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

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CANNON POINT PRESERVATION CORPORATION and JAMES P. DONOVAN,

Petitioners,

- against -

THE CITY OF NEW YORK; BILL DE BLASIO, in his official capacity as the Mayor of the City of New York; THE NEW YORK CITY PUBLIC DESIGN COMMISSION; THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ("EDC"); JAMES PATCHETT, in his official capacity as President and CEO of EDC; MARILYN LEE, in her official capacity as Vice President of EDC; THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION ("City Parks"); MITCHELL J. SILVER, in his official capacity as Commissioner of City Parks; THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION ("NYC DOT"); POLLY TROTTENBERG, in her official capacity as Commissioner of NYC DOT; NEW YORK CITY DEPARTMENT OF SMALL BUSINESS SERVICES ("DSBS"); GREGG BISHOP, in his official capacity as Commissioner of DSBS; and NEW YORK STATE DEPARTMENT OF TRANSPORTATION ("NYS DOT"),

Respondents.

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Index No. 152692/2019

DECISION and ORDER

Mot. Seq. 1, 2 & 3

HON. EILEEN A. RAKOWER, J.S.C.

Motion Sequence 1

Petitioners Cannon Point Preservation Corporation and James P. Donovan (collectively, "Petitioners") bring this action pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking an Order:

> (1) annulling and vacating Respondent The New York City Public Design Commission's (the "Design Commission approval of East Midtown Esplanade Project (the "Project"), insofar as the Design Commission's approval was based on inadequate environmental assessments of the impact of the proposed pedestrian Bridge in Clara Coffey Park (the "Bridge");
>
> (2) declaring the environmental assessment prepared in connection with the Project inadequate under the New York State Environmental Review Act ("SEQRA") and the City Environmental Quality Review Act ("CEQR"), insofar as they failed to adequately consider the environmental impacts stemming from the placement of the Bridge;
>
> (3) declaring that the Design Commission's reliance on the environmental assessment arbitrary, capricious, an abuse of discretion, and in violation of law;
>
> (4) declaring that the Design Commission's approval of the Bridge's placement null and void, as it operates as a violation of the Public Trust Doctrine;
>
> (5) declaring that any use(s) by Municipal Respondents of Clara Coffey Park for the Bridge site is in violation of the Public Trust Doctrine; and
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> (6) granting expedited discovery.

Motion Sequence 2

Respondents The City of New York ("the City"); Bill De Blasio, in his official capacity as the Mayor of the City of New York; the Design Commission; The New York City Economic Development Corporation ("EDC"); James Patchett, in his

official capacity as President and CEO of EDC; Marilyn Lee, in her official capacity as Vice President of EDC; The New York City Department of Parks and Recreation ("City Parks"); Mitchell J. Silver, in his official capacity as Commissioner of City Parks; The New York City Department of Transportation ("NYC DOT"); Polly Trottenberg, in her official capacity as Commissioner of NYC DOT; New York City Department of Small Business Services ("DSBS"); and Gregg Bishop, in his official capacity as Commissioner of DSBS (collectively, "Municipal Respondents") oppose and cross move for an Order dismissing Petitioners' Verified Petition pursuant to CPLR 3211(a)(1), (5), (7), and (10), and CPLR 1003 on the grounds that a defense is founded upon documentary evidence, failure to join a necessary party, failure to state a cause of action, and statute of limitations. Petitioners oppose

Motion Sequence 3

Respondent New York State Department of Transportation ("NYS DOT") opposes and cross moves for an Order dismissing Petitioners' Verified Petition and denying Petitioners' request for "expedited discovery" pursuant to CPLR 3211(a)(5), (7) and (10) and CPLR 7804(f). Petitioners oppose.

Statute of Limitations

A. Parties' Contentions

Municipal Respondents and NYS DOT contend that Petitioners' challenge to the environmental review of the Project under SEQRA and CEQA[1] should be dismissed as time barred pursuant to CPLR 3211(a)(5).

