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

PRESENT: HON. JOAN B. LOBIS PART 6

Justice

DISTRICT 4 PRESIDENT'S COUNCIL

Plaintiff(s),

- v -

FRANCHISE & CONCESSION REVIEW

Defendant(s).

INDEX NO. 107463/09

MOTION DATE 6/7/10

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to 42, were read on this motion to/for renew and reargue

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause – Affidavits – Exhibits	1-8
Answering Affidavits – Exhibits	9-17
Replying Affidavits	18-20

supp. aff in support: 21-31
supp. op: 35-42

Cross-Motion: [ ] Yes [✓] No

Upon the foregoing papers, it is ordered that

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 9/8/10

JOAN B. LOBIS, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [✓] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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THE CITYWIDE COUNCIL ON HIGH SCHOOLS; DISTRICT 4 COMMUNITY DISTRICT EDUCATION COUNCIL; EAST HARLEM PRESERVATION, INC.; NOS QUEDAMOS COMMITTEE, INC.; NEW YORK CITY PARK ADVOCATES, INC.; MARINA ORTIZ; and HECTOR NAZARIO,

Petitioners,

- against -

THE FRANCHISE AND CONCESSION REVIEW COMMITTEE OF THE CITY OF NEW YORK; MICHAEL R. BLOOMBERG, Mayor of the City of New York; ANTHONY CROWELL, Special Counsel to Mayor Michael R. Bloomberg; WILLIAM C. THOMPSON, JR., Comptroller of the City of New York; MICHAEL A. CARDOZO, Corporation Counsel for 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.

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

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Index No. 107463/09

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.:

Respondents seek reargument and renewal under C.P.L.R. Rule 2221 of that portion of the Hon Marilyn Shafer's December 29, 2009 amended decision, order, and judgment (the "December 2009 Order"), which awarded petitioners costs in the form of expenses and attorneys' fees pursuant to 22 N.Y.C.R.R. § 130-1.1 and referred the issue of the amount of fees to a special referee. Respondents seek reargument and renewal on the grounds that they were not given a reasonable opportunity to be

heard on the issue of whether costs should be awarded under § 130-1.1, and that costs under that provision are not justified because nothing they did was frivolous. Respondents alternatively move for leave to conduct discovery should this court allow the award to stand.

This proceeding arises out of matters related to the Randall's Island sports fields and facilities. Portions of Randall's Island are used as venues for athletic programs for a variety of high school sports teams. The schools using the Randall's Island sports fields have not historically paid fees for the permits to use the grounds. The New York City Department of Parks and Recreation ("DPR") has recently undertaken the Randall's Island Sports Field Development Project (the "Project"), which encompasses a large portion of Randall's Island and which goes beyond redesigning and rehabilitating the sports fields. In furtherance of the Project, DPR entered into a concession agreement with the Randall's Island Sports Foundation, Inc., a non-profit organization, and Randall's Island Fields Group, LLC, a group of private schools in 2007 (the "2007 Concession"). The 2007 Concession gave priority of use of the sports facilities and fields to the group of private schools in exchange for the schools' payment of fees for permits issued by DPR. It was approved by the Franchise and Concession Review Committee of the City of New York (the "FCRC") on February 14, 2007.

The 2007 Concession was the subject of challenge in a previous Article 78 proceeding that had been assigned to the Hon. Shirley Kornreich. See District 4 Presidents' Council v. Franchise & Concession Review Comm. of the City of New York, 18 Misc.3d 1123(A) (Sup. Ct. N.Y. Co. 2008) (Kornreich, J.) (Index No. 108327/07) (the "Prior Order"). In the Prior Order, Justice Kornreich determined, inter alia, that the 2007 Concession triggered mandatory review under the Uniform Land

Use Review Procedures ("ULURP") and that the respondents had failed to conduct the ULURP review. She vacated the FCRC's determination approving the 2007 Concession. Justice Kornreich denied petitioners' motion to amend their petition to add a claim under the State Environmental Quality Review Act ("SEQRA") after a hearing wherein she determined the challenge was time-barred.

