Stop Irresponsible Frick Dev. v Landmarks Preserv. Commn.
2019 NY Slip Op 30626(U)
March 12, 2019
Supreme Court, New York County
Docket Number: 155904/2018
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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STOP IRRESPONSIBLE FRICK DEVELOPMENT,

Petitioner,

- v -

THE LANDMARKS PRESERVATION COMMISSION, THE FRICK COLLECTION

Respondent.

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INDEX NO. 155904/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this Article 78 proceeding, petitioner Stop Irresponsible Frick Development (SIFD) challenges a decision by the Landmarks Preservation Commission (LPC) to vote on plans for the expansion of the Frick Collection (the Frick), a museum located on Fifth Avenue between East 70th and East 71st Streets, when there was a vacancy on the commission and a request for evaluation was pending. SIFD seeks injunctive and declaratory relief. LPC and the Frick each have cross-moved to dismiss the petition or, alternatively, to give them the opportunity to serve and file their answers.

BACKGROUND

The Frick is named after Henry Clay Frick, an industrialist and art collector who built the mansion in 1913-14 and resided there until his death in 1919. Frick bequeathed the building to the City, with the direction that it be used as a "house museum" which featured the artwork and

furnishings within it (NYSCEF Doc. No. 1, ¶ 1).[1] The Frick opened to the public in 1935 (NYSCEF Doc. No. 1, ¶ 8). It has expanded since its inception but is much more intimate than traditional museums such as the Museum of Modern Art and the Metropolitan Museum of Art.

Respondent LPC is entrusted with "the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts" (NYC Administrative Code [Landmarks Law] § 25-303 [a]). The mayor appoints eleven Commissioners – including at least three architects, one historian, one city planner or landscape architect, and one realtor – each for a three-year term (73 NYC Charter §§ 3020 [1], [2 (a)]). The mayor also designates a chair and a vice chair out of this group (*id.*, § 3020 [4]). LPC has the power to designate specific buildings, interior areas, scenic areas, and historic districts as landmarks (Landmarks Law § 25-303 [a]). Once a building or area becomes a landmark, it is unlawful "to alter, reconstruct or demolish" the site without LPC's approval (Landmarks Law § 25-305 [a] [1]). If LPC approves the application, it issues a Certificate of Appropriateness (COA) (Landmarks Law § 25-307). Where further administrative approvals, such as zoning and environmental approvals, are necessary, LPC only issues the COA if the Board of Standards and Appeals (the BSA) approves all pending applications before it.

The Frick mansion received landmark status in 1973. In 1974, after the Frick purchased three adjacent lots and submitted its plans for development, LPC expanded the landmark designation to include the the construction of a viewing garden not generally open to the public (the Russell Page Garden) and a pavilion. In 1977, LPC approved the enclosure of the portico area as well as its conversion to a gallery space (NYSCEF Doc. No. 48, ¶ 7).

[1] The will gave Mr. Frick's widow a life estate.

In 2014, the Frick announced a proposed expansion plan which, among other things, replaced the viewing garden with an addition to the building (the 2014 Plan). The plan, especially the proposed destruction of the garden, caused a public outcry, engendered the opposition of the mayor, and resulted in negative press coverage (NYSCEF Doc. No. 1, ¶ 30). In addition, opponents to the plan formed Unite to Save the Frick (Unite), which retained the services of David Paul Helpern, an architect, to devise two alternative plans for development which retained the viewing garden, reception hall, and pavilion (NYSCEF Doc. No. 1, ¶¶ 31-32). In 2015, the Frick withdrew the 2014 plan from consideration.

After the 2015 withdrawal, the Frick worked on a new plan that was more responsive to the public's criticism. It hired architect Annabelle Selldorf to develop it. On April 4, 2018, its Board of Trustees approved a new plan (the Plan) which preserves the viewing garden (NYSCEF Doc. No. 48, ¶ 10). On April 25, 2018, the Frick submitted the Plan to LPC along with a request for a COA (Docket No. LPC-19-25099).

