

District 4 Presidents' Council v Franchise & Concession Review Comm. of City of N. Y.
2008 NY Slip Op 31420(U)
May 14, 2008
Supreme Court, New York County
Docket Number: 0108327/2007
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH
Justice

PART 54

DISTRICT 4 PRESIDENTS' COUNCIL,
ETAL.

INDEX NO. 108327/07

MOTION DATE 4/10/08

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

- v -

THE FRANCHISE AND CONCESSION
REVIEW COMMITTEE OF THE CITY OF N.Y.,
ETAL.

The following papers, numbered 1 to _____ were read on this motion to/for preliminary

injunction

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the decision in motion sequence 002, dated May 14, 2008.

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[Signature]
J.S.C.

Dated: _____

E-Filed Document

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
DISTRICT 4 PRESIDENTS' COUNCIL; THE
CITYWIDE COUNCIL ON HIGH SCHOOLS;
EUGENIA SIMMONS-TAYLOR; MARCIA
ORTIZ; and MATTHEW WASHINGTON,

Index No.: 108327/07

DECISION, ORDER

Petitioners,

-against-

THE FRANCHISE AND CONCESSION REVIEW
COMMITTEE OF THE CITY OF NEW YORK;
MICHAEL R. BLOOMBERG, MAYOR;
ANTHONY CROWELL, Special Counsel to
Mayor Michael R. Bloomberg; WILLIAM C.
THOMPSON, JR., Comptroller of the City
of New York; MARK PAGE, Director of the New
York City Office of Management and Budget;
SCOTT STRINGER, President, Borough of Manhattan;
each in his official capacity as member of The Franchise
and Concession Review Committee of the City of New
York; THE NEW YORK CITY DEPARTMENT OF
PARKS AND RECREATION; and THE CITY OF
NEW YORK,

Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.

On January 30, 2008, this court issued a decision, order and judgment that: 1) granted petitioners' claim under New York City's Uniform Land Use Review Procedure; 2) denied a motion to amend the petition to assert a claim that respondents violated the competitive public bidding requirements of the City Charter, based upon the statute of limitations; and 3) held in abeyance petitioners' motions for disclosure (motion seq. 003) and to amend to assert a claim under the State Environmental Quality Review Act (SEQRA) (motion seq. 002), pending a

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[* 3]
hearing on the statute of limitations issue raised by respondents.

The decision framed the issue for the hearing as follows:

The question that remains is how long before June 14, 2007, did petitioners know or could they have readily ascertained that a Negative Declaration had been issued by Parks [the New York City Department of Parks and Recreation].

Subsequently, respondents moved for a preliminary injunction (motion seq. 004).

The hearing was held on March 5, 2008. Respondent submitted a pre-hearing memorandum of law, and both sides submitted post-hearing memoranda of law. In addition, petitioners submitted the affidavit of Geoffrey Croft, sworn to on April 14, 2008 and an affirmation of Norman Siegel, dated March 24, 2008, to which respondents were given leave to respond by letter dated April 17, 2008. The parties stipulated to the facts in the affidavits of Martina Ortiz, David Bloomfield, Matthew Washington, Eugenia Simmons-Taylor, Faith Kaminsky Cohen and Eric Kaufman (all dated March 4, 2008, except Eric Kaufman's, which was dated March 5, 2008). Familiarity with the Decision is assumed and the facts and rulings therein will be repeated only as necessary to determine the remaining issues before the court.

Findings

A Type II Memorandum¹ was issued by Parks on July 28, 2006, stating that the Randall's Island Sports Fields Development Project had no potential for significant adverse environmental impacts. On August 31, 2006, Parks wrote a letter to Community Board 11 stating that it would be presenting to respondent Franchise Concession Review Committee of the City of New York (FCRC) "a sole source agreement" with Randall's Island Sports Foundation (RISF). The letter elaborated on the project with a statement that:

¹ The Type II Memorandum is defined in the Decision as the Negative Declaration.

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Upon completion, approximately 65 sports fields will be available for use, including 34 brand new fields and 31 reconstructed fields.

