Matter of Carnegie Hill Neighbors, Inc. v City of New York
2019 NY Slip Op 31182(U)
April 24, 2019
Supreme Court, New York County
Docket Number: 161375/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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INDEX NO. 161375/2017

MOTION DATE 01/02/2018

MOTION SEQ. NO. 001

In the Matter of

CARNEGIE HILL NEIGHBORS, INC., MUNICIPAL ART SOCIETY OF NEW YORK, FRIENDS OF THE UPPER EAST SIDE HISTORIC DISTRICTS, INC., CIVITAS CITIZENS, INC., DIEGO BARBERENA, and CHARLES E. HARRISION,

Petitioners,

- v -

CITY OF NEW YORK, NEW YORK CITY COUNCIL, NEW YORK CITY PLANNING COMMISSION, NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, and AVALONBAY COMMUNITIES, INC.

Respondents.

DECISION, ORDER, and JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 15, 16, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 188, 189, 190

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

I. Introduction

In this CPLR article 78 proceeding, the petitioners, who include two neighborhood improvement and protection associations, an arts society, an urban advocacy organization, and individuals who reside on the Upper East Side, seek judicial review of a New York City Planning Commission (CPC) determination approving the development of a New York City-owned site between East 96th and East 97th Streets in Manhattan. The petitioners allege that the CPC misapplied or violated the Uniform Land Use Review Procedure (New York City Charter § 197-c; hereinafter ULURP), the State Environmental Quality Review Act (ECL §8-0101, *et seq.*; hereinafter SEQRA), and the City Environmental Quality Review (CEQR) provisions of the Rules of the City of New York (62 RCNY 5-01, *et seq.*). Specifically, the petitioners claim that

the CPC, in approving the project, mischaracterized a playground situated within the development site by failing to designate it as parkland, thus tainting the entire land-use and environmental review process.

The respondents include the CPC, the New York City Council, and the New York City Educational Trust Construction Fund (ETCF), a city agency that will take title to the project site for purposes of development, as well as Avalonbay Communities, Inc. (Avalonbay), a private corporation that is developing the project. The respondents answer the petition, and the municipal respondents submit the voluminous administrative record. They argue that, regardless of the fact that the CPC or City Council did not formally designate the playground as parkland, they treated it as such for purposes of satisfying the public trust doctrine, a rule of law requiring state legislative approval before land expressly or impliedly dedicated as municipal parkland is alienated or put to non-park uses. To this end, the respondents note that the State Legislature enacted, and the Governor signed, a law authorizing the alienation of the playground and its discontinuance as parkland (see L 2017, ch 402; hereinafter the alienation legislation).

The petitioners do not challenge the alienation legislation and did not join the State as a party respondent.

The petition is denied and the proceeding is dismissed.

II. Background

The City owns the entirety of the block on which the project site is situated. The project site currently includes the School of Cooperative Technical Education, also known as Coop Tech, on the east side of the block, and the Marx Brothers Playground (the playground) on the west side. The playground is owned by the City and is included in the "jointly operated playground" (JOP) program. JOPs are maintained by and under the jurisdiction of the New York City Department of Parks and Recreation (NYC DPR). They usually are used by students in

adjacent schools during the school day and used by the general public outside of school hours. Neither Coop Tech nor the adjacent Life Sciences Secondary School (MS 655) uses the playground in connection with their curriculum, and the playground is presently occupied by the Metropolitan Transportation Authority (MTA) for use the as a staging area for its Second Avenue Subway development work. The plan for the project calls for the construction of a 760 foot, 63-story, 1,140,000-square-foot private mixed-use building, including 990,000 square feet of residential floor area (comprising approximately 1,200 dwelling units), approximately 20,000 square feet of commercial space, and, for Coop Tech, a separate 130,000 square foot building. In addition, two other public high schools---the Park East High School and The Heritage School---will share approximately 130,000 square feet. The total proposed development will extend over approximately 1,270,000 square feet.