Before LPC consideration, the Frick went before the local community board, Community Board 8 (*see* https://www1.nyc.gov/site/lpc/applications/certificate-of-appropriateness.page [stating that applicants must schedule appointments with their local community boards prior to LPC consideration]). On May 13, 2018, the Community Board 8's Landmarks Committee disapproved the Plan by a 6-4 vote. Among other things, the committee found the project was not sufficiently specific, the proposed changes were not in scale with the mansion or the viewing garden, and the Plan would result in a more institutional appearance to the building's exterior (NYSCEF Doc. No. 1, ¶ 44). Community Board 8 took no position on the Plan (NYSCEF Doc. No. 1, ¶ 45; NYSCEF Doc. No. 55, ¶ 6 [stating that the members neither supported nor opposed the application]).

The Frick continued with its application before LPC, which scheduled a public hearing for May 29, 2018, the Tuesday after Labor Day. This hearing is required under Landmarks Law § 25-308. LPC had publicly announced the hearing on its website on May 24, 2018. It also posted the Frick's proposal online that day (NYSCEF Doc. No. 1, ¶ 46). SIFD alleges that by providing such short notice LPC intended to "chill[] meaningful public knowledge of, or commentary on, that application" (NYSCEF Doc. No. 1, ¶ 49). Unite, several preservation and arts societies including the Municipal Arts Society, Frick descendent Martha Frick Symington Sanger, and concerned citizens testified in opposition to the 2018 Plan, while others, including descendants of Henry Clay Frick, made statements in support. Among other things, the critics urged LPC to consider alternative plans which better retained the exterior and interior character of the Frick.

There was significant opposition to the proposed destruction of the Frick's Music Room. The Music Room is a 1,625-square-foot circular room with a domed ceiling, damask walls, and a circular skylight, and it hosts social events and concerts. The Plan replaces the room with three special exhibition galleries and adds a larger auditorium in the basement. At the public hearing, preservationist Theodore Grunewald filed a request for evaluation (RFE) which asked LPC to give landmark status to the Carrere´ and Hastings West Gallery, the Music Room, and The John Barrington Bailey Reception Hall – the latter two of which, Grunewald noted, "are threatened with complete erasure by the proposal before [LPC] today" (NYSCEF Doc. No. 8, p 35, ll 4-12). In its current petition, SIFD argued that if LPC approved the Frick's application, then Grunewald's application will be moot.

At the hearing, Chairperson Meenakshi Srinivasan opined that, given the comments about and the concerns with the Plan, more detailed information was necessary. Chairperson Srinivasan

then closed the public hearing. SIFD argues that LPC violated 63 RCNY ¶ 1-05 when it closed the hearing without making a motion first (NYSCEF Doc. No. 1, ¶ 62-63), and that it deliberately curtailed public discussion. According to the Frick, on the other hand, "everyone who asked to speak [was] given the opportunity to do so" and after making sure the Commissioners had no further questions Chairperson Srinivasan "declared the meeting closed" (NYSCEF Doc. No. 48, ¶¶ 17, 18).

LPC scheduled the Frick application for review at its June 19, 2018 meeting. LPC announced the meeting on June 14. At this point, two weeks after Chairperson Srinivasan's retirement, LPC was without a chairperson. In addition, the Vice Chair, Frederick Bland, had recused himself from consideration of this application because of a conflict of interest.[2] SIFD's attorney wrote to LPC and the Frick, stating that it was improper for LPC to go forward with neither a chairperson or vice-chairperson in attendance. In response, LPC pulled the Frick's application from the June 19 agenda (NYSCEF Doc. Nos. 6, 7). At the June 19 meeting, LPC rescheduled consideration of the 2018 Plan for June 26, 2018, when Bland would be absent, and passed a resolution which made another commissioner, John Gustafsson, vice chairperson on this date. SIFD argues that LPC lacked the authority to appoint a temporary vice chairperson and that it had no power to move forward without a chairperson (citing NYC Charter § 3020 [1]).

