

Manning v City Council of the City of N.Y.
2022 NY Slip Op 34190(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 158809/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8Roger Manning

INDEX NO. 158809/2021

- v -

MOT. DATE

City Council Of The City Of New York et al

MOT. SEQ. NO. 1-3

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

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

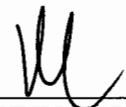
ECFS DOC No(s). _____

This Article 78 proceeding was initially commenced on September 25, 2021 while petitioner Roger Manning was self-represented. Petitioner seeks an order annulling the zoning amendments pertaining to Governors Island approved by the City Council of the City of New York ("City Council") on May 27, 2021 and granting a permanent injunction prohibiting any construction in violation of the deed covenants. Respondents are the City Council, Bill de Blasio, in his capacity as Mayor of the City of New York, the Governors Island Corporation d/b/a the Trust for Governors Island ("the Trust"), and the City Planning Commission ("CPC") (collectively "Respondents"). Respondents have answered the petition and oppose the relief sought.

In motion sequence 2, petitioner, now represented by counsel, moves pursuant to CPLR 3025[b] for leave to amend the petition. Respondents oppose the motion as well. Finally, in motion sequence 3, nonparty City Club of New York ("City Club") seeks to file a memorandum of law, submitted herewith, as amicus curiae in support of Petitioner's application. There is no opposition to the City Club's motion, which is therefore granted.

For the reasons that follow, petitioner's motion to amend is granted only to the extent that the court will consider petitioner's amplified claims in support of the original petition, the petition is denied and this proceeding is dismissed.

At the outset, the court will consider the motion to amend first. Petitioner initially claimed that the 2021 zoning amendments violated restrictive covenants in the deed transferring Governors Island from the federal government to the Trust. The original petitioner, along with new parties proposed to be joined as additional petitioners, have proposed filing an amended petition with fleshed-out allegations as well as a new claim challenging the 2021 zoning amendments' environmental review pursuant to

Dated: 12/8/22

 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

State Environmental Quality Review Act ("SEQRA"). As respondents correctly point out, the new SEQRA claim was interposed approximately nine months after the challenged administrative action occurred, does not relate back to the original petition, and is thus untimely asserted. Moreover, petitioner's *pro se* status when this proceeding was commenced does not excuse or otherwise permit the court to overlook the four-month statute of limitations applicable to petitioner's claims (*Matter of Thorton v. New York City Hous. Auth.*, 100 AD3d 556, 557 [1st Dept 2012]). Accordingly, petitioner's motion to amend is granted only to the extent that the court will grant petitioner leave to amend his petition to the extent that petitioner challenges the Trust's compliance with the deed's restrictive covenants. The balance of the motion to amend is denied as untimely.

The court now turns to the petition as amplified by the amended petition. The relevant facts are not in dispute. In 2010, the Trust took ownership of Governors Island and agreed to follow certain covenants outlined in a deed prepared in 2003 transferring the Island from the U.S. Government to the National Trust for Historic Preservation (the "Deed"). Insofar as is relevant to this proceeding, the Deed requires 40 acres of parkland on the Island, 20 of which must be contiguous. Further, the Deed expressly provides:

The restrictions, conditions and covenants contained herein are intended to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island, guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States.

Also in 2010, the Trust developed a Park and Public Space Master Plan (the "Master Plan"). Before 2013, the entire Island was mapped as an R3-2 zoning district, which limited uses to residential or community facilities. In 2013, CPC approved a zoning map amendment and zoning text amendment establishing the Special Governors Island District ("SGID") on the North Island. The SGID allowed for the adaptive reuse of the North Island's historic structures and a wide range of commercial uses, such as offices, restaurants and shops, as well as some commercial uses with manufacturing components, consistent with the Deed's covenants, including art studios and the manufacture and sale of artisan goods.