Long before the applications for the project were submitted, the State Legislature approved the temporary alienation of the playground for use by the MTA as a staging area for the Second Avenue subway construction project (*see* L 2004, ch 543). On June 9, 2017, the ETCF, as lead agency, and Avalonbay jointly submitted a Final Environmental Impact Statement (FEIS) to the CPC. At page S-8 thereof, the FEIS concluded that:

> "the proposed project would limit public access to the Marx Brothers Playground throughout the duration of construction; the temporary displacement of the playground is discussed in more detail in Chapter 16, 'Construction.' Upon completion of the project, the playground would be reconstructed in its new location and its overall condition would be enhanced in comparison to the No Action condition.
>
> "The analysis of indirect effects concluded that the proposed project would not result in a significant adverse open space impact as a result of reduced open space ratios. While the open space ratios for the study area are, and would continue to be, below the City's open space goals and the median community district ratios, the proposed project would not result in a decrease of more than five percent in the total, active, and passive open space ratios. In addition, the proposed project would enhance open spaces options within the study area by reconstructing the Marx Brothers Playground. The private rooftop open spaces that would be created on the proposed residential tower would be for use by building residents and would help to serve the open space needs of the residents to be generated by the proposed project. There would also-be rooftop access on

> COOP Tech, specifically for students enrolled in the school's solar panel program."

In the FEIS, Avalonbay addressed the petitioners' comments in connection with the Draft Environmental Impact Statement (DEIS) that previously had been circulated. In that submission, dated May 26, 2017, and addressed to the ETCF, Avalonbay explained that:

> "the mixed-use redevelopment of the entire city block spanning from 2nd Avenue to 1st Avenue between East 96th Street and East 97th Street proposes to redevelop and upgrade the entire Marx Brothers Playground with new facilities and resiliency improvements. The proposed design would increase site resiliency by elevating the entire park, including a new multi-purpose athletic field and comfort station out of the 100-year floodplain to meet the Base Flood Elevation of 12' and Design Flood Elevation of 13', respectively.
>
> "Additional upgrades include two separate playgrounds for ages 2-5 and 5-12, spectator and companion seating, shaded picnic tables and gathering areas, and pedestrian security lighting, all designed in response to public comments gained during a community scope meeting in October 2016.
>
> "The playground comfort station would be constructed according to NYC Parks current design standards."

In the FEIS, both the ETCF and the CPC adopted that response as their own, with the ETCF explaining that "[a]s part of the Proposed Project, AvalonBay and E[T]CF will contribute approximately $8 million for the renovation and upgrading of the Marx Brothers Playground."

The applications for the project also were made subject of the ULURP process. Community Board 11 approved the project on March 21, 2017, with 26 board members in favor, 8 opposed, and 2 abstentions. After a May 10, 2017, public hearing, the CPC reported favorably on the project on June 21, 2017. On August 24, 2017, the City Council passed a resolution that accepted and approved the FEIS and approved the revision of the zoning map under ULURP to permit the development of the project.

The petitioners concede that the respondents obtained approval from the State Legislature permitting the alienation of the playground, as required under the public trust doctrine. In his October 23, 2017, memorandum approving the alienation legislation, the Governor wrote that:

> "[d]uring the course of reviewing this bill, it came to our attention that this property appears to have been improperly designated as parkland and that instead, it is and has always been a playground. Property records going back forty years appear to suggest that this land has always been considered a playground under the jurisdiction of the New York City Department of Education, and not a park under the jurisdiction of the New York City Parks Department. However, a 2004 law (L. 2004, c. 543) appears to assume that this land is parkland."

He further wrote that "the Executive and the Legislature have agreed to a chapter amendment in which, before New York City can take any steps to discontinue the use of the Marx Brothers playground, the Commissioner of the New York State Department of Parks, Recreation and Historic Preservation will investigate all of the property's historical records, uses, and any other factor relevant to the land's designation."