On June 24, 2018, SIFD commenced this proceeding by order to show cause. At this stage, SIFD sought a temporary restraining order (TRO) as well as a preliminary injunction (PI) to restrain the June 26, 2018 vote. On the petition itself, SIFD requested an order adjudging and declaring that due to the constitution of LPC Board at the time, the decision to consider the 2018 Plan on June 26, 2018 violated LPC rules and the New York City Charter. In addition, it asked

[2] His architectural firm was working on the Frick expansion.

the court to adjudge and declare that LPC could not consider and vote on the Frick's application until LPC decided the Grunewald RFE concerning the Music Room and to reverse LPC's decision to hold the vote on June 26. For the same reasons that the petition sought to stay the vote, the petition also seeks the reversal of any determination made on June 26, 2018.

On June 25, 2018, the parties argued the application for interim relief before this court. The court signed the order to show cause but declined to issue a TRO (NYSCEF Doc. No 49, p 42, ll 14-20, 23-25). It also set forth a briefing schedule and scheduled oral argument on the merits of the petition. SIFD immediately filed a notice of appeal and sought an order restraining the vote (NYSCEF Doc. No. 37). The First Department denied petitioner's request for an interim stay (NYSCEF Doc. No. 50). On June 26, 2018, LPC voted 6-1, with one Commissioner abstaining, to approve the 2018 Plan (NYSCEF Doc. No. 55, ¶ 12). Although the meeting was open to the public, the hearing already had been closed, thus precluding consideration of further public comments and submissions (*see Jacobs v New York City Landmarks Preserv. Comm.*, 59 Misc 3d 1223 [A], 2017 NY Slip Op 51999 [U], *3 [Sup Ct, NY County 2017]). Therefore, SIFD's application for interim relief became moot, and it withdrew its appeal of the June 25 order (NYSCEF Doc. No. 39).

The Frick and LPC each have submitted a cross motion to dismiss the petition, and in its reply papers, SIFD has opposed the cross motions. LPC's motion argues that because the challenged vote has occurred, the petition is moot. The Frick does not argue that the proceeding is moot. In fact, at oral argument its counsel stated, "I . . . believe there's a piece of the petition that has not been rendered moot by reason of the [LPC] vote" (NYSCEF Doc. No. 59, p 7, ll 16-18). LPC also states that the court should dismiss this matter as premature because the BSA must approve the Plan before LPC can issue a COA and work can commence. If the BSA declines the

application, LPC explains, it may send the application back to LPC for additional review (NYSCEF Doc. No. 56, p 10). At oral argument, the Frick's counsel stated that he did not agree with the LPC's position on this issue (NYSCEF Doc. No. 59, p 8-10 [distinguishing this matter from *Matter of Committee to Save the Beacon Theater v City of New York* (Beacon Theater), 146 AD2d 397, 541 NYS2d 364 (1st Dept 1989)]).

LPC and the Frick both argue that dismissal is appropriate because the petition does not state a cause of action and SIFD lacks standing (NYSCEF Doc. No. 54, p 11). In addition, the Frick argues that, as an unincorporated association, SIFD lacks the capacity to sue (*id.*) Furthermore, both respondents argue that even if this court reaches the merits it should dismiss the petition because LPC complied with all applicable rules throughout the review process. Only one public hearing was necessary, they say (e.g., *id.* [citing Landmarks Law § 25-308]). They contend that Chairperson Srinivasan properly closed the hearing without entertaining a motion to close, and that SIFD has misinterpreted 63 RCNY § 1-05. As eight members attended the June 26 meeting and six members concurred, a quorum existed and there was no procedural bar to the vote. They claim that the pendency of Grunewald's RFE did not prevent the LPC vote because LPC has "unfettered discretion to decide whether to calendar an item for landmark designation" (NYSCEF Doc. No. 54, p 21 [quoting *Matter of Deane v City of New York Dept. of Bldgs.*, 177 Misc 2d 687, 695, 677 NYS2d 416, 421 [Sup Ct, NY County 1998]). Additionally, because the Plan still requires BSA approval and construction will not commence until 2020, the Frick has time to adapt its plans and submit the new plan for LPC approval if the Music Room is landmarked.