Municipal Respondents assert that Petitioners failed to identify a SEQRA determination within four months prior to Petitioners filing the Verified Petition. Municipal Respondents assert that "the City issued a CEQR Negative Declaration for the Project" in 2015, and the Federal Highway Administration issued a Finding of No Significant Impact ("FONSI") for the Project in 2016, and that Petitioners had "ample notice of the 2015-2016 environmental review." Municipal Respondents assert that even if the 2015-2016 environmental review is not deemed a final agency action, the governmental applications, approvals, and commitments show that the agencies reached a "definite position on the issue." Municipal Respondents argue that the Design Commission's preliminary project approvals on November 14, 2018 do not constitute SEQRA actions and therefore do not restart the statute of

[1] CEQR applies SEQRA's regulations to New York City agencies. References to "SEQRA" include "CEQR."

limitations because PDC is not "the lead agency principally responsible for approving the project" and is not subject to the requirements of SEQRA.

NYS DOT asserts that any SEQRA claims against NYS DOT arose between 2013 and 2016. NYS DOT argues that it had no role in the Design Commission's November 14, 2018 resolution. NYS DOT asserts that any SEQRA claim Petitioners could have had against NYS DOT would be for the Esplanade Project. NYS DOT contends that the Negative Declaration for the Esplanade Project was issued for a 30-day public comment period from October 14, 2015 to November 16, 2015.

Petitioners contend that their SEQRA claims are timely because the Design Commission's approval of the Project on November 14, 2018 was the final action. Petitioners argue that Respondents "repeatedly" stated that the decision would be final once the Design Commission approved the Project. Petitioners argue that the Design Commission's project approvals have constituted SEQRA actions by the First Department and the Design Commission exercises review over SEQRA issues. Petitioners further argue that discretionary decision-making subjects the Design Commission to SEQRA.

B. Law

"A petitioner who seeks article 78 review of a determination must commence the proceeding 'within four months after the determination to be reviewed becomes final and binding upon the petitioner' (CPLR 217[1])." *Walton v. New York State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 194 [2007]. "An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Id.* "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party." *Id.*

C. Discussion

Petitioners' environmental review challenge under SEQRA is time-barred. The environmental review of the Project was completed at the latest in 2016 when the FONSI was issued for the Project, which was supported by the Negative Declaration and the Final Design and Environmental Assessment ("FD/EA"). At that juncture, the location of the Bridge had been determined and was final. Specifically, the Negative Declaration and the FD/EA states:

> **54th Street Upland Bridge Connection:** This connection would run east-west along East 54th Street at the Sutton Place terminus. The clear width of the connection would be 12 feet to allow for bi-directional pedestrian traffic and cyclist to comfortably walk their bicycles across the proposed esplanade. Modifications to limited areas of Sutton Parks would be required to construct the Upland Bridge Connection…

(Ex. 6a of Municipal Respondents Opposition and in Support of Motion to Dismiss).

The Design Commission's subsequent and limited review of the aesthetics of the Project design did not restart the statute of limitations to challenge the Project's environmental review.

CEQR/SEQRA Standard

A. Parties' Contentions

Petitioners argue that "[t]he Design Commission's approval of the Project was arbitrary and capricious, 'without regard to the facts' and in violation of law because it failed to adequately consider the adverse environmental impacts of the Bridge on Clara Coffey Park, the Sutton Historical District, and the neighboring Sutton Buildings, as required by SEQRA and CEQR." (Verified Petition at 45). Petitioners assert that the Design Commission "hurried" approval for the Project without a "reasoned" analysis and "hard look" pursuant to SEQRA against the "serious concerns" stated by community members and local elected officials. Petitioners contend that the Project is a Type I action and the Design Commission should have assessed whether there was a need for an Environmental Impact Statement ("EIS").

Petitioners argue that the Design Commission inadequately determined the adverse impacts on Clara Coffey Park would be "minimal" or "non-existent" and based its conclusion on misleading information. Petitioners assert that the FD/EA ignores the huge impacts the Bridge will have on Clara Coffey Park. Petitioners contend that the FD/EA stated that the Bridge will "impact 0.2 acres" but it failed to consider that Clara Coffey Park is only 0.85 acres and the Bridge would occupy approximately one fourth of Clara Coffey Park. Moreover, Petitioners argue that the FD/EA inaccurately assesses whether the Bridge will impact the "scenic or aesthetic resource[s]" of Clara Coffey Park. Petitioner contends that local residents use Clara Coffey Park to enjoy the view and the garden space and the FD/EA acknowledges that the Bridge may "obstruct these views and impact parkgoers' enjoyment of the Park's aesthetic qualities" but also states that the Project would not result in the

"diminishment of the public enjoyment and appreciation of the designated aesthetic resource". (Verified Petition at 51-52). Petitioners argue that the FD/EA fails to assess the increased traffic and fundamental changes to the character of Clara Coffey Park the Project will have. Petitioners assert that the FD/EA did not consider the potential "dangers to parkgoers posed by cyclists and pedestrians using Clara Coffey Park to access the Bridge - particularly the elderly and persons with disabilities" even though community members have raised serious safety concerns. (Verified Petition at 52).