On January 22, 2007, Parks sent a letter to the Chairperson of Community Board 11, Robert Rodriguez, notifying him that there would be a public hearing on the sole source agreement on February 13, 2007. Community Board 11 represents East Harlem, which is close to Randall's Island. The January 22 letter informed Mr. Rodriguez that the sole source agreement involved the development and upgrade of approximately 65 sports fields on Randall's Island.

The petition admits that notice of the public hearing was published in the City Record from January 23, 2007 through February 13, 2007. Petitioner Ortiz attended the public hearing and made comments. George Sarkissian, District Manager of Community Board 11, also spoke on behalf of the Board and its Chair, Robert Rodriguez. Tr. February 13, 2007, p. 80. In Mr. Sarkissian's concluding remarks he said, "we ask the FCRC to seize this opportunity and vote against this proposal tomorrow..." *Id.* at 83. Scott Stringer, the Manhattan Borough President and a member of the FCRC also mentioned that the vote would be the next day and asked that it be postponed. *Id.* at 24, 31 and 40.

The scope of the project in terms of land was manifest in the comments made at the public hearing. Comments by various speakers reflected that the project would involve the development and upgrade of approximately 65 sports fields, a unique opportunity to create the largest complex of athletic fields in the City on 160 acres, the addition of 27 new fields, a major expansion of the fields and hundreds of acres. *Id.* at 5, 8, 10, 34 and 72.

Notice of the February 14, 2007 meeting of the FCRC, at which the agreement was approved, was published in The City Record on Feb 5, 6, 7, 8, 9, 12, 13 and 14, 2007. March 5,

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2008 Hearing, Exhibits E-1 through E-8 and Tr., pp. 45-46. At the March 5, 2008 hearing, Eli Blochman, editor of The City Record, testified that it is an official journal of the City of New York, that it is published pursuant to the City Charter and is required by the Charter to be distributed to all city agencies, public officials, public libraries and political offices and community boards. March 5, 2008 Hearing Tr., p. 44. Mr. Blochman stated that in February 2007, Community Board 11 subscribed to two copies of The City Record. *Id.* at 50 and 52. Petitioners Marina Ortiz and Matthew Washington were members of Community Board 11 in February 2007. In addition, the Daily News, The New York Post, Newsday, El Diario and Stroock and Lavan, petitioners' counsel, had subscriptions at that time. *Id.* The City Record is freely available in every public library. *Id.* at 51.

The challenged agreement was reported by major media outlets. Three articles about the concession agreement appeared in the Daily News and mentioned that the FCRC vote would be held on February 14, 2007. March 5, 2008 hearing, Respondents' Exh. F-1 through F-3. Moreover, on February 15, the Daily News reported that the FCRC had approved the agreement and that "under [it] the city will rebuild the current 36 rundown ball fields and build up to 29 new ones, all on city parkland." *Id.*, Exh. F-6. The February 15 Daily News article reported that "[a]t least 12 ½ acres of parkland will be converted to sports fields...." *Id.*, Exh. F-7, p. 2. N.Y.P. Holdings, Inc., wrote, on February 15, that the agreement had been approved and, on February 16, that the number of fields would increase from 36 to 65. *Id.*, Exhs. F-8 and F-9. Newsday reported on February 13 that the vote would be the next day. *Id.*, Exh. F-10. Further, on February 10, the New York Times reported that the plan would result in an increase from 36 to 63 fields, including as many as 14 with artificial turf. *Id.*, Exh. F-11. On February 15, the New

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York Times published an article stating that the plan had been approved on February 14. *Id.*,
Exh. F-12.

The petition was filed on June 14, 2007. The motion to amend the petition was made on
September 12, 2007.

