

**Matter of Williamsburg Independent People, Inc. v
Tierney**

2010 NY Slip Op 32838(U)

October 5, 2010

Supreme Court, New York County

Docket Number: 104249/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. _____
Justice

PART 11

Williamsburg Independent

INDEX NO. 104249109

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Trinney, Robert

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is determined in accordance with the annexed decision, order and judgment.

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 141B).

Dated: October 5, 2010


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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION J.S.C.

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
In the Matter of a Proceeding pursuant to Article 78 of the
Civil Practice Law and Rules
WILLIAMSBURG INDEPENDENT PEOPLE, INC.
("W.I.P. INC."), C/O CEAL HOLZMAN,

INDEX NO. 104249/09

Petitioner,

-against-

ROBERT B. TIERNEY, Chair of the New York
Landmarks Preservation Commission,

Respondent.

-----X
JOAN A. MADDEN, J.:

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appear in person at the Judgment Clerk's Desk (Room
141B).

This is a petition for Article 78 relief in the form of mandamus. It concerns the granting of landmark status to one or more parts of the former Domino Sugar Refinery located in Williamsburg, Brooklyn, New York. Ceal Holzman is a founding member of petitioner Williamsburg Independent People, Inc. (hereinafter "WIP"), a voluntary, incorporated public citizens advocacy association dedicated to supporting the community of Williamsburg, Brooklyn. Among petitioner's concerns are issues related to development, re-zoning and landmark preservation within Williamsburg.

Respondent Robert B. Tierney is Chair of the New York City Landmarks Preservation Commission (hereinafter the "Commission"). The Commission is a city agency created by the City Council in 1965 to protect and perpetuate "the city's cultural, social, economic, political and architectural history" by designating historic districts and landmarks. NYC Admin Code § 25-301(b); see Society for Ethical Culture in the City of New York v. Spatt, 68 AD2d 112, 114 (1st Dept 1979), aff'd 51 NY2d 449 (1980).

Following are the underlying facts, as relevant to the instant petition. The Domino Sugar Refinery was originally founded as the Havemeyers & Elder Refinery, and was built along the Williamsburg, Brooklyn waterfront in and around 1856. The refinery, which expanded over the years, covers approximately eleven acres, or five city blocks, and consists of a series of buildings and structures that serve several different functions. The structures include three conjoined properties, the Filter House, the Pan House and the Finishing House, which are located at 292-350 Kent Avenue, and together, are known as the Havemeyers & Elder Filter, Pan and Finishing House.

In 2004, the Domino Sugar Refinery plant closed and the plant site was acquired by C.P.C. Resources, the development arm of the Community Preservation Corporation. A public hearing was held before a full Commission on September 25, 2007. After presentations and public discussion, the Commission voted to designate the Havemeyers & Elder Filter, Pan and Finishing House as a landmark. On December 11, 2007, the City Counsel gave its approval. The remainder of the eleven-acre site, consisting of the Adant House, Boiler House, Pump House, Turbine Room, Power House, Syrup Station, Raw Sugar Warehouse, Wash House, Bin Structure, Packaging House, and the Specialty Sugar House (together, the "other structures"), was not calendared, designated or considered by the Commission, nor was the iconic Domino Sugar sign that is affixed to one structure. Various citizens and community groups, including petitioner WIP, were disappointed that the Commission did not consider the entire eleven-acre Domino Sugar Refinery plant site (hereinafter the "Entire Refinery").

On or about October 22, 2008, petitioner submitted a Request for Evaluation (hereinafter "2008-RFE") to the Commission, together with a number of supporting letters from other

concerned citizens and citizens groups, requesting landmark consideration of the Entire Refinery, and listing the property locations as: 292-314, 316-328, 269-289, 330-350 and 268-290 Kent Avenue; 2-28 and 1-29 South 2nd Street; 3-15 South 3rd Street; and 3-17 South 5th Street, Brooklyn, New York. In support of its request for expanded landmarks consideration of the Entire Refinery, petitioner argued that the entire site is eligible for inclusion in the National Register, and that the remainder of the site meets the criteria for landmark status, and has equal, if not greater, historic significance than the Filter, Pan and Finishing House portion.

By letter dated December 4, 2008, Mary Beth Betts, Director of Research for the Commission, advised petitioner that its request for landmark consideration of the Entire Refinery was denied (hereinafter the “denial letter”). The denial letter states, in relevant part as follows:

Re: Domino Sugar Refinery, expansion of existing landmark site, Brooklyn
Dear Mr. Holzman,

In response to the information you submitted concerning the property referenced above, please be advised that the Landmarks Preservation Commission conducted a thorough review of the entire site prior to the September 25, 2007 designation of the Havemeyers & Elder Filter, Pan and Finishing House. At this time, an expansion of the existing landmark site will not be recommended to the full Commission for further consideration.