Petitioners assert that the FD/EA advises Respondents that they should "analyze the potential effects" the Bridge will have on the 11 historic resources, but no analysis was conducted. Petitioners contend that the concerns raised by the community and public officials regarding the impacts on the Sutton Buildings and Sutton Historic District were either dismissed or not addressed.

Municipal Respondents assert that Respondents "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." (Municipal Respondents' Memo. of Law at 25). Municipal Respondents argue that the "potential significant adverse impacts" as a result of the Project were "carefully considered". Municipal Respondents contend that Petitioners failed to demonstrate how the environmental review was arbitrary and capricious. Municipal Respondents assert that the FD/EA concluded that the Project "will not adversely affect the activities, features, and attributes" of Clara Coffey Park. (Municipal Respondents' Memo. of Law at 27). Municipal Respondents further assert that the Negative Declaration concluded that there would be no significant adverse impacts because "the seating and general use of the park as a passive recreation resources would not be limited" and further stated that the Project would not "limit public access to these open spaces or result in significant amounts of increased noise, air pollutant emissions, odors, or shadows (post-construction) that would affect their usefulness". (Municipal Respondents' Memo. of Law at 27).

Municipal Respondents contend that the City's CEQR Technical Manual is consistent with the FD/EA and the Negative Declaration. Municipal Respondents assert that "the Technical Manual states that when a direct effect to public open space 'would be so small that it would be unlikely to change the use of the open space,' a detailed analysis may not be warranted". (Municipal Respondents' Memo. of Law at 28). Municipal Respondents argue that the environmental review does not contain contradictions and the agencies did consider potential adverse impacts regarding pedestrian traffic and noise. Municipal Respondents contend that the FD/EA reviewed the potential adverse impact on historic resources in accordance with the National Environmental Policy Act, SEQRA, the National Historic Preservation

Act, and the New York State Historic Preservation Act. Municipal Respondents further contend that the Negative Declaration followed an analogous analysis to the FD/EA. Municipal Respondents assert that the agencies consulted with the New York State Office of Parks, Recreation, and Historic Preservation before the completion of the environmental review. Municipal Respondents assert that an EIS is not necessary because the agencies completed an Environmental Assessment Statement and determined there were no potential significant adverse impacts pursuant to SEQRA.

NYS DOT argues that Petitioners fail to bring a cause of action against NYS DOT. NYS DOT asserts that Petitioners do not challenge a determination by NYS DOT but instead refers to NYS DOT as "Project Respondents" being involved in preparing "facially inadequate environmental assessments of the proposed Bridge." (NYS DOT's Memo. of Law at 18). NYS DOT contends that Petitioners do not claim that NYS DOT "failed to perform a duty enjoined upon it by law, or … proceeded without jurisdiction, or that any determination … was arbitrary and capricious, or an abuse of discretion." (NYS DOT's Memo. of Law at 19). NYS DOT argues that Petitioners do not state a SEQRA claim against NYS DOT because NYS DOT only had a limited role in the SEQRA review for the Esplanade Project in 2015 and it was ministerial. NYS DOT asserts that pursuant to SEQRA "an agency is subject to its environmental review requirements only if the agency directly undertakes the project in issue, funds or provides funding from other State or local agencies for the project or has regulatory authority to license, permit or otherwise authorize the project. See 17 N.Y.C.R.R. §§ 15.2(a)(1), 15.2(q)." (NYS DOT's Memo. of Law at 20). NYS DOT argues that here, the Esplanade Project was advanced by EDC and its consultant AECOM on behalf of the City, and was not undertaken, funded or permitted by NYS DOT.

B. Law

Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." See CPLR 7803 [3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and

capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making". *Zutt v. State*, 99 AD3d 85, 100 [2d Dept 2012]. "Since SEQRA contains no provision regarding judicial review, courts apply the standard governing proceedings pursuant to CPLR article 78 for the review of administrative determinations." *Id.* "The relevant question before the court is whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination". *Id.* "While the judicial review must be genuine, 'the agency's substantive obligations under SEQRA must be viewed in light of a rule of reason' and the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration." *Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 NY2d 668, 688 [1996]. "While judicial review must be meaningful, the 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 561, 570 [1990] (citation omitted).

When a Municipality issues a "Negative Declaration" pursuant to SEQRA and CEQR, it is generally a "determination that the proposed action would not have a significant environmental impact". *Save Audubon Coal. v. City of New York*, 180 AD2d 348, 358–59 [1st Dept 1992]. "An EIS is required when an action can reasonably be expected to lead to any of the impacts listed in the regulations (CEQR[A] § 6 [a]; 6 NYCRR § 617.11[a])." *Id.* at 359. "If an agency issues a Negative Declaration it must provide a reasoned elaboration for the basis of its determination". *Id.*

C. Discussion

Even if the SEQRA claims are timely, the record reflects that Respondents identified the relevant areas of environmental concerns, took the requisite "hard look" at those concerns and provided a "reasoned elaboration" for the basis of their determination. The record shows that Respondents did consider the environmental impact the Project would have on the surrounding area, specifically Clara Coffey Park.

Here, Respondents show that they assessed the potential significant adverse impacts of the Project on Clara Coffey Park, the Sutton Historical District, and the neighboring Sutton Buildings. Respondents demonstrate that they considered various access streets and assessed the best Bridge location. Respondents

considered: the elevation of the streets (51st is 42 feet, 52nd 43 feet, 53rd is 12 feet and 54th is 17 feet) and how those elevations would affect the length of the proposed spans; prohibitions such as subway tunnels and sewers; vehicular access to the FRD drive and traffic volumes. Indeed, comparing the four potential access points, they assessed street end elevation, total length, impact to local street, impact to parking, impact to FDR access, physical impact to Clara Coffey Park, visual impact to community, ease of access to greenway, constructability, whether it is within Project limits and within existing environmental reviews. Ultimately, the analysis determined that the Bridge location would be 54th street. All of these considerations and the analysis were presented to the public in January of 2018. The court concludes that the agencies involved took the necessary "hard look" provided a "reasoned elaboration" for their final determination. Therefore, Respondents reliance on these considerations was not arbitrary or capricious.

Public Trust Doctrine

A. Parties' Contentions

Petitioners argue that without the approval of the New York State Legislature for the placement of the Bridge in the Clara Coffey Park, Respondents have violated New York's Public Trust Doctrine. Petitioners assert that Respondents are "unlawfully alienating parkland for 'other than park purpose.'" Petitions assert the Bridge will be a "substantial intrusion" because approximately one fourth of Clara Coffey Park will be unusable, the Bridge will limit "the public's use and enjoyment" of Clara Coffey Park and will substantially change the character of the Clara Coffey Park, and will render the Clara Coffey Park unusable during the construction.

Municipal Respondents assert that Petitioners' public trust claim fails on the merits even if the Court deems that Clara Coffey Park is dedicated parkland, a pedestrian bridge and the promotion of bikes is a proper park use. Additionally, Municipal Respondents argue that the temporary closure of the Clara Coffey Park for construction of the Bridge is not an alienation of the park, even if the site was a dedicated park because the construction is for an appropriate park purpose.

B. Law

"Under the public trust doctrine, dedicated parkland cannot be converted to a nonpark purpose for an extended period of time absent the approval of the State Legislature." *Union Square Park Cmty. Coal., Inc. v. New York City Dep't of Parks & Recreation*, 22 NY3d 648, 654 [2014] (citation omitted). "A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication." *New York State Assemblyman v. City of New York*, 85 AD3d 429, 431

[1st Dept 2011]. "Where, as here, there is no formal dedication of land for public use, an implied dedication may exist when the municipality's act and declarations manifest a present, fixed, and unequivocal intent to dedicate." *Glick v. Harvey*, 121 A.D.3d 498, 499 [1st Dept 2014], *aff'd*, 25 N.Y.3d 1175 [2015]. "In determining whether a parcel has become a park by implication, a court should consider the owner's acts and declarations and the circumstances surrounding the use of the land." *Id.* "The burden of proof rests on the party asserting that the land has been dedicated for public use." *Id.*

"The test of a non-park use, in the opinion of this court, is not whether the facility attracts people who are not already in the park." *795 Fifth Ave. Corp. v. City of New York*, 40 Misc. 2d 183, 191 [Sup. Ct, NY County 1963], *aff'd*, 20 A.D.2d 850 [1st Dept 1964], *aff'd*, 15 N.Y.2d 221 [1965]. "The test is rather whether the facility concerned offers substantial satisfactions to the public, which would only be possible in a park setting." *Id.*

C. Discussion

Clara Coffey Park does not constitute parkland subject to the public trust doctrine. Clara Coffey Park is neither dedicated parkland nor impliedly dedicated parkland. In 1950, the City of New York filed a change to the city map – it laid out lines and grades for two pedestrian overpasses across the FDR Drive at East 51st Street and East 54th Street and designated a park on the north side of 51st Street and adjacent to the west side of the FDR Drive. The 54th Street overpass was never built. However, that map does not show the creation of the Clara Coffey Park. Rather, that area between 53rd street and 54th street is undesignated. The area is not a park as such is defined - it is not so designated in the city plan. Petitioners point to exhibit 7, a property card, to show this was an area with "TITLE VESTED: in C.N.Y.," and "JURISDICTION- PARK," "for maintenance and operation." It does say it is one of "Five Parks," an improved sitting area maintained by Department of Parks "as per DPR press release 10/11/45." However, on the same document, it states that the area was "not officially transferred to Parks by B/E." The reservation "not officially transferred to Parks by B/E" is consistent with the mapped pedestrian overpass which was proposed at 54th Street. More importantly, it is consistent with the Project proposed here. The Clara Coffey Park area remains an improved sitting area, and a pedestrian access to the greenway is proposed at 54th Street. Therefore, the proposed Bridge does not need legislative approval.

Expedited Discovery

A. Parties' Contentions

Petitioners seek expedited discovery of documents related to the environmental assessments of the Project. Petitioners assert that the documents were "explicitly referenced" in the FD/EA but were not included. Petitioners argue that the requested documents are needed to evaluate the "full scope" of the Project. Petitioners contend that limited documents were provided to Petitioners from NYS DOT and City Parks and no documents were provided by EDC, the Design Commission, NYC DOT, and DSBS.

Municipal Respondents assert that the information sought is neither material nor necessary to the Article 78 proceeding. Municipal Respondents argue that Petitioners' discovery request is moot because Respondents have responded to Petitioners' FOIL Requests. Municipal Respondents contend that the documents that were not provided were either exempt pursuant to FOIL or not in the agencies' possession. Municipal Respondents assert that Petitioners' should resolve their complaints through the FOIL process and not through an Article 78 proceeding.

B. Law

"[D]isclosure is available only by leave of the court in a CPLR article 78 proceeding." *In re Weinstein v Harvey*, No. 103844/12, 2013 WL 1494997, at *6 [Sup. Ct, NY County 2013] (citations omitted). "In an Article 78 proceeding, a court should not grant leave to conduct discovery 'absent a showing that the discovery sought was likely to be material and necessary to the prosecution or defense' of the proceeding." *Id.* "Indeed, re-examining past governmental action or inaction in connection with a present challenge would be contrary to the policy of resolving Article 78 proceedings expeditiously. *Id* at *8.

C. Discussion

Petitioners' request for "materials relevant to the environmental assessments that were conducted in connection with the Project, largely in connection with Respondents' consideration of potential impacts on Clara Coffey Park and surrounding historic properties" are neither material nor necessary to determine whether Respondents took the requisite "hard look" at those concerns and provided a "reasoned elaboration" in the FD/EA. (Verified Petition at 63). To the extent documents were not provided, Petitioners must exhaust administrative remedies prior to bringing an Article 78 proceeding.

Wherefore it is hereby

ORDERED that the portions of Respondents' motions to dismiss the SEQRA/CEQR claims in the Verified Petition (Mot. Seq. 2, and 3) as time-barred pursuant to CPLR § 3211(a)(5) is granted; and it is further

ORDERED that the remainder of the Verified Petition (Mot. Seq. 1) is denied and the Clerk is directed to enter judgment dismissing the action accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 13, 2019

Eileen A. Rakower, J.S.C.