In reply, SIFD reiterates its challenges to the "clear deficiencies in the process by which the LPC has . . . handled the Frick's application" (NYSCEF Doc. No. 58, p 5). It claims that after

the public hearing in May, it submitted additional materials which respondents ignored (*id.*, pp 5-6). SIFD argues that the petition sought relief in addition to the injunctive relief, and therefore the proceeding is not moot. Furthermore, SIFD states, the petition is not premature. It argues that it has standing because at least one of its members has a membership to the Frick, and this individual also lives across the street from the museum. It contends that it does not seek to compel LPC to grant landmark status to the Music Room, but simply asks for a ruling that it was improper to approve the application before the RFE was considered.

STANDARD OF REVIEW/ANALYSIS

Before evaluating the substantive arguments concerning LPC's actions, the court examines the threshold issues. As stated, LPC argues that the June 26 vote has rendered the entire proceeding moot. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Comm.*, 2 NY3d 727, 728-29, 778 NYS2d 740, 742, 811 NE2d 2, 4 [2004] [citations and internal quotation marks omitted]). LPC points to cases such as *Matter of Building Contractors v Greenberg* (203 AD2d 661, 661 [3rd Dept 1994]), in which an Article 78 proceeding which sought to prohibit a grand jury investigation from going forward was moot because the proceeding already had occurred. The court concludes – and both SIFD and the Frick agree – that the portions of the petition which sought to stay the June 26, 2018 meeting and enjoin a vote on the Frick's application are moot under this principle. As SIFD urges, however, its request is still viable to the extent it seeks to reverse LPC's decision to vote on the Frick's application on June 26. Thus, LPC's argument on this issue fails.

Next, the court concludes that the petition is not premature. "[A]n action must be final before it is ripe for judicial review" (*Town of Orangetown v Magee*, 88 NY2d 41, 51, 665 NE2d 1061, 1067, 643 NYS2d 21, 27 [1996]). However, some determinations are ripe for review even where, as here, further governmental review is required. The finality requirement "relates to the procedure by which a party injured by a decision may seek review and obtain a remedy if the decision is found to be lawful" (*id.*). Courts make "a pragmatic evaluation . . . of whether the decisionmaker has arrived at a definitive position on the issue which afflicts an actual, concrete injury" (*Matter of Gordon v Rush*, 100 NY2d 236, 242, 792 NE2d 168, 172, 762 NYS2d 18, 22 [2003]). Thus, because the COA has not been issued, a challenge to LPC's substantive decision to approve the Plan would be premature. As SIFD clarifies, however, its challenge here is to the purported procedural missteps that resulted in an impermissible vote. LPC's decision to hold the vote will not be reviewed by BSA and the current application does not pose an "abstract or hypothetical problem[]" (*de St. Aubin v Flacke*, 68 NY2d 66, 75, 496 NE2d 879, 884, 505 NYS2d 859, 864 [1986]). As SIFD notes, if it waited until the BSA reaches a decision a challenge to the LPC vote would be time-barred under CPLR § 217 (1).

LPC relies on *Beacon Theater* for the proposition that, under this principal, the current proceeding is not ripe. The court does not find this argument persuasive. In *Beacon Theater*, the First Department determined that a "Notice of Approval" letter was not a final determination. The letter stated LPC would issue a COA only if the applicants satisfied certain conditions, and it specifically noted in all capital letters that "THIS IS NOT A PERMIT" (*Beacon Theater*, 146 AD2d at 400, 541 NYS2d at 366). In *Beacon Theater*, the Court went on to clarify that it was the conditional nature of the letter that rendered LPC's decision nonfinal. In fact, the Court interpreted one of the leading cases, *Church of St. Paul and St. Andrew v Barwick* (67 NY2d

510, 505 NYS2d 24, 496 NE2d 183 [Church of St. Paul], *cert denied*, 479 US 985, 107 S Ct 574, 93 L Ed 578 [1986]), to mean "that the matter here would not be ripe until issuance of a Certificate of Appropriateness by [LPC]" (*Beacon Theater*, 146 AD3d at 402, 541 NYS2d at 367). Here, on the other hand, the challenge is to a vote which, according to SIFD, should not have been held.

