SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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SIERRA CLUB, FRIENDS OF FORT GREEN, THE CITY CLUB OF NEW YORK, MARY LOU HOUSTON, SUDIP MUCKHERJEE, JUDITH SCHRAEMLI, VERICE WEATHERSPOON, HUI-LING HSU, KELLY SCHAEFFER, ENID BRAUN, LUCY KOTEEN

Plaintiff,

- v -

THE DEPARTMENT OF PARKS AND RECREATION OF THE CIITY OF NEW YORK, THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 151735/2019

MOTION DATE 09/10/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 51, 52, 53, 55

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

This Article 78 proceeding challenges the Department of Parks and Recreation of the City of New York's (respondent, or the Parks Department) determination that the proposed changes to Fort Greene Park (the Park) in Brooklyn, New York, constitute a Type II action exempt from environmental review. Petitioners argue that the changes the Project envisions – including the removal of trees, the replacement of a grassy area with a concrete playground, and the alteration of the park's entrance – go beyond the types of repairs and renovations that the statute envisions for a Type II classification, and are also inconsistent with the aesthetics and history of the Park. Therefore, petitioners allege, the determination violates the New York State Environmental Quality Review Act (SEQRA). As relief, they seek an order which voids the determination and enjoins any actions by the Parks Department to advance the Project until it complies with SEQRA.

Petitioners filed the original petition and the request for judicial intervention on February 15, 2019. By stipulation dated April 2, 2019, the parties agreed that the petition, motion sequence number 001, was withdrawn and an amended petition, motion sequence number 002, would be considered instead. Respondent answered the amended petition and submitted its opposing papers, including its legal memorandum and numerous other documents, on May 29, 2019. However, petitioners did not file their memorandum in support of the petition and 14 supporting exhibits until July 11, 2019. Alleging that petitioners' latest papers included new arguments and evidence, respondent submitted a sur-reply by letter on July 26, 2019. Petitioners opposed the submission on July 30, 2019. The court heard oral argument on September 10, 2019 and corporation counsel filed the transcript on September 30.

SEQRA Procedure

This proceeding arises under SEQRA (Environmental Conservation Law [ECL] §§ 8-0101 — 8-0117). The pertinent regulatory scheme, by which an agency implements its review under SEQRA, is codified at 6 NYCRR §§ 671.1 – 617.21. SEQRA "inject[s] environmental considerations directly into governmental decision making; thus the statute mandates that social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities" (*Matter of Sierra Club v Martens*, 158 AD3d 169, 174 [2d Dept 2018] [*Martens*] [internal quotation marks, internal bracket, and citation omitted]). There is a "need for strict compliance with SEQRA requirements" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 [2004]).

Initially, agencies must determine whether an "action," as defined at ECL 8-0105 (4), may have a substantial impact on the environment. The regulatory scheme sets forth the decision-making process. The first step is to determine whether the action is a Type I, Type II, or Unlisted action (6 NYCRR § 617.5 [a] [4]). A Type I action is one that may have a significant impact on the environment. Type I actions include, as is relevant here, nonresidential projects which involve the physical alteration of 10 acres of land, otherwise unlisted actions which exceed 2.5 acres of public parkland, and otherwise unlisted actions which exceed 2.5 acres of land on the National or State Register of Historic Places or has been deemed eligible for listing on the State Register (6 NYCRR §§ 617.4 [b] [8], [9]). Type II actions are deemed "not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]" (6 NYCRR § 617.5 [a]). Among other actions, Type II actions include maintenance or repair work which does not substantially change the facility, changes in kind which upgrade buildings to satisfy building, energy, or fire codes, maintenance of landscaping and natural growth already in existence, and routine or continuing management and administration by the agency in charge which does not include "new programs or major reordering of priorities that may affect the environment" (6 NYCRR §§ 617.5 [c] [1], [2], [6], [26]).

Although Unlisted actions do not meet the threshold necessary to be considered a Type I action, they still require further consideration. If an action is either a Type I or Unlisted action, the lead agency must prepare an environmental assessment statement (EAS) to determine whether a full environmental review (an environmental impact statement, or EIS) is required (ECL § 8-0109 [concerning the preparation of EIS]; 6 NYCRR §§ 617.3 [c]; *see Matter of Merson v McNally*, 90 NY2d 742, 750-751 [1997]). No further analysis is necessary for Type II actions (6 NYCRR 617.5 [a]).