In 2009, FCRC approved a second, similar concession agreement (the "2009 Concession"). The 2009 Concession was challenged in the underlying proceeding. In her December 2009 Order, Justice Shafer (to whom this proceeding was originally assigned) found, inter alia, that respondents had improperly segmented certain aspects of the redevelopment of Randall's Island and the 2009 Concession in order to avoid having to review the agreement under ULURP and in order to avoid complying with Justice Kornreich's Prior Order. Justice Shafer also reached an issue that Justice Kornreich had not addressed in the Prior Order and determined that DPR's issuance of a "Negative Declaration" that the proposed project would have no or no significant impact on the environment under SEQRA was affected by an error of law. In her December 2009 Order, Justice Shafer vacated the FCRC's June 19, 2009 determination to approve the 2009 Concession, determined that the 2009 Concession required ULURP review, and vacated DPR's issuance of the Negative Declaration.

Justice Shafer concluded that respondents made a number of arguments that were "manifestly without foundation." She found that, even with the benefit of the Prior Order, respondents again attempted to craft their concession agreement to avoid ULURP review. Justice Shafer also determined that respondents' arguments regarding the Negative Declaration were "completely without

merit" and could not "be justified by any reasonable legal theory or extension of the law." Under the circumstances described and relying on C.P.L.R. §§ 8101 and 8301, and 22 N.Y.C.R.R § 130-1.1, Justice Shafer found that petitioners were "equitably entitled to costs, taxable disbursements, and reasonable attorneys' fees" in the underlying action, ordered respondents to pay petitioners' costs and disbursements in the amount of $505 upon petitioners' submission of a bill of costs, and referred the issue of attorneys' fees to a special referee. Justice Shafer retired at the end of 2009 and this matter was randomly reassigned to the undersigned. This motion to renew and reargue Justice Shafer's award of costs followed.

At oral argument on March 30, 2010, I granted reargument because 22 N.Y.C.R.R. § 130-1.1(d) requires that the parties be given a "reasonable opportunity to be heard" before the court may award the costs authorized by this provision, and the parties had not been provided with such opportunity prior to the award of costs under § 130-1.1 in the December 2009 Order. The parties stipulated to a briefing schedule for their submission of papers on the issue of whether the award of costs was warranted. This motion was then fully submitted on July 13, 2010.

Respondents argue that their conduct was not objectionable. They assert that Justice Shafer's conclusion that they engaged in "frivolous conduct" was based on the court's misunderstanding of respondents' position, the scope of the Environmental Assessment Statement ("EAS"), and well-settled SEQRA jurisprudence. Respondents argue that Justice Shafer's reasons for sanctions with respect to the ULURP arguments were similarly without basis.

In opposition, petitioners argue that the record supports an award of costs pursuant to 22 N.Y.C.R.R. § 130-1.1. They argue that this is the second time that they have prevailed against respondents and successfully defeated a concession agreement that would establish a system of payments by a consortium of private schools for permits to use sports fields on Randall's Island. Petitioners cite specific portions of Justice Shafer's decision that support their position that the legal arguments made by respondents have been held to be frivolous and that it is thereby appropriate for an award of costs under 22 N.Y.C.R.R. § 130-1.1.

The court, in its discretion, may make an award of costs against a party for frivolous conduct as defined in § 130-1.1(c), which sets forth that conduct is frivolous if

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> * * * In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

While this court is mindful that once reargument is granted, the issue of costs must be considered de novo, Justice Shafer's substantive decision is not being revisited. In fact, such a review

by this court would be improper. Looking solely at the standard for frivolous conduct as defined in 22 N.Y.C.R.R. § 130-1.1, the SEQRA arguments are not so devoid of merit as to be frivolous under the statute. However, the arguments offered by respondents to avoid reviewing the 2009 Concession under ULURP are frivolous within the meaning of the statute for the reasons stated by Justice Shafer. This finding is sufficient to adhere to Justice Shafer's determination that an award of costs is warranted. Therefore, after compliance with the discovery ordered herein, the hearing before a special referee shall be scheduled as previously ordered. Accordingly, it is

ORDERED that respondents' request for discovery is granted to the extent that petitioners shall respond to document request numbers 1, 2, 3, and 5 of respondents' first notice of discovery and inspection within twenty (20) days of the service of a copy of this order with notice of entry; and it is further

ORDERED that upon granting the motion of respondents for leave to reargue, the court adheres to the amended decision, order, and judgement of Justice Shafer dated December 29, 2009.

Dated: September 8, 2010

JOAN B. LOBIS, J.S.C.