In addition, SIFD has standing to bring this proceeding. The seminal New York case on institutional standing is *Society of Plastics Ind. v County of Suffolk* (77 NY2d 761, 573 NE2d 1034, 570 NYS2d 778 [1991] [Society of Plastics]). Standing relates to justiciability and the requirement that a case or controversy exist (*id.* at 772, 573 NE2d at 1040, 570 NYS2d at 784). The Court of Appeals held that a petitioner or plaintiff must demonstrate an injury-in-fact which relates to the zone of interest the law seeks to protect (*id.* at 772-73, 573 NE2d at 1040-41, 570 NYS2d at 784-85). Standing also requires a showing that the challenger "would suffer direct harm, injury that is in some way different from that of the public at large" (*id.* at 774, 573 NE2d at 1041-42, 570 NYS2d at 785-86). Courts construe standing liberally (*see Shinnecock Neighbors v Town of Southampton*, 53 Misc 3d 874, 878, 37 NYS3d 679 [Sup Ct Suffolk County 2016]).

An organization has standing to sue on behalf of its members if "at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*Aristy-Farer v State of New York*, 143 AD3d 101, 111, 40 NYS3d 7, 15 [1st Dept 2016], *modified on other grounds*, 29 NY3d 501 [2017]). Here, where the preservation of a landmark is at issue, standing exists where the representative member or members show that they have sustained an injury distinct from the public (*Matter of Citizens Emergency Commn. to Preserve Preserv. v*

Tierney, 70 AD3d 576, 576, 896 NYS2d 41, 42 [1st Dept] [Matter of Citizens Commn.], *lv denied*, 15 NY3d 710, 936 NE2d 917, 910 NYS2d 36 [2010]). "[I]njury to a particular petitioner's aesthetic and environmental well-being, activities, or pastimes and his desire to use or observe . . . even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing" (*Matter of Allison v New York City Landmarks Preserv. Commn.*, 35 Misc 3d 500, 505, 944 NYS2d 408, 414 [Sup Ct, NY County 2011] [citations and internal quotation marks omitted]).

Defendants satisfied their burden of showing, prima facie, that SIFD lacks standing to bring this Article 78 proceeding (*Matter of Violet Realty, Inc. v County of Erie*, 158 AD3d 1316, 1317, 72 NYS3d 267 [4th Dept], *lv denied*, 32 NY3d 904, 109 NE3d 1158, 84 NYS3d 858 [2018]). The petition itself does not show that the impact of the proposed changes to the Frick is greater for SIFD, which describes itself vaguely, as "an unincorporated association consisting of concerned Frick neighbors, preservationists, and open space activists who stand for the responsible development of the Frick" (Pet., ¶ 11) than it is on "the thousands of pedestrians and other New Yorkers who pass by on a daily basis over the course of a year" (Pet., ¶ 2). As the Frick points out, this is insufficient to show standing (*see Citizens Commn.*, 70 AD3d at 576, 896 NYS2d at 42).

In response to a pre-answer motion to dismiss, the petitioner "has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the [petitioner's] submissions raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Americas v Vitellas*, 131 AD3d 52, 60, 13 NYS3d 163, 170 [2nd Dept 2015] [Deutsche Bank]). SIFD's submissions satisfy this burden. In support of its argument, SIFD points out that at least one of its members, Leslie B. Samuels, has standing.