In 2020, the Trust and the New York City Department of Small Business Services ("SBS") submitted two joint land use review applications to the Department of City Planning ("DCP") to amend the Island's zoning to allow for further development on the South Island. These applications, like those in 2013, underwent review through the ULURP review process. The first application sought two amendments to the zoning map: (1) to rezone the R3-2 district within the South Island to a C4-1 district and (2) to extend the SGID to the South Island. The second application sought to amend the zoning text to (1) establish the existing SGID as the North Island Subdistrict of the SGID, (2) establish a new South Island Subdistrict of the SGID; in alignment with the Master Plan, create distinct subareas for the park space (the "Open Space Subarea") and the Eastern and Western Development Zones (the "Eastern Subarea" and "Western Subarea", respectively); and further split the Development Zones into five building parcels (E-1, E-2, E-3, E-4 and W-1), and (3) establish new provisions of the SGID that modify the regulations of the new C4-1 zoning district. The Trust presented the plan to Community Board 1 ("CB1") in 2018 and 2020. CB1 held a public hearing on the application on November 2, 2020 at which the Trust and members of the public testified.

Thereafter, the Trust submitted a letter to CB1, dated December 22, 2020, which agreed to certain changes that CB1 had requested, such as the removal of certain use groups permitted in the Open Space Subarea, in particular use group 15 (amusements), and the reduction of maximum heights for open space buildings housing park amenities. Meanwhile, CB1 voted, with 26 in favor, 3 opposed, 7 abstentions, and 2 recusals, to recommend disapproval of the application unless various conditions, including those outlined in the Trust's letter, were satisfied, such as reductions in height, density and bulk,

and that the "permitted uses in the zoning text must align with the Governors Island 2003 Deed requirements. . .".

On January 20, 2021, Manhattan Borough President Gale Brewer held a public hearing where the Trust and members of the public gave testimony on the ULURP Applications. On January 27, 2021, Borough President Brewer recommended disapproval of the applications unless the Trust met a number of conditions, including height reductions and use restrictions in line with the comments of CB1.

On February 3, 2021, CPC held a public hearing on the applications. Several groups testified in favor of the proposed development, while petitioner and others, including CB1, the Manhattan Borough President, and representatives of other community groups, expressed opposition to the application, objecting largely to the scale of potential development.

On February 26, 2021, in response to comments raised during the public review process, the Trust revised its ULURP applications. The Trust submitted amendments further limiting certain uses within the South Island's designated open spaces and expanded the width of the Eastern Esplanade. It also lowered the permitted maximum building height and maximum number of parking spaces permitted within the Development Zones and reduced the permitted heights of any buildings or portions of buildings near the Governors Island Historic District or public open space.

On March 17, 2021, the CPC approved the applications. In its report, the CPC reasoned:

The Commission supports the goals outlined in the 2010 Master Plan that envisioned a substantial public open area on the South Island flanked by two development areas. New York City is full of examples of successful and exciting interplays between the urban and natural environments, development and recreation areas, and active and passive activities. One need only look as far as Central Park, where thrilling skyline views are part and parcel of the pastoral experience, or the High Line, where a verdant park literally threads its way under and between buildings. The Commission notes that Governors Island today contains this very juxtaposition on the North Island, where public green spaces are threaded around historic structures, creating the very character that so many find special about the island. The actions sought by the Trust will continue this pattern, replacing abandoned Coast Guard buildings and fenced off open lots with new developments that will be enlivened by researchers, educators, and students, side by side with major open spaces, public plazas, and intimate circulation pathways. Together, the proposed actions will allow the Trust to find parties interested in developing a significant new series of institutional, educational, and commercial buildings that will further its vision of creating a global center for climate and resiliency research, study, and education. This concept of a Center for Climate Solutions will center New York City in the global effort to address the causes and effects of climate change, perhaps the greatest crisis and challenge of our time and for generations to come. Further, the zoning actions sought by the Trust, after working in collaboration with DCP staff over several years, contain thoughtful zoning and urban design controls that will ensure that new buildings within the development areas of the South Island will complement the existing public open spaces and Governors Island Historic District, while creating exciting new areas of the island that will bring year-round life and activity to areas that are now underutilized and largely closed off to public access.

On April 5, 2021, the City Council Subcommittee on Zoning and Franchises held a public hearing on the applications. Following the Committee's hearing, the Trust, in consultation with the Council Committee on Land Use, again submitted proposed modifications to the rezoning to address issues raised.