III. Discussion

A. Public Trust Doctrine

> "[U]nder the public trust doctrine, dedicated park areas in New York are impressed with a public trust for the benefit of the people of the state, and their use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred. Stated differently, parkland may be alienated or leased for non-park purposes as long as authorized by the legislature and the legislative authority required to enable a municipality to sell its public parks must be plain"

Matter of Avella v City of New York, 131 AD3d 77, 82 [1st Dept 2015], *affd* 29 NY3d 425 [2017] [internal quotation marks and citations omitted]; *see Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 632 [2001]; *Miller v City of New York*, 15 NY2d 34 [1964]; *Aldrich v City of New York*, 208 Misc 930, 939 [Sup Ct, Queens County 1955], *affd* 2 AD2d 760 [2d Dept 1956]). Parkland may be established by express dedication or by implication. Dedication by implication is recognized when the municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate real property as parkland (*see Matter of Glick v Harvey*, 121 AD3d 498, 499 [1st Dept 2014]; *Powell v City of New York*, 85 AD3d 429, 431 [1st Dept 2011]).

New York City Zoning Resolution § 12-10 defines the term "public park" as "any publicly owned park, *playground,* beach, parkway or roadway within the jurisdiction and control of the Commissioner of Parks and Recreation, except for park strips or malls in a street the roadways of which are not within the Commissioner's jurisdiction and control" (emphasis added). 56 RCNY 1-02 provides that "Park" "signifies public parks, beaches, waters and land under water, pools, boardwalks, *playgrounds*, recreation centers and all other property, equipment, buildings and facilities now or hereafter under the jurisdiction, charge, or control of the Department [of Parks and Recreation]" (emphasis added).

> "A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. It need not and should not be a mere field or open space, but no objects, however worthy, such as court houses and school houses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself and the strict construction of a private grant is not insisted upon. Differences naturally arise as to the meaning of the phrase 'park purposes.' . . . Monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor; floral and horticultural displays, zoological gardens, *playing grounds*, and even restaurants and rest houses and many other common incidents of a pleasure ground contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community. The environment must be suitable and sightly or the pleasure is abated. Art may aid or supplement nature in completing the attractions offered."

(*Williams v Gallatin*, 229 NY 248, 253 [1920]; *see Matter of Avella v City of New York*, 29 NY3d 425, 438 [2017]). Thus, the use of real property as playground is generally not inconsistent with use of the real property as parkland. Nonetheless, where land is expressly dedicated for use as an "ornamental public square," use as a playground is inconsistent with the donor's intent, and may be enjoined (*see Beth Israel Hosp. Assn. v Moses*, 250 App Div 591 [1st Dept 1937]).

The petitioners have cited, and research has revealed, no persuasive authority that, under the common law, a playground, standing alone, always constitutes parkland. That said, it must be presumed that, as early as 2004, when the Legislature approved the temporary non-park use of the playground to accommodate the MTA, it concluded that the playground was

indeed parkland. Moreover, the petitioners correctly note that Zoning Resolution and the Rules of the NYC DPR suggest that the City has dedicated all publicly owned playgrounds under the jurisdiction of the Commissioner of Parks and Recreation as parkland, subject to the public trust doctrine. The playground, designated as Playground Ninety Six, has been under the jurisdiction of the Commissioner since 1947. Hence, the petitioners have a strong argument that, prior to the enactment of the alienation legislation, the playground was dedicated as parkland. The court notes that, whether the playground had been under the jurisdiction of the New York City Department of Education or the NYC DPR is relevant to the parkland status of the playground only if the definition set forth in Zoning Resolution is the sole determinant of that status. The court notes that this approach is unduly limited, and that the determination of parkland status rests on whether the land was expressly or impliedly dedicated as parkland and the nature of the uses to which the property was dedicated and actually employed.

The court, however, rejects the petitioners' contention that the method by which the approval of the alienation legislation was obtained was flawed, particularly in light of their failure to join the State of New York as a party respondent. In addition, the issue of whether the playground historically was characterized as parkland or not has no bearing on the outcome of this dispute. Once the alienation legislation was enacted, the area constituting the playground was no longer parkland, and its use as parkland was permitted to be discontinued, regardless of its prior status.