Background

The challenged project concerns Fort Greene Park, a 30-acre park with "a storied history" (NYSCEF Doc. No. 25 [Mattes Aff in Support of Answer] ¶ 4).[1] In 1776, General Nathanael Greene constructed Fort Putnam in an area that is now part of the Park for use during the Revolutionary War, and the fort was rebuilt and used again during the War of 1812. In 1845, Brooklyn designated the space as a public park. Frederick Law Olmsted and Calvert Vaux, the two

[1] Eric Mattes, a Parks employee, was the Director of Landscape Architecture for Brooklyn during the relevant period.

landscape architects whose firm had designed Central and Prospect Parks, designed the Park in 1867. In addition to "the . . . Olmsted and Vaux landscape design, along a hillside, a small stately entry building leads into the tomb of the remains of some 11,000 patriots captured by British soldiers in the Revolutionary War" and stashed in overcrowded prison ships (NYSCEF Doc. No. 7 [Amended Verified Pet] ¶ 15).[2] The Park is part of the Fort Greene Historic District, which has been on the National Register of Historic Places since 1983.

Over the years, several changes have been made to the Park. In 1905, the architectural firm McKim, Mead & White constructed the Prison Ship Martyrs Monument (the Monument), a broad promenade which contained a 100-foot wide staircase which led from the base of the hillside, past the tomb, and to the hilltop (*id.*). Tennis courts had been added by 1929. In 1936, architect Gilmore Clarke created a retaining wall at the Park's northwest corner (*id.* ¶ 18). In another alteration in the 1970s, landscape architect A.E. Bye, Jr. added paths to the Park and replaced a portion of the promenade with a children's play area of stone and earth mounds (*id.* ¶ 16 [the Bye mounds]). Renovations in the 1980s and 1990s included the installation of safety surfacing, pavements, benches, and fences; the replacement of roofing and the drainage and water systems; improvements to the tennis and basketball courts; and the addition of trees, shrubs, and groundcover.

In 2015, respondent launched its Parks Without Borders (PWB) program, which aimed "(1) to make parks more accessible and welcoming to everyone; (2) to improve neighborhoods by extending the beauty of parks out into communities; and (3) to create vibrant public spaces by transforming underused areas" (NYSCEF Doc. No. 25 [Mattes Aff in Support of Answer] ¶ 4). The program "rethink[s] the edges, entrances, and adjacent spaces of parks across the City," which the Parks Department deems necessary in order to increase their openness and accessibility (NYSCEF Doc. No. 26 [Silver Aff in Support of Answer] ¶ 6).[3] When the program launched, respondent conducted a survey asking New York City residents which parks they thought should be part of the PWB program. Over 6,000 people participated in the survey, nominating 691 parks. Respondent states Fort Greene Park received 194 comments in support, the second most votes of the parks in Brooklyn. The Park was one of the eight nominees that the Parks Department selected for renovation (NYSCEF Doc. No. 25 [Mattes Aff in Support of Answer] ¶ 8).

The Project focuses on the northwest area of the Park, which the parties refer to as the Lower Plaza. Pursuant to the Project, an entrance and stairway will move from one location on Myrtle Avenue to another, "in keeping with the corner entrance design established by Olmsted in his original design of the Park" (*id.* ¶ 11). In addition, ramps and pathways compliant with the Americans With Disabilities Act of 1990, As Amended (42 USC Ch. 126, §§ 12101 – 12213 [ADA]), will be installed. Under the Project there also will be "new pavement, lighting, planting, tables, chairs, benches, and fencing," an area where people can barbecue "will be reconstructed so that it is ADA-compliant and furnished with picnic tables and grills," the existing "adult fitness area will be enlarged and the basketball court reconstructed" (NYSCEF Doc. No. 25 [Mattes Aff] ¶ 11). The sidewalk along the Lower Plaza "will be reconstructed," the current Belgian Block Oval replaced by "new pavers and a granite block amenity strip furnished with new benches and trees"

[2] Ultimately, the tombs were transferred to an area near the Brooklyn Navy Yard.

[3] Mitchell J. Silver has been the Commissioner of Parks since May 2014 and thus was in charge during the relevant period.

(*id.*). The Project also proposes the removal of the staircases, to be replaced with granite treads, side walls, and handrails, the removal of part of the Gilbert Clarke retaining wall, and the removal of the Bye mounds. Respondent asserts that, altogether, around 7.86 acres of the approximately 30-acre Park will be affected.

Before the Project's approval, respondent held two public input meetings – on November 2, 2016 and February 16, 2017 – and the Project ultimately incorporated some of the public's suggestions. In the fall of 2017, following June presentations to the board and its executive committee, respectively, the local community board, Brooklyn's Community Board 2, approved the proposal by formal letter. Further, because the Park is in a landmarked district, the Fort Greene Historic District, portions of the Project were subject to review by the Landmarks Preservation Commission (LPC). In September 2016, LPC issued a Binding Report approving the proposed alterations; in November 2018, it issued an amendment which also approved additional changes. It approved the PWB portions of the Project in November 2017 and issued a Binding Report regarding its approval in November 2018. Also, at a public meeting on October 15, 2018, the New York City Public Design Commission unanimously approved the Project.