Petitioner thereafter commenced this Article 78 proceeding for a writ of mandamus compelling the Commission “to uphold a fair and transparent process by timely considering in public on the record, the entire Domino Sugar Site for landmarks designation.” Specifically, the petition seeks an order directing respondent to perform the “non-discretionary and ministerial” duties of: 1) “comply[ing] with constitutional provisions of due process, including not only by administering the Landmark Law in a transparent process with fairly applied legal standards for landmark designation, and to apply the rational basis standard required for the constitutional

exercise of state police powers under landmark preservation legislation for all properties that are properly submitted to the Commission for consideration as landmarks, including not only properties that are designated, but also properties that are properly submitted for consideration to the Commission and are not designated”; and 2) “promptly present[ing] to the full Commission for consideration, the properties listed in this Petition, for which a proper and completed RFE has already been submitted and received.” In lieu of answering, the Commission cross-moved to dismiss the petition pursuant to CPLR 3211(a), on the grounds that the petition fails to state a cause of action, fails to name a necessary party and is time-barred.

On a pre-answer motion to dismiss an Article 78 petition, only the petition is to be considered, and the allegations in the petition are to be deemed true and are considered in the light most favorable to petitioner. See 1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Village of Garden City, 62 AD3d 1004 (2nd Dept 2009); Matter of Northway 11 Communities, Inc. v. Town Board of the Town of Maltz, 300 AD2d 786 (3rd Dept 2002). Here, petitioner seeks relief in nature of mandamus to compel, which is available “only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law. Thus, mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial.” New York Civil Liberties Union v. State, 4 NY3d 175, 184 (2005) (citations omitted). “A discretionary act ‘involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.’” Id (quoting Tango by Tango v. Tujevech, 61 NY2d 34, 41 [1983]). “A party seeking mandamus must show a ‘clear legal right’

to relief.” Brusco v. Braun, 84 NY2d 674, 679 (1994) (quoting County of Fulton v. State of New York, 76 NY2d 675, 678 [1990]).

Applying the foregoing standards, the court concludes that deeming the facts as alleged the petition to be true and considered in the light most favorable to petitioner, the petition fails to allege a sufficient factual basis to support a cognizable claim for mandamus relief, as the acts petitioner seeks to compel are discretionary, and not ministerial.

The petition alleges that the Commission denied the 2008-RFE “without explanation as to process, which is contrary to the requirements under the enabling law.” Specifically, the petition asserts that New York City Charter § 3020 and New York City Administrative Code §§ 25-303 (a)(1) and 25-313 (b) “set forth a process” that the Commission is required to follow, which involves “fully documented, open plenary deliberations by a diverse group of professionals,” followed by a public hearing. The petition also alleges that the denial of the 2008-RFE “by the staff of the Commission did not uphold the required administrative procedure of transparency and establishment of clear designation standards to explain the process of review in evaluating the Request for Evaluation.” The petition further alleges that the Commission’s website describes its “process and procedures” without explaining the standards used in considering requests for evaluation.

In cross-moving to dismiss the petition, respondent argues that petitioner’s 2008-RFE was simply an untimely request for reconsideration of the Commission’s 2007 determination, which resulted in the landmark designation of the Havemeyers & Elder Filter, Pan and Finishing House. Respondent also argues that the procedures and standards used by the Commission in considering an RFE, and the Commission’s decision as to whether to calendar a property for

landmark designation, are entirely within the Commission's discretion and not subject to mandamus relief. Respondent explains that even though the Commission has "exclusive discretion" to determine which buildings should be considered for landmark designation, the Commission has developed a "RFE practice" where members of the public can propose a building for individual designation or inclusion within a historic district. Respondent, however, emphasizes that "there are no statutory provisions which require any particular action on the part of the Commission with regard to an RFE, a public hearing, or as to time frames during which the Commission is required to act on an RFE."

Petitioner submits opposition to the cross-motion, asserting that it has a "valid" claim, since the Commission did not evaluate the entire Domino Sugar Factory site in an "transparent manner." Notably, petitioner now "admits that the ultimate decisions as to which properties to calendar for public hearing are in fact subject to discretion." Petitioner clarifies that it requests "only that the final disposition of every RFE should take place on the record in a fair and transparent way." Citing the lower court's decision in Citizens Emergency Committee to Preserve Preservation v. Tierney, 2008 WL 5027203 (Sup Ct, NY Co. 2008), rev'd 70 AD3d 576 (1st Dept 2010),¹ petitioner argues that "initial review of the LPC is a ministerial action, statutorily required by the enabling law and the Administrative Code," and that the "petition merely seeks to compel the LPC to perform that [ministerial] function, namely to review

¹At oral argument on the cross-motion, counsel for respondent noted that the Citizens Emergency Committee to Preserve Preservation v. Tierney case had just been argued in front of the Appellate Division First Department. The First Department subsequently issue its decision while the instant cross-motion was sub judice.

Petitioner's RFE for the Domino Site in its entirety, on the record, so that a fair process may be upheld."