Contrary to the petitioners' contentions, the outcome of this dispute has no bearing on the future administrative treatment or disposition of JOPs. If the status or characterization of one of those playgrounds is disputed, a proper party can raise that issue in a timely fashion either in the relevant administrative proceeding, by way of a declaratory judgment action, or by seeking to have the City Council amend the New York City Charter or Administrative Code expressly to dedicate such playgrounds as parkland for the purposes of the public trust doctrine.

B. SEQRA/CEQR and ULURP

There is also no merit to the petitioners' contentions that the environmental review and ULURP approval processes were affected by procedural error, that those processes were tainted by the CPC's apparent presumption that the playground was not parkland, that the FEIS was improper, or that the respondents' findings that environmental impacts have been mitigated to the maximum extent practicable are incorrect. Regardless of the CPC's understanding of whether the subject property was parkland, the CPC proceeded as if it were parkland, and obtained the legislation that was needed to approve the project under that presumption. The fact that the legislation was secured after the conclusion of the ULURP and SEQRA/CEQR processes is of no moment, and provides no basis upon which to revisit or recommence the ULURP or SEQRA/CEQR processes.

1. SEQRA/CEQR

> "In New York State, SEQRA makes environmental protection a concern of every agency. Any construction project that requires . . . agency approval . . . which [sic] may have a significant effect on the environment, must go through a full SEQRA assessment to make sure that it is undertaken in a way that minimizes damage to the environment and public health. To that end, the agency must prepare an environmental impact statement (EIS) that complies with both the substantive and procedural requirements of SEQRA and all other applicable regulations. This insures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices
>
> "After the agency initially determines that it must prepare an EIS, SEQRA review proceeds through several steps. First, the project sponsor or the lead state agency on the project may conduct an optional 'scoping session,' exploring the method to be used in assessing the project's environmental impact. Next, the lead agency must prepare or cause to be prepared a draft environmental impact statement (DEIS), to be filed with the Department of Environmental Conservation, which surveys the relevant environmental risks posed by the proposed project. After the DEIS has been finished and publicly reviewed, the agency prepares and files a final environmental impact statement (FEIS). The DEIS and FEIS must analyze the environmental impact and any unavoidable adverse environmental effects of the project under review, as well as alternatives to the proposed action . . . , including a 'no-action alternative' . . . and mitigation measures. Finally, before approving the project, the agency must make an

> explicit finding that the requirements of [SEQRA] have been met and that [,] consistent with social, economic [,] and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided. By administrative regulation, such finding must be contained in a written findings statement, which considers the conclusions reached in the FEIS, weighs and balances the relevant environmental impacts, and provide[s] a rationale for the agency's decision"

Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan, 30 NY3d 416, 424-425 [2017] [citations and internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414 [1986], ECL 8-0103[8], 8-0109[2], [6], [8]; 6 NYCRR 617.1 [b][1], [2]; 617.8; 617.11[c], [d]; 617.12 [b] [6]). "CEQR, adopted by Local Law of the City, provides procedures for the compliance with SEQRA by City agencies . . . [T]he requirements of CEQR generally follow the provisions of SEQRA" (*Matter of Nash Metalware Co. v Council of City of N.Y.*, 14 Misc 3d 1211[A], 2006 NY Slip Op 52485[U], *9 [Sup Ct, N.Y. County, Dec. 21, 2006]; *see Matter of Save the Audubon Coalition v City of New York*, 180 AD2d 348, 351 [1st Dept 1992])).

A court must "'review the record to determine whether the agency identified the relevant areas of environmental concern, [take] a 'hard look' at them, and [make] a 'reasoned elaboration' of the basis for its determination'" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d at 430, quoting *Akpan v Koch*, 75 NY2d 561, 570 [1990] [citations omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 417). Judicial review of a SEQRA or CEQR determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure (*see Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012]; *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Akpan v Koch*, 75 NY2d at 570; *Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619 [2d Dept 2002]). "[T]he courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the

desirability of any action or [to] choose among alternatives'" (*Akpan v Koch*, 75 NY2d at 570, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 416; *see Matter of Community United to Protect Theodore Roosevelt Park v City of New York*, ____AD3d____, 2019 NY Slip Op 02965 [1st Dept, Apr. 18, 2019]; *Matter of C/S 12th Ave. LLC v. City of New York*, 32 AD3d 1, 6-7 [1st Dept 2006]; *Matter of Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]).