The Challenged Determination

In addition to the above, under both the City Environmental Quality Review (CEQR) laws and SEQRA, the Parks Department evaluated the potential environmental impact of the Project. On August 30, 2018, the Parks Department's Director of Environmental Review issued its Type II CEQR Determination (NYSCEF Doc. No. 14). The determination notes that the Park "has an over 150-year history of development, alterations, and renovations to serve the changing needs of the City" (*id.* p 1). In addition to the PWB elements described above, the determination noted that the Project would add "erosion control measures and plantings . . . in suitable locations" (*id.*). The determination states that these alterations would "connect the park to the adjacent crosswalks and neighborhood in a safer manner, increase the ADA and other accessibility elements, remedy problems with the existing pavements, and control erosion in the Park. The various components of the Project, the determination states, "address physical deficiencies, enhance public accessibility and neighborhood connectivity, and support[s] modern day usage needs, while honoring and reconciling the rich design history of the site" (*id.* p 2).

The determination outlines the components of the Project in turn. It states that the move of the lower plaza entrance to the corner of Myrtle Avenue and St. Edwards Street "reinforce[s] the axial connection to the monument and connect[s] the park to the adjacent crosswalks and neighborhood in a safer manner" (*id.*). The installation of ramps at the corner, the determination states, will make the entrance ADA-compliant. The report notes that the repairs to the stairs and sidewalk involve the replacement of some of the older materials (*id.*). The determination indicates that of the approximately 7.86 acres the Project impacts, around 4.4 acres consists of repairs and reconstruction, and around 3.46 acres are part of the PWB component (*id.* p 3). In addition, a buffer zone surrounding the Project area will increase this amount to the "contract limit" of up to 9.85 acres (*id.*). However, no work will be performed in the buffer zone. The determination further notes that 83 trees will be removed, 32 of which are in poor condition, that around 267 replacement trees are planned for the Park, and that the work will comply "with Administrative Code Section 18-107, a tree protection plan, and NYC Parks' standard tree protection protocols" (*id.*). In

addition, the determination states that the City's Departments of Environmental Protection and Transportation were consulted in the planning and that LPC approved the Project. The determination concludes that the Project has "no potential for significant adverse environmental impacts and is not subject to further environmental review" (*id.* p 4). In particular, the determination states everything in the Project falls within the following Type II actions: maintenance or repair work which does not involve a substantial change to the Park (6 NYCRR § 617.5 9 [c] [1]); in-kind replacements, rehabilitations, or reconstructions of the Park, in order to meet building and fire codes (6 NYCRR § 617.5 9 [c] [2]); maintenance of the landscaping and natural growths in the Park (6 NYCRR § 617.5 9 [c] [6]); and, regular, ongoing administration and management by the Parks Department which does not involve the addition or programs or "major reordering of priorities that may affect the environment" (6 NYCRR §§ 617.5 9 [c] [26]).

Pleadings and Positions of the Parties

The petition asserts as its single cause of action a violation of SEQRA. The pleading decries the changes respondent plans to implement, alleging that the renovations will cause environmental damage and "will destroy historic aesthetic enjoyment" (*id.* ¶¶ 20, 21). Because of this, the petition urges, the Project has "the potential for at least *one* significant adverse environmental impact" (*id.* ¶ 25), and the Type II designation is improper under SEQRA (*id.* ¶ 30). Petitioners argue that the Project "break[s] the Olmsted tradition by proposing a corner entrance, taking down the Gilmore Clark northwest corner wall, replacing the original northeast corner Belgian Block Oval with pink-tinted concrete pavers, and leveling the [children's play area, with its grass mounds] and, in so doing, removing 83 mature shade trees and endangering more during construction" (NYSCEF Doc. No. 7 [Amended Petition] ¶ 19). Furthermore, the petition states that because the Park is publicly owned or operated, the fact that more than 2.5 acres of the Park will be affected automatically makes this a Type I action (*id.* ¶ 39 [citing 6 NYCRR 617.4 (b) (10)]).

In support, petitioners have filed a copy of an impassioned email from petitioner Friends of Fort Greene Park's landscape preservation consultant, Michael Gotkin, to LPC during its consideration of the Project. Gotkin objects to the proposed "massive paved plaza across the original green open space," among other objections related to the transformation of the alleged earlier landscaping scheme with "a strange ersatz rendition of a City Beautiful era formalism on steroids" (NYSCEF Doc. No. 8 at p 2). In particular, Gotkin states that the Project's plan, "for the first time in the park's history, breaches the wooded corner of the park and replaces the mature grove of trees and protective rustic retaining wall with an outsize grand staircase . . ." which also renders a critical entrance inaccessible to individuals who are wheelchair-bound and to caregivers with strollers, relegating them to a ramp inconvenient to the central area of the Park (*id.* at p 5). The Project has "more in common with the new luxury condominium towers . . . outside the park, than with the historical design and verdant nature within the park walls" (*id.*).