Discussion

The four month statute of limitations contained in CPLR 217 is applicable in an Article
78 proceeding. In a proceeding challenging compliance with SEQRA, the statute begins to
run when the agency adopts a plan committing itself to a course of action that affects the
environment and that inflicts a concrete injury on the petitioner, provided the aggrieved party
receives notice of the determination. *Matter of Metro. Museum Historic Dist. Coalition v. De
Montebello*, 20 A.D.3d 28, 35 (1st Dept. 2005)(statute of limitations ran from approval by Parks
of plan to enlarge museum that affected environment despite contemplated further review
regarding landmark preservation); *Matter of Sierra Club v. Power Auth.*, 203 A.D.2d 15 (1st
Dept. 1994)(statute of limitations ran from date of public hearing approving agreement claimed
to threaten tribal lands and wildlife habitat); *Matter of Vilella v. Department of Transp.*, 142
A.D.2d 46 (3rd Dept. 1988), *appeal den.*, 74 N.Y.2d 602 (1989)(agency determination final and
aggrieved petitioners when project approved and bidding authorized).

Section 1066 of the New York City Charter mandates publication of The City Register.²
Subsection f of §1066 requires that free subscriptions to The City Record be provided to each

² Although Charter §1066(c) states that “a publication therein shall be sufficient compliance with any law
requiring publication of such matters or notices,” respondents point to no law (and research has disclosed none)
requiring publication of FCRC meetings to approve concessions. There is a requirement to publish notices of FCRC
public hearings regarding franchises and revocable consents. Charter §371.

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community board, each branch of the public library, and news media as defined in Charter §1043(b)(3). News media is defined as:

all radio and television stations broadcasting in the city of New York, all newspapers published in the city of New York having a city-wide or borough-wide circulation, and any newspaper of any labor union or trade association representing an industry affected by such rule, and (ii) any community newspaper or any other publication that requests such notification on an annual basis.

A press release of the specifying the nature of an agreement constitutes notice. *Matter of Sierra Club v. Power Auth., supra.*

The record in this case amply demonstrates that petitioners had notice, actual and constructive, that the vote on the concession would take place on February 14. Petitioner Ortiz attended the public hearing, during which another member of Community Board 11 stated that the FCRC would vote on the agreement the next day. In addition, there were 8 notices of the February 14 meeting in the City Register, to which Community Board 11 had two subscriptions, as well as press reports. Petitioners Ortiz and Washington were members of that Community Board. Furthermore, at the public hearing and in the press, both before and after the agreement was approved, and in the August 2006 letter to Community Board 11, the scope of the project and its potential environmental impact were revealed. In addition, as noted in the Prior Decision, the agreement was available for inspection on January 22, 2007.

Hence, the proposed amendment is time-barred under CPLR 217 because it was not raised until the September 12, 2007 motion to amend. The statute of limitations began to run on February 14, 2007, when the FCRC committed to the course of action that petitioners' seek to challenge on environmental grounds. Petitioners filed their petition without raising a SEQRA

claim on June 14, 2007 and, as noted in the prior decision, the SEQRA claim did not relate back to the original petition because it did not give notice of the transactions or occurrences underlying the SEQRA challenge. CPLR 203(f). Consequently, the four-month statute of limitations expired in June 2007, three months before the motion to amend was made.

Petitioners' motion for disclosure (sequence 003) is moot in light of the disposition of the motion to amend. In addition, petitioners' motion for a preliminary injunction (sequence 004) is denied because a motion for a preliminary injunction must be made in a pending action. CPLR 6301; *Shotland v. Mulligan*, 134 A.D. 504 (1st Dept. 1909); *Evans v. Evans*, 273 A.D. 895 (2nd Dept. 1948); *Seebaugh v. Borruso*, 220 A.D.2d 573 (2nd Dept. 1995). Accordingly, it is

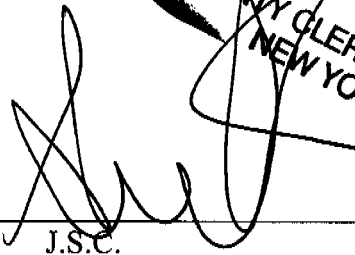
ORDERED that petitioners' motion to amend the petition to add a SEQRA claim is denied; and it is further

ORDERED that petitioners' motion for disclosure is denied; and it is further

ORDERED that petitioners' motion for a preliminary injunction is denied.

Dated May 14, 2008

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