Although CEQR, in implementing SEQRA, requires that each FEIS include an analysis of a "No Action" alternative as though the project were not being constructed, and existing conditions on the project would remain unchanged, an FEIS is not required to consider the petitioners' preferred alternative scenario of development at the project site where such a scenario would not have met the objectives and capabilities of the respondents (*see* 6 NYCRR 617.9 [b] [5] [v]; *see also Matter of Residents for Reasonable Dev. v City of New York*, 128 A.D.3d 609, 610-611 [1st Dept 2015]; *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d at 5).

Here, the FEIS explicitly addressed the impacts anticipated if the current playground were discontinued, reconstructed, and relocated, in a slightly different form, to another portion of the project site. In their FEIS, the ETCF and CPC addressed the concerns raised by the petitioners in connection with the playground during the comment period subsequent to the circulation of the DEIS. The ETCF, as the lead agency, made appropriate findings in a separate SEQRA/CEQR findings statement that, to the maximum extent practicable, it mitigated open space and recreational impacts arising from the discontinuance of the playground in its current form. Hence, in compliance with SEQRA and CEQR, the respondents took the requisite hard look at the relevant impacts and made the requisite reasoned elaboration for their decision.

2. ULURP

ULURP creates a complex procedural process for the approval by the City or a City agency of "changes approvals, contracts, consents, permits or authorization thereof, respecting

the use, development or improvement of real property subject to city regulation" in twelve specified circumstances (*Matter of Neighborhood in the Nineties v City of New York*, 24 Misc 3d 1239[A], 2009 NY Slip Op 51812[U], *11 [Sup Ct, N.Y. County, Aug. 13, 2009]). The ULURP process is triggered where, as here, a "site selection for capital projects" is made by a city agency, such as the ETCF, or a disposition of city-owned property is involved (*see* New York City Charter § 197-c[a][5], [10]).

ULURP requires that, upon the filing of proposals for land-use activity of specified types with the Department of City Planning, the proposal be forwarded to the appropriate Community Board (*see* New York City Charter § 197-c[c]). A Community Board is composed of not more than 50 persons who reside or have a business, professional, or other significant interest in the particular Community District (*see* New York City Charter § 2800). Community Districts coincide as far as possible with the historic communities from which the city has developed (*see* New York City Charter § 2701 [b] [1]). The Board is authorized to hold hearings, prepare plans for the improvement and development of its district, and cooperate with and advise city agencies and officials (see New York City Charter § 2800[d]).

Upon receipt of a land use proposal, a Community Board has 60 days within which to conduct a public hearing and submit its written recommendations to the CPC. Not later than 60 days thereafter, the CPC must reach its own conclusion on the proposal and its determination, if it modifies or disapproves a Board recommendation, "shall be accompanied by a written explanation of its reason for such action" (New York City Charter § 197-c[e]). The CPC's decision is submitted, in turn, to the City Council for final action (*see* New York City Charter § 197-d[b][1]; 62 RCNY 2-02[a][5], [b][5]). "The Community Board, although it acts in a purely advisory capacity, is, therefore, the means whereby those who live or work in an area affected by a proposal land use are advised of pending proposals and given the opportunity to make known their views" (*Matter of Waybro Corp. v Board of Estimate of City of N.Y.*, 67 NY2d 349, 355 [1986]; *see Akpan v Koch*, 75 NY2d 561 [1990]).

Here, the respondents adhered to the procedural requirements of the ULURP process. There is no merit to the petitioners' contention that Community Board 11, the CPC, or the City Council would have withheld their approvals of the project had the ETCF or the CPC expressly characterized the playground as parkland. Inasmuch as the petitioners raised this issue at every step of the ULURP process and the respondents sought and obtained the alienation legislation from the Legislature, the court concludes that all relevant boards and agencies took the issue into account prior to their approvals.

IV. Conclusion

Accordingly, it is,

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

4/24/2019
DATE

JOHN J. KELLEY, 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