According to respondent's answer, the Project will not have a negative or significant impact on the Park's landscape. The answer denies that respondent's Type II designation was arbitrary and capricious or inconsistent with SEQRA's guidelines (NYSCEF Doc. No. 11 [Answer] ¶¶ 29, 31-32). The answer states that the 2.5-acre rule on which petitioner relies applies only to Unlisted actions, and therefore the 10-acre restriction applies here (NYSCEF Doc. No. 11 [Answer] ¶ 39). Additionally, respondent argues that all proposed actions fall within Type II

exemptions in that they either maintain or repair structures without making a substantial change; replace, rehabilitate, or reconstruct a structure or facility; maintain or support the Park's natural landscape; and continue routine management that does not create new programs or significantly reorder and impact the Park's priorities. The answer challenges the petition's characterizations of the ideals of the Park and the goals of the Project, referring generally to respondent's November 2016 public meeting presentation as well as respondent's November 2017 presentation to LPC.

In support of its arguments, respondent includes the exhibits used for the public meeting and LPC presentations, as exhibits C and F, respectively (NYSCEF Doc. Nos. 15, 18). The former exhibit describes the goals of PWB and the selection process which led respondent to choose Fort Greene Park as one of its initial projects; and, using photographs and graphics, it shows past configurations of Fort Greene Park and outlines the proposed changes. It notes that at two parts of the renovation, the goal will be to mitigate erosion and problems due to storm water accruals, to update and improve the parks entrances and pavements, and to better connect various areas of the park. It indicates that there will be a new, ADA compliant, entrance ramp, that one entrance will be reconstructed, that granite block edging will be added and asphalt pavements will be replaced throughout the Park, and that trees will be added to prevent erosion along steep slopes. None of these are considered as "replacement in kind" changes. Instead, the repairs to steps at the Park's DeKalb entrance fall within the "in kind" category. Another section shows areas marked for a change to the Belgian block under the PWB program, without an explanation of what the change will be. The section on the lower park plaza seems to depict images of the area from a historical and a present-day perspective. There are also photographs of monuments in other national parks.

The latter exhibit, which was provided to the LPC, focuses entirely on numerous photographs and graphics which show the Park in all its permutations and documents the proposed changes. It states that one stair entrance is not ADA-compliant, and that the Bye mounds are not used often. It lists a number of alterations, including the addition of a garden, the removal and relocation of a large portion of one entrance, leaving only a small entrance at the original spot, and a new section of trees. The exhibit shows that tables and chairs, picnic tables, fencing, more tables and chairs, a larger fitness area, a reconstructed basketball court, and benches, among other things, will be added at various parts of the Park. It states that the objectives are to honor the original intent of the Martyrs Memorial, reconcile and honor the many designs and changes made to the Park, improve safety, access, and openness, and address the Park's more contemporary and community needs.

Respondent has filed numerous additional documents as well. Among them, the Brooklyn Community Board 2 letter states that, based on a 39-1-3 vote, it recommended to LPC that it approve the Project application, and the more detailed LPC binding report. The LPC report, dated September 12, 2016, notes that in November 2010 it had approved changes which "alter[ed] a park entrance, stairs, pathways and sidewalk. . ." (NYSCEF Doc. No. 16 [2016 Binding Report] p 2). The 2016 LPC report concludes, among other things,

> "that the proposed alterations to the granite cheek wall and landscaping will help provide a barrier-free entrance to the park without significantly increasing the amount of paving, eliminating any significant landscape features, or disrupting a prominent vista;

> that the . . . form of the ramp will help minimize the needed length for the ramp and be compatible with the formal character and block forms at the historic entrance; that, with the exception of the removal of a portion of the granite cheek wall, none of the work will eliminate or significantly diminish any significant architectural fabric; that the two new paths will . . . provide circulation . . . while also matching the surrounding paths in terms of basic design, proportions, materials and curvilinear form; that the modest adjustments to slope, increase in steps, installation of cheek walls and curbing, and drainage system upgrades will help address existing . . . drainage and erosion problems"

(*id.*). The report also concludes that other proposals were consistent with the design and historic character of the Park and notes that respondent would consult with LPC with respect to archeology.

The answer also annexes materials from subsequent presentations, documentation about the trees in the Park and the impact of the proposed changes, and subsequent approval letters from LPC and other governmental entities. LPC's November 26, 2018 Binding Report incorporated a discussion of the modifications and chronology of the subsequent presentations. Among other things, it concluded that the modifications would increase the landscaping and reduce the amount of paving. The report also stated that the stairs to be reconstructed were in deteriorated conditions, that the Project would use new materials which were consistent with the original materials, and that the addition of sidewalk and lampposts would further improve safety and access to and around the Park (NYSCEF Doc. No. 22 [2018 Binding Report]). Respondent also submits the Mattes and Silver affidavits in support of the answer.

