the entire project should be halted to prevent the restaurant.

In sum, the community will suffer tremendous harm if the Parks Department is prevented from implementing the badly needed improvements to the comfort stations, playground and Greenmarket, in addition to rehabilitating the dilapidated Pavilion structure and the surrounding stonework. The Parks Department also will suffer significant financial harm if work is stopped. USCC's interest can be protected by narrowly tailoring the remedy to preventing the alienation of park property for the benefit of a private concession pending the outcome of this lawsuit.

Accordingly, the motion will be granted in part to enjoin respondents from installing fixtures for, or actually operating, the proposed restaurant or offering a private

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concession to operate such restaurant. The balance of the equities weigh in petitioners' favor on this point, because the court is relying on the Parks Department's contention that no final determination has been made on how the renovated Pavilion will be used, and that the plan contemplates other uses that are not objectionable to petitioners. The Parks Department will suffer no harm because the injunction is consistent with its plan of action. However, respondents may proceed with the administrative and community review procedures necessary to carry out this objective, and arguably providing the basis for a new lawsuit. Accordingly, it hereby is

ORDERED that petitioners' motion for a preliminary injunction is granted in part to the extent that respondents are enjoined from installing fixtures for or operating a restaurant in the Pavilion, or allowing someone else to operate a restaurant, or offering a concession to operate a restaurant in the Pavilion, until further court order, and the motion otherwise is denied; and it further is

ORDERED that petitioners are directed to post an undertaking in the amount of $100; and it is further

ORDERED that respondents shall serve an answer or otherwise respond to the petition in accordance with the so-ordered stipulation of May 6, 2008.

Dated: May 7, 2008

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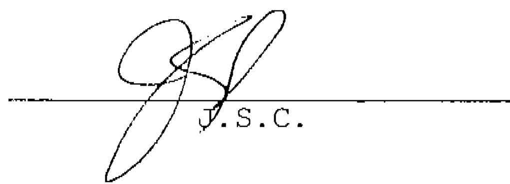

J.S.C.

JANE S. SOLOMON

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