In his affirmation in support of SIFD's order to show cause, Samuels states that he is a member of the Frick who attends concerts there. In addition, he states that he is "a neighbor of the Frick," with an apartment on 70th Street between Madison and Fifth Avenues (NYSCEF Doc. No. 22, ¶ 2). Although, as the Frick points out, people who do not belong to the Frick may pay a fee and visit the museum, Samuels' membership to the museum, the physical proximity of his apartment to the space, and his regular attendance, collectively raise an issue of fact as to his standing (*see Deutsche Bank*, 131 AD3d at 60, 13 NYS3d at 170). His enjoyment of the area establishes standing (*see Matter of Citizens Commission*, 70 AD3d at 576, 896 NYS2d at 42). Moreover, as SIFD points out, as a neighbor of the Frick Samuels will be impacted by the construction in a manner distinct from that of the public in general (NYSCEF Doc. No. 33, p 28; *see Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of New York*, 259 AD2d 26, 32, 695 NYS2d 7, 11 [1st Dept 1999]).[3]

Next, the court turns to SIFD's challenges to the vote. SIFD and respondents dispute the import of 63 RCNY § 1-05, which states:

> The Commission may, upon the adoption of a motion, close the hearing and leave the Record open on a particular item until a stated date to allow for the submission of additional written information. Submissions received after the stated date will be included in the Record provided they are received prior to the Commission's determination or action on the item. The Commission will neither make a final determination nor take any final action on an item while the Record is open on that item.

[3] Arguably, SIFD could have claimed organizational standing on the basis that SIFD itself has sustained injury (*Matter of Mental Hygiene Legal Serv. v Daniels*, - NY3d -, -NYS3d -, - NE3d -, 2019 NY Slip Op 01123 [2019]). If an organization's sole purpose "is to promote and preserve [the property in question] as a unique and historical structure, [it] has a real and substantial interest in the outcome of [this] proceeding" (*Matter of Toll Land V L.P. Partnership v Planning Bd. of Vil. of Tarrytown*, 49 Misc. 3d 662, 672, 12 NYS2d 874, 882 [Sup Ct Westchester County 2015] [citation and internal quotation marks omitted] [citing, inter alia, *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 305, 918 NE2d 917, 921-22, 890 NYS2d 405. 409-10 (2009)]).

According to SIFD, because LPC did not close the public hearing on this application by motion, the record remained open and LPC lacked the power to take any action on the Frick's proposal at the next meeting.

In its cross motion, the Frick argues that 63 RCNY § 1-05 did not require a formal motion in the circumstances at hand. It notes that over 50 individuals spoke at the public hearing on May 29 and asserts that it was perfectly appropriate for Chairperson Srinivasan to close the meeting after every individual who wished to speak had his or her opportunity (NYSCEF Doc. No 8, p 136 ll 6-9; p 149 ll 24-25).[4] According to the Frick, SIFD has misread the pertinent rule. Instead of requiring a formal vote to close every public hearing, the rule requires a motion when LPC chooses to close a public hearing but leaves the record open for additional responsive comments. The Frick notes that there was no objection to the chairperson's decision to close the hearing, and it asserts that for this reason the decision was reasonable and is entitled to deference (citing *Matter of Arif v New York City Taxi-Limousine Commn.*, 3 AD3d 345, 346, 770 NYS2d 344, 346 [1st Dept 2004]).

In addition, the Frick asserts that, "assuming *arguendo* that LPC was required to entertain a formal motion to close the public hearing, the deviation from such a purported rule was *de minimis*" because Chairperson Srinivasan only closed the meeting after ensuring that everyone who wanted to speak had such opportunity (NYSCEF Doc. No. 54, p 22 [citing, inter alia, *Caniglia v Elnokrashy*, 2003 NY Slip Op 50824 [U], *1 [Sup Ct App T 2003] [available at 2003 WL 20187125, *1]).

LPC annexes the case, *Board of Directors of 35 E. 68th St. Realty Corp. v New York City Landmarks Preservation Comm.* (Sup Ct, NY County, March 4, 2015, Edmead, J., index No.