Petitioners filed the memorandum which supports their petition after respondent filed its answer. Thus, in addition to supporting the petition, the memorandum addresses respondent's arguments. As petitioners note, SEQRA is established law, and agencies must adhere to it strictly. Petitioners state that there is a low threshold for determining that a particular project is a Type I action, and that respondent's failure to recognize this constitutes legal error. Petitioners contend that the maintenance, repair, and other work involved here, which will cost over $10 million, is more than the minimal work that SEQRA envisions for a Type II action, and therefore the Project should have undergone further environmental review. In addition, petitioners contend that the Project is a Type I project because of the potential for significant adverse environmental impact, and, therefore, none of the Type II exemptions on which respondent relies are applicable.

For the first time, petitioners argue that because there is the potential for adverse impacts on more than 2.5 acres of the Park, and the Park is listed on the State Register of Historic Places, 6 NYCRR § 617.4 (b) (9) mandates that the Project constitutes a Type I action. Although petitioners acknowledge that that provision and 6 NYCRR § 617.4 (b) (10) apply solely to Unlisted actions, they argue that in its analysis, respondent arbitrarily broadened the list of Type II actions to the point that virtually all Park alterations, including those that should be labeled a Type I or an Unlisted action, would fall within the purview of Type II. Also, petitioners state that because LPC utilizes a different standard when it determines whether a project is consistent with a

development's landmarked status, respondent's reliance on the Project approval by LPC is misplaced.

Also, for the first time, petitioners state that respondent's designation of the Project is improper even if the 10-acre guideline applies. The memorandum argues that the Project area should include the amount of land that will be fenced off throughout the construction. Petitioners allege that respondent's 9.85-acre estimate was conclusory, imprecise, and unsupported by evidence. Petitioners state that their own calculations show that the work will impact 10.28765 acres or, including the stairs area, 10.4554 acres (*see also* NYSCEF Doc. No. 49 [Fort Greene Park Area of Disturbance Estimate] [including diagrams which show petitioners' calculations]). Thus, it falls within the purview of 6 NYCRR § 617.4 (b) (6) (i).

Furthermore, petitioners contend that 6 NYCRR § 617.7 – which provides guidelines for deciding, in the context of an Environmental Assessment Form (EAF), whether a Type I or Unlisted action may have a significant impact on the environment – is relevant to the question of whether the Project may have a similar impact. Petitioners state that several proposed changes would have a significant and adverse effect on the environment within the meaning of 6 NYCRR § 617.7. As examples, petitioners argue that the removal of 83 trees would constitute a significant impact under 6 NYCRR § 617.7 (c) (ii) and the changes to historically and architecturally significant elements of the Park bring it within the purview of 6 NYCRR § 617.7 (c) (v).

Next, petitioners state that even if the court determines the Project is not a Type I action, it should find that it should have been considered an Unlisted action. Petitioners annex select pages from the Third Edition of the SEQR Handbook (NYSCEF Doc. No. 50 [The SEQRA Handbook]) in support of these arguments. Among other things, the repairs must be normal cleaning and upkeep, along with minor repairs. As examples, the SEQRA Handbook cites upgrades which bring the structure or facility up to code and repairs to damaged properties using the same footprint. Repaving of a narrow walkway can be a Type II action although paving a large area for sporting activities would bring the action within the purview of Type I. According to petitioners, the proposed changes fall into the latter of these categories. Nor does respondent propose a "replacement in kind," petitioners argue, because the changes go beyond additions of ADA-accessible components or the removal of asbestos, but, among other things, extend to the creation of a new entrance, changes to the staircase to the memorial, and the destruction of both the earthen mounds and the low stonewalls along the Park's border. Petitioners also assert that because of the removal of trees and the addition of pavement, the Project does not merely propose the "maintenance of existing landscaping or natural growth" (6 NYCRR § 617.5 [c] [8]). Finally, petitioners claim the Project includes more than normal administrative and managerial oversight such as the relocation of an office or the alteration of operating hours (6 NYCRR § 617.5 [c] [26]).

In addition to the Gotkin letter they originally submitted, petitioners provide additional evidence in support of their petition and memorandum. Of particular relevance, petitioners submit the April 27, 2018 affidavit of Carsten W. Glaeser, principal of Glaeser Horticultural Consulting Inc. (NYSCEF Doc. No. 43). Glaeser inspected the trees at four locations in the northwest corner of the Park. He opines that, contrary to the conclusion of respondent, the majority of the Zelkova trees are "healthy and robust," with a small percentage of diseased trees requiring removal, and the remainder of the problems are correctable (*id.* ¶ 5). The removal of the trees, which potentially

could "achieve a tree height of 50 to 60 feet, and a canopy spread of equal size . . . is in my opinion unthinkable" (*id.*). Glaeser also concludes that the proposal to prune the 60-foot London Planetrees, along with other proposed changes, will reduce photosynthesis, weaken the trees, negatively impact air quality, and increase the stress on the trees, among other problems. He disputes respondent's prognosis for other of the existing trees, and states that the aesthetics of the Park also will be harmed.