On May 27, 2021, the New York City Council adopted two resolutions. The first resolution approved with the Committee and Trust's modifications, CPC's approval of the Zoning Text amendment, with 45 in favor, 2 opposed, 1 abstentions, and 1 absent. The second resolution approved the decision of the CPC to approve the Zoning Map amendment, with 44 in favor, 3 opposed, 1 abstentions, and 1 absent.

Thus the challenged zoning amendments, in their final form, create a new resource called the "Open Space Subarea". Respondents assert that this new resource was created to limit the permitted uses in the Open Space Subarea to be more in line with those found in other parks in the region. Respondents further assert that the zoning amendments will also allow the Trust "to create a vibrant, mixed-use, 24-hour regional destination anchored by a cross-disciplinary academic Center for Climate Solutions [] focused on urban climate change mitigation and to create financial sustainability for the Island that will support its public programs, the park, and other public open spaces well into the future." The Trust plans to continue phased redevelopment of the Island and expand the existing South Island Park from 43-acres to approximately 46-acres and widen the existing esplanade by over 2-acres. It will also add additional public space across the Development Zones by creating a public circulation network containing primary and secondary pedestrian walkways that connect the perimeter esplanade to the South Island Park.

Petitioner Roger Manning is a musician, a part time web developer, and a cofounder of a community group called Metro Area Governors Island Coalition which he claims "advocates preserving the unique green open space quality of Governors Island for the benefit of everyday New Yorkers." Petitioner claims that the 2021 zoning amendments violate restrictive covenants in Governors Island's deed because the zoning amendments permit development that goes beyond the permitted uses of the Island outlined in the Deed and fail to create and protect the Deed's required 40-acres of parkland. The actual issue animating Petitioner's claim is his opposition to the Governors Island phased redevelopment plan, but since Petitioner is not a party to the Deed and therefore lacks standing to challenge compliance with the Deed, he has instead brought a claim challenging the zoning amendments affecting Governors Island.

Changes to zoning do not alter deed restrictions, such as those in place here, and any applicable deed restrictions remain in effect notwithstanding whatever the zoning is (*Friends of Shawangunks, Inc. v. Knowlton* [64 NY2d 387 [1985]]). The zoning and deed restrictions operate together as parallel regulations of the land. Thus, the court cannot say that the City Council's actions were arbitrary and capricious simply because the zoning does not mirror the Deed. Nor does the court find the rezoning irrational in light of the Deed and the Governors Island Master Plan. While respondents and amicus lament changes to the natural qualities of the island, respondents have weighed those considerations and opted to prioritize enhancing public enjoyment and access. Nor does the court find that the proposed rezoning necessarily conflicts with the Deed's requirement to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island. The Deed does not require Governor's Island to remain static. It is not for the court or petitioners to supplant respondents' determinations simply because a 360-degree panorama view of the harbor will no longer be available from the 82-foot high hill in the southern park area.

Finally, petitioners have failed to show that the rezoning violates the public trust doctrine. "Parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes" (*Avella v. City of New York*, 29 NY3d 426 [2017] citing *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623 [2001]). The rezoning will allow "buildings or other structures containing permitted uses, up to a height of ... 25 feet," occupying as much as 20 percent of the Open Space Subarea. These buildings will also be permitted to use cellars for any use otherwise permitted in the southern subdistrict. While these uses are not insignificant, the court cannot say they violate the public trust doctrine at this juncture. Compared to cases where public trust claims have succeeded, there is no actual project to which petitioners have raised an objection. Simply permitting buildings to be constructed on parkland with cellar space does not necessarily constitute a public trust violation (see *i.e. Union Square Park Community Coalition v. City of New York*, 22 NY3d 648 [2014]). Thus, respondents are correct that this claim is not ripe for adjudication at this time.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 3 is granted without opposition; and it is further

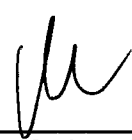
ORDERED that motion sequence 2 is granted to the extent that the court will grant petitioner leave to amend his petition to the extent that petitioner challenges the Trust's compliance with the deed's restrictive covenants. The balance of the motion to amend is denied as untimely; and it is further

ORDERED that the petition is denied on the merits, this proceeding is dismissed, and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/8/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.