[4] Prior to the vote on June 26, the Frick notes, LPC briefly reopened the record so that the Frick could respond to the questions LPC had posed at the prior hearing.

162657/2014, p 15), in which Justice Carol Edmead found that although LPC closed the public hearing without making a motion, this was not a violation of LPC procedure (*see* NYSCEF Doc. No. 48, ¶ 15). Justice Edmead based her decision on LPC's papers, which "established that such practice is typical, and not in violation of any written statutory guideline or regulation governing the scope of its power" (NYSCEF Doc. No. 57, p 16). Here, one of the Frick's attorney's, Valerie G. Campbell – who served as LPC's general counsel from 1994 to 1998 – asserts that it is accepted practice for LPC to "close the hearing and direct the applicant to return with a revised proposal for presentation at a future public meeting" and notes that courts have upheld this practice (NYSCEF Doc. No. 48, ¶ 15 [citing *Matter of Maxtone-Graham v Landmarks Preserv. Commn. of City of N.Y.*, 1 AD3d 295, 296 (1st Dept 2003) (Maxtone); *Jacobs*, 59 Misc 3d 1223 (A), 2017 WL 9325887 at *3).

The court concludes that LPC did not violate 63 RCNY § 1-05 when it closed the public hearing without a motion. There was no objection to the closing of the public hearing, and it was within the chairperson's power to take this action. The comments of Campbell that this was in keeping with LPC's practice carries extra weight here, as she has firsthand knowledge of LPC's workings. The court also takes judicial notice of Justice Edmead's ruling, which she based on the evidence submitted to her in that proceeding. As respondents assert, even if the chairperson should have closed the public discussion with a motion, the purported error was ministerial and did not diminish the parties' rights.

SIFD's position that it submitted documents after the public hearing and that LPC should have considered them because the hearing was not properly closed has no merit. As the additional information LPC requested from the Frick did not "been a substantial deviation from that originally presented," a second public hearing was not necessary (*Maxtone*, 1 AD3d at 295,

767 NYS2d at 594; *see* Landmarks Law § 25-308 [requiring "a public hearing on each request for a certificate of appropriateness"]).

SIFD also argues that LPC lacked the power to vote on June 26, 2018 because Chairperson Srinivasan had retired and Mayor de Blasio had yet to replace her or to select an interim chairperson under NYC Charter § 3020 (2) (b). In addition, SIFD notes, Vice Chair Bland recused himself from the vote and was not present at the meeting. Thus, SIFD contends, LPC should not have held a vote without a chairperson, and that the vote violated NYC Charter 3020 (4). Also, according to SIFD, because NYC Charter § 3020 (1) states that LPC consists of eleven members, the June 26 vote – when LPC had only ten members – violated this provision as well.

In the cross motions to dismiss, LPC and the Frick contend that this argument lacks merit. They state that LPC may proceed even when a vacancy leaves them short of eleven members. LPC cites *Matter of Town of Eastchester v New York State Bd. of Real Prop. Servs.* (23 AD3d 484, 485-86, 808 NYS2d 90, 92-93 [2nd Dept 2005]), which notes that "a majority of the whole number" of commissioners constitutes a quorum (General Construction Law § 41). The Frick points out that, in addition to the General Construction Law, under 63 RCNY § 1-01, a quorum consists of six Commissioners (NYSCEF Doc. No. 54, pp 17-18). It also notes that the six favorable votes on June 26 would have been adequate even with eleven voting members (*id.*; *see also* 63 RCNY § 1-04 [stating that "[n]o final determination or action will be made or taken except by concurring vote of at least six Commissioners"]).