The procedure for proposing a landmark, as set forth on the New York City Landmarks Preservation Commission website,² is as follows:

The Commission asks members of the public who propose individual properties and districts for landmark status to fill out a Request for Evaluation (RFE) form. After the form is completed, the LPC staff will evaluate the property or district to determine whether it meets the criteria for landmark designation, and may recommend it for consideration by the Commission.

The website explains that the Research Department is charged with evaluating "proposals for landmark designation," by "conduct[ing] research and assess[ing] the significance of these resources in order to recommend whether or not proposed sites meet the criteria for landmark designation." The website further explains that once the Commission receives a RFE, "an RFE Committee, consisting of the Chairman, the Executive Director, the Chief of Staff, the Director of Research, and other agency staff members, review the materials submitted and discuss whether the property meets the criteria for designation. The Director of Research then sends a letter to the person who submitted the request, informing him or her of the committee's determination." At that point "[i]f the RFE Committee determines that proposed historic property merits further consideration, a photograph, statement of significance and the committee's recommendation is [sic] sent to each individual commissioner for their comment," and "[u]ltimately the decision whether to bring the property forward to the full Commission for review is made by the Chair."

²The New York City Landmarks Preservation Commission website can be found at: www.nyc.gov/html/lpc/html/about/about/slml.

Petitioner’s reliance on City Charter §3020 and Administrative Code §§25-303 (a)(1) and 25-313 (b), is misplaced. Neither City Charter §3020, nor Administrative Code §§ 25-303 (a) (1) or 25-313 (b), nor any other code provision or regulation mandate any procedures or standards for evaluating a properly submitted RFE. The Administrative Code simply dictates the course of action respondent must follow if, and only if, after reviewing an RFE, the Commission staff recommends a particular property for landmark consideration.

Specifically, City Charter §3020 (6) empowers the Commission to establish and regulate landmarks, portions of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts. Section 25-303(a)(1) of the Administrative Code empowers the Commission “after a public hearing . . . to designate a list of landmarks.” Neither of these provisions requires the Commission to take such actions with regard to every property for which an RFE is properly submitted. Likewise, Administrative Code §25-313 (b), which provides for public hearings that give interested parties an opportunity to offer facts and express their views on a proposed landmark, does not mandate that a public hearing be held for every property for which an RFE is submitted.

As petitioner now concedes, the decision to calendar, or to not calendar, a particular property for the full Commission’s consideration is discretionary in nature. See Citizens Emergency Committee to Preserve Preservation v. Tierney, 70 AD3d 576, 577 (2010); Landmark West! v. Burden, 15 AD3d 308, 309 (1st Dept), lv app den 5 NY3d 713 (2005). As set forth in the Commission’s regulations on “Calendering,” the “Landmarks Preservation Commission *may*, upon the adoption of a motion, calendar an item to be considered for landmark designation [emphasis added].” 63 RCNY §1-02.

To the extent petitioner continues to claim that the Commission's consideration and determination of every RFE should take place in a transparent manner, in public and on the record, that claim is without merit in view of the First Department's holding in Citizens Emergency Committee to Preserve Preservation v. Tierney, *supra*. In that case, just as in the instant proceeding, the petitioner challenged the RFE process and sought to make the procedures more transparent and fair, by requiring every disposition of an RFE to be made on the record, the publication of clear standards for landmark designation, the presentation of all RFEs to the full Commission, and the presentation of negative as well as positive recommendations to the Commission. The lower court granted the petition and directed the Commission to promulgate procedures for all RFE's to be submitted to the RFE Committee within 120 days of receipt, and for all RFE Committee recommendations, whether positive or negative, to be reported on the record to the full Commission. The First Department reversed, finding that the lower court "erred in granting mandamus, as there is no statutory requirement that the Commission adhere to a particular procedure in determining whether to consider a property for designation." *Id* (citing New York Civil Liberties Union v. State, *supra*; and Saslow v. Cephas, 198 AD2d 53 [1st Dept 1993], *lv app den* 83 NY2d 757 [1994]). The Court further found that "[w]e have previously rejected claims similar to that made here, recognizing the Commission's broad discretion in controlling its calendar without the necessity of creating a public record in that respect." *Id* (citing Matter of Landmark West! v. Burden, 15 AD3d 308, 309 [1st Dept], *lv app den* 5 NY3d 713 [2005]).

Thus, based on the Appellate Division First Department's decision in Citizens Emergency Committee to Preserve Preservation v. Tierney, *id*, the petition in this proceeding fails to state a

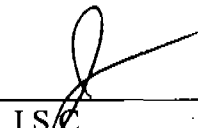
claim for mandamus relief, and the cross-motion to dismiss is granted. In light of this determination, the court need not consider the additional grounds for dismissal raised in respondent's cross-motion.

Accordingly, it is

ORDERED and ADJUDGED that respondent's cross-motion to dismiss the petition is granted, and the petition and this proceeding are dismissed.

DATED: October 5, 2010

ENTER:



J.S.C.

UNFILED JUDGMENT

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