Petitioners also include a copy of a study Nancy Owens Studio LLC, an urban landscape architecture design firm, conducted for the Parks Department (NYSCEF Doc. No. 45 [the Owens Report]). In particular, petitioners mention that the Owens Report recommends retaining the lawn area, including the Bye mounds, and makes frequent references to the significance of adhering to the Park's historic plans and purposes as much as possible. The Report also emphasizes the importance of retaining as many trees as possible and suggests that the Parks Department avoid planting new trees in the open portions of the Park. The Project as it currently exists, petitioners suggest, ignores the history and aesthetics of the Park. Respondent has argued that the Report's purpose was to inform respondent as it planned the Project.

Respondent submits a Sur-Reply affirmation in response to petitioners' memorandum. According to respondent, petitioners raised new arguments in their legal memorandum and supporting documents. First, respondent alleges that the Glaeser affidavit, which was submitted in a prior lawsuit, was not provided along with the petition. Moreover, respondent states there is no basis to Glaeser's challenge to the Project due to the removal of trees, noting that the Project also adds trees to the Park and results in a higher number of trees overall. In addition, respondent contends that the New York City Charter and related caselaw gives the Parks Department the authority to renovate the city's parks, and therefore petitioners cannot challenge respondent's decision to remove the trees at issue.

Second, respondent alleges, petitioners argue for the first time that the Project impacts more than 10 acres of the Park and therefore is a Type I action. In support, respondent provides the affidavit of Paul Kidonakis, a landscape architect and Parks Department employee (NYSCEF Doc. No. 52 [Kidonakis Aff]). Kidonakis was involved in the plans for Phase 2 of the Project as well as the PWB component. Among other things, Kidonakis states, he "calculated the contract limits and areas of disturbance limits" for both of these components (*id.* ¶ 3). According to Kidonakis, petitioners incorrectly used the contract limit boundary – which includes the buffer area – rather than the area of disturbance, or the area that actually will undergo change. Moreover, Kidonakis disputes petitioners' position that 10.4554 rather than 9.85 acres will be unavailable to the public during construction. He opines that petitioners based their measurements on a diagram that was annexed to the Type II memorandum (*id.* ¶ 6). He explains that the diagram is not fully accurate, but rather is a "schematic representation" which shows where the renovations will occur (*id.* ¶ 7). Therefore, Kidonakis states, petitioners' reliance on the diagram led to the inaccurate measurement. He states that his computation, based on the actual measurements, is the accurate one. Kidonakis also contends that the Glaeser Affidavit includes inaccuracies, ignores the plan to plant 200 shade and ornamental trees in the Park, and overstates the amount that the trees will be pruned. Petitioners object to the sur-reply, citing a Third Department case, *BAC Home Loans Servicing, LP v Uvino* (155 AD3d 1155 [3d Dept 2017] [*BAC Home Loans*]), for the proposition

that respondent was required to move for permission to file a sur-reply,[4] and contending that the petition mentioned both that if the area of disturbance exceeds 10 acres the action is Type I, and that 83 trees will be removed from the Park.

Applicable Law

Petitioners bring this action under Article 78 of the CPLR – in particular, CPLR § 7803 (3), which allows a challenge to determinations which allegedly were arbitrary and capricious or were an abuse of discretion. The court's examination is limited accordingly (*see Matter of Chinese Staff v Burden*, 19 NY3d 922, 923-924 [2012]). Additionally, the reviewing court must evaluate the agency's reasoning based on the evidence that was before the agency (*see Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 316 [1st Dept 2009] [*Develop Don't Destroy I*], *lv denied* 13 NY3d 713 [2009]). That is, a respondent cannot rely on new evidence or arguments to justify the agency's decision.

It is not the court's job to second-guess the agency's determination (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017]). The court also cannot "substitute its judgment for that of the agency" (*Matter of Community United to Protect Theodore Roosevelt Park v City of New York*, 171 AD3d 567, 568 [1st Dept 2019] [internal quotation marks and citation omitted]). At the same time, "[t]he judicial standard of review for an administrative agency decision, while deferential, does not require the Court to act as a rubber stamp" (*Matter of Adirondack Wild v New York State Adirondack Park Agency*, -- NY3d --, 2019 NY Slip Op 07520, *8 [2019]; *see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 549 [2009]). Therefore, if an agency does not satisfy the statutory requirements, "the governmental action is void and, in a real sense, unauthorized" (*Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 371 [1988]).

In the context of an Article 78 review of a SEQRA action in particular, courts must decide "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" (*Matter of Zutt v State of New York*, 99 AD3d 85, 100 [2d Dept 2012] [*Zutt*] [evaluating challenge to Type II determination under regulations governing the Department of Transportation] [internal quotation marks and citation omitted]). The "environment" includes a broad array of physical conditions which the action may affect, including land, flora, fauna, "objects of historic or aesthetic significance," and neighborhood character (ECL § 8-0105 [6]). Courts cannot interfere with a discretionary decision unless it is an arbitrary or illegal one. However, "the municipal respondent[] cannot foreclose a challenge to a determination merely by claiming 'discretion' without articulating a factual and rational basis for the particular decision" (*Stein v Town of New Castle*, 50 Misc 3d 1209 [A], 2016 NY Slip Op 50059 [U], *12 [Sup Ct, Westchester County 2016]).

Analysis

Initially, the court addresses respondent's application to submit a sur-reply and petitioners'

[4] Petitioners cite two Second Department cases as well, but these also refer to the improper inclusion of additional evidence and arguments in the sur-reply.

opposition to the request. Respondent submitted its answer, legal memorandum, and supporting documents in response to the petition, which included more generalized allegations, and the Gotkin email, which was the only document petitioners included with their pleading. Because petitioners did not file their legal memorandum or their 14 additional supporting documents until afterwards, respondent did not have the opportunity to respond to the amplified arguments and additional papers. Thus, in the interest of fairness, the court considers the sur-reply.

The Court notes that petitioners' reliance on *BAC Home Loans* in its opposition is misplaced. The court retains the discretion to consider a sur-reply if good cause is shown (*see* CPL 2214 [c]). In *BAC Home Loans*, therefore, the Third Department upheld the trial court's discretionary decision not to consider a sur-reply where the defendants did not ask for permission to submit the document (155 AD3d at 1156). Here, on the other hand, respondent requested that the court consider the submission, and petitioners had a chance to reply to the request in writing and to address the issue at oral argument (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006] [affirming trial court's decision to consider the petitioner's reply affidavit, although it introduced new information, because the court considered respondent's sur-reply and allowed oral argument on the issue]).

Next, the Court turns to petitioners' challenge to the sufficiency of the record respondent has provided. Under CPLR § 7804 (e), a respondent must file "a certified transcript of the record of the proceedings" along with "affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact" (*see also Develop Don't Destroy (Brooklyn), Inc. v Empire State Dev. Corp.*, 30 Misc 3d 616, 627 [Sup Ct, NY County 2010] [*Develop Don't Destroy II*]). At argument, respondent correctly contended that there is no requirement that it file a certified record "of the proceedings" because there was no hearing, and thus no transcript to be certified. Instead, "the requirement is for the record to be sufficiently developed to provide an adequate basis upon which to review the rationality of the agency's action" (*Matter of Global Tel*Link v State of N.Y. Dept. of Correctional Servs.*, 70 AD3d 1157, 1159 [3d Dept 2010] [internal quotation marks and citation omitted]). Respondent is bound by the rationale it set forth in its Type II determination (*see Matter of Save America's Clocks, Inc. v City of New York*, 33 NY3d 198, 209-210 [2019] [*Save America's Clocks*]), and may only rely on the supporting materials and analysis originally before the Parks Department (*see Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005]). As indicated, respondent asserted during oral argument that it has provided all documents on which it based its decision. In addition, respondent provided copies of various determinations along with photographs, charts, and graphs of the park and its components. At oral argument, Robert L. Martin, III, assistant corporation counsel, represented to the court that respondent provided all of the materials on which respondent based its decision.

Despite this representation, the court is troubled by respondent's failure to mention or annex the 151-page Owens Report. The Owens Report states that it was prepared for respondent's use as it planned the Project. The report's purpose was "to introduce a unified comprehensive vision for future improvements to [the Park]" (NYSCEF Doc. No. 45 [the Owens Report], p 5) and the Nancy Owens Studio used input from the Parks Department as well as from one of the petitioners (*id.*). The report analyzed the conditions at the Park, including its topography, infrastructure, lighting, and other issues which the Project ultimately addressed. The Owens Report contains an extensive study of the Park's history, including its many renovations. Also, among

other things, the Report discusses problems with the trees; problems with the drainage and infrastructure; the need for more adequate lighting in some areas in and around the park; and the need for ADA accessibility. As respondent describes the history set forth in the report and discusses several of the issues in the report, it appears that it may have relied on some parts of the study even though it rejected others. Not only did respondent fail to mention the report in its Type II determination, but it does not include or even reference the report in its current papers.

Mr. Martin stated at oral argument that Owens was merely "an outside consultant" who "recommended certain work" to the Parks Department in 2015, and that her report "has no bearing on whether the work that's currently happening in the park . . . falls squarely within the Type II exemptions" (NYSCEF Doc. No. 55 [Transcript of Oral Argument], p 17, lines 6-12). However, this ignores the Parks Department's input during the preparation of the report. It also ignores that although the Project was not approved until late 2018, the nomination process which resulted in the selection of the Park for inclusion in the PWB project began in 2015 (NYSCEF Doc. No. 25 [Mattes Aff] ¶ 8). It is hard to believe that respondent commissioned the report and contributed to the report during its preparation, all around the same time the PWB program was announced, but that respondent then ignored the document in its entirety a few months later, when the Park was selected as a participant in the program.

Even if the current record is complete without the Owens Report, the Mattes affidavit includes additional justifications for the Type II determination, which this court cannot consider (*see Save America's Clocks*, 33 NY3d at 209-210).[5] Significantly, the affidavit also refers to and relies on materials which are not part of the record. For example, Mattes states that, as a result of the November 2, 2016 meeting, Parks received "[s]pecific feedback . . . by community participants" which "were ultimately included in the final scope of work for the Project" (NYSCEF Doc. No. 25 [Mattes Aff] ¶ 22). Mattes also refers to additional public hearings, on February 16, 2017, June 19, 2017, and September 12, 2016. However, the Mattes affidavit only generally refers to the areas of community concerns and provides no documentation from these critical meetings, which Mattes states formed part of the basis for respondent's decision.

Furthermore, this Court finds that the Type II designation letter is inadequate under the prevailing legal standard. Respondent was required to provide a "reasoned elaboration of the basis for [its] determination" when it stated that the Project was a Type II action (*Zutt*, 99 AD3d at 100-101 [internal quotation marks and citation omitted]; *see* NYSCEF Doc. No. 7 [Amended Petition] ¶¶ 29-30). In particular, it should have "document[ed] the rationale for this initial determination, in order to facilitate judicial review, when it is not manifestly clear that the activity involved meets the criteria defining a particular class of type II actions . . . ." (*Matter of Hazan v Howe*, 214 AD2d 797, 800 [3d Dept 1994] [finding that such individualized assessment was not required for a project which required no new construction, affected only one residential lot, and did not have a direct impact on "environmentally sensitive land"]).

The determination sets forth the background of the Park and the proposed changes, and it also sets forth the Type II classification. However, it does not include analysis showing which of

[5] To the extent that the affidavit explains respondent's determination, the document is relevant.

the proposed changes fall within which classifications (*see* NYSCEF Doc. No. 14).[6] The addition of ADA-compliant ramps, the repairs to damaged pipes and stairs, the addition of erosion control measures, and adjustments that make the Park code-compliant are clearly within the scope of Type II, and there is no need for further elaboration. However, the letter does not explain why the expansion of the adult fitness area, the reconstruction of the barbecue area and the basketball court, and the possible reconstruction of the entire sidewalk at Saint Edwards Street are minor maintenance and repairs which fall within the scope of Type II (*see Town of Goshen v Serdarevic*, 17 AD3d 576, 579 [2d Dept 2005] [addition of drainage pipe, replacement of another pipe with a larger one, and extension of ditches were not matters of routine maintenance]). It is not clear which of the proposed alterations are part of the "routine or continuing agency administration and management" (6 NYCRR § 617.5 [c] [26]). Additionally, the determination indicates that 32 of the trees are diseased but does not explain why the other 51 trees must be removed. Although the determination indicates that around 267 replacement trees are planned for the Park, and that the work follow the Administrative Code as well as Parks' tree protection protocols, it does not provide any explanation as to its reasoning in determining that neither the destruction of apparently healthy trees nor the addition of trees throughout the Park has the potential for an adverse impact. There is only a perfunctory mention of the impact of the changes on the aesthetic, and cultural value of the Park or the neighborhood's character, and there is no real explanation as to why respondent concluded there is no possibility of any negative aesthetic and cultural impacts or of negative impacts to the neighborhood character (*see* ECL § 8-0105 [6]).[7]

The court notes that there are statements in the record from which it can deduce some of respondent's rationales. However, the agency "has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]). Similarly, it is not proper for a court to re-evaluate the materials underlying an agency's decision in order to justify it.

Finally, petitioners raise arguments in support of their contention that the Project is a Type I or even an unlisted action. The court does not conclude that the Type II designation was improper, however. It is not the court's job to "render an advisory opinion as to any different circumstances which may or may not arise in the future" (*Matter of Village of S. Blooming Grove v Village of Kiryas Joel Bd. of Trustees*, 175 AD3d 1413, 1415 [2d Dept 2019] [internal quotation marks and citation omitted]). Instead, the court remits the matter to respondent for a revised review and determination (*Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park*, 152 AD3d 1234, 1236 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]). Accordingly, it is

ADJUDGED that the petition is granted and the matter is remitted to respondent for a

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[6] The letter also notes that the Park has undergone prior alterations and renovations, but it does not compare them in scope changes to the ones proposed here, and it does not indicate whether an EAF or EIS were required for the projects that occurred after November 1, 1978, when SEQRA went into effect. These omissions lessen the usefulness of the information.

[7] The court rejects petitioners' argument that the buffer zone around the Project area, which increases the acreage involved to around or over 9.85 acres, should be included in the 10-acre computation. Respondent has stated that no work will be performed in the buffer zone.

further determination consistent with this order.

December 23, 2019

HON. JULIO RODRIGUEZ III, JSC

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