The court concludes that LPC did not violate procedure when it voted with only nine members present. As both respondents point out, there is no requirement that all commissioners attend meetings whenever a vote is to occur. Under 63 RCNY § 1-01, only six LPC

commissioners must be present at public hearings and public meetings for a quorum to exist. Moreover, the rule states that even without a quorum, "[p]ublic hearings and public meetings may be conducted" (*id.*). For practical purposes a quorum is necessary for a vote to take place, as under 63 RCNY § 1-04 there must be six concurring votes for any final determination. Furthermore, courts have found that under General Construction Law § 41, a vote is valid where a quorum exists but there are vacancies on a commission or board (*see, e.g.*, *Matter of Empire State Rest. & Tavern Assn. v Rapoport*, 240 AD2d 576, 577, 658 NYS2d 687, 688 [2nd Dept 1997]).

SIFD presents no caselaw or statutory law that expressly counters respondents' argument or caselaw. SIFD also does not support its contention that LPC had no power to select someone to run the June 26 meeting in lieu of the Chair or Vice Chair. The court further notes that the Mayor did not announce a replacement for Chairperson Srinivasan until the fall, and under SIFD's interpretation of the rules this would have prevented LPC from voting on any matters for approximately four months.

Finally, the court finds that it was appropriate to vote on the application while the RFE which seeks to obtain landmark status for the music room was pending. The BSA still must consider the zoning application, and the Frick has indicated that it will not begin construction until 2020. Accordingly, as the parties acknowledged at oral argument, a rejection or modification of the Frick's plan by the BSA in response to its application for a zoning variance, or the designation of the music room as a landmark, would require the Frick to alter its plan and begin the approval process anew.

LPC and the Frick point out that LPC "has complete discretion over whether to afford formal consideration to . . . any item" (*Landmark West! v Burden*, 3 Misc 3d 1102 [A], 787

NYS2d 678 [Sup Ct, NY County] [table; available at 2004 WL 913217, at *6], *aff'd*, 15 AD3d 308, 790 NYS3d 107 [1st Dept], *lv denied*, 5 NY3d 713, 840 NE2d 132, 806 NYS2d 163 [2005]), and the courts cannot "compel LPC to entertain [an] application for landmark status" (*Matter of Deane v City of New York Dept. of Bldgs.*, 177 Misc 2d 687, 694, 677 NYS2d 416, 421 [Sup Ct, NY County 1998]). A decision that invalidated LPC's June 2018 vote and forbade LPC from considering the Frick's application until after it considered the RFE would encroach on LPC's authority and discretion concerning the RFE application and would stall the procedure indefinitely.

As SIFD clarified in its papers, its current challenge is to the legitimacy of the vote and not to the substance of LPC's decision (*see* NYSCEF Doc. No. 58, p 11; NYSCEF Doc. No. 3, ¶ 25). The court has considered all issues and arguments presented. It notes, in dicta, that the Frick's argument regarding SIFD's capacity to sue lacks merit. Although General Associations Law § 12, which provides that the association's president or treasurer may bring a special proceeding on behalf of the association, applies, SIFD's failure to include the president or treasurer's name in the caption of its petition is not fatal (*see Arbor Hill Concerned Citizens Neighborhood Assn. v City of Albany, N.Y.*, 250 F Supp 2d 48, 62 [ND NY 2003]). The defect is viewed as a procedural one (*see id.*; *Matter of Stephentown Concerned Citizens v Herrick*, 223 AD2d 862, 864 n2, 636 NYS2d 470, 471 n2 [3rd Dept 1996], *lv dismissed and denied*, 96 NY2d 881, 756 NE2d 72, 730 NYS2d 784 [2001]). The court would not have denied a meritorious "application on this narrow procedural ground" (*Mancheski v Gabelli Group Capital Partners*, 20 Misc 3d 1118 [A], *2, 867 NYS2d 17 [Sup Ct, Westchester County 2006] [table; text available at 2006 WL 5918038, *1]; see *US Bank N.A. v Konstantinovic*, 147 AD3d 1002, 1004,

48 NYS3d 182 [2nd Dept 2017] [where there is no prejudice to respondents, a court may allow the correction of the name of the [petitioner] in the caption"]).

Accordingly, for the reasons above, it is

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondents, do recover from petitioner, costs and disbursements, as